

THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. Pen-26-77

STATE OF MAINE
Appellant

v.

BRANDON ROSSI
Appellee

ON APPEAL from the Penobscot County
Unified Criminal Docket

BRIEF OF APPELLEE

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INTRODUCTION

Assuming this Court reaches the merits – and defendant thinks there are insurmountable barriers to the Court’s jurisdiction – it should glance at NMS Labs’ website, <https://nmslabs.com/resources/smith-v-arizona-information>.¹ There, NMS promises to help its clients get around *Smith v. Arizona*, 602 U.S. 779 (2024), the Confrontation Clause, and the “primary purpose” test. NMS offers its “proposed framework” for doing so by linking steps in the testing process to quality practices, accreditation, and licensing standards, a process desired [sic] to satisfy the “primary purpose” condition.

NMS, *website, supra*. Yet the State, in its brief and argument below, portrays NMS as a disinterested laboratory without a clue that it produces evidence bound for criminal courts.

Defendant shares this at the outset of the brief because it epitomizes a concerning theme of modern criminal justice, and the primary-purpose test in particular. By privatizing evidence-collection, the State can skirt constitutional laws – or at least it might – where its own “state-actors” cannot. This Court should read Supreme Court case-law and construe Article I, § 6 to put the brakes on this obvious attempt at an end-run around the right to confront.

¹ All links in this brief were verified as of July 22, 2026.

STATEMENT OF THE CASE

About two years ago, the State obtained an indictment charging defendant with trafficking drugs that were consumed in a manner causing the user's death. A31; *see* 17-A M.R.S. § 1105-A(1)(K). For over a month post-arraignment, the State failed to appoint counsel to represent defendant. A3-A5. Another five months later, the State moved *in limine* “for an order finding that the [toxicology] data and report produced by [the private laboratory retained by the State] [are] non-testimonial in nature.” A39. Six months thereafter, the court (Penobscot County, Mattson, J.), was able to convene a three-hour evidentiary hearing on the matter. Three and a half months later, the court issued its findings and order, mostly ruling against the State. The State appealed, invoking 15 M.R.S. § 2115-A(1). *See* Blue Br. 15-16.

I. The State sought a determination that everything to do with the toxicology report is non-testimonial.

The State's motion proposed a finding that all “data produced by NMS Laboratories in this case is nontestimonial,” A32, or “the data and report produced by NMS Laboratories is non-testimonial in nature.” A39. Though the Court's eventual order also contemplated the autopsy report, *see* A13, A15-15, A30, that extent of the order is not before this Court.²

² The State's brief does not contain any argument pertaining to the autopsy report. And it is axiomatic that, when the development of the record might influence the court's eventual findings and ruling, the preservation requirement necessitates notice to the opposing party of the importance of making such a record when it is still possible – *i.e.*, before the hearing. *Cf.*

That toxicology report itself, State's Exhibit 1, is reproduced at A40 of the Appendix. It is entitled "Toxicology Report" and is addressed to Dr. Mark Flomenbaum of the Maine Office of the Chief Medical Examiner (OCME). The decedent's name is printed near the top of the page next to "Patient Name." A40. The first of the four pages of the report lists "Positive Findings" for ten substances, notably, for this prosecution, "Fentanyl," "Norfentanyl," "4-ANPP," and "Acetyl Fentanyl," all quantified. A40. The report asserts, "Other than the above findings, examination of the specimen(s) submitted did not reveal any positive findings of toxicological significant by procedures outlined in the accompanying Analysis Summary." A41. Elsewhere, the report conveys which tests were conducted and on which substances. A42-A43.

II. At the hearing, the State called the NMS toxicologist and the former chief medical examiner.

Dr. Flomenbaum heard about the death from Det. Brock of Bangor Police Department. The detective reported that the deceased's corpse was found in a sober house, and the man had been sober for a few months after struggling with heroin-use. Tr. 79. The decedent was found upright on his bed, slumped over with cash-bills in his hand, located near his face. Tr. 79. Tinfoil was set out on the nightstand. Tr. 79.

One of OCME's "medicolegal death investigators," *see* 22 M.R.S. § 3023-A, was dispatched to the funeral home, where he retrieved the

Rairdon v. Dwyer, 598 A.2d 444, 445 (Me. 1991). The State did not, in its *in limine* filing, seek admission of the autopsy report.

decedent's urine. Tr. 80. This is routine practice for OCME "to confirm the death is due to drugs if [OCME] believe[s] that is the case." Tr. 74. In this case, "[t]he urine indicated there's probably something going on, so [the medicolegal death investigator] drew the blood." Tr. 80.

Given the results, the investigator concluded that "it was almost certainly going to be a drug-related death." Tr. 80. "It's a reasonable assumption," Dr. Flomenbaum ventured, that someone sold the decedent the narcotics. Tr. 82.

A. OCME sent a sample of the decedent's blood to NMS Labs for testing.

OCME is statutorily charged with determining the cause and manner of death whenever drug-overdose is suspected. Tr. 73, 83; 22 M.R.S. §§ 3022(3), 3025(1), 3028(1) & (7). To perform that duty in this case, OCME sent the blood-sample to NMS. Tr. 83-84. OCME does not have its own "in-house forensic toxicology" lab. Tr. 76. So it contracts with a private company, NMS Labs, to undertake the work. Tr. 76-77.

NMS "are amongst the largest [labs] in the country." Tr. 77. "[M]ost" medical examiners lacking an in-house lab also use NMS. Tr. 77. "[I]n the medical examiner community," NMS is "a well-regarded lab." Tr. 77.

B. NMS performed several tests.

The only NMS employee who testified at the *in limine* hearing was the forensic toxicologist who signed off on the final report. Tr. 7, 17. He formerly worked for the medical examiner's office in another state. Tr. 8.

NMS does “postmortem work” for medical examiners and coroners; drug chemistry analysis and intoxicated-driving sample-analysis for law enforcement; and therapeutic drug monitoring for some clinical clients. Tr. 11-12. NMS undertakes “batch work” rather than “cradle to grave” work, meaning that a technician completes a “batch” of one task along the laboratory process before advancing the test-sample to the next step. Tr. 14-15. There are several general steps along the way:

- “Accessioners” process the specimens received at NMS. Tr. 15. They cut open the packaging, remove the specimen and review the requisition form. Tr. 21. They assign the case a unique barcode and list the specific tests to be undertaken, based on the medical examiner’s order. Tr. 15, 21.
- Screeners undertake the screening-level testing. Tr. 21-22. They use a pipette to remove an aliquot from the specimen, then route the sample back to “secure refrigerated storage.” Tr. 22. If aliquots are defective, “the stats reviewers within the laboratory” would catch that error. Tr. 23-24. Or the toxicologist himself could catch the error. Tr. 24-25.
- Analysts, otherwise untitled in the record, undertake confirmatory testing.
 - For example, a gas chromatography headspace flame ionization detector spectrometer is utilized by an analyst who places an aliquot of blood into a 30-ml vial, which is

then capped and placed into the machine. Tr. 30-31. A different analyst must ensure that the position of the vials on the machine is proper. Tr. 31-32. To ensure the machine is properly calibrated, “blanks” are run through the machine. Tr. 31-32.

- The enzyme-linked immunosorbent assay machine requires an analyst to aliquot the blood onto a plate. Tr. 40. Batches of 40 to 50 different samples are tested in one sitting. Tr. 40.
- The mass spec TOF test requires an analyst to “take an aliquot of the drug” by “putting it into a state that is suitable for analysis on the instrument,” which entails “pulling out of the drug, putting it into another solvent that’s amenable to the instrument.” Tr. 43. Blood cannot be placed directly into the machine. Tr. 43-44.
- An analyst utilizing the LC-MS/MS triple quadrupole mass spectrometer for fentanyl likewise must “remove the drugs from the blood specimen, put it into a solvent that’s amenable” to the machine and place it into the instrument. Tr. 51-52.
- “Calculators” obtain the data from the testing machine or apparatus, reviewing for errors. Tr. 25. They then upload the resulting data into LIMS, NMS’ internal data-system, checking along the way for any non-compliant data. Tr. 25, 35-36, 46-47.

Though the toxicologist himself does not know how it might be done, there remains the theoretical possibility that the data could be manipulated in the process. Tr. 36. The calculators' supervisors often review this process. Tr. 25.

- A toxicologist then reviews the data and certifies it. Tr. 17, 38-39, 56. He relates "what does that number mean ... to the case." Tr. 37. He looks for mistakes such as a positive confirmatory test following a negative screening test. Tr. 47.

For postmortem cases like this one, NMS undertakes a "postmortem expanded panel." Tr. 26. Such consists of three different screening tests: "a volatiles analysis, which looks primary for alcohol," and is conducted on a gas chromatography headspace flame ionization detector spectrometer, Tr. 26, 30; an "immunoassay component," that detects cannabinoids and barbiturates, *id.*, Tr. 39-40; and liquid chromatography, time-of-flight mass spectrometry, which looks for numerous drugs including fentanyl, cocaine, heroin, opiates, opioids, etc., conducted on a mass spec a/k/a TOF mass spectrometer, Tr. 26-27, 42. Then for confirmatory testing, a ropinirole test looks for three or four drugs, including citalopram, and is performed on an LC-mass spec/mass spec, also called a triplequadrupole, Tr. 48-49; and fentanyl and its related metabolites are found via a separate test conducted on the same machine. Tr. 51.

The toxicologist summed up the NMS' role: "We conduct toxicological analysis in this postmortem case to help assist the Maine Office of the Chief Medical Examiner to determine cause and manner of death." Tr. 60.

“[T]here’s no one person” who produces the resulting toxicology report; LIMS “automatically” spits it out. Tr. 61.

C. NMS’ test-results were the basis for OCME’s determination of cause and manner of death.

When Dr. Flomenbaum later received the results, they became “the basis” – singular – for his opinion as to cause and manner of death. Tr. 84. Reporting police officers “usually do try” to contact OCME to determine what the final report concludes, Tr. 86-87, and Det. Brock obviously did so here. “[P]olice are waiting to see what I say,” as Dr. Flomenbaum put it. Tr. 91-92. He will “share [his findings] with them.” Tr. 92.

III. The court mostly denied the State’s motion in limine, finding that the State failed to prove that all of NMS’ statements are testimonial.

The court’s lengthy order appears at pages A10 through A31 of the Appendix, so it is not detailed here.

ISSUES PRESENTED FOR REVIEW

II. Does this Court lack jurisdiction to hear this appeal because the State has not proven that the interlocutory order will seriously impair its prosecution? Even if it does have jurisdiction, should the Court nonetheless decline to decide the case now, because the record is not suitable to reach the entirety of the merits and the resulting delay is improper in the circumstances?

II. Did the court abuse its discretion in determining that the State failed to prove that all of the statements implied within the toxicology report, State's Exhibit 1, are nontestimonial?

ARGUMENT

I. The Court lacks jurisdiction, and should anyway decline, to entertain this interlocutory appeal, as the State has failed to make a record establishing that its prosecution will be seriously impaired.

Three unanswered questions undermine the State's contention that the ruling below will seriously impair its prosecution. *See* 15 M.R.S. § 2115-A(1). On this record, the State has not carried its burden of proving jurisdiction. *See State v. Glenn*, 179 N.E.3d 1205, 1211 (Ohio 2021) (“The burden of establishing the appellate court's jurisdiction over an interlocutory appeal falls on the party who knocks on the courthouse doors asking for interlocutory relief.”) (quotation marks omitted). This Court should dismiss for lack of a sufficient proof of “serious impairment.”

A. What statements, exactly, does the State want to elicit without affording confrontation?

The State has specified merely the entire “report” and all the “data” authored by NMS, sans limitation. A39. Without precise statement-by-statement identification of its proffered evidence, it has not carried its burden to prove that its prosecution will be seriously impaired such as to trigger this Court's jurisdiction. The trial court's *in limine* ruling is, in that way, not final. *See State v. Brackett*, 2000 ME 54, ¶ 6, 754 A.2d 337 (dismissing State's appeal as “premature because it comes to this Court on a motion in limine, which ruling is not final until the evidence is offered at trial.”). This deficiency renders unproven the State's concern that its prosecution will be seriously impaired; we can only speculate how many witnesses might need to appear live.

The Supreme Court has “not h[e]ld, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution’s case.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 n. 1 (2008). Who to call is “up to the prosecution to decide,” knowing that whatever “testimony is introduced must (if the defendant objects) be introduced live.” *Id.* (emphasis in original). Does the State plan to call *all* such individuals referenced at the *in limine* hearing? Would its prosecution truly be seriously impaired if it only called a handful of them?

B. How many witnesses will the State *really* need to establish its case?

Despite the State’s alarmism, *see* Blue Br. at 15, this does not equal the total number of individuals who might have had some hand, however minor, in producing the toxicology report and its many extraneous details. For example, the State’s prosecution does not depend on quantification of ethanol, caffeine, nicotine, THC, alprazolam, etc.³ The tests that yielded such results were performed by analysts other than those who undertook the fentanyl-quantification. *See* **STATEMENT OF THE CASE**, *supra*, at II.B. How are those analysts truly necessary to the prosecution? On the record we have, we can only guess, leaving us to speculate whether the prosecution has been seriously impaired or merely inconvenienced.

³ The indictment alleges that the death-causing substance was “fentanyl powder.” A31.

C. Why does the State need to call *any* out-of-state witness?

Maine *does* have an in-state governmental entity charged with toxicology analysis which frequently collaborates with the very prosecutors prosecuting this case – the Forensic Chemistry Section of HETL (Health and Environmental Testing Laboratory). *Cf. State v. Osborn*, 2023 ME 19, 290 A.3d 558 (HETL chemist testified at trial prosecuted by State’s attorney below). Its “mission” is described thusly:

The mission of the Forensic Chemistry Section is to provide accurate, reliable, timely, and state of the art scientific analysis and subsequent expert testimony in the areas of seized drugs and toxicology. The service is provided primarily to criminal justice agencies within the State of Maine, although the forensic director may authorize the occasional acceptance of other work related to governmental agency investigations. Chemists provide expert witness testimony, presenting and defending their findings in courts in Maine.

Maine Department of Health and Human Services, *Forensic Chemistry* <https://www.maine.gov/dhhs/mecdc/services/maine-public-health-laboratory/forensic-chemistry> . At HETL, “[b]lood and urine samples are screened for the presence of drugs and the identity of any suspected drugs is confirmed by Liquid Chromatography/Tandem Mass Spectrometry (LC/MS) for blood samples or Gas Chromatography/Mass Spectrometry (GC/MS) for urine samples.” *Id.* at *Forensic Unit*

<https://www.maine.gov/dhhs/mecdc/services/maine-public-health-laboratory/forensic-chemistry/toxicology-unit> .

The State has not made a record establishing that it could not submit the remainder of the decedent's blood-sample to HETL for confirmatory "mass spec" testing.⁴ Why must it resort to any out-of-state witnesses and any private-entity witnesses?

The elephant in the room: Yes, HETL is apparently so underfunded as to delay prosecutions all over the State, so far with barely a concern for the defendants involved. See Josh Keefe, *The Maine Monitor*, *District attorney drops drug trafficking case after violating discovery rules* (Dec. 15, 2025) <https://themainemonitor.org/maloney-drops-case-violating-discovery-rules> (quoting D.A. Maeghan Maloney: "The Maine Health and Environmental Testing Laboratory currently has only one chemist for the entire State of Maine which is not sufficient to handle all of the drug cases in our state."). That legislators and executive-department officials have chronically underfunded the system to the point of constitutional violation neither vitiates that constitutional right nor provokes "serious impairment" of a prosecution. Cf. *State v. Brewer*, 882 S.E.2d 156, 165 (S.C. 2022) ("We acknowledge that it may be more efficient for a pathologist to utilize a private lab in investigating a death in some situations. However, the Confrontation Clause does not carve out an efficiency exception, and therefore, we cannot compromise a defendant's constitutional rights in the name of efficiency.").

⁴ The State adduced that it takes but a "small sample" to perform a test. Tr. 22.

Otherwise – that is, if a delay in HETL’s ability to produce toxicology reports *does* work “serious impairment” of a prosecution – it would stand to reason that defendants, too, would be seeing some nature of relief resulting from HETL’s role in the corollary “serious impairment” of their right to timely trials. *See* M.R. App. P. 48(b)(1) (dismissal due upon “unnecessary delay”). It can’t both be true that it’s too hard for the State to go through HETL yet there is no “unnecessary delay” to the countless defendants whose lives are tied up for months and years by HETL-caused delays. If this appeal is cognizable, the dam will surely break for defendants, too.

The State of Maine has chosen to have a broken forensic toxicology and chemistry system. That neglect should neither buy it a pass around the Confrontation Clause nor be the basis for this Court’s jurisdiction. This Court has a role to play in ensuring that the system is not underfunded to the point of unconstitutionality or even “unnecessary delay.” The State’s ask here implies we’re at that point.

D. Even were this Court to have jurisdiction, it should decline to hear the appeal on this record.

This September marks two years since the indictment was filed. *See* A3, A31. Defendant waited over a month for counsel to be appointed to represent him, thanks to the State’s underfunding of the appointed-counsel system. A5. Six and a half months post-indictment, the State filed the motion *in limine* at issue in this appeal. A6, A32. Maine courts were unable

to schedule an *in limine* hearing for yet another six months, likely⁵ because of the chronic underfunding of the Judicial Department. A7. The decision below was issued three and a half months after the hearing. A7-A8. Five months later, defendant is filing this brief. Given this Court's own backlog, should this case go to argument and a decision on the merits be published, the delay will be substantial. Faced with this unnecessary delay, *defendant demands a speedy trial* and requests dismissal pursuant to M.R. U. Crim. P. 48(b)(1).

“Even if the legislature has given [this Court] jurisdiction over an appeal, the question always remains whether in any particular case it is inappropriate for us to exercise that jurisdiction....” *State v. Doucette*, 544 A.2d 1290, 1292 (Me. 1988). Given the unnecessary delays in the prosecution; the underfunding of the entire criminal system; and the undeveloped record, it is inappropriate to wait months or years more for this Court's decision, then further proceedings. Defendants' lives cannot be held in stasis because the other branches prefer to fund initiatives other than those which are constitutionally obligatory.

⁵ Such will be determined when defendant moves in the trial court for dismissal for lack of a speedy trial.

II. On the merits, the court did not abuse its discretion⁶ by determining that the State failed to prove that all of the statements are nontestimonial.

The State contends that the issue is controlled by the primary-purpose test endorsed, albeit tepidly, by the Supreme Court. Defendant acknowledges that this is probably the controlling federal standard. However, this Court ought not skip over state constitutional law, and, below, he discusses the issue of preservation.

Defendant turns now to a discussion of the applicable legal standards. He then applies that law to the two categories of evidence the State seeks to admit – the toxicology report *in toto* and the constituent technician-statements within it.

A. The Supreme Court’s “primary purpose” muddle

Crawford reinvigorated the Confrontation Clause, observing that “the principal evil” the Clause was meant to expunge is the Crown’s “use of *ex parte* examinations as evidence against the accused.” *Crawford v. Washington*, 541 U.S. 36, 50 (2004). In that way, the Clause represents a bulwark against “the coercive machinery of the State.” *Ohio v. Clark*, 576 U.S. 237, 251 (2015) (Scalia, J., concurring). The challenge since *Crawford*, rather, has been establishing the contours of its trigger – testimonial statements. Unevenly and with increasing displeasure, the Court has often looked to a statement’s “primary purpose.”

⁶ Defendant concedes that the State has identified the proper standard of review. See Blue Br. 2, 14, 17 (arguing that the court “abused its discretion”).

The primary-purpose test, such as it is, first appeared in 2006. Holding that a recorded 9-1-1 call was not testimonial, the Court pronounced, Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822 (2006) (emphasis added). Somewhat differently, statements are testimonial if made as “part of an investigation into possibly criminal past conduct.” (emphasis added). Nothing indicates that this binary is the only way to differentiate the two categories. Just the opposite, the *Davis* Court wrote that it was *not* offering a comprehensive classification. *Id.*

Three years later, in *Melendez-Diaz*, the Court – and Justice Scalia authored both *Davis* and *Melendez-Diaz* – made no mention of the primary-purpose test. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 345 (2009) (Kennedy, J., dissenting) (noting this omission). The likely reason is intuitive: Unlike 9-1-1 calls, *of course* the drug-identifying “certificates of analysis” at issue in *Melendez-Diaz* were made with an eye to trial. State statute made them *prima facie* evidence of whatever they purported. *Id.* at 308-09. Forensic test results conveyed by attestation certainly “would lead

an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id.* at 311, quoting *Crawford v. Washington*, 541 U.S. 36, 52 (2004).

Prior to the Court’s next discussion of the right to confront those offering forensic statements came *Michigan v. Bryant*, 562 U.S. 344 (2011). In analyzing a dying victim’s statements about who had shot him, the Court penciled a few strokes on its sketch of the primary-purpose test. Such queries whether a statement was “procured with a primary purpose of creating an out-of-court substitute for trial testimony.” *Bryant*, 562 U.S. at 358. Thus, a statement is nontestimonial pursuant to the primary-purpose test only when it has been made “*not* to create a record for trial.” *Id.* (emphasis added). The test is entirely objective. *Id.* at 359-60.

Later that term, *Bullcoming* returned to the matter of forensic statements. There, the Court held that a surrogate lab analyst who played no part in the analysis nonetheless offered testimonial statements when serving as a mouthpiece for the absent, test-performing, analyst. *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). Again, as in *Melendez-Diaz*, the Court seemed unconcerned with the “primary purpose,” barely mentioning the test in a footnote. *Id.* at 659 n. 6. Again, it seemed a foregone conclusion that a “forensic laboratory report” prepared in the course of an investigation could be anything other than testimonial.

Williams v. Illinois, 567 U.S. 50 (2012) (plurality opinion) was a majority-less mess, so it is fortunate for those of us who struggle to decipher it that it lacks precedential value. A plurality suggested that one forensic

analyst may testify about another, non-testifying, analyst's work so long as such is merely "basis" for the expert's testimony. 567 U.S. at 77-78. Such is somehow not offered for the truth, the plurality posited. *Id.* Anyway, the plurality theorized, the primary-purpose test asks only whether a statement was made to prosecute "a targeted individual" rather than someone "who was neither in custody nor under suspicion at that time." *Id.* at 84. That view has never been adopted by a majority of the Court, as the court below ably documents, and is not the law. *See* A19, A29.

Next, *Ohio v. Clark*, 576 U.S. 237 (2015) concerned child-victims' statements to teachers, not forensic evidence. There, the Court held that statements made by "persons other than law enforcement officers" can be testimonial. 576 U.S. at 246. *Clark* otherwise did little to flesh-out the primary-purpose test, as its author, Justice Alito, is a frequent critic of the test and the testimonial/nontestimonial distinction itself.

Most recently, the Court returned to forensic statements in *Smith v. Arizona*, 602 U.S. 779 (2024). *Smith* blew up the *Williams* plurality's legal fiction, holding that so-called "basis" statements are of course offered for the truth of the matter, thereby implicating the Confrontation Clause. 602 U.S. at 792-802. It remanded for consideration whether such statements are testimonial. *Id.* at 800-01. In the process, *Smith* merely endorsed, "this Court has stated" that the testimonial-question "focuses on the 'primary purpose' of the statement. *Id.* at 800. To count as testimonial a statement's "primary purpose must have a focus on court." *Id.* at 802 (internal quotation marks omitted).

Nonetheless, *Smith* offered “a few thoughts” to guide the analysis. *Id.* at 801. A “court will need to consider exactly which of [the non-testifying forensic analyst’s] statements are at issue.” *Id.* As defendant complains throughout, that is missing from our record. The State omitted to establish “exactly what those statements were.” *Id.* at 802.

Second, “some records of lab analysts will not have an evidentiary purpose,” and therefore will be deemed nontestimonial. *Id.* Some records – *e.g.*, those made “primarily to comply with laboratory accreditation requirements or to facilitate internal review and quality control” – “would not count as testimonial.” *Id.* Such just happens to be the angle NMS, in its “proposed framework,” *see* NMS, *website, supra & infra*, and the State are plying here.

This Court has since held that, in the context of forensic evidence, the applicable Sixth-Amendment analysis is the primary-purpose test. *State v. Thomas*, 2025 ME 34, ¶¶ 60-62, 334 A.3d 686; *State v. Gleason*, 2025 ME 52, ¶ 23, 339 A.3d 774. Defendant acknowledges that this Court has a reasonable basis for so holding, but he notes that *Smith*’s discussion of the issue is technically dicta. And the Court’s earlier forensic cases – *Melendez-Diaz* and *Bullcoming* – seemed to take it for granted that forensic lab reports offered at trial are of course testimonial without need to formally analyze their “primary purpose.” Moreover, the Court is hardly in agreement that the primary-purpose test is sound constitutional law in any context; it has slid to the precipice of disavowal. *See Smith*, 602 U.S. at 807 (Gorsuch, J., concurring in part) (“I worry that the Court’s proposed ‘primary purpose’ test

may be a limitation of our own creation on the confrontation right.”); *id.* at 807 (Thomas, J., concurring in part) (“I disagree with the Court’s suggestion that the Arizona Court of Appeals should answer that question by looking to each statement’s ‘primary purpose.’”); *Williams*, 567 U.S. at 135 (Kagan, J., dissenting) (“Where that test comes from is anyone's guess.”); *Franklin v. New York*, 145 S.Ct. 831, 834 (2025) (Gorsuch, J., statement regarding denial of cert.) (“The test appears nowhere in the text of the Sixth Amendment, nor have our decisions sought to justify it by reference to the Amendment’s original meaning and the historic practices that informed it.”). Fortunately, this Court can forge an independent path, and it should do so as a matter of state law.

B. A state-constitutional complement to the primary-purpose test

This Court has been repeatedly burned by lockstep adherence to the Supreme Court’s Confrontation Clause jurisprudence. Before the Court suddenly incorporated the Clause against the states in 1965, *see Pointer v. Texas*, 380 U.S. 400, 403-04 (1965), this Court felt safe in writing that the state constitutional analogue makes face-to-face confrontation “merely desirable” such that it may be dispensed with “where it cannot be obtained.” *State v. Herlihy*, 102 Me. 310, 313, 66 A. 643, 645 (1923). That turned out to be too low a floor to satisfy the Sixth Amendment. *See Coy v. Iowa*, 487 U.S. 1012, 1018 (1988) (“We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.”). Then, in line with *Ohio v.*

Roberts, 448 U.S. 56, 66 (1980), this Court adopted the formulation that no confrontation is due attendant to any statements bearing “sufficient indicia of reliability.” *State v. Hassapelis*, 620 A.2d 288, 291 (Me. 1993). But, years later, when *Crawford* abrogated that test, this Court, again, was forced to move the state constitutional goalposts – in an unreasoned footnote. *State v. Rickett*, 2009 ME 22, ¶ 1 n. 2, 967 A.2d 671. Then, in 2014, this Court fell victim yet again when attempting to read the Court’s tealeaves in *Williams*. See *State v. Mercier*, 2014 ME 28, 87 A.3d 700. *Mercier*’s basis for upholding a murder conviction – and de facto *life sentence*, to boot – was explicitly overruled (by name) in *Smith*. 602 U.S. at 789 n. 2. Lockstep has been a rocky path for § 6.

Maine’s constitution is devalued by reflexive adherence to the United States Constitution. Instead of robust consideration of the way Maine law ought to work, Maine courts’ reflexive coextensive-theory has “curtail[ed] our ability to look to the Maine Constitution....” *State v. Wai Chan*, 2020 ME 91, ¶ 35, 236 A.3d 471 (Connors, J., concurring). In addition to the unpredictability sown by the yo-yoing of controlling law, it is difficult to view the state constitution other than cynically as a result. The law – *i.e.*, *our constitution is uncritically changeable and miraculously identical to federal law* – loses persuasive force when it arises from footnotes and without explanation, let alone *any* of the prerequisite components of a state constitutional argument advanced by a litigant. See *State v. Moore*, 2023 ME 18, ¶ 18, 290 A.3d 533 (“Generally speaking, the [preferred state-constitutional analysis] includes, without limitation, an examination of the

text, legislative history, and general historical context of the state constitutional provision; relevant common law, statutes, and rules; economic and sociological considerations; and precedent from jurisdictions with similar provisions to the extent that precedent is deemed persuasive.”).

To guard against the continued susceptibility to the whims of the Supreme Court, this Court should instead adopt “adequate and independent” state-law grounds for deeming that the statements at issue implicate § 6’s right to confrontation. *Cf. Michigan v. Long*, 463 U.S. 1032, 1042-43 (1983) (Supreme Court lacks jurisdiction to entertain appeals from decisions resting on such bases). There is no barrier to doing so. There should be no preservation-barrier, as it has been, and still is, the State’s burden to establish the admissibility of its desired evidence sans confrontation. Its decision not to cite the state constitution cannot somehow lighten its load.⁷ And, “development” of the issue below is no barrier, either. On remand, if necessary, defendant can simply make the state-law arguments he makes herein, as an *in limine* ruling such as that here is not final until the evidence is offered trial. *See* M.R. Evid. 103(e). In the end, commitment to the primacy approach and judicial economy favor a decisive opinion rather than piecemeal litigation, whether in this matter or others.

⁷ In fact, in adherence with the primacy approach, the State’s omission to address state law should be construed as a waiver – by the State. This Court’s current primacy approach generally omits to place any responsibility on the State for state-constitutional analysis. It has a role, too, especially when it is the party seeking to establish the lawfulness of its evidence.

Defendant is cognizant of the history-heavy “checklist” that is sometimes useful for divining state constitutional law. *See* Hon. Catherine R. Connors & Connor Fitch, *Primacy in Theory and Application: Lessons from a Half-Century of New Judicial Federalism*, 75 ME. L. REV. 1, 20-32 (2023). But, when accounts of the drafters of the constitution, interpretive decisions, and other old sources are “sparse, difficult to find, and ambiguous,” *id.* at 17 – as this Court knows they are in this context – are we therefore destined to have *no* state constitutional law? Perhaps the relative lack of historical record and the capaciousness of the text of the constitutional provision are the knowing result of the drafters’ intent to allow future generations to “gather meaning from experience.” *Nat’l. Mut. Ins. Co. of D.C. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).⁸ Absent the historical landmarks that might make constitutional analysis easier, courts cannot simply “throw up their hands”

⁸ It is not as if, anyway, the Supreme Court has a sound historical basis for its primary-purpose test. *Bryant*, 562 U.S. at 379 (Thomas, J., dissenting) (“I have criticized the primary-purpose test as an exercise in fiction that is disconnected from history and yields no predictable results.”) (quotation marks omitted).

And what history the Supreme Court has relied on in formulating that test was wrongly divined, some argue. Thomas Y. Davies, *Not ‘The Framers’ Design’: How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis ‘Testimonial’ Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL’Y 349, 352-53 (2007) (“[W]hatever might be said for or against *Crawford’s* formulation as a matter of contemporary constitutional policy, the fictional character of the historical claims made in that opinion constitute further evidence that originalism is a defective approach to constitutional decision-making.”).

and leave the Constitution in desuetude. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024).

What, then, is an appropriate state-law standard?⁹ First, consider the task. It is possible – and defendant does not argue otherwise – that the primary-purpose test “may have some useful role to play” in a suitable state-constitutional analysis. *Franklin*, 145 S.Ct. at 833-34 (Gorsuch, J., statement concerning denial of cert.). The Supreme Court’s primary-purpose test, after all, itself was not – and certainly still is not – some “grand unified criminal theory for accessing Confrontation Clause claims....” *Id.* at 834 (internal quotation marks omitted). The point is to improve, not replace for the sake of replacement.

Defendant proposes a state-constitutional consideration that most squarely addresses the “principal evil” meant to be extinguished by the right to confrontation: the government’s creation and elicitation of out-of-court statements. *Cf.* David L. Noll, *Constitutional Evasion and the Confrontation Puzzle*, 56 B.C. L. REV. 1899, 1950 (2015) (The Court’s post-*Crawford* jurisprudence “is best understood as an effort to prevent the government from using substitutes for witness evidence that impermissibly circumvent the defendant’s basic confrontation right.”). Consideration of the government’s role in procuring the statements in question – a “state-actor

⁹ Consider, first of all, that this Court need not explicate a standard at all, certainly not one fully hewed out in one fell swoop. It is sufficient just to hold that a statement carries with it the right to confrontation as a matter of law. Later Law Courts may then “gather meaning” from such experience.

factor” – gives a necessary weight to “the Crown’s” role in circumventing the constitutional rights, something that often escapes the scales of current federal law.

The factor, fleshed out in some detail, see John L. Watts, *The Confrontation Clause & State Action*, 77 S.M.U. L. Rev. 399 (2024), rectifies some of the failings of the primary-purpose test. If contracted analysts are left in the dark, or left “in their own little silo,” as the State puts it, Tr. 58, they might plausibly deny any “purpose” directed to court-purposes. If governmental agencies are creatively branded as non-law-enforcement, their statements get a free pass. The state-actor criterion reduces, if not eliminates, these diminutions of the right to confront.

The Bill of Rights controls governmental action, not private action. In contrast, the primary-purpose test focuses on individuals’ personal “purpose” in making their statements. This is not merely doctrinal discordance; it is an invitation for manipulation. State actors have submarined the primary-purpose test by deploying undercover police and confidential informants. *See id.* at. 418-19. They are given leeway to undertake something resembling vouching: State actors – *e.g.*, a law enforcement “handler” or a chief medical examiner – repeat and promote statements about what evidence *they* deem trustworthy and, as in our case, which lab *they* consider to be the most “well regarded.” Tr. 77. Thus, these state actors get to sit as vouching lie-detectors for the out-of-court statements they themselves have solicited, pored over and selected. The state-actor factor would cut out the middle-man and allow the jury to make

credibility determinations of their own accord without the self-interested imprimatur of the State.

The primary-purpose “fails to deter government efforts to create out-of-court statements as a substitute for live testimony subject to cross-examination.” Watts, *State Action*, *supra*, at 414. State investigators, naturally, “are almost always, to some degree, motivated to create evidence for use in a criminal prosecution.” *Id.* at 417-18. Yet, even in cases of “mixed motives,” a defendant retains a Sixth-Amendment interest in exploring those motives and biases. *See Davis v. Alaska*, 415 U.S. 308, 317 (1974) (“We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.”); *see also State v. Coleman*, 2018 ME 41, ¶¶ 22-26, 181 A.3d 689 (evidence pertaining Dr. Flomenbaum’s potential bias erroneously excluded from trial). Perversely, rather than safeguard the concomitant Sixth-Amendment right to examine a witness about his potential motives and biases, the primary-purpose test assumes that, if a witness has more than one motive, he is not a “witness” subject to cross-examination. The state-actor consideration rectifies that absurdity. *See Watts, State Actor*, *supra*, at 419-20.

Another branch of Maine constitutional law – due process – is meant to ensure “governmental fair play.” *Wai Chan*, 2020 ME 91, ¶ 35 (Connors, J., concurring; internal quotation marks omitted). Surely, the very same section of the Constitution does not simultaneously countenance the government’s intentional mass circumvention of the right to confront.

C. Application

1. The NMS toxicology report and its data are testimonial

With or without applying the state-actor factor, this Court can easily see how the toxicology report, State's Exhibit 1, *see* A40, triggers defendant's right to confrontation.

Primary purpose: The State argues that it "is impossible" for an NMS analyst to know or even "reasonably anticipate that their work is focused on being used to prove a fact in a criminal proceeding...." Blue Br. 20. That is a stretch, with all respect. Not only are the objective circumstances such that NMS employees should reasonably know their role in the prosecution, it's clear that they *actually* know of that role, too.

Consider, at the top level, what OCME knew. The police called OCME because the death was suspicious; they found the deceased in a sober home with rolled up cash-bills in his hand near his face and tinfoil on the nightstand. Tr. 79-80. Its "medicolegal death investigator" gathered the decedent's urine and realized "there's probably something going on," so he drew the blood that was subject to the testing at issue in this case. Tr. 80. While this is not dispositive of what NMS employees, including the toxicologist, knew, it is telling background information about how state actors are well aware of their work's "focus on court."

The State's own evidence established that the forensic toxicologist is in fact quite aware that NMS is "look[ing] ... for drugs and toxins and poisons to help the [medical examiner] determine cause and manner of death." Tr.

12. He knows that it “is a postmortem case, and the only reason for testing is to help them determine the cause and manner of death.” Tr. 19. Information from the medical examiner also includes the “presumptive manner of death” – *i.e.*, drug overdose. That makes sense; how else would NMS analysts know to conduct a toxicology report for narcotics?

This is as far as we need to go. NMS toxicologists know – or certainly ought to – that they are involved in making statements “to establish or prove past events potentially relevant to later criminal prosecution.” *Davis*, 547 U.S. at 822. They’ve been doing so in Maine for years. *See, e.g., Gleason*, 2026 ME 52, ¶¶ 5, 7-8 (NMS analyst testifies about toxicology testing conducted in OCME case stemming from death in September 2022, the very same month as when the decedent in this case passed). They’ve been doing so elsewhere for years. *See, e.g., State v. Brewer*, 882 S.E.2d 156, 158, 162-65 (S.C. 2022) (NMS toxicology report ordered by medical examiner following death is testimonial); *Commonwealth v. Lezynski*, 993 N.E.2d 333, 336 (Mass. 2013) (confirmatory NMS toxicology report ordered by local toxicologist is testimonial). They admit it on their own website. NMS Labs, *Smith v. Arizona Information, Navigating Testimonial Hearsay* at <https://nmslabs.com/resources/smith-v-arizona-information> (“*Smith* bars the admission of ‘testimonial hearsay,’ meaning if a substitute witness relies on notes, reports, and related documents that are prepared with a focus for the court, or are reasonably anticipated to be admitted in court, such hearsay is disallowable ‘testimonial hearsay.’”). The very toxicologist who testified at the *in limine* hearing has repeatedly testified in other states about toxicology

reports stemming from medical-examiner death investigations, garnering repeated mentions in reported appellate decisions. *E.g.*, *State v. Robinson*, 926 S.E.2d 459, 463-64 (N.C. App. 2026); *Fischer v. State*, 273 N.E.3d 515, 518-20 (Ind. Ct. App. 2025); *State v. McCrorey*, 896 S.E.2d 309, 313 (N.C. App. 2023). This sure seems like a “focus on court” sufficient to trigger the primary-purpose test.

Still, there is more. By statute, OCME must investigate and compose a report about the manner and cause of death. 22 M.R.S. §§ 3022(3), 3025(1), 3028(1) & (7). The resulting death certificate and any “documents attached to the certificate” are statutorily admissible as “prima facie evidence of any fact” they state. 22 M.R.S. § 3022(6). OCME and its team of “medicolegal death investigators” direct police to investigate and seize anything OCME determines “may be useful in establishing the cause, manner and circumstances of death.” 22 M.R.S. § 3028(4), (5). The otherwise confidential records produced and obtained by OCME are freely distributed to any “criminal justice agency for the purpose of criminal or juvenile justice.” 22 M.R.S. § 3022(12)(A). OCME is effectively prosecutors’ “medicolegal” arm, and NMS is OCME’s toxicology arm prepared to testify at trial. NMS employees, like everyone else, “are presumed to know what the law is.” *State v. Austin*, 2016 ME 14, ¶ 11, 131 A.3d 377.

Other courts have found this sort of symbiosis to be characteristic of “testimonial” evidence. *E.g.*, *Brewer*, 882 S.E.2d at 164-65 (“[I]f 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. Miller*, 2025

Minn. App. Unpub. LEXIS 128, ** 8-9, 2025 WL 583178, * 3 (Minn. App. 2025); *Cuesta-Rodriguez v. State*, 241 P.3d 214, 228 (Okla. 2010); *State v. Locklear*, 681 S.E.2d 293, 305 (N.C. 2009); *Commonwealth v. Brown*, 185 A.3d 316, 329 (Penn. 2018); *State v. Plank*, 2018 N.J. Super. Unpub. LEXIS 461, ** 13-14, 2018 WL 1074278, * 5 (N.J. Super App. 2018); *Conners v. State*, 92 So. 3d 676, 684 (Miss. 2012); *State v. Frazier*, 735 S.E.2d 727, 731 (W.Va. 2012). Holding otherwise would “ignore the reality that if a criminal prosecution takes place, the NMS report [which is integral to the autopsy report] would be critical to prove the State’s case.” *Brewer*, 882 S.E.2d at 165. It strains credulity to imagine that anyone at NMS could be ignorant of the focus of their work.

State-actor factor: How convenient it would be for the State if it could insulate its evidence from cross-examination. Contracting out might seem like a good “framework,” in NMS’s parlance, for getting around the primary-purpose test. Consider again: If HETL is already established, would the State (assuming an adequately funded HETL) really need to send *anything* out of state? What if OCME had such a set-up? Would there be any need to contract around the Confrontation Clauses?

Consider again NMS’ website, where the lab tellingly promises its clients in light of *Smith*:

NMS Labs has consulted with other legal and scientific stakeholders and has developed an analysis, strategy, and resources to support you in your efforts to continue your work with the least possible disruption.

NMS Labs, website, *supra*. NMS is implementing a “proposed framework” for “linking steps in the testing process to quality practices, accreditation, and licensing standards, a process desired **to satisfy the ‘primary purpose’ condition.**” *Id.* (emphasis added).

Such collaboration is illustrative of two things: (1) NMS is ready to “support [the State] in [the prosecution’s] work with the least possible disruption” in light of *Smith* – a clear indication that it knows that its primary purpose is as part of the prosecution-machinery; and (2) it is actively working with the State – perhaps in this very case¹⁰ – to avoid the Confrontation Clause. That is quite a good reason to count the state-actor factor, lest NMS’s “proposed framework” pull the rug over the right to confront.

2. The State has not proven that the subsidiary statements within “the data” are nontestimonial.

i. The State waived this argument.

With some irony, the State’s brief reads, “The motion court failed to identify the statements at issue (the individual tests performed by the NMS lab analysts)....” Blue Br. 19. That was the State’s responsibility, and its omission to do so is a problem both for this court’s jurisdiction, as discussed above, and for the merits.

For one, the State failed to request whatever additional findings it desired, which renders its current complaints unpreserved. *Anderson v.*

¹⁰ A couple times, the NMS toxicologist tellingly referenced the “primary purpose” of NMS as opposed to the medical examiner. Tr. 19, 58-59.

O'Rourke, 2008 ME 42, ¶ 13, 942 A.2d 680 (“To preserve an issue for appeal, a party must not only object, but must also state the specific grounds of its objection, thereby **allowing the trial court the opportunity either to make additional findings of fact essential to appellate review** or, having been advised of previously unnoticed legal authority, to reconsider its previous ruling in a new light.”) (emphasis added; internal quotation marks omitted). Here, the State’s decision to appeal rather than seek the findings it now complains were erroneously omitted may well be a “competent tactical choice” designed to avoid “adverse factual findings.” *State v. Commeau*, 2004 ME 78, ¶ 21 n. 10, 852 A.2d 70. These principles apply to the State, too.

As *Smith* instructed, a court considering the primary purpose of a statement “will need to consider exactly which of [the subsidiary] statements are at issue.” 602 U.S. at 801. Here, the State omitted to develop the specifics of those statements; it simply sought a holding that *all* NMS statements – whatever they are – are nontestimonial. See A32 and A36. Given the analysis above, clearly the toxicologist’s statements are testimonial. Thus, it is not so that all of the State’s statements are nontestimonial. Why isn’t that alone enough to defeat the State’s motion *in limine*?

Nonetheless, defendant presses on, both mapping the holes in the record and highlighting NMS’ workers’ obvious awareness of their role in the evidence-making factory that is NMS.

ii. NMS technicians' constituent statements are testimonial.

Primary purpose: There are numerous important *things* the State might like to prove, but the State omitted to develop a record of what *statements* NMS employees might need to make in order to prove those things. Before going there, defendant acknowledges that some of the evidence the State plausibly seeks to admit pertains to excruciating details that sound pedantic. Yet, they are hardly inconsequential, for two reasons. For one, they are vital to foundation. More importantly, these details go directly to the sort of things that can undermine forensic testing – *e.g.*, whose sample was tested, was it contaminated, is the person who placed it into the machine to be trusted? Recall, this work is being done in “batch work” with dozens of identical-looking samples being handled at one time.

To understand the importance of these details, recall the scandal in Massachusetts' forensic laboratory. There, a technician was caught after years of claiming to have performed screening and confirmatory testing that was never undertaken; falsifying records about transfers of the specimens; and purposefully “contaminat[ing] samples with drugs from other cases to ensure that they would test positive for narcotics, or to increase the weight of drugs, which could lead to longer sentences.” Sean K. Driscoll, ‘I messed up bad’: *Lessons on the Confrontation Clause from the Annie Dookhan Scandal*, 56 ARIZ. L. REV. 707, 716 (3: 2014). These improprieties occurred notwithstanding that “[t]he state laboratory where she worked adhered to industry standard protocols.” *Id.* at 717; *but see* Blue Br. 22 (boasting of

NMS’ “compliance with rigorous procedures” mandated by accrediting bodies). *Tens of thousands* of cases had to be overturned or dismissed as result of the abnormalities hidden among these seemingly excruciating details. See Massachusetts Supreme Judicial Court, *Press Release: Supreme Judicial Court Dismisses Over 21,000 Cases Affected by the Breach at the Hinton State Laboratory Institute*, available at: <https://www.mass.gov/news/supreme-judicial-court-dismisses-over-21000-cases-affected-by-the-breach-at-the-hinton-state-laboratory-institute> .

The Confrontation Clause prescribes just one prophylactic against this malady: confrontation. *Crawford*, 541 U.S. at 68-69; *but see* Driscoll, *Lessons on the Confrontation Clause*, *supra* at 736-39 (advocating for “new rule” whereby Confrontation Clause might provide for retesting of forensic evidence). Certainly imperfect and perhaps even inadequate, cross-examination of those stating that samples have been appropriately prepared, the correct specimens have been tested, and that the results of such testing have been accurately ascribed, go to the heart of the function of forensic evidence. Skipping over them, though a defendant demands a shot at cross-examination, will disincentivize and discourage precision and care. As automated, robotic “workers” replace humans, the burden to present human witnesses might lessen, but humans remain fallible and sometimes have ulterior motives.

NMS is *actually* aware that its technicians will have to testify, as it acknowledges on its website: **“The decision [Smith] is also being**

construed to require the appearance and testimony of everyone in the testing chain.” NMS Labs, *website, supra* (emphasis added). Whether it likes it or not, NMS Labs hereby acknowledges it is aware that judges view its technicians’ work as having a primary purpose of preparing evidence for future trials.

The State offers a blanket argument: the “individual analysts” “know nothing about the anonymous¹¹ sample in front of them except the test assigned to them.” Blue Br. 19. This is subtle but certain misdirection. The primary-purpose test is not contingent upon knowledge of a named, targeted individual. *See supra* at page 27, and A27, A29 (discussing how no controlling law requires knowledge of targeted individual); *but see* Blue Br. 20 (NMS employees are unaware “that their work is focused on being used to prove a fact in a **particular** criminal proceeding....”) (emphasis added). It is about the obvious fact that workers are undertaking their work to produce what is often evidence central to the prosecution of a crime.

At bottom, the State implies that “batch work” insulates NMS from knowledge of the point of their jobs. But imagine an assembly-line worker at a Ford factory lubricating door hinges but remaining unaware that the

¹¹ Whatever happens later in the process, it is not true that the accessioners are unaware of the identity of the sample or its purposes. *See* Tr. 15-16 (accessioner takes note of the fact that the samples are submitted by OCME; obviously this requires the decedent’s name, as is evidenced on A40 – the report produced by NMS). Anyway, the tests performed, are specific to certain types of drugs. So, regardless whether NMS employees other than the accessioner and the toxicologist are aware of the name of the decedent, they are obviously aware that the blood is being tested for, as an example, highly lethal and illegal fentanyl.

finished product is destined for the America's highways. Or an elf at the Keebler factory placing chocolate chips, rather than raisins, into the hopper yet claiming ignorance about what comes out of the oven. NMS technicians – *e.g.*, “accessioners,” “screeners” and “calculators,” *see* Tr. 21-22, 25 – are similarly not unaware that the point of their work is to “establish or prove past events potentially relevant to later criminal prosecution.” *Davis*, 547 U.S. at 822

While the toxicologist himself is not sure how calculators or others might “modify the raw data” coming out of the testing-apparatuses, the State hardly established that such was impossible. *See* Tr. 36. “Jailbreaks,” malware, and zero-day flaws are part of our vernacular, even on systems thought invulnerable for decades. And, anyway, can't a calculator just upload “the raw data” from another, previously completed, test as a stand-in for defendant's “raw data” – accidentally or purposefully?

This hints at the problems with the State's record. While the gist of what the State would like to prove is no surprise, we don't have a record of the statements by which it would propose to do so. Incidentally, each of the following question marks disprove the State's assertion that its case merely rests upon data invulnerable to cross-examination. *See* Blue Br. 20-22 (“[T]he instruments utilized by NMS all produce testing results without any human involvement in the testing process once the sample is inserted into the instrument.”).

Here are examples:

- Is the “specimen” that the State’s report has attributed to the decedent in fact his? The State made no record about how the lead toxicologist might recognize that the accessioner made an error of this kind. Does it seek to offer statements that the accessioner recalls this specific case and actually remembers properly handling the sample sent from OCME? Did it stick in the accessioner’s mind because it was a “postmortem case” that, for the reasons discussed above, would cause a person to reasonably believe that a criminal prosecution is afoot? Or does the toxicologist blindly trust all statements he receives from the accessioners, even those whose employment has been terminated? Have, in fact, any been terminated, or all they all so good at their job that they’re perfect and no such mistake has ever been reported? How many times in your own life, by analogy, have you accidentally opened up someone else’s mail?
- Have the screeners in NMS’ “screening department” prepared an aliquot from the applicable specimen rather than someone else’s? Has the screener done so without contaminating it? *See* Tr. 22. The testifying toxicologist has no such personal knowledge, *see* Tr. 22-23,¹² so what statements does the State proffer he will make? Tr. 22-23. Did he speak with the screener

¹² While an aliquot that is merely inadequate for analysis could be caught by the toxicologist, the State made no record supporting any finding that he might also catch the wrong-specimen or contaminated-sample possibilities.

in this particular case to double-check, owing to the reasonable expectation, discussed above, that this is an obvious criminal case? Or does he just blindly accept that the screeners have done so correctly – an implicit statement?

- Are the specimens, which are “always being shuffled between a bench top where an analyst will take a sample out of it” and NMS’ “secured refrigerated storage” the right ones? *See* Tr. 22. Have those shuffling the samples around contaminated them? Other than hoping that such is done according to “standard operating procedure,” the toxicologist must rely on the statements of those ferrying the materials from place to place. Tr. 23. Sure, there might be barcode-scans, but what about intra-batch commingling when everything is on the same “bench top” and in the same machine?
- Did the “analyst” feed the right specimen into the various testing apparatuses? *See* Tr. 25. Or, again, was it someone else’s? How does the toxicologist know that – *i.e.*, what statements, explicit or implicit, is he relying on to certify that the decedent’s blood is the source of the data he’s analyzed?
- Have the “calculators” and the calculators’ supervisors uploaded the correct “data” into the correct electronic profile within NMS’ information management system? *See* Tr. 25-26. Or was it sent to someone else’s?

It is just not plausible that the employees in a forensic toxicology factory are unaware that their labors often end up in court. How could they possibly be ignorant of the fact that the toxicologist who reviews their work is routinely called to testify in criminal trials about their work?

State-actor factor: The State's brief is replete with efforts to differentiate "private" from "law enforcement" and "medical examiner" from "law enforcement." This is exactly the sort of tactic that the state-actor consideration captures. Without it, the State will be able to farm out its forensic work and obviate any need for confrontation.

Placing witnesses in "their own little silo" doesn't make them ignorant of why they're farming. In the same way the employees of HETL or a hypothetical in-house toxicology lab within OCME cannot possibly be oblivious of their purpose, nor can contracted employees in an evidence-mill be so in the dark.

CONCLUSION

For the foregoing reasons, this Court should dismiss the State's appeal, or, in the alternative, affirm the ruling below, then remand for further proceedings.

Respectfully submitted,

July 24, 2026

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CERTIFICATE OF FILING & SERVICE

I have filed this brief, and served opposing counsel, as listed on the briefing schedule and the Board of Bar Overseers' (email) directory, in compliance with M.R. App. P. 1D(c), 1E and 7(c).

/s/ Rory A. McNamara
