

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

REPLY BRIEF FOR PETITIONER

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

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

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

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Avenue
Bethesda, MD 20814

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REPLY BRIEF FOR PETITIONER

The forensic laboratory reports in this case are sworn declarations from state officials, asserting that evidence the police seized as part of a criminal investigation satisfies an element of the “class B” drug offenses codified in the Massachusetts Controlled Substance Act. The reports’ sole purpose was to “simplify proof” in this prosecution by substituting for the officials’ being “called as witnesses” and giving their incriminating testimony in court and in front of the jury. Resp. Br. 2 (quoting *Commonwealth v. Johnson*, 589 N.E.2d 328, 330 (Mass. App. Ct. 1992)). The reports, therefore, implicate the Confrontation Clause’s core concerns regarding trial-by-affidavit.

The Commonwealth and its amici nonetheless offer a scattershot of arguments to avoid the straightforward conclusion that introducing the reports in place of live testimony violates the Constitution. They argue that forensic reports are not testimonial because they are not directly accusatory; because they are neutral and objective documents; and because they resemble business or official records. The Commonwealth also contends that the Confrontation Clause permits the prosecution to introduce testimonial hearsay so long as the defendant has the ability to challenge the declarations’ reliability through pretrial hearings and by calling the declarants as his own witnesses at trial.

None of these arguments withstands scrutiny. The Confrontation Clause applies to declarations created for prosecutorial use regardless of whether they directly accuse someone of committing a crime

and regardless of whether they appear reliable. And the Confrontation Clause categorically requires the prosecution, at the defendant's insistence, to introduce the testimony of available witnesses as part of its case-in-chief before the jury. These simple, fundamental principles have guided criminal trials for centuries, and, as the experience of states other than Massachusetts shows, there is no practical need – much less theoretical justification – for abandoning these principles here.

I. FORENSIC LABORATORY REPORTS PREPARED FOR USE IN CRIMINAL PROSECUTIONS ARE TESTIMONIAL EVIDENCE.

A. A Declaration Need Not Directly Accuse The Defendant Of Committing A Crime To Be Testimonial.

The Commonwealth acknowledges, as it must, that a forensic report identifying a substance as an illegal drug incriminates a defendant when combined with other testimony “linking the substance . . . to the person now on trial.” Resp. Br. 17; *see also* U.S. Br. 5-6 (“Experience confirms that testing results may . . . inculpate a defendant.”). The Commonwealth nonetheless argues that laboratory reports are nontestimonial because they “do not *directly* accuse anyone of any criminal conduct.” Resp. Br. 16-17 (emphasis added); *see also id.* 20 (statement is testimonial only if it asserts “that the person now on trial . . . committed a crime”). This novel conception of the Confrontation Clause is so extraordinarily narrow as to blink common sense. Not surprisingly, it also contravenes the text of the Sixth Amendment and this Court's precedent.

1. The Commonwealth's "directly accusatory" rule is startlingly restrictive. Many criminal prosecutions rest entirely on circumstantial evidence, none of which "directly accuse[s] anyone of any criminal conduct." Resp. Br. 16-17. Consider, for instance, a typical homicide case. One person says he heard gunshots just after midnight. Another says he saw a man speed away from the scene in a blue car. Another says that a local man named Joe Smith, who happens to own a blue Chevrolet, also owns a legally registered hunting rifle. And so on. Under the Commonwealth's view of the Confrontation Clause, the prosecution could present such cases entirely through out-of-court affidavits. The same would be true respecting prosecutions for white collar crimes such as money laundering, where each person's testimony provides merely a link in a complex chain of prosecutorial evidence. Even in cases that feature a witness who directly accuses the defendant of committing the crime, the prosecution could present the great bulk of its evidence, under the Commonwealth's theory, through affidavits or the civil-law mode of *ex parte* examinations.

It is hard to understand how this could be constitutional. "[T]he 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." *Crawford v. Washington*, 541 U.S. 36, 50 (2004). In the place of such out-of-court testimony, the Framers insisted upon following the common-law system of "open examination of witnesses *viva voce*, in the presence of all mankind" at a public trial. 3 William Blackstone, Commentaries on the Laws of

England *373 (1768). It would make a mockery of the Confrontation Clause to restrict its application only to the occasional case in which some witness makes a direct and complete accusation that the defendant committed the crime.

2. The text of the Confrontation Clause confirms that it does not limit the confrontation right to evidence that directly accuses the defendant of criminal conduct. The Clause guarantees a defendant the right to be confronted with “the witnesses against him.” U.S. Const. amend. VI. The phrase “witnesses against” is broader than the word “accusers.”

There is ample evidence that the Framers deliberately selected the broader concept. Some state declarations of rights that preceded the federal Bill of Rights distinguished between “accusers” and “witnesses,” yet each protected the right to be confronted with *both*.¹ All other state confrontation provisions simply protected the right to be confronted with the prosecution’s witnesses.² Thus, while statements

¹ See Virginia Declaration of Rights § VIII (1776) (“That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation to be confronted with the accusers and witnesses”); Delaware Declaration of Rights § 14 (1776) (“That in all prosecutions for criminal offences, every man hath a right . . . to be confronted with the accusers or witnesses”); North Carolina Declaration of Rights § VII (1776) (“[I]n all criminal prosecutions, every man has a right . . . to confront the accusers and witnesses with other testimony . . .”).

² See Pennsylvania Declaration of Rights § IX (1776) (“That in all prosecutions for criminal offences, a man hath a right . . . to be confronted with the witnesses”); Maryland Declaration of Rights Art. XIX (1776) (“That in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him”); Vermont Declaration of Rights Art. X (1777) (“[I]n all

directly accusing the defendant of committing a crime may lie at the *core* of the right to confrontation, nothing suggests that the right was intended to be limited to such direct accusations, leaving prosecutors free to present the rest of their cases by means of affidavits or *ex parte* deposition testimony. See *California v. Green*, 399 U.S. 149, 179 (1970) (Harlan, J., concurring) (“[T]he Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and *absentee witnesses*.”) (emphasis added).

3. This Court’s precedent reinforces that “a witness is considered to be a witness ‘against’ a defendant for purposes of the Confrontation Clause” so long as “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).

In *Kirby v. United States*, 174 U.S. 47 (1899), the government charged the defendant with receiving stolen goods. At trial, the prosecution introduced records of statements (apparently, guilty pleas) from certain individuals confessing to having stolen the property at issue. *Id.* at 49. These records, just like the forensic reports here, indicated that the objects at the center of Kirby’s prosecution were illicit, but they did not directly accuse Kirby of anything. This Court nevertheless held that the Confrontation Clause applied to the records and precluded the government

prosecutions for criminal offenses, a man hath a right . . . to be confronted with the witnesses”); Massachusetts Declaration of Rights Art. XII (1780) (“[E]very subject shall have a right . . . to meet the witnesses against him fact to face”); New Hampshire Bill of Rights Art. XV (1784) (“[E]very subject shall have a right . . . to meet the witnesses against him face to face”).

from introducing them in place of “witnesses confronting the accused” respecting the facts they alleged. *Id.* at 56.

Drawing from Justice Harlan’s concurrence in *Dutton v. Evans*, 400 U.S. 74 (1970), the Commonwealth urges this Court to recast *Kirby* as resting on grounds other than the Confrontation Clause. Resp. Br. 33. In *Crawford v. Washington*, 541 U.S. 36 (2004), however, this Court already “reject[ed]” Justice Harlan’s restrictive view of the Confrontation Clause expounded in *Dutton* and cited *Kirby* with approval as a confrontation case. *See Crawford*, 541 U.S. at 50-51, 57. *Kirby*, in short, means what it says. The decision also is consistent with this Court’s explanation years later in *Dowdell v. United States*, 221 U.S. 325 (1911), that a declarant is a “witness against the accused within the meaning” of the Confrontation Clause whenever he testifies to “facts concerning [the defendant’s] guilt or innocence.” *Id.* at 330.

The Commonwealth further suggests that this Court’s *Bruton* jurisprudence excludes from the reach of the Confrontation Clause statements that “become [incriminating] . . . ‘only when linked with other evidence introduced later at trial.’” Resp. Br. 24 (quoting *Gray v. Maryland*, 523 U.S. 185, 191 (1998), quoting in turn *Richardson v. Marsh*, 481 U.S. 200, 208 (1987)); *see also Bruton v. United States*, 391 U.S. 123 (1968). But the *Bruton* doctrine does just the opposite: it confirms beyond a doubt that the Confrontation Clause applies to such statements. A *Bruton* situation arises when two defendants are tried together and one has confessed. If the confessing defendant refuses to take the stand, his confession “cannot be admitted against the other.” *Richardson*,

481 U.S. at 206; *see also Cruz*, 481 U.S. at 189-90. So the question arises whether the prosecution can still introduce the confession *against the defendant who confessed*. The *Bruton* doctrine allows the prosecution to introduce the confession against the confessing defendant when it is redacted so that it incriminates the co-defendant “only when linked with [other] evidence.” *Richardson*, 481 U.S. at 208. But this rule respecting confessions that are not directly accusatory does not relax the basic bar against introducing such statements *against nonconfessing defendants*. To the contrary, this Court insists that even after the statement is redacted, the trial court must give a “limiting instruction” specifically admonishing the jury that it may not consider the statement as evidence against a nonconfessing defendant. *Cruz*, 481 U.S. at 190; *Richardson*, 481 U.S. at 211.

B. Evidence Need Not Appear To Be Biased Or Inaccurate To Be Testimonial.

The Commonwealth next claims that forensic reports are nontestimonial for three inter-related reasons. First, the Commonwealth asserts that forensic examiners are “neutral” governmental agents because they have “no interest or stake in the outcome” and “sometimes determine that the substances submitted for testing are not drugs at all.” Resp. Br. 40, 50. Second, the Commonwealth contends that laboratory reports are “objectively verifiable” and “reflect only . . . objective or neutral facts.” Resp. Br. 23, 29. Third, the Commonwealth argues that when a forensic report “is confirmed by mechanical testing . . . , the primary source of the [report’s conclusion] is not even the analyst, but the machine itself.” Resp. Br. 30.

These three arguments are just different ways of asserting that forensic reports should be deemed nontestimonial because they are reliable. This Court in *Crawford*, however, expressly rejected such an approach to the Confrontation Clause. And even if the perceived reliability of forensic reports mattered in some way, the Commonwealth's suggestions that such report are indisputable are significantly overblown.

1. It is irrelevant to the “testimonial” inquiry whether declarants are supposedly neutral or whether their statements concern objectively verifiable facts. The Confrontation Clause, as this Court explained in *Crawford*, “is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” 541 U.S. at 61. Accordingly, “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. That is not what the Sixth Amendment prescribes.” *Id.* at 62.

Contrary to the Commonwealth's and United States' suggestions, this principle applies with full force to declarations prepared for criminal prosecutions that purportedly do nothing more than “report” objective observations concerning nontestimonial evidence. Resp. Br. 30; U.S. Br. 20-21. Such declarations – prepared as they are by humans – transmit at least implicit assertions regarding the declarants' perception, attentiveness, methodology, and honesty. Those implicit assertions render such reports testimonial and thus subject to the Constitution's procedural rules governing testimonial evidence.

An everyday example illustrates the point. Police officers, just like state-employed forensic examiners, are public agents charged with pursuing justice, and they are legally required to divulge exculpatory as well as inculpatory evidence. *See Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963). As part of their investigations, police officers often investigate crime scenes and record objectively verifiable observations regarding nontestimonial (physical) evidence – *e.g.*, the house at issue is located behind two oak trees; there is a foot-long blood stain on the carpet; there are clothes strewn across the master bedroom; etc. Yet it would be outlandish to suggest that the prosecution could introduce a police officer’s affidavit describing a crime scene in place of live testimony simply because police investigations sometimes exonerate suspects and because the officer’s observations report objective facts concerning nontestimonial evidence. *Cf. Crawford*, 541 U.S. at 66 (“The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by ‘neutral’ government officers.”).

The same principle controls here. The Commonwealth did not introduce a machine, “print-out or screen-shot of [any laboratory] instrument’s direct output” into evidence at petitioner’s trial. U.S. Br. 22. Instead, it submitted forensic analysts’ sworn assertions that the bags that the Boston Police Department gave them contained certain amounts of cocaine. Pet. App. 24a-29a. Those human assertions were testimonial.

2. Even if this Court were inclined to try to distinguish between reports that neutrally and

objectively describe nontestimonial evidence and those that are not necessarily reliable, forensic reports would unquestionably fall in the latter camp. The Commonwealth asserts that forensic examiners are neutral state officials who lack any personal interest or knowledge concerning police investigations. Resp. Br. 23, 29. But most examiners are given extrinsic information suggesting suspects' guilt at the same time police officers ask them to perform forensic tests. Edward J. Ungvarsky, *Remarks on the Use and Misuse of Forensic Science to Lead to False Convictions*, 41 New Eng. L. Rev. 609, 618 (2007).³ And all examiners know, at the very least, that their findings are "to be used for the enforcement of law," Mass. Gen. Laws ch. 111, § 12. It is well established that examiners in such a situation perceive a stake in the law enforcement enterprise that subtly (and sometimes overtly) biases their work toward the prosecution. *See generally* D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects*

³ Explaining incidents in which faulty DNA analyses contributed to wrongful convictions, Ungvarsky writes: "How can forensic DNA evidence be wrong? Scientists are supposed to be disinterested and dispassionate. But that is not the way forensic science collection and analysis generally works. Police departments deliver biological material with cover letters to laboratory personnel that inform the analysts of non-DNA evidence that suggest the suspect's guilt and then ask the analyst to corroborate that inculpatory evidence. This subtle influencing can lead to erroneous interpretations of physical evidence. It is often easy to interpret, unconsciously and unintentionally, evidence in a way that is consistent with the theory the prosecution has presented. There is a natural impulse that, when given both a complicated crime-scene profile and a suspect profile, the forensic technician will combine her analysis of the samples and conclude that the suspect's profile can be observed in the crime-scene evidence." Ungvarsky, *supra*, at 618.

in Forensic Science: Hidden Problems of Expectation and Suggestion, 90 Cal. L. Rev. 1 (2002).

The Commonwealth also claims that forensic reports are “objectively verifiable” and “reflect the results of neutral, scientific testing.” Resp. Br. 29. But as the amicus brief from the Innocence Network demonstrates in great detail, forensic science depends on subjective judgment (not to mention personal integrity), and even well-intentioned reports often have startling error rates. Just last week, the prosecuting attorney for Wayne County, Michigan – one of the signatories of the National District Attorneys Association’s amicus brief – announced she was closing Detroit’s crime laboratory after a report revealed “erroneous or false findings in 10 percent of 200 random cases.” Corey Williams, *Error-Prone Detroit Police Crime Lab Shut Down*, Associated Press, Sept. 25, 2008, <http://ap.google.com/article/ALeqM5g4iOg8AHDDZBOKqdpOPbvUik5HwD93E4K2G0>. And lest there be any doubt, drug tests are susceptible to the same kinds of mistakes as other forensic analyses; as leading scholars have reported, “there seems to be a significant error rate in the drug testing conducted by some American laboratories.” 2 Paul C. Giannelli & Edward J. Imwinkelried, *Scientific Evidence* § 23.01 (4th ed. 2007).⁴

⁴ For additional, recent examples, see Radley Balko & Roger Koppl, *C.S.Oy*, Slate, Aug. 12, 2008, <http://www.slate.com/id/2197284/>; Thomas J. Lueck, *Sloppy Police Lab Work Leads to Retesting of Drug Evidence*, N.Y. Times, Dec. 4, 2007, at B1 (“[S]loppy work by analysts in the [New York Police Department’s crime laboratory could have skewed drug evidence used by prosecutors.”).

Finally, the United States posits that a forensic examiner testing for the presence of drugs “effectively functions as a reporter, relaying the nontestimonial instrument-generated results” of a laboratory test “to a court.” U.S. Br. 20. But as the Commonwealth acknowledges, “some interpretation of the machine-generated data ordinarily is required” to conclude that a sample contains an illegal drug. Resp. Br. 30 n.10; *see also* Petr. Br. 31-32 (describing subjective judgments that are required); Br. of Alabama et al. 20 (“[H]uman technicians likely interpret[] the machine’s raw data in some fashion.”). This need for interpretation creates the possibility for honest mistakes, negligence, and worse – including the all-too-frequent practice of “dry labbing,” that is, attesting to examinations that are never even conducted. *See* Br. of Innocence Network 15-17. Hence, even if there were some constitutional basis for distinguishing prosecutorial reports that do nothing more than attest to the validity or existence of records from those that proffer “[a] person’s *interpretation* of” evidence or test results, U.S. Br. 16, the forensic reports here would fall squarely in the latter class.⁵

⁵ Contrary to the United States’ suggestion, nothing in *Dowdell v. United States*, 221 U.S. 325 (1911), suggests that reports “prepared in lieu of testimony for use at trial” (U.S. Br. 19) can be nontestimonial. *Dowdell* did not involve a report prepared in lieu of testimony for use at trial. Rather, the case involved certificates that court personnel prepared *after a trial was over*, for purposes of completing the record for appellate review. 221 U.S. at 330-31. Such certificates do not implicate the Confrontation Clause any more than does a typical transcript or notation of a guilty plea prepared by a court reporter. Each of the other cases the United States cites for the generalized proposition that “a certificate [prepared as a substitute for live testimony] reflecting the

C. Forensic Lab Reports Would Not Have Been Admissible During The Founding Era As Business Or Official Records.

Petitioner has explained that the historical treatment of forensic-type reports reinforces the conclusion that such reports are testimonial. Petr. Br. 19-30. The Commonwealth nonetheless contends that the common law’s conception of business and public records actually demonstrates that forensic reports are nontestimonial. It faces a high burden in making this argument. In *Crawford*, this Court held that the Sixth Amendment’s requirement of confrontation does not countenance any “open-ended exceptions . . . to be developed by the courts,” but rather “admit[s] only those exceptions established at the time of the founding.” 541 U.S. at 54; *see also id.* at 56. The Commonwealth cannot make the showing that *Crawford* requires, for there is no reason to believe that forensic reports would have been admissible as business or public records at the time of the Founding.

contents of [nontestimonial] records” is itself nontestimonial (U.S. Br. 20) comes from a lower court and post-dates *Crawford*. *See* U.S. Br. 19-20. At least some of the cases appear to conflict with historical practice and precedent. *See* Petr. Br. 23 n.3 (citing cases); *see also* 3 John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* § 1678(7), at 560 (2d ed. 1923) (“[T]he only evidence receivable” at common law to prove the nonexistence of a record “would be the testimony on the stand of one who had made a search”); 1 S. March Phillipps et al., *A Treatise on the Law of Evidence* 317 n.5 (5th Am. ed. 1868) (same). In any event, each of the cases involves a report that, unlike a forensic analysis, describes something that was not itself generated for prosecutorial purposes.

1. The Commonwealth’s suggestion that laboratory reports would have fallen within the Founding-era business-records hearsay exception misconceives the historical development of that exception. No Founding-era case characterized a report prepared for litigation as a business record. Furthermore, in *Palmer v. Hoffman*, 318 U.S. 109 (1943), this Court expressly declined to construe the business-records exception – even as it then existed in its broad, post-Founding form, covering not just shop books but also other “regular entries made in the course of business,” Resp. Br. 45 – to include records created during the “[p]reparation of cases for trial.” *Palmer*, 318 U.S. at 113-14. “Unlike payrolls, accounts receivable, accounts pay-able, bills of lading and the like,” this Court explained, evidentiary reports “are calculated essentially for use in the court, not in the business.” *Id.* at 114.

The Commonwealth argues that *Palmer* has “come to stand for” the more generalized notion that a record “ought not be admitted if there was a substantial motive to misrepresent when the report was prepared.” Resp. Br. 49 (quotation omitted). Even if true, this assertion is irrelevant. *Palmer* found unequivocally that reports prepared for litigation fall outside of the common law’s conception of business records. 318 U.S. at 113-14. That holding confirms that such reports were not admissible as business records at the time of the Founding (or for generations thereafter). To any extent that modern hearsay law now characterizes as business records some supposedly reliable reports generated for litigation, that reality does not dent the Confrontation Clause’s conception of such reports as testimonial evidence;

confrontation concerns “do[] not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.” *Crawford*, 541 U.S. at 56 n.7; *see also id.* at 61 (Clause does not turn on “the vagaries of the rules of evidence”).

2. Nor would forensic reports have been admissible during the Founding era as public or official records. Common law courts recognized a hearsay exception covering records prepared by public officials acting pursuant to a public duty. *See* 3 John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* § 1632, at 386 (2d ed. 1923). But the Commonwealth and its amici fail to cite a single case from the Founding era – or, for that matter, from nearly a century-and-a-half thereafter – in which reports prepared for use as evidence against a criminal defendant were deemed official records or exempt from confrontation.

To be sure, the Commonwealth and its amici cite various cases involving prison entrance and discharge records, weather records, military enlistment records, and marriage certificates. Resp. Br. 37-38; U.S. Br. 11-12; Br. of NDAA et al. 29-31. But those cases support nothing more than the proposition that routine records created by public officials independent of the prosecutorial process are classifiable as official records. Even if it might be “foreseeable” that such records might occasionally be used in litigation or even that they might sometimes be used to “prov[e] a fact essential to the government’s case,” U.S. Br. 11-12, the fact remains that these types of records are not *created to serve as surrogates for testimony in criminal cases*. And it is *that* quality – the “[i]nvolvement of govern-

ment officers in the production of testimony with an eye toward trial,” *Crawford*, 541 U.S. at 56 n.7 – that distinguishes forensic laboratory reports from traditional public records; that likens them to the kinds of police reports that even today fall outside the public records rule; and that makes it clear beyond peradventure that they are testimonial. *See* Petr. Br. 21-22.

The United States suggests that forensic examiners’ evidentiary reports are exempt from confrontation requirements even though police reports are not, because forensic examiners “have an official duty to conduct and report their analyses accurately.” U.S. Br. 13. But this is nothing more than a reliability-based argument, which *Crawford* flatly precludes. *See supra* p. 8. In any event, police officers also have an official duty to conduct their investigations dispassionately and to report their findings accurately. *See, e.g., Luna v. Massachusetts*, 354 F.3d 108, 109-10 (1st Cir. 2004). Likewise, magistrates taking examinations under the Marian statutes acted under an official duty of law, yet the admission of their reports was a “principal evil at which the Confrontation Clause was directed.” *Crawford*, 541 U.S. at 50.

Finally, the Commonwealth and its amici claim that the treatment of coroners’ reports during the Founding era indicates that forensic reports would have been admissible as public records. Resp. Br. 51-54; Br. of Alabama et al. 13-15. But under the prevailing practice at that time, coroners’ reports were not offered as “a source of evidence” against the accused at all. Wigmore, *supra*, § 1671(6), at 516. As Wigmore’s treatise explains, such reports, “so far as *criminal* proceedings [were] concerned, [were] ‘in the

nature of indictments.” *Id.* (quoting Edward Hyde East, I Pleas of the Crown 389 (1803)); *see also Smalls v. State*, 28 S.E. 981, 982 (Ga. 1897) (“At common law the verdict of a coroner’s jury was, when it contained the subject-matter of an accusation, equivalent to an indictment of the accused for the homicide of the deceased.”); William L. Clark, Criminal Procedure § 50, at 130 (1895) (“[T]he finding of the coroner’s jury is itself equivalent to the finding of a grand jury.”). “[T]herefore,” it was “superfluous . . . to offer [coroners’ reports] against the accused on trial; they [were] the foundation of the charge against him.” Wigmore, *supra*, § 1671(6), at 516 (footnote omitted).

The Commonwealth’s argument that coroners’ reports were actually admissible as evidence relies exclusively on a single case: *State v. Parker*, 7 La. Ann. 83, 1852 WL 3553 (La. 1852). *See* Resp. Br. 53. In that case, the Louisiana Supreme Court held that the procès verbal of a coroner’s inquest was admissible respecting the fact and physical cause of death. Louisiana, however, appears to have been the only state that allowed prosecutors to introduce coroners’ findings into evidence, departing from the common law view that coroners’ reports served only as a basis for bringing a criminal charge. “The general rule” well into the twentieth century was that “in a prosecution for homicide the finding of a coroner or the verdict of a coroner’s jury as to the manner and cause of the death of the deceased [was] inadmissible in evidence *for any purpose.*” *Sandel v. State*, 119 S.E. 776 (S.C. 1922) (quoting 4 Ann. Cas. 1020 (William M. McKinney et al. eds., 1907) (collecting cases)); *see also* B. W., *Official Records. Coroner’s Inquest*, 65 U. Penn L. Rev. 290 (1917) (“In homicide cases the verdict of the coroner is

clearly inadmissible in every state in the Union except Louisiana.”). The suggestion that *Parker* – an isolated decision from the only state with a civil law heritage – reflects “how modern-day forensic lab reports would have been treated ‘at the time of the Founding’ and shortly thereafter,” Br. of Alabama et al. 14 (citation omitted), is thus, to say the least, misleading.

II. STATES MAY NOT AVOID THE CONFRONTATION CLAUSE BY GIVING DEFENDANTS ALTERNATIVE WAYS TO CHALLENGE FORENSIC EVIDENCE OR BECAUSE PRESENTING LIVE FORENSIC TESTIMONY MIGHT BE BURDENSOME.

This Court held in *Crawford* that “[w]here testimonial evidence [from available witnesses] is at issue, . . . the Sixth Amendment demands what the common law required”: in-court testimony subject to cross-examination. 541 U.S. at 68. The Commonwealth and its amici nonetheless argue, for two reasons, that even if forensic reports are testimonial, the prosecution need not present such evidence through ordinary confrontation procedures. First, the Commonwealth asserts that a state satisfies the Confrontation Clause by giving defendants options besides traditional confrontation “to challenge the validity of [forensic reports] and confront the individual analysts who prepare[] them.” Resp. Br. 54. Second, the Commonwealth and its amici argue that requiring forensic examiners to present their analyses through live testimony “would overwhelm the existing judicial, prosecutorial and administrative resources” devoted to handling narcotics cases. Br. of NDAA et

al. 8, 10; *see also* Resp. Br. 61; Br. of Alabama et al. 28. Neither of these arguments withstands scrutiny.

A. Allowing Defendants To Challenge Testimonial Evidence In Pretrial Hearings Or Through The Use Of Their Subpoena Power Does Not Satisfy The Confrontation Clause.

The Commonwealth argues that even if forensic reports are testimonial, it satisfied the Confrontation Clause in this case because petitioner could have attacked the validity of the forensic reports here in one of two ways: (1) by availing himself of pretrial procedures to challenge the reliability of the laboratory reports, *see* Resp. Br. 55-57, or (2) by issuing a subpoena to compel the forensic analysts to submit to cross-examination “as if they had been called as part of the prosecution’s case,” *id.* at 57. To the extent that these arguments are fairly included in the question presented, they plainly lack merit.

1. A state does not satisfy the Confrontation Clause by affording a defendant an opportunity to challenge in a pretrial hearing “the scientific validity of the testing methods and the qualifications of [forensic] analysts.” Resp. Br. 56. Such an *in limine* procedure merely allows a defendant to invoke a state court’s “gatekeeper role” of excluding expert testimony that is so unreliable that it should not even be presented to the jury. *Id.*; *see also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Confrontation Clause, however, conveys procedural rights that a defendant may invoke *at trial*, regardless of whether the evidence at issue is “deemed reliable by

a judge.” *Crawford*, 541 U.S. at 61. The Clause, in other words, “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination” before a jury that can observe the witnesses as they testify. *Id.*

2. Nor is a defendant’s ability to subpoena a forensic examiner (or any other prosecution witness) as part of his defense enough to satisfy the Confrontation Clause. The Clause guarantees a defendant the right “to be confronted with the witnesses against him.” U.S. Const. amend. VI. As this passive language implies – and as numerous courts squarely have held – it is the prosecution’s responsibility to arrange the confrontation, not the defendant’s.⁶

This Court’s precedent comports with this understanding of the Sixth Amendment. In *Taylor v. Illinois*, 484 U.S. 400 (1988), this Court explained that the right to confrontation, like most other Sixth Amendment rights, “arise[s] automatically on the initiation of the adversary process and no action by the

⁶ See *Belvin v. State*, 986 So. 2d 516 (Fla. 2008) (holding that right to subpoena forensic examiner does not satisfy Confrontation Clause); *Thomas v. United States*, 914 A.2d 1 (D.C. 2006) (same); *State v. Coombs*, 821 A.2d 1030 (N.H. 2003) (same) (subpoena power “is beside the point” because “the duty to confront a defendant with witnesses falls upon the State.”); *People v. McClanahan*, 729 N.E.2d 470, 477 (Ill. 2000) (same); *Barnette v. State*, 481 So. 2d 788, 792 (Miss. 1985) (same); *United States v. Oates*, 560 F.2d 45, 82 n.39 (2nd Cir. 1977) (same); *State v. Rohrich*, 939 P.2d 697 (Wash. 1997) (same regarding child witness); *Snowden v. State*, 867 A.2d 314, 332 (Md. 2005) (same); *Schaal v. Gammon*, 233 F.3d 1103, 1107 (8th Cir. 2000) (same); *Lowery v. Collins*, 996 F.2d 770 (5th Cir. 1993) (same); *Briggs v. State*, 789 S.W.2d 918 (Tex. Crim. App. 1990) (same).

defendant is necessary to make [it] active in his or her case.” *Id.* at 410. More specifically, the right to confrontation is “designed to restrain the prosecution by regulating the procedures by which it presents *its case* against the accused. [It applies] in every case, whether or not the defendant seeks to rebut the case against him or to present a case of his own.” *Id.* at 410 n.14 (emphasis added) (quotation marks omitted). This means that absent obtaining a defendant’s consent to present testimonial hearsay of an available witness in lieu of live testimony, the prosecution must call the witness to the stand or forego introducing the out-of-court statement.

Any other conception of the Confrontation Clause would render it a superfluous constitutional right. As the Commonwealth acknowledges (Resp. Br. 57), the Sixth Amendment’s Compulsory Process Clause – which guarantees defendants the right “to have compulsory process for obtaining witnesses in [their] favor,” U.S. Const. amend. VI – already gives defendants the right to “compel a witness’ presence in the courtroom” for a live examination. *Taylor*, 484 U.S. at 409. The Commonwealth would thus have this Court construe the Confrontation Clause to afford a defendant nothing more than the Compulsory Process Clause already gives him. This result contravenes the “first principle of constitutional interpretation,” which is that “every word must have its due force, and appropriate meaning.” *Wright v. United States*, 302 U.S. 583, 588 (1938) (quotation marks omitted). “[N]o word” in the Constitution “was unnecessarily used, or needlessly added.” *Id.*

This is especially true with respect to the “bedrock procedural guarantee,” *Crawford*, 541 U.S. at 42, that the Confrontation Clause secures. Allowing the prosecution to present its case through extrajudicial declarations – subject only to defendants’ subpoena power – deprives defendants of the ancient right to stand “face-to-face” with adverse witnesses as the witnesses convey incriminating evidence on direct examination. Moreover, instead of having the right to undertake cross-examination on the heels of the prosecution’s direct examination, with little risk of worsening the evidentiary record or alienating the jury, defendants required to subpoena adverse witnesses in order to question them must gamble that calling a witness to the stand will generate such powerful impeachment evidence that the jury will understand why the defense wanted to elicit the testimony. *See Lowery*, 996 F.2d at 772; *Rohrich*, 939 P.2d at 700-01. This “is no substitute for cross-examining that declarant *as a state’s witness*.” *State v. Fisher*, 563 P.2d 1012, 1017 (Kan. 1977) (emphasis added); *see also* Richard D. Friedman, *Shifting the Burden*, Mar. 16, 2005, <http://confrontationright.blogspot.com/2005/03/shifting-burden.html> (elaborating on this point).⁷

Lest there be any remaining doubt, the Commonwealth’s argument that it may simply leave it to defendants to subpoena prosecutorial witnesses leads to patently unacceptable results. As the Illinois Supreme Court has recognized, this proposition, taken

⁷ Professor Friedman also elaborates on the practical deficiencies of requiring defendants to subpoena forensic examiners in a pending petition for certiorari. *See* Petition for a Writ of Certiorari, *Briscoe v. Virginia*, No. 07-11191 (Mar. 29, 2008).

to its logical conclusion, would “necessarily mean that there would be no constitutional problem with allowing the State to introduce all of its evidence by affidavit as long as the defendant is allowed to bring the prosecution’s witnesses into court himself.” *People v. McClanahan*, 729 N.E.2d 470, 477 (Ill. 2000).

It is difficult to conceive of a scenario more offensive to the Confrontation Clause. “The primary object” of the Clause is “to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination . . . of the witness” *Mattox v. United States*, 156 U.S. 237, 242 (1895); accord *Crawford*, 541 U.S. at 50; *California v. Green*, 399 U.S. 149, 157 (1970). No conception of the Confrontation Clause that permits – indeed, invites – prosecution-by-*ex-parte*-interview can be correct.

B. Any Burden That Subjecting Forensic Reports To Traditional Confrontation Requirements Imposes Does Not Warrant Suspending The Confrontation Clause.

The Commonwealth and its amici assert that petitioner advocates an “absolutist approach” to the Confrontation Clause that would impose severe and unjustified burdens on criminal justice systems. Resp. Br. 59; Br. of Alabama et al. 21. But these assertions misapprehend petitioner’s position and overestimate the requirements it would impose on states such as Massachusetts. And even if abiding by traditional confrontation requirements would impose burdens on some states, that would not supply a valid reason for avoiding these time-tested procedures.

1. Contrary to the Commonwealth's argument, petitioner does not advocate a "categorical rule requiring live testimony in every case where drug analysis is performed – even when the defendant . . . has no real intention or desire to cross-examine the analysts." Resp. Br. 59. Nor would petitioner unavoidably "require the [prosecution] to keep the testing analyst at their beck and call, in the courtroom, at trial – just in case a defendant raises a last-second *Crawford* objection." Br. of Alabama et al. 22. Rather, petitioner's point is merely that the Confrontation Clause permits a defendant to insist that testimonial evidence, including forensic reports, be introduced by means of live trial testimony that is subject to cross-examination. If prosecutors believe that a defendant has no intention of challenging forensic evidence, they may seek and obtain waivers or stipulations obviating the need to present live testimony.

Some states, including the major population centers of California and Illinois, already follow a system requiring prosecutors, absent obtaining stipulations or waivers, to present forensic testimony at trial through live witnesses. *See* Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 478 & n.10 (2006). Forensic reports in these states are admissible when accompanied by live testimony of a forensic examiner, but not on their own under any hearsay exception. *See, e.g.*, 3 California Criminal Defense Practice § 71.23 (2005). 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 the overwhelming majority of criminal prosecutions result

in plea bargains. And even in the sliver of cases that proceed to trial, it is “almost always the case,” as the Commonwealth itself explained in a brief to the Massachusetts Supreme Judicial Court in *Verde* (and acknowledges again here) that forensic laboratory reports are “almost always . . . admitted without objection.” 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).

Generally, defendants do not object to the admission of drug certificates most likely because there is no benefit to a 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.

Id.; *accord* Resp. Br. 55; U.S. Br. 24. Accordingly, prosecutors frequently are able to secure waivers respecting forensic reports or pretrial stipulations in which defendants voluntarily attest that forensic examiners have reached certain conclusions. *See* Br. of Law Professors at 10-13; Anthony G. Amsterdam, Trial Manual 5 for the Defense of Criminal Cases § 357 (1989) (“Counsel should always keep in mind the possibility of offering to stipulate to matters that the prosecutor can amply prove . . .”).

If a state wishes to be even more proactive than simply allowing its prosecutors to obtain plea bargains or pretrial stipulations in the vast majority of cases, it may – as the United States explains and as several

states already have done – adopt a “notice-and-demand” statute. Such a statute may “require the defense counsel,” after receiving notice of the prosecution’s intent to present forensic evidence, to “demand before trial that the laboratory witnesses be called to testify.” U.S. Br. 32; *see also* Br. of Law Professors 13-15 & 14 n.2 (discussing ten state statutes legitimately mandating such procedures).⁸ Accordingly, if the Commonwealth thinks it unfair that petitioner was able insist on his confrontation rights at what its amici call the “last second” – namely, when prosecution attempted to introduce testimonial hearsay as a substitute for live testimony – it has ample tools at its disposal to avoid such occurrences in the future.

2. In the end, whatever extra burden states might face to abide by the dictates of the Confrontation Clause with respect to forensic evidence is irrelevant. Time and again, this Court has emphasized that when it comes to the rudiments of criminal procedure, attempts to “secure greater speed, economy and convenience in the administration of law at the price of

⁸ Some “notice and demand” statutes impose greater burdens on defendants, such as requiring them to proffer a “good faith” reason for wanting the prosecution to present its testimonial forensic evidence through live testimony. *See, e.g.*, Ala. Code § 12-21-302. Petitioner agrees with the United States (U.S. Br. 31) and the Law Professors (Br. 15 n.3) that such notice-and-demand-plus statutes raise serious constitutional questions that should be left for another day. This Court should also leave for another day whether or when the prosecution may comply with the Confrontation Clause by presenting forensic reports through expert witnesses who did not conduct the original analyses. *See* U.S. Br. 27 (noting some of the conflicting lower-court authority on the subject).

fundamental principles of constitutional liberty” exacts a “price [that] is too high.” *Bruton v. United States*, 391 U.S. 123, 135 (1968) (quotation marks and citation omitted); *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) (“The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done.”) (quotation marks omitted).

For example, in *Bruton*, this Court imposed confrontation restrictions on the use of confessions that discourage joint trials, despite the fact that such trials “conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial.” 391 U.S. at 134. In *Blakely v. Washington*, 542 U.S. 296 (2004), this Court insisted that facts subjecting defendants to increased punishment be proven to juries, noting that its decision could not “turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice.” *Id.* at 313. And in *Gideon v. Wainwright*, 372 U.S. 335 (1963), this Court held that all indigent persons accused of felonies are entitled to appointed counsel, notwithstanding the State of Alabama’s contention – in language even more alarmist than it advances here – that doing so would impose on states “an unbearably onerous financial burden to pay the fees of attorneys.” Br. of Alabama et al. 13, *Gideon v. Wainwright*, 372 U.S. 335 (1963), available at 1962 WL 115123; compare Br. of Alabama et al. 25-28.

Any burden that states such as Massachusetts might face as a result of complying with the traditional requirements of confrontation in the context of forensic evidence pales in comparison to those imposed by a

case such as *Gideon*.⁹ And that burden would be a small price to pay for abiding by a fundamental safeguard of the American trial system – a safeguard that experience shows beyond dispute is necessary in this context, no matter how trustworthy we might want to think forensic science may be.

CONCLUSION

For the foregoing reasons, as well as those in petitioner’s opening brief, the decision of the Appeals Court of Massachusetts should be reversed.¹⁰

⁹ In 2004, the supervisor of a Massachusetts Department of Public Health drug laboratory asserted that if forensic reports were deemed testimonial, the Department of Public Health would need only “between four to eight additional chemists in order to keep up with the analyses of samples and court appearances.” Affidavit of Charles Salemi, *in* Appendix, Br. for the Commonwealth as *Amicus Curiae* 3, *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005). What is more, this estimation appears to be premised on the incorrect assumption that forensic examiners would need to testify in “every narcotics case that goes to trial,” *id.*, without the ability to take mitigating measures such as seeking waivers or adopting a notice-and-demand statute.

¹⁰ The Commonwealth requests, in the event this Court holds that petitioner’s confrontation rights were violated, that it have the opportunity on remand to argue that the error was harmless beyond a reasonable doubt. Resp. Br. 66. Petitioner disagrees with the Commonwealth’s contention, which it is raising for the first time in this Court, that the error could have been harmless. The police testified that they had “no ‘real knowledge,’” apart from the forensic reports, that the contents of the bags they seized contained cocaine, Resp. Br. 4 n.1, and the trial court took the unusual step of reserving judgment on the defendant’s motion for a required finding of not guilty until after the jury returned its verdict. Tr. 2/227. The Appeals Court of Massachusetts found sufficient evidence to uphold petitioner’s conviction in part only

Respectfully submitted,

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

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

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

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Avenue
Bethesda, MD 20814

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because of the forensic reports. Pet. App. 8a. Petitioner nonetheless agrees that the proper procedure is for this Court to remand the case for the parties to litigate this issue in the state courts. *See, e.g., Lilly v. Virginia*, 527 U.S. 116, 139-40 (1999) (remanding case involving confrontation violation to the state courts for harmless error inquiry).