

[J-59-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 66 MAP 2005
	:	
Appellant	:	Appeal from the Order of Superior Court
	:	entered October 29, 2004 at No. 912 MDA
	:	2002 which reversed the Order of Court of
v.	:	Common Pleas of Dauphin County,
	:	Criminal Division, entered May 29, 2002,
	:	(exited May 30, 2002) at No. 1683 CD
ALFONSO F. CARTER,	:	1998.
	:	
Appellee	:	861 A.2d 957 (Pa. Super. 2004)
	:	
	:	ARGUED: May 8, 2006

CONCURRING OPINION

MR. JUSTICE SAYLOR

DECIDED: October 17, 2007

I join Part II of the majority opinion, and the result thus obtained. However, I am unable to join Part I because, in my view, the laboratory report at issue was prepared by the police in anticipation of litigation, thus taking it outside of the traditional business records exception to the hearsay rule. See generally Echo Acceptance Corp. v. Household Retail Services, 267 F.3d 1068, 1091 (10th Cir. 2001) (“It is well-established that one who prepares a document in anticipation of litigation is not acting in the regular course of business.” (citation omitted)); Commonwealth v. Bruce, 916 A.2d 657, 668

(Pa. Super. 2007) (“[T]he trial court erred in applying the business records exception to a laboratory report that was prepared in anticipation of litigation.”).¹

¹ In dissent, Mr. Chief Justice Cappy expresses that the lab report should not be deemed to be covered by Section 6104, 42 Pa.C.S. §6104, because, as a general proposition, records prepared in anticipation of litigation fall outside the business records exception to the hearsay rule due to their lack of trustworthiness. See Dissenting Opinion, slip op. at 3-4 (citing Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477 (1943)). However, the Supreme Court’s Palmer decision, on which the dissent principally relies, was one of statutory interpretation. While it did note that the “probability of trustworthiness” of ordinary business records “because they were routine reflections of the day to day operations of a business” was the basis of the rule adopted by Congress, id. at 113-14, 63 S. Ct. at 480, it did not suggest that every form of document prepared in anticipation of litigation is attended by circumstances indicating an affirmative lack of reliability, as required for exclusion under Section 6104(b). This is not to say that the courts should necessarily attach special trustworthiness to documents created by a police crime lab. It is worth noting, however, that a police forensic lab is not a “business” in the traditional sense, but rather, exists to promote the interests of justice. Thus, like the majority, I am equally unwilling to attach the label of untrustworthiness to crime lab reports merely because of their source. In short, absent some evidentiary support I see no reason to presume that a report issuing from such a lab in the regular course of its activities is likely to be unreliable for purposes of the Section 6104(b) exclusion.