MATTER INVOLVED

On February 28, 2008, this Court sought supplemental briefing on the admissibility of the foundational documents set forth at pages 244-45 of Judge King's initial Findings and Conclusions, which were filed on February 13, 2007, with arguments to be made in the context of *Crawford v. Washington*, 541 *U.S.* 36, 124 *S.Ct.* 1354, 158 *L.Ed.2d* 177 (2004).

In this consolidated letter brief, we urge the Court to hold that all of these documents were created by the State Police and the manufacturer for the purpose of litigation, address facts of elemental concern in *per se* prosecutions, and, as such, are testimonial in nature, rendering the documents, alone, inadmissible without testimony from the declarant of each document.

APPLICABLE LEGAL PRINCIPLES

I.

WHEN HEARSAY DECLARATIONS ARE TESTIMONIAL AND PREPARED SOLELY FOR THE PURPOSE OF PROSECUTION, THE CONFRONTATION CLAUSE REQUIRES THE DECLARANT TO TESTIFY, REGARDLESS OF THE RELIABILITY OF THE INFORMATION CONTAINED IN THE HEARSAY

The phrase "trial by machine" was mentioned throughout the proceedings in this matter. If the Court wishes to determine whether foundational documents require confrontation under the State and Federal Constitutions, despite all of the flaws and issues previously set forth in prior Defense Briefs regarding a machine that is software-driven and demonstrably prone to error, it is axiomatic that defendants must have the ability to cross

examine the humans whose written declarations will be used to prove the machine's operability and to obtain convictions in these cases.

"One of the fundamental guaranties of life and liberty is found in the sixth amendment of the constitution of the United States." *Kirby v. U.S.*, 174 *U.S.* 47, 55, 19 *S.Ct.* 574, 43 *L.Ed.* 890 (1899).

"In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." *U.S. Const. Amend.VI; see also N.J.Const., Art 1, Par.10.*

"[C]ross-examination is the principal means by which the...truth [is] tested," *Davis v. Alaska*, 415 *U.S.* 308, 316, 94 *S.Ct.* 1105, 39 *L.Ed.2d* 347 (1974), and "is fundamental and essential to a fair trial in a criminal prosecution." *Pointer v. Texas*, 380 *U.S.* 400, 403-04, 85 *S.Ct.* 1065, 13 *L.Ed.2d* 923 (1965). In fact:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.

Id. at 405.

A defendant in a DWI prosecution is entitled to vigorously cross examine all aspects of the breath machine. *California v. Trombetta*, 467 *U.S.* 479, 490, 104 *S.Ct.* 2528, 81 *L.Ed.2d* 413 (1984). "[A]s to operator error, the defendant retains the right

to cross-examine the law enforcement officer who administered the Intoxilyzer test, and to attempt to raise doubts in the mind of the fact-finder whether the test was properly administered." *Id.*

"Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." *Id.* at 485. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 *U.S.* 683, 690, 106 *S.Ct.* 2142, 90 *L.Ed.2d* 636 (1986) (citations omitted) (quoting *Trombetta*, 467 *U.S.* at 485).

"[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, [evidentiary rules] may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 *U.S.* 284, 302, 93 *S.Ct.* 1038, 35 *L.Ed.2d* 297 (1973). "[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Holmes v. South Carolina*, 547 *U.S.* 319, 331, 126 *S.Ct.* 1727, 1735, 164 *L.Ed.2d* 503 (2006).

The U.S. Supreme Court's recent decision in *Crawford*, 541 *U.S.* at 36, reexamined the application of the Confrontation Clause in criminal prosecutions, reversed the erosion of Confrontation Clause rights exemplified by the Court's decision in *Ohio v. Roberts*, 448 *U.S.* 56, 100 *S.Ct.* 2531, 65 *L.Ed.2d* 597

(1980) (unavailable declarant's hearsay statement admissible if it bears adequate indicia of reliability, where the evidence falls within a firmly rooted hearsay exception, or based on a showing of particularized guarantees of trustworthiness), and re-established the fundamental importance of testing evidence by cross examination.

Crawford holds that out-of-court statements by witnesses that are testimonial in nature are barred, under the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed generally reliable by the court, abrogating *Ohio v. Roberts*. "[T]his bedrock procedural guarantee applies to both federal and state prosecutions." *Crawford*, 541 *U.S.* at 42, *citing Pointer*.

The term "witness" refers to all those who "bear testimony." *Id.* at 51. "'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* (*citations omitted*). It applies both to "in-court testimony" and "out-of-court statements introduced at trial." *Id.* at 50-51. "The constitutional text...reflects an especially acute concern with a specific type of out-of-court statement." *Id.* at 51. "[T]his core class of 'testimonial' statements" includes:

> 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...extrajudicial

> statements … contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions...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.... (Emphasis added and citations omitted).

Id. at 51-52.

"To be testimonial, [a] communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 *U.S.* 177, 189, 124 *S.Ct.* 2451, 159 *L.Ed.2d* 292 (2004) (*quoting Doe v. United States*, 487 *U.S.* 201, 210, 108 *S.Ct.* 2341, 101 *L.Ed.2d* 184 (1988)).

Davis v. Washington, 547 *U.S.* 813, 126 *S.Ct.* 2266, 2273-4, 165 *L.Ed.2d* 224 (2006) defined testimonial statements:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The final test is whether the "evidentiary products" of the communication are of the same character as their "courtroom analogues" so that they "substitute for live testimony." *Id.* at 2277-8. When out of court statements "do precisely what a witness does on direct examination...they are inherently testimonial." *Id.* at 2278.

Each of these out-of-court "testimonial statements" are subject to the accused's right to confrontation. *Crawford*, 541

U.S. at 68-69. This requires that they be subject to "testing in the crucible of cross-examination." *Id.* at 61. Accordingly, the Sixth Amendment places an absolute prohibition against the introduction of out-of-court "testimonial statements" made by any witness unless: (1) the witness is unavailable; and (2) the defendant had a prior opportunity to cross-examine the witness. *Id.* at 68. Further, "a witness is not 'unavailable'...unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Barber v. Page*, 390 *U.S.* 719, 724-25, 88 *S.Ct.* 1318, 20 *L.Ed.2d* 255 (1968).

That such "testimonial statements" may have been produced by a "neutral" government official does nothing to remove them from these constitutional constraints. *Crawford,* 541 *U.S.* at 66. To the contrary, "[I]nvolvement 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...." *Id.* at 56, n.7. Such circumstances "implicate the core concerns of the old *ex parte* affidavit practice." *Lilly v. Virginia*, 527 *U.S.* 116, 137, 119 *S.Ct.* 1887, 144 *L.Ed.2d* 117 (1999). When such a statement is admitted, where the defendant has no opportunity to cross-examine the maker, a clear violation of the Sixth Amendment has occurred. *Crawford*, 541 *U.S.* at 68-69.

These principles strictly limit judicial discretion. *Id.* at 67-68. "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection

to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" *Id.* at 61. "Admitting [such] statements [on the basis that they have been] deemed reliable by a judge is fundamentally at odds with the right of confrontation." *Id.* Further, the very wisdom underlying the various exceptions which have been crafted to the hearsay rule is undermined in such cases. *Id.* at 56, n.7. As a result, all such exceptions are completely superseded by the right to confrontation where out-of-court testimonial statements are involved. *Id.* at 68.

"[T]he Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited" not "by 'neutral' government officers". *Crawford,* 541 *U.S.* at 66. They were keenly aware of the hazards presented by such practices, hazards that do "not evaporate when testimony happens to fall within some broad, modern hearsay exception." *Id.* at 56, n.7.

The rule we are left with is clear and unequivocal: "Where testimonial evidence is at issue...the Sixth Amendment demands...unavailability and a prior opportunity for cross-examination" before such out-of-court statements may be introduced. *Id.*

This Court recognized this issue in *State v. Simbara*, 175 *N.J.* 37 (2002), where it stated:

> A laboratory certificate in a drug case is not of the same ilk as other business records, such as an ordinary account ledger or office memorandum in a corporate-fraud case. Those latter documents have not been prepared specifically

> for the government's use in a potential criminal prosecution. In contrast, the analyst prepares the laboratory certificate at a prosecuting agency's request for the sole purpose of investigating an accused. Because the certificate is singularly important in determining whether the accused will be imprisoned or set free, we must be sensitive to Sixth Amendment interests whenever a defendant preserves those interests for trial.

A laboratory certificate certifying simulator solution ultimately certifies operability of the Alcotest. The State and Draeger rely heavily on the before and after control tests, claiming this to be the bedrock of the Alcotest's reliability. Notwithstanding the algorithm manipulation performed on readings produced by the drifting fuel cell, as confessed by Draeger's engineer, Brian Shaffer, this reliability of the control tests is predicated on the assay of the simulator solution being accurate. To preclude confrontation on this certifying document would prevent examination of one of the most fundamental documents in an Alcotest prosecution.

In *State v. Berezansky*, 386 *N.J.Super.* 84 (App.Div. 2006), *cert.gr.* 191 *N.J.* 317 (2007), relying on *Crawford*, the Appellate Division held that the blood testing toxicology certificate could not be admitted in evidence unless the technician who prepared it testified. The defendant's right of confrontation was violated by the admission of the laboratory certificate, which clearly was hearsay and testimonial.

In *State v. Renshaw*, 390 *N.J.Super.* 456 (App Div. 2007), the Appellate Division recently considered whether a nurse's testimony was required as to how blood was drawn and initially

stored, notwithstanding legislative allowance of affidavit based "proof" of a medically acceptable blood draw. The court stated:

> For purposes of confrontation clause analysis, relying on *Davis*, we held in *Buda*, in the context of a statement given to a DYFS worker, that the statement was testimonial because the ongoing police emergency had ended and the primary purpose of the statement was to establish or prove past events potentially relevant to later criminal prosecution. *Buda*, 389 *N.J.Super.* 241, 912 *A.2d* 735 (slip op. at 12). Here, we have no difficulty in finding the certification to be testimonial. If a statement of a child about his injuries is deemed testimonial when the immediate emergency has passed, then certainly a certification prepared for purposes of trial, and indeed only for purposes of trial, can be nothing other than testimonial.
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> ...
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> In the instant case, the preparation of the Uniform Certification for Bodily Specimens Taken in a Medically Acceptable Manner could not qualify for admission under the business record exception to the hearsay rule, *N.J.R.E.* 803(c)(6), because it was not prepared in the ordinary course of business. Instead, the certification was prepared solely to be used "in any proceeding as evidence of the statements contained" within such record. *N.J.S.A.* 2A:62A-11. As we observed in *Berezansky*, *supra*, the business records exception will not apply if the document was prepared specifically for the purposes of litigation. 386 *N.J.Super.* at 94, 899 A.2d 306.
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> Having found that the certification is testimonial in nature, and in light of our conclusions about what *Berezansky* and *Simbara* require, we see no principled basis to afford a defendant challenging the admissibility of a certification concerning the procedures used to draw his blood any fewer rights than a defendant challenging a technician's report on blood alcohol content or a report on the presence of a controlled dangerous substance. *N.J.S.A.* 2A:62A-11, the statute at issue here, is thus free of any constitutional difficulties only in those circumstances when a defendant consents to the admission of the nurse's certificate and agrees to waive the opportunity for cross-examination; however, when an objection is raised, the existence of the statute is not a justification for the State's failure to produce the witness. *Ibid.*

Renshaw, 390 *N.J.Super.* at 466-67 (emphasis added).

In *State v. Kent*, 391 *N.J.Super.* 352 (App.Div. 2007), the Appellate Division again held that a State Police laboratory report and related worksheets were testimonial in nature under *Crawford*, and the blood test certificate prepared by a hospital employee who had extracted blood from the defendant at a police officer's request was also testimonial in nature.

The foundational documents, no less, are certifications or statements prepared solely for the purpose of litigation to prove the truth of the matters asserted in the documents. They are not business records. They have no purpose other than to support the Alcotest and the proposition that it was properly operating on the date of the defendant's breath test.

The defense has already noted that, because of *Crawford*, New Jersey Courts have been establishing a body of case law on Confrontation Clause issues.[1]

Across the country, it has been held that breath testing affidavits are testimonial under *Crawford*[2], lab reports are testimonial[3], as are documents proving an underlying offense[4].

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[1] *See* Defendants' Initial Brief After Remand re Source Code submitted December 10, 2007, at pp. 56-57, n. 315. *See also State v. Branch*, 182 *N.J.* 338 (2005) (reversing conviction because detective testified to hearsay -- specifically, that he developed Branch as a suspect "based on the information received" and included Branch's picture in a photographic array shown to witnesses).

[2] *See Belvin v. State*, 922 *So.2d* 1046, 1054 (Fla.App., 4 Dist., 2006) (parts of breath test affidavit re breath test technician's procedures and observations in administering breath test are testimonial evidence, and their admission at DUI trial violated right of confrontation); *Shiver v. State*, 900 *So.2d* 615, 618

(Fla.App., 1 Dist., 2005) (parts of the breath test affidavit re instrument maintenance was testimonial because, *inter alia*, the only reason the affidavit was prepared was for admission at trial.)

[3] See *Diaz v. U.S.*, 223 *U.S.* 442, 450-51, 32 *S.Ct.* 250, 56 *L.Ed.* 500 (1912) (admitting autopsy report violated confrontation clause); *State v. Crager*, 164 *Ohio App.3d* 816, 844 *N.E.2d* 390 (Ohio App., 3 Dist., 2005) (DNA report inadmissible without analyst's testimony); *State v. Smith*, 2006 *WL* 846342 (Ohio App., 3 Dist., 2006) (CDS laboratory report was testimonial); *Sobota v. State*, 933 *So.2d* 1277, 1278, (Fla.App., 2 Dist., 2006) (blood test results were testimonial); *Johnson v. State,* 2005 *WL* 3556038, 2-4 (Fla.App., 2 Dist., 2005) (lab report prepared and admitted to establish an element of a crime is testimonial hearsay); *People v. Lonsby,* 268 *Mich.App.* 375, 707 *N.W.2d* 610 (2005) (testimony by serologist re lab report and notes of non-testifying crime lab serologist prohibited); *Las Vegas v. Walsh,* 124 *P.3d* 203 (Nev. 2005) (en banc) (nurse's affidavit re blood blood draw was testimonial); *Johnson v. State*, 929 *So.2d* 4, 7 (Fla.App., 2 Dist., 2005) (lab report is testimonial even if admissible as a business record); *People v. Rogers*, 8 *A.D.3d* 888, 891-92, 780 *N.Y.S.2d* 393, 396-97 (N.Y.A.D., 3 Dept.,2004) (blood test report re BAC was testimonial); *State v. Clark*, 964 *P.2d* 766, 771-72 (Mont. 1998) (evidence rule permitting introduction of state crime lab reports violates right to confront witnesses); *Crisp v. Hatley*, 796 *So.2d.* 233 (Miss. 2001) (admission of non-testifying analyst certificate re identification of substance violated defendant's constitutional right to confront witnesses); *Barnette v. State*, 481 *So.2d* 788, 791 (Miss. 1985) (same); *State v. Caulfield*, 722 *N.W.2d* 304 (Minn. 2006) (lab report concluding that substance found on defendant was cocaine was testimonial and statute requiring defendant to request that analyst testify in person violated the Confrontation Clause); *People v. McClanahan*,191 *Ill.2d* 127, 729 *N.E.2d* 470 (2000) (same); *State v. Williams*, 253 *Wis. 2d* 99, 644 *N.W.2d* 919 (2002) (crime lab reports and the like may not be admitted under business or public records exceptions to hearsay rules because they are reports generated in contemplation of prosecution).

[4] *See People v. Pacer,* 6 *N.Y.3d* 504, 847 *N.E.2d* 1149, 814 *N.Y.S.2d* 575 (N.Y. 2006) (confrontation right violated in prosecution for unlicensed motor vehicle operation by receipt in evidence of "affidavit of regularity/proof of mailing," sworn to by state motor vehicle department employee, and affidavit was not a business record since it was prepared specifically for prosecution); *People v. Niene*, 8 *Misc.3d* 649, 651, 798 *N.Y.S.2d* 891, 893 (N.Y.C.Crim.Ct. 2005) (Dept. of Consumer Affairs official's affidavit that her review of the Department's records disclosed that defendant did not have a general vendor's license

In light of *Crawford*, *State v. Dorman*, 393 *N.J.Super.* 28 (App.Div. 2006), *cert. gr.* 192 *N.J.* 475 (2007), discussing Breathalyzer certificates, was wrongly decided.

Because a breath test result is essentially an element of a *per se* case, the State must offer, *inter alia*, full proof that a Breathalyzer be in proper working order. *See Romano v. Kimmelman*, 96 *N.J.* 66, 81, 82 (1984); *State v. Johnson*, 42 *N.J.* 146, 171 (1964). Thus, the operating condition of the breath testing device is elemental as well as foundational and "extremely material." *State v. Ford*, 240 *N.J.Super.* 44, 50 (App.Div. 1990).

While Breathalyzer maintenance has been characterized as a "regular business function..." that business has one purpose: to convict persons charged with DWI. The particular instrument is not used generally in society except for that one purpose. The machine is never sold to any entity but law enforcement -- a policy that distinguishes breath testing equipment from scientific instruments like the gas chromatograph or mass spectroscope, which are sold to whomever wishes to purchase one and is used throughout the forensic, academic, and medical communities. Anyone charged with DWI based on Alcotest results is held hostage by the monopoly maintained by the State and enforced by Draeger. Inspection and maintenance procedures are

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was testimonial, and defendant was entitled to confront and cross-examine declarant); *U.S. v. Wittig*, 2005 *WL* 1227790 (D.Kan. 2005) (certifications made to admit business records under *F.R.E.* 902(11) are testimonial under *Crawford*).

conducted in secret and under the complete direction and supervision of the State. Defendants have no window into the process other than through cross examination.

We are asked to trust the State and Draeger. "The Framers, however, would not have been content to indulge this assumption." *Crawford*, 541 *U.S.* at 67.

The holding in *Dorman* begs a critical underpinning of *Crawford*. "Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." *Crawford*, 541 *U.S.* at 61. "Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts." *Id.* at 63.

The Framers "knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people." *Id.* "They were loath to leave too much discretion in judicial hands." *Id.* Finding such documents "non-testimonial" does violence to the Framer's design. *See id.* at 67-68. The breath test coordinator, of course, *is* a witness. He bears testimony. He makes "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 50-51. That fact is the operability of the Alcotest. Without this fact, there is no result, because a *per se* element -- a properly operating machine -- is missing.

II.

THE STATE'S PRODUCTION OF TESTIMONY SOLELY FOR TRIAL PRESENTS UNIQUE POTENTIAL FOR PROSECUTORIAL ABUSE – A FACT BORNE OUT TIME AND AGAIN[5]

The State is not only prosecuting the individual, it is seeking to admit self-authenticating documents that it and the manufacturer produced in support of the prosecution. The State, through its own documentation, certifies that the machine is in proper working order. Likewise, Draeger as the manufacturer of the machine also submits self-authenticating documents demonstrating that the machine is properly functioning. Draeger's bias is palpable based on its financial interest in the machine. With the Breathalyzer, at least, Guth Laboratories, an entity separate from the State, certified the ampoules.

Dr. Brettell's certification, drafted by him at the beginning of the *Chun* litigation, is a prime example of why confrontation on the State's documentation is required. Brettell certified that firmware version 3.11 had substantive changes from version 3.8 to comply with *State v. Foley*, 370 *N.J.Super.* 341 (Law Div. 2004). *See* Exh. D-123. Through cross-examination, we learned that software changes he requested modified the overall program, not only purportedly done to comply with *Foley*, but also expanded the agreement tolerances on the machine from ± 5% to ± 10%, exploiting an error in the *Foley* decision.

[5] ***Id.* at 56, 124 *S.Ct.* at 1367, n.7.**

In *Trombetta*, the accuracy of the Intoxilyzer was reviewed and certified by the California Department of Health, an entity separate from the prosecuting authority, giving it some measure of independent reliability. *Trombetta*, 467 *U.S.* at 489. In Alabama, the Department of Forensic Sciences (DFS) runs the Alcotest program, and is an independent and separate entity from the prosecuting agency. Their certification that a machine is in proper working order means something, as they do accuracy testing of the machines, *i.e.* testing all the systems of the machine.

The State Police run the Alcotest program in New Jersey. The Office of Forensic Sciences, formerly headed by Dr. Brettell, is a division of the State Police. There is no separation between the scientist and the prosecutor to create even the appearance of an independent assessment of Alcotest operability.

The State contends that their Alcotest generated calibrations and linearity checks equal proper operation, and seeks to admit these self-created documents without right of confrontation.

As for documents generated by the machine itself -- *i.e.*, the New Standard Solution Reports (items i and ix on Judge King's list), Calibration Reports (including control and linearity tests) (item vi), and the Alcohol Influence Reports, for that matter -- it can be said: "Without testimony and cross-examination of the coordinator who tested the machine, the certificate becomes the sole proof of the machine's accuracy, and in reality it is often accepted as the 'full proof' required for

conviction. Trial by this machine without proof of its accuracy holds no place in our system of jurisprudence." *State v. Connors*, 125 *N.J.Super.* 500, 507 (Cty.Ct. 1973); *but see State v. McGeary*, 129 *N.J.Super.* 219 (App.Div. 1974).

Likewise, Draeger, the machine's manufacturer, offers various certificates of accuracy for the CU34 simulator, temperature probes, the machine itself, and the Ertco-Hart temperature measuring system -- items iii, iv, v, x, xi, and xii on Judge King's list -- to demonstrate that the machine and its many parts (simulator, temperature probe, etc.) are accurate.

Finally, simulator certificates for the various simulator solutions relevant to (a) control tests done in connection with each individual's breath tests, (b) control and linearity tests done as part of the annual certification process, and (c) new standard solution changes -- items ii, vii, and viii on Judge King's list -- are offered without testimony and without "all graphs depicting the results of the … analysis and graphs of the standard tests performed on the gas chromatograph which relate to the tests of [simulator solution and the notes of forensic chemists on the specific tests and standard tests, if any such notes exist…" *See State v. Weller*, 225 *N.J.Super.* 274, 281-82 (Law Div. 1986).

Confrontation is still required under the *Trombetta* and Alabama situations. It is particularly required in New Jersey, where the State and Draeger are attesting to the operability of their own machine.

III.

FOUNDATIONAL DOCUMENTS LISTED BY THE SPECIAL MASTER WERE PRODUCED BY THE STATE AND DRAEGER SOLELY FOR THE PURPOSE OF PROSECUTION, AND ARE THEREFORE TESTIMONIAL, REQUIRING THE PROTECTIONS OF THE CONFRONTATION CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS

These records, made in anticipation of prosecution, are not business records. Business records were defined by *Palmer v. Hoffman*, 318 *U.S.* 109, 63 *S.Ct.* 477, 87 *L.Ed.* 645 (1943), as commercial records with entries made systematically or as a matter of routine to record events or occurrences to reflect transactions with others or to provide internal controls. Business records are records that reflect day to day operation of the business, and are not testimonial since they are not prepared with litigation in mind. In *Palmer*, an accident report was held not to be a business record, because it was prepared in anticipation of litigation. *Crawford* intends that business records are still admissible when the primary reason for their creation is not prosecution-oriented -- *e.g.*, bank records are created for banking purposes. Their use at trial is secondary to their primary use, and are likely acceptable under *Crawford*.

The statements made in Judge King's "foundational documents" are clearly intended to be used in a quasi-criminal prosecution to prove that the machine is calibrated and in proper working order. The Confrontation Clause is directed at those who make solemn declarations or affirmations of facts to government

officers for the purpose of establishing or proving facts in issue in the case being prosecuted. These documents contain statements only useful prosecutorially, and are made under circumstances which would lead an objective witness to reasonably believe the statements would be available for trial.

These documents are prepared solely for admission at trial. They are crucial to the State's case against an individual, because the admissibility of the breath testing results depend on the machine being in proper working order. There is no other way for the State to prove whether the machine was maintained and in proper working order, but to have these documents admitted at the time of trial or to have a witness testify to the substance of the documents. This requires confrontation of the proponent.

The documents at issue are solemn declarations or affirmations of fact for the purpose of establishing or proving a fact in issue in this quasi-criminal prosecution. The fact in issue is operation of the machine: whether it was set up and configured properly. Each document certifies to the operability of the machine and testing in some way, thus seeking to remove doubt as to the accuracy of the final result used to convict. The documents thus constitute testimonial evidence.

This is the precise scenario the U.S. Supreme Court used to exemplify a Confrontation Clause violation, discussing Sir Walter Raleigh's trial for treason, wherein an alleged co-conspirator's affidavit was read in court as evidence against Raleigh. Raleigh

contested the allegations and demanded an opportunity to confront the attestor, face-to-face. This was denied.

"Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." *Crawford*, 541 *U.S.* at 51. Allowing the foundational documents into evidence without confrontation, subverts the most basic of constitutional rights and would astound the Framers.

These foundational documents were (a) created by the prosecuting authority or the manufacturer, (b) for the sole purpose of establishing operability of the machine, (c) to prove facts leading to a conviction of a *per se* offense of DWI. When used in an official proceeding to prove, support, establish or evidence some proposition, these documents are proffered to be the equivalent of affidavits, even though unsworn. The documents testify to (1) the accuracy of the evidence, establishing the breath alcohol level, which constitutes an element of the *per se* offense, and (2) the qualifications of the individual making that determination. In this context, they also testify to their own credibility, both in the methods used to create them and their substantive contents.

Subjecting these facts to the fundamental principles enunciated in *Crawford*, the foundational documents are clearly testimonial in nature. These documents are neither affidavits nor certifications. They are assertions of fact without support. They were "produced with an eye toward trial...under

circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at trial." *Id.* at 51-52. They are submitted as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact," *i.e.* the machine was in proper working order on the date in question and that the individual's breath test result was accurate (and hence over the legal limit).

In every way, the documents offered by the State satisfy *Crawford's* definition of "testimonial statements."

Further, these documents are written assertions made out of court and offered at trial to prove the truth of the matter asserted. This characterization is firmly in line with the definition of testimony utilized by the *Crawford* court as an "affirmation made for the purpose of establishing or proving some fact." *Id.* at 51. As such, before it can be admitted, the State is required to establish that the witness who created the document was both unavailable and that the defendant had a prior opportunity to cross-examine the author of the document. If the State fails to meet these requirements, the documents are inadmissible under the Sixth Amendment.

The rule enunciated by the Court in *Crawford* is clear, strict and unambiguous. "Where testimonial statements are at issue, the only indicia of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69. Where out-of-court testimonial "evidence is at issue the Sixth Amendment demands

unavailability and a prior opportunity for cross-examination" before it may be introduced. *Id.* at 68-69. The conditions are "necessary" and "dispositive" in determining admissibility of "testimonial statements." *Id.* at 55-56. As neither condition is satisfied, the foundational documents cannot, alone, be admitted.

Based on *Berezansky*, *Kent*, and *Renshaw*, lab reports and certifications are inadmissible under *Crawford*, as an individual whose blood or urine was tested has the right to confront the persons who collected and tested the sample, to determine the methodology of the collection and testing. In a drug based DWI prosecution, the Drug Recognition Evaluator ["DRE"] undoubtedly would have to testify to his or her opinion, rather than offer the DRE officer's written report alone into evidence. Alcotest prosecutions must carry no less protection for confrontation.

The foundational documents make an Alcotest case a paper prosecution. Rights of confrontation must be the same or similar in all prosecutions, whether a DWI or any other criminal or quasi-criminal matter. Certainly, there must be confrontational parity in prosecutions under the same DWI statute, regardless whether the sample is breath, blood or urine. If the people who have contact with the blood sample, for instance, are required to come to court under *Renshaw* and *Kent*, there must be no less protection afforded a defendant in a breath testing case. All individuals who affect the breath testing result, and whose opinions appear in writing in the foundational documents, must be subject to confrontation by the accused. Someone taken to a

police station for a breath test should receive no less Constitutional protection than someone taken to a hospital for a blood test. They are charged under the same DWI statute.

Classifying the foundational documents as non-testimonial would make prosecuting a breath testing case easier, but it would also be intellectually dishonest, and would violate the New Jersey and United States Constitutions.

Alcotest prosecutions are based on a software-driven machine. If the machine issues a result above the *per se* limit, even with the safeguards set forth by Judge King in his initial report, there can be no assurance that the machine is reporting accurate information, based on the information set forth in the remand hearing. There is no way to confront this machine and the flaws in its software. Without the ability to confront the humans, whose written statements attest to how they have set up the machine, the breath test reading printed out by the machine will be accepted with no ability to challenge the process undertaken to achieve the result, i.e. true trial by machine.

CONCLUSION

The foundational documents have no primary purpose other than prosecution of DWI and are therefore inadmissible.

Respectfully submitted,

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