No. ___

IN THE
Supreme Court of the United States

Luis E. Melendez-Diaz,
Petitioner,

v.

Massachusetts

On Petition for a Writ of Certiorari
to the Appeals Court of Massachusetts

PETITION FOR A WRIT OF CERTIORARI

Mary T. Rogers
ATTORNEY AT LAW
P.O. Box 47
Salem, MA 01970

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

Thomas C. Goldstein
AKIN, GUMP, STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

October 26, 2007

QUESTION PRESENTED

Whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is "testimonial" evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rule

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Luis E. Melendez-Diaz respectfully petitions for a writ of certiorari to the Appeals Court of Massachusetts in *Commonwealth v. Melendez-Diaz*, No. 05-P-1213.

OPINION BELOW

The memorandum and order of the Appeals Court of Massachusetts (App. 1a-10a) is reported at 69 Mass. App. Ct. 1114, 870 N.E.2d 676, and is unpublished. The order of the Massachusetts Supreme Judicial Court denying review (App. 11a) is reported at 449 Mass. 1113, 874 N.E.2d 407. The relevant trial court proceedings and order are unpublished.

JURISDICTION

The Massachusetts Supreme Judicial Court denied review of this case on September 26, 2007. App. 11a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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 . . . ."

Chapter 111 of the General Laws of Massachusetts provides in relevant part:

"**§ 12. Analyses of narcotic drugs, poison, drugs, medicines, or chemicals.** The department [of

public health] shall make, free of charge, a chemical analysis of any narcotic drug, or any synthetic substitute for the same, or any preparation containing the same, or any salt or compound thereof, and of any poison, drug, medicine or chemical, when submitted to it by police authorities or by such incorporated charitable organizations in the commonwealth, as the department shall approve for this purpose; provided, that it is satisfied that the analysis is to be used for the enforcement of law.

§ 13. Certificate of result of analysis of narcotic drugs, poisons, drugs, medicines, or chemicals; evidence: The analyst or an assistant analyst of the department [of public health] . . . shall upon request furnish a signed certificate, on oath, of the result of the analysis provided for in the preceding section to any police officer or any agent of such incorporated charitable organization, and the presentation of such certificate to the court by any police officer or agent of any such organization shall be prima facie evidence that all the requirements and provisions of the preceding section have been complied with. This certificate shall be sworn to before a justice of the peace or notary public, and the jurat shall contain a statement that the subscriber is the analyst or an assistant analyst of the department. When properly executed, it shall be prima facie evidence of the composition, quality, and net weight of the narcotic or other drug, poison, medicine, or chemical analyzed or the net weight of any mixture containing the narcotic or other drug, poison, medicine, or chemical analyzed, and the court shall take judicial notice of the signature of the analyst or assistant analyst, and of the fact that he is such."

INTRODUCTION

This case presents a pressing issue concerning the administration of criminal justice across the country, and over which the federal and state courts are openly and deeply divided: whether state forensic laboratory reports prepared for use in criminal prosecutions are "testimonial" evidence, and thus subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004). The Appeals Court of Massachusetts, following a binding decision from the Massachusetts Supreme Judicial Court, held in this case that they are not.

Until quite recent times, this Court and others generally assumed that the Sixth Amendment required the prosecution, absent a stipulation from a defendant, to present the findings of its forensic examiners through live testimony at trial. *See, e.g.*, *United States v. Wade*, 388 U.S. 218, 227-28 (1967) (forensic analyses of fingerprints, blood and hair samples, etc.); *Diaz v. United States*, 223 U.S. 442, 450 (1912) (autopsy reports); *State v. Henderson*, 554 S.W.2d 117, 120 (Tenn. 1977) (surveying lower courts). However, following this Court's decision in *Ohio v. Roberts*, 448 U.S. 56 (1980), which conflated the Confrontation Clause with hearsay law, many states began to exempt crime laboratory reports from the reach of the Sixth Amendment by labeling them as "business records" or "public records." *See* Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 508 & n.165 (2006). Even in jurisdictions that resisted characterizing crime laboratory reports as business or public records, many legislatures enacted—and courts condoned—laws specifically making

such reports admissible in the prosecution's cases-in-chief in lieu of live testimony. *See id.* 478 & n.9.

This departure from traditional practice raised a serious constitutional question even during the *Roberts* era. *See, e.g.*, Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 Ohio St. L.J. 671, 674-75 (1988). But the constitutionality of prosecutors' submitting forensic laboratory reports in lieu of live testimony has become especially suspect in the wake of this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* returned the Confrontation Clause to its traditional mode of operation—that is, to a procedural provision that forbids the government from introducing "testimonial" hearsay in place of live testimony at trial. A classic form of testimonial hearsay is an *ex parte* affidavit, *id.* at 43-49, and modern forensic laboratory certificates closely resemble such affidavits.

STATEMENT

1. Massachusetts law requires a forensic analyst, upon a police officer's representation "that the analysis is to be used for the enforcement of law," to test evidence for the presence of illegal drugs or other chemicals. Mass. Gen. Laws ch. 111 § 12. The forensic analyst does not need to test all specimens that are part of a group from a common source; "[i]t is enough to make representative tests." *Commonwealth v. Shea*, 545 N.E.2d 1185, 1189 (Mass. App. 1989). Once testing is complete, Massachusetts law requires the forensic analyst, upon a police officer's request, to recount the results of his examination on a "signed certificate, on

oath" and to furnish the certificate to the officer. Mass. Gen. Laws ch. 111 § 13.

Massachusetts, like many other states, allows prosecutors to introduce such forensic analysts' certifications as substitutes for live testimony at trial. Specifically, a Massachusetts statute directs courts to admit sworn crime laboratory reports "as prima facie evidence of the composition, quality, and the net weight of the narcotic or other drug, poison, medicine, or chemical analyzed or the net weight of any mixture containing the narcotic . . . or chemical analyzed." *Id., see also* Mass. Gen. Laws ch. 22C § 39 (providing same when police department instead of department of health performs chemical analysis). "The purpose of [this statute] is to reduce court delays and the inconvenience of having the analyst called as a witness in each case." *Commonwealth v. Verde*, 827 N.E.2d 701, 704 n.1 (Mass. 2005). Accordingly, prosecutors need not call as witnesses the forensic analysts who prepare these reports, even if defendants request that they do so.

2. In November of 2001, the loss prevention manager of a Boston-area K-Mart called the police to report the suspicious activities of a store employee, Thomas Wright. According to the manager, Wright would sometimes leave the store, take short rides in a blue sedan, and return about ten minutes later.

The police came the store later that day. Shortly after arriving, they observed Ellis Montero drive up in a blue sedan, with petitioner Luis Melendez-Diaz riding in the front passenger seat. Wright got into the back seat of the sedan, and the three men drove

forward a short distance and stopped. The officers never noticed whether anything changed hands between the car's occupants, but, looking through the car's back window, the officers saw Wright lean forward and then back. When Wright got out of the car and began walking towards K-Mart, one officer stopped and searched him. The officer found four small bags in Wright's front pocket. Two of the bags contained white powder, and two contained light yellow powder with small clumps. Suspecting that a drug transaction had just taken place, officers arrested Wright, Montero, and Petitioner.

Officers then drove Wright, Montero, and Petitioner to the police station. While the three men were being booked, the officers inspected the police cruiser that had transported Montero and Petitioner. In the back seat, they found nineteen plastic bags containing dark yellow powder with large clumps.

The police officers submitted the plastic bags from Wright's pocket and from the back seat of the cruiser to the state crime laboratory for testing. Approximately two weeks later, two state-employed forensic analysts issued three sworn reports on letterhead from the Massachusetts Department of Public Health. The first two reports asserted that the four bags taken from Wright contained a total of 4.75 grams of a substance containing cocaine. The third report asserted that the nineteen bags found in the police cruiser contained 22.16 grams of a substance containing cocaine.

The reports, which are reproduced at App. 24a-29a, are largely conclusory. They do not describe the

qualifications or experience of the analysts who conducted the testing. They do not indicate whether any recordkeeping or storage measures had been taken to preserve the integrity of the items for testing. They do not identify the testing method the analysts used to arrive at their conclusions or describe any difficulties (and accompanying error rates) associated with the particular method(s) the analysts used to test for cocaine. Nor do the reports specify the percentages of cocaine allegedly present in the substances tested or otherwise address the differences in the samples that account for why some of the bags contain white powder and others contain dark yellow solids. The reports do, however, provide what the Commonwealth needed to prosecute a criminal case against Petitioner: declarations from state forensic analysts that the packages seized in connection with Petitioner's arrest weighed over fourteen grams and all contained cocaine.

3. The Commonwealth charged Petitioner with distributing cocaine and with trafficking in cocaine in an amount between fourteen and twenty-eight grams. *See* Mass. Gen. Laws ch. 94C §§ 32A & 32E(b)(1).

At trial, the prosecution offered the laboratory reports during a police officer's testimony as proof that the four bags recovered from Wright and the nineteen bags found in the police cruiser contained, respectively, 4.75 and 22.16 grams of substances containing cocaine. Petitioner objected and specifically cited *Crawford v. Washington*, 541 U.S. 36 (2004), to signal that introducing these reports without also calling to the stand the analysts who prepared them would violate his Sixth Amendment right to confrontation. Tr. at 2/81, 2/98. The trial court overruled the

objection without explanation and admitted the reports into evidence. *Id.* at 2/81. The Commonwealth never called the state forensic examiners to the stand or asserted that they were unavailable to testify.

After being instructed that the laboratory reports alone permitted it to conclude that the bags the officers seized contained cocaine, Tr. 3/69, the jury found Petitioner guilty on both counts. The court sentenced him to three years in prison, the mandatory minimum for trafficking in over 14 grams of substances containing cocaine, and to three years' probation.

4. The Appeals Court of Massachusetts affirmed. As is relevant here, the appellate court rejected Petitioner's *Crawford* argument on the basis of the Massachusetts Supreme Judicial Court's prior holding in *Commonwealth v. Verde*, 827 N.E.2d 279 (Mass. 2005), that introducing "certificates of drug analysis" in lieu of live testimony does not "deny a defendant the right of confrontation." App. 8a n.3. (The *Verde* decision is reproduced at App. 12a-23a.)

5. Petitioner sought discretionary review of this decision in the Massachusetts Supreme Judicial Court. He argued, among other things, that "*Verde* is contrary to the holding in *Crawford* and the United States Supreme Court's post-*Verde* decision in *Davis v. Washington* because the primary purpose of the analyses was to produce evidence for use in a criminal prosecution." Petr. Br. for Further Appellate Review in Mass. S.J.C. at 15-16. The Massachusetts Supreme Judicial Court denied review without comment.

REASONS FOR GRANTING THE WRIT

This Court held in *Crawford v. Washington*, 541 U.S. 36 (2004), that the Confrontation Clause prohibits the prosecution from introducing "testimonial" hearsay against a criminal defendant unless the declarant is unavailable and the defendant has (or had) an opportunity for cross-examination. Federal courts of appeals and state courts of last resort are now divided six-to-five over whether state forensic laboratory reports prepared for use in criminal prosecutions are testimonial.

This Court should use this case to resolve this conflict. Forensic reports are an integral part of a large number of criminal prosecutions. Exempting them from the rigors of the adversarial process poses a significant threat of wrongful convictions. And the holding below—namely, that a state forensic analyst's sworn report analyzing evidence the police seized at a crime scene is not testimonial—is incorrect. *Crawford* and this Court's subsequent decision in *Davis v. Washington*, 126 S. Ct. 2266 (2006), dictate that such formalized statements made for prosecutorial purposes are quintessentially testimonial.

I. The Decision Below Implicates an Irreconcilable Conflict Among Federal and State Courts.

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 declarant is unavailable and the defendant has (or had) an opportunity for cross-examination. *Id.* at 54, 68. This Court "le[ft] for another day any effort

to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68. Nonetheless, this Court did provide some guidance concerning the concept. It emphasized that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure"—particularly "its use of *ex parte* examinations" and "sworn *ex parte* affidavits" as evidence against the accused. *Id.* at 50, 52 n.3. Accordingly, "formal statement[s] to government officers" and other statements produced with the "[i]nvolvement of government officers . . . with an eye toward trial" are paradigmatically testimonial statements. *Id.* at 51, 56 n.7. At the same time, this Court noted that certain hearsay evidence that was admissible at the time of the Founding was nontestimonial. Such hearsay included "business records [and] statements in furtherance of a conspiracy." *Id.* at 56.

Since *Crawford*, state supreme courts and the federal courts of appeals have become deeply divided over whether forensic examiners' drug analysis certificates and similar laboratory reports—which are formalized, evidentiary documents prepared with an eye toward trial, but which also are sometimes classified under modern hearsay law as business records—are testimonial.

1. In this case, the Appeals Court of Massachusetts applied the binding decision of the Massachusetts Supreme Judicial Court in *Common-wealth v. Verde*, 827 N.E.2d 701 (2005), to hold that forensic reports certifying under oath that a substance the police seized is an illegal drug are not testimonial. The *Verde* court offered two reasons for this conclusion. First, citing *Crawford*'s mention of the admissibility of

business records at the time of the Founding, the Massachusetts Supreme Judicial Court asserted that a drug analysis certificate "is akin to a business record and the confrontation clause is not implicated by this type of evidence." *Id.* at 702, App. 12a. Second, the Massachusetts Supreme Judicial Court reasoned that drug analysis reports "are neither discretionary nor based on opinion," but rather are a product of a "well-recognized scientific test." *Id.* at 705, App. 17a.

Four other state supreme courts and one federal appeals court likewise have held that forensic laboratory reports prepared in contemplation of prosecution are not testimonial. *See United States v. Ellis*, 460 F.3d 920 (7th Cir. 2006) (police-directed blood test indicating the presence of methamphetamine); *State v. O'Maley*, 932 A.2d 1 (N.H. 2007) (blood alcohol analysis); *People v. Geier*, 161 P.3d 104 (Cal. 2007) (DNA analysis);[1] *State v. Forte*, 629 S.E.2d 137 (N.C. 2006) (DNA analysis); *State v. Dedman*, 102 P.3d 628 (N.M. 2004) (blood alcohol analysis). Intermediate courts in two other states also have also held that such laboratory reports are nontestimonial. *See Pruitt v. State*, 954 So.2d 611 (Ala. Crim. App. 2006) (certificate of drug analysis); *People v. Meekins*, 828 N.Y.S.2d 83 (N.Y. App. Div. 2006) (DNA analysis).

In addition to the business record and reliability rationales in *Verde,* the California and New Hampshire Supreme Courts have advanced one other reason for holding that the Confrontation Clause does not

---

[1] *See also People v. Salinas*, 146 Cal. App. 4th 958 (Cal. App. Ct.) (finding laboratory reports identifying the presence of methamphetamine to be nontestimonial), *rev. dismissed*, 167 P.3d 25 (Cal. 2007) (review dismissed "in light of [*Geier*]").

apply in this setting. Drawing on this Court's post-*Crawford* decision in *Davis v. Washington*, 126 S. Ct. 2266 (2006), which held that statements describing an ongoing emergency to a 911 operator are not testimonial, these courts have reasoned that forensic laboratory reports are nontestimonial because they "constitute [the analyst's] contemporaneous record-ation of observable events." *Geier*, 161 P.3d at 139; *see also O'Maley*, 932 A.2d 1, at 11-12 (following *Geier*).

2. In direct contrast, five state supreme courts have held that forensic laboratory reports prepared in contemplation of prosecution are testimonial. *See Hinojos-Mendoza v. People*, ___ P.3d ___, 2007 WL 2581700 (Colo. Sept. 10, 2007) (laboratory report identifying presence of illegal drug); *State v. March*, 216 S.W.3d 663 (Mo.) (same), *cert. dismissed,* 128 S. Ct. ___ (Oct. 5, 2007);[2] *Thomas v. United States*, 914 A.2d 1 (D.C. 2006) (same); *State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006) (same); *City of Las Vegas v. Walsh*, 124 P.3d 203 (Nev. 2005) (affidavit from nurse who drew blood to conduct blood alcohol analysis).[3] Intermediate courts in six other states also have held that such laboratory reports are testimonial. *See State*

---

[2] The State of Missouri filed a petition for certiorari in *March*, raising the same question presented here. But the State later moved to dismiss the petition as moot because it had entered into a plea bargain with the defendant.

[3] One other state supreme court has stated that a forensic laboratory report "bears testimony in the sense that it is a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact'" but did not ultimately render a holding on whether such a report is testimonial. *State v. Campbell*, 719 N.W.2d 374, 376 (N.D. 2006) (quoting *Crawford*, 541 U.S. at 51), *cert. denied,* 127 S. Ct. 1150 (2007).

v. Laturner, 163 P.3d 367 (Kan. Ct. App. 2007) (report certifying presence of illegal drug); *State v. Moss*, 160 P.3d 1143 (Ariz. Ct. App. 2007) (report alleging presence of illegal drugs in blood sample); *State v. Smith*, 2006 WL 846342 (Ohio Ct. App. 2006) (report certifying that substance contained illegal drug); *Johnson v. State*, 929 So.2d 4 (Fla. Dist. Ct. App. 2005) (certificate of chemical analysis), *rev. granted*, 924 So.2d 810 (Fla. 2006); *State v. Miller*, 144 P.3d 1052 (Or. Ct. App. 2006) (same), *opinion adhered to on reconsideration*, 149 P.3d 1251 (Or. Ct. App. 2006); *Deener v. State*, 214 S.W.3d 522 (Tex. App. 2006) (same), *rev. denied* (Tex. Crim. 2007).

The courts holding that forensic reports are testimonial have provided a more uniform rationale than courts on the other side of the conflict. These courts reason that such reports are created solely for use in criminal prosecutions and present *ex parte* attestations aimed at helping to prove the defendant's guilt. The Missouri Supreme Court, for example, explained:

> Under the definitions of "testimony" and "testimonial" in *Crawford*, as well as the "primary purpose" test in *Davis*, it is clear that the laboratory report in this case constituted a "core" testimonial statement subject to the requirements of the Confrontation Clause. The laboratory report was prepared at the request of law enforcement for [the defendant's] prosecution. It was offered to prove an element of the charged crime—*i.e.*, that the substance [the defendant] possessed was cocaine base. The

> report was a sworn and formal statement offered in lieu of testimony by the declarant. Use of sworn *ex parte* affidavits to secure criminal convictions was the principal evil at which the Confrontation Clause was directed. *Crawford*, 541 U.S. at 50. A laboratory report, like this one, that was prepared solely for prosecution to prove an element of the crime charged is "testimonial" because it bears all the characteristics of an *ex parte* affidavit.

March, 216 S.W.3d at 666; *see also Hinojos-Mendoza*, 2007 WL 2581700, at *5 (report testimonial because it is a document "prepared at the direction of the police . . . in anticipation of criminal prosecution"); *Caulfield*, 722 N.W.2d at 309 ("The report conforms to the types of statements about which the Court in *Crawford* expressed concern—affidavits and similar documents admitted in lieu of present testimony at trial."); *Thomas*, 914 A.2d at 13 ("The use of such *ex parte* affidavits to secure criminal convictions was 'the principal evil at which the Confrontation Clause was directed.' We agree with *amicus* that 'it is difficult to imagine a statement more clearly testimonial.'" (citation omitted)); *Walsh*, 124 P.3d at 207.

This conflict over the nature of forensic examiners' crime laboratory reports is deeply entrenched. Nothing could be gained from further percolation. Courts have had ample time to digest *Crawford*, and they have continued to reach conflicting decisions after *Davis.* Indeed, recent opinions simply acknowledge the division of authority over this issue and choose a side. *See, e.g.*, *March*, 216 S.W.3d at 667 n.2; *Hinojos-*

Mendoza, 2007 WL 2581700, at *4; *Geier*, 161 P.3d at 134-38; *O'Maley*, 932 A.2d 1, at 10-13. It is time for this Court to step in.

II. The Question Presented Significantly Impacts the Administration of Criminal Justice.

For at least three reasons, this Court should not allow the conflict over whether forensic laboratory reports are testimonial to persist.

1. Crime laboratory analyses play a central evidentiary role in a large number of criminal trials. Prosecutions that lack direct evidence identifying the perpetrator depend heavily on scientific evaluations of circumstantial evidence. Forensic analyses, of course, also are at the center of many drug prosecutions, such as the one here. And given the onward march of technology, criminal prosecutions in the future promise to rely even more on scientific analysis. The new practice of prosecutorial DNA testing is only a glimpse of what is likely to come.

2. The question presented implicates practices across the country. Forty-four states and the District of Columbia have hearsay exceptions permitting courts to admit forensic examiners' certified reports to establish the identity of controlled substances. *See* Metzger, 59 Vand. L. Rev. at 478 & n.9. Numerous states also allow the admission of forensic certificates as hearsay evidence to proffer "the results of DNA tests, microscopic hair analyses, fingerprint identifications, coroners' reports, ballistics tests, and a wide range of other tests conducted by a crime laboratory." *Id.* at 479; *see id.* at 479 n.12 (collecting citations).

3. The unchecked use of state crime laboratory reports in place of live testimony undermines the integrity of the criminal justice system. Recent reports have shown that "tainted or fraudulent science" contributes to a large proportion—perhaps as much as one-third—of wrongful convictions. *See* Barry Scheck et al., Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted 246 (2000); *see also* Metzger, 59 Vand. L. Rev. at 491-500 (detailing numerous examples). The leading treatise on scientific evidence further observes:

> This is an especially appropriate time to put drug testing under the microscope. There have been recent indications that drug identification testimony is sometimes erroneous or worse. Despite the extensive experience of drug tests, there seems to be a significant error rate in drug testing conducted by some American laboratories . . . .

2 Paul C. Giannelli & Edward J. Imwinkelried, Scientific Evidence §23.01 (4th ed. 2007).

These error rates derive from several factors. First, many prosecutorial crime laboratories use protocols that generate undependable results. One study revealed that 30% of state forensic examiners asked to test a substance for the presence of cocaine rendered incorrect results. *See* U.S. Dep't of Justice, *Project Advisory Committee, Laboratory Proficiency Testing Program, Supplementary Report—Samples 6-10*, at 3 (1976). Even the FBI's most sophisticated laboratories have been plagued by startling error rates. *See* Paul C. Giannelli, Ake v. Oklahoma*: The*

Right to Expert Assistance in a Post-Daubert*, Post-DNA World*, 89 Cornell L. Rev. 1305, 1320 (2004) (describing a 1997 report by the Department of Justice Inspector General). Second, a substantial number of crime laboratories are not even required to follow any standardized procedures. "[O]f the 400-500 laboratories conducting forensic examinations for criminal trials, only 283 are accredited." Metzger, 59 Vand. L. Rev. at 494. Finally, many forensic examiners, as employees of state police and other law enforcement departments, are prone to prosecutorial bias. *See., e.g.,* Edward J. Ungvarsky, *Remarks on the Use and Misuse of Forensic Science to Lead to False Convictions*, 41 New Eng. L. Rev. 609, 618 (2007). This bias can subconsciously influence examiners' conclusions or cause them outright to manipulate evidence. Recent scandals in Baltimore, Phoenix, and Houston have revealed rampant falsification of evidence in those cities' crime laboratories. *See* Metzger, 59 Vand. L. Rev. at 495 & n.83.[4]

These realities demand that state forensic examiners' evidentiary certifications be subject to the customary processes of direct and cross-examination. If state forensic examiners understand that they may have to present and defend their work in front of judges and juries at public trials, they are more likely to be careful and conscientious, and to use the best

[4] Massachusetts' forensic laboratories also have faced recent criticism for mishandling evidence and issuing erroneous reports. *See* Jonathan Saltzman & John R. Ellement, *Crime Lab Mishandled DNA Results*, Boston Globe, Jan. 13, 2007, at A1; Jack Thomas, *Two Police Officers Are Put on Leave: Faulty Fingerprint Evidence Is Probed,* Boston Globe, April 24, 2004, at B1.

available testing methods. And when examiners do make mistakes or commit malfeasance, our judicial system's traditional adversarial process is more likely than a system of trial-by-affidavit to uncover the truth. There is no doubt our Framers understood this, and the time has come to reaffirm this time-tested principle.

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. The case comes to this Court on direct review, and Petitioner unambiguously objected at trial that introducing the forensic laboratory reports without the live testimony of the analysts would violate his federal constitutional right to confrontation. Tr. at 2/81, 2/98. Petitioner also preserved this issue by contending at each level of the Massachusetts appellate courts that the admission of the reports violated the Sixth Amendment. *See* Petr. Mass. C.A. Br. at 37; Petr. Br. for Further Appellate Review in Mass. S.J.C. at 15-16. Finally, the Massachusetts courts resolved the issue on the merits. App. 8a n.3.

2. The Sixth Amendment issue here turns exclusively on whether the forensic laboratory certification is testimonial. Unlike some other states, Massachusetts does not have any statutory procedure that allows defendants to demand before trial that the prosecution call a forensic examiner to the stand or even that advises that defendants must subpoena such

examiners if they wish them to appear at trial. *Compare Verde,* 827 N.E.2d at 706, App. 19a (resolving Sixth Amendment challenge solely on testimonial issue), *with Caulfield*, 722 N.W.2d at 310, 313, 317-18 (holding unanimously that forensic laboratory reports are testimonial but dividing over whether Minnesota's statutory "notice and demand" procedure otherwise satisfied Sixth Amendment); *State v. Campbell*, 719 N.W.2d 374, 377 (N.D. 2006) (avoiding testimonial question on the ground that North Dakota's statutory "notice and demand" procedure satisfied the Sixth Amendment), *cert. denied,* 127 S. Ct. 1150 (2007). Accordingly, there can be no claim that some procedural aspect of state law satisfied Petitioner's right to confrontation.

3. This case aptly illustrates the dangers of allowing the government to introduce lab reports in place of live testimony subject to cross-examination. When the police arrested Petitioner, they seized twenty-three bags that they suspected contained cocaine. The four bags that the police seized from Wright contained white and light yellow powder. The nineteen bags, by contrast, that the officers later recovered from the patrol car contained a dark yellow, chunky substance. The question whether those nineteen bags contained cocaine is critical, for the certified weight of the substance in those bags transformed the charges against Petitioner from drug distribution, which carries no mandatory jail time, into a drug trafficking offense, which carries a three-year mandatory minimum prison sentence. Yet the Commonwealth did not present any evidence besides the forensic analyst's certification to support its allegation that the substance in the nineteen bags contained cocaine.

What is more, nothing even in forensic reports explains whether the chunky substance in the nineteen bags could have come from the same source as the powder in the four bags seized from Wright. If the substances in the different bags had different origins and chemical compositions, it is takes more of a leap to infer, as the prosecution asked the jury to do, that Petitioner sold Wright the substance in the four bags. Had an analyst taken the stand at trial, Petitioner's counsel could have observed his testimony, demeanor, and attentiveness to detail, and decided whether to press the analyst with respect to his testing procedures and proffered findings.

IV. The Decision Below Misconstrues the Confrontation Clause.

This Court's precedents dictate that a laboratory report, prepared by a state forensic examiner to further a criminal investigation, is testimonial evidence.

1. In *Crawford*, this Court observed that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." 541 U.S. at 50; *see also Mattox v. United States*, 156 U.S. 237, 242 (1895) (clause intended to prohibit "*ex parte* affidavits" in place of live testimony). The Framers directed the Clause at this method of creating and presenting evidence because the "[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 throughout a history with which the Framers were keenly

familiar." *Crawford*, 541 U.S. at 56 n.7. In *Davis v. Washington*, this Court further explained that statements made to police officers "are testimonial when the circumstances objectively indicate . . . that the primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution." 126 S. Ct. at 2273-74.

State forensic examiners' crime laboratory reports fall squarely within this class. Forensic examiners in Massachusetts, as elsewhere, create such laboratory reports at the behest of police officers "for the enforcement of law." Mass Gen. Laws ch. 111 § 12; *see also Hinojos-Mendoza*, 2007 WL 2581700, at *14 (drug certificates are created "in anticipation of criminal prosecution"). The reports are formal, sworn statements. Mass. Gen. Laws ch. 111 § 13; *see* App. 24a-29a. And they are forthrightly offered "in lieu of present testimony at trial." *Caulfield*, 722 N.W.2d at 309; *see also Verde,* 827 N.E.2d at 704 n.1, App. 14a n.1 (certificates are offered to avoid "having the analyst called as a witness in each case"). They thus are exactly the kind of "solemn declaration[s] or affirmation[s]" that *Crawford* and *Davis* characterized as quintessentially testimonial. *Crawford*, 541 U.S. at 51; *Davis*, 126 S. Ct. at 2274.

Further, although this Court has never squarely decided the issue, it has assumed on several occasions that the prosecution may not introduce a crime laboratory report as a substitute for presenting live testimony from a forensic examiner. As early as 1912, this Court stated that certain pretrial "testimony," including an autopsy report, "could not have been admitted without the consent of the accused . . . be-

cause the accused was entitled to meet the witnesses face to face." *Diaz v. United States*, 223 U.S. 442, 450 (1912).[5] Years later, this Court noted that when the government performs "scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like[,] . . . the accused has the opportunity for a meaningful confrontation of the Government's case at trial." *United States v. Wade*, 388 U.S. 218, 227-28 (1967). Similarly, in refusing to recognize a due process right to have the government preserve breath samples, this Court observed that "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 factfinder whether the test was properly administered." *California v. Trombetta*, 467 U.S. 479, 490 (1984).

2. None of the three rationales that the Massachusetts Supreme Judicial Court and other courts have invoked to characterize forensic examiners' laboratory reports as nontestimonial provide any reason to retreat from this straightforward application of the Confrontation Clause.

a. The Massachusetts Supreme Judicial Court held that forensic reports identifying controlled substances are not testimonial in part based on the supposed reliability of such scientific tests, reasoning that they are "neither discretionary nor based on opinion." *Verde*, 827 N.E.2d at 705, App. 16a; *see also Dedman*, 102 P.3d at 636 (finding forensic reports nontest-

[5] This Court in *Diaz* was discussing the Philippine Constitution's counterpart to the Confrontation Clause, but the Court proceeded on the basis that the two provisions confer the same protection. 223 U.S. at 450-51.

imonial because "the process [of their creation] is routine, non-adversarial, and made to ensure an accurate measurement"); *Forte*, 629 S.E.2d at 143 (same). This is nothing more than *Roberts redux*. Even if these courts' assessment of the reliability of forensic testing were correct, *but see supra* at 16-17, this Court expressly rejected such legal reasoning in *Crawford*: "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 62. Defendants have a right to insist that prosecutorial testimony be presented through the adversarial process, regardless of whether judges surmise that cross-examination would likely bear fruit.

b. Nor does *Crawford*'s reference to business records support deeming forensic reports nontestimonial. The common law "shop book rule" exception for regularly kept business records, to which *Crawford* adverted, *see* 541 U.S. at 56, did not remotely encompass reports generated for prosecutorial use. *See Palmer v. Hoffman*, 318 U.S. 109, 113-14 (1943) (explaining that records "calculated for use essentially in the court" or whose "primary utility is in litigating" fall outside of common law rule, and declining to expand federal exception to allow their admission); *State v. Miller*, 144 P.3d 1052, 1058-60 (Or. Ct. App. 2006) (tracing history of business records exception and concluding that state crime laboratory reports fall outside historical exception). Even as recently as the 1970s, the drafters of the Federal Rules of Evidence declined to expand the "public records" exception in criminal cases to include "matters observed by police officers and other law enforcement personnel" and

"factual findings resulting from an investigation." Fed. R. Evid. 803(8). They took this action "in view of the almost certain collision with confrontation rights which would result from [such records'] use against the accused in a criminal case." Advisory Committee's Notes, Note to Paragraph (8) of Rule 803, 56 F.R.D. 313 (1972). *See generally United States v. Oates*, 560 F.2d 45, 68-73 (2nd Cir. 1977).

It makes no difference that some jurisdictions, such as Massachusetts, have since decided to characterize laboratory reports as "akin to" business records, 827 N.E.2d at 702, App. 12a, or that others have gone so far as to expand their statutory definitions of business records expressly to include state crime laboratory reports. As this Court emphasized in *Crawford*, the reasons for subjecting testimonial statements to confrontation procedures "do[] not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." 541 U.S. at 56 n.7. In other words, "*ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them." *Id.* at 51. Accordingly, jurisdictions may no more insulate state crime laboratory reports from confrontation scrutiny by labeling them business records as they could by giving the same label to transcripts of custodial interrogations, which, after all, police conduct in their ordinary course of business.

c. Finally, this Court's decision in *Davis* does not support courts' attempts to classify laboratory reports as nontestimonial on the ground that they are "contemporaneous recordation[s] of observable events."

Geier, 161 P.3d at 139. *Davis* involved a drastically different scenario than is at issue here—namely, a crime victim calling 911 in the midst of an ongoing emergency. To the extent that timing matters in that context, *Davis* holds that a declarant's statements are nontestimonial when they narrate threatening, criminal events while they are actually happening. Nothing in that decision suggests that a state official's formalized description of evidence that police seized days or weeks before is not testimonial, especially when the forensic report's express purpose is to build a case for prosecution.

The crux of *Davis*, like *Crawford* before it, is that statements gathered for "the primary, if not indeed the sole, purpose of . . . investigat[ing]" a past crime are testimonial. *Davis*, 126 S. Ct. at 2278; *see also id.* at 2273-74; *Crawford*, 541 U.S. at 53 (statements obtained by police officers serving an "investigative and prosecutorial function" are testimonial). That is the undeniable purpose of sworn forensic reports. This Court should not wait any longer to make clear that the Confrontation Clause applies to such evidence.

CONCLUSION

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

Respectfully submitted,

Mary T. Rogers
ATTORNEY AT LAW
P.O. Box 47
Salem, MA 01970

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

Thomas C. Goldstein
AKIN, GUMP, STRAUSS
HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

October 26, 2008