No. 09-___

IN THE

Supreme Court of the United States

RICHARD PENDERGRASS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition for a Writ of Certiorari
to the Indiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Confrontation Clause permits the prosecution to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard Pendergrass respectfully petitions for a writ of certiorari to the Indiana Supreme Court in *Pendergrass v. State*, No. 71S03-0808-CR-00445.

OPINIONS BELOW

The opinion of the Indiana Supreme Court (App. 1a) is published at 913 N.E.2d 703. The opinion of the Indiana Court of Appeals (App. 20a) is published at 889 N.E.2d 861. The relevant trial court proceedings and order (App. 39a) are unpublished.

JURISDICTION

The opinion of the Indiana Supreme Court was entered on September 24, 2009. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

STATEMENT OF THE CASE

This Court held in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), that the prosecution violates the Confrontation Clause when it introduces forensic laboratory reports into evidence without affording the accused an opportunity to "'be confronted with' the analysts at trial." *Id.* at 2532 (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004)). This case raises the question of whether the prosecution complies with that holding by introducing forensic reports through the in-court testimony of someone, such as a supervisor, who did not perform or observe the testing discussed in the reports. In this case, a bare majority of the Indiana Supreme Court upheld the practice, deepening a square conflict of authority on the issue.

1. In May 2003, petitioner Richard Pendergrass took his daughter C.P. to the doctor, where they learned she was pregnant. C.P. later broke the news to her mother, petitioner's ex-wife. Her mother demanded that C.P. reveal the father's name within a week. Near the end of that week, C.P. told her mother that she thought petitioner was the father. She could not recall any instance of petitioner having intercourse with her. But C.P. said that petitioner had inappropriately touched her in the years leading up to the pregnancy. According to C.P., petitioner sometimes gave her "sleeping pills" at night, after which she would wake up to find petitioner on top of her or digitally penetrating her vagina.

C.P.'s mother relayed these accusations to the police, who then began an investigation. Shortly thereafter, C.P. had an abortion. Officer Steven

Metcalf of the St. Joseph County Police Department retrieved a tissue sample collected from the fetus, so that the police could test the tissue.

When the police questioned petitioner about C.P.'s accusations, petitioner denied them. He also voluntarily provided a blood sample to the police. Finally, petitioner played for Officer Metcalf a phone message C.P. had left for him, stating that her accusations were false. After reviewing this evidence, the police took no further action at that time.

Three years later, however, for reasons not apparent from the record, the police resumed their investigation. Officer Kris Hinton contacted C.P. and collected a cheek swab. The police then sent this swab, petitioner's blood sample, and the tissue from the aborted fetus to the Indiana State Police Laboratory in Lowell.

Daun Powers, one of the laboratory's forensic examiners, conducted a DNA analysis on these three specimens. This type of DNA examination involves several stages of analysis. *See generally* Indiana State Police Laboratory Division, Forensic Biology Unit, *DNA Test Methods and Procedures* (rev. 2003); Seattle-Post Intelligencer, *How DNA is Tested in Crime Labs*, July 22, 2004, *available at* http://www.seattlepi.com/dayart/20040722/DNAtesting.pdf. First, an analyst conducts a fourteen-step procedure that isolates and extracts DNA from the tissue samples. Next, the analyst instigates a polymerase chain reaction (PCR) to generate a workable amount of DNA. PCR is a "complex, multi-step technique" which requires laboratory technicians to "exercise great care to avoid contaminating the

samples and committing other mechanical errors." 2 PAUL GIANNELLI & EDWARD IMWINKELRIED, SCIENTIFIC EVIDENCE § 18.04[a], at 48 (4th ed. 2007). During the third stage, an analyst follows a six-step process to separate sixteen specified areas of the DNA molecule onto a grid called an electropherogram, which the analyst then reads and interprets. In interpreting this grid, the analyst must exercise discretion in separating actual DNA peaks from "spurious peaks or technical artifacts," which can lead to erroneous results. Scientific Evidence § 18.04[b].

After purportedly following all of these protocols, Powers prepared a "Certificate of Analysis," a two-page report identifying the evidence received by the lab and summarizing her test results. App. 48a-51a (reproducing report). Powers also created a second report, titled "Profiles for Paternity Analysis," which purports to set forth (for purposes of conducting a comparison) genetic markers of petitioner, C.P., and the fetus. App. 51a. The laboratory supervisor, Lisa Black, reviewed these documents and initialed the former with her employment number ("4774") and the latter with "LB." The police then forwarded the reports to Dr. Michael Conneally, a retired professor at Indiana University, for statistical paternity analysis. Although the record does not expressly say so, Conneally presumably told the police that he thought, based on the information Powers had provided, that petitioner was the father of the child.

2. The State charged petitioner with two counts of sexual molestation. Ind. Code § 35-42-4-3. Petitioner denied the charges and sought to prove

that there were two other possible fathers of C.P.'s child.

The State put C.P. on the stand and then sought to verify her accusations through its DNA evidence. The State, however, did not call Powers to testify at trial, nor did the State ever assert that she was unavailable for any reason. Instead, the prosecution sought to introduce the Certificate of Analysis and the Profiles for Paternity Analysis that Powers had authored, as State Exhibits 1 and 2, through the testimony of Lisa Black. Petitioner argued that this would violate the Confrontation Clause as construed in *Crawford v. Washington*, 541 U.S. 36 (2004), because it would deprive the defense of any "way of challenging th[e] report[s]." App. 44a. More specifically, petitioner argued that forensic laboratory reports were testimonial evidence because they were prepared as part of the police investigations. Therefore, petitioner continued, the prosecution could not introduce the reports without "hav[ing] the person who did the test come in and [be] subject to cross-examination." App. 44a.

Conceding that petitioner may have a "marvelous appellate argument," the trial court overruled his objection. App. 44a. The trial court reasoned that police laboratory reports could not be testimonial because they are business records. App. 45a. Therefore, according to the trial court, "*Crawford* [did not] mean that the person that did the lab report now has to come in." App. 44a.

Over petitioner's continuing objection, Black testified concerning Powers' laboratory reports. Black explained that as the police laboratory's supervisor, she had reviewed and initialed Powers'

work. But Black's testimony concerning the DNA analysis that Powers claimed to have performed, and the conclusions Powers reached, consisted solely of repeating Powers' assertions made in the reports themselves. App. 4a; *see also* App. 18a (Rucker, J., dissenting) ("There is no evidence that Ms. Black did anything more than rubber stamp the results of Ms. Powers' work."). Furthermore, when the defense pressed Black for specifics concerning Powers' testing sequence beyond what was stated in the reports, Black responded: "I don't have any knowledge of that." App. 4a. And when asked to explain why she thought that Powers would not have had two specimens open at once during her work (a practice contrary to standard protocol for DNA analysis), Black responded, "I know because she is an excellent analyst and that's how she would do it." Tr. 154 (Oct. 1, 2007).

The State later put Dr. Conneally on the stand. Dr. Conneally again recited Powers' findings and testified extensively regarding the content of her work product. He claimed that based on the forensic conclusions she had reached, there was a 99.9999% chance that petitioner was the father of the fetus. App. 4a.

In her closing argument, the prosecution acknowledged that its case was "circumstantial" because C.P. could not testify that petitioner had ever had intercourse with her. But the prosecution contended that the DNA evidence it had presented "confirmed" C.P.'s belief that petitioner had committed the crime. Tr. 546 (Oct. 1, 2007). In particular, the prosecution exhorted the jury to focus on Dr. Conneally's testimony and to "look at the lab

report, and the lab report talks about the different items of evidence that were received, the different items that were tested from each person, and the profiles that were generated from those items that were tested . . . ." Tr. 544 (Oct. 1, 2007). Those reports, the prosecution contended, showed beyond a reasonable doubt that petitioner must have impregnated C.P.

The jury convicted petitioner on both counts. The trial court sentenced him to consecutive terms totaling sixty-five years in prison.

3. The Indiana Court of Appeals affirmed. It upheld the trial court's *Crawford* rulings, but on entirely different grounds. The court of appeals reasoned that Powers' forensic reports were admissible despite her not taking the stand because "the Confrontation Clause does not apply to statements admitted for reasons other than proving the truth of the matter asserted." App. 37a (citing *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) (in turn citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985))). As the court of appeals put it, the reports "were not admitted to prove that Pendergrass molested C.P.," but "instead they merely provided context for Dr. Conneally's opinion." *Id.*

4. The Indiana Supreme Court granted discretionary review. While the case was pending, this Court issued its decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), clarifying that forensic laboratory reports are testimonial under *Crawford*. Three months later, a bare majority of the Indiana Supreme Court affirmed the court of appeals, adopting yet another rationale to justify admitting Powers' forensic reports without calling her to the

stand. Specifically, the Indiana Supreme Court upheld the admission of Powers' testimonial statements on the ground that "it [is] up to the prosecutors to choose among the many ways of proving up scientific results, as long as the way chosen feature[s] live witnesses." App. 12a (citing *Melendez-Diaz*, 129 S. Ct. at 2532 n.1). The court noted that State introduced two live witnesses: Lisa Black, Powers' supervisor, and Dr. Conneally, the prosecution's genetics expert. In the Indiana Supreme Court's view, this "sufficed for Sixth Amendment purposes." App. 12a-13a.

The dissent accused the majority of basing its reasoning on "certain isolated passages from the *Melendez-Diaz* opinion" that, "taken in context," dictated the opposite result. App. 15a-16a. In the dissent's view, *Melendez Diaz* held that "a defendant has a constitutional right to confront at the very least the analyst that actually conducts the tests." App. 19a. The opportunity to cross-examine a supervisor is "no substitute for a jury's first-hand observations of the analyst that performs a given procedure." App. 19a.

REASONS FOR GRANTING THE WRIT

State high courts and federal courts of appeals are deeply and intractably divided over whether the Confrontation Clause, as explicated in *Crawford v. Washington*, 536 U.S. 36 (2004), and *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), allows the government to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of another forensic analyst who did not perform or observe the laboratory analysis described in the statements. This Court should use this case to

resolve this escalating conflict. Forensic evidence plays a central role in many criminal prosecutions. Allowing surrogate analyst testimony prevents scrutiny of the actual analyst's "honesty, proficiency, and methodology," *Melendez-Diaz*, 129 S. Ct. at 2538, in the form guaranteed by the Sixth Amendment: live testimony in front of the accused and the trier of fact, with an opportunity for cross-examination. As such, the court's holding below – that the Confrontation Clause was satisfied by allowing the defendant to cross-examine someone other than the author of the reports the prosecution introduced – is incorrect.

I. The Indiana Supreme Court's Decision Deepens The Conflict Over The Question Presented.

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court held that the prosecution may not introduce "testimonial" hearsay against a criminal defendant unless the defendant has an opportunity to cross-examine the declarant, or unless the declarant is unavailable and the defendant has (or had) an opportunity for cross-examination. *Id.* at 54, 68. Five years later, in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), this Court clarified that forensic laboratory reports are testimonial evidence. *Id.* at 2532. Accordingly, this Court held that the prosecution violates the Confrontation Clause when it introduces a nontestifying analyst's forensic laboratory report through the testimony of a police officer.

This Court further indicated that two important, but distinct, questions concerning forensic evidence must be resolved to implement *Melendez-Diaz.* The

first is whether a state satisfies the Confrontation Clause if it requires defendants to do more than simply demand that the prosecution put an analyst on the stand in order to introduce the contents of a forensic report. *See Melendez-Diaz,* 129 S. Ct. at 2541 n.12. When this Court decided *Melendez-Diaz,* one case touching on this issue was pending on a petition for a writ of certiorari, *Briscoe v. Virginia*, 657 S.E.2d 113 (Va. 2008), *cert. granted*, 129 S. Ct. 2858. This Court immediately granted the petition and is hearing the case this Term.

The second issue concerns whether the prosecution satisfies the Confrontation Clause whenever it calls *some* forensic analyst to the stand. *See Melendez-Diaz,* 129 S. Ct. at 2532 n.1; *id.* at 2444-46 (Kennedy, J., dissenting). When this Court decided *Melendez-Diaz*, several cases touching on this issue – that is, cases in which the courts found no confrontation violations at least in part because the prosecution had called at least some forensic expert to the stand – were pending on petitions for writs of certiorari. The cases fell into three categories. First, some cases involved scenarios in which the prosecution introduced forensic reports while an analyst was on the stand, but those reports were simply machine print-outs and thus were nontestimonial. *See United States v. Washington*, 498 F.3d 225 (4th Cir. 2007) (Supreme Court docket No. 07-8291); *Blaylock v. Texas*, 259 S.W.3d 202 (Tex. Ct. App. 2008) (No. 08-8259). Second, one case involved a scenario in which a laboratory supervisor testified based in part on someone else's forensic reports, but the supervisor never repeated anything in the reports and the prosecution never introduced them into evidence; instead, the supervisor limited

himself to stating his own conclusions without revealing their underlying basis. *State v. O'Maley*, 932 A.2d 1 (N.H. 2007) (No. 07-7577). Third, some cases involved scenarios in which the prosecution introduced nontestifying analysts' forensic reports through the in-court testimony of a different forensic analyst. *People v. Barba*, 2007 WL 4125230 (Cal. Ct. App. Dec. 21, 2007) (unpublished) (No. 07-11094); *State v. Crager*, 879 N.E. 2d 745 (Ohio 2007) (No. 07-10191).

This Court denied certiorari in the first two categories of cases, leaving in place their holdings that the Confrontation Clause had not been violated.[1] But this Court granted, vacated, and remanded the two cases in the third category – the cases that had held that the prosecution could introduce one forensic analyst's testimonial statements through the in-court testimony of another.[2] A split among state supreme courts and a federal court of appeals has quickly developed concerning this issue, which in fact deepens a preexisting conflict on the question. That is the issue this case presents.

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[1] *See Washington v. United States*, 129 S. Ct. 2856 (2009); *Blaylock v. Texas*, 129 S. Ct. 2861 (2009); *O'Maley v. New Hampshire*, 129 S. Ct. 2856 (2009).

[2] *See Barba v. California*, 129 S. Ct. 2857 (2009); *Crager v. Ohio*, 129 S. Ct. 2856 (2009). This Court denied certiorari in one other case involving this fact pattern: *People v. Geier*, 161 P.3d 104 (Cal. 2007), *cert. denied*, 129 S. Ct. 2856 (2009) (No. 07-7770). However, the California Supreme Court had held that even if a Confrontation Clause violation had occurred, any error was harmless. *Geier*, 161 P.3d. at 140.

1. In the wake of *Melendez-Diaz*, two state supreme courts and one federal court of appeals have held that the Confrontation Clause prohibits what might be called "surrogate" forensic testimony – that is, introducing one forensic analyst's testimonial statement through the in-court testimony of another. In *Commonwealth v. Avila*, 912 N.E.2d 1014 (Mass. 2009), the defendant argued that the prosecution violated the Confrontation Clause by permitting one forensic analyst "to recite [another's] findings and conclusions on direct examination." *Id.* at 1027. Drawing on its earlier decision in *Commonwealth v. Nardi*, 893 N.E.2d 1221 (Mass. 2008), which had held that a testifying analyst in such a scenario is "plainly . . . asserting the truth of" the nontestifying analyst's findings in a manner that triggers the defendant's constitutional right to confrontation, *id.* at 1232-33, the court held that *Melendez-Diaz* and *Crawford* require a testifying "expert witness's testimony [to be] confined to his or her own opinions." *Avila*, 912 N.E.2d at 1029. When a forensic examiner, "as an expert witness . . . recite[s] or otherwise testif[ies on direct examination] about the underlying factual findings of [an] unavailable [forensic analyst] as contained in [his forensic] report," the prosecution transgresses the Confrontation Clause. *Id.* at 1029.

Similarly, in *State v. Locklear*, 681 S.E.2d 293, 304-305 (N.C. 2009), the prosecution introduced two forensic analysts' reports through the in-court testimony of a third analyst. Reciting *Crawford*'s basic rule that "[t]he Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless *the declarant* is unavailable to testify and the accused has had a prior opportunity to cross-

examine *the declarant*," the North Carolina Supreme Court held that introducing one forensic analyst's report through the live testimony of a different analyst "violate[s a] defendant's constitutional right to confront the witnesses against him." *Id.* at 304-05 (emphasis added); *see also State v. Galindo*, 683 S.E.2d 785 (N.C. Ct. App. 2009) (finding confrontation violation where supervisor testified concerning someone else's forensic analysis).

The Seventh Circuit likewise has held that has held that although a surrogate forensic analyst may testify based on raw data someone else generated, the "conclusions" of the nontestifying analyst who performed the testing are testimonial statements that must be "kept out of evidence." *United States v. Moon*, 512 F.3d 359, 362 (7th Cir.), *cert. denied*, 129 S. Ct. 40 (2008). Reaffirming that ruling in a case after *Melendez-Diaz*, the Seventh Circuit held that a forensic analyst's testimony based on forensic tests that another analyst performed did not violate the Confrontation Clause because "[the second analyst's] report was not admitted into evidence." *United States v. Turner*, ___ F.3d ___, 2010 WL 92489, at *5 (7th Cir. Jan. 12, 2010). The Confrontation Clause would have been violated if the testifying analyst had "not [been] involved in the testing process" at issue and the prosecution had introduced the second analyst's certificate of analysis. *Id.* at *4-*5.

Intermediate courts in three large states – Texas, Michigan, and California – have likewise held that surrogate forensic testimony violates the Confrontation Clause. *See People v. Payne*, 774 N.W.2d 714 (Mich. Ct. App. 2009); *Wood v. State*, ___ S.W.3d ____, 2009 WL 3230848 (Tex. Ct. App. Oct. 7,

2009); *Hamilton v. State*, ___ S.W.3d ____, 2009 WL 2762487 (Tex. Ct. App. Aug. 31, 2009); *Cuadros-Fernandez*, ___ S.W.3d ____, 2009 WL 2647890 (Tex. Ct. App. Aug. 28, 2009); *People v. Dungo*, 98 Cal. Rptr. 3d 702 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009); *People v. Lopez*, 98 Cal. Rptr. 3d 825 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009).[3] Moreover, while the Michigan Supreme Court has not ruled on the issue, it has denied review in a case holding that surrogate forensic testimony violated the Confrontation Clause and has vacated and remanded three decisions that condoned such testimony. *Compare People v. Horton*, 2007 WL 2446482 (Mich. Ct. App. 2007), *rev. denied,* 772

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[3] Two reported California Court of Appeal opinions have reached a contrary result, reasoning that the California Supreme Court's pre-*Melendez-Diaz* decision in *People v. Geier*, 161 P.3d 104 (Cal. 2007), *cert. denied*, 129 S. Ct. 2856 (2009), dictates that "contemporaneously created" forensic reports are not testimonial and that surrogate forensic testimony does not violate the Confrontation Clause. *See People v. Rutterschmidt*, 98 Cal. Rptr. 3d 390, 411-12 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009); *People v. Gutierrez*, 99 Cal Rptr. 3d 369 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009); *accord People v. Bingley,* 2009 WL 3595261 (Cal. Ct. App. Nov. 3, 2009). As explained *supra* in footnote 2, however, this Court's denial of certiorari in *Geier* is readily explainable by the California Supreme Court's alternative harmless-error holding. Indeed, the State of California itself conceded in *Dungo* that "the reasoning in *Melendez-Diaz* undermines some of the rationale of *People v. Geier*," and the State withdrew its "argument that the autopsy report [was] not testimonial because it constitutes a 'contemporaneous recordation of observable events.'" 98 Cal. Rptr. 3d at 711 n.11 (quoting state's supplemental letter brief).

N.W.2d 46 (Mich. 2009), *with People v. Raby*, 2009 WL 839109 (Mich. Ct. App. 2009), *vacated and remanded*, 775 N.W.2d 144 (Mich. 2009); *People v. Dendel*, 2008 WL 4180292 (Mich. Ct. App. 2008), *vacated and remanded,* 773 N.W.2d 16 (Mich. 2009); *and People v. Lewis*, 2008 WL 1733718 (Mich. Ct. App. Apr. 15, 2008), *vacated and remanded,* 772 N.W.2d 47 (Mich. 2009). These post-*Melendez-Diaz* orders strongly suggest that the Michigan Supreme Court views the practice of surrogate forensic testimony as untenable.

2. In direct contrast, three state high courts have held, based on the two distinct theories the Indiana appellate courts adopted below, that introducing one forensic analyst's testimonial statement through the in-court testimony of another does not violate the Confrontation Clause.

a. Two state supreme courts have reasoned that surrogate forensic testimony satisfies the Confrontation Clause because it gives defendants the opportunity to cross-examine someone who is generally knowledgeable about the analyses involved, even if not the analyst who authored the forensic reports the prosecution seeks to introduce. In this case, the Indiana Supreme Court followed this theory, reasoning that "the [*Melendez-Diaz*] majority insisted that it would be up to the prosecutors to choose among the many ways of proving up scientific results, as long as the way chosen featured live witnesses." App. 12a (citing *Melendez-Diaz*, 129 S. Ct. at 2532 n.1). At least when the live witness the prosecution chooses is familiar with the laboratory as well as with the analyst who authored the report at issue, this, in the Indiana Supreme Court's view,

"suffice[s] for Sixth Amendment purposes." App. 10a-11a, 13a.

The Georgia Supreme Court has also adopted the "good enough to suffice" rationale. *See Rector v. State*, 681 S.E.2d 157 (Ga. 2009). So long as a forensic analyst whom the prosecution puts on the stand has "reviewed the data and testing procedures to determine the accuracy" of another analyst's report, the testifying analyst may tell the jury the absent analyst's conclusions and say that he endorses them. *Id.* at 160.

b. The Illinois Supreme Court – like the Indiana Court of Appeals in this case, *see* App. 37a-38a – has held that forensic analysts, as expert witnesses, can repeat testimonial statements of nontestifying analysts on the theory that such statements, even when the sole basis for the experts' opinions, are not offered for the truth of the matter asserted. *People v. Lovejoy*, ___ N.E.2d ____, 2009 WL 3063366 (Ill. Sept. 24, 2009). In *Lovejoy*, a medical examiner testified that another toxicologist detected six different types of drugs in the victim's body after conducting blood tests, indicating that poisoning caused the victim's death. *Id.* at *21-*23. Relying on footnote nine in *Crawford*, which reaffirmed that the Confrontation Clause is not implicated when out-of-court statements are introduced for reasons other than establishing the truth of the matter asserted, the Illinois Supreme Court held that the medical examiner's testimony repeating the nontestifying analyst's conclusions was not admitted for its truth but rather was introduced "to show the jury the steps [the examiner] took prior to rendering an expert

opinion in th[e] case." *Id.* at *22-*23 (citing *Crawford*, 541 U.S. at 59 n.9).[4]

3. The post-*Melendez-Diaz* conflict concerning surrogate forensic testimony deepens a pre-existing split over whether, as a more general matter, testimonial statements of a nontestifying witness can be introduced through the in-court testimony of an expert witness.

The Second Circuit, three state supreme courts, and the District of Columbia's highest court have held that introducing the testimonial statements of a nontestifying witness through the in-court testimony of an expert witness violates the Confrontation Clause. *See United States v. Mejia*, 545 F.3d 179 (2d Cir. 2008) (admission of testimonial statements through the in-court testimony of a gang expert); *Roberts v. United States*, 916 A.2d 922 (D.C. 2007) (admission of forensic laboratory reports through DNA expert's testimony); *State v. Johnson*, 982 So. 2d 672 (Fla. 2008) (admission of lab report through supervisor's testimony); *State v. Mangos*, 957 A.2d 89

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[4] Footnote nine in *Crawford* referenced *Tennessee v. Street*, 471 U.S. 409 (1985), reaffirming that the Confrontation Clause is not implicated when the prosecution offers hearsay (even testimonial hearsay) for a purpose other than establishing the truth of the matter asserted. In *Street*, the defendant argued that his confession was false because the police had simply given him the confession of his alleged accomplice and told him to repeat it. *Id.* at 411-12. The prosecution countered by introducing the nontestifying accomplice's confession to show that it differed in material ways from the defendant's. Because the accomplice's confession was not offered for its truth, this did not violate the Confrontation Clause. *Id.* at 417.

(Me. 2008) (admission of statements concerning creation of DNA swabs through supervisor); *People v. Goldstein*, 843 N.E.2d 727 (N.Y. 2005) (admission of testimonial statements through psychologist's testimony), *cert. denied*, 547 U.S. 1159 (2006).[5]

In contrast, in *State v. Tucker*, 160 P.3d 177 (Ariz. 2007), *cert. denied*, 552 U.S. 923 (2007) a prosecutorial expert witness (a "materials expert") repeated statements on the stand that another, nontestifying expert had told him in an investigatory interview.[6] The Arizona Supreme Court did not dispute that the nontestifying expert's statements were testimonial. But the court refused to find a *Crawford* violation, reasoning that "a testifying expert witness may, for the limited purpose of showing the basis of his or her opinion, reveal the substance of a non-testifying expert's statements." *Id.* at 193. "Such statements do not violate the Confrontation Clause," the court continued, "because they are not admissible for their truth." *Id.*

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[5] The Fourth Circuit, in an opinion by Judge Wilkinson, recently agreed with the Second Circuit's *Mejia* decision, explaining that "[a]llowing a [prosecution] witness simply to parrot out-of-court testimonial statements . . . directly to the jury in the guise of an expert opinion would provide an end run around *Crawford*." *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009). But the Fourth Circuit held that the Confrontation Clause was not violated in the case it was considering because the expert did not repeat or refer to any testimonial statements to the jury.

[6] The petition for certiorari in this case did not raise this Confrontation Clause issue.

The Arizona Court of Appeals has applied *Tucker* following *Melendez-Diaz* to hold that the prosecution may present an expert forensic analyst to testify concerning the results of tests performed by others. *State v. Gomez*, 2009 WL 3526649, at *4-5 (Ariz. Ct. App. Oct. 29, 2009).

4. Although *Melendez-Diaz* is a recent decision, this conflict over surrogate testimony is now firmly entrenched and ripe for resolution. The split among state high courts and the federal courts of appeals now stands at eight-to-four. Five of those decisions post-date *Melendez-Diaz*, and they are divided three-to-two. There is no prospect that this split will resolve itself, nor any reason to believe that further percolation or anything this Court says in its forthcoming *Briscoe* decision will reveal any new arguments or considerations relevant to the dispute.[7]

II. This Issue Is Important To The Proper Administration Of Criminal Trials.

This Court should not allow the conflict over surrogate witnesses to persist.

1. The question presented implicates practices in several states across the country. Crime laboratory analyses play a central evidentiary role in a large number of criminal trials, and prosecutors in numerous jurisdictions rely on surrogate witnesses to present the analysis of nontestifying analysts. Prosecutors, defense lawyers, and judges need to

[7] Of course, if this Court, out of an abundance of caution, wishes to hold this case pending the outcome in *Briscoe*, petitioner would have not objection to that.

know as soon as possible whether surrogate testimony satisfies the Confrontation Clause.

2. The question presented also directly implicates the truth-seeking function of trial. As this Court noted in *Melendez-Diaz*, forensic reports, just like other *ex parte* testimony created by law enforcement agents, presents "risks of manipulation." 129 S. Ct. at 2536. Indeed, investigative boards, journalists, and interest groups have documented numerous recent instances of fraud and dishonesty in our nation's forensic laboratories. *Id.* at 2536-38.[8] This Court also has recognized that "a forensic analyst responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution." *Melendez-Diaz*, 129 S. Ct. at 2536. Even an entirely honest and objective forensic analyst may suffer from a "lack of proper training or deficiency in judgment," *id.* at 2537, or may place undue analytical weight on a suspect methodology, *id.* at 2538.

Surrogate witnesses fail to address – and may actually aggravate – the problems posed by an analyst's potential fraud, incompetence, or flawed methodology. A recent case from California vividly illustrates the point. In *People v. Dungo,* 98 Cal. Rptr. 3d 702 (Cal. Ct. App. 2009), *rev. granted* (Cal.

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[8] For the most recent such example, see Jeremy W. Peters, *Report Condemns Police Lab Oversight*, N.Y. Times, Dec. 18, 2009 (describing "pervasively shoddy forensics work," as well as routinely "falsified test results," over a fifteen year period in the New York State crime laboratory).

Dec. 2, 2009) the prosecution introduced an autopsy report to prove that a certain amount of time had elapsed before the victim's death, a hotly contested issue at trial. The medical examiner who had authored the report, however, had since been fired. He had also been forced to resign "under a cloud" from another job, and was blacklisted by law enforcement in two more counties for falsifying his credentials. *Id.* at 704. Finally, the examiner had been known to base his conclusions on police reports instead of forensic methods. *See People v. Beeler*, 891 P.2d 153, 168 (Cal. 1995); Scott Smith, *S.J. Pathologist Under Fire Over Questionable Past,* THE RECORD, Jan. 7, 2007, *available at* http://www.recordnet.com/apps/pbcs.dll/article?AID=/20070107/A_NEWS/701070311#STS=g329z7h5.134t.

In light of this problematic track record, the prosecution put the medical examiner's supervisor on the stand instead of the examiner. As the supervisor explained during the preliminary hearing, "[t]he only reason they won't use [the examiner himself] is because the law requires the District Attorney to provide this background information to each defense attorney for each case, and [the prosecutors] feel it becomes too awkward to make them easily try their cases." *Dungo*, 98 Cal. Rptr. 3d at 708 (alterations in original). The California Court of Appeal held that this surrogate testimony violated *Crawford*, observing that the "prosecution's intent" had been to "prevent[] the defense from exploring the possibility that the [medical examiner] lacked proper training or had poor judgment or from testing [his] 'honesty, proficiency, and methodology.'" *Id.* at 714 (quoting *Melendez-Diaz*, 129 S. Ct. at 2538).

Under the Indiana Supreme Court's holding in this case, however, the prosecution would have been permitted to hamstring the defense in this manner. Even in cases seemingly involving less dramatic facts, allowing surrogate testimony would effectively insulate forensic analysts' work from scrutiny. In the field of ballistics and toolmark analysis, even good faith forensic conclusions "involve subjective qualitative judgments by examiners, and [] the accuracy of the examiners' assessments is highly dependent on their skill and training." *United States v. Taylor,* ___ F. Supp. 2d ___, 2009 WL 3347485, at *7 (D.N.M. Oct. 9, 2009) (quoting Committee on Identifying the Needs of the Forensic Sciences Community; Committee on Applied and Theoretical Statistics, National Research Council, *Strengthening Forensic Sciences in the United States: A Path Forward,* 5-20 (2009). Yet there is little hope for defense counsel to find out through questioning supervisors which ballistics and toolmark reports are faulty; only questioning the analysts who authored incriminating reports can reveal whether the analysts actually understand the science at issue and whether they exercised appropriate care and followed necessary protocols in reaching their conclusions.

III. This Case Is An Excellent Vehicle For Considering The Question Presented.

This case presents an excellent vehicle for resolving the split of authority over the question presented.

1. This case raises the question presented free from any waiver or collateral review complications. It comes to this Court on direct review, and petitioner

clearly and unambiguously objected at trial, arguing that the introduction of the forensic reports through the testimony of a witness other than the one who authored them violated the Confrontation Clause. App. 2a-3a; App. 41a-45a. Petitioner also preserved this issue by contending at each level of the Indiana appellate courts that the admission of the analyst's reports violated the Sixth Amendment. *See* Petr. Ind. C.A. Br. at 8-11; Petr. Ind. Sup. Ct. Br. at 3. Finally, the Indiana courts resolved this issue on the merits. App. 13a-14a.

2. This case clearly and cleanly presents the question of whether the prosecution may introduce one forensic analyst's testimonial statements through the testimony of a different forensic analyst. The forensic reports at issue are unquestionably testimonial under *Melendez-Diaz*, and the statements in the reports were unquestionably relayed to the jury. In fact, the prosecution introduced the reports directly into evidence. Moreover, the shortcomings of using a surrogate witness were perfectly encompassed in the supervisor's assertion that she "kn[e]w" the analyst had followed standard procedures "because she is an excellent analyst and that's how she would do it." Tr. 154 (Oct. 1, 2007).

3. Finally, the forensic reports at issue played a central role at trial. Acknowledging the "circumstantial" nature of its case, the prosecution told the jury that the DNA reports "confirmed" the victim's testimony. *Id.* at 544. Indeed, the prosecution urged jurors to "look at" the nontestifying analysts' lab reports, emphasizing that "the lab report talks about the different items of evidence that

were received, the different items that were tested from each person, and the profiles that were generated from those items that were tested." *Id.* If this Court concludes that petitioner's confrontation rights were violated, he would be entitled to a new trial.[9]

IV. The Indiana Supreme Court's Decision Is Incorrect.

1. The Indiana Supreme Court erred in holding that the government may introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of another forensic analyst. The Sixth Amendment guarantees a defendant the right "to be confronted with *the* witnesses against him." U.S. Const. amend VI

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[9] Concurring in the judgment of the court of appeals, one judge expressed his belief that C.P.'s testimony "would, on its own, have been sufficient to support [petitioner's] conviction." App. 39a (Baker, C.J., concurring in the judgment). Even accepting this assessment as true, an assessment of "whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of" cannot establish harmless error. *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963); *see also United States v. Lane*, 474 U.S. 438, 450 n.13 (1986) ("[T]he harmless-error inquiry is entirely distinct from a sufficiency-of-the-evidence inquiry.") (internal quotation marks and citation omitted). Rather, "the government must demonstrate beyond a reasonable doubt that the tainted evidence did not contribute to the conviction." *United States v. Alvarado-Valdez*, 521 F.3d 337, 342 (5th Cir. 2008); *accord Fields v. United States*, 952 A.2d 859, 867-68 (D.C. 2008); *see generally Chapman v. California*, 386 U.S. 18 (1967). The government cannot do that when, as here, its own closing argument stressed the importance of the evidence.

(emphasis added). The use of the definite article in this constitutional provision is not adventitious. Instead, it dictates that if the State decides to introduce testimonial evidence, it must afford the defendant the opportunity be confronted with the specific creator of that evidence – that is, the person who actually made the statement or authored the document at issue. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Accordingly, this Court has repeatedly held that the government violates the Confrontation Clause if it introduces a witness's testimonial statements through the in-court testimony of a different person, such as a police officer. *See id.*; *Davis v. Washington*, 547 U.S. 813 (2006); *Melendez-Diaz*, 129 S. Ct. at 2532; *id.* at 2546 (Kennedy, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second . . . .").

Nothing about the status of an in-court witness as a forensic supervisor or similar type of person alters this analysis. It is true that a supervisor may be a "competent witness" to answer general questions regarding someone else's forensic declarations, such as "systemic problems with the laboratory processes" that the person used. App. 11a. But the Confrontation Clause guarantees more than that. As this Court explained in *Melendez-Diaz*, the Clause guarantees an opportunity to test the "honesty, proficiency, and methodology" of the actual author of a forensic report that the prosecution seeks to introduce into evidence. 129 S. Ct. at 2538. Indeed, an analyst "who provides false results may, under oath in open court, reconsider his false testimony.

And, of course, the prospect of confrontation will deter fraudulent analysis" and "weed out . . . incompetent [analysts] as well." *Id.* at 2537 (citations omitted).

The holding of *Melendez-Diaz*, in fact, effectively resolves the question presented here. There, this Court explained that "[a] witness's testimony against a defendant is . . . inadmissible unless *the witness* appears at trial or, if *the witness* is unavailable, the defendant had a prior opportunity for cross-examination." 129 S. Ct. at 2531 (emphasis added); *see also id.* at 2532 ("petitioner was entitled to 'be confronted with' *the analysts* at trial") (emphasis added); *id.* at 2537 n.6 ("The analysts who swore the affidavits provided testimony against Melendez-Diaz, and *they* are therefore subject to confrontation . . . .") (emphasis added). The inescapable implication of this holding – as even the dissent acknowledged – is that the analyst who wrote "those statements that are actually introduced into evidence" must testify at trial. 129 S. Ct. at 2545 (Kennedy, J., dissenting). Surrogate forensic testimony does not satisfy the Confrontation Clause.

2. Neither of the rationales that courts have offered for avoiding this straightforward conclusion withstands scrutiny.

a. The Indiana Supreme Court concluded that surrogate forensic testimony "suffice[s] for Sixth Amendment purposes" based on a footnote in *Melendez-Diaz* concerning how the Confrontation Clause regulates prosecutorial attempts to prove a chain of custody. Quoting this Court's statement that its ruling "does not mean that everyone who laid hands on the evidence must be called," 129 S. Ct. at

2532 n.1, the Indiana Supreme Court asserted that "the majority [of this Court] insisted that it would be up to the prosecutors to choose among the many ways of proving up scientific results, as long as the way chosen featured live witnesses." App. 12a.

This Court did not suggest, much less insist upon, any such thing. The full quote from the footnote at issue was as follows:

> While the dissent is correct that "[i]t is the obligation of the prosecution to establish the chain of custody," *post,* at 2546, this does not mean that everyone who laid hands on the evidence must be called. . . . It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live.

Melendez-Diaz, 129 S. Ct. at 2532 n.1. The import of the full passage is unambiguous: prosecutorial discretion with respect to proving some fact lies in choosing whose testimonial statements to present, not in deciding whom to put on the stand for purposes of admitting a particular testimonial statement. Once the prosecution has decided to introduce a particular person's testimonial statements (whether it is in the form of a forensic report or anything else), the prosecution must present the person who made those statements to testify live in court.

At bottom, the Indiana Supreme Court's reasoning – like the Massachusetts courts' reasoning

in *Melendez-Diaz* itself – "is little more than an invitation to return to [this Court's] overruled decision in [*Ohio v. Roberts*, 448 U.S. 56 (1980)]." *Melendez-Diaz,* 129 S. Ct. at 2536. The Indiana Supreme Court asserted: "If the chief mechanism for ensuring reliability of evidence is to be cross-examination, Pendergrass had that benefit here." App. 11a. But *Crawford* does not simply require an opportunity for cross-examination of *someone* who can discuss, or even vouch for, the reliability of the testimonial evidence introduced. It requires the prosecution to make the declarant of testimonial evidence available for cross-examination, so the defendant can probe the reliability of the declarant's statements directly. *Crawford*, 541 U.S. at 61. Hence, as a leading treatise explains, "*Crawford*'s language simply does not permit cross-examination of a surrogate when the evidence in question is testimonial." D.H. KAYE ET AL., THE NEW WIGMORE: A TREATISE ON EVIDENCE-EXPERT EVIDENCE § 3.10.3, at 57 (Supp. 2009).

b. The "not for the truth" rationale that the Indiana Court of Appeals advanced here, and that other courts have relied upon, fares no better.

> To use [testimonial] information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true. If the jury believes that the basis evidence is true, it will likely also believe that the expert's reliance is justified; conversely, if the jury doubts the accuracy or validity of the basis evidence, that presumably increases

> skepticism about the expert's conclusions.

THE NEW WIGMORE, *supra*, § 3.10.8, at 53. Thus, as courts and commentators have recognized, it is simply "nonsense" to claim that a forensic report introduced to provide a basis for some other analyst's in-court testimony is not introduced for the truth of the matter asserted. *Id.* at 54; *see also People v. Goldstein*, 6 N.Y.3d 119, 128 (N.Y. 2005) ("The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context."); Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 GEO. L.J. 828, 855-56 (2008) ("[I]t is not logically possible for a jury to use the hearsay statements to assess the weight of the expert's opinion other than by considering their truth").

This case illustrates the point. It strains all sense of reason to suggest that the DNA reports that Powers authored were not introduced for their truth. Almost all of Black's direct examination was focused on establishing the credibility of Powers' work, and when Conneally testified that there was a 99.9999% chance that the petitioner was the father, his estimate was based exclusively on the testimonial evidence provided by Powers. If the jury could not accept Powers' reports as true and correct, it would have had no way to credit Black's testimony or Conneally's statistical conclusions. That is why the prosecutor specifically told the jury in her closing argument, to "look at the lab report, and the lab report talks about the different items of evidence that were received, the different items that were tested

from each person, and the profiles that were generated from those items that were tested . . . ." Tr. 544.

To be sure, modern rules of evidence generally allow expert witnesses to offer opinions based on information of the type that is customarily relied upon by other experts in the field, regardless of whether that information is independently admissible. *See, e.g.*, Fed. R. Evid. 703. But it is now well established that the Confrontation Clause does not depend on "the vagaries of the rules of evidence." *Crawford,* 541 U.S. at 61. Thus, in a criminal case "[w]here testimonial hearsay is involved, the Confrontation Clause trumps [expert] rules of evidence." *People v. Dungo,* 98 Cal. Rptr. 3d at 713 n.14. Such is the case here.

The "not for truth" justification for surrogate testimony, in short, is "an effort to make an end run around a constitutional prohibition by sleight of hand." Jennifer Mnookin, *Expert Evidence and the Confrontation Clause after* Crawford v. Washington, 15 J.L. & POL'Y 791, 822 (2007). This Court should not allow it to stand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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January 19, 2010

APPENDIX A

Supreme Court of Indiana.

Richard PENDERGRASS, Appellant
(Defendant below),
v.
STATE of Indiana, Appellee
(Plaintiff below)

No. 71S03-0808-CR-00445
Sept. 24, 2009

On Petition to Transfer from the
Indiana Court of Appeals,

No. 71A03-0712-CR-00588.

SHEPARD, Chief Justice.

Richard Pendergrass was convicted of two counts of child molesting based in part on DNA evidence showing he was very likely the father of the victim's aborted fetus. The State's witnesses to this effect were a laboratory supervisor with direct knowledge of the processing of the samples and an expert DNA analyst who used the laboratory's print-outs to render an opinion. Pendergrass contends his rights under the Confrontation Clause were violated because the State did not present the technician who ran the samples through the laboratory's equipment. We conclude that the proof submitted was consistent with the Sixth Amendment as recently detailed in *Melendez-Diaz v. Massachusetts.*

Facts and Procedural History

This case commenced when the State charged Richard Pendergrass with two counts of child molesting, class A felonies. Ind. Code § 35-42-4-3 (2007).

At trial, C.D., Pendergrass's daughter, testified that he had started touching her inappropriately when she was eleven years old. At age thirteen, when she began to feel ill, Pendergrass took her to the doctor, who told them she was pregnant. C.D. told her mother of her pregnancy and its cause, and C.D.'s mother then reported Pendergrass to the police. Soon after, C.D. had an abortion.

Two witnesses testified at trial concerning DNA evidence demonstrating the likelihood that Pendergrass was the father of the fetus. Lisa Black, a supervisor at the Indiana State Police Laboratory, explained the process of test sampling for DNA. (Tr. at 120-97.) Dr. Michael Conneally, a DNA expert who performed the paternity analysis, explained how he came to his conclusions regarding the likelihood that Pendergrass was the father of the aborted fetus. (Tr. at 209-52.) During the testimony given by Black and Conneally, the State presented three documents, two prepared by the Indiana State Police Laboratory in Lowell, Indiana, and one prepared by Conneally. Pendergrass objected to admitting these documents, insisting on Confrontation Clause and hearsay grounds that the State must call the analyst who performed the test in the laboratory. Over

Pendergrass's objection the court admitted these documents into evidence.

Exhibit 1 was labeled "Certificate of Analysis," prepared by Daun Powers, a forensic DNA analyst at the Lowell laboratory, and admitted during Black's testimony. This document consisted of an inventory of physical evidence submitted to the lab, a list of the tests performed, and indications of where the evidence and the test results were sent. It did not contain any test results or conclusions. (App. at 6-7.)

Exhibit 2, also admitted while Black was on the stand, was a table of the test results titled "Profiles for Paternity Analysis" and compiled by Powers. (App. at 8; Tr. at 176.) This table did not contain conclusions about paternity, just numbers in columns categorized by abbreviated test labels for each of the three test subjects: Pendergrass, C.D., and the aborted fetus. (App. at 8.)

Black had reviewed Exhibit 2 in the original course of the State Police Laboratory's work. (Tr. at 179-80.) In Black's role as supervisor she performs technical, administrative, and random reviews of the work of DNA analysts at the Lowell and Ft. Wayne laboratories. All DNA case work is reviewed by a second qualified analyst. Black performs some of these technical reviews and all of the other reviews. She performed the technical review of Powers's tests on the evidence at issue in this case. (Tr. at 126-27, 131, 179-81.) Her initials appear next to each of the three samples on the DNA profile, indicating she "confirmed that this paperwork that Ms. Powers was providing to

Dr. Conneally was an accurate representation of her results." (App. at 8, Tr. at 179-80.) On the stand Black described the steps Powers took to develop the DNA profiles for each of the three samples. (Tr. at 127.) She described what types of samples were taken from the three subjects based on Powers's notes. (Tr. at 140-42.)

Black testified about the general procedures followed at the laboratory, including receiving, storing, and testing evidence. (Tr. at 126-30, 138-40, 153-55.) Throughout Black's testimony, it was plain enough that Powers had performed the original laboratory processing and that Black had supervised and checked her work. (Tr. at 120-97.) For example, when asked which test was performed first, Black replied, "I don't have any knowledge of that." (Tr. at 153.) She sometimes relied on Powers's notes for her testimony about the specific tests performed. (Tr. at 140-42.) For example, when asked if anything indicated a difficulty in creating the DNA profile, Black looked to Powers's notes, which were not admitted into evidence. (Tr. at 140-42.) She had not reviewed most of Powers's notes for trial. (Tr. at 145-46.)

During Conneally's testimony the court admitted Exhibit 3, a paternity index table that Conneally created. (Tr. at 217, 222.) Conneally used the index to calculate the probability that Pendergrass was the father of the fetus based on the laboratory's test results. (Tr. at 214, 216, 222.) Given the paternity index results, there was a 99.9999 percent likelihood that Pendergrass was the father of the fetus that C.D. aborted, or, in other words, Pendergrass was 2.8

million times more likely to be the father than a random man. (Tr. at 215-26.)

The jury returned guilty verdicts on both counts. The trial court sentenced Pendergrass to consecutive terms of 40 years on Count I and 25 years on Count II. (App. at 3.) The Court of Appeals affirmed. *Pendergrass v. State,* 889 N.E. 2d 861 (Ind. Ct. App. 2008). We granted transfer. 898 N.E. 2d 1219 (Ind. 2008) (table).

I. Pendergrass Was Not Denied His Right of Confrontation.

The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36 (2004).

Crawford overturned the rule announced in *Ohio v. Roberts,* 448 U.S. 56, 72 (1980), which permitted hearsay statements as long as they bore what the *Roberts* opinion described as the "indicia of reliability." *Crawford,* 541 U.S. at 68. *Crawford* dispensed with this substantive understanding of the Confrontation Clause in favor of a procedural one, stating,

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination . . . . Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

541 U.S. at 61-62.

In determining the types of evidence to which the Confrontation Clause applies, *Crawford* turned to definitions of language from the text itself: "It applies to 'witnesses' against the accused-in other words, those who 'bear testimony.' 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Crawford,* 541 U.S. at 51, (quoting 2 N. Webster, *An American Dictionary of the English Language* (1828)).

"Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford,* 541 U.S. at 68-69. While the *Crawford* court intentionally refrained from defining what evidence is "testimonial," it listed three "formulations of this core class of 'testimonial' statements":

> (1) *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;
>
> (2) extrajudicial statements . . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;
>
> (3) statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Crawford, 541 U.S. at 51-52 (numbers added).

Crawford emphasized that the Sixth Amendment's very essence is to protect against abuses of government officials. "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse — a fact borne out time and again throughout a history with which the Framers were keenly familiar." *Crawford,* 541 U.S. at 56 n. 7. The opinion later claimed that the "Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers." *Crawford,* 541 U.S. at 66.

Therefore, says *Crawford*, the text, taken with traditional exceptions, means that the Sixth Amendment does not permit the admission of "testimonial" statements of a witness who does not appear at trial unless he or she is unavailable to testify and the defendant had a prior opportunity for cross-examination. *Crawford,* 541 U.S. at 53-54.

Since *Crawford*, the Supreme Court has clarified incrementally the definition of "testimonial." It first excluded from "testimonial" statements whose primary purpose is to enable police assistance but not statements made to police during an investigation. *Davis v. Washington*, 547 U.S. 813 (2006). *Davis* that the testimonial statements are those that are substitutes for live testimony, that is "they do precisely *what a witness does* on direct examination . . . ." *Davis,* 547 U.S. at 830. Because "[n]o 'witness' goes into court to proclaim an emergency and seek help," statements seeking help during an emergency do not classify as "testimonial." *Davis,* 547 U.S. at 828. By contrast, in the companion case to *Davis, Hammon v. Indiana*,[1] where the prosecution sought to enter an affidavit by the alleged victim based on conversations with the police in their investigation, the Confrontation Clause barred admission because the officer was seeking to find out "what happened," not "what is happening." *Davis,* 547 U.S. at 830.

The more recent and most relevant for our purposes is *Melendez-Diaz v. Massachusetts,* __U.S.__, 129 S. Ct. 2527 (2009), in which the defendant was convicted for drug crimes based partly on certificates

[1] Decided here as *Hammon v. State*, 821 N.E.2d 444 (Ind. 2005).

of analysis stating the substance found in seized bags was cocaine of a certain weight, admitted without any live testimony either by the analyst who signed the affidavits or by anyone else. The state processes contemplated that the affidavits were to stand on their own, so no witnesses were called. *Melendez-Diaz*, 129 S. Ct. at 2531. After concluding that the certificates were "quite plainly affidavits," the Supreme Court held that the affidavits clearly fell within "testimonial" evidence because they "are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination,'" the analysts swearing their accuracy were "witnesses" for Sixth Amendment purposes, and the defendant was entitled to "be confronted with" the analysts at trial, absent a showing that the analysts were unavailable to testify and the defendant had a prior opportunity to cross-examine them. *Melendez-Diaz*, 129 S. Ct. at 2532 (quoting *Davis v. Washington,* 547 U.S. at 830 (2006)).

Concluding that the certificates were the functional equivalent of live, in-court testimony, the Court pointed out that the affidavits were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Melendez-Diaz*, 129 S. Ct. at 2532 (quoting *Crawford,* 541 U.S. at 52). Indeed, the sole purpose of the certificates was to provide "*prima facie* evidence of the composition, quality, and the net weight" of the substance. *Melendez-Diaz,* 129 S. Ct. at 2532 (quoting Mass. Gen. Laws, ch. 111, § 13). This purpose was reprinted on the certificates themselves. *Melendez-Diaz,* 129 S. Ct. at 2531.

The court characterized its opinion as a "rather straightforward application of our holding in *Crawford*." *Melendez-Diaz,* 129 S. Ct. at 2533. As such, we take *Melendez-Diaz* as another clarifying step, in the vein of *Davis*, in defining the boundaries of the term "testimonial." Following *Melendez-Diaz* we will therefore treat the Certificate of Analysis in the present case as testimonial, as it fits the definition of testimony as clarified by *Melendez-Diaz*.

It is not clear whether more than one analyst signed each certificate in *Melendez-Diaz* or three different analysts signed each one. We similarly do not know whether the majority insisted that all the analysts involved in the testing should have testified at trial or if fewer than all of them would be permissible. For instance, if the tests were done jointly, it is not clear whether one who participated in the testing would be sufficient. The court gave some clue on such matters from the majority's declaration that its conclusion "does not mean that everyone who laid hands on the evidence must be called," and that the Confrontation Clause leaves discretion with the prosecution on which evidence to present. *Melendez-Diaz,* 129 S. Ct. at 2532 n.1. That is precisely what the prosecution did in the case before us. It chose to call the laboratory supervisor rather than the laboratory processor. The laboratory supervisor who took the stand did have a direct part in the process by personally checking Powers's test results. (Tr. at 179-80; App. at 8.) As such, she could testify as to the accuracy of the tests as well as standard operating

procedure of the laboratory and whether Powers diverged from these procedures.

The prosecution further chose to call an expert to interpret the test results for the jury. Thus, Pendergrass had the opportunity to confront at trial two witnesses who were directly involved in the substantive analysis, unlike Melendez-Diaz, who confronted none at all.

If the chief mechanism for ensuring reliability of evidence is to be cross-examination, Pendergrass had that benefit here. If there were systemic problems with the laboratory processes, Black would be a competent witness, perhaps the ideal witness, against whom to lodge such challenges. Moreover, Black had personal knowledge of the laboratory's work on the specimens at issue as the person who performed the technical review. The State's view is that such an examination of processes is precisely what occurred: "Indeed, Pendergrass effectively cross-examined Black on every step of the evidence testing process, from receipt of the samples from police, through storage, extraction, and comparison." (Appellee's Br. at 13.) After Black left the stand, of course, the State called the expert who actually gave the opinion that the DNA of Pendergrass, C.D., and the fetus matched.

While the prosecution presented its two witnesses, Pendergrass challenges that it did not call the right — or enough — witnesses. The justices of the Supreme Court wrestled some on this question in *Melendez-Diaz*, although the certificates in that case were not accompanied with any live testimony. 129 S. Ct. at

2531, 2532 n.1, 2546 (Kennedy, J., dissenting). The dissent raised the specter of requiring "in-court testimony from each human link in the chain of custody." *Melendez-Diaz,* 129 S. Ct. at 2546 (Kennedy, J., dissenting). The majority rejected this characterization of its ruling by stating that it "does not mean that everyone who laid hands on the evidence must be called." *Melendez-Diaz,* 129 S. Ct. at 2532 n. 1.

The *Melendez-Diaz* majority described the affidavits in that case as including only a "bare-bones statement" that the substance was found to be cocaine and emphasized that the defendant "did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed." *Melendez-Diaz,* 129 S. Ct. at 2537. We note that here Pendergrass complains of no such ignorance by the time of trial. In fact, his counsel was thoroughly prepared when the State sought to admit the Certificate of Analysis. (Tr. at 132-37.)

Responding to the dissenters' contention that the decision in *Melendez-Diaz* would require platoons of live witnesses to testify about everything down to and including chain of custody for tested samples, the majority insisted that it would be up to the prosecutors to choose among the many ways of proving up scientific results, as long as the way chosen featured live witnesses. *Melendez-Diaz,* 129 S. Ct. at 2532 n.1. Here, the prosecution supplied a supervisor with direct involvement in the laboratory's technical processes

and the expert who concluded that those processes demonstrated Pendergrass was the father of the aborted fetus. We conclude this sufficed for Sixth Amendment purposes.

II. Should the Exhibits Have Been Excluded as Hearsay?

Pendergrass argues that the trial court improperly admitted the State's exhibits 1-3 as hearsay, and the parties exchange arguments about various subsections of Indiana Evidence Rule 803.

One general rule about opinions by qualified experts is that they may rely on information supplied by other persons who have supplied material which the expert regards as material, even if the supplier is not present to testify in court. Ind. Evidence Rule 703; *Ealy v. State,* 685 N.E. 2d 1047, 1056 (Ind. 1997) (trial court did not err by admitting expert testimony based on a properly admitted autopsy report, even if the report had been inadmissible). Medical experts who render an opinion about an individual's mental state on the basis of multiple sources detailing treatment and observation are such an instance. *See, e.g., In re A.J.,* 877 N.E.2d 805, 814 (Ind. Ct. App. 2007) (trial court did not err by admitting expert's testimony as to his treatment recommendations, which were based in part on polygraph results).

The sources upon which Conneally relied might have been subject to a limiting instruction about the purposes for which they were being tendered, but it was not error to admit them.

III. Conclusion

We affirm the trial court.

DICKSON and SULLIVAN, JJ., concur.

RUCKER, J., dissenting.

Before *Crawford v. Washington,* 541 U.S. 36 (2004) as applied in the recent United States Supreme Court decision of *Melendez-Diaz v. Massachusetts,* 557 U.S. ___, 129 S. Ct. 2527 (2009), I would have agreed with the majority that a defendant's opportunity to cross-examine "a supervisor with direct involvement in the laboratory's technical processes . . . ." was sufficient to satisfy the demands of the Sixth Amendment. Op. at ___. Indeed this jurisdiction has historically admitted documents and testimony containing laboratory results from witnesses other than the experts who actually performed the tests or analyses. *See, e.g., Ealy v. State,* 685 N.E.2d 1047, 1055 (Ind. 1997) (holding that an autopsy report was properly admitted under the public records exception to the hearsay rule); *Thompson v. State,* 386 N.E.2d 682, 684 (1979) (holding that an autopsy report was properly admitted under the business records exception to the hearsay rule although the doctor who prepared the report did not sponsor the report at trial and reasoning that the business records exception "does not mean that a sponsor of an exhibit must have personally made it, filed it, or have had first-hand knowledge of the transaction represented by it."); *Fowler v. Napier,* 663 N.E. 2d 1197, 1200 (Ind. Ct. App.1996) (holding that

DNA test results prepared by one doctor and presented at trial by another were properly admitted under the business records exception to the hearsay rule). However, *Melendez-Diaz* seems to point in a different direction thus casting considerable doubt on the continued validity of the foregoing authority.

To be sure *Melendez-Diaz* is not as clear as it could have been in identifying *who* must testify at trial. As the majority correctly observes, "[t]he justices of the Supreme Court wrestled some on this question. . . ." Op. at ___. But to support its contention that the prosecutor may introduce into evidence documents prepared by the actual analyst, through a supervisor, the majority relies on certain isolated passages from the *Melendez-Diaz* opinion. For example the majority points to comments that not "everyone who laid hands on the evidence must be called" and that "the Confrontation Clause leaves discretion with the prosecution on which evidence to present." Op. at ___ (citing *Melendez-Diaz,* 129 S. Ct. at 2532 n.1). However, these comments were directed at a very narrow proposition concerning chain of custody and not the broader proposition the majority here advances.[2] Indeed immediately preceding the footnoted

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[2] The full quote follows:

> Contrary to the dissent's suggestion . . . we do not hold, 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. While the dissent is correct that "[i]t is the obligation of the prosecution to establish the chain of custody," . . . this does not mean that everyone who laid

comment on which the majority relies, the Court was unequivocal: "Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial." *Id.* at 2532 (emphasis in original) (quoting *Crawford,* 541 U.S. at 54).

Also, contrasting the facts in *Melendez-Diaz* to the facts here, the majority notes that the Court described the affidavits in that case as a "bare-bones statement" and that the defendant in that case "did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed." Op. at ___ (quoting *Melendez-Diaz,* 129 S. Ct. at 2537). Again, however, these comments must be taken in context. The Court itself described them as "illustrative" of its main point which was "[l]ike expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination." *Id.* at 2537. As the Court also observed,

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> hands on the evidence must be called. As stated in the dissent's own quotation, . . . "gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility." It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live. Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.

Melendez-Diaz, 129 S. Ct. at 2532 n.1 (internal citations omitted) (alteration and emphasis in original).

"Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." *Id.*

The record is clear that it was Ms. Powers who examined an aborted fetus specimen and buccal swabs taken from C.D., and blood samples apparently taken from defendant Richard Pendergrass, Tr. at 138-42. It was Ms. Powers who conducted a "PCR or polymerase chain reaction" test, Tr. at 124, and ultimately created DNA profiles that were then forwarded to Dr. Conneally of the Indiana University Medical Center for paternity analysis. Tr. at 127, 142. Although the State Police laboratory is qualified to create a DNA profile, it apparently is not qualified to conduct a paternity analysis. Tr. at 127. In any event the "Certificate of Analysis" — a two-page document identifying the evidence received by the laboratory and a summary of the test results — prepared by Ms. Powers and a document entitled "Profiles for Paternity Analysis" — a one-page document detailing the test results-also prepared by Ms. Powers, were admitted into evidence through the testimony of Ms. Powers' supervisor, Ms. Black. It was on the basis of the Profiles for Paternity Analysis that Dr. Conneally reached his conclusion that Pendergrass was the father of the aborted fetus. But, Ms. Powers was never subjected to the rigors of cross-examination on either the examination she performed, the testing she conducted, or the results she reached.

The record shows that Ms. Black testified at length about DNA evidence generally and the specific procedures her office used to map DNA. As to her role,

Ms. Black testified, "As the supervisor obviously I supervise nine people. I review their work. I make the case assignments. I make sure the quality control of the entire unit is what it's supposed to be." Tr. at 121. She further testified:

> I do regular reviews of their case work. I do some technical — all DNA case work has to be reviewed by another qualified analyst which is a technical review. I do some of those. I also do some administrative reviews which means then after it's been technically reviewed they are administratively reviewed. I also do quarterly. I do just the regular — randomly pull cases out and review again for the quality of the work. And I can do all of those on any particular case of my choice.

Tr. at 122. Ms. Black testified that she recalled the particular case of Richard Pendergrass, that she reviewed the testing in that case, and that she indicated that review by writing her four digit number on the bottom. Tr. at 126-27, 131. Specifically she said, "Those are my initials that I confirmed that this paperwork that Ms. Powers was providing to Dr. Conneally was an accurate representation of her results." Tr. at 179.

There is no evidence Ms. Black did anything more than rubber stamp the results of Ms. Powers' work. And the question thus presented is whether those results are in fact accurate. Ms. Black did not testify that she observed Ms. Powers perform any examination of the laboratory specimens or conduct any tests.

Obviously Ms. Black could not testify whether Ms. Powers diverged from standard laboratory procedures or how carefully or competently she performed the specific analyses. Although a supervisor might be able to testify to her charge's general competence or honesty, this is no substitute for a jury's first-hand observations of the analyst that performs a given procedure; and a supervisor's initials are no substitute for an analyst's opportunity to carefully consider, under oath, the veracity of her results. "Confrontation is one means of assuring accurate forensic analysis." *Melendez-Diaz,* 129 S. Ct. at 2536.

In sum, despite whatever ambiguity *Melendez-Diaz* may have created on the question of *who* must testify at trial, it appears to me the opinion is clear enough that a defendant has a constitutional right to confront at the very least the analyst that actually conducts the tests. "A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Id.* at 2531 (citing *Crawford*, 541 U.S. at 54). Because Ms. Powers did not appear at trial, and because there was no evidence of her unavailability or a prior opportunity for Pendergrass to cross-examine her, the trial court erred by admitting into evidence Ms. Powers' testimony by way of the Certificate of Analysis and Profiles for Paternity Analysis. I therefore respectfully dissent on this issue.

BOEHM, J., concurs.

APPENDIX B

Court of Appeals of Indiana

Richard PENDERGRASS, Appellant-Defendant,
v.
STATE of Indiana, Appellee-Plaintiff.

No. 71A03-0712-CR-588

July 8, 2008.

OPINION

RILEY, Judge.

STATEMENT OF THE CASE

Appellant-Defendant, Richard Pendergrass (Pendergrass), appeals his conviction for two Counts of child molesting, Class A felonies, Ind. Code § 35-42-4-3.

Affirmed.

ISSUES

Pendergrass raises two issues on appeal, which we restate as follows:

> (1) Whether the trial court abused its discretion by admitting several exhibits and related testimony concerning deoxyribonucleic acid (DNA) test results without the testimony of the

laboratory technician who performed the actual testing; and

(2) Whether Pendergrass' confrontational rights pursuant to the Sixth Amendment of the United States Constitution were violated when he was denied the opportunity to confront and cross-examine the laboratory technician who performed the DNA analysis.

FACTS AND PROCEDURAL HISTORY

C.P., born on June 8, 1989, is the daughter of D.W. (Mother) and Pendergrass. C.P.'s parents divorced when she was approximately one and one half years old. Originally, C.P. and her siblings lived with their Mother; however, when C.P. was eleven years of age, the children moved in with Pendergrass and his extended family in a residence located in South Bend, Indiana. Pendergrass, C.P., and her younger sister, J.P., shared a downstairs bedroom. Pendergrass slept in a bed, while the girls slept on blankets on the floor.

C.P. was eleven years old when Pendergrass started to touch her inappropriately. The first time it happened, C.P. was asleep and Pendergrass touched her vagina while she was clothed. She woke up and told him to stop. Pendergrass complied. After that time, Pendergrass gave C.P. pills every night which C.P. believed to be sleeping pills. According to C.P.'s sister, the drugs Pendergrass gave to C.P. were red pills that left C.P. acting "dumb, like dumbfounded" or "slow" mentally. (Transcript p. 277). Pendergrass also gave J.P. cold medicine, such as Nyquil. Even though

the pills Pendergrass gave her would usually make her "black out," at times, she would wake up. (Tr. p. 76). C.P. remembered Pendergrass sitting next to her on the floor and touching her vagina under her clothes, sometimes inserting his fingers into her vagina. Whenever he put his fingers inside of her vagina, it made her feel "dirty." (Tr. p. 73-74). On several occasions, he would also kiss her by putting his tongue in her mouth. There were times that C.P. woke up in Pendergrass' bed, with her clothes off and Pendergrass on top of her. Although C.P. had no recollection of feeling anything, afterwards, she would notice an abnormal discharge in her underwear.

When she was thirteen, C.P. began feeling ill and Pendergrass took her to see a doctor. Given her symptoms, the doctor asked C.P. for a urine sample. Following the results of the urine sample, the doctor informed C.P. and Pendergrass that she was pregnant. On Mother's Day, May 11, 2003, C.P. informed her Mother that she was pregnant and that Pendergrass was the father of her unborn child. Mother notified the St. Joseph County Police Department, specifically speaking to Detective Steven Metcalf (Detective Metcalf).

As a result of the police report, Metcalf investigated Pendergrass. In June of 2003, C.P., accompanied by her Mother, had an abortion. Following C.P.'s abortion, Detective Metcalf took possession of the fetus for DNA testing. He also collected a buccal swab from C.P. and a blood sample from Pendergrass for DNA testing. All the evidence was tagged and properly stored in the freezer located

at the St. Joseph County Police Post. Although Detective Metcalf "firmly believed that [he] had sent these items to the [Indiana State Police Laboratory]," he never actually did so. (Tr. p. 308). It was not until May of 2006 that Detective Metcalf discovered his omission and the evidence was sent to the Indiana State Police Laboratory for DNA testing. After testing, it was determined that given the paternity index results, there was a 99.9999 percent likelihood that Pendergrass was the father of the fetus aborted by C.P.

On June 11, 2006, the State filed an Information, charging Pendergrass with two Counts of child molesting, Class A felonies, Ind. Code § 35-42-4-3. On October 1, 2007, a jury trial commenced. During the trial, the trial court admitted, over the objection of defense counsel, three exhibits concerning the DNA testing and testimony related thereto. Four days later, on October 5, 2007, the jury found Pendergrass guilty as charged. On November 1, 2007, at the sentencing hearing, the trial court sentenced Pendergrass to forty years incarceration on Count I and twenty-five years incarceration on Count II, with sentences to run consecutively.

Pendergrass now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Admission of Evidence*

Initially, Pendergrass contends that the trial court abused its discretion when it admitted, over his objection, the test results from the DNA analysis performed by the Indiana State Police Laboratory and testimony related thereto. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Sullivan Builders & Design, Inc. v. Home Lumber of New Haven, Inc.,* 834 N.E.2d 129, 133 (Ind. Ct. App.2005), *reh'g denied, trans. denied.* An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.* Moreover we will not reverse the trial court's admission of evidence absent a showing of prejudice. *Id.*

Specifically, Pendergrass contests the admission of three particular exhibits, *i.e.,* State's Exhibits 1, 2, and 3. State's Exhibit 1 is a Certificate of Analysis, prepared by forensic biologist, Daun C. Powers (Powers), employed by the Indiana State Police Laboratory. The Exhibit reflects the results of Powers' DNA extraction from a tissue sample from the arm of the fetus, the buccal swab taken from C.P., and Pendergrass' blood sample. State's Exhibit 2, also prepared by Powers, contains the development of Pendergrass', C.P.'s, and the fetus' "Profiles for Paternity Analysis." (Appellant's App. p. 2). The Exhibit provides the information necessary to establish paternity between the individuals, if any. This information was subsequently submitted to Dr.

Michael Conneally, M.D. (Dr. Conneally), a retired professor of human genetics, human genetic disorders and DNA at Indiana University Medical Center in Indianapolis. State's Exhibit 3 is the Paternity Index, as prepared by Dr. Conneally, which establishes a 99.9999% probability of Pendergrass being the fetus' biological father.

Pendergrass' overarching claim with regard to all three exhibits focuses on the purported hearsay statements contained within each document. With respect to Exhibits 1 and 2, which were admitted at trial through the testimony of Lisa Black (Black), Powers' supervisor at the Indiana State Police Laboratory, Pendergrass asserts that the documents include hearsay statements and thus can only be admitted if the documents fall within one of the recognized hearsay exceptions. In this light, Pendergrass disputes the Exhibits' admissibility based on Indiana Evidence Rule 803(8)(a through d) which prohibits the introduction of investigative reports by police and other law enforcement personnel. With regard to the admission of State's Exhibit 3, which was introduced through Dr. Conneally's testimony, Pendergrass objects that the document was based almost completely on the "impermissible hearsay findings of [Powers]." (Appellant's Br. p. 5). On the other hand, the State asserts that all three Exhibits were properly admitted under the business record exception to the hearsay rules. *See* Ind. Evid. Rule 803(6).

As the use of DNA analysis has become prevalent in criminal cases, it came as a surprise to this court

that after a thorough review of the case law, no precedent exists establishing how documents explaining the underlying analysis of DNA testing may be admitted at a criminal trial. We will discuss the admissibility of each Exhibit in turn.

A. *State's Exhibit 1*

As mentioned before, State's Exhibit 1 is a Certificate of Analysis which compiled the results of Powers' DNA extraction from a tissue sample from the arm of the aborted fetus, from C.P.'s buccal swab, and from Pendergrass' blood sample. Pendergrass contests this admission, arguing that the document was inadmissible under each of the four exceptions of Evid. R. 803(8).

Indiana Evidence Rule 803(8) states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness.
>
> (8) Public Records and Reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations in any form, of a public office or agency, setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to a duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not

> within this exception to the hearsay rule: (a) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case; (b) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; (c) factual findings offered by the government in criminal cases; and (d) factual findings resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

Pendergrass asserts that Exhibit 1 is either an investigative report excluded by subsections (a) and (b) or a factual finding excluded by subsections (c) and (d). The State, on the other hand, claims that Exhibit 1 was properly admitted pursuant to Evid R. 803(6), records of regularly conducted business activity.

The words "DNA test results" are not magic words which, once uttered, cause the doors of admissibility to open. Although Indiana Code § 35-37-4-13(b)[1] makes

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[1] Indiana Code § 35-37-4-13 provides:

> "Forensic DNA analysis" defined; admissibility
>
> (a) As used in this section, "forensic DNA analysis" means an identification process in which the unique genetic code of an individual that is carried by the individual's deoxyribonucleic acid (DNA) is compared to genetic codes carried in DNA found in bodily substance samples obtained by a law enforcement agency in the exercise of the law enforcement agency's investigative function.
>
> (b) In a criminal trial or hearing, the results of forensic

DNA evidence per se admissible without an inquiry into whether the evidence is scientifically reliable in a particular case, the statutory language merely establishes the reliability of the evidence and the party introducing the evidence will still need to comply with the customary rules of evidence.

Here, State's Exhibit 1 was compiled by Powers and admitted at trial through the testimony of Black, Powers' supervisor at the Indiana State Police Laboratory. Black testified that she supervises nine employees, reviews the testing process, and oversees the general quality control of the work performed at the laboratory. She provides both the technical and administrative review of the DNA testing done by the laboratory. Black clarified the general DNA testing procedures to the jury and stated that she specifically reviewed Powers' testing of the DNA samples taken from C.P.'s fetus, C.P., and Pendergrass.

In *Jenkins v. State,* 627 N.E.2d 789 (Ind. 1993), *reh'g denied, cert. denied,* 513 U.S. 812 (1994), our supreme court was asked to decide whether a technician's laboratory notes concerning DNA testing fall within the business record exception to the hearsay rule where the trial court admitted the documents through the technician's supervisor's testimony. *Id.* at 794. For purposes of its analysis, the *Jenkins'* court assumed "for the sake of argument that

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DNA analysis are admissible in evidence without an antecedent expert testimony that forensic DNA analysis provides a trustworthy and reliable method of identifying characteristics in an individual's genetic material.

the laboratory notes do not fall under the business record exception." *Id.* Instead of investigating the admissibility of the technician's notes, the supreme court focused on the expert who based his opinion on the contested notes and stated that "[a]n expert is allowed to base an opinion on facts or data that are not admissible in evidence if they are of the type reasonably relied upon by experts in the field." *Id.* Thus, the court concluded that as these laboratory notes are used by every supervisor involved in DNA testing, admission is harmless because of use by the expert witness. *Id.*

While we agree with the ultimate result reached in *Jenkins* — admissibility of the documents — we will address the issue disregarded by the *Jenkins'* court, *i.e.,* whether documents created by a laboratory technician at the Indiana State Police Laboratory concerning DNA analysis are admissible under the exceptions to the hearsay rules. However, unlike *Jenkins,* we do not believe the business record exception pursuant to Evid. R. 803(6)[2] comes into play.

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[2] Indiana Evidence Rule 803(6) provides as follows:

> Records of Regularly Conducted Business Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The term "business" as used in

It does not appear to us that the Indiana State Police Laboratory depends on State's Exhibit 1, the Certificate of Analysis, to operate its business. Rather, the report is compiled for the sole benefit of the State to pursue an action against Pendergrass. Unlike financial statements, inventory records, or other administrative or operational documents traditionally allowed under the business records exception, State's Exhibit 1 appears to be a substantive end product of a service offered by the Indiana State Police Laboratory to a government agency and which becomes the permanent property of that agency. *See, e.g., In re Termination of Parent-Child Relationship of E.T.,* 808 N.E.2d 639, 645 (Ind. 2004) (report compiled by social services agency describing home visits and supervised visits are not admissible under the business records exception to the hearsay rule as this report was a service offered by the social services agency and the report would become the permanent property of an external government agency). As such, State's Exhibit 1 cannot be characterized as a record "kept in the course of a regularly conducted business activity." *See* Evid. R. 803(6).

At first glance, State's Exhibit 1 appears to fall squarely within the first part of the public records exception as stipulated by Evid. R. 803(8). A Certificate of Analysis prepared by an employee of the Indiana State Police Laboratory is clearly a report of a public agency setting forth factual findings resulting

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this Rule includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

from an investigation made pursuant to authority granted by law. *See* I.C. § 10-13-6-6(2). However, Evid. R. 803(8) continues and excludes some statements from its exception to the hearsay rule. Pendergrass now maintains that the trial court should have found State's Exhibit 1 inadmissible as it is excluded under all four exceptions to the public records rule: (a) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case; (b) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; (c) factual findings offered by the government in criminal cases; and (d) factual findings resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

Our supreme court analyzed the "factual findings offered by the government in criminal cases" exclusion in depth in *Ealy v. State,* 685 N.E. 2d 1047 (Ind. 1997) and crafted a three-step test for determining the admissibility of hearsay under that subpart. The *Ealy* test has since been extended to all of the exclusions listed in Evid. R. 803(8). *See Shepherd v. State,* 690 N.E. 2d 318, 326 n.2 (Ind. Ct. App. 1997), *trans. denied; Bailey v. State,* 806 N.E. 2d 329, 333-34 (Ind. Ct. App. 2004), *trans. denied.*

Application of the *Ealy* test mandates that a court first determine whether the report or record contains findings that address a materially contested issue in the case. *Ealy,* 685 N.E. 2d at 1054. If the inquiry in the first step is answered in the negative, the analysis

ends there and the record or report is not rendered inadmissible on hearsay grounds. *Id.* Otherwise, the court must proceed to the second step, which requires the court to determine if the record or report contains factual findings. *Id.* Factual findings are conclusions drawn by an investigator from the facts. *Id.* at 1051. This would be in contrast to "simple listings, or a simple recordation of numbers and the like." *Id.* at 1054. If the record or report does contain factual findings, then the court must move on to step three and determine whether the report was prepared for advocacy purposes or in anticipation of litigation. *Id.* If the report or record was prepared for advocacy purposes or in anticipation of litigation, then it is inadmissible hearsay. *Id.* Even if the trial court determines that the record or report clears that final hurdle, the record or report may be inadmissible if it is not relevant or if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *See* Evid. R. 402 and 403.

Applying the first *Ealy* step to the facts of this case, we conclude that the Certificate of Analysis does not relate to a materially contested issue before the trial court. State's Exhibit 1 is a compilation of data derived from the DNA analysis of the fetus, C.P., and Pendergrass. This mere compilation is not contested by Pendergrass. As the inquiry into the first step is answered in the negative, State's Exhibit 1 is not inadmissible on hearsay grounds. However, even proceeding to the second step, we find that State's Exhibit 1 does not contain factual findings as defined by *Ealy*. Rather, Powers detailed in State's Exhibit 1

the evidence received from the St. Joseph County Police Department for further analysis and recorded the results of the DNA analysis on the fetus, C.P.'s buccal swab, and Pendergrass' blood as observed by her. As such, the contested exhibit is a recording of physical conditions as they were observed by Powers akin to a simple recordation of numbers and therefore admissible under the *Ealy* test. Consequently, we conclude that the trial court did not abuse its decision by admitting State's Exhibit 1. *See Sullivan Builders & Design, Inc.,* 834 N.E. 2d at 133.

B. *State's Exhibit 2*

State's Exhibit 2, also prepared by Powers and admitted at trial through Black's testimony, contains the development of Pendergrass', C.P.'s, and the fetus' "Profiles for Paternity Analysis." (Appellant's App. p. 8). The Exhibit specifies sixteen markers present in an individual's DNA sample as a numerical value. Here, too, Pendergrass contests the admission of the document asserting it falls within one of the exceptions of the public records rule of Evid. R. 803(8).

As with State's Exhibit 1, State's Exhibit 2 was properly admitted at trial. Application of the *Ealy* test indicates first that the Profiles for Paternity Analysis does not relate to a materially contested issue before the trial court. State's Exhibit 2 is a numerical, uncontested compilation of data derived from the DNA analysis of the fetus, C.P., and Pendergrass. As the first inquiry into the first step is answered in the negative, State's Exhibit 2 is not inadmissible on hearsay grounds. However, even applying the second

step, we find that State's Exhibit 2 does not contain factual findings as defined by *Ealy*. Rather, in State's Exhibit 2, Powers assigns numerical values to the sixteen markers found in the DNA samples of the fetus, C.P., and Pendergrass. She does not interpret the values, reach a conclusion or infer anything from the enumeration. As such, the contested Exhibit is, like State's Exhibit 1, a mere recording of physical conditions as they were observed by Powers and therefore admissible under the *Ealy* test. Consequently, we conclude that the trial court did not abuse its discretion by admitting State's Exhibit 2. *See Sullivan Builders & Design, Inc.,* 834 N.E. 2d at 133.

C. *State's Exhibit 3*

State's Exhibit 3 represents the Paternity Index, as prepared by Dr. Conneally, which establishes a 99.9999 percent probability of Pendergrass being the fetus' biological father. This document was admitted at trial through the testimony of its author, Dr. Conneally. His testimony clarified that although he authored the Paternity Index and calculated the probability score, this result was entirely based upon his interpretation of the numerical values contained in State's Exhibit 2, the Profiles for Paternity Analysis. Pendergrass disputes the admissibility of Exhibit 3, claiming that the "State may not use an expert as a conduit to introduce the hearsay statements of another witness that it has failed to produce." (Appellant's Br. p. 7).

Initially, we note that State's Exhibits 1 and 2 were properly admitted as exceptions to the hearsay

rule pursuant to Evid. R. 803(8). These exhibits had been admitted prior to Dr. Conneally taking the stand. Accordingly, Dr. Conneally did not introduce hearsay statements when discussing his expert opinion concerning Pendergrass' probability of being the fetus' biological father.

Furthermore, with regard to expert testimony, Indiana's Rule of Evidence 703 specifies:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. Experts may testify to opinions based on inadmissible hearsay, provided that it is of the type reasonably relied upon by experts in the field.

Here, it is not only statutorily enacted in I.C. § 35-37-4-13 that "forensic DNA analysis provides a trustworthy and reliable method of identifying characteristics in an individual's genetic material," but Dr. Conneally also testified that the only method of calculating paternity is by reliance and reference to State's Exhibits 1 and 2. He clarified that this method is universally used within the scientific community. Accordingly, we conclude that State's Exhibit 3 was properly admitted at trial.

II. *Confrontation Rights*

Lastly, Pendergrass contends that the trial court erred by admitting evidence in violation of his Sixth Amendment right to confront and cross examine

witnesses pursuant to *Crawford v. Washington,* 541 U.S. 36 (2004). In particular, he maintains that as State's Exhibits 1 and 2 are testimonial in nature, the documents should have been introduced through Powers' trial testimony, unless the State had established that she was unavailable to testify and Pendergrass had a prior opportunity for cross-examination.

The Confrontation Clause of the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . . to be confronted with the witnesses against him." In *Crawford,* the United States Supreme Court determined that the Confrontation Clause bars "admission of testimonial statements of a witness who [does] not appear at trial unless he [is] unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54. In essence, *Crawford* drew a line between testimonial and non-testimonial hearsay without providing a definition of testimonial evidence,[3] granting the State latitude for developing their hearsay laws in relation to non-testimonial hearsay. *See Richardson v. State,* 856 N.E. 2d 1222, 1230 (Ind. Ct. App. 2006), *trans. denied.* However, the Supreme Court did comment on existing hearsay exceptions, stating "[m]ost hearsay exceptions covered statements that by their nature were not testimonial — for

[3] We note that *Crawford* has been expanded upon and clarified by *Hammon v. State,* which was decided together with *Davis v. Washington,* 547 U.S. 813 (2006), but do not believe those decisions affect our result in the instant case.

example, business records or statements in furtherance of a conspiracy." *Crawford,* 541 U.S. at 56.

Even without deciding whether the public records exception of Evid. R. 803(8) is one of the existing hearsay exceptions that covers non-testimonial statements, we find that State's Exhibits 1 and 2 are not subject to the strictures of *Crawford.* It is well established that the Confrontation Clause does not apply to statements admitted for reasons other than proving the truth of the matter asserted. *Id.* at 59 n. 9 (citing *Tennessee v. Street,* 471 U.S. 409, 414 (1985)). Here, State's Exhibits 1 and 2 were not admitted to prove that Pendergrass molested C.P., instead they merely provided context for Dr. Conneally's opinion. Both documents clarify the procedures and basis for the parental probability percentage as calculated by Dr. Conneally. In sum, we conclude that the admission of State's Exhibits 1 and 2 did not implicate Pendergrass' right to confront the witnesses against him.

CONCLUSION

Based on the foregoing, we conclude that the trial court properly admitted State's Exhibits 1, 2, and 3 and related testimony concerning DNA analysis and the subsequent test result without the testimony of the laboratory technician who performed the actual testing; and Pendergrass' confrontational rights pursuant to the Sixth Amendment of the United States Constitution were not implicated when he was denied the opportunity to confront and cross-examine

the laboratory technician who performed the DNA analysis.

Affirmed.

ROBB, J., concurs.

BAKER, C.J., concurs in result with separate opinion.

BAKER, Chief Judge, concurring in result.

I concur in the result reached by the majority and in the analysis it applied to reach that result. I write separately to add that Pendergrass raises no challenge to C.P.'s testimony. Therefore, even if the exhibits at issue had been admitted erroneously, I believe that the error would have been harmless because C.P.'s testimony that Pendergrass molested her would, on its own, have been sufficient to support Pendergrass's conviction.

APPENDIX C

IN THE ST. JOSEPH SUPERIOR COURT
SOUTH BEND, INDIANA

STATE OF INDIANA,	)	
	)	
Plaintiff	)	
	)	
v.	)	CAUSE NO. 71D03-0607-FA-0034
	)	
RICHARD PENDERGRASS,	)	
	)	
Defendant	)	

TRANSCRIPT OF PROCEEDINGS

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* * * *

[*130]

STATE'S WITNESS—LISA BLACK (DIRECT)

* * * *

Q. (By Ms. Hurley) Ms. Black, I'm going to show you what's been marked as State's Exhibit 1 for identification purposes. Can you identify that document, please?

A. Yes. This is the Certificate of Analysis that was prepared by Daun Powers on her results.

[*131]

Q. Okay. And was that — you said that you were the supervisor involved in this case; is that correct?

A. That is correct.

Q. And is that document prepared at or near the time Daun is conducting the analysis?

A. Yes, it was.

Q. And reviewed then by you as the supervisor?

A. Yes. And that's indicated down at the bottom. It says reviewed by and it has my number 4774 which is my public employee number which indicates that I did review it.

Q. Okay. And is this —

THE COURT: Is that a way to identify you?

THE WITNESS: Yes.

THE COURT: Okay. What's the thing called?

THE WITNESS: Public employee.

THE COURT: No, no, not that, this sheet.
THE WITNESS: Certificate of Analysis.

Q. (By Ms. Hurley) And is that document made or kept in the ordinary course of lab business?

A. I'm sorry?

Q. I'm sorry. Is that document made or kept in the ordinary course of the lab's business?

A. Yes. **[*132]**

MS. HURLEY: Okay. Your Honor, I'd offer into evidence State's Exhibit 1.

MR. LUBER: I have a question on voir dire if I might?

THE COURT: Sure.

MS. LUBER: Ms. Black, the agency that you are employed for in this laboratory is a branch of the Indiana State Police; is that correct?

THE WITNESS: That is correct.

MR. LUBER: We have an objection

THE COURT: Okay. We have to come over here.

(The following side bar conference was held out of the hearing of the jury.)

MS. HURLEY: I didn't even hear the question.

THE COURT: He said the agency — or the agency that you are employed by is a branch of the Indiana State Police. I think that's what he said. Is that what you said?

MR. LUBER: Yes. We have an objection to the introduction of this document because it's hearsay.

THE COURT: And that's why? Why is it **[*133]** hearsay?

MR. LUBER: It's being offered for the truth of the contents of it, and it's hearsay. My client has had no opportunity to cross-examine the document.

THE COURT: Well, I thought she was going for the business exemption.

MR. LUBER: Well, I would say it might be a business exception except following within this exception investigative reports by police and other law enforcement personnel except when offered by an accused. It's the Indiana State Police Laboratory.

THE COURT: I don't think it's an investigative report. It's a lab report.

MS. HURLEY: And in the case of *Fowler v. Napier*, which I have, from I believe 1996, the Court ruled that DNA reports are business records. In a paternity case it should be no different —

MR. LUBER: A paternity case is not a criminal case in which *Crawford* has said in Indiana cases has said since the defendant has this right to confront the accuser. And we have no way of cross-examination.

[*134]

THE COURT: Let me see *Fowler*. Let me see it. It's *Fowler*, F-o-w-l-e-r, v. N-a-p-i-e-r. And the cite for that is 663 N.E. 2d 1197, Court of Appeals from 1996.
And do you have *Crawford*?

MR. LUBER: Yes.

THE COURT: What does *Crawford* say?

MR. LUBER: Well, *Crawford* is the Supreme Court case that basically said that the right of confrontation does stand. It actually overruled *Ohio v. Roberts* which basically said records and other kinds of things can come in because it —

MS. HURLEY: I believe, Your Honor —

THE COURT: Time out. We're talking about investigative reports. Was it a DNA case?

MR. LUBER: It was not DNA. It was reports taken from a witness who —

THE COURT: Got you. Got you. I understand. I still would like *Crawford*. But this is a question of

a lab test by the Indiana State Police, and I don't understand *Crawford* to have said you can never again have Indiana State Police DNA evidence.

MR. LUBER: It doesn't say that and they **[*135]** can do it if they have the person who did the test came in and was subject to cross-examination. We have no way of challenging that report.

THE COURT: You may have a marvelous appellate—if they come in against you, you may have a marvelous appellate argument. I don't think so because I think the DNA testing under the Indiana State Police doesn't bring—even though it is a criminal investigation it does not mean—I do not understand *Crawford* to mean that the person that did the lab report now has to come in.

MR. LUBER: The only case that I'm aware of recently—and unfortunately I didn't bring the citation—was an Oregon case that I think allowed the kind of stuff, and in its procedure said the DNA reports come in and that the defendant can force them to produce the thing so they can cross-examine. And they said that was too much of a burden upon the defendant, that simply that record was not going to come in here, and it's not the kind of thing that comes in—

THE COURT: You mean Oregon kept it out?

[*136]

MR. LUBER: Oregon said no, we can't do that. It doesn't meet the standards of *Crawford v. Washington*—

THE COURT: So Oregon keep [sic] it out?

MR. LUBER: Yes.

THE COURT: You may bring it into Indiana to keep it out in Indiana, but Oregon doesn't control Indiana. I'm going to let it in. I agree it's an issue, but my ruling is that the business exception has been met. I understand you to be saying that it still isn't enough to get it in because of confrontation.

MR. LUBER: Right. I made the same argument before Judge Chamblee in another case, and he ruled against me. It was all set up to go, but the guy got found not guilty so—

THE COURT: So there you go. Well, you may have it anyway. But you made the same argument. He made the same ruling. If the business exception comes in, it's in. And it's not the confrontation question I gather.

MR. LUBER: Yes.

THE COURT: Got it. That's what I'm doing, too. Whatever he said I say. Although it's hearsay if he says it.

[*137]

MR. LUBER: The business record might do it in the regular commercial business but this is—but they are doing tests and things. It is no different than if the local police department did a fingerprint analysis and the local police department did a gun residue test or any of these other kind [sic] of stuff. That's part of their investigation of the crime.

The Indiana State Police is simply a branch of law enforcement who is carrying it out. They dress it up with laboratory, but they are an investigative arm of the State.

THE COURT: You may get a ruling that completely cuts all investigative procedures for fingerprints, DNA, and everything else—

MR. LUBER: Because in those situations the examiner is the one who comes in and testifies not the paper.

THE COURT: Well, she's riding on being right. We'll see.

(Side bar concluded.)

THE COURT: There was an objection. We've had our discussion about the objection. For the reasons I have stated at our little side bar, I am overruling the objection.

[*138]

So you move to admit State's Exhibit 1. I am admitting it over objection, and that's a continuing objection through the discussion of the exhibit.

Q (By Ms. Hurley) Lisa, can you describe how—when you received in this case the fetus, how would you prepare a DNA profile from such evidence?

A. In a case of product of conception in this case, you will get actual tissue parts of the fetus. In this case Ms. Powers described it as it appeared to be like an arm from the fetus. She takes a tissue sample from that and then proceeds as I described. She takes a portion of it into a tube and extracts the DNA and proceeds.

Q. And you received a blood sample from Richard Pendergrass. How is the profile developed with a blood sample?

* * * *

APPENDIX D

[1]

CERTIFICATE OF ANALYSIS
Indiana State Police

State Police Laboratory
1550 East 181st Avenue
Lowell, IN 46356

Telephone: (219) 696-1835

EVIDENCE
RELEASED TO:
Printed Name:
Billy D. [illegible]
Signature: /s/
Date: 6-23-06
10:55 AM

June 2, 2006

TO: KRIS G. HINTON
FAMILY VIOLENCE AND
SPECIAL VICTIMS UNIT
912 EAST LASALLE AVE
SUITE 200
SOUTH BEND IN 46617

STATE'S
EXHIBIT
1

Lab File #: 06L-827

Agency Case #: 03-3001

Evidence Submitted By: Inv. Kris G. Hinton

Received by Laboratory 05/12/06 at 09:00

Item 1 Indiana State Police Evidence Collection Kit containing blood sample taken from suspect Richard A. Pendergrass sealed and marked SM 198.

Item 1A1 Sealed manila envelope containing a stain card prepared from the purple top tube of

	whole blood from Richard A. Pendergrass contained in item 1.
Item 2	Aborted fetus specimen taken from the victim Cassie R. Pendergrass sealed in a specimen bottle and marked KGH #2043, sealed in a manila evidence envelope.
Item 2A	Sealed manila envelope containing a sample of the fetal tissue contained in item 2.
Item 3	Buccal swab taken from the victim Cassie R. Pendergrass sealed in an evidence envelope marked KGH #2043.
Item 3A	Sealed manila envelope containing the buccal swab from Cassie R. Pendergrass retained from item 3.

RESULTS:

In the DNA analysis detailed below, the following loci were analyzed using Polymerase Chain Reaction (PCR): FGA, TPOX, D8S1179, vWA, Penta E, D18S51, D21S11, TH01, D3S1358, Penta D, CSF1PO, D16S539, D7S820, D13S317, D5S818 and Amelogenin.

A stain card (item 1A1) was prepared from the whole blood standard of Richard A. Pendergrass contained in item 1.

DNA profiles were determined for Richard A. Pendergrass (item 1A1), Cassie R. Pendergrass (item 3A, retained from item 30, and the fetal tissue (item 2A, retained from item 2). This information was forwarded to Dr. Michael Conneally of the Indiana University Medical Center for paternity analysis.

Lab File # 06L-827

[handwritten:] DP
Reviewed by 4774

[2]

All subitems created from originally submitted items will be retained by the Indiana State Police Laboratory for the possibility of future analysis.

/s/
Daun C. Powers
[handwritten:]#6497, 6/18/06
Forensic Biologist

DCP
Lab File # 06L-827

Reviewed by 4774

APPENDIX E

06L _7
Profiles for Paternity Analysis

	Item #	FGA	TPOX	DB	Vwa	Penta E	D18	D21	TH01	D3	Penta D	CSF	D16	D7	D13	D5	Amelogenin
Richard A. Pendergrass	1A1	20,21	8,8	11,13	16,16	11,12	15,16	29,30	6,6	17,18	11,13	10,12	9,10	11,11	9,11	12,12	XY [initials: LB]
Fetus	2A	21,25	8,8	11,13	16,17	12,12	16,16	27,30	6,8	17,18	11,12	10,10	10,10	11,12	11,12	12,13	XY [initials: LB]
Cassie R. Pendergrass	3A	21,25	8,11	13,13	16,17	12,14	16,16	27,30	6,8	15,17	11,12	10,10	10,12	11,12	9,12	12,13	XX [initials: LB]

Indiana State Police Laboratory

STATE'S EXHIBIT

2

D. Powers #6497
[handwritten:] DP6497