No. _____

IN THE
Supreme Court of the United States

STATE OF MISSOURI,

Petitioner,

v.

ROBERT D. MARCH,

Respondent.

On Petition For Writ Of Certiorari To The Missouri Supreme Court

PETITION FOR WRIT OF CERTIORARI

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
JAMES R. LAYTON
State Solicitor
SHAUN J MACKELPRANG
Chief Counsel, Criminal Division
Counsel of Record
LISA KENNEDY
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-0774

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QUESTION PRESENTED

Whether a chemical laboratory report, which was admitted at trial as a "business record," is "testimonial" and, therefore, subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004).

PARTIES TO THE PROCEEDING

Petitioner, the state of Missouri, was the respondent below. Respondent, Robert March, was the appellant below.

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The opinion of the Missouri Supreme Court reversing the trial court's judgment and sentence, filed March 20, 2007, and reported at 216 S.W.3d 663 (Mo. banc 2007), is reprinted in the Appendix ("App.") at A1-A7.

JURISDICTION

The Missouri Supreme Court entered its judgment on March 20, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

INTRODUCTION AND STATEMENT

This case poses a question that has become common in criminal cases after *Crawford v. Washington*, 541 U.S. 36 (2004): whether a chemical laboratory report, which was admitted at trial as a "business record," is "testimonial" and, therefore, subject to the demands of the Confrontation Clause.

The respondent in the case was convicted of trafficking in the second degree based on his possession of 2.7 grams of cocaine base. App. at A1. At trial, to

prove that the substance was cocaine base and weighed at least two grams, the State admitted a chemical laboratory report under the business records exception, which documented the forensic analysis of the cocaine base and showed the results of that analysis. App. at A2, A10. Dr. Robert Briner, the analyst who signed the report, did not testify at respondent's trial because he had moved to North Carolina. App. at A2.

The State called Pam Johnson, the new director of the crime lab and custodian of the lab's records, to lay a foundation for the admission of the crime laboratory report under Missouri's business record exception (MO. REV. STAT. § 490.680 (2000)). App. at A2. Respondent objected, arguing that the report was barred by the Confrontation Clause under *Crawford*, because the State did not show that Dr. Briner was unavailable and because respondent was not given a prior opportunity to cross-examine him App. at A2.

On appeal, the Missouri Supreme Court held that the report was "testimonial" under *Crawford* and, thus, should not have been admitted absent the analyst's in-court testimony. App. at A8. Citing the features of "testimony" discussed in *Crawford*, as well as the "primary purpose" test employed in *Davis v. Washington*, 126 S.Ct. 2266 (2006), the court held it was "clear that the laboratory report in this case constituted a 'core' testimonial statement subject to the requirements of the Confrontation Clause." App. at A7.

In support of its holding, the court stated that the laboratory report was prepared at the request of law enforcement for respondent's prosecution, was offered to prove an element of the charged crime, and was a

sworn and formal statement offered in lieu of testimony by the declarant. App. at A7. The court said these were all characteristics of an *ex parte* affidavit, which was the principal evil at which the Confrontation Clause was directed. App. at A7.

The Missouri Supreme Court further stated that *Crawford*'s reference to "business records" as something other than "testimonial" hearsay was *dicta*. App. at A4. The court stated that this *dicta* did not resolve the Confrontation Clause issue "because *Crawford* divorced the hearsay exceptions from the Confrontation Clause analysis." App. at A4. The court also stated that the business record exception in 1791 was "a narrow one." App. at A4.

The court then reviewed cases from other jurisdictions that have held that laboratory reports are business records, and that such business records are not "testimonial." App. at A4-A5. But the court stated that these cases "seem to incorrectly focus on the reliability of such reports" even though *Crawford* made reliability, once paramount under *Ohio v. Roberts*, 448 U.S. 56 (1980), irrelevant. App. at A4. At issue, according to the court, was whether the laboratory report was "testimonial" under *Crawford*. App. at A5.

REASONS FOR GRANTING THE WRIT

I. In *Crawford*, the Court suggested an answer to the question of whether the Confrontation Clause bars admission of laboratory reports under the business records exception to the hearsay rule.

In *Crawford*, the Court significantly altered the Confrontation Clause analysis for hearsay evidence by holding that the admission of a class of out-of-court statements this Court labeled "testimonial hearsay" violates a defendant's rights to confront and cross examine witnesses, unless the witness was unavailable and the defendant had a prior opportunity to cross examine the witness. *Crawford*, 541 U.S. at 59, 68.

The Court did not "spell out a comprehensive definition of 'testimonial.'" *Crawford*, 541 U.S. at 68. But the Court did offer a number of observations that suggest the contours of that definition. First, the Court noted that both the historical background and text of the Confrontation Clause indicate that "the principal evil at which [it] was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 50. According to the Court, "the Sixth Amendment" and, presumably the term "testimonial" as well, "must be interpreted with this focus in mind." *Id.* at 50. This Court indicated that a statement produced through the "[i]nvolvement of government officers" and with an "eye towards trial" is testimonial because it "presents [a] unique potential for prosecutorial abuse – a fact borne out time and again through a history with which the Framers were keenly familiar." *Id.* at 56 n.7.

With those principles in mind, as a baseline definition, the Court stated: "Whatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68. The Court explained that "[t]hese are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id.*

On the other hand, the Court also identified other types of out-of-court statements that might *not* qualify as testimonial: "Most of the hearsay exceptions covered statements that by their nature were not testimonial – for example, business records or statements in furtherance of a conspiracy." *Id.* at 56; *see also id.* at 76 ("To its credit, the Court's analysis of 'testimony' excludes at least some hearsay exceptions, such as business records and official records") (Rehnquist, C.J., concurring).

In a significant departure from what this Court suggested in *Crawford*, the Missouri Supreme Court held that the Confrontation Clause prohibits a business record such as a laboratory report to be introduced at trial over a defendant's objection as a substitute for live testimony. App. at A8. In the Missouri Supreme Court's opinion, it was "clear that the laboratory report in this case constituted a 'core' testimonial statement subject to the requirements of the Confrontation Clause." App. at A7.

But again, in *Crawford*, the Court did not hold that business records were testimonial and, to the contrary, the Court suggested otherwise. The Court suggested that the very same characteristics that preclude a

statement's classification as a business record are likely to render the statement testimonial. *See Crawford*, 541 U.S. at 56 n.7 (describing as testimonial statements produced through the "[i]nvolvement of government officers" and made "with an eye towards trial"). Indeed, the essence of the business record exception contemplated in *Crawford* is that such records or statements are not testimonial in nature because they are prepared in the ordinary course of regularly conducted business and are "by their nature" not prepared for litigation.

This course makes sense. A chemical laboratory report that meets the criteria for a business record under MO. REV. STAT. § 490.680 (2000) ensures that the report is not testimonial because a business record is fundamentally inconsistent with what this Court has suggested comprises the defining characteristics of testimonial evidence. In Missouri a business record is a "record of an act, condition or event" that "shall, insofar as relevant," be considered competent evidence

> if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

MO. REV. STAT. § 490.680 (2000). The term "business" includes "every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not." Mo. Rev. Stat. § 490.670

(2000). The term "regular course of business" as used in section 490.680 "must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business." *State ex rel. Hobbs v. Tuckness*, 949 S.W.2d 651, 655 (Mo. App. W.D. 1997). Because MO. REV. STAT. § 490.680 (2000) requires business records to be kept in the regular course of a business activity, records created in anticipation of litigation do not fall within its definition.

In *Crawford*, this Court did not answer the question whether business records fall outside the Confrontation Clause. But by differentiating such hearsay exception evidence from what its answer to the question presented there *did* address, the Court suggested it would give a different answer when faced with business records.

II. State courts of last resort and federal appellate courts have given conflicting answers to this common question.

The Missouri Supreme Court has taken sides in the conflict among state courts of last resort and federal appellate courts about whether a chemical laboratory report, which was admitted at trial as a "business record," is "testimonial" and, therefore, subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*.

Despite the change in hearsay analysis following *Crawford*, many state courts of last resort and federal courts of appeal have held that crime laboratory reports admitted under a state's business record

exception are nontestimonial and therefore continue to admit the reports into evidence without the live testimony of the reports' authors. *See United States v. Lee*, 374 F.3d 637, 644 (8th Cir. 2004) (citing *Crawford* as authority that business records are not testimonial); *U.S. v. Ellis*, 460 F.3d 920 (7th Cir. 2006) (stating that *Crawford* explicitly noted that business records by their nature were not testimonial and therefore holding that certified copy of results of blood and urine tests were admissible without testimony of lab technicians who tested samples because the results were nontestimonial business record); *Commonwealth v. Verde*, 827 N.E.2d 701, 705-706 (Mass. 2005) (noting that *Crawford* suggested that business and public records were not subject to its holding and concluding that certificates of chemical analysis showing weight and composition of controlled substances are public records admissible under *Crawford* and the Confrontation Clause); *State v. Dedman*, 102 P.3d 628, 635 (N.M. 2004)(blood alcohol report was public record, was not testimonial, and its admission did not violate Confrontation Clause); *State v. Forte*, 629 S.E.2d 137 (N.C. 2006) (stating that *Crawford* said in *dicta* that business records are not testimonial, noting the differences between business records and testimonial evidence, and finding that reports of lab serologist that contained information on chain of custody of DNA material and agent's DNA analysis were business records and not testimonial evidence).[1] These cases

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[1] Several jurisdictions have adopted this same reasoning to hold that autopsy reports are at least in part nontestimonial. *See State v. Feliz*, 467 F.3d 227 (2nd Cir. 2006)(held that a statement properly admitted as a business record under FRE 803(6) cannot be testimonial because a

routinely make reference to the inclusion of "business records" in the *Crawford* opinion's citation of classic examples of nontestimonial hearsay. *See* Steven Yermish, Crawford v. Washington *and Expert Testimony: Limiting the Use of Testimonial Hearsay*, 30-Nov. Champion 12, 13 (2006).

Other courts, now including the Missouri Supreme Court, have rejected that reading of *Crawford*. Instead of viewing laboratory reports as nontestimonial hearsay, these courts have found laboratory reports admitted as business records to be testimonial hearsay under *Crawford*. *See State v. March*, 216 S.W.3d 663 (Mo. banc 2007) (App. at A1-A7); *State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006) (lab report detailing composition of controlled substance was testimonial); *State v. Campbell*, 719 N.W.2d 374 (N.D. 2006) (not deciding whether a lab report is testimonial but suggesting that a forensic scientist's report bears testimony); *City of Las Vegas v. Walsh*, 124 P.3d 203, 208 (Nev. 2005)(nurse's affidavits authenticating and outlining standard blood-testing procedures are testimonial because even though they document standard procedures, they are made for use at a later trial or legal proceeding in lieu of live testimony); *State v. Birchfield*, 157 P.3d 216 (Or. 2007) (trial court's

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business record is fundamentally inconsistent with what this Court suggested comprise the defining characteristics of testimonial evidence); *State v. Craig*, 853 N.E.2d 621, 639 (Ohio 2006) (wholly nontestimonial); *State v. Lackey*, 120 P.3d 332, 348-352 (Kan. 2005)(objective observations in autopsy reports are nontestimonial, while "opinions" are testimonial); *Rollins v. State*, 897 A.2d 821, 844-846 (Md. 2006) (same).

admission of lab report without requiring state to produce at trial the criminalist who prepared the report violated defendant's confrontation rights but not reaching question of whether admission of lab report also violated the Confrontation Clause); *State v. Coombs*, 821 A.2d 1030 (N.H. 2003) (although a pre-*Crawford* opinion, finding that a laboratory report used to prove an essential element of the crime is an *ex parte* affidavit).

The conflict is stark; state courts of last resort and federal courts of appeal have reached precisely opposite results when confronted with the admission of critical evidence – laboratory reports – as business records.

The conflict matters not just to prosecutors but to defendants. The differing interpretations of the Sixth Amendment's Confrontation Clause under *Crawford* implicate a defendant's due process rights. Drug convictions should not rest on geography or which interpretation of *Crawford* a court has chosen to follow.

And the conflict will only deepen as more state courts of last resort and federal courts of appeal address this issue. And they will address it; laboratory tests are useful and even necessary not just in drug cases, but in a wide range of prosecutions. Only this Court can eliminate that division and provide clear guidance whether a crime laboratory report admitted as a business record is nontestimonial hearsay.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General
JAMES R. LAYTON
State Solicitor
SHAUN MACKELPRANG
Chief Counsel, Criminal Division
Counsel of Record
LISA KENNEDY
Assistant Attorney General

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-0774

June 18, 2007

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