No. 07-591

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

REPLY BRIEF FOR PETITIONER

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The Commonwealth acknowledges that this case raises an "important constitutional question" over which state supreme courts and federal courts of appeals are deeply divided: whether state forensic laboratory reports prepared for criminal prosecutions are testimonial evidence. BIO 1, 30-31. The Commonwealth contends, however, that (1) the conflict should be allowed to percolate even longer; (2) that this case is an unsuitable vehicle for resolving the question presented; and (3) that the decision below is correct. None of these arguments provides any reason to delay resolving this escalating split of authority.

1. The conflict of authority over the testimonial nature of crime laboratory reports is intractable and needs to be resolved now. Since the filing of the petition, the conflict over the issue has grown in state courts of last resort and federal courts of appeals to six-to-six. *See* Pet. 9-15; *United States v. Moon*, 512 F.3d 359 (7th Cir. 2008) (drug lab reports testimonial); *State v. Crager*, 879 N.E.2d 745 (Ohio 2007) (divided opinion: DNA reports not testimonial). If one includes under the umbrella of the question presented the cases the Commonwealth cites respecting a forensic laboratory's machine-generated data and respecting autopsy reports, this brings the conflict to ten-to-six. *See* BIO 30-31.[1]

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[1] This count leaves aside the Seventh Circuit's decision in *United States v. Ellis*, 460 F.3d 920 (7th Cir. 2006), given that court's holding in *Moon* that forensic reports just like those here are testimonial. None of the other jurisdictions the Commonwealth cites has addressed a situation exactly like the one here.

The notion that this split of authority should be allowed to percolate longer is hard to take seriously. The Commonwealth suggests that courts should be given more time to digest this Court's decision in *Davis v. Washington*, 126 S. Ct. 2266 (2006). BIO 32. But since *Davis* was decided, state courts of last resort and federal courts of appeals – using the Commonwealth's collection of cases – already have divided *six-to-four* over the issue. Furthermore, not one of the courts that decided the issue prior to *Davis* has found it necessary to revisit its position.

Indeed, Petitioner asked the Supreme Judicial Court of Massachusetts in this case to reconsider *Commonwealth v. Verde,* 827 N.E.2d 701 (Mass. 2005), in light of *Davis*. *See* Pet. 8. The court refused to do so, and has refused to do so, in accordance with the Commonwealth's wishes, in numerous other post-*Davis* cases.[2] The time clearly has come for this Court to settle the deepening confusion regarding this Court's explication of the Sixth Amendment.

2. This case is an excellent vehicle to resolve the question whether forensic laboratory reports prepared for criminal prosecutions are testimonial. Although the Commonwealth offers a scattershot of supposed

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[2] *See Commonwealth v. Castro,* 877 N.E.2d 1286 (Mass. App. 2007) (unpublished opinion), *rev. denied,* ___ N.E.2d ___ (Mass. Jan. 31, 2008); *Commonwealth v. Jackson,* 877 N.E.2d 641 (Mass. App. 2007) (unpublished opinion), *rev. denied,* ___ N.E.2d ___ (Mass. Jan. 31, 2008); *Commonwealth v. Jackson,* 863 N.E.2d 583 (Mass. App.) (unpublished opinion), *rev. denied,* 868 N.E.2d 132 (Mass. 2007); *Commonwealth v. Franco,* 846 N.E.2d 792 (Mass. App.) (unpublished opinion), *rev. denied,* 850 N.E.2d 583 (Mass. 2006).

impediments to this Court's reaching this Sixth Amendment issue, none has any force.

a. The Commonwealth's suggestion (BIO 33-34) that petitioner did not give the Massachusetts courts an adequate opportunity to address his Confrontation Clause argument is baseless. Petitioner objected to the introduction of the reports at trial, specifically citing *Crawford v. Washington,* 541 U.S. 36 (2004), and the trial court overruled those objections. Tr. 2/81, 2/98. Petitioner renewed the *Crawford* argument in the Appeals Court of Massachusetts, even though the Massachusetts Supreme Judicial Court's *Verde* decision was binding on that court, and the Appeals Court rejected the argument on the merits. Pet. App. 8 n.3. And petitioner unsuccessfully sought review in the Massachusetts Supreme Judicial Court, arguing 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." Pet. for Further Appellate Review 15-16. Even the Commonwealth concedes that these actions are sufficient to trigger this Court's jurisdiction. BIO 33; *see also Lilly v. Virginia,* 527 U.S. 116, 123 (1999); *Taylor v. Illinois,* 484 U.S. 400, 406 n.9 (1988). These actions also expended more than enough defense resources on an argument that depended on the Supreme Judicial Court reconsidering its recent and controlling precedent with which several other state courts of last resort agree.

b. The Commonwealth suggests that this Court should decline to hear petitioner's constitutional claim

because state law afforded him a pretrial procedure to challenge "the reliability of the testing methods reflected in the drug analysis certificates." *See* BIO 1, 16-19. This suggestion misapprehends the nature of the Confrontation Clause. The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination" before the jury. *Crawford,* 541 U.S. at 61; *see also Taylor*, 484 U.S. at 410 & n.14. Petitioner asserted his right to this procedure, and the Massachusetts courts denied it. The fact that petitioner might have been able to contest the substantive reliability of the testing methods used to produce the certificates in a pretrial *Daubert*-type hearing is beside the point.

c. Nor is the Commonwealth correct that other cases currently pending in this Court might frame the question presented better than this one. *See* BIO 32-33. In *People v. Geier,* 161 P.3d 104 (Cal. 2007), *pet'n for cert. filed,* No. 07-7770, the California Supreme Court, unlike the Massachusetts appellate courts in this case, found that "any error" in admitting the forensic report at issue "was harmless." *Id.* at 140. Furthermore, in *Geier*, *United States v. Washington,* 498 F.3d 225 (4th Cir. 2007), *pet'n for cert filed,* No. 07-8291, and *State v. O'Maley,* 932 A.2d 1 (N.H. 2007), *pet'n for cert filed*, No. 07-7577, forensic examiners actually testified at trial. Those cases, therefore, raise only the issue of whether the testifying examiners could rely on certain reports and machine-generated data to support their expert opinions. Here, by contrast, the Commonwealth never placed any forensic examiner on the stand. Instead, the Commonwealth introduced extrajudicial certificates, declaring under

oath that the substances at issue in petitioner's case contained cocaine. *See* Pet. 5. Accordingly, this case more clearly implicates the Confrontation Clause and more cleanly raises the question respecting the testimonial nature of forensic laboratory reports.

d. Finally, the Commonwealth urges this Court to deny review on the ground that the forensic reports it introduced over petitioner's objection were merely "cumulative of other evidence presented" at trial. BIO 16. If that were really so, one would wonder why the Commonwealth insisted on creating an obvious and serious constitutional issue for appeal by introducing them. One also might wonder why the Commonwealth never argued harmless error before its own courts, advancing the argument for the first time in its brief in opposition in this Court. Such unanswered questions illustrate why this Court has adopted a "general custom" of granting certiorari to resolve federal constitutional issues squarely decided by state courts – including confrontation issues specifically – and then "allowing state courts initially to assess the effect of erroneously admitted evidence in light of substantive state criminal law." *Lilly,* 527 U.S. at 139-40.

In any event, the Commonwealth's newly devised harmless-error argument lacks merit. The Commonwealth had to prove as an element of the crimes charged that the substance in the bags it introduced into evidence contained an illegal drug. The Commonwealth notes that Massachusetts law allows a jury to make such a finding based on the testimony of police officers. *See* BIO 15. But the very case cited by the Commonwealth notes that "it would be a rare case in

which a [police officer's] statement that a particular substance looked like a controlled substance would alone be sufficient to support a conviction." *Commonwealth v. Dawson*, 504 N.E.2d 1056, 1057-58 (Mass. 1987). Accordingly, unlike the anticipated trial in *Dawson*, the Commonwealth here introduced *forensic reports* respecting the substances at issue. The jury was instructed – consistent with Massachusetts law rendering such reports "prima facie" evidence of what they assert, *see Commonwealth v. Maloney,* 855 N.E.2d 765, 769-70 (Mass. 2006) – to consider the reports in determining whether the substances contained contraband and that it was "permitted" based on the reports alone to find that they did.[3]

This case was close enough that the trial court took the unusual step of reserving ruling on the defendant's motion for a required finding of not guilty

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[3] The two relevant jury instructions here stated in full: (1) "In considering this element, you may consider all the relevant evidence you had in the case about what the substance was. In particular, you have a certificate of analysis that was marked as an exhibit. That is evidence for your consideration and you should consider that together with all other evidence in deciding whether or not the Commonwealth has met its burden of proving that this was, in fact, cocaine. *So from that certificate of analysis you're permitted but you're not required to conclude the substance was cocaine.* It's entirely up to you to decide." Tr. 3/69 (emphasis added). (2) "The first element requires proof beyond a reasonable doubt that the substance the defendant allegedly distributed was cocaine and I explained to you that is a controlled substance. 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 the certificate . . . ." Tr. 3/80. The jury was never instructed, as the Commonwealth claims, that it was "free to disregard the certificates of analysis entirely." BIO 1.

until after the jury returned its verdict, Tr. 2/227, and it is impossible to say beyond a reasonable doubt that the jury did not rely on the forensic reports in making its findings here. The reports were the only "scientific" or definitive evidence that the prosecution offered to prove that the substances the officers seized contained cocaine. Although the lead officer testified that he "believed" the substances he seized were cocaine, Tr. 2/100, he acknowledged that he had no "real knowledge" in that respect apart from the forensic reports. Tr. 2/120.[4] Unlike in *Dawson*, no officer testified to having ingested the substances the defendant allegedly possessed so as to describe their physiological effects. Nor did the officers even perform any field test.

Finally, cross-examination would have enabled petitioner to explore anomalies in the forensic examiner's conclusory certification that the substance in the nineteen bags supposedly found in the patrol car that transported petitioner to the station contained the same illegal drug as the four bags seized at the K-Mart from Wright. Pet. for Cert. 20. The Commonwealth notes that the lead officer testified that the substances in both batches of bags looked "identical." BIO 11. But this testimony simply underscores the potential flaw in the prosecution's case. The bags themselves were introduced into evidence at trial. And it is undeniable (the Commonwealth does not contend otherwise) that they actually look different. The bags seized from Wright contained a white and light yellow powder, while the ones the officers later supposedly

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[4] The other police officer the Commonwealth cites simply testified, *upon being shown the bags in court,* that they "appear[ed] to be" or "look[ed] like" cocaine. Tr. 1/105, 107-08.

found in the patrol car contained a dark yellow, chunky substance. Accordingly, the fact that the lead officer's testimony was clearly incorrect heightened the need for proper adversarial testing of the state-employed agent who certified that the substances were chemically the same. Such adversarial testing would have been perfectly consistent with petitioner's defense that there was no evidence linking him to the bags the Commonwealth introduced at trial. If the bags the police supposedly found in the patrol car contained a different substance or composition than the ones the officers seized from Wright outside the K-Mart, then the Commonwealth's theory that petitioner sold Wright four bags from a uniform collection of some twenty-three bags appears highly dubious.[5]

3. The Commonwealth, finally, advances several arguments in defense of the holding below that forensic laboratory reports prepared for criminal prosecutions are nontestimonial. Given the depth of the conflict over this issue, it does not really matter at

[5] To any extent the Commonwealth further suggests that petitioner's current contentions are inconsistent with the defense he put on, the Commonwealth disregards the realities of criminal trials. In run-of-the-mill drug cases in which defendants are represented by appointed counsel, such counsel all-too-often does not conduct an extensive investigation or seriously attack the prosecution's allegations through pretrial motion practice. Instead, defense counsel relies on his or her ability to put the prosecution to its proof at trial and to present a defense that responds to apparent weaknesses in the prosecution's case. Once the trial court here ruled that the Commonwealth could present forensic certificates in place of live testimony respecting the chemical composition of the substances in the bags at issue, defense counsel had little choice but to move away from a line of defense that depended entirely on disputing the alleged contents of the bags.

this stage whether the decision below is on the proper side of the split of authority. In any event, the Commonwealth's "multi-factor" merits argument is unconvincing.

The Commonwealth first describes the drug analysis certificates as "akin to" business records. BIO 25-27. But the petition for certiorari explains why *Crawford*'s reference to the common law's narrow "business record" rule provides no support for treating modern forensic laboratory reports as nontestimonial, *see* Pet. 23-24, and the Commonwealth does not even engage (much less refute) this explanation. The Commonwealth's next asserts that forensic laboratory reports are nontestimonial because they relate "the current condition of the substances being tested." BIO 27. But this argument likewise fails to respond to the petition's explanation as to why it lacks force. *See* Pet. 24-25. The Commonwealth further contends that forensic laboratory reports are nontestimonial because forensic examiners create them in a "non-adversarial setting" and the reports do "not accuse [defendants] of any crime." BIO 28-30. But the *ex parte* nature of the forensic examiner's certifications is part of the problem, *see Crawford*, 541 U.S. at 50, not a salutary aspect of the evidence at issue here. And the certifications, even if not directly accusatory, relate information that unquestionably implicates the Confrontation Clause's fundamental purpose of precluding trial by affidavit. The reports certify on oath that an essential element of the crimes charged is satisfied – namely, that substances seized in connection with petitioner's arrest contained illegal drugs. The reports therefore serve as documentary "testimony" –

specifically designed to substitute for live testimony (*see* Pet. 5) – against him.

Finally, the Commonwealth argues that recognizing forensic laboratory reports as testimonial evidence would "wreak havoc" on administration of criminal justice. BIO 34. This, too, is really a merits argument better left for merits briefing – and an unmeritorious argument at that. This Court has explained repeatedly that the meaning of the Sixth Amendment does not turn on administrative "efficiency." *Blakely v. Washington,* 542 U.S. 296, 313 (2004). "The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and [this Court], no less than the state courts, lack[s] authority to replace it with one of [its] own devising." *Crawford,* 541 U.S. at 67. That is presumably why this Court already has assumed in prior opinions that criminal defendants have a right to demand that prosecutors introduce forensic evidence through live testimony subject to cross-examination. *See California v. Trombetta,* 467 U.S. 479, 490 (1984) ("the defendant retains the right to cross-examine the law enforcement officer who administered the [blood-alcohol] test, and to attempt to raise doubts in the mind of the factfinder whether the test was properly administered"); *United States v. Wade,* 388 U.S. 218, 227-28 (1967) (same regarding other forensic tests).

In any event, several states, including California and Illinois, have long required forensic examiners, upon demand from the defense, to testify at trial regarding allegedly incriminating conclusions reached in their laboratories. *See* Pamela R. Metzger, *Cheating the Constitution,* 59 Vand. L. Rev. 475, 478 & n.10

(2006); *see also id.* at 481-82 & n.23 (referencing twelve other states that require such testimony if demanded according to certain statutory procedures). Several other states have held that *Crawford* requires this rule. *See* Pet. 12-13. Nothing suggests that the criminal justice system in any of these states has ground to a halt, or even has slowed in processing cases. This is probably because, as the Commonwealth itself explained in a brief to the Massachusetts Supreme Judicial Court in *Verde*:

> [I]t is almost always the case that [forensic laboratory reports] are admitted without objection. Generally, defendants do not object to the admission of drug certificates most likely because there is no benefit to the defendant from such testimony. The testimony of the analyst will only serve to resolve any possibility of reasonable doubt, not only in the identification of the substance as contraband but also as to the weight of the substance for trafficking offenses.

Br. for the Commonwealth as *Amicus Curiae* 7, *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005), *available at* 2004 WL 3421945 (citations omitted).

At the same time, there are certain cases in which defendants wish to put the prosecution to its proof with respect to forensic evidence. And it is a well documented fact that such evidence is sometimes revealed to be incorrect or even deliberately manipulated or fabricated. *See* Br. *Amici Curiae* of Prof. Pamela R. Metzger et al. 12-20 & App. This Court should confirm now that forensic reports are testimonial, not only to ensure that courts protect criminal

defendants' constitutional procedural rights, but also to ensure that investigators and prosecutors face the right incentives to develop such evidence in dependable and upright manners.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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