No. 07-591

IN THE
Supreme Court of the United States

LUIS E. MELENDEZ-DIAZ,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS APPEALS COURT

BRIEF IN OPPOSITION

MARTHA COAKLEY
Attorney General

JAMES J. ARGUIN*
DAVID S. FRIEDMAN
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108-1598
(617) 727-2200
*Counsel of Record

QUESTION PRESENTED

Petitioner claims that the admission of drug analysis certificates at his state-court trial for cocaine trafficking and distribution violated his Sixth Amendment right to confront witnesses against him. Should certiorari be denied where (1) the certificates were merely cumulative of substantial other evidence establishing the composition and weight of the drugs; (2) Petitioner failed to avail himself of available state procedures that could have eliminated any Sixth Amendment questions; (3) the state courts properly determined that the certificates were not "testimonial" evidence simply because they were prepared for use at trial; and (4) only a handful of courts have adopted the bright-line rule urged by Petitioner, which would hinder the administration of justice, without any gain in the truth-seeking process?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT 3

A. Petitioner's trial strategy 4

B. The 4 bags of cocaine seized from Wright 4

C. The 19 bags of cocaine recovered from the backseat area of the cruiser 5

D. The street-level drug market 6

E. The drug analysis certificates 7

F. Petitioner's undeveloped arguments in his state-court appeal 10

G. Petitioner's factual misstatements 11

REASONS FOR DENYING THE PETITION 14

A. Certiorari should be denied because resolution of the constitutional issue would not change the outcome of Petitioner's trial 14

B. Certiorari should be denied because, to the extent Petitioner challenges the reliability of the testing methods, his claims are waived 16

C. Certiorari should be denied because the state courts correctly decided the constitutional issue raised by the Petition..... 19

D. Certiorari should be denied because Petitioner exaggerates the conflict among courts about whether lab reports are subject to *Crawford*..... 30

E. Certiorari should be denied because the bright-line rule proposed by Petitioner threatens the administration of justice 34

CONCLUSION..... 38

TABLE OF AUTHORITIES

Cases

Adams v. Robertson,
520 U.S. 83 (1997) 33

Brown v. State,
939 So.2d 957 (Ala. Crim. App. 2005) 36

Canavan's Case,
432 Mass. 304, 733 N.E.2d 1042 (2000) 17

Commonwealth v. Arroyo,
442 Mass. 135, 810 N.E.2d 1201 (2004) 17, 18

Commonwealth v. Berrio,
43 Mass. App. Ct. 836, 687 N.E.2d 644 (1997) .. 9

Commonwealth v. Bly,
448 Mass. 473, 862 N.E.2d 341 (2007) 18

Commonwealth v. Bowler,
407 Mass. 304, 553 N.E.2d 534 (1990) 10

Commonwealth v. Dawson,
399 Mass. 465, 504 N.E.2d 1056 (1987) 14, 15

Commonwealth v. DeOliveira,
447 Mass. 56, 849 N.E.2d 218 (2006) 25

Commonwealth v. Galicia,
447 Mass. 737, 857 N.E.2d 463 (2006) 25

Commonwealth v. Harvard,
356 Mass. 452, 253 N.E.2d 346 (1969) 9

Commonwealth v. Johnson,
32 Mass. App. Ct. 355, 589 N.E.2d 330 (1992) .. 9

Commonwealth v. Lanigan,
419 Mass. 15, 641 N.E.2d 1342 (1994) 17

Commonwealth v. McNickles,
434 Mass. 839, 753 N.E.2d 131 (2001) 17, 18

Commonwealth v. Paniaqua,
413 Mass. 796, 604 N.E.2d 1278 (1992) 15

Commonwealth v. Patterson,
445 Mass. 626, 840 N.E.2d 12 (2005) 18

Commonwealth v. Shea,
28 Mass. App. Ct. 28,
545 N.E.2d 1185 (1999) 11, 12

Commonwealth v. Slavski,
245 Mass. 405, 140 N.E. 465 (1923) 26

Commonwealth v. Verde,
444 Mass. 279, 827 N.E.2d 701 (2005) .....*passim*

Crawford v. Washington,
541 U.S. 36 (2004) .....*passim*

Darr v. Burford,
339 U.S. 200 (1950) 32

Daubert v. Merrell Dow Pharm., Inc.,
509 U.S. 579 (1993) 17

Davis v. Washington,
547 U.S. 813, 126 S. Ct. 2266 (2006) ..... *passim*

Delaware v. Van Arsdall,
475 U.S. 673 (1986) 16

Herb v. Pitcairn,
324 U.S. 117 (1945) 19

Hinojos-Mendoza v. People,
169 P.3d 662 (Colo. 2007) 31

Las Vegas v. Walsh,
121 Nev. 899, 124 P.3d 203 (2005),
cert. denied, 547 U.S. 1071 (2006) 31

Michels v. Commonwealth,
47 Va. App. 461, 624 S.E.2d 675 (2006) 29

Napier v. State,
827 N.E.2d 565 (Ind. Ct. App. 2005),
cert. denied, 546 U.S. 1215 (2006) 36

People v. Durio,
794 N.Y.S.2d 863, 7 Misc. 3d 729
(N.Y. Sup. Ct. 2005) 37

People v. Geier,
41 Cal.4th 555, 161 P.3d 104,
petition for cert. filed, No. 07-7770
(U.S. Nov. 14, 2007) 24, 27, 28, 29, 30

People v. Johnson,
121 Cal. App. 4th 1409,
18 Cal. Rptr. 3d 230 (1st Dist. 2004) 36

People v. So Young Kim,
368 Ill. App. 3d 717,
859 N.E.2d 92 (2006) 23, 32

People v. Stechly,
225 Ill.2d 246, 870 N.E.2d 333 (2007)..... 25

Pointer v. Texas,
380 U.S. 400 (1965)..... 19n

Pruitt v. State,
954 So.2d 611 (Ala. Crim. App. 2006) 36

Rollins v. State,
392 Md. 455, 897 A.2d 821,
cert. denied, 127 S. Ct. 392 (2006) 37

Sommerville v. United States,
376 U.S. 909 (1964)..... 14

State v. Carter,
326 Mont. 427, 114 P.3d 1001 (2005)..... 23

State v. Caulfield,
722 N.W.2d 304 (Minn. 2006)..... 31

State v. Crager,
Nos. 06-0294/06-0298,
2007 WL 4569702 (Ohio Dec. 27, 2007) 30, 37

State v. Craig,
110 Ohio St. 3d 306, 853 N.E.2d 621 (2006),
cert. denied, 127 S. Ct. 1374 (2007) 30

State v. Cutro,
365 S.C. 366, 618 S.E.2d 890 (2005) 30, 31

State v. Dedman,
136 N.M. 561, 102 P.3d 628 (2004) 29

State v. Forte,
360 N.C. 427, 629 S.E.2d 137,
cert. denied, 127 S. Ct. 557 (2006) 29, 30

State v. Lackey,
280 Kan. 190, 120 P.3d 332 (2005),
cert. denied, 547 U.S. 1056 (2006) 37

State v. March,
216 S.W.3d 663 (Mo.), *cert. dismissed*,
No. 06-1699 (U.S. Oct. 5, 2007) 31

State v. O'Maley,
932 A.2d 1 (N.H.),
petition for cert. filed, No. 07-7577
(U.S. Nov. 7, 2007) 24, 25, 28, 29, 30, 33

The Monrosa v. Carbon Black Export, Inc.,
359 U.S. 180 (1959).....14, 33

Thomas v. United States,
914 A.2d 1 (D.C. 2006),
cert. denied, 128 S. Ct. 241 (2007) 31

United States v. De La Cruz,
Nos. 06-1659/07-2515, 2008 WL 273970
(1st Cir. Feb. 1, 2008) 26, 30

United States v. Ellis,
460 F.3d 920 (7th Cir. 2006).....24, 26, 30

United States v. Feliz,
467 F.3d 227 (2d Cir. 2006) 24, 30

United States v. Moon,
Nos. 05-4506/06-1840,
2008 WL 43585 (7th Cir. Jan. 3, 2008) 29, 31

United States v. Washington,
498 F.3d 225 (4th Cir.) *petition for cert. filed*,
No. 07-8291 (U.S. Dec. 14, 2007).....27, 30, 32

White v. Illinois,
502 U.S. 346 (1992)..... 20

Whorton v. Bockting,
127 S. Ct. 1173 (2007)..... 21n

Constitutional and Statutory Provisions

U.S. Const. amend. VI 19n

28 U.S.C. § 1257(a) 33

Mass. Gen. Laws ch. 94C, § 32A 3

Mass. Gen. Laws ch. 94C, § 32E(b)(1)..... 3

Mass. Gen. Laws ch. 111, § 12 .....8, 25, 26

Mass. Gen. Laws ch. 111, § 13 .....8, 9, 25, 26

Rules

Mass. R. Crim. P. 14(a)(2) 18n

Mass. R. Crim. P. 17 12

Other Authorities

Brief of the Attorney General and Department of Public Health as Amici Curiae , *Commonwealth v. Verde*, No. SJC-09320, 2004 WL 3421947 (2004)... 35

Bureau of Justice Statistics, Federal, State, and Local Crime Lab Backlog Reached 500,000 in 2002 (2005), http:www.ojp.usdoj.gov/bjs/pub/press/cpffc102pr.htm 34

Eugene Gressman, et al., *Supreme Court Practice* (9th ed. 2007).....14, 32

Jennifer L. Mnookin, *Expert Evidence and The Confrontation Clause After Crawford v. Washington*, 15 J.L. & Pol'y 791 (2007).....32, 35, 36, 38

Noah Webster, *An American Dictionary of the English Language* (1828) 20

30A Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 6371.2 (Supp. 2007)..... 29

INTRODUCTION

The Commonwealth of Massachusetts respectfully requests that the Court deny the petition for a writ of certiorari. This case is a poor vehicle to resolve the important constitutional question presented. Although Petitioner objected to the admission of the drug analysis certificates at trial, his defense was grounded on the theory that there was no evidence to link the drugs to him. Consistent with this theory, Petitioner did not object to testimony from experienced narcotics officers and other witnesses that the drugs were, in fact, cocaine. Nor did he object when the narcotics officers estimated the weight and value of the cocaine. The trial judge, in all events, instructed the jury that they were free to disregard the certificates of analysis entirely. Thus, even if the state court erred in admitting the drug analysis certificates, the error would not have changed the result below.

Moreover, to the extent Petitioner challenges the reliability of the testing methods reflected in the drug analysis certificates or the qualifications of the analysts who conducted the testing, certiorari should be denied because Petitioner waived these claims by failing to raise them in the manner required by state law. Indeed, had Petitioner complied with the established state-law procedures for raising these claims, any constitutional questions could have been obviated.

This case also is a poor vehicle for resolution of the constitutional question presented because the

underlying decision is an unpublished decision of the Commonwealth's intermediate appellate court, with no precedential value. Petitioner and *Amici* use this case merely as a vehicle for challenging the Massachusetts Supreme Judicial Court's decision in *Commonwealth v. Verde*, 444 Mass. 279, 827 N.E.2d 701 (2005). In *Verde*, the Supreme Judicial Court held that drug analysis certificates are not within the rule announced in *Crawford v. Washington*, 541 U.S. 36 (2004), because they are "nontestimonial" statements akin to business or official records. *Verde*, 444 Mass. at 284, 827 N.E.2d at 706.

Although not all courts agree with *Verde*'s reasoning, Petitioner exaggerates the scope and depth of the conflict that exists. The majority of courts, like *Verde*, have followed a case-by-case approach to determining whether a particular statement is testimonial or nontestimonial. Only a handful of courts have adopted the bright-line rule urged by Petitioner, which would render testimonial – and, thus, subject to the Confrontation Clause – all laboratory reports prepared for use at trial. This interpretation of the Confrontation Clause would impose enormous burdens in countless criminal cases by needlessly requiring live testimony from laboratory technicians who are unlikely to have any independent recollection of one – out of the thousands – of tests they routinely perform.

Also, only two years have passed since the Court, in *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266 (2006), clarified *Crawford*'s distinction between testimonial and nontestimonial statements.

The passage of time and opportunity for further percolation in the lower courts will assist the Court in assessing the far-reaching consequences that a decision in this case might have on criminal prosecutions throughout the country.

STATEMENT

A Massachusetts jury convicted Petitioner of distributing and trafficking in cocaine in violation of Mass. Gen. Laws ch. 94C, § 32A and § 32E(b)(1).[1] The facts supporting Petitioner's convictions are detailed in the state appeals court's decision. Petr.'s App. 1a-5a. Additional facts are set forth below in response to specific allegations contained in Petitioner's Statement.

Petitioner and his codefendant, Ellis Montero, sold cocaine to Thomas Wright in the parking lot of a retail store. Petr.'s App. 1a, 6a-7a. Two batches of cocaine were introduced at trial. Petr.'s App. 3a n.1, 4a n.2. The first batch consisted of 4 bags of cocaine that the arresting officer, Detective Robert Pieroway, seized from Wright. Petr.'s App. 3a. The second batch consisted of 19 bags of cocaine that the police found in the backseat area of the cruiser used to

---

[1]Mass. Gen. Laws ch. 94C, § 32A prohibits, in relevant part, any person from knowingly or intentionally distributing cocaine. Section 32E(b)(1) prohibits any person from trafficking in cocaine by "knowingly or intentionally" possessing with intent to distribute a "net weight of [14] grams or more" of a mixture containing cocaine.

transport Petitioner, Montero, and Wright following their arrests. Petr.'s App. 4a.

A. Petitioner's trial strategy.

At trial, Petitioner did not contest that the drugs recovered from Wright and the backseat area of the cruiser were cocaine. Instead, his strategy was to convince the jury that there was no evidence directly linking him – as opposed to Wright or Montero – to the drugs. *See* Tr. 1:79; Tr. 3:17, 19-20, 23-24. Petitioner also did not contest the amount of the drugs. As Petitioner's counsel argued in closing: "[T]he amount of drugs isn't in question. What is in question is who possessed those drugs." Tr. 3:23.

B. The 4 bags of cocaine seized from Wright.

Consistent with this strategy, Petitioner failed to object to testimony establishing that the drugs recovered from Wright and the backseat area of the cruiser were, in fact, cocaine. *See* Tr. 2:79-80, 98-99. Wright, for instance, "told Pieroway that he had four bags of cocaine on his person." Petr.'s App. 3a; Tr. 2:113-14. Pieroway then searched Wright and recovered "a plastic bag that contained four clear white plastic bags of cocaine [from Wright's] front right pocket." Petr.'s App. 3a; Tr. 2:74. Pieroway had seen cocaine similar to this "in excess of two thousand times" during his career. Tr. 2:74, 76. Each bag had a "little knot tied on it that open[ed] up," Tr. 2:76, and appeared to be "at least gram size." Tr. 2:74. Pieroway also identified Exhibits 8 and 9 as "[t]he cocaine that we recovered from Mr.

Wright." Tr. 2:79-80. Petitioner did not object to any of this testimony.

Sergeant Detective Paul Murphy, an expert on street-level drug dealing, likewise testified – without objection – that the 4 bags recovered from Wright contained cocaine. Tr. 1:105-08; Tr. 2:79-80. According to Murphy, the bags were all "about the same size" and appeared to contain the "same amount of cocaine." Tr. 1:107. The store loss prevention officer likewise testified – without objection – that Pieroway recovered from Wright "four small bags of a white powder substance that appeared to be cocaine." Tr. 2:35.

C. The 19 bags of cocaine recovered from the backseat area of the cruiser.

Petitioner also did not dispute at trial that the 19 bags recovered from the backseat area of the cruiser contained cocaine. Pieroway testified – again without objection – that, after Petitioner, Montero, and Wright got out of the cruiser, a police officer found "a plastic bag that contained [19] plastic bags of cocaine" in the area where they were sitting. Tr. 2:97. The bags were tied with a knot and contained a "white powder" that Pieroway "believed to be cocaine." Tr. 2:100. Moreover, each bag "appeared to be the same size and same packaging, same looks, everything as the four [bags] that [he had] recovered from Mr. Wright." Tr. 2:100, 102; Petr.'s App. 5a. The 19 bags, Pieroway concluded, were "identical" to those recovered from Wright, and the color of the cocaine appeared to be uniform. Tr. 2:100-01.

Murphy likewise testified – without objection – that the 19 bags recovered from the backseat area of the cruiser contained cocaine. Tr. 1:108-09; Tr. 2:97-99. In addition, he confirmed that the 19 bags "look[ed] to be about the same size bags" as those recovered from Wright. Tr. 1:108.

The police officer who found the 19 bags of cocaine also testified – without objection – that he "observed some drugs," specifically a "white powder substance," in a plastic bag in the back of the cruiser. Tr. 2:165-66; *see also* Tr. 2:100-01 (Pieroway testifying that "[c]ocaine is white"). His partner testified – also without objection – that this substance was "cocaine." Tr. 2:204.

D. The street-level drug market.

In addition to the direct testimony establishing that the drugs were cocaine, the Commonwealth presented circumstantial evidence as well. At the time of Petitioner's arrest, cocaine was "packaged primarily in plastic bags, a corner of a sandwich bag . . . and the amount [was] put in there and wrapped and knotted and cut off." Tr. 1:96; Tr. 2:101. The packaging of the cocaine recovered from Wright and the backseat area of the cruiser was consistent with how cocaine ordinarily was packaged for sale. Tr. 2:101-02.

The price of a bag of cocaine varied according to the amount of cocaine in the bag. Tr. 1:96-97. At the time of Petitioner's arrest, a $40 bag contained .40 grams of cocaine. Tr. 1:97. Based on their

knowledge of the drug market, Pieroway and Murphy agreed that the 4 bags of cocaine seized from Wright and the 19 bags of cocaine recovered from the backseat area of the cruiser were worth $80 to $100 each. Tr. 1:106-09; Tr. 2:83, 102.

Murphy further testified that, based on his experience in conducting hundreds of drug surveillance operations, drug dealers operating at the time of Petitioner's arrest frequently conducted their transactions in cars to avoid detection. Tr. 1:87, 90-93. The dealers would pick up the buyer in their car and then "take basically a meaningless ride" for a short distance to complete the transaction. Tr. 1:91-92. Petitioner and Montero's sale to Wright fit this profile. Petr.'s App. 1a-4a.

Drug dealers, at the time of Petitioner's arrest, also frequently relied on pagers and cell phones to maintain contact and arrange drug sales. Tr. 1:93. And, following their arrest, police often found that dealers possessed cash in a variety of denominations. Tr. 1:94. During the booking process, police recovered two cell phones and $301 from Montero, and a pager and $157 from Petitioner. Petr.'s App. 4a. In addition, police found $320 on the ground outside the cruiser – "the same amount that Wright had paid for his purchase of the [4] bags of cocaine. . ." *Id.* at 4a-5a.

E. The drug analysis certificates.

Notwithstanding the substantial – and unobjected-to – evidence establishing the

composition and weight of the drugs recovered from Wright and the backseat area of the cruiser, Petitioner's counsel objected, cursorily citing *Crawford*, when the Commonwealth asked Pieroway the results of analysis conducted on the bags. Tr. 2:81, 98. The judge overruled the objection and admitted the certificates. Tr. 2:81-82, 97-98; App. 24a-29a. The certificates confirmed that the 4 bags recovered from Wright contained 4.75 grams of cocaine, Tr. 2:82-83; Petr.'s App. 24a-27a, and that the 19 bags recovered from the backseat area of the cruiser contained 22.16 grams of cocaine.[2] Tr. 2:98, Petr.'s App. 28a-29a.

The certificates were prepared and admitted at trial pursuant to Mass. Gen. Laws ch. 111, §§ 12-13. Section 12 requires the Massachusetts Department of Public Health to "make . . . a chemical analysis of any narcotic drug . . . when submitted to it by police authorities . . . provided, that it is satisfied that the analysis is to be used for the enforcement of law." Section 13, in turn, provides that an "analyst or an assistant analyst of the department . . . shall upon request furnish a signed certificate, on oath, of the result of the [chemical] analysis [of a narcotic drug submitted to

---

[2]On cross-examination, Pieroway agreed that, apart from the laboratory reports, he had no "real knowledge" of what was in the bags. Tr. 2:120. But, he confirmed, once again, that the substances looked liked drugs to him. *Id.* This concession, therefore, did not detract from the weight of Pieroway's other testimony or that of other witnesses who identified the substances as cocaine.

it by police authorities]." Section 13 further states that the "presentation of such certificate to the court by any police officer . . . shall be prima facie evidence that all the requirements [of section 12] have been complied with." The certificate must be sworn and contain a statement identifying the subscriber as an analyst or assistant analyst of the department. Mass. Gen. Laws ch. 111, § 13. "When properly executed, [the certificate] shall be prima facie evidence of the composition, quality, and the net weight of the . . . drug . . . analyzed." *Id.*

Section 13 is intended "to simplify proof of chemical analyses performed routinely and accurately by a public agency and 'to reduce court delays and the inconvenience of having busy public servants called as witnesses'" in every case where drug analysis evidence is presented. *Commonwealth v. Johnson*, 32 Mass. App. Ct. 355, 357, 589 N.E.2d 328, 330 (1992) (internal citations omitted). When its requirements are met, the certificate is "admissible only as prima facie evidence of the composition . . . and weight of the substance . . . , which a defendant may rebut if he doubts its correctness. . . ." *Verde*, 444 Mass. at 284, 827 N.E.2d at 705; *see also Commonwealth v. Harvard*, 356 Mass. 452, 462, 253 N.E.2d 346, 352 (1969) ("If the defendant doubted the correctness of the certificates in any respect it was open to him to rebut them, but he did not pursue this course."). As prima facie evidence, the certificate "carries no particular presumption of validity." *Commonwealth v. Berrio*, 43 Mass. App. Ct. 836, 837, 687 N.E.2d 644, 645 (1997). Rather, "the weight to be accorded [it] is 'a

matter left entirely to the jury's discretion.'" *Id.* (citation omitted). The jury, if it so chooses, may disregard the certificate entirely, even when no contrary evidence is presented. *Id.* at 838, 687 N.E.2d at 646. Here, the trial judge twice admonished the jury that they were free to disregard the certificates. Tr. 3:69, 80.

F. Petitioner's undeveloped arguments in his state-court appeal.

In his brief on appeal, Petitioner argued that the admission of the drug analysis certificates violated his Sixth Amendment rights and that "*Verde* was contrary to the holding in *Crawford*." Petr.'s State Ct. Br. 38-39. Except for what the state appeals court described as these "simple assertions," Petr.'s App. 8a n.3, Petitioner's argument was undeveloped and barely sufficient under Massachusetts practice. *See Commonwealth v. Bowler*, 407 Mass. 304, 310, 553 N.E.2d 534, 537 (1990) (arguments "not supported by reasoned theory or citation" are not proper appellate argument and may be disregarded). In a footnote to its unpublished decision, the state appeals court rejected Petitioner's assertions as being "without merit." Petr.'s App. 8a n.3.

Thereafter, Petitioner repeated essentially the same undeveloped arguments in his application for discretionary review by the state's highest court. *See id.* at 11a. That court denied without comment Petitioner's application. *Id.*

G. Petitioner's factual misstatements.

1. Petitioner incorrectly asserts that the drug analysis certificates were the *only* evidence offered at trial to establish that the 19 bags recovered from the backseat area of the cruiser contained cocaine. Pet. 19. As detailed above, there was substantial additional evidence establishing that these bags contained cocaine. Statement at 5-6.

2. Nor is there any merit to Petitioner's assertion that the two batches of cocaine lacked a common source. Pet. 20. Pieroway's testimony on this point was unequivocal: the two batches were "identical." Tr. 2:100; Petr.'s App. 5a. Moreover, to the extent Petitioner belatedly disputes Pieroway's testimony about the color or appearance of the cocaine, *see* Pet. 6-7, 19-20, the jury resolved those issues against him. As the state appeals court explained: "the jury had available to them all the seized packages of cocaine" and, thus, could evaluate for themselves this "disputed question of fact." Petr.'s App. 10a.

3. Petitioner correctly states that, where multiple samples of drugs are submitted for analysis, the state laboratory may perform representative testing on the samples. *See* Pet. 4, 19 (citing *Commonwealth v. Shea*, 28 Mass. App. Ct. 28, 33, 545 N.E.2d 1185, 1189 (1989)). But, there is no indication that the testing here was performed in this manner. And, even if representative testing had been performed here, there was nothing improper in doing so given Pieroway's testimony that the two batches of cocaine were uniform in appearance and

packaging. *See Shea*, 28 Mass. App. Ct. at 33, 545 N.E.2d at 1189. Petitioner, in all events, failed to object to the drug analysis certificates on this basis at trial. *See* Tr. 2:81, 98.

4. Petitioner states that the Commonwealth need not call "as witnesses the forensic analysts who prepare the [certificates], even if defendants request that they do so." Pet. 5, 18. But, he neglects to mention that he never requested that the Commonwealth call the analysts. Nor did he seek to rebut in any way the correctness of the certificates, as was his right. *See Verde*, 444 Mass. at 284, 827 N.E.2d at 705. He did not, for instance, call his own expert or subpoena the analysts to testify at trial. *See id.*; Mass. R. Crim. P. 17. In addition, as detailed below, Petitioner failed to follow available state-court procedures for challenging any perceived deficiencies in the testing methods reflected in the certificates. *See* Pet. 6-7, 16-17.

5. Petitioner incorrectly states that the drugs were submitted to the "state crime lab" for analysis. Pet. 6. As noted on the face of the exhibits, however, the certificates were prepared by the Department of Public Health's State Laboratory Institute. *See* Petr.'s App. 24a-28a.

6. Petitioner also distorts the fair import of the trial judge's instructions about the drug analysis certificates. Contrary to Petitioner's allegations, the judge did not merely instruct the jury that the "laboratory reports alone permitted it to conclude that the bags the officers seized contained cocaine."

See Pet. 8. Instead, in considering whether the Commonwealth established that petitioner was guilty of trafficking in cocaine, the judge instructed the jury that they "may consider all the relevant evidence you had in the case about what that substance was." Tr. 3:69. The drug analysis certificates, the judge instructed, should be considered "with all other evidence in deciding whether or not the Commonwealth ha[d] met its burden of proving that this was, in fact, cocaine." *Id.* Furthermore, the judge cautioned that "from that certificate of analysis *you're permitted but you're not required to conclude that the substance was cocaine*. *It is entirely up to you to decide*." *Id.* (emphasis added).

Shortly thereafter, the judge provided a substantially similar instruction in connection with the distribution charge: "The first element requires proof beyond a reasonable doubt that the substance [Petitioner] allegedly distributed was cocaine . . . . I refer again to the certificate of analysis for your review, keeping in mind that *you are permitted but not required to conclude that it was cocaine* based on that certificate and any mixture of cocaine will suffice for distribution." Tr. 3:80 (emphasis added).

REASONS FOR DENYING THE PETITION

A. Certiorari should be denied because resolution of the constitutional issue would not change the outcome of Petitioner's trial.

Certiorari should be denied when resolution of a constitutional question is not likely to change the result reached below. *See* Eugene Gressman, et al., *Supreme Court Practice* § 4.4(f), at 248 (9th ed. 2007) (citing *Sommerville v. United States*, 376 U.S. 909 (1964)). As the Court observed: "While this Court decides questions of public importance, it decides them in the context of meaningful litigation" that has practical significance to the parties. *The Monrosa v. Carbon Black Export, Inc.,* 359 U.S. 180, 184 (1959).

Here, even accepting that a significant conflict existed among federal courts of appeal and the highest state courts regarding the admissibility of drug analysis certificates, resolution of that conflict likely would not change the jury's verdict.. This is because, at trial, petitioner did not contest that the drugs recovered from Wright and the backseat of the cruiser were cocaine or how much the cocaine weighed. Statement at 3-6. Instead, his defense was premised on the theory that there was no evidence linking him to the drugs. *Id.*

Moreover, under Massachusetts law, "[p]roof that a substance is a particular drug need not be made by chemical analysis and may be made by circumstantial evidence." *Commonwealth v.*

Dawson, 399 Mass. 465, 467, 504 N.E.2d 1056, 1057 (1987). Experienced police officers, for instance, may testify "as to what drug a particular substance was." *Id.* Here, the Commonwealth presented testimony from two experienced narcotics officers (and other witnesses) establishing the composition and weight of the drugs. *See* Statement at 4-7. Petitioner never challenged the expertise of these officers or objected to their testimony that the 4 bags seized from Wright and the 19 bags recovered from the backseat area of the cruiser each contained "at least" a gram of cocaine. *See id.*; *Commonwealth v. Paniaqua,* 413 Mass. 796, 802, 604 N.E.2d 1278, 1282 (1992) ("jurors could credit the officers' beliefs that the white powdery substance was cocaine").

The drug analysis certificates were cumulative of this substantial other evidence and did not factor heavily in the case. The prosecutor, in fact, never directly referred to the certificates in his closing argument. *See* Tr. 3:35-51. His only references to the certificates were indirect and passing, by commenting that: (1) the 4 bags of cocaine seized from Wright had been "analyzed as such" and (2) the cocaine recovered from the backseat area of the cruiser weighed 22.16 grams. Tr. 3:38-39. Petitioner did not object to either of these statements. *Id.* In addition, any impact that these passing references had on the jury was easily outweighed by the trial judge's explicit instructions – repeated in connection with both the trafficking and distribution charges – that the jury was free to disregard the certificates entirely. Tr. 3:69, 80.

On this record, resolution of whether Petitioner's Confrontation Clause rights were violated by the admission of the drug analysis certificates is largely academic because the error, if any, was harmless beyond a reasonable doubt. *See Delaware v. Van Arsdall,* 475 U.S. 673, 681 (1986) (alleged Confrontation Clause violations are subject to harmless-error analysis). The certificates did not factor heavily in the prosecution's case, they were cumulative of other evidence presented, and the overall case against Petitioner was very strong. *See id.* at 684. This case, therefore, presents a poor vehicle for resolving the important constitutional question raised by the Petition.

B. Certiorari should be denied because, to the extent Petitioner challenges the reliability of the testing methods, his claims are waived.

Petitioner and *Amici* highlight recent scandals at laboratories across the country that, they say, call into question the reliability of laboratory test results and underscore the need for cross-examination of technicians in all cases where forensic evidence is presented. *See* Pet. 16-18. More particularly, Petitioner complains that, under Massachusetts law, he had no opportunity to challenge the reliability of the testing methods reflected in the drug analysis certificates or the qualifications of the analysts who conducted those tests.[3] *See id.* at 6-7, 18. Petitioner,

[3]Petitioner also complains that the certificates did not specify the percentage of cocaine present in the samples. Pet. 7. But, "[a]s long as the mixture contains cocaine (which it did) and weighs in excess of the threshold amount (which it also

however, waived these claims by failing to raise them in the manner required by state law.

Under Massachusetts law, a party seeking to challenge the reliability of scientific evidence must file a pretrial motion *in limine* and request an evidentiary hearing on the admissibility of the evidence. *Commonwealth v. Arroyo*, 442 Mass. 135, 145, 810 N.E.2d 1201, 1210 (2004). At this "inherently fact-intensive" hearing, the trial judge acts as "gatekeeper," screening out unreliable scientific methods and "assess[ing] the credibility of [the] various expert witnesses in determining whether proposed scientific testimony is reliable." *Canavan's Case*, 432 Mass. 304, 312, 733 N.E.2d 1042, 1049 (2000); *see also Commonwealth v. Lanigan*, 419 Mass. 15, 25-26, 641 N.E.2d 1342, 1349 (1994) (adopting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)). The "judge's gatekeeper role . . . includes the obligation to determine whether the testing at issue was conducted properly [and not just whether the testing method is theoretically reliable]." *Commonwealth v. McNickles*, 434 Mass. 839, 850, 753 N.E.2d 131, 140 (2001). Thus, a defendant – like Petitioner here – who claims that a particular scientific test was not "properly performed" or that the expert was not qualified to perform the test – must file a pretrial motion,

---

did), the purity of the cocaine need not be proved to establish the offense of trafficking." *Verde,* 444 Mass. at 285, n.5, 827 N.E.2d at 706. Nor was the purity of the cocaine an element of the distribution charge. *See* Tr. 3:80-81 (judge instructing jury that "any mixture of cocaine will suffice for distribution. It doesn't have to be in pure form.").

challenging the admissibility of that evidence. *Id.; see also Commonwealth v. Patterson,* 445 Mass. 626, 648, 840 N.E.2d 12, 28-29 (2005) ("the procedure that we adopted in *Lanigan* includes ensuring not only the reliability of the abstract theory and process underlying an expert's opinion, but the particular application of that process").

Had Petitioner followed these well-established state-court procedures, the constitutional question raised by the Petition could have been obviated. [4] The trial judge either would have accepted or rejected Petitioner's claims that the analysts were not qualified and that the testing methods were flawed. If the judge accepted the claims, she would have excluded the certificates from evidence. If the judge rejected the claims, petitioner nevertheless would have been afforded an opportunity to cross-examine the individual analysts, leaving only the issue of the analysts' unavailability for trial. *See Crawford*, 541 U.S. at 59.

Petitioner, however, failed to follow these established state-court procedures and, consequently, waived any objections he may have had to the "reliability of the testing and the conclusions reached." *Arroyo,* 442 Mass. at 145, 810 N.E.2d at 1211; *see also Commonwealth v. Bly*, 448 Mass. 473, 489, 862 N.E.2d 341, 355 (2007) (failure

---

[4]Petitioner also failed to pursue available means for obtaining pretrial discovery of all documentation relevant to the scientific testing reflected in the drug analysis certificates. *See* Mass. R. Crim. P. 14(a)(2).

to raise issue in pretrial motion "waived its consideration on the question of admissibility"). This waiver constitutes an independent and adequate state-law bar to certiorari review on any questions relating to the reliability of the testing methods reflected in the certificates or the qualifications of the analysts who conducted the tests. *See Herb v. Pitcairn*, 324 U.S. 117, 125 (1945) ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.").

C. Certiorari should be denied because the state courts correctly decided the constitutional issue raised by the Petition.

In all events, certiorari should be denied because the state courts correctly decided the constitutional issue raised by the Petition. Relying on the Supreme Judicial Court's decision in *Verde*, the state appeals court held that admission of the drug analysis certificates, without live testimony from the analysts who prepared those certificates, did not violate Petitioner's Sixth Amendment rights.[5] Petr.'s App. 8a, n.3. It also correctly rejected Petitioner's "simple assertions" that *Verde* is contrary to *Crawford*. *Id.*

[5]The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This procedural guarantee applies to state prosecutions. *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

Under *Crawford*, the crucial determination for Confrontation Clause analysis is whether the out-of-court statement is testimonial or nontestimonial. *Crawford*, 541 U.S. at 51, 68. Only testimonial statements are subject to the Confrontation Clause; nontestimonial statements, "while subject to traditional limitations upon hearsay evidence, [are] not subject to the Confrontation Clause." *Davis,* 126 S. Ct. at 2273. This is because the text of the Sixth Amendment reflects an "especially acute concern with a specific type of out-of-court statement." *Crawford,* 541 U.S. at 51; *see also White v. Illinois*, 502 U.S. 346, 365 (1992) (the Confrontation Clause was aimed "only" at a "discrete category" of "formalized testimonial materials" and should "not be construed to extend beyond the historical evil to which it was directed") (Thomas, J., concurring in part and concurring in the judgment). That concern is with "[o]nly" those statements that cause a declarant to be a "witness" against the accused. *Davis,* 126 S. Ct. at 2273.

A witness, the Court has explained, is a person who "bear[s] testimony." *Crawford*, 541 U.S. at 51. "'Testimony,' in turn, is typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* (quoting Noah Webster, *An American Dictionary of the English Language* (1828)). Thus, "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* Barring such testimony from evidence except where the witness is unavailable and the defendant has an

opportunity for cross-examination, avoids the "principal evil" that the Confrontation Clause was intended to prevent: the "civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[6] *Id.* at 50.

Where, in contrast, "nontestimonial hearsay is at issue, it is wholly consistent with the Framer's design" to afford states latitude to develop their own hearsay rules of admissibility concerning such statements. *Id.* at 68. Although the Court did not define the scope of what evidence falls into this "nontestimonial" category, it indicated that "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial – for example, business records. . . " *Id.* at 56. Additionally, Chief Justice Rehnquist, in his concurring opinion, noted that "the Court's analysis of 'testimony' excludes at least some hearsay exceptions, such as business records and official records. . . . To hold otherwise would require numerous additional witnesses without any apparent gain in the truth-seeking process." *Id.* at 76 (Rehnquist, C.J., concurring).

The Court provided some additional guidance on the distinction between testimonial and nontestimonial statements in *Davis.* There, the

---

[6]The Court recently reaffirmed that the principal purpose of the *Crawford* test was to restore "the [Framer's] original understanding of the meaning of the Confrontation Clause," rather than to enhance the "fundamental fairness and accuracy" of criminal proceedings. *Whorton v. Bockting*, 127 S. Ct. 1173, 1182 (2007).

Court applied the rule announced in *Crawford* to two cases concerning 911 calls and initial police investigation. *Davis*, 126 S. Ct. at 2270-73. Although the Court again declined "to produce an exhaustive classification of all conceivable statements – or even all conceivable statements in response to police interrogation – as either testimonial or nontestimonial," it explained that:

> 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.

Id. at 2273-74. The Court also identified several indicia useful in determining whether, objectively viewed, the "primary purpose" of a hearsay statement may be said to be testimonial. Among these indicia are: (1) whether the statement was about "events *as they were actually happening,* rather than 'describing past events'"; (2) whether any reasonable listener would recognize that the caller was facing an "ongoing emergency"; (3) whether what was asked and answered was, viewed objectively, "necessary to be able to resolve the present emergency, rather than simply to learn . . .

what had happened in the past"; and (4) the "level of formality" of the interview. *Id.* at 2276-77 (emphasis in original).

Measured against these standards, Petitioner argues that drug analysis certificates are testimonial because they are formal statements prepared at the request of the police for use in a criminal trial and not in connection with any emergency. Pet. 4, 13, 24-25. Petitioner notes that, in *Crawford,* the Court included a statement "made under circumstances which would lead an objective witness reasonably to believe that [it] would be available for use at a later trial" as one possible formulation of the "core class of 'testimonial' statements." *Crawford*, 541 U.S. at 51-52. Seizing on this language, Petitioner and *Amici* contend that *Crawford* established a bright-line rule, holding that any formal statement, including a sworn drug analysis certificate, prepared for use at trial is testimonial and, thus, subject to the Confrontation Clause. *See* Pet. 4, 13, 24-25.

The Court, however, never endorsed this or any other specific formulation of what is a testimonial statement. *Davis*, 126 S. Ct. at 2273; *see also State v. Carter*, 326 Mont. 427, 114 P.3d 1001, 1007 (2005). Instead, a statement's possible use at trial "was but one of several considerations that *Crawford* identified as bearing on whether evidence is testimonial. None of the factors was deemed dispositive." *People v. So Young Kim*, 368 Ill. App. 3d 717, 720, 859 N.E.2d 92, 94 (2006).

Davis "confirms that the proper focus [about whether an out-of-court statement is testimonial] is not on the mere reasonable chance that an out-of-court statement might later be used in a criminal trial." *People v. Geier,* 41 Cal. 4th 555, 605, 161 P.3d 104, 139, *petition for cert filed*, No. 07-7770 (U.S. Nov. 14, 2007); *see also State v. O'Maley*, 932 A.2d 1, 10 (N.H.), *petition for cert. filed*, No. 07-7577 (U.S. Nov. 7, 2007). As the Seventh Circuit explained: "it cannot be that a statement is testimonial in every case where a declarant reasonably expects that it might be used prosecutorially." *United States v. Ellis*, 460 F.3d 920, 926-27 (7th Cir. 2006); *accord United States v. Feliz*, 467 F.3d 227, 236 (2d Cir. 2006) ("where a statement is properly determined to be a business record . . . it is not testimonial within the meaning of *Crawford,* even where the declarant is aware that it may be available for later use at trial"). If this were the standard, the Court in *Davis* would have held that the 911 call from the victim reporting a domestic disturbance was testimonial because a reasonable person would know that the result of such a call would be the arrest and prosecution of the perpetrator. *Ellis*, 460 F.3d at 926*; see also Geier*, 41 Cal. 4th at 605,161 P.3d at 139 (same); *O'Maley*, 932 A.2d at 10 (same). *Davis,* thus, "confirms that the critical inquiry is not whether it might be reasonably anticipated that a statement will be used at trial but the circumstances under which the statement was made." *Geier,* 41 Cal. 4th at 607, 161 P.3d at 140.

Massachusetts adheres to this "cautious case-by-case approach" in resolving questions of admissibility in the wake of *Crawford* and *Davis*. *See Commonwealth v. DeOliveira*, 447 Mass. 56, 66, n.10, 849 N.E.2d 218, 226 (2006); *see also Commonwealth v. Galicia*, 447 Mass. 737, 741, 857 N.E.2d 463, 467 (2006) ("Both *Crawford* and *Davis* counsel that the determination whether a statement is testimonial or nontestimonial . . . is highly dependent on the context in which the statement was made."). This approach makes sense because, as the Illinois Supreme Court stated, "it would be fruitless to attempt to provide an exhaustive list of factors which may potentially enter into the 'testimonial' calculus and the weight to be accorded them." *People v. Stechly*, 225 Ill.2d 246, 296, 870 N.E.2d 333, 363 (2007). "Each case must be resolved on its own merits, and a pertinent factor in one case may not carry much weight in another." *Id.; see also O'Maley*, 932 A.2d at 12 ("While bright line tests may be easy to administer and 'bring[] clarity and predictability. . . . we believe that the Court's decision in *Davis* requires a case-by-case approach.") (internal citations omitted).

Here, several factors support the conclusion that drug analysis certificates are nontestimonial, notwithstanding that the analysts probably knew their test results would be used as evidence in a criminal prosecution. *See* Mass. Gen. Laws ch. 111, §§ 12-13. *Crawford* itself "suggested in dictum that a business or official record would not be subject to its holding as this exception was well established in 1791." *Verde*, 444 Mass. at 283, 827 N.E.2d at 705

(citing *Crawford*, 541 U.S. at 56). One "ancient principle of common law, recognized at the time of the adoption of the Constitution," allows "record[s] of a primary fact made by a public officer in the performance of official duty" to be admitted as "prima facie evidence as to the existence of that fact." *Id.* (citing *Commonwealth v. Slavski,* 245 Mass. 405, 417, 140 N.E. 465, 469 (1923)). Drug analysis certificates are "well within" this public records exception. *Id.* at 284, 827 N.E.2d at 705.

Analysts employed by the Department of Public Health are required by law to perform chemical tests on drugs and certify the results of those tests when requested to do so. *See* Mass. Gen. Laws ch. 111, §§ 12-13. In carrying out these official duties, the analysts – like the declarant reporting the emergency in *Davis* – were not acting as witnesses and were not testifying. *See Davis,* 126 S. Ct. at 2277. Instead, they were state officials simply recording the "results of a well-recognized scientific test" that the law required them to perform in the ordinary course of the department's business. *See Verde*, 444 Mass. at 283, 827 N.E.2d at 705. Thus, these statements are "akin to a business or official record, which [are] not testimonial in nature." *Id.* at 284; 140 N.E.2d at 706; *see also United States v. De La Cruz*, Nos. 06-1659/072515, 2008 WL 273970, at **9-10 (1st Cir. Feb. 1, 2008) (autopsy report prepared in the ordinary course of business pursuant to an obligation imposed by law is nontestimonial and, thus, not subject to *Crawford*); *Ellis*, 460 F.3d at 926-27 (medical records establishing the presence of

drugs in defendant's system were "statements that by their nature were not testimonial").

The certificates also were nontestimonial because they did not relate a past fact of history as would be done by a witness. *See Davis*, 126 S. Ct. at 2276-77. In *Davis*, for instance, the Court concluded that the transcript of a 911 call, in which the caller identified the defendant as the person assaulting her, did not contain "testimonial statements," requiring the prosecution to present the declarant in court. *Id.* "Rather than describing past events," the statements by the 911 caller were "speaking about events as they were actually happening." *Id.* The purpose of the 911 call, the Court observed, was "to meet an ongoing emergency" and the caller was not testifying as a "witness" or in a form that would be a "weaker substitute for live testimony" about events witnessed. *Id.* at 2277.

Similarly, the certificates here were nontestimonial because they were not relating past events but, instead, the current condition of the substances being tested. *Cf. United States v. Washington*, 498 F.3d 225, 232 (4th Cir.) (laboratory test results showing presence of PCP and alcohol in defendant's blood were not testimonial because "they were not relating past events but the current condition of the blood in the machines"), *petition for cert. filed*, No. 07-8291 (U.S. Dec. 14, 2007); *Geier,* 41 Cal. 4th at 606,161 P.3d at 140 (in determining whether a statement is nontestimonial, the "crucial point is whether the statement represents the contemporaneous recordation of observable events").

The only assertions of fact contained in the certificates were the weight and composition of the substances tested. *See* Petr.'s App. 24a-29a. Neither of these assertions made any "links to the past." *Cf. Geier*, 41 Cal. 4th at 606, 161 P.3d at 140.

Moreover, had the analysts been called to testify, they "would merely have authenticated the document" and likely would have been "unable to recall from actual memory information related to [the certificate's] specific contents. . . ." *O'Maley,* 932 A.2d at 13. Thus, like the 911 call in *Davis*, the certificates were not a "weaker substitute for live testimony at trial." *See Davis,* 126 S. Ct. at 2277.

In addition, the certificates did not "implicate 'the principal evil at which the Confrontation Clause was directed.'" *Verde* (quoting *Crawford*, 541 U.S. at 50). "In *Crawford*, this referred to the "'historical practice of justices of the peace or other court officials questioning witnesses, *ex parte*, and then merely reading the witnesses' statements into evidence.'" *O'Maley*, 932 A.2d at 12-13 (citation omitted). Unlike today, these magistrates performed an "essentially investigative and prosecutorial function." *Id.* The certificates were not prepared under any circumstances approaching this historical practice. Although the police requested that the certificates be prepared, the scientific testing recorded on the certificates was performed in a non-adversarial setting. The police did not question the analysts regarding Petitioner, nor probe them for information about the underlying crimes based on the analysts' personal knowledge. Thus, none of the

"factors likely to cloud the perception of an official engaged in the more traditional law enforcement functions of observation and investigation of crime" was implicated here. *See State v. Dedman*, 136 N.M. 561, 568, 102 P.3d 628, 635 (2004).

Lastly, the certificates did not accuse Petitioner of any crime. "*Crawford* emphasized that a principal aim of the Confrontation Clause is to protect a criminal defendant from accusations of criminal wrongdoing." *O'Maley*, 932 A.2d at 13 (quoting *Michels v. Commonwealth*, 47 Va. App. 461, 470, 624 S.E.2d 675, 680 (2006)). "Records of laboratory protocols followed and the resulting raw data acquired are not accusatory. 'Instead, they are neutral, having the power to exonerate as well as convict.'" *Geier*, 41 Cal. 4th at 607,161 P.3d at 140 (quoting *State v. Forte,* 360 N.C. 427, 435, 629 S.E.2d 137, 143, *cert. denied*, 127 S. Ct. 557 (2006)); *see also O'Maley,* 932 A.2d at 14 ("results generated from the blood test were neutral, as the tests could have led either to incriminatory or exculpatory results"). Thus, the "documentary evidence at issue here has very little kinship to the type of hearsay the confrontation clause intended to exclude, absent an opportunity for cross-examination." *Verde*, 444 Mass. at 284, 827 N.E.2d at 706. Or, as some respected commentators observed: a chemist's certification that a "substance is cocaine" does not "look much like the 'accusations' of crime" that are the "core concern of the Confrontation Clause." 30A Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 6371.2 (Supp. 2007); *but see United States v. Moon,* Nos. 05-

4506/06-1840, 2008 WL 43585, at *2 (7th Cir. Jan. 3, 2008) (non-testifying chemist's conclusion that substance was cocaine was testimonial, but data underlying that conclusion were nontestimonial).

D. Certiorari should be denied because Petitioner exaggerates the conflict among courts about whether lab reports are subject to *Crawford.*

Certiorari also should be denied because the conflict among courts about whether the results of laboratory testing are testimonial or nontestimonial is not as broad or deep as Petitioner contends. *See* Pet. 10-11. The majority of state supreme courts and federal circuit courts to address this issue have held that laboratory reports prepared for trial are nontestimonial *See, e.g., De La Cruz*, Nos. 06-1659/072515, 2008 WL 273970, at **9-10 (autopsy report nontestimonial); *Washington*, 498 F.3d at 229-30 (drug-alcohol analysis from chromatograph machine nontestimonial); *Ellis*, 460 F.3d at 926-27 (blood-urine test results nontestimonial); *Feliz*, 467 F.3d at 237 (autopsy report nontestimonial); *State v. Crager*, Nos. 06-0294/06-0298, 2007 WL 4569702, at **13-14 (Ohio Dec. 27, 2007) (DNA report nontestimonial); *O'Maley*, 932 A.2d at 13-24 (blood test results nontestimonial); *Geier,* 41 Cal. 4th at 607, 161 P.3d at 140 (DNA report nontestimonial); *Forte*, 360 N.C. at 435, 629 S.E.2d at 143 (serology report nontestimonial); *State v. Craig*, 110 Ohio St. 3d 306, 320-21, 853 N.E.2d 621, 638 (2006) (autopsy report nontestimonial), *cert. denied*, 127 S. Ct. 1374 (2007); *Dedman*, 136 N.M. at 569, 102 P.3d at 636 (blood test report nontestimonial); *State v. Cutro*,

365 S.C. 366, 378, 618 S.E.2d 890, 896 (2005) (autopsy report nontestimonial). In determining that laboratory reports were nontestimonial, these courts, consistent with *Crawford* and *Davis*, considered all of the surrounding circumstances, not just that the reports were prepared for possible use at trial. *See id.*

In contrast, only a handful of courts have disagreed with *Verde* or reached contrary conclusions. *See, e.g., Moon,* Nos. 05-4506/06-1840, 2008 WL 43585, at *2 (non-testifying chemist's conclusion that substance was cocaine was testimonial but no plain error in its admission); *Hinojos-Mendoza v. People*, 169 P.3d 662, 667 (Colo. 2007) (drug test report testimonial); *State v. March*, 216 S.W.3d 663, 665-66 (Mo.) (same), *cert. dismissed*, No. 06-1699 (U.S. Oct. 5, 2007); *State v. Caulfield*, 722 N.W.2d 304, 309 (Minn. 2006) (same); *Thomas v. United States*, 914 A.2d 1, 12-15 (D.C. 2006) (same), *cert. denied*, 128 S. Ct. 241 (2007); *Las Vegas v. Walsh*, 121 Nev. 899, 124 P.3d 203, 208 (2005) (chain-of-custody affidavit from nurse who drew defendant's blood testimonial), *cert. denied*, 547 U.S. 1071 (2006). These courts reached their conclusions by relying on a bright-line test similar to that urged by Petitioner and *Amici* here. *See, e.g., Hinojos-Mendoza*, 169 P.3d at 667 (laboratory report testimonial because there could be "no serious dispute that the sole purpose of the report was to analyze the substance found in [defendant's] vehicle in anticipation of criminal prosecution"). As shown above, however, that test "focuses too narrowly on the question of whether a document may be used in

litigation. This was but one of several considerations that *Crawford* identified as bearing on whether evidence is testimonial." *So Young Kim*, 368 Ill. App. 3d at 720, 859 N.E.2d at 94.

Furthermore, the conflict among courts is not as entrenched as Petitioner believes. Not even two years have passed since the Court, in *Davis*, further clarified *Crawford* -- a decision issued only four years ago. In the meantime, the range of scientific evidence potentially subject to the Confrontation Clause continues to expand. *See* Jennifer L Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & Pol'y 791, 810-11 (2007). The "perspective of time" may help shed more light on the important constitutional question posed by this Petition. *Darr v. Burford,* 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting). Allowing further percolation in the lower courts also will assist the Court in fully evaluating the ramifications that a decision in this case might have on criminal prosecutions throughout the country. *See* Gressman et al., *Supreme Court Practice* § 6.37(i)(1), at 503-04 ("The more important an issue is, the more the Court would benefit by allowing the issue to percolate so it may avail itself of the wisdom of other courts before settling a momentous matter.").

The Commonwealth, in fact, is aware of several other pending petitions for certiorari review relating to the admission of laboratory test reports allegedly in violation of defendants' Confrontation Clause rights. *See, e.g.*, *Washington*, 498 F.3d 225,

petition for cert. filed, No. 07-8291 (U.S. Dec. 14, 2007) (blood test results for alcohol and PCP); *Geier*, 41 Cal.4th 555, 161 P.3d 104, *petition for cert. filed,* No. 07-7770 (U.S. Nov. 14, 2007) (DNA test results); *O'Maley*, 932 A.2d 1), *petition for cert. filed,* No. 07-7577 (U.S. Nov. 7, 2007) (blood test results). Further analysis of this complicated issue by lower courts is appropriate because a new federal constitutional rule requiring live witness testimony in all cases involving laboratory testing would have enormous ramifications on countless federal and state criminal prosecutions. If the Court chose to address this issue now, however, a decision in one of these other cases might be of more practical significance to the parties than it would be here on the record described above. *See The Monrosa*, 359 U.S. at 184 (certiorari improvidently granted where resolution "can await a day when . . . [question] is posed less abstractly").

These considerations are particularly important given Petitioner's barebones arguments in the state appellate courts. *See Petr.'s* App. 8a n.3. Although his arguments were minimally sufficient to confer jurisdiction under 28 U.S.C. § 1257(a), Petitioner nevertheless did not provide the Supreme Judicial Court with any reasoned basis for reexamining its decision in *Verde.* Principles of comity require that the Supreme Judicial Court be afforded a full and fair opportunity – on a more developed record than presented here – to reconsider *Verde* and, if necessary, remedy any potential Confrontation Clause violation associated with the challenged statutory scheme. *See Adams v. Robertson,* 520 U.S. 83, 90 (1997) (principles of

comity require that state courts be given a fair opportunity to consider proposed changes that could obviate a federal constitutional challenge).

E. Certiorari should be denied because the bright-line rule proposed by Petitioner threatens the administration of justice.

Further, certiorari should be denied because the bright-line rule urged by Petitioner and *Amici* threatens the efficient administration of justice. In their view, anytime the results of scientific testing are prepared for possible use at a criminal trial – including, DNA analysis, microscopic hair analyses, fingerprint identifications, autopsy reports, ballistics tests, drug analysis, and other tests not yet imagined – the Confrontation Clause requires the prosecution to present live testimony from the actual technician who performed the testing. *See* Pet. 4, 15, 21. The *only* exception would be if the technician is unavailable and there has been a prior opportunity for cross-examination. *See Crawford,* 541 U.S. at 59. As detailed above, *Crawford* and *Davis* do not support this result, and adoption of such a rule would wreak havoc on criminal prosecutions across the county, without any gain in the truth-seeking process.

According to one study, crime laboratories received approximately 2.7 million requests for forensic laboratory services during 2002. Bureau of Justice Statistics, Federal, State, and Local Crime Lab Backlog Reached 500,000 in 2002 (2005), <http:www.ojp.usdoj.gov/bjs/pub/press/cpffcl02pr.ht

m>. Testing of controlled substances was the most frequently requested type of forensic laboratory service requested during the year, accounting for approximately half of all requests submitted. *Id.* In Massachusetts alone, the Department of Public Health estimates that it analyzes between 38,000 to 40,000 drug samples each year. *See* Brief for the Attorney General and Department of Public Health as Amici Curiae Supporting the Commonwealth, *Commonwealth v. Verde*, No. SJC-09320, 2004 WL 3421947, at *5 (2004).

To reduce court delays and the burden of having the laboratory personnel called as witnesses in every criminal case where forensic evidence is at issue, the vast majority of jurisdictions in the United States have adopted statutes that "explicitly permit the introduction of some kinds of routinely generated expert evidence by forensic scientists" without the need for live testimony. Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & Pol'y at 797. Indeed, according to one recent study, only six jurisdictions have failed to enact similar legislation. *Id. at n.15.*

Even proponents of the bright-line rule urged by Petitioner, including some *Amici,* concede that "[i]t may be a significant drain on limited forensic science budgets to require that every forensic science test be presented in court by whoever actually performed the test, unless that examiner is unavailable and the defendant had a prior opportunity for cross-examination." Mnookin, *Expert Evidence and the Confrontation Clause After*

Crawford v. Washington, 15 J.L. & Pol'y at 836. As one court explained: "'To have forensic scientists traveling across [the state] to testify in every case involving forensic evidence, even in those cases in which the opposing party has no intention of challenging the forensic evidence, would greatly reduce the amount of time those scientists have to actually conduct the examinations and analyses and would cause even more delays in the criminal justice system.'" *Pruitt v. State*, 954 So.2d 611, 615 (Ala. Crim. App. 2006) (quoting *Brown v. State*, 939 So.2d 957, 960-61 (Ala. Crim. App. 2005)); *accord Napier v. State,* 827 N.E.2d 565, 567 (Ind. Ct. App. 2005) (it would be "unreasonable" to require a witness to routinely testify that the operator of a breathalyzer machine was certified and the machine was in good working order), *cert. denied*, 546 U.S. 1215 (2006).

This burden is particularly unnecessary "where the author, signator, or custodian of the document ordinarily would be unable to recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his or her own action." *People v. Johnson*, 121 Cal. App. 4th 1409, 1413, 18 Cal. Rptr. 3d 230, 233 (1st Dist. 2004) (internal citations omitted); *see also* Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & Pol'y at 836 (bright-line application of *Crawford* may "seem particularly nonsensical when there is little chance that the actual declarant, the author of the forensic report, will still have an independent memory of conducting the test by the time of trial. . . ."). That, of course, is precisely the

situation with the routine laboratory tests at issue here. *See Verde*, 444 Mass. at 283, 827 N.E.2d at 705.

The bright line rule urged by Petitioner and *Amici* also could result in substantial injustice. Years can pass between the preparation of a scientific report and the trial of a perpetrator. *See People v. Durio*, 794 N.Y.S.2d 863, 869, 7 Misc. 3d 729, 736 (N.Y. Sup. Ct. 2005). By the time of trial, the scientist who prepared the report may have moved, changed professions, or even died. *See id.* As the Supreme Court of Kansas noted, excluding an autopsy report because the medical examiner who conducted the autopsy is unavailable or dead at the time of trial would be an unduly "harsh" result. *State v. Lackey,* 280 Kan. 190, 213, 120 P.3d 332, 351 (2005), *cert. denied*, 547 U.S. 1056 (2006); *see also Rollins v. State,* 392 Md. 455, 496, 897 A.2d 821, 845 (it would be "unacceptable in practical application" to interpret *Crawford* as precluding the admission of an autopsy report when the author dies before trial), *cert. denied*, 127 S. Ct. 392 (2006).

Similar concerns would be at play when the analyst who performed a drug test is no longer available to testify at the time of trial. "If that were the situation, would the [drug] tests have to be redone, even though there are no questions about the accuracy of the tests, and there are no indications of any discrepancies?" *Crager, Nos. 06-0294/06-0298,* 2007 WL 4569702, at *15. It would be "incongruous" to require such a result. *Id.* Indeed, there are many cases – Petitioner's included – where

"the key issue at trial does not at all relate to the reliability of the forensic evidence." Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & Pol'y at 859. Thus, to require live testimony in every case where drug testing evidence is involved "may well be a significant waste of resources." *Id.* It would, as Chief Justice Rehnquist said, needlessly require the prosecution to present "numerous additional witnesses without any apparent gain in the truth-seeking process." *Crawford*, 541 U.S. at 76 (Rehnquist, C.J., concurring).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARTHA COAKLEY
Attorney General

JAMES J. ARGUIN*
DAVID S. FRIEDMAN
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108-1598
(617) 727-2200
*Counsel of Record

February 2008