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State of New York  
**Court of Appeals**

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The People of the State of New York,

-against-

Stephen M. Pacer

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**Brief of the  
New York State Association of Criminal Defense Lawyers and  
National Association of Criminal Defense Lawyers, *Amici Curiae***

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## PRELIMINARY STATEMENT

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ( “NACDL”) and the New York State Association of Criminal Defense Lawyers ( “NYSACDL”) in support of the respondent’s brief in *People v. Stephen M. Pacer, Respondent*.

The NACDL is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates. The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL’s objectives are to ensure the proper administration of justice and to ensure that criminal statutes and caselaw are construed and applied in accordance with the United States Constitution. One of its particular concerns is ensuring that individuals not be subjected to punishment through unconstitutional evidence.

The NYSACDL is a non-profit membership organization of more than 800 attorneys who practice criminal defense law in the State of New York. Founded in 1986, its purpose is to assist, educate and provide support to the criminal defense bar to enable its members to better serve the interest of their clients and to enhance

their professional standing. NYSACDL therefore has an interest in ensuring that its members' clients are not subject to punishment through unconstitutional evidence.

Accordingly, the NACDL and NYSACDL urge this Court to adopt the respondent's argument that the official affidavit of mailing prepared specifically and solely for the prosecution of the charges in this case was admitted in violation of the United States Constitution, Sixth Amendment, Confrontation Clause, as recently construed by the Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004).

## POINT

### **THE *CRAWFORD* DECISION SQUARELY BARS OFFICIAL AFFIDAVITS PREPARED SPECIFICALLY AND SOLELY FOR A GIVEN PROSECUTION**

The issue before the Court is whether the Confrontation Clause of the Bill of Rights, as recently interpreted in *Crawford v. Washington*, 541 U.S. 36 (2004), bars admission against a criminal defendant of a government affidavit, offered for the truth of the matter asserted, prepared solely to enable the prosecution to prove an element of the crime, when the defendant has not had an opportunity to cross-examine the affiant, who was not shown to be unavailable and did not appear. The People claim that affirmance of the court below will cause great inconvenience. That is conjectural, but what is known is that enactment of the Confrontation Clause along with the rest of the Bill of Rights decisively settled the balance between individual rights and the convenience of the government, for the Bill of Rights does nothing if not make arrests, prosecutions, and convictions more difficult for government. Further, *Crawford* leaves little doubt that prosecution by the type of affidavit utilized in this case is precisely within the core of the evil the Confrontation Clause was designed to prevent.

## **The Statute Authorizing the Affidavit**

The People create a false dichotomy between affidavits which “recite routine and undisputed factual matters about the operation of an agency,” and police interrogations. (District Attorney’s Brief [“DA”] 42) No doubt the People find it highly congenial to determine what matters ought to be “undisputed” at a trial, but that is not how our system proceeds, and nothing in *Crawford* endorses such government pre-emption of the issues. Doubtless the statutory authorization for admission of the affidavit involved, Vehicle and Traffic Law sec. 214 – which, despite claimed desperate straits, was not even enacted until 1987 – reflected the desire of the Department of Motor Vehicles not to attend court, but the Department’s special pleading for such a law boiled down to nothing more than lobbying for its own convenience. The People’s presentation of the Department as a benign community disinterested in criminal matters belies the experience of untold numbers of New Yorkers whose *only* brush with the criminal law is via the ministrations of that Department. (DA 46)

The Memorandum of the Department cited by the People is not persuasive that the risk of error and burden of testifying should be shifted from the state to the accused. (DA 43) A statute authorizing admission of the affidavit was claimed to be necessary because motorists under suspension drive “with impunity because they

are aware that the inability to convict them of a first violation prevents their being charged with the more serious degree of the offense as second and subsequent offenders.” To credit this assertion one must believe these drivers were aware of evidentiary difficulties in potential cases, and even as they were blithely violating the law they were anticipating the failure not of an initial but of a subsequent prosecution, and that they knew they did not face a conviction of a first violation because they believed, accurately, that a witness from the Department would not appear to testify.

It should also be noted that the statute created “presumptive evidence” that notice of suspension, revocation or order was produced and mailed – even though the United States Supreme Court had held (for the second time) some eight years earlier that it is unconstitutional to have a burden-shifting presumption against a criminal defendant. *Sandstrom v. Montana*, 442 US 510, 524 (1979). The prosecutor here concedes that this presumption, had it been charged to the jury, “would have placed a judicial imprimatur on the inference . . . .” Lest one optimistically believe that an unconstitutional burden-of-proof shifting presumption would not be charged, some lower courts have in fact read the presumption in that manner. *People v. Gabriel*, 164 Misc.2d 473, 476 (NYC Crim. Ct. Queens Co. 1995) (statute gives prosecutor “benefit of a rebuttable presumption”); *People v.*

*Kirksey*, 186 Misc. 2d 514, 516 (Ithaca City Court 2000) (“defendant has failed to rebut the presumption of proper notice created by Vehicle and Traffic Law sec. 214”); *People v. Pabon*, 167 Misc.2d 214, 218 (NYC Crim. Ct. Bronx Co. 1995) (the affidavit under the statute is presumptive evidence”). This Court should not countenance a presumption that violates the Due Process clause and Confrontation Clause at the same time.

The People’s claim that exclusion of this affidavit will cripple the functioning of the Department is not logical. They claim that the Department would have to prepare contemporaneous certificates of mailing for “every one of the million and one-half orders of suspension or revocation issued each year. This task would require the preparation of such certificates in nearly 6000 cases per work day . . . .” (DA 50) Why such certificates would be necessary because of exclusion of an affidavit of mailing procedures is not explained. After all, the affiant could simply testify in court to the facts sworn to in the affidavit. What there is about exclusion of the affidavit that suddenly opens up a contemporaneous certificate requirement is left unsaid, unless the implication is that should the affiant actually testify as per the affidavit the testimony would be unconvincing to a jury and subject to fruitful attack on cross-examination. These are reasons not to admit the affidavit but to exclude it.

## **The Sole Purpose of the Affidavit**

If ever hearsay was manufactured solely to convict, this is that hearsay. The affidavit in question was notarized August 13, 2003, less than a month after the arrest on July 19 (DA 2). The People paint the affidavit in the blandest tones, that here is an affidavit of the agency's "routine operations performed in furtherance of its duties... part of the ordinary functions of the agency," as if common sense teaches that bureaucratic bumbles are naught but urban legends. (DA 44) We are not attacking the fine civil servants of New York – we are simply pointing out that the stakes for the defendant in a criminal case are too high to permit niceties and fairy tales to smother constitutional protections. Any official or agency can be in error. The prosecutor draws strength from cases admitting reports of autopsies; we submit that prospect, given problems with autopsies, should alone warrant drawing the *Crawford* line on the other side of this affidavit. (DA 30-31 See, e.g., *TORT: Medical Examiner: No Liability for Uncorrected Autopsy*, 6 City Law 68 (May/June 2000; Center for New York City Law)

The prosecutor also submits that "the subject in the statements in the section 214 filing has an existence and purpose 'prior to and regardless of' the affidavit itself." (DA 45) If what is meant is that the events in the affidavit occurred prior to

the affidavit, then that is true for all hearsay, and for all testimony, for that matter. If what is intended is that the subject of the affidavit has a purpose apart from the affidavit, that is an absurdity: there is no reason to believe that the Department makes affidavits for itself to tell itself what the alleged mailing customs of the Department are.

The *raison d'être* of this affidavit is for convicting defendants and the affidavit serves no other purpose. An affidavit prepared for litigation could not even be admitted in a civil case. “Material prepared for litigation poses special problems under [Fed. R. Ev. 803(6)] and is typically inadmissible, either as not having been prepared in the regular course of business or as having indications of lack of trustworthiness.” 5 Weinstein’s Federal Evidence, sec. 803.08[6][d] at p. 803–71 (2d ed. 2005) (footnote omitted) “*Crawford* at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant’s awareness or expectation that his or her statements may later be used at a trial.” *United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004). “[T]he focus of *Crawford* is the purpose for which the *ex parte* statement was obtained or given.” *People v. Taulton*, 129 Cal. App. Fourth 1218, 1224 (2005). “A warrant of deportation is recorded routinely and not in preparation for a criminal trial.” *United States v. Cantellano*, 2005 U.S. App. LEXIS 24526 (11 Cir. 2005).

The prosecutor submits that the affidavit in the instant case does “not involve any direct accusations of guilt, or even describe any of the acts surrounding the commission of the crime.” (DA 48) This assertion skirts the mens rea requirement of the crime: “knowing, or having reason to know, that his license or privilege of operating such motor vehicle in this state . . . is suspended, revoked, or otherwise withdrawn by the commissioner . . . .” (Jury Charge, A325) Proof of mens rea, like actus reus, is regulated by the Confrontation Clause, and this affidavit was intended to be proof – sole proof, in fact – of scienter, an element of the crime.

### **The *Crawford* Framework**

*Crawford* teaches that the Confrontation Clause is a “bedrock” procedural guarantee. 541 U.S. at 42. For a time English common law allowed uncross-examinable testimony against a defendant, and for a while “[c]ontroversial examination practices were also used in the Colonies.” *Id.* at 43-50. “[T]he principal evil at which the Confrontation Clause was directed was . . . use of ex parte examinations as evidence against the accused.” *Id.* at 50. “Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon ‘the law of Evidence for the time being.’ 3 Wigmore sec. 1397,

at 101 [5 Wigmore, Evidence sec. 1397 at p. 159 (Chadbourn rev. 1974)]; accord, *Dutton v. Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring in result). 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.” *Id.* at 50-51. “[E]x parte examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them”. *Id.* at 51.

While the Court states that there is an “especially acute concern” with accusers’ formal statements to the government, *id.*, nothing in *Crawford* limits its bar to accusers’ statements. The Court contemplated various possible formulations of the core class of “testimonial” statements, including affidavits. *Id.* One formulation quoted by *Crawford* is “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial”. *Id.* at 52. That formula fits the Motor Vehicle affidavit perfectly.

*Crawford* notes that some hearsay exceptions had been well established by 1791, but “most . . . were not testimonial – for example, business records or statements in furtherance of a conspiracy.” *Id.* at 56. It is vital to see how the Court is using “testimony” or “testimonial”. In the usage of the Court “testimony” does not include

typical business records, but an agency affidavit prepared solely for a prosecution (as in this case) is not within the class of typical business records *Crawford* deems non-testimonial: “Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse . . . . This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.” *Id.* at n.7.

*Crawford* thus discarded the then-current rationale that hearsay can pass the bar of the Confrontation Clause if it fell within a “firmly rooted” exception to the hearsay clause or bore “particularized guarantees of trustworthiness”. The quoted tests were rejected as ahistorical and both too broad and too narrow: “[A current test] admits statements that do consist of *ex parte* testimony upon a mere finding of reliability.” *Id.* At 60. In view of this language dismissing “mere” reliability as sufficient, it is surprising that the People continuously emphasize the alleged reliability of the affidavit in this case. (*DA passim*)

## The People's Authorities

With the People's emphasis on convenience and reliability either rejected or not alluded to in *Crawford*, it remains to weigh the persuasiveness of the cases cited in their brief (we will not discuss all of them, for many are duplicative). *United States v. Cervantes-Flores*, 421 F.3d 825 (9th Cir. 2005), deemed a certification of non-existence of an official record as non-testimonial, begging the question by premising that a certification of the existence of a record would be admissible; it further stated that the certification pertained to a class of documents that existed prior to the litigation. *Id.* at 832. The court's opinion that the certification is outside of the bar of *Crawford* is mostly conclusory. Even more conclusory is *United States v. Rueda-Rivera*, 396 F.3d 678 (5 Cir. 2005), which relied solely on another conclusory, unpublished opinion, *United States v. Gutierrez-Gonzales*, 111 Fed. Appx. 732 (5th Cir. 2004) (per curiam). *State v. N.M.K.*, 118 P.3d 368 (Wash. Ct. App. 2005), simply declared a certification of no drivers license issued to be a business record under *Crawford* and cited *Rueda-Rivera, supra*. *United States v. Weiland*, 420 F.3d 1062 (9th Cir. 2005), admitted: 1) a "penitentiary packet" to prove defendant's criminal record; the packet apparently was not created for that case and 2) the certification of authenticity of the packet by another state's official. Considering that the Full Faith and Credit Clause of the Constitution is designed to ease admissibility of out of state records – and presumably can "trump" the

Confrontation Clause as a specific provision creating an exception to a general one – the decision is not precedent for a wholly domestic prosecution.

*Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005), admitting a lab report into evidence, is extravagant when compared with New York history, which required a statutory amendment to permit such reports even before grand juries. CPL 190.30(2) (Commission Staff Notes: “dispensing with the necessity of summoning and obtaining actual grand jury testimony from chemists”). Opposing *Verde* is *People v. Hernandez*, 7 Misc.3d 568 (Sup. Ct. N.Y. Co. 2005) (fingerprint report barred by *Crawford*). Lab reports are barred in some federal courts by the Federal Rules of Evidence hearsay rule. *United States v. Oates*, 560 F.2d 45 (2d Cir. 1975). Florida post-*Crawford* decisions also bar lab reports. *Johnson v. State*, 2005 Fla. App. LEXIS 14049 (citing similar Florida decisions). The reasoning of *Verde* to the contrary is hardly persuasive: “Certificates of chemical analysis are neither discretionary nor based on opinion.” 827 N.E.2d at 705. The assertion that the conclusions of a chemist are “not based on opinion” is odd.

Also cited by the People are cases that mostly support our position or do not hold against it: *United States v. Bahena-Cardenas*, 411 F.3d 1067, 1075 (9th Cir. 2004) (deportation warrant was not prepared in anticipation of litigation and therefore not barred by *Crawford*); *State v. William*, 110 P.3d 1114 (Ore. App. 2005) (court does not

reach issue because not raised at trial level; plain error rejection, not merits analysis); *Luginbyhl v. Commonwealth*, 618 S.E.2d 347 (Va. App. 2005) (confusing opinion commingling and making codependent hearsay law and Confrontation Clause); *Flores v. State*, 120 P.3d 1170 (Nev. 2005) (passing dictum in footnote); *Napier v. State*, 827 N.E.2d 565 (Ind. App. 2005) (certification of operator and instrument was not prepared for any particular case); *State v. Carter*, 114 P.3d 1011 (Mont. 2005) (distinguishing certification of instrument reports, admissible, from lab report pertaining to particular case, which would have been barred); *State v. Cook*, 2005 Ohio 1550 (Ct. App. 2005) (does not consider *Crawford* as to record of appellant's test, because officer testified; as to records of quality of instrument and qualifications of officer, affidavit laying foundation for business records is not "testimonial", those records not created in an investigatorial or prosecutorial setting, and are "business records"); *People v. Kanhai*, 8 Misc. 3d 447 (NYC Crim. Ct. Queens Co. 2005) (calibration and similar records created prior to arrest).

The People also cite old cases, some apparently not even criminal and thus not subject to the Confrontation Clause, and some prior to the time the Supreme Court ruled the States are bound by the Clause. In all events, *Crawford* has superseded all prior decisions, federal and state.

## **Respondent's Authorities**

For cases supporting our position in addition to those described above, there are *People v. Rogers*, 8 A.D.3d 888 (3d Dept. 2004), holding that a blood test report violated *Crawford*; *People v. Capellan*, 6 Misc.3d 809 (NYC Crim. Ct. Kings Co. 2004), barring an affidavit similar to the instant document; *People v. Niene*, 8 Misc.3d 649 (NYC Crim. Ct. NY Co. 2005) barring affidavit of no license on record; *Shiver v. State*, 900 So.2d 615 (Fla. App. 2005), barring maintenance record of breathalyzer, despite statute specifically authorizing admission; *City of Las Vegas v. Walsh*, 91 P.3d 591 (Nev. 2004), rejecting under *Crawford* a nurse's affidavit describing how she withdrew blood – an affidavit the court assumed was made specifically admissible by a statute.

In sum, examination of the cases shows mostly that affidavits prepared solely for the purpose of prosecution and to prove guilt have not been admitted by the courts since *Crawford*. At the end of the day, what the prosecutor is arguing for is admissibility of hearsay within hearsay: an affidavit that itself is based only “upon information and belief”. (A5, para. 12) The prosecutor sees no need to confront and cross-examine an affiant who does not swear she has direct knowledge based on observation but only that she is “familiar with the procedures”. Yet the affidavit does not furnish any detail how she so became “familiar”, other than possible implications arising from her position as

records manager on at least the day (we are not told how long she held the position) she executed the affidavit. Affiant swore that on “information and belief” the order allegedly mailed to respondent was sent in the

regular course of business. Admission of hearsay claims of “information and belief” does not sound like a ringing endorsement of the Confrontation Clause.

## CONCLUSION

### **THE COURT SHOULD FIND ADMISSION OF THE AFFIDAVIT BARRED BY THE CONFRONTATION CLAUSE**

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