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No. 07-591

IN THE
Supreme Court of the United States

Luis E. Melendez-Diaz,
Petitioner,

v.

Massachusetts
Respondent

On Writ of Certiorari
to the Appeals Court of Massachusetts

BRIEF FOR PETITIONER

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June 16, 2008

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).

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JURISDICTION

The Massachusetts Supreme Judicial Court denied review of this case on September 26, 2007. Pet. 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

Until quite recently, this Court and others generally assumed that the Sixth Amendment required the prosecution, absent a stipulation from a defendant, to present the findings of 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.* at 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 in the wake of this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), prosecutorial use of forensic laboratory reports in lieu of live testimony has become even less constitutionally

defensible. *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 are the functional equivalent of such affidavits. The Appeals Court of Massachusetts, following a binding decision from the Massachusetts Supreme Judicial Court, nonetheless held in this case that such certificates are not testimonial.

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 seized 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. Ct. 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 several 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, rather than the health department, performs a 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 to the store shortly after receiving the manager's call. Upon 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. Looking through the car's back window, the officer observing the suspects saw Wright lean forward and then back. The officer never noticed any hand movements or anything else indicating that any kind of exchange had taken place between the car's occupants. Nevertheless, when Wright got out of the car and began walking towards K-Mart, the 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, the officer arrested Wright and radioed to the other officers on the scene, who arrested 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 them to the police station. 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 Massachusetts Department of Public Health's State Laboratory Institute for testing. Although this laboratory is "not currently accredited by an[y] external certification body" for purposes of forensic testing,[1] it is an entity to which the Boston Police Department regularly turns for chemical analyses of suspected drugs. J.A. 27. Approximately two weeks later, two state-employed analysts issued three sworn reports on letterhead from the Massachusetts Department of Public Health. The first two reports assert that the four bags taken from Wright

[1] *See* Letter of Julianne Nassif, Director, Division of Analytical Chemistry, Executive Office of Health and Human Services, Massachusetts Department of Public Health, to David J. Nathanson, Esq. (May 30, 2008) (produced in response to state freedom of information request and reproduced as an Appendix to this brief); *see also Laboratories Accredited by ASCLD/LAB,* http://www.ascld-lab.org/legacy/aslablegacylaboratories.html (listing nationwide accreditations as of May 19, 2008).

contained a total of 4.75 grams of a substance containing cocaine. Pet. App. 24a-27a. The third report asserts that the nineteen bags found in the police cruiser contained 22.16 grams of a substance containing cocaine. Pet. App. 28a-29a.

The reports, which are reproduced at Pet. 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). Petitioner refused to stipulate to the authenticity of the Commonwealth's drug analyses or to any other facts, J.A. 7-8, and demanded a trial.

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. J.A. 30, 32. 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. J.A. 29, 32. The trial court overruled the objections without explanation and admitted the reports into evidence. *Id.* The Commonwealth never called the state forensic examiners to the stand or asserted that they were unavailable to testify.

The officers involved in the case also testified that they thought the substance in the bags at issue "appeared to be cocaine." J.A. 23; *see also* J.A., 18, 19, 26, 33. But the lead officer acknowledged on cross-examination that he did not "have any real knowledge of what [was in the bags] except what came back from the lab" in the certificates. J.A. 35. And the district attorney emphasized in his closing that the bags the police had seized contained "cocaine, *analyzed as such.*" J.A. 50 (emphasis added).

After being instructed that the laboratory reports alone permitted it to conclude that the bags the officers seized contained cocaine, J.A. 59, the jury found petitioner guilty on both counts.[2] The court sentenced

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[2] The two relevant jury instructions stated in relevant part: (1) "In considering this element [whether the evidence at issue contains cocaine], you may consider all the relevant evidence you had in the case about what the substance was. In particular, you

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 701 (Mass. 2005), that introducing "certificates of drug analysis" in lieu of live testimony does not "deny a defendant the right of confrontation." Pet. App. 8a n.3. The *Verde* decision, which is reproduced at Pet. App. 12a-23a, reasoned that a drug analysis certificate is "akin to a business or official record, which the Court [in *Crawford*] stated was not testimonial in nature." Pet. App. 18a. The Massachusetts Supreme Judicial Court further took comfort in the assertion that drug analysis certificates "are neither discretionary nor based on opinion," but rather are a product of a "well-recognized scientific test." Pet. App. 17a.

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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." J.A. 59 (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 that certificate . . . ." J.A. 61.

The Appeals Court further held that "[b]ased on all the evidence, *including the drug analysis certificates concerning the substances taken from Wright and the back of the cruiser*," there was sufficient evidence to support petitioner's convictions. Pet. App. 8a (emphasis added).

5. Petitioner sought discretionary review of this decision in the Massachusetts Supreme Judicial Court. He claimed, among other things, that the introduction of the drug analysis certificate violated the Confrontation Clause. Specifically, petitioner argued 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. Pet. App. 11a.

SUMMARY OF ARGUMENT

A. A state forensic analyst's laboratory report prepared for use in a criminal prosecution is "testimonial" evidence and, therefore, subject to the Confrontation Clause. In *Crawford v. Washington*, 541 U.S. 36 (2004), 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." *Id.* 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). This Court further has

explained that statements gathered by 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." *Davis v. Washington*, 547 U.S. 813, 822 (2006).

State forensic examiners' crime laboratory reports fall squarely within this class. Forensic examiners in Massachusetts, as elsewhere, create such reports at the behest of police officers "for the enforcement of law." Mass Gen. Laws ch. 111, § 12. The reports are formal, sworn statements. And prosecutors forthrightly offer them in lieu of live testimony at trial. Forensic laboratory reports are thus the modern equivalent of *ex parte* affidavits – exactly the kind of "solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact" that this Court has characterized as quintessentially testimonial. *Crawford*, 541 U.S. at 51 (quotation and citation omitted).

B. Neither characterizing a forensic report as "akin to a business or official record" (Pet. App. 18a) nor as a declaration of objective fact (Pet. App. 17a) undermines its testimonial nature. It is immaterial under the Confrontation Clause whether a piece of hearsay evidence can be classified under any particular modern hearsay exception. While *Crawford* noted that records that were admissible under the common-law "shop book" rule were nontestimonial in nature, shop books were not prepared with an eye toward criminal investigations or potential litigation. Forensic reports, by contrast, are expressly prepared for law enforcement to aid in criminal investigations.

As such, and as courts recognized prior to this Court's decision in *Ohio v. Roberts*, 448 U.S. 56 (1980), forensic certifications are fundamentally testimonial in a way that classic business and official records were not.

The Confrontation Clause also applies with the same force to statements that are factual in nature as it does to statements of opinion. Even if factual or objective statements are more likely to be reliable, *Crawford* expressly rejected reliability as a basis for exempting testimonial hearsay from the adversarial process. In any event, the Massachusetts' courts' supposition that forensic reports are purely objective is mistaken. Such reports reflect complicated, subjective interpretations of imprecise scientific tests. It thus is entirely proper—indeed, vital—that forensic witnesses' claims be subject to the ordinary Sixth Amendment process of live testimony subject to cross-examination.

ARGUMENT

Prior to its decision in *Crawford v. Washington*, 541 U.S. 36 (2004), this Court assumed on three separate occasions that the Sixth Amendment's Confrontation Clause requires the prosecution, absent a stipulation from a defendant, to present the findings of its forensic examiners through live testimony at trial. *See California v. Trombetta,* 467 U.S. 479, 490 (1984) ("[T]he 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 fact-finder whether the test was properly administered."); *United States v. Wade*, 388 U.S. 218, 227-28 (1967) (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."); *Diaz v. United States*, 223 U.S. 442, 450 (1912) (Certain pretrial "testimony" including an autopsy report "could not have been admitted without the consent of the accused . . . because the accused was entitled to meet the witnesses [who prepared the report] face to face."). A straightforward application of *Crawford*'s now-controlling "testimonial" framework confirms the correctness of this Court's prior assumptions.

A. A State Forensic Analyst's Laboratory Report Prepared For Use In A Criminal Prosecution Is "Testimonial" Evidence.

1. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. A "witness[]" is a person who gives testimony. Accordingly, in *Crawford v. Washington*, 541 U.S. 36 (2004), this Court held that the prosecution may not introduce "testimonial" hearsay against a criminal defendant absent a showing both that the declarant is unavailable and that the defendant had a prior opportunity for cross-examination. *Id.* at 54, 68.

The *Crawford* opinion and this Court's subsequent decision in *Davis v. Washington,* 547 U.S. 813 (2006), "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Crawford*, 541 U.S. at 68; *see also Davis,* 547 U.S. at 822 (2006). Nonetheless, this Court has provided

considerable guidance concerning the concept. As a starting point, this Court has noted that "testimony" is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." 541 U.S. at 51 (quoting 2 Noah Webster, American Dictionary of the English Language (1828)). This Court also has 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 substitutes for live testimony against the accused. *Id.* at 50, 52 n.3; *see also Dowdell v. United States,* 221 U.S. 325, 330 (1911) (Confrontation Clause "intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits"); *Mattox v. United States*, 156 U.S. 237, 242 (1895) (clause intended to prohibit use of "*ex parte* affidavits" in place of live testimony).

The Framers directed the Clause at the civil-law method of creating and presenting accusatory evidence for two main reasons. First, the prosecution's submission of written declarations deprives the accused of "an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox,* 156 U.S. at 242-43; *see also* 3 William Blackstone, Commentaries on the Laws of England *373-74 (1768) (same). Second, 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. The Confrontation Clause "must be interpreted with this focus in mind." *Id.* at 50.

Applying these guiding principles, this Court held in *Crawford* that statements made by an individual to governmental officers during a stationhouse interrogation are testimonial. *Id.* at 51-52. This Court explained that police officers conducting interrogations perform "investigative functions" with an eye toward preparing cases for prosecution. *Id.* at 53. Consequently, allowing prosecutors to introduce records of such investigative statements instead of live testimony subject to cross-examination "presents the same risk[s]" of inaccuracy and distortion as the historical trial-by-affidavit abuses that the Framers decried. *Id.* at 53.

In *Davis*, this Court refined *Crawford*'s application to official interrogations, holding that statements made to governmental agents "are testimonial when the circumstances objectively indicate . . . that the primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution." *Davis,* 547 U.S. at 822. That being so, a person's statement to a police officer responding to the scene of a suspected crime was testimonial because she gave it as part of the officer's "investigation into possibly criminal past conduct," and the statement "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed." *Id.* at 829-30. "Such statements," this Court explained, "are an obvious substitute for live testimony, because they do precisely *what a witness*

does on direct examination; they are inherently testimonial." *Id.* at 830 (emphasis in original). In other words, when "*ex parte* actors and the evidentiary products of the[ir] *ex parte* communication[s] align[] perfectly with their courtroom analogues," the communications are testimonial. *Id.* at 828.

By contrast, this Court also held in *Davis* that a person's cry for help to a 911 operator was not testimonial. Even though the caller's statements described criminal activity, this Court explained that the 911 operator elicited the statements "to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past." *Davis*, 547 U.S. at 827. Accordingly, the caller "simply was not acting as a *witness* . . . . No 'witness' goes into court to proclaim an emergency and seek help." *Id.* at 828.

2. A state forensic analyst's laboratory report prepared as part of a police investigation is plainly testimonial evidence. 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. The reports are formal, sworn statements. Mass. Gen. Laws ch. 111, § 13; *see* Pet. App. 24a-29a. Indeed, they are the functional equivalent of affidavits, insofar as an affidavit is "[a] voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as a notary public." Black's Law Dictionary 62 (8th ed. 2004). And such forensic reports are forthrightly offered at trial in lieu of "having the analyst called as a witness." Pet. App. 14a n.1. "That is, in fact, their very *raison*

d'etre: the whole idea of the certificates is to be used in lieu of the [live] testimony that would otherwise be necessary." Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After* Crawford v. Washington, 15 J. L. & Pol'y 791, 800 (2007). Sworn forensic reports are thus 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*, 547 U.S. at 824.

The confrontation violation that occurs when, as here, a forensic laboratory report is introduced to establish an element of the crime at issue is particularly acute. In *Kirby v. United States,* 174 U.S. 47 (1899), the prosecution introduced a record of a co-conspirator's guilty plea for larceny to prove that property that the defendant had received was stolen. This Court held that introducing this record violated the Confrontation Clause because it served to prove, by means of unconfronted testimony, a "vital fact which the government was bound to establish affirmatively." *Id.* at 55-56. In other words, the introduction of the co-conspirator's statement of guilt, which the defendant was unable to cross-examine, unconstitutionally "enable[d] the government to put the accused, although shielded by the presumption of innocence, upon the defensive" concerning an element of the charge. *Id.* at 60-61. A contemporaneous treatise elaborated upon this holding: "[R]ecords are not admissible to prove the acts constituting the offense itself. Where a document or record relates to facts which are not such as can be proved only by an original or a certified copy, but may be established by oral testimony . . . the constitutional guaranty [of

confrontation] applies." 16 C.J.S. § 2113, at 837-38 (1918) (footnotes omitted).

Such is precisely the case here. One of the elements of the crimes with which petitioner was charged was that he possessed cocaine. J.A. 58, 61. In order to establish that element, the Commonwealth offered forensic analysts' sworn certificates. And the jury was instructed that it could find that petitioner possessed cocaine based on these certificates alone. J.A. 59, 61. As the D.C. Court of Appeals has stated, "it is difficult to imagine a statement more clearly testimonial" than a forensic report used in this manner. *Thomas v. United States*, 914 A.2d 1, 13 (D.C. 2006), *cert. denied*, 128 S. Ct. 241 (2007) (internal quotation and citation omitted).

B. Neither Characterizing Forensic Laboratory Reports As Business Records Nor Deeming Them Objectively Reliable Exempts Them From Confrontation Scrutiny.

Six state high courts and four state intermediate courts have employed the straightforward analysis above to hold that forensic laboratory reports prepared in contemplation of prosecution are testimonial. *See State v. Johnson,* ___ So. 2d ___, 2008 WL 1901456 (Fla. May 1, 2008) (laboratory report identifying presence of illegal drug); *Hinojos-Mendoza v. People*, 169 P.3d 662 (Colo. 2007) (same); *State v. March*, 216 S.W.3d 663 (Mo.) (same), *cert. dismissed,* 128 S. Ct. 1441 (2007); *Thomas v. United States*, 914 A.2d 1 (D.C. 2006) (same), *cert. denied*, 128 S. Ct. 241 (2007); *State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006) (same); *State v. Campbell*, 719 N.W.2d 374, 376 (N.D.

2006) (assuming same), *cert. denied,* 127 S. Ct. 1150 (2007); *State 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); *State v. Miller*, 144 P.3d 1052 (Or. Ct. App.) (same), *opinion adhered to on reconsideration*, 149 P.3d 1251 (Or. Ct. App. 2006).

In this case, however, the Appeals Court of Massachusetts reached the opposite conclusion. Following the Massachusetts Supreme Judicial Court's decision in *Commonwealth v. Verde*, 827 N.E.2d 701 (2005), the Appeals Court held that forensic reports certifying under oath that the substances the police seized in connection with petitioner's arrest contained an illegal drug were *not* testimonial. The *Verde* decision, which is reproduced at Pet. App. 12a-23a, advanced two reasons for deeming such reports nontestimonial. First, the Massachusetts Supreme Judicial Court asserted that a drug analysis certificate "is akin to a business or official record, which the Court [in *Crawford*] stated was not testimonial in nature." Pet. App. 18a. 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." Pet. App. 17a.

Neither of these rationales withstands scrutiny.

1. The Massachusetts Supreme Judicial Court's assertion that a state-generated drug analysis certif-

icate is "akin to a business or official record" is irrelevant to the constitutional issue presented here. This Court squarely held in *Crawford* that the Confrontation Clause is a rule of criminal procedure that does not turn on "the vagaries of the rules of evidence." 541 U.S. at 61. Accordingly, the fact that a state has deemed a piece of evidence to be admissible under one of its hearsay exceptions does not determine whether it can be introduced against the accused in a criminal trial. *Id.* at 50-51.

To be sure, this Court noted in *Crawford* that certain hearsay exceptions encompass types of statements that "by their nature [a]re not testimonial." *Id.* at 56. And the exception for business records that existed at the time of the Founding was one such provision. The scope of that exception, however, was extremely limited. It permitted the introduction only of "shop-books"—that is, ledgers of "men of trades and handicraftsmen" recording wares shipped, sold, and received. 5 John H. Wigmore, Wigmore on Evidence §§ 1517-18, at 347 (3d ed. 1940) (quotation marks omitted); *see also Radtke v. Taylor,* 210 P. 863 (Or. 1922) (detailing history of shop-book rule).

The common-law shop-book exception for regularly kept business records did not remotely encompass reports generated for use in investigations or litigation. Indeed, as late as the mid-twentieth century this Court declined to expand the federal hearsay exception for business records to cover a railroad's accident report that it purportedly created in the regular course of business. *See Palmer v. Hoffman*, 318 U.S. 109, 113-15 (1943). This Court explained that the business-record rule applied only to

"the management or operation" of businesses. *Id.* at 113. Extending the rule to cover records "calculated for use essentially in the court" or created during the "[p]reparation of cases for trial" would "completely empty the words of the [business-records rule] of their historic meaning." *Id.* at 113-14; *see also State v. Simbara*, 811 A.2d 448, 455 (N.J. 2002) ("A laboratory certificate in a drug case is not of the same ilk as other business records, such as an ordinary account ledger or office memorandum in a corporate-fraud case.").

Nor did the common-law hearsay exception for official (or public) records—to the extent it even existed at the time of the Founding—cover reports produced in anticipation of litigation. Rather, the exception developed to allow the introduction of "[o]fficial registers, or books kept by persons in public office, in which they are required to write down particular transactions, or to enrol or record particular contracts or instruments." *Ferguson v. Clifford*, 37 N.H. 86, 95 (1858). Even today, the Federal Rules of Evidence expressly prohibit using the "public records" hearsay exception in criminal cases to introduce reports recording "matters observed by police officers and other law enforcement personnel" or "factual findings resulting from an investigation made pursuant to authority granted by law." Fed. R. Evid. 803(8)(B) & (C). The Rule's drafters codified these prohibitions while otherwise expanding the reach of the Rule in order to avoid "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 also Kirby*, 174 U.S. at 60-61 (official record of co-conspirator's guilty

plea not admissible in place of co-conspirator's live testimony); *United States v. Oates,* 560 F.2d 45, 63-84 (2d Cir. 1977) (chemist report prepared for prosecution cannot be characterized as "public record"); *Cole v. State*, 839 S.W.2d 798, 801-06 (Tex. Crim. App. 1990) (same).

It makes no difference that some jurisdictions have recently expanded their statutory definitions of business or official records to encompass forensic laboratory reports. No matter how classified under state hearsay law, sworn statements that law enforcement officers gather "to establish or prove past events potentially relevant to later criminal prosecution" are testimonial. *Davis*, 547 U.S. at 822. And 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. Accordingly, jurisdictions may no more insulate state crime laboratory reports from the adversarial process by labeling them business or official records than they could by giving the same label to transcripts of custodial interrogations, which, after all, police conduct as public officials in their ordinary course of business. *See Johnson,* ___ So.2d at ___, 2008 WL 1901456, at *5. "*[E]x parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them." *Crawford*, 541 U.S. at 51.

From the time of the Founding until the germination of this Court's now-abandoned *Roberts*

framework, courts generally recognized as much. During the nineteenth and early twentieth centuries, prosecutors occasionally tried to invoke business- or public- record rules to introduce certifications prepared with an eye toward litigation in lieu of live testimony. Yet courts applying state constitutional counterparts to the Confrontation Clause consistently rejected such attempts.[3] Federal cases during this era reached similar conclusions.[4]

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[3] *See State v. Green*, 109 So. 143, 144 (La. 1926) (introduction of certification concerning public death registry violated right to confrontation); *State v. Joseph*, 101 So. 21, 21 (La. 1924) (admission of medical examiners' certification regarding cause of death violated right to confrontation); *State v. Dixon*, 117 S.E. 170, 171-72 (N.C. 1923) (even if bank's certification of a party's lack of funds in account would be admissible in "a civil action involving a construction of the law of merchant," it constituted "testimony" that was inadmissible in a criminal prosecution absent the declarant testifying at trial); *People v. Bromwich*, 93 N.E. 933, 934 (N.Y. 1911) (same respecting certificate from court clerk stating that no record of naturalization existed); *People v. Goodrode*, 94 N.W. 14, 15-16 (Mich. 1903) (same regarding certificate from court clerk saying no marriage record existed); *Colquit v. State*, 64 S.W. 713, 714 (Tenn. 1901) (same regarding coroner's inquest); *State v. Parker*, 7 La. Ann. 83, 1852 WL 3553, at *2 (La. 1852) (same); *Farrington v. State*, 10 Ohio 354, 1841 WL 4, at *1-2 (Ohio 1841) (same regarding notary public's certification in forgery prosecution that names on notes and bills were fictitious because it constituted unconfronted "testimony"). Some state courts during this period went even further, holding that the admission of certain business records prepared without any connection to potential litigation violated state confrontation clauses. *See, e.g.*, *People v. Schallman,* 113 N.E. 113 (Ill. 1916) (merchant's ledger); *Cook v. State,* 120 P. 1038 (Okla. Crim. App. 1911) (freight delivery receipts); *People v. Mitchell*, 29 P. 1106 (Cal. 1892) (train register of arrivals and departures); *State v. Thomas,* 64 N.C. 74, 1870 WL 1668 (N.C. 1870) (railroad's delivery ledger).

Indeed, just three years before this Court's decision in *Ohio v. Roberts*, 448 U.S. 56 (1980), the Tennessee Supreme Court noted that with the exception of a few Prohibition-era cases involving the chemical analysis of alcohol, it could "find no reported cases in which the very identity of [seized substances] as contraband has been established by hearsay." *State v. Henderson,* 554 S.W.2d 117 (Tenn. 1977) (quotation omitted); *see also infra* at 29-30 (discussing Prohibition-era cases). Specifically rejecting the state's argument that chemists' certifications could be introduced in lieu of live testimony because they could be characterized as business records, the Tennessee Supreme Court explained:

> From the record it appears that the chemists were well-trained to perform the tests involved and that they had no apparent motive to falsify the reports. Yet it must also be noted that the records in this case, while they may satisfy the technical requirements of [Tennessee's business-records rule], do not fit the classic business records mold, *i.e.* "shop books" or hospital records. . . . [T]he records here realistically cannot be said to have been prepared for any reason other than their potential litigation value. Therefore, when they are produced at trial in

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[4] *See Naftzger v. United States*, 200 F. 494 (8th Cir. 1912) (admission of post office inspector's report concerning post office robberies violated Confrontation Clause); *United States v. Elder*, 232 F. 267 (W.D. Ky. 1916) (same respecting official records created for IRS enforcement actions because they constituted unconfronted hearsay "testimony").

> lieu of personal testimony, and are offered to prove the single most damaging fact against this defendant, they fall into the category of the dreaded *ex parte* affidavit. It was to prevent the use of just such documents that the Confrontation Clause was adopted. *Mattox v. United States*, 156 U.S. at 242-43. (Moreover, we are not unaware that at the time they performed the tests and made the reports, both absent witnesses were employees of the State, the very party now prosecuting this defendant and offering against him evidence which consisted of certain items allegedly bought by another State employee.)

Henderson, 554 S.W.2d at 120.

Other courts confronted with similar arguments during the pre-*Roberts* era likewise held that expansive business- or official-records rules could not trump confrontation objections to the introduction of other kinds of forensic reports created for litigation. *See Stewart v. Cowan,* 528 F.2d 79, 83-85 (6th Cir. 1976) (introduction of ballistics report constituted improper *ex parte* "testimony"); *Commonwealth v. McCloud,* 322 A.2d 653, 656-57 (Pa. 1974) ("evidentiary use, as a business records exception to the hearsay rule, of an autopsy report in proving legal causation [in a homicide case] is impermissible unless the accused is afforded the opportunity to confront and cross-examine the medical examiner who performed the autopsy"). A few courts adhered to this view even after *Roberts*

conflated the rules of evidence with the Confrontation Clause.[5]

Of course, the Commonwealth of Massachusetts does not even classify the forensic certificates here as business or official records. Massachusetts' business-records rule, reflecting the historical roots of that hearsay exception, requires that a record be created "before the beginning of the civil or criminal proceed-

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[5] *See Miller v. State,* 472 S.E.2d 74, 77-79 (Ga. 1996) (drug analysis certificate introduced as business record constituted "hearsay *testimony*" in violation of Confrontation Clause when offered in lieu of live testimony) (emphasis added); *United States v. McClintock*, 748 F.2d 1278, 1290-92 (9th Cir. 1984) (introducing analyses of values of gemstones in lieu of live testimony violated Confrontation Clause). The majority of jurisdictions during the *Roberts* era, however, allowed forensic laboratory reports characterized as business or official records to overcome confrontation objections on the ground that the records were sufficiently reliable. *See, e.g.*, *Howard v. United States*, 473 A.2d 835 (D.C. 1984), *overruled by Thomas v. United States,* 914 A.2d 1 (D.C. 2006). This trend actually started following this Court's decision in *Dutton v. Evans,* 400 U.S. 74 (1970), in which a plurality of this Court sowed the seeds of *Roberts* by rejecting a defendant's challenge to the admission of a co-conspirator's statement in part on the ground that the statement was reliable. *See State v. Kreck,* 542 P.2d 782, 784-88 (Wash. 1975) (upholding introduction of unconfronted laboratory report on the ground that it could be likened to business or official records and deemed reliable); *State v. Larochelle,* 297 A.2d 223 (N.H. 1972) (same). One justice dissenting from one of these initial decisions bemoaned: "[U]nder the rule adopted by the plurality in *Dutton* and this court in the case before us, the right to confrontation can be wiped out by unlimited exceptions to the hearsay rule so long as a majority of the court decides that the evidence possesses sufficient 'indicia of reliability.' This is an amorphous test indeed. Such a view, it seems to me, substitutes a rule of men for one of law and reduces a great safeguard to dependence upon the whim of judges." *Larochelle,* 297 A.2d at 228 (Grimes, J., dissenting).

ing" at issue. Mass. Gen. Laws Ch. 233, § 78. Drug analysis certificates obviously fail that test. Accordingly, the prosecution here introduced the drug analysis certificates under Massachusetts' special statutory hearsay exception, Mass. Gen. Laws ch. 111, § 13, allowing such certificates to be introduced in lieu of live testimony.

But just as with invocations of expansive business- or official-record rules, introducing testimonial hearsay evidence under a special exception "akin to" a business or official record rule (Pet. App. 18a) cannot insulate it from the ordinary adversarial process. And just as with pre-*Roberts* invocations of expansive business- or official-record rules, courts during pre-*Roberts* era generally recognized as much. During the nineteenth century, a handful of state statutes specifically provided that prosecutors could introduce milk inspectors' sworn certificates stating that milk had been adulterated as evidence of adulteration. When state high courts reviewed prosecutorial invocations of these statutes, the courts noted the potential for a confrontation problem. But they did not find such violations because—as this Court consistently has held—"when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements," *Crawford*, 541 U.S. at 59 n.9 (citing *California v. Green*, 399 U.S. 149, 162 (1970)), and the milk inspectors in these prosecutions testified at trial. *See Commonwealth v. Waite*, 93 Mass. 264, 266 (1865) (fact that inspector "testified [at trial] to all the facts set forth in the certificate" satisfied right to confrontation); *State v. Newton*, 45 N.J.L. 469, 1883 WL 8120, at *5 (N.J. 1883) ("The validity of this

provision does not arise in this case because the chemist himself was examined and cross-examined at the trial."); *State v. Campbell,* 13 A. 585, 586 (N.H. 1888) (same); *People v. Salisbury*, 37 N.Y.S. 420, 421 (N.Y. App. Div. 1896) (noting that examiner "was called as a witness for the people"). Indeed, it does not appear that any prosecutor in the milk cases ever forced this issue by introducing a certificate without also calling the milk inspector to the stand. And many other cases involving other kinds of forensic tests and similar certifications note that the examiners testified at trial, reinforcing the inference that this was the typical and accepted practice.[6]

On the rare occasions when prosecutors did introduce certificates produced for trial under special hearsay rules without also producing the authors to testify at trial, courts did not hesitate to find confrontation violations. *See State v. Reidel,* 26 Iowa 430, 1869 WL 237, at *3-4 (Iowa 1869) (introduction of certification from notary public of non-existence of bank funds violated right to confrontation because declarant did not testify); *Wilson v. State,* 75 So. 95, 97 (La. 1917) (same regarding certification from internal revenue collector describing license issued to defend-

[6] *See, e.g.*, *State v. Hinkle,* 6 Iowa 380, 1858 WL 158, at *5 (Iowa 1858) (test for poison in stomach of murder victim); *State v. Bowman,* 78 N.C. 509, 1878 WL 2385, at * 1 (N.C. 1878) (same); *Dane v. State*, 35 S.W. 661, 662 (Tex. Crim. App. 1896) (test for presence of alcohol in liquid). Early treatises on expert testimony also discuss forensic evidence without ever suggesting that forensic examiners did not need to testify during trials. *See* Henry Wade Rogers, The Law of Expert Testimony §§ 76-78, 80, 83 (1883); John D. Lawson, The Law of Expert and Opinion Evidence 6-8, 121(1883).

ant). The only less-than-uniform line of authority in this respect involved statutes allowing reports certifying the presence of alcohol to be introduced against the accused in Prohibition-era prosecutions. *Compare Torres v. State,* 18 S.W.2d 179, 180 (Tex. Crim. App. 1929) (admitting report "in the absence of the chemist who made the analysis" was "plainly violative of the constitutional right of this appellant to be confronted by the witnesses against him"); *Volrich v. State*, 4 Ohio Law Abs. 253, 1925 WL 2473 (Ohio. App. 1925) (same), *with State v. Torello*, 131 A. 429 (Conn. 1925) (no violation); C*ommonwealth v. Slavski,* 140 N.E. 465 (Mass. 1923) (same); *Bracey v. Commonwealth*, 89 S.E. 144 (Va. 1916) (same); *see also Kay v. United States*, 255 F.2d 476, 478, 480-81 (4th Cir. 1958) (following *Bracey* to uphold the admission of blood alcohol test under similar Virginia hearsay exception).

But to the extent that a few decisions allowed such certificates to be introduced in the absence of live testimony, they did so based on reasoning unequivocally rejected in *Crawford.* Perhaps influenced by the contemporaneous publication of Wigmore's influential treatise on evidence, these decisions supposed that "[t]he rules of evidence relating to the admissibility of exceptions to the hearsay rule are the same in civil and criminal actions." *Torello,* 131 A. at 431; *see also Slavski*, 140 N.E. at 468-69 (interchanging civil and criminal cases). *Crawford*, however, makes clear that the federal Confrontation Clause does not operate in this manner: "Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." 541 U.S. at 51. If a statement is testimonial in nature, it remains

subject to the Confrontation Clause regardless of whether it falls within a modern hearsay exception.

2. The Massachusetts Supreme Judicial Court's assertion that forensic reports identifying controlled substances are not testimonial because they are "neither discretionary nor based on opinion," Pet. App. 17a, is similarly baseless. "[A] witness is considered to be a witness 'against' a defendant for purposes of the Confrontation Clause . . . if his testimony is part of the body of evidence that the jury may consider in assessing his guilt." *Cruz v. New York*, 481 U.S. 186, 190 (1987). Hence, the Confrontation Clause applies with full force to *all* prosecutorial witnesses, regardless of whether they describe objectively verifiable facts or they offer an opinion concerning who committed the crime. A neighbor's statement telling the police that she saw a blue car drive down the street at midnight is no less testimonial than an assault victim's statement saying that John Doe beat him up and then sped away in his blue car. Indeed, the statements that this Court held in *Crawford* and *Davis* were testimonial involved mostly objective, factual assertions. *See Crawford*, 541 U.S. at 39-40; *Davis*, 547 US. at 820-21.

The most that might be said for out-of-court declarations that are factual, as opposed to opinionated, in nature is that objective declarations are more likely to be reliable. But allowing the untested introduction of statements prepared with an eye toward trial on the ground that judges deem the statements "reliable" is "fundamentally at odds with the right to confrontation." *Crawford*, 541 U.S. at 61. As this Court explained in *Crawford*, 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." *Id.* "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." *Id.* at 62. Accordingly, defendants have a right to insist that prosecutorial testimony be presented through the traditional adversarial process, regardless of whether judges surmise that cross-examination would likely bear fruit. *See id.* at 61-62, 68-69.

In any event, the Massachusetts Supreme Judicial Court's assumption that cross-examination is unlikely to be productive in this context is greatly exaggerated. That court assumed that laboratory reports identifying a substance as contraband are reliable because they purport to be the objective product of a "well-recognized scientific test." Pet. App. 17a. But forensic examiners can lie about the results of well-recognized scientific tests. Indeed, recent examples abound of falsified and otherwise corrupt forensic testing being used in criminal prosecutions. *See* Br. of Innocence Projects as *Amici Curiae*.

Even putting aside the potential for fabrication, many scientific and legal experts have explained that testing for the presence of drugs is hardly a simple, objective or foolproof enterprise. In order to produce trustworthy results, analysts, among other things, must have sufficient expertise and experience in forensic testing; they must handle samples in manners that ensure the samples' integrity; they must use dependable testing methods; they must interpret their

data properly; and they must verify tentative conclusions by testing samples using at least two different methods. United States Dep't of Justice, Drug Enforcement Administration & Executive Office of the President, Office of National Drug Control Policy, Counterdrug Technology Assessment Center, *Scientific Working Group for the Analysis of Seized Drugs (SWGDRUG) Recommendations*, at 14-26 (3d ed. 2007-08-09); Giannelli, *supra*, 49 Ohio St. L.J. at 688-95.

Indeed, there are at least *seventeen different methods* currently used for analyzing seized substances for the presence of drugs, each involving differing systematic error rates, *SWGDRUG, supra,* at 14, and differing "element[s] of subjectivity." 2 Paul C. Giannelli & Edward J. Imwinkelried, Scientific Evidence §23.02[b] & [c] (4th ed. 2007); *see also* Melvin B. Lewis, *The Element of Subjectivity in Interpreting Instrumental Test Results*, in Practicing Law Institute, Scientific and Expert Evidence 409 (2d ed. 1981); S.K. Niyogi, *Toxicology*, in Scientific and Expert Evidence, *supra*, 343, 343-44, 349-86. 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 . . . .

Giannelli & Imwinkelreid, *supra*, at §23.01; *see also* U.S. Dep't of Justice, Project Advisory Committee,

Laboratory Proficiency Testing Program, Supplementary Report—Samples 6-10, at 3 (1976) (finding that 30% of state forensic examiners asked to test a substance for the presence of cocaine rendered incorrect results); 2 David Bernheim, Defense of Narcotics Cases §§ 4.06-13 (1992 rev. ed.) (describing various drug-testing methods in detail, errors commonly made in such testing, and outlining methods of challenging such evidence); *see generally* Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. Rev. 163 (2007) (describing problems with other kinds of forensic testing).[7] A significant percentage of crime laboratories, including the one that performed the testing in this case, *see supra* at 6, are not even accredited. Metzger, *supra*, 59 Vand. L. Rev. at 494.

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 available testing methods. They also are more likely to divulge information and data surrounding their tests in advance of trial. 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 expose the truth.

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[7] A congressionally created committee of the National Academy of Sciences is currently studying the efficacy of forensic testing and expects to issue a report at the end of this summer. *See Identifying the Needs of the Forensic Sciences Community,* http://www8.nationalacademies.org/cp/projectview.aspx?key=4871.

There is no doubt our Framers understood this, and a straightforward application of *Crawford* and *Davis* reaffirms that time-tested principle.

CONCLUSION

For the foregoing reasons, the decision of the Appeals Court of Massachusetts should be reversed.

Respectfully submitted,

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June 16, 2006

APPENDIX

[GREAT SEAL OF MASSACHUSETTS]

The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Department of Public Health
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DEVAL L. PATRICK
Governor
TIMOTHY P. MURRAY
Lieutenant Governor
JUDYANN BIGBY, MD
Secretary
JOHN AUERBRACH
Commissioner

May 30, 2008

David J. Nathanson, Esq.
Wood & Nathanson, LLP
Attorneys at Law
83 Atlantic Avenue
Boston, Massachusetts 02110

RE: Public Records Request

Dear Mr. Nathanson:

I am writing in response to your letter dated May 22, 2008 regarding the Massachusetts Department of Public Health Drug Analysis Laboratories. The

laboratories provide accurate identification of illicit drugs and pharmaceuticals for law enforcement purposes using methodology recommended by the Scientific Working Group for the Analysis of Seized Drugs. Appropriate quality control and quality assurance practices are regularly employed to ensure the integrity of the sample data.

The drug laboratories are not currently accredited by an external certification body.

Sincerely,
/s/
Julianne Nassif
Director
Division of Analytical Chemistry