

**STATE OF MAINE  
PENOBSCOT, ss.**

**SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT  
DOCKET NO: PEN-26-77**

**STATE OF MAINE,  
Appellant**

**v.**

**BRANDON ROSSI,  
Appellee**

**ON APPEAL FROM THE UNIFIED CRIMINAL DOCKET**

**BRIEF OF APPELLANT**

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## **TABLE OF CONTENTS**

| <b>Section</b>                                                                                                                                                                                                                                         | <b>Page</b> |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| Table of Authorities .....                                                                                                                                                                                                                             | 4           |
| Procedural History .....                                                                                                                                                                                                                               | 5           |
| Statement of Facts .....                                                                                                                                                                                                                               | 6           |
| Statement of the Issues .....                                                                                                                                                                                                                          | 13          |
| Summary of Argument .....                                                                                                                                                                                                                              | 14          |
| Argument.....                                                                                                                                                                                                                                          | 15          |
| <b>I. The motion court’s order has a reasonable likelihood of seriously impairing or terminating the prosecution.....</b>                                                                                                                              | <b>15</b>   |
| <b>II. The motion court abused its discretion by misapplying the “primary purpose” test to determine whether NMS analyst statements are testimonial.....</b>                                                                                           | <b>17</b>   |
| <b>A. The applicable legal standard is the “primary purpose” test.....</b>                                                                                                                                                                             | <b>17</b>   |
| <b>B. The motion court improperly applied the legal standard by failing to identify and analyze the specific statements at issue and imputing erroneous findings as to the primary purpose of one set of statements onto all other statements.....</b> | <b>19</b>   |
| <b>C. When properly applying the standard, NMS lab analyst statements are non-testimonial.....</b>                                                                                                                                                     | <b>20</b>   |
| <b>III. OCME is not a “quasi-law enforcement agency” and,</b>                                                                                                                                                                                          |             |

|                                                                                                                                                                                                           |           |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| <b>even if they are, labeling something “law enforcement”<br/>is not dispositive in the primary purpose test.....</b>                                                                                     | <b>23</b> |
| <b>A. OCME is not a “quasi-law enforcement agency.” ....</b>                                                                                                                                              | <b>23</b> |
| <b>B. Even if OCME is a “quasi-law enforcement agency,”<br/>labeling something “law enforcement” is not<br/>dispositive in the primary purpose test .....</b>                                             | <b>25</b> |
| <b>C. The motion court’s erroneous conclusion that<br/>OCME is a “quasi-law enforcement agency” and<br/>misunderstanding of the law is the premise of its<br/>improper primary purpose analysis .....</b> | <b>25</b> |
| <b>Conclusion.....</b>                                                                                                                                                                                    | <b>27</b> |
| <b>Certificate of Service.....</b>                                                                                                                                                                        | <b>28</b> |

## **TABLE OF AUTHORITIES**

| <b>Cases</b>                                                         | <b>Page</b>     |
|----------------------------------------------------------------------|-----------------|
| <i>Davis v. Washington</i> , 547 U.S. 813 (2006) .....               | 17              |
| <i>Manocchio v. Moran</i> , 919 F.2d 770 (C.A.1 1990) .....          | 23-24           |
| <i>Michigan v. Bryant</i> , 562 U.S. 344 (2011) .....                | 17, 25          |
| <i>Smith v. Arizona</i> , 602 U.S. 779, 784 (2024) .....             | 17-18, 25       |
| <i>State v. Beeler</i> , 2022 ME 47, 281 A.3d 637 .....              | 17, 21          |
| <i>State v. Carter</i> , 2025 ME 77, 345 A.3d 38 .....               | 17              |
| <i>State v. Drown</i> , 447 A.2d 466 (Me. 1982) .....                | 15              |
| <i>State v. Dube</i> , 2014 ME 43, 87 A.3d 1219 .....                | 17              |
| <i>State v. Gleason</i> , 2025 ME 52, 339 A.3d 774 .....             | 17-18, 25       |
| <i>State v. Thomas</i> , 2025 ME 34, 334 A.3d 686 .....              | 17-18, 21       |
| <i>State v. Tozier</i> , 2015 ME 57, 115 A.3d 1240 .....             | 21              |
| <i>United States v. De La Cruz</i> , 514 F.3d 121 (C.A.1 2008) ..... | 24              |
| <br><b>Statutory Provisions &amp; Rules</b>                          | <br><b>Page</b> |
| 5 M.R.S. § 191-205 .....                                             | 24              |
| 15 M.R.S. § 2115-A(1) (1999) .....                                   | 15              |
| 17-A M.R.S. §§ 1105-A(1)(K) (2017) .....                             | 5, 15           |
| 22 M.R.S. §§ 3022(3) (2021) .....                                    | 24, 26          |

## **PROCEDURAL HISTORY**

On September 25, 2024, the Penobscot County Grand Jury returned an indictment charging Rossi with one count of Aggravated Trafficking in Scheduled Drugs, Class A<sup>1</sup>. (A. 31). On April 2, 2025, the State filed a Motion in Limine Re: NMS Employees. (A. 32). On October 17, 2025, a hearing was held on the Motion in Limine, which was denied in a written order dated February 3, 2026. (*Matson, J.*). (A. 10). Notice of appeal was timely filed on February 13, 2026. (A. 8).

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<sup>1</sup> 17-A M.R.S. §§ 1105-A(1)(K) (2017).

## **STATEMENT OF FACTS**

National Medical Services (NMS) is a private laboratory that is accredited by the American Board of Forensic Toxicology and the College of American Pathologists, among others, and is certified by the International Organization for Standardization. (M. Tr. 8-9). Obtaining and maintaining these accreditations is an involved process requiring ongoing audits, mandatory testing of known samples, quality control, and quality assurance. (M. Tr. 9-10). The requirements of accreditation also impact the testing processes and standard operating procedures at NMS, as they must follow best practices and follow the guidelines for forensic work. (M. Tr. 10). Every part of NMS' testing process is covered by a standard operating procedure. *Id.*

NMS provides services to clients in all 50 states including private physicians, private hospitals, government entities, as well as international clients. (M. Tr. 12-13). Law enforcement is only one type of client that NMS serves, and no part of NMS' lab is dedicated solely to law enforcement or criminal work. (M. Tr. 14). Additionally, no one person at NMS does all the testing related to a specific sample. (*Id.*). This is not unique to NMS, and most modern forensic labs do what is called "batch work," where different individual departments or analysts split up the confirmations and screenings for a sample. (M. Tr. 14-15).

In summary, when a blood specimen is received by NMS, it is given a unique barcode and work order number to track it through the lab by an accessioner. (M. Tr. 15, 18). The unique barcode and work order number cause the specimen to be deidentified (anonymized), meaning personnel in the lab can only see a work order number and barcode. (M. Tr. 18). Additionally, this allows the tracking of the specimen as it moves around the lab and automatically updates the chain of custody as the sample is scanned. (M. Tr. 18-19).

The anonymized specimen then goes to the screening department where a sample (aliquot) is taken for processing. (M. Tr. 16, 22). The anonymized sample then goes to the departments that conduct initial screening. (M. Tr. 16, 30). Each required screening, as determined by the work order, is typically done at the same time in different departments by different sets of people. (M. Tr. 30). Based on the screening tests, a sample then goes to other departments and groups of employees to conduct confirmation and quantification of those individual substances. (M. Tr. 16). Although analysts are involved in the testing process, the scientific tests themselves are performed automatically by the instruments. (M. Tr. 25, 34, 41, 45).

The data generated by the instruments is electronically uploaded automatically into NMS' laboratory information management system (LIMS).

(M. Tr. 16, 34-35). Meaning, NMS' laboratories are paperless and no human takes the data from an instrument and enters it personally into LIMS. (*Id.*). The raw data automatically uploaded to LIMS is reviewed by a calculator for compliance with standards to approve it or not, depending on whether it meets the laboratory's reporting criteria. (M. Tr. 36). NMS' analysts have no way to modify the raw data generated and uploaded by the instruments. (*Id.*). The instrument data comes in various forms, depending on the instrument, including chromatograms (which produce peaks on a line), the presence or absence of wavelengths of light. (M. Tr. 37, 41).

After all these steps are completed, the forensic toxicologist reviews every piece of unadulterated data generated by the instruments and prepares a report. (M. Tr. 16, 38-39, 53). Technically the toxicology report itself is automatically generated by the LIMS (computer), and the toxicologist receives it, reviews it all for accuracy, and certifies it. (M. Tr. 61). Only the toxicologist has access to the totality of the information from the submission information from the clients to all the testing work performed. (M. Tr. 58).

In this case, NMS received a specimen of blood from decedent Joshua Cox (Cox) on September 16, 2022, from the Maine Office of the Chief Medical Examiner (OCME). (M. Tr. 17-20). The only information provided by OCME was that the manner of death was undetermined, and that the specimen was

postmortem. (M. Tr. 19-20). The specimen was then anonymized through the assignment of a unique work order number and barcode and sent to necessary departments for sampling and screening. (M. Tr. 18-22).

This sample had the “postmortem expanded panel” performed, which included three different types of screens. (M. Tr. 26). Collectively it screens for the presence of hundreds and hundreds of different drugs. (M. Tr. 27). A positive screen requires further confirmatory analysis through “orthogonal testing,” that is, typically at a different time by a different analyst using a different testing method. (M. Tr. 27-28). The data generated by the instruments performing the screening tests was electronically uploaded automatically into LIMS. (M. Tr. 34-35, 41, 45).

Thereafter, two additional confirmatory tests were performed, one for the presence of fentanyl and one for citalopram. (M. Tr. 48). These tests use similar instruments and processes, and again, are fully automated once the sample is in the instrument. (M. Tr. 49-50, 52). These are also, again, calculators reviewing the output for reporting criteria. (M. Tr. 50, 52). This data is also automatically uploaded into the system for later review. (M. Tr. 50, 53).

By this point in the process, at least 15 distinct lab employees were involved in some way in performing the tests described above. (M. Tr. 54). This number could climb into the low twenties if including people who merely

moved samples throughout the lab. (M. Tr. 55). None of these personnel know anything about the anonymized samples, what the testing is for, or even who the client ordering it is. (M. Tr. 57).

After reviewing the unadulterated LIMS data, NMS forensic toxicologist Dr. Brower certified the LIMS report regarding Cox's specimen on October 12, 2022. (M. Tr. 61). During his review, Dr. Brower did not know what the purpose of the analysis was beyond it being labeled postmortem; although he inferred that the purpose was to help determine the cause and manner of death based on his prior work experience at a medical examiner's office. (M. Tr. 19, 58). Indeed, Dr. Brower did not know, prior to the hearing, that there was any criminal investigation relating to the sample, nor did any law enforcement representatives ever contact NMS during the analysis, nor were the results ever reported out from NMS to law enforcement. (M. Tr. 59). He also estimated that bringing all the lab personnel involved, including himself, to Maine for a trial would cost well over \$100,000 and would be very detrimental to the operation of the lab itself. (M. Tr. 62-64).

Former Chief Medical Examiner Dr. Mark Flomenbaum gave testimony about OCME's obligations, duties, and requirements. (M. Tr. 71). For any death which is not entirely natural, OCME has a statutory duty to determine the cause

and manner of death. (M. Tr. 73). A suspected drug overdose is but one example of the non-natural deaths that OCME is obligation to investigate. (M. Tr. 74).

When a death is reported by anyone, OCME determines whether they must investigate. (*Id.*). An OCME investigation, and the steps they take in an investigation, vary depending on the specific case; however, the purpose of an OCME investigation is to gain information to comply with their statutory duty to determine cause and manner of death. (M. Tr. 73-74, 83).

In the case of a suspected overdose death investigation, OCME typically collects biological specimens to confirm whether a death is due to drugs by getting the quality and quantity of foreign substances in the body. (M. Tr. 74-75). OCME does not have in-house ability to do forensic toxicology, so they send samples to NMS Laboratories because it is one of the largest, top-rated companies and is used by most of their colleague medical examiners throughout the country. (M. Tr. 77). OCME receives NMS' results electronically and these results are frequently relied upon by OCME in making cause and manner determinations. (M. Tr. 78).

The death of Cox was reported to OCME by Detective Brock. (M. Tr. 79). Det. Brock's report to OCME included no suggestion of a crime, or a possible future criminal investigation, and noted, "no concerns at the scene." (M. Tr. 79-80). A medical examiner was dispatched to a funeral home to examine Cox's

body and obtain blood and urine samples. (M. Tr. 80). Dr. Flomenbaum explained that if police communicate to OCME that they believe a crime led to the death, OCME's response and investigation into Cox's death would have been substantially different, including asking police not to move the body and sending an investigator to where the body was found. (M. Tr. 81).

Nothing like that happened in this case, and nothing indicated to OCME that a crime had been committed or that a criminal investigation was anticipated. (M. Tr. 81-82). Neither law enforcement nor prosecutors requested OCME take any specific steps in its investigation. (M. Tr. 83). In this situation, OCME was conducting a normal investigation with the primary purpose of determining the cause and manner of death, pursuant to its statutorily mandated duty. (M. Tr. 83). No details were communicated to NMS by OCME about the case other than the postmortem work order. (M. Tr. 84). NMS' findings were communicated back to OCME which informed the ultimate opinion as to cause of death. (*Id.*). An investigative summary regarding the cause of death was later signed off on by Dr. Flomenbaum on October 19, 2022. (M. Tr. 85). Dr. Flomenbaum never heard of any law enforcement follow up regarding the death prior to being subpoenaed for the motion hearing. (M. Tr. 87).

## **STATEMENT OF THE ISSUES**

- I. Does the motion court's order substantially impair or terminate the prosecution of this case?**
- II. Are the instrument-generated data and statements of NMS lab analysts testimonial under the primary purpose test?**
- III. Is OCME a "quasi-law enforcement agency" and, if so, does that alone render all its death reports testimonial hearsay?**

## **SUMMARY OF ARGUMENT**

1. The motion court's erroneous order substantially impairs and effectively terminates the prosecution of Brandon Rossi for Aggravated Trafficking contributing to a death. Indeed, this order substantially impairs any prosecution involving NMS. It is simply not feasible for any prosecutorial entity to expend such significant resources for every case in which NMS testing is involved.
2. The motion court abused its discretion by misapplying the legal test to determine whether an out-of-court statement is testimonial. Rather than identify the specific statement at issue and then determine the "primary purpose" of the specific statement, the motion court conducted its analysis in reverse, imputing its erroneous findings as to the "primary purpose" of OCME's statements onto all NMS statements. This analysis is contrary to precedent and constitutes a clear abuse of discretion.
3. The motion court erred by concluding that OCME is a quasi-law enforcement agency. This conclusion fails to consider all the relevant circumstances of OCME's statutory obligations and is contrary to First Circuit precedent. The motion court's reasoning, following its erroneous quasi-law enforcement finding, indicates that all law enforcement "statements" are testimonial. This is contrary to United States Supreme Court precedent.

## **ARGUMENT**

### **I. The motion court's order has a reasonable likelihood of seriously impairing or terminating the prosecution.**

This Court must first consider whether it is required by 15 M.R.S. § 2115-A to entertain this appeal. *State v. Drown*, 447 A.2d 466, 469 (Me. 1982). The State is allowed to appeal from any order of the court prior to trial which, either under the particular circumstances of the case or generally for the type of order in question, has a reasonable likelihood of causing either serious impairment to or termination of the prosecution. 15 M.R.S. § 2115-A(1) (1999).

The motion court's order has ruled that every result by every analyst at NMS who was involved with the various tests that led up to the toxicologist's report (without considering their primary purpose) is testimonial. The effect of that order requires the State to produce a minimum of 15 additional out-of-state witnesses from NMS to render the conclusions of the toxicologist (Dr. Brower) and the medical examiner (Dr. Flomenbaum) admissible at trial. Proving the charged offense requires proof that the trafficked drug was a contributing factor to the death of an individual. 17-A M.R.S. § 1105-A(1)(K) (2017). Doing so requires scientific evidence of the content of the decedent's blood, which requires evidence contained in the toxicologist and medical examiner reports.

Furthermore, requiring every NMS employee who had any involvement with a sample, no matter how insignificant to the testing results, would effectively shut down a section of the laboratory at NMS for a period of days. If shutting down an entire section of NMS for days is even possible, the cost of doing so would be “well over \$100,000 probably to send those people to Maine.” (M. Tr. 62-64). This cost not only applies to the prosecution of Brandon Rossi but would also apply to every prosecution involving testing performed by NMS. It is simply not feasible for any prosecutorial entity to expend such significant resources for a single trial; let alone for every future trial involving NMS.

The net effect of this is that the allegation of the trafficked drug contributing to the death of a person cannot be proven and would have to be abandoned in favor of a lesser offense that does not allege death. That constitutes the termination of the prosecution for Aggravated Trafficking, and a significant impairment to the prosecution generally. This is true under the particular circumstances of this case, as well as of all pending overdose death prosecutions, since all blood is sent by OCME to NMS for forensic testing. (M. Tr. 77).

**II. The motion court abused its discretion by misapplying the “primary purpose” test to determine whether NMS analyst statements are testimonial.**

The denial of a motion in limine is reviewed for an abuse of discretion, and its legal conclusions are reviewed de novo. *State v. Dube*, 2014 ME 43, ¶ 8, 87 A.3d 1219. Review for abuse of discretion involves answering three questions: (1) are factual findings, if any, supported by the record according to the clear error standard; (2) did the court understand the law applicable to its exercise of discretion; and (3) given all the facts and applying the appropriate law, was the court's weighing of the applicable facts and choices within the bounds of reasonableness. *State v. Carter*, 2025 ME 77, ¶28, 345 A.3d 38.

**A. The applicable legal standard is the “primary purpose” test.**

The Confrontation Clause “applies only to testimonial hearsay.” *Smith v. Arizona*, 602 U.S. 779, 784 (2024) (quoting *Davis v. Washington*, 547 U.S. 813, 823 (2006)); *State v. Gleason*, 2025 ME 52, ¶ 12, 339 A.3d 774. A statement is only testimonial if its primary purpose is to establish or prove a fact to be used in a future criminal proceeding. *Smith v. Arizona*, 602 U.S. at 800-801; *Michigan v. Bryant*, 562 U.S. 344 (2011); *State v. Gleason*, 2025 ME 52, ¶ 23, 339 A.3d 774; *State v. Thomas*, 2025 ME 34, ¶62, 334 A.3d 686; *State v. Beeler*, 2022 ME 47, ¶22, 281 A.3d 637.

To determine whether a hearsay statement is testimonial, the court must follow a two-step process. First, the court must identify the specific out-of-court statement at issue. *Smith*, 602 U.S. at 801; *Gleason*, 2025 ME at ¶ 23. Second, the court must determine “the ‘primary purpose’ of the statement.” *Smith*, 602 U.S. at 801; *Gleason*, 2025 ME at ¶ 23. The “primary purpose” of a statement is “the principal reason [the statement] was made” based on “all the ‘relevant circumstances.’ ” *Id.*

Regarding lab reports, courts “should consider the range of recordkeeping activities that lab analysts engage in [and] that lab reports may come into being primarily to comply with laboratory accreditation requirements or to facilitate internal review and quality control.” *Smith*, 602 U.S. at 802. A statement in a lab report is only testimonial if the primary reason that the statement was made has “a focus on court,” meaning focused on proving a fact at a future criminal trial. *State v. Thomas*, 2025 ME 34, ¶ 63 (citing *Smith*, 602 U.S. at 801-802).

**B. The motion court improperly applied the legal standard by failing to identify and analyze the specific statements at issue and imputing erroneous findings as to the primary purpose of one set of statements onto all other statements.**

The motion court failed to identify the statements at issue (the individual tests performed by the NMS lab analysts) and then determine the primary purpose for which the lab analysts made their statements. Instead, the motion court first determined that the primary purpose of OCME's statements requesting NMS testing was to generate statements for use at a future criminal trial. (A. 25). Then the motion court imputed its determination of OCME's primary purpose to NMS, writ large.

The motion court did briefly address the purpose of the forensic toxicologist's statements. However, those were not the statements at issue. The statements at issue were those of the individual analysts (who know nothing about the anonymous sample in front of them except the test assigned to them) on which the toxicologist relied. These statements and the primary purpose of these statements were essentially ignored by the motion court in its decision.

In other words, the motion court decided all NMS statements are testimonial because the motion court found OCME's statements are testimonial. Nothing in the plain reading of any of the above cases indicates that the primary purpose of one statement can be imputed onto all other, or any other,

statement. Indeed, if imputation were proper, the *Smith* Court's directive to identify the exact statement(s) at issue is rendered surplusage.

**C. When properly applying the standard, NMS lab analyst statements are non-testimonial.**

As a threshold matter, the work of NMS is attenuated from any criminal investigation or focus on the court by its very makeup. NMS is a private lab that provides services to a wide range of non-law enforcement clients such as hospitals and research institutes. No portion of NMS is dedicated to working solely with law enforcement agencies. Compare with the Maine Crime Lab, a state entity that only provides services to law enforcement for criminal investigations.

Further attenuation occurs once a sample is received by NMS. All NMS samples are labeled and tracked in a completely anonymous manner. As a result, no analyst is aware of the identity of a sample that they are working on at any stage in the process. Given the variety of clients that engage the services of NMS and the anonymity of each sample, it is impossible for any individual analyst to knowingly document or reasonably anticipate that their work is focused on being used to prove a fact in a particular criminal proceeding, in a possible future criminal proceeding, or any criminal proceeding at all.

Regarding NMS' procedures, an individual NMS toxicologist relies on a combination of instrument-generated data and analyst-generated documentation to reach their conclusion regarding the content of a blood sample. Instrument-generated data is nontestimonial. *State v. Tozier*, 2015 ME 57, ¶ 19, 115 A.3d 1240; *State v. Beeler*, 2022 ME 47, ¶27, 281 A.3d 637; *State v. Thomas*, 2025 ME 34, ¶63 n.20, 334 A.3d 686. Although more complex than an Intoxilyzer, the instruments utilized by NMS all produce testing results without any human involvement in the testing process once the sample is inserted into the instrument. When testing is complete, a technician uploads the testing results into LIMS. This exported data is similarly the result of the “internal actions of the machine itself” and is therefore nontestimonial. *Tozier*, 2015 ME at ¶ 21, 115 A.3d 1240.

Analyst-generated data includes the specimen processors who prepare a sample, the analyst who inserts the sample into the instrument, the analyst who uploads the instrument data into LIMS, and two receiving analysts who check the data for errors prior to review by the toxicologist. Again, based on the anonymous labeling and tracking, each analyst in this process has no way of knowing who the sample belongs to, or why certain testing was requested, or even whether their documentation is primarily focused on, and intended to be used in, a future criminal proceeding.

Instead, the primary purpose of the work and documentation done by the NMS analysts is a function of their accreditation and standard operating procedures. NMS is accredited by ANSI National Accreditation Board, the College of America Pathologists, and the America Board of Forensic Toxicology. These accreditation certificates require the adoption of standard operating procedures, specific training for employees, proficiency testing, a quality assurance program, and annual evaluation by the various accrediting bodies. Thus, everything done by an NMS analyst, including their statements (data), is dictated by a standard operating procedure that is necessary for NMS' accreditation. In other words, the primary purpose of the analysts' statements is to maintain accreditation and to do good, scientific work through compliance with rigorous procedures.

NMS' work – the testing of anonymized samples at a private lab that contracts with both public and private entities – is in stark contrast to analysts working for state labs that have direct connection, or only offer their services to, law enforcement and for the criminal investigation process.

**III. OCME is not a “quasi-law enforcement agency” and, even if they are, labeling something “law enforcement” is not dispositive in the primary purpose test.**

**A. OCME is not a “quasi-law enforcement agency.”**

At the outset of its analysis, the motion court held that OCME is a “quasi-law enforcement agency” based upon its own statutory interpretation and cites no Law Court precedent to support that interpretation. This conclusion entirely ignores OCME’s statutory obligations to conduct death investigations under many circumstances that never, or are unlikely to ever, result in a criminal prosecution. This conclusion also ignores OCME’s obligation to compile and preserve death records for reasons other than criminal prosecution. Instead, the decision merely assumes that because criminal conduct was charged, 23 months later, in connection with the death, then OCME’s investigation (regardless of their statutory duty) was therefore subject to the authority and direction of State prosecutors.

Neither OCME nor its employees fit into any definition of “law enforcement agency” or “law enforcement officer” contained in multiple Titles of the Maine Revised Statutes. Indeed, the First Circuit has rejected the argument that medical examiner reports are produced by “law enforcement personnel,” holding that a medical examiner is more similar “to a treating physician than [an expert] who is merely rendering an opinion for use in [a]

trial.” *Manocchio v. Moran*, 919 F.2d 770, 777 (C.A.1 1990). At least twice the First Circuit has distinguished medical examiners from law enforcement based on a medical examiner’s “statutorily regularized procedures,” which are fulfilled pursuant to “established medical standards,” and the fact that death reports “are intended to provide a permanent record of findings relevant to the cause of death.” *Id.* at 777-778; *United States v. De La Cruz*, 514 F.3d 121, 132-133 (C.A.1 2008).

The motion court’s only basis for its “quasi-law enforcement” conclusion is that OCME was “created” within the Department of the Attorney General (OAG). However, this conclusion fails to acknowledge that OCME is established in Title 22 (Health and Welfare), Part 6 (Births, Marriages and Deaths), rather than any section pertaining solely to criminal law or criminal investigations. Moreover, Title 5, Chapter 9 clearly establishes that the duties of OAG cover a broad range of areas and not just law enforcement. *See* 5 M.R.S. § 191-205. Indeed, if OAG is only a law enforcement agency, then 5 M.R.S. § 200-A, which establishes the criminal division within OAG, is rendered redundant.

**B. Even if OCME is a “quasi-law enforcement agency,” labeling something “law enforcement” is not dispositive in the primary purpose test.**

“Law enforcement” or “quasi-law enforcement” is not dispositive consideration under the primary purpose test. The United States Supreme Court has never said such a label is dispositive and has, in fact, recognized that “there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured [by the police] with the primary purpose of creating an out-of-court substitute for trial testimony.” *Bryant*, 562 U.S. at 358 (2011) (emphasis original). Such is the case here. The primary purpose of OCME was to fulfill its statutory obligation to determine a cause of death.

**C. The motion court’s erroneous conclusion that OCME is a “quasi-law enforcement agency” and misunderstanding of the law is the premise of its improper primary purpose analysis.**

The Supreme Court and Law Court decisions clearly hold that the primary purpose analysis is objective and considers the totality of the circumstances. *Smith*, 602 U.S. at 800-801 (2024); *Gleason*, 2025 ME at ¶23, 339 A.3d 774. The motion court, by erroneously conferring “quasi” status to OCME, absolved itself from conducting this objective, totality analysis.

Specifically, by just saying law enforcement equals testimonial, the motion court failed to consider OCME’s statutory obligations. OCME is statutorily obligated to investigate all nonnatural deaths and natural deaths

with a complicating factor. 22 M.R.S. §§ 3022(3) (2021). That statutory obligation is independent of any role they have in the criminal justice system.

As part of its obligation to investigate, OCME draws blood in almost every case and, depending on the particular investigation, OCME sends some samples to NMS for testing. Contrary to the motion court's conclusion, although some OCME death investigations may result in a criminal prosecution, that is not the primary purpose. The primary purpose is fulfillment of OCME's statutory obligations to investigate independent of any criminal investigatory process.

The mere fact that OCME knows that some of its death investigation reports may end up being used in a future criminal proceeding does not mean that those reports are composed primarily for that accusatory purpose. Nor is the State's use of a death report the automatic, inevitable conclusion of a death report's composition. Moreover, as argued above, the primary purpose of statements the motion was supposed to be analyzing were those of the NMS analysts.

In sum, the motion court's analysis and conclusion result from many fundamental errors. Not all law enforcement statements are testimonial; OCME is required to fulfill statutory obligations regardless of the criminal investigatory process; OCME sends samples to NMS primarily to fulfill its obligations to provide a determination of cause and manner of death; the

primary purpose of one statement cannot be imputed to any and all other statements; and the primary purpose of the NMS lab analyst statements are to fulfill their work order to get paid, and conduct good science to maintain their accreditation, (M. Tr. 60), all with zero knowledge that their work has, or will ever have, any focus or usefulness in a future criminal proceeding.

### **CONCLUSION**

For the foregoing reasons, the State respectfully asks that the motion court's order be vacated, and the State's Motion in Limine granted.

Respectfully submitted,

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Dated: May 22, 2026

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Assistant Attorneys General  
Of Counsel

**CERTIFICATE OF SERVICE**

I, Jason Horn, Assistant Attorney General, certify that I have sent a native PDF and mailed two copies of the foregoing “BRIEF OF APPELLANT” to Belony’s attorney of record, Jeffrey Toothaker, Esq.

Dated: May 22, 2026

/s/ Jason Horn

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