

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO. KEN-25-571

STATE OF MAINE v. PERCY DIXON

**On Conditional Appeal from an Order
Granting the State's Motion in Limine
to Use a Substitute Toxicologist At Trial**

BRIEF OF APPELLANT PERCY DIXON

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STATEMENT OF FACTS

Mr. Keating died May 19th, 2019, of a suspected drug overdose, and Mr. Dixon was arrested on trafficking charges the next day from an ensuing investigation. APP177-80. On July 25, 2021, a Kennebec County Grand Jury returned an indictment charging the Defendant, Percy Dixon (“Mr. Dixon”) with Aggravated Trafficking of a Scheduled Drug that in fact caused the death of William Keating, a Class A Felony, in violation of 17-A M.R.S. § 1105-A(1)(K), among other charges. APP031-2. Mr. Dixon pleaded not guilty to each charge. APP005.

The State, anticipating a Confrontation Clause objection due to witness availability, filed a motion in limine on June 16, 2025, to address the issue of their unavailable toxicologist and their intention to call a substitute toxicologist to testify based upon the original toxicologist’s report. APP033. On June 18, 2025, the trial court conducted an evidentiary hearing on the issue of witness availability and the Defense’s Confrontation Clause challenge to a substitute toxicologist’s report. APP013.

The trial court granted the State’s motion in limine after the evidentiary hearing and subsequent briefings by the parties. APP018. Justice McElwee found that in 2019, the Maine Office of the Chief Medical Examiner (“OCME”) sent a sample of a decedent’s blood to the nationally accredited NMS Forensic

Toxicology Laboratory (“NMS”), and at NMS, a series of tests were conducted on three portions of the blood sample by “dozens” of lab employees. APP019. As to each of the four tests conducted to screen for different substances, as many as three lab employees were involved in the process. APP020. Two different lab employees then “reviewed the results of each of the four tests to determine whether the instruments were accurate, there were no anomalies, and appropriate protocols were followed.” Id.

NMS Toxicologist Chelsey Deisher (“Deisher”) indicated at the hearing that she did not conduct the tests herself but reviewed the data and documentation handled by others, including notes signed and dated by others. APP119-20. The Deputy Chief Medical Examiner, Dr. Liam Funte (“Funte”), after receiving the toxicology report, issued a report concluding that the decedent’s death was caused by acute fentanyl intoxication. APP171.

The State conceded that Deisher’s expert opinion testimony contains hearsay statements, and Justice McElwee agreed. APP023. The trial court then considered whether the statements implicated by Deisher’s proposed testimony were testimonial and violative of the Confrontation Clause. The court found that “considering the relevant circumstances that existed in 2019... the lab employees’ statements, including the results of the tests they conducted and their notes, are nontestimonial.” APP029. Mr. Dixon entered into a conditional guilty plea based

upon this ruling on December 5th, 2025, to One Count of Unlawful Trafficking in Scheduled Drugs, a B Felony. APP015. After a sentencing hearing, Mr. Dixon was sentenced to 3 years with all but 6 months to serve and two years of probation. APP016. He is on post-conviction bail pending this appeal. APP017.

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred when determining that the NMS Laboratory analysts' statements, including the results of the tests they conducted and their notes, are nontestimonial.

SUMMARY OF ARGUMENT

Deisher relied on the work done by NMS analysts. She relied on the tests and the work performed by dozens of employees in issuing her toxicology report. The work performed included loading samples onto testing machines, operating the machines, exporting data, entering extracted data, and reviewing the results of each of the four tests to determine whether the instruments were accurate, whether any anomalies were detected, and whether appropriate protocols were followed. The State seeks to call from NMS Deisher and Deisher only, even though she never performed any of the tests herself and does not know or possess a record of which employees operated the instruments or exported the data from the instruments.

Calling Deisher to opine on the work of absent and in some instances unknown NMS analysts and technicians violates Appellants Confrontation Clause rights. The primary purpose of each of the statements (the data, the results of the

tests conducted, and the notes associated with the data) is to aid an investigation into a suspicious death and to prove a past event for a future criminal proceeding. If this type of surrogate testimony were allowed, it would allow the Government to easily and impermissibly evade the requirements of the Confrontation Clause. The actual tests performed *were not* performed by any witnesses that the State intends to call in this case, and to hold that the notes, recordings, and data associated with those tests to be non-testimonial would erode the protections of the Confrontation Clause. It would allow the State to secure a conviction based upon laboratory findings without calling any witnesses from that laboratory who have personal knowledge of how the testing was performed or who performed the testing in the first place.

ARGUMENT

I. Legal Standard

This case is before the Law Court on a conditional appeal of an order granting a Motion in Limine concerning factual findings and legal findings. Assessing a Confrontation Clause violation is a “fact-specific inquiry.” State v. Metzger 999 A.2d 947, 954 (2010). The trial court's “legal conclusions that certain statements are nontestimonial, and therefore admissible over Confrontation Clause objections, are reviewed de novo.” State v. Kimball, 117 A.3d 585 (2015).

II. Legal Overview

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend. VI. The United States Supreme Court expanded on the right to confront witnesses in Crawford v. Washington which created a category of “testimonial statements” by which a defendant has a right to confront witnesses who utter them as “solemn declaration[s] or affirmation[s] made for the purpose of proving some fact.” Crawford v. Washington, 541 U.S. 36, 51 (2004). While the Court gave examples of statements that are testimonial, such as an affidavit or a custodial examination, the Court did not provide an exhaustive list; instead, the Court held that testimonial statements can include “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” Id. at 52. The Court held that “[where] testimonial statements are at issue, the only indicium of reliability sufficient to satisfy the constitutional demands is the one the Constitution actually prescribes: confrontation.” Id. at 68-9.

The Court, through Crawford and its progeny, expanded on what fits the bill for testimonial statements with regard to scientific evidence. In Melendez-Diaz v. Massachusetts, the Supreme Court held that certain certificates had an “evidentiary purpose” that was clear from the face of those certificates, thereby making them the type of evidence that would lead an objective witness to reasonably believe that

they would be available for use at a later trial. Melendez-Diaz v. Massachusetts, 667 U.S. 305, 311 (2009). In Bullcoming v. New Mexico, the Court ruled that in-court testimony of an analyst who did not sign a certification or personally perform or observe the performance of a test reported in the certification violated the Confrontation Clause. See Bullcoming v. New Mexico, 564 U.S. 647, 660 (2011). The Court reasoned that “[m]ost witnesses... testify to their observations of factual conditions or events” and that these observations are “meet for cross examination.” Id.

The latest guidance from the U.S. Supreme Court, in Smith v. Arizona, directed courts to look to the “primary purpose” of a statement to determine whether it is testimonial. Smith v. Arizona, 602 U.S. 779, 800 (2024). The Court in Smith instructs a trial court to determine “given all the relevant circumstances... the principal reason [a statement] was made.” Smith v. Arizona, 602 U.S. 779, 800 (2024). While the Court in Smith dealt primarily with the hearsay prong of the Confrontation Clause analysis, the Court gave guidance as to the testimonial prong, as well. The Court said that “some records of lab analysts will not have an evidentiary purpose... that lab records may come into being primarily to comply with laboratory accreditation requirements or to facilitate internal review and quality control... or some analysts’ notes may be written simply as reminders to self... in those cases, the record would not count as testimonial... [and] [t]o do so,

the document’s primary purpose must have a focus on court.” Id. at 802, (citations omitted).

Turning to Maine decisions, the Maine Law Court held in State v. Thomas that a chemist that did an “technical review” of an absent first chemist’s testing and work became a “conduit” for the original chemist’s work. State v. Thomas 334 A.3d 686, 703 (2025). While State v. Thomas addressed the hearsay prong of the Confrontation Clause analysis, the Court held that “Chemist Two relied on the truth of the notes and the generated data.” Id.

The Maine Law Court decided State v. Gleason after the United States Supreme Court Decided Smith. In Gleason, the Law Court in confronting the hearsay prong of the Confrontation Clause analysis, found that the forensic toxicologist who testified at trial, Chelsea Deisher¹, “conducted a technical review of the data and the documentation in the case, which included lab notes made by other lab employees concerning anomalies in the data and whether protocols had been followed.” State v. Gleason, 339 A.3d 774, 780 (2025). The Law Court found that Deisher necessarily relied on the truth of the statements coming from the other analysts at NMS, holding that “the date and record of the lab procedures are out-of-court statements being offered for their truth because if the tests did not reveal the presence of fentanyl, Deisher’s expert opinion would have been of no

¹ Ms. Deisher is the same forensic toxicologist in the instant case.

value to the prosecution.” Id. at 781. The Court briefly touched on the testimonial prong of the Confrontation Clause analysis but ultimately did not delve into the testimonial analysis. The Court in Gleason indicated that the “fact-specific” analysis concerning whether a statement is testimonial versus nontestimonial must first be done by the trial court. Id. That analysis occurred in this Appellant’s case, teeing the issue up for review. APP018-029.

III. Primary Purpose

When assessing a Confrontation Clause challenge, the reviewing court must determine the “primary purpose” of the statement. See Smith v. Arizona 602 U.S., at 800; Michigan v. Bryant, 562 U.S., at 369, 131 S.Ct. 1143. In Smith, the Court said that the issue of whether a statement is testimonial or not focuses on the primary purpose of the statement, and “in particular on how it relates to a future criminal proceeding.” Smith v. Arizona 602 U.S., at 800. A Court must “identify the out-of-court statement introduced, and must determine, given all the relevant circumstances, the principal reason it was made.” Id., citations omitted.

As outlined in Michigan v. Bryant, out-of-court statements can “evade the basic objective of the Confrontation Clause, which is to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial.” Michigan v. Bryant, 562 U.S. 344, 358 (2011). The formality of the statement factors into its primary purpose. Id. The court explains that “a

statement’s formality or informality can shed light on whether a particular statement has a primary purpose of use at trial. Id. While Crawford and its’ progeny States across the country have reasoned that “if an autopsy is legally required in order to investigate a death, then its primary purpose is for a criminal investigation and thus, is testimonial; however, there are additional state court opinions reaching contrary conclusions. State v. Brewer, 438 S.C. 37, 53 (2022); See State v. Frazier, 229 W.Va. 724, 735 (2012); Cuesta-Rodriguez v. State, 241 P.3d 214, 228 (Okla. 2010); State v. Locklear, 363 N.C. 438, 452 (2009); but see Ackerman v. State, 51 N.E.3d 171, 189 (Ind. 2016).

A. Statutory Law as it Relates to the Primary Purpose Analysis

To evaluate the primary purpose of the statements at issue in the present case, we must first look at how Maine Law creates the practice and procedure for analyzing certain suspicious deaths and the procedure for conducting autopsies. Maine law requires certain types of deaths that “raise suspicion” that the death occurred under certain circumstances² be referred to the Office of Chief Medical

² Those circumstances include the following:

- A. Death is suspected of having been caused by any type of physical injury, including poisoning, regardless of whether the suspected manner of death is homicide, suicide or accident. This circumstance must be reported irrespective of whether the deceased had been attended by a physician, was a patient in a hospital, survived for a considerable time following the physical injury or died from terminal natural causes consequent to and following the physical injury;
- B. Suddenly when the person is in apparent good health and has no specific natural disease sufficient to explain death;
- C. During diagnostic or therapeutic procedures under circumstances indicating gross negligence or when clearly due to trauma or poisoning unrelated to the ordinary risks of those procedures;

Examiner (“OCME”). 22 M.R.S.A § 3025. OCME’s responsibilities include the “certification and completion of reports of deaths identified as medical examiner cases,” which is to be “accomplished by examination of bodies and useful objects and by investigation and inquiry into the circumstances surrounding deaths. 22.

M.R.S.A. § 3022. OCME “may compile and preserve records and data relating to criminal prosecution, public health, public safety and vital statistics, as these relate to the Chief Medical Examiner. The law explicitly says “any person who becomes aware of a suspected medical examiner case shall immediately notify a law enforcement officer or the Office of the Chief Medical Examiner,” and if law enforcement suspects a medical examiner case, they must “immediately notify the Office of

D. Death when the person is in custody pursuant to an arrest, confined in a state correctional or detention facility, county jail, other county correctional or detention facility or local lockup or is on the way to or from a courthouse or any of these places while in the custody of a law enforcement officer or county or state corrections official;

E. Death while the person is a patient or resident of a facility of the Department of Health and Human Services or residential care facility maintained or licensed by the Department of Health and Human Services, unless clearly certifiable by an attending physician as due to specific natural causes;

F. Death suspected of being due to a threat to the public health when the authority of the medical examiner is needed to adequately study the case for the protection of the public health;

G. Death suspected of not having been certified, including, but not limited to, bodies brought into the State and any buried remains uncovered other than by legal exhumation;

H. Deaths suspected of being medical examiner cases which may have been improperly certified or inadequately examined, including, but not limited to, bodies brought into the State under those circumstances;

I. Sudden infant death syndrome deaths and all other deaths of children under the age of 18 unless clearly certifiable by an attending physician as due to specific natural causes unrelated to abuse or neglect;

J. Whenever human or possibly human remains are discovered not properly interred or disposed of, for which the responsibility to do so cannot be readily determined; or

K. Any cause when there is no attending physician capable of certifying the death as due to natural causes. When a person dies who is under the care of a religious practitioner who uses prayer and spiritual means of healing, the fact that the deceased has been under such religious care does not warrant suspicion of foul play or investigation beyond that warranted by the other facts of the case.

22 M.R.S.A § 3025.

Chief Medical Examiner. 22 M.R.S.A § 3026(1), (2). Section 3027 outlines the procedure for the scene of the death, involving strict procedures for moving and preserving the body. See generally 22 M.R.S.A § 3027. Officers are instructed to “whenever possible arrange for photographs, measurements and a record of the location and position of a body.” 22 M.R.S.A § 3027(3). It is important to note the strict procedure and meticulous record keeping requirements whenever a “suspicious” death is identified.

The medical examiner or medicolegal death investigator “has authority to conduct an investigation and inquiry into the cause, manner and circumstances of death in a medical examiner case.” 22 M.R.S.A § 3028(1). Additionally, if the medical examiner or medicolegal death investigator elects not to proceed to a scene, the law requires a law enforcement officer in charge to “[i]nvestigate, take photographs and take possession of useful objects as directed by the medical examiner, medicolegal death investigator or the Office of the Chief Medical Examiner; remove the bod in accordance with the instructions of the medical examiner...” and to “make a report of the investigation available to the medical examiner, medicolegal death investigator or the Office of Chief Medical Examiner.” 22 M.R.S.A § 3028(2).

OCME has the authority to “request the assistance and use of the facilities of the law enforcement agency having jurisdiction over the case” and allowing for the

examiner access to a “written report of the steps taken in providing the assistance.” 22 M.R.S.A § 3028(3). The medical examiner can even “direct that a law enforcement officer at the scene make measurements, take photographs and take possession of all objects that in the opinion of the medical examiner.... May be useful in establishing the cause, manner, and circumstances of death.” 22 M.R.S.A § 3028(4). Maine law allows the OCME to be an active part of the investigation into the circumstances of a suspicious death, even going so far as to affording them the ability to direct local law enforcement on the ground. If an autopsy is deemed proper “in the opinion of the medical examiner, the Chief Medical Examiner, the district attorney.... Or the attorney general” that it is in the “public interest,” the OCME can conduct an autopsy. 22 M.R.S.A § 3028(8). The Maine OCME and the statutory schema in which it originates, with respect to how and when an autopsy is conducted, is closely linked metaphorically and literally in the statute with the chief law enforcement offices of the county as well as state, the local District Attorney and the state Attorney General, respectively.

Taken together, the statutory scheme that creates the OCME 1) requires specific suspicious deaths to be investigated; 2) grants the medical examiner the authority to direct local law enforcement in preserving evidence and documentation; and 3) allows an autopsy to be performed if the OCME, the District Attorney, or the Attorney General determine that an autopsy is in the

“public interest.” See generally 22 M.R.S.A § 3022-3028. While the “public interest” is not defined, common sense would indicate that investigating how suspicious deaths may relate to criminal action is always in the public interest.

As discussed *supra* there is persuasive authority from certain states that have reasoned “if an autopsy is legally required in order to investigate a death, then its primary purpose is for a criminal investigation and thus, is testimonial.” State v. Brewer 438 S.C., at 53. In Brewer, the South Carolina Supreme Court evaluated the same lab at issue in the Appellant’s case, NMS. There, tissue samples were submitted to NMS by a pathologist that performed an autopsy of a young child and who could not determine a cause of death for that child Id. at 41. The pathologist received a report from NMS concluding that the child died from ‘acute oxycodone toxicity.’ Id. The State did not call any witnesses who actually performed the tests as part of the NMS report. Id. at 43. In Brewer, the Court reasoned that “while [they] must review the primary purpose of the evidence to ascertain whether it is testimonial, [they] cannot ignore the reality that if a criminal prosecution takes place, the NMS report would be critical to proving the State’s case.” Id. at 53.

Here, the trial court concluded that Mr. Dixon’s case is distinguishable from Brewer because in Brewer, the state of South Carolina sought to introduce the NMS toxicology report through the pathologist and not through an employee of NMS. APP027. That is ultimately a distinction without a difference. Deisher, like

the pathologist in Brewer, did not know who performed the various tests. APP119-20. Deisher, like the pathologist in Brewer, could not name the employees who operated the instruments. Deisher, like the pathologist, relied on the data obtained by others when drafting their respective reports. Deisher's report made it to OCME which issued its report on the cause of death of Mr. Keating. That reliance on the work of others is the crux of the issue, and it is the exact issue that compels confrontation.

Like Justice Ginsburg outlined in Bullcoming, this type of representations "relating to past events and human actions are "meet for cross-examination." Bullcoming v. New Mexico 564 U.S., at 660. It is just as true here as it was in Brewer that if not for the analyst's reports from NMS, the OCME would not be able to determine a cause of death by acute fentanyl poisoning of Mr. Keating. APP171. The Brewer Court held that the "NMS report here served as the basis for [the pathologist's] cause of death determination and revealed the quantity of oxycodone found in the child," and that finding "[goes] straight to the heart of the state's burden of proof for this homicide" because that proof was necessary to rule out the defense's theory of the case of accidental ingestion of oxycodone. Brewer 438 S.C., at 53.

Similarly, the State of Maine would have had to introduce evidence that Mr. Dixon *in fact* contributed to the death of another, Mr. Keating, through his

trafficking of a scheduled drug and that Mr. Keating was “in fact” killed because of the use of a scheduled drug. 17-A M.R.S.A § 1105-A(1)(K). The Brewer Court concluded that a violation of the Confrontation Clause occurred, and while it may be “efficient for a pathologist” to utilize NMS “in investigating a death,” the “Confrontation Clause does not carve out an efficiency exception. Brewer 438 S.C. at 54. Similarly, the Law Court should not carve out an efficiency exception by allowing Ms. Deisher to testify in lieu of the unknown number of analysts that actually performed the analysis of scheduled drugs.

B. Formal versus Informal Statements

Courts have indicated that the formality of a statement factors into the analysis of whether a statement is testimonial. As the Court outlined in Crawford, there are certain statements that are definitively testimonial, like affidavits or custodial examinations, but the Court did not give an exhaustive list, and instead, they held that “or “extrajudicial statements... contained in formalized testimonial materials... or “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” Crawford v. Washington, 541 U.S., at 51-2. It is in that final flexible standard outlined by the Court that drives the vast majority of the litigation into whether a statement is testimonial. See Generally Bullcoming v. New Mexico

564 U.S. 647 (2011); Melendez-Diaz v. Massachusetts, 667 U.S. 305 (2009). The Supreme Court said the following in Michigan v. Bryant:

Formality is not the sole touchstone of [the] primary purpose inquiry because, although formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to establish or prove past events relevant to a later criminal prosecution, informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent.

Michigan v. Bryant, 562 U.S. 344, 366 (2011).

The Supreme Court in Bryant emphasized the informality of an encounter between a victim and police. Id. at 366. While formality is not a sufficient condition for whether a statement is testimonial, the formality does factor into the analysis and would bring a statement closer to the types of statements outlined in Crawford, like an affidavit or a custodial interrogation.

The Court in Bryant expanded on the ongoing emergency doctrine as outlined in Davis v. Washington which determined that certain statements taken by police officers during the course of an investigation were nontestimonial when elicited “under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency” but were testimonial when “to establish or prove past events potentially relevant to later criminal prosecution.” Davis v. Washington, 547 U.S. 813, 822 (2006). The Court in Davis looked to the circumstances around how certain statements were elicited. Id. at 826. In Davis, statements were elicited by authorities during a 911

call. The Court held that those statements were nontestimonial, in part, due to the informality of the line of questioning. Id. at 827. The Court found that the fact that, in Davis, the declarant was talking about things that were “actually happening” as opposed to “past events” was significant, and it contrasted the interrogation in Crawford that occurred hours later at the “station house,” speaking to “past events.” Id.

The Supreme Court in Davis elaborated that “the difference in the level of formality between the two interviews is striking. Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; [the declarant in Davis’s] frantic answers were provided over the phone, in an environment that was not tranquil, or even... safe.” Id. at 814. The absence of an emergency does, in the view of the Court in Davis and Bryant, make it more likely that the primary purpose is to shore up a future prosecution and to prove past events. Michigan v. Bryant, 562 U.S., at 366; Davis, 547 U.S., at 827-8.

In State v. Thomas, the Law Court opined that certain notes that were signed and dated by an absent chemist were not sworn or signed under oath and lacked certain formalities, but still found that they were testimonial. State v. Thomas 334 A.3d 686 at 705 (2025). There, the court hung its hat on the fact that since law enforcement had “indicated that the samples should be tested as a “rush job,” and

that the substitute chemist's testimony "regarding [the original chemist's] worksheet and notes that indicated the weight of the substances violated Thomas's confrontation right." Id. This case underscores that formality is not the end of the primary purpose analysis.

In the present case, NMS became involved upon receiving a sample and a request for testing from one of its clients, OCME. APP119. That request contained certain identification information for the individual from whom the sample was generated as well as the testing the client requested. APP122. While Funte testified that not all OCME investigations involve suspicious deaths, many do. APP165. He further testified that he does routinely get accompanying information about a case, and most of the time, that information is from law enforcement. APP174. He could not recall if he got such information in this case and indicated he would have to "review his case file" to know for sure. APP175.

This sample was taken from the person that law enforcement suspected of overdose. APP167. He testified that he based his findings on cause of death on the laboratory results from NMS and issued a report. APP171. His report detailing the case of death of Mr. Keating is necessary in proving the State's case. Ms. Deisher testified that NMS receives these requests, and NMS has strict standard operating procedures to ensure that their testing is accurate. APP171. She testified that NMS has must meet annual quality control requirements to maintain the lab's

accreditation. APP117. The statements generated by NMS, namely the data, the results interpreted from that data, all were evaluated by Deisher when issuing her toxicology report. APP128.

Deisher's report will be used at trial to show what substances were in Mr. Keating's blood, and that report is undoubtedly testimonial. However, the formality of that report does not make the statements that go into that report -- the testing, the data generated, the data analyzed and compiled, any less formal. As Ms. Deisher testified, NMS has strict procedures and quality control standards. APP115-6. The testing was all done with the purpose of proving a past event relevant to a future criminal prosecution or trial, namely, that a sample from an individual contained certain substances. See Crawford v. Washington at 51-2, Michigan v. Bryant at 366.

The fact that these analysts made their statements in an unsworn manner or not in a certificate or affidavit does not mean that the statements are not testimonial. Bullcoming v. New Mexico, 564 U.S., 664. There, the court reasoned that "the formalities attending the report of blood alcohol analysis are more than adequate to qualify [the original analyst's] assertions as testimonial. Id. at 665. The Court found that the fact that a "law enforcement officer" seized evidence to be tested at a "state laboratory required by law to assist in police investigations" to be evidence of that formality. Id. While NMS is not a laboratory ran by the State of

Maine, the State of Maine’s OCME contracts with NMS with the aim of providing evidence that the OCME will rely on in order to further the State’s criminal prosecutions. APP171.

As discussed *supra*, the State of Maine grants the OCME the authority to direct law enforcement on the ground, and grants them the authority, as well as the Attorney General and the Local District Attorney, to request autopsies for suspicious, unnatural deaths. See 22 M.R.S.A § 3022, 22 M.R.S.A §3028. Dr. Funte testified that “most of the time” the information he receives about a case comes from law enforcement, although he could not remember if he received that information in the instant case. APP174. OCME and enforcement work hand-in-hand and to say otherwise would be disingenuous.

C. Forensic Reports

The Confrontation Clause applies to forensic reports. Smith v. Arizona, 602, U.S. 779, 785 (2024); State v. Thomas, 334 A.3d 686, 701 (2025), State v. Gleason 339 A.3d 774, 779. In Melendez-Diaz, the State sought to introduce a certification that the Court held functioned as an affidavit in lieu of live testimony from the analyst that did the testing or certified the result, and the Court held this was a Confrontation Clause Violation as it fell within the “core class of testimonial statements.” Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311. It is important to note here that no individuals from the Massachusetts lab were called during the

trial proceeding. Justice Scalia reasoned that the information contained in the certificate introduced by the state would have been “the precise testimony the *analysts* would be expected to provide if called at trial.” *Id.* at 308 (emphasis mine.) The Defendant in Melendez-Diaz had a right to confront the analysts who performed the testing and signed the certificate, as the certificate was “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id.* (internal quotations omitted). The Court further said “[f]orensic evidence is not uniquely immune from the risk of manipulation. *Id.* at 318; Smith v. Arizona at 785.

In Bullcoming v. New Mexico, the Court held that a substitute analyst who did not perform the testing of the blood sample at issue in that case and did not observe the sample’s testing in any way, violated the Confrontation Clause. Bullcoming, 564 U.S. 647, 651. The Court reasoned that “[the state] could have avoided any Confrontation Clause problem by asking [the substitute analyst] to retest the sample, and then testify to the results of his retest rather than to the results of a test he did not conduct or observe.” *Id.* at 666. Personal observation of a test and the procedures adhered to while testing is crucial, and the Supreme Court in Bullcoming said representations that relate to “past events and human actions” are “meant for cross-examination” since they are not “revealed in raw, machine produced data.” *Id.* at 660. The Court goes on to say that a substitute analyst

cannot convey what the original analyst “knew or observed about the events [their] certification concerned, i.e., the particular test and testing process he employed... [n]or could such surrogate testimony expose any lapses or lies on the certifying analyst’s part.” Id. at 661-2.

Here, like the substitute analyst in Bullcoming, Ms. Deisher would not be able to testify with personal knowledge about how the tests were conducted and data was generated. APP133-4. What makes matters worse is the fact that there were as many as 2 to 3 analysts who were involved in the tests performed by NMS. APP142-3. Deisher has no personal knowledge of any of those tests or testing processes employed during the testing, other than her independent review as a secondary reviewer of the data those analysts generated. APP143-4. Justice Ginsburg in Bullcoming put forth an example first raised by defense counsel of a radar gun:

Could an officer other than the one who saw the ... gun present the information in court – so long as that officer was equipped to testify about any technology the observing officer deployed and the police department’s standard operating procedures? As our precedent makes plain, the answer is emphatically “No.” Bullcoming v. New Mexico at 660.

Deisher can certainly testify as to what technology was used and what the standard operating procedures were for NMS, but she cannot testify as to what the analysts observed as they conducted their confirmatory tests. She cannot testify as to whether the standard operating procedures were adhered to by each respective

analyst that handled the sample. As relayed in Bullcoming, “the analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess the scientific acumen of Mme. Curie and the veracity of Mother Teresa. Bullcoming v. New Mexico, 564 U.S. 647, at 661 (citations omitted).

In State v. Gleason, the Maine Supreme Court ruled that testimony provided by NMS laboratories by way of Ms. Deisher were hearsay, but the Law court did not touch on the issue of whether those statements were testimonial. State v. Gleason 339 A.3d 774, 778 (2025). There, the Court held that since Ms. Deisher relied “on the assumption that all the testing sequences and processes were properly followed” and recognized that the “data she reviewed was the product of judgments made by other reviewers and lab employees,” her statements contained in her toxicology report were offered for the truth of the matter asserted, and she was a “mouth piece” to convey that other employees had followed and adhered to certain procedures. Id. at 780. The defense was unable to cross-examine those who actually followed the procedures when conducting the testing at issue. Id. The Law Court remanded the matter for further findings as to whether the statements relied upon by Ms. Deisher were testimonial. Id. at 781.

As discussed on page 5, *supra*, the United States Supreme Court has given additional guidance as to whether a statement may be testimonial. The Court said

that “*some* records of lab analysts will not have an evidentiary purpose,” listing an analyst’s reminder to themselves or certain lab records that “come into being primarily to comply with laboratory accreditation requirements or to facilitate internal review or quality control.” Smith v. Arizona at 802 (emphasis added). The Court emphasized that a reviewing court must first identify what the statements in fact were before it can assess that statement’s primary purpose. Id. The Court rejected the notion that “neutral, scientific testing” should be subject to a different rule. Id. at 785 (citations omitted). In Smith., the Court reiterated that labs are not “immune from the risk of manipulation or mistake,” and a defendant “might have used cross-examination to probe what tests the analysts performed, whether those tests presented a risk of error, and whether the analysts had the right skill set to interpret the results.” Id. at 785-6 (citations omitted).

It is important to note the contrast between the Court’s statements about how some records of lab analysts that will not have an evidentiary purpose, naming internal reminders-to-self and documents concerning quality control or accreditation, and the information that the Court says can or should be tested through cross-examination, namely the types of tests performed and whether the analyst performed them according to certain standards and had the skills to do so. The former category does not have the primary purpose of providing evidentiary value,

according to the court, while the latter is “meet for cross examination” Bullcoming, 564 U.S., at 660.

Here, the statements Deisher is relying on from NMS’s analysts is of the latter category. The analysts test the samples utilizing their training and skillset, record that data, and submit it for the toxicologist to ultimately review based upon the analyst’s findings. The statements that Deisher relies on are exactly the type of statements that are generated to provide an evidentiary purpose at a later criminal proceeding. As discussed in Appellant’s brief at the trial court level, the laboratory analysts know the tests they are performing are forensic tests and generating forensic evidence, and the Confrontation Clause should and does apply “in full” to forensic evidence. APP061; Smith v. Arizona 602 U.S.,at 783. And as Deisher testified, errors can happen at each stage of the testing process. APP156. The Appellant should be afforded the opportunity to cross examine these individuals who actually performed the testing.

D. Machine Generated Data

The Law Court has issued guidance concerning machine-generated data with respect to whether that data is testimonial. In State v. Thomas, the Law court included in a footnote a discussion on machine-generated data falling outside of the protection of the Confrontation Clause. State v. Thomas, 334 A.3d 686, 705, fn 30. In that footnote, the Court cites State v. Beeler. In Beeler, the Law Court held

that an I-9000 breathalyzer certificate was non-testimonial because, unlike the certificates in Melendez-Diaz and Bullcoming that contained forensic analysis, an intoxilyzer certificate “merely reports the results generated by a self-contained breath-alcohol testing machine” State v. Beeler, 281 A.3d 637 (2022).

Here, the results of the four screens requested by OCME to NMS require human interpretation. APP131. Ms. Deisher testified that human beings (multiple) are involved with exporting the data. APP 132. She further testified that it was possible for analysts to make errors in the process of reviewing that data. APP156. These statements generated by the NMS analysts are not machine generated in the same way that the self-contained initializer generated its statement in Beeler. Here, the Confrontation Clause is certainly implicated. In Bullcoming, the Court held that “the comparative reliability of an analyst's testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar. Bullcoming v New Mexico, 564 U.S. 647, 661 (2011).

E. The Relevant Circumstances in 2019

In Justice McElwee’s order, she found that the relevant circumstances in 2019 support the conclusion that the statements made by NMS analysts were nontestimonial. APP027. In that order, the court discussed cases that have held that certain reports in some cases prepared by independent laboratories at the behest of that state’s medical examiner were prepared without an indication that a

criminal investigation was proceeding or about to proceed. Id. Those cases are distinguishable from Appellant's as the relevant circumstances associated differ.

The trial court cites United States v. James for the proposition that a toxicology report was nontestimonial because, at the time of the testing, a death by poisoning was not being investigated by law enforcement as a homicide. This case was decided in the wake of Williams v. Illinois, but given the lack of clear guidance from the Supreme Court in their plurality opinion in Williams, the Second Circuit decided to base its rationale primarily on the cases that came before Williams. United States v. James, 712 F. 3d 79, 95 (2013); See generally Williams v. Illinois, 567 U.S. 50 (2012).

In James, the Second Circuit held that a toxicology report was nontestimonial, in part, because there was a "scant" record of the circumstances under which the autopsy report was produced. Id. at 98. The cause of death was "undetermined." Id. at 99. There was not any evidence that the one performing the autopsy or "anyone else involved in [the] autopsy suspected that [the decedent] had been murdered and that the medical examiner's report would be used at a criminal trial. Id. at 99. The Second circuit also found it relevant that New York statute grants the Medical Examiner authority to conduct its own investigations independent of law enforcement. Id. at 97. The autopsy in James occurred substantially before any criminal investigation into [the death] had begun. Id. at 99.

The Maine statute reads differently. Maine makes clear that the Medical Examiner's investigation into the case and OCME's custody of the body is "subject to the authority of the Attorney General," the chief law enforcement agency of the State. 22 M.R.S.A § 3028. Additionally, contrary to the law at issue in James, Maine lists along with the medical examiner the "district attorney... or the Attorney General" as those who can order an autopsy, indicating more independence for medical examiners in New York than in Maine. *Compare* 22 M.R.S.A § 3028(8) *with* New York City, N.Y., Code § 17-203. It is important to note that this case in 2013 does not have the benefit of Smith v. Arizona's discussion about what types of statements may be testimonial and what types of statements may not be discussed on page 8, *supra*.

Here, the investigation kicked off right away with law enforcement furthering their investigation the same date of Mr. Keating's death, zeroing in on Appellant within a day. APP178. Unlike the situation in James, law enforcement had pinpointed Mr. Dixon as a suspect early, and they even took Mr. Dixon into custody the day after Mr. Keating passed away, telling Mr. Dixon that he would be charged with a crime. APP180. Consequently, the relevant circumstances are different here than they were in the context of James due to the presence of an active law enforcement investigation.

The trial court further cites United States v. Moya, a decision from the 10th Circuit. APP028. New Mexico requires medical examiners to conduct autopsies if the medical examiner suspects a death was caused by a criminal act or if the cause of death is “obscure.” United States v. Moya, 748 Fed. Appx. 819, 820 (2018). The 10th Circuit held that, despite the statutory scheme that connects New Mexico’s Office of Medical Investigation with law enforcement, the investigation and subsequent toxicology report issued by that office was not testimonial. Moya, 758 Fed. Appx, 829. There, the 10th Circuit found that the fact that the report was not provided to law enforcement was relevant in the analysis. Id. The Court in Moya said that while a report not being sent to law enforcement is a relevant circumstance and would point toward a statement contained therein being nontestimonial, it is not in and of itself determinative or whether the statement is testimonial. Id. at 829-30. In Moya, the court found convincing that the time gap of 3 years before a criminal investigation into the death was telling, and that a “reasonable person in [a toxicologist’s] position that the primary purpose of [the] report... was for a criminal investigation or prosecution.” Id. at 829-30.

Here, the criminal investigation kicked off the day Mr. Keating died. APP178. While there was a 2 year gap in the indictment, Mr. Dixon was taken into custody within days of Mr. Keating’s death. APP180. This occurred well before the original toxicologist report returned from NMS on 06/08/2025. APP

040. While the record is not as clear in Moya about the details of that investigation, the gap in time between the completion of the toxicology report and the government's decision to charge the defendant mattered for the 10th circuit. Moya, 748 Fed.Appx, 829.

Here, the record is clear concerning Mr. Dixon's arrest in May of 2019, which occurred before the issuance of the first toxicology report. APP040. The relevant circumstances in May of 2019 involve an investigation into a criminal trafficking case and Funte testified that he often coordinates with law enforcement as to what happened, although he did say he "[tries] to keep an open mind." APP168. The relevant circumstances indicate that the primary purpose of OCME's investigation into the death of Mr. Keating was to investigate a suspected death by way of trafficking an illegal drug, fentanyl.

The trial court cites State v. Mattox for the proposition that a toxicologist report's context indicates that the primary purpose of the report was to provide the medical examiner with information concerning an unknown cause of death, but that case is distinguishable on the facts. State v. Mattox, 373 Wis.2d 122. The toxicology report at issue in Appellant's case was detailed and was based upon the notes and independent testing of multiple analysts. APP040-3. The toxicology report issued in Mattox was undated and lacked a significant amount of the formalities associated with the toxicology report in the present case. Mattox, 373

Wis.2d, 131. The Court in Mattox said that the toxicology report was “not sworn, certified, or in the form of an affidavit and it comprised only numerals quantifying the concentration of substances... without any analysis or interpretation of those numbers.” Id. at 128. Here, Deisher’s report contains interpretation, analysis, and conclusions that make this particular report easy to distinguish from the report in Mattox. APP040-3. While formalities are not the end of the analysis, the more formalities associated with a statement, the more likely the statement is testimonial. See generally State v. Thomas 334 A.3d 686 at 705 (2025); Michigan v. Bryant, 562 U.S. 344, 366 (2011).

Additionally, a fair reading of Mattox would indicate that the person signing the toxicology report performed the testing at issue. Mattox, 373 Wis.2d, 133. Here, there were multiple people involved in each stage of the testing of Mr. Keating’s blood. APP119. The Wisconsin Supreme Court reasoned, among other considerations, that “[at] the time the medical examiner sent the samples for testing, there was no defendant against whom to generate evidence because there was no known crime.” Mattox, 373 Wis.2d, 140. That is not the case here. APP177-9. The fact that Mr. Dixon was a suspect in May of 2019 and the fact that multiple individuals were involved in the various tests ordered by OCME is enough to distinguish Mattox from the present facts. The Court in Brewer had the right of it when it reasoned “although the forensic analyst who actually performed

the testing may not have known each particular fact calling Brewer's innocence into question, the State cannot undermine the Confrontation Clause by utilizing a private laboratory in a criminal trial without calling the individual who performed the testing.” State v. Brewer, 438 S.C. 37, 52, 882 S.E.2d 156, 164 (2022).

The trial court cites Commonwealth v. Bloom for the proposition that an independent lab’s testing was ordered for establishing a cause of death and that the toxicologist did not know or have reason to know that a criminal investigation would begin. APP027. The Supreme Court of Pennsylvania held that statements contained in a toxicology report were nontestimonial. Commonwealth v. Bloom, 341 A.3d 752, 768 (2025). There, the Court considered the identifying information that accompanied the sample, as well as the agency that ordered it, in supporting its conclusion. Id. at 767. The Court found that “other than the report’s indicating that Dr. Goldblatt is from ‘ForensicDx,’ there is nothing suggesting to the analyst who prepared the report that it was being requested as part of a criminal investigation.” Id. at 768. Additionally, the Court indicated that the defendant was “not arrested until over a year after” the defendant’s death. Id.

That case is distinguishable on the facts from Appellant’s case. Unlike in Bloom, the investigation proceeded quickly, and appellant was taken into custody within days. APP177-9. Unlike the report in Bloom, there was a great deal more evidence that the analysts who performed the tests on Mr. Keating’s blood were

aware that the tests could be used in a criminal investigation. As discussed in appellant's brief to the trial court, the word "forensic" accompanies many of the codes applied to the testing of Mr. Keating's blood samples. APP061. If the analysts at NMS knew they were doing forensic testing, and if the Confrontation Clause applies to forensic reports, the Confrontation Clause should apply in full force to testimonial statements that inform the forensic report. Smith v. Arizona Smith v. Arizona, 602, U.S. 779, 785 (2024).

CONCLUSION

WHEREFORE for the reasons noted above, Mr. Dixon respectfully requests this Court vacate the Order Granting State's Motion in Limine and remand this matter to the Trial Court for further proceedings in accordance with the forgoing.

Dated: March 25, 2026

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Certificate of Service

I, Connor Herrold, certify that on the date indicated below, I have sent a copy of the Appellant's Brief to the party listed below by electronic mail:

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