FOR PUBLICATION

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, **Plaintiff,** **vs.** **PETERKIN FLORESCA TABABA,** **Defendant.**	**CRIMINAL CASE NO. 11-0144A** **ORDER DENYING THE COMMONWEALTH'S MOTION TO ADMIT A PATERNITY TEST INTO EVIDENCE AS AN OFFICIAL RECORD**

I. INTRODUCTION

THIS MATTER came before the Court on July 27, 2012 at 9:30 a.m. in Courtroom 202A. Assistant Attorney General, Margo A. Brown, appeared on behalf of the Commonwealth of the Northern Mariana Islands ("the Commonwealth"). Steven P. Pixley, private counsel, appeared on behalf of the defendant, Peterkin Floresca Tababa ("Defendant"). The Commonwealth brought a motion to admit a paternity test into evidence as an official record.[1]

Based on the papers submitted and oral arguments of counsel, the Court hereby **DENIES** the Commonwealth's motion.

II. BACKGROUND

Defendant is charged with three counts of sexual assault of a minor in the first degree, in violation of 6 CMC section 1306(a)(1). Prior to giving birth, the minor victim, R.G.S., stated that the father of her child could either be Defendant or Defendant's father, who were

[1] The Commonwealth also argued a different motion to permit the lab technician who performed the paternity test to testify via video conferencing, which the Court ruled upon in a separate order.

ordered to submit to DNA testing. On April 17, 2010, at the age of thirteen years old, R.G.S. gave birth to a daughter, J.M.S. In March 2011, Affiliated Genetics Lab, Inc. ("Lab"), an accredited lab located in Salt Lake City, Utah, conducted a paternity test using DNA samples collected from Defendant and J.M.S. On April 22, 2012, the Lab completed the test, finding a 99.9999% chance that Defendant is the biological father of J.M.S. (Comm. Ex. B.) On May 23, 2011, after receiving the results of the paternity test, the Commonwealth charged Defendant with sexual abuse of a minor.

On August 7, 2012, the Commonwealth filed a motion to admit the paternity test conducted by the Lab's Chief Operations Officer, Ms. Nelson, into evidence as an official record. Ms. Nelson performed the DNA paternity test to determine whether Defendant is the biological father of J.M.S. Oral arguments were heard on August 27, 2012, and Defendant filed a written objection to the Commonwealth's motion on September 4, 2012.

III. DISCUSSION

The Commonwealth moved to include the results of Defendant's paternity test as proof of an official record, pursuant to NMI R. Crim. P. 27. Rule 27 defers to the Commonwealth Rules of Civil Procedure when proving the existence or absence of an official record. The Commonwealth then cited NMI R. Civ. P. 44(a) in arguing that the Court authenticated Defendant's paternity test as an official record in its previous family court case order, *DYS v. Tababa*, NMI Super. Ct. June 1, 2011 (Order). (Comm. Ex. D.) The Commonwealth argues, therefore, that the paternity test should be admitted into evidence in the criminal case at bar.[2]

Defendant does not dispute that Defendant's paternity test is an official record. Rather, Defendant objects to the admission of the paternity test "on grounds that: (1) the admission would violate the confrontation clause of the United States Constitution; and (2) the test results are hearsay." (Def's. Opp. To the Comm's. Mot. To Include Official Records at 2.) The first

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[2] The Commonwealth overlooks the fact that evidentiary standards are less stringent in family court cases than in criminal matters. Unlike in criminal cases, there are specific statutes permitting the introduction of evidence relating to paternity. *See* 8 CMC §§ 1711, 1712. The fact that Defendant's paternity test was admissible in his previous family court case does not make it admissible *per se* in the pending criminal case. *Cf. In re J.A.M.*, 945 S.W.2d 320, 322 (Tex. Ct. App. 1997) ("Appellant's argument, however, overlooks the Texas statute that makes paternity testing reports admissible even without the establishment of the business records exception.").

issue before the Court is whether the paternity test falls within the "business record" hearsay exception pursuant to NMI R. Evid. 803(6). If yes, then the second issue is whether its admission would nevertheless violate the confrontation clause.

A. DEFENDANT'S PATERNITY TEST FALLS WITHIN THE HEARSAY EXCEPTION FOR BUSINESS RECORDS.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." NMI R. Evid. 801(c). "Hearsay is not admissible except as provided by these rules or by law." NMI. R. Evid. 802. There can be no dispute that the paternity test is hearsay since it is an out-of-court statement offered to prove that Defendant is the father of J.M.S. Therefore, it is inadmissible unless it falls within an exception to the hearsay rule. Here, the only relevant hearsay exception is Rule 803(6), which applies to:

> [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 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 of the custodian or other qualified witness, unless the source of the information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Once a document is established as a business record, it is admissible despite the general rule against hearsay unless it lacks trustworthiness. *Id.*; *Guerrero v. Tinian Dynasty Hotel & Casino*, 2006 MP 26 ¶ 36 (citations omitted) ("In admitting a document as a business record, the most important consideration is the trustworthiness of the document: there should be no strong motive by the declarant to misstate the facts.") Business records under Rule 803(6) are presumed admissible, *id.*, and the court "has wide discretion in determining whether a business record meets the standard of trustworthiness." *United States v. Olano*, 62 F.3d 1180, 1206 (9th Cir. 1995).

Here, the paternity test prepared by the Lab is a business record. The Lab routinely conducts DNA tests, such as Defendant's paternity test, in the ordinary course of its business. The test results also possess sufficient trustworthiness because they represent a computational figure, which were obtained from a neutral party with no alleged motive to provide false results. Furthermore, according to the Commonwealth, Ms. Nelson was unaware of the facts surrounding the instant case or the implications that her test results may have. Therefore, the Court finds that Defendant's paternity test falls within the hearsay exception as a business record. *Cf. States v. Huu The* Cao, 626 S.E.2d 301, 305 (N.C. Ct. App. 2006); *People v. Brown*, 801 N.Y.S.2d 709, 711 (N.Y. Sup. 2005); *People v. Johnson*, 121 Cal. App. 4th 1409, 1412-13 (Cal. Ct. App. 2004).

B. ADMISSION OF DEFENDANT'S PATERNITY TEST WOULD VIOLATE THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT.

In all criminal prosecutions, "[t]he accused has the right to be confronted with adverse witnesses." NMI Const. art. I, § 4(b)[3]; *see also* U.S. Const. amend. VI. Generally, the confrontation clause ensures a criminal defendant's right to confront his or her witnesses face-to-face and to have the opportunity to cross examine them. *Maryland v. Craig*, 497 U.S. 836, 849 (1990); *Mattox v. United States*, 156 U.S. 237, 243 (1895). However, the general rule for face-to-face confrontation and cross-examination may yield to evidence that falls within a hearsay exception under certain circumstances. The relationship between the confrontation clause and the hearsay rule has had a long and tremulous development culminating in the recent U.S. Supreme Court case of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318-19 (2009).

The U.S. Supreme Court first analyzed the confrontation clause in *Mattox*, noting that its "primary object . . . was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases," being used against criminal defendants whose liberty is at stake. *Id.* at 242. Nevertheless, the Court did note that the right to confrontation "must occasionally give way to considerations of public policy and necessities of the case." *Id.* at

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[3] The NMI Constitution's confrontation clause is patterned after the U.S. Constitution's confrontation clause in the Sixth Amendment so the court may rely on the U.S. Supreme Court's interpretation of the confrontation clause. *Commonwealth v. Condino*, 3 NMI 501, 507 (1993).

243. A case may necessitate the admission of hearsay evidence without confrontation such as when the declarant is unavailable or when the evidence is highly reliable and it would be unduly burdensome to require the declarant(s) to testify. These principles lay the foundation for the twenty-nine hearsay exceptions recognized in the Commonwealth of the Northern Mariana Islands. NMI R. Evid. 803(1)-(24), 804(b)(1)-(b)(5).

The Court in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) analyzed the relationship between the confrontation clause and hearsay rule, noting that they serve the same truth-seeking objective in promoting the reliability of testimony and evidence. The Court held that hearsay evidence bears adequate "indicia of reliability" if it "falls within a firmly rooted hearsay exception" or its trustworthiness is otherwise assured. *Id.* Such evidence is admissible if the declarant is shown to be unavailable. In other words, *Roberts* held that there is no confrontation clause violation whenever there is an unavailable declarant and the evidence falls within a hearsay exception. This rule was abrogated by *Crawford v. Washington*, 541 U.S. 36 (2004).

Crawford introduced the determinative distinction between testimonial and non-testimonial statements when deciding whether to apply the confrontation clause. *Id.* at 68. Non-testimonial hearsay that falls within a Rule 803 or Rule 804 exception is not barred by the confrontation clause. *Id.* However, if the hearsay is testimonial, "the Sixth Amendment demands that what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* *Crawford* expressly declined to define "testimonial." *Id.* However, two years later, the Court shed some clarity on this issue in holding that a statement is non-testimonial when made to assist the police in an ongoing emergency but it is testimonial if its primary purpose is "to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006).

After *Crawford* and *Davis*, jurisdictions across the United States and its territories used these cases to interpret the testimonial nature of statements that arose in other contexts, apart from communications with the police. Most relevant to the case at bar is the interpretation of statements made by lab technicians or medical professionals concerning DNA tests.

Immediately following *Crawford* and *Davis*, courts were nearly evenly split on whether scientific tests were testimonial. Some courts "concluded that because such evidence-fingerprint analysis, autopsy reports, serology reports, drug analysis reports, DNA reports-is prepared for possible use at a criminal trial it is testimonial and inadmissible unless the conditions for its admission, outlined in *Crawford*, have been met." *People v. Geier*, 161 P.3d 104, 134 (Cal. 2007) (collecting cases); *see, e.g., City of Las Vegas v. Walsh*, 124 P.3d 203, 207-08 (Nev. 2005). Other courts, however, held that scientific evidence was not testimonial, even though it may have been prepared for possible use at trial. *Geier*, 161 P.3d at 134 (collecting cases); *see, e.g., United States v. Moon*, 512 F.3d 359, 362 (7th Cir. 2008).

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 307 (2009), the U.S. Supreme Court addressed the issue whether a scientific test, which concluded that a certain substance was cocaine, is testimonial, subjecting the lab technician to cross-examination by the defendant. The Court held that the drug test results were testimonial, and further stated that "[t]he same is true of many of the other types of forensic evidence commonly used in criminal prosecutions." *Id.* at 320. Although scientific tests are generally mechanical and analysts usually have no motive to provide false results, confrontation is still a valuable tool to "weed out not only the fraudulent analyst, but the incompetent one as well." *Id.* at 319. There have been many reports of erroneous scientific results based on incompetent analysts who carelessly mishandle DNA samples or testing equipment, or misinterpret the data. *See id.* (citation omitted).

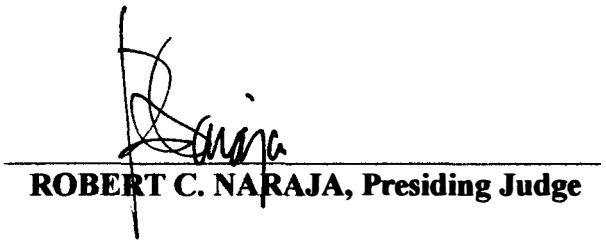
The issue here - whether Defendant's paternity test is testimonial, entitling Defendant with an opportunity for cross-examination - is nearly identical to the issue analyzed in *Melendez-Diaz*. Like *Melendez-Diaz*, this Court holds that the paternity test is testimonial; therefore, its introduction into evidence as a business or official record would violate the confrontation clause. Business records ordinarily are admissible despite their hearsay status pursuant to the Rule 803(6) exception, but not when the records are produced for use at trial. *Melendez-Diaz*, 557 U.S. at 319. The paternity test was produced for use at trial because Defendant was ordered to submit to DNA testing after being accused by the victim as being potentially the biological father of her child. *But cf. Williams v. Illinois*, 132 S. Ct. 2221, 2243-

44 (2012) (holding that a DNA report was not testimonial because "its primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time."). Based on the ruling in *Melendez-Diaz*, the Court holds that Defendant's paternity test is testimonial and may therefore not be introduced into evidence without affording Defendant the opportunity to cross examine the analyst pursuant to the confrontation clause.

IV. CONCLUSION

For the foregoing reasons, the Court hereby **DENIES** the Commonwealth's motion.

IT IS SO ORDERED this 10th day of September, 2012.



ROBERT C. NARAJA, Presiding Judge