No. 07-591

In the
Supreme Court of the United States

LUIS E. MELENDEZ-DIAZ,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

On Writ of Certiorari to the
Appeals Court of Massachusetts

BRIEF OF THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, KANSAS, KENTUCKY, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WASHINGTON, WYOMING, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the written report of a forensic drug analysis is "testimonial" evidence subject to the demands of the Confrontation Clause.

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INTEREST OF AMICI

Since 2000, state and federal law enforcement officials have arrested more than 11 million persons for possessing or trafficking illegal narcotics. *See* Uniform Crime Report, *Crime in the United States 2000-2006*, Table 29. As the number of arrests escalates, so does the burden on the state and local laboratories charged with analyzing the substances recovered:

Year	Persons Arrested	Substances Analyzed
2000	1,579,566	532,412[1]
2001	1,586,902	1,894,610
2002	1,538,813	1,798,045
2003	1,678,192	1,715,598
2004	1,745,712	1,734,658
2005	1,846,351	1,749,275
2006	1,889,810	1,935,788

See id.; National Forensic Laboratory Information System ("NFLIS"), *Years 2000-2006 Annual Report*, Table 1.1. As the slow, steady growth of these numbers shows, the war on drugs is far from over.

Nor has it been cheap. In 1998 alone, the States spent $81.3 billion—13.1% of our annual budgets—fighting "substance abuse and addiction." The National Association on Addiction and Substance Abuse, *Shoveling Up: The Impact of Substance Abuse*

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[1]The increase in reported analyses from 2000 to 2001 is attributable to the NFLIS gaining access to statistics from all fifty states beginning in 2001. *See* NFLIS, *Year 2000 Annual Report*, 3.

on State Budgets, 9 (2001). Of this amount, $3.6 billion was spent in the state courts, $2.4 billion of which funded drug-related cases in criminal courts. *Id.* at 16.

As stewards of the public's resources, the amici States have two interests. The first is to spend the lion's share of the public's money where it matters most: on the front lines, fighting and preventing continued drug abuse. The second is to keep our technicians in the laboratory, whenever possible, to handle the daily influx of drug analysis requests and to chip away at the backlog of cases that exceeded 135,000 in 2002. Bureau of Justice Statistics, *50 Largest Crime Labs, 2002*, Table 1 (2004), available at http://www.ojp.gov/ bjs/abstract/50lcl02.htm.

The States have adopted two primary methods to accomplish these goals. Forty-two states and the District of Columbia have statutes allowing the introduction of forensic lab reports *in lieu* of live testimony.[2] Alternatively, the States often produce qualified surrogate witnesses at trial to explain testing procedures and to offer opinions based on the original test data when the testing analyst is unavailable due to death, change of employment, or an overwhelming workload. Petitioner's interpretation of the Confrontation Clause threatens—if not destroys—both of these solutions.

To be clear: The States do not seek to evade confrontation. If a criminal defendant wishes to contest the findings contained in a lab report, he can. As outlined *infra* at pages 28-33, each state's

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[2]This figure includes both drug and blood-alcohol analysis statutes because both are affected by this case. A chart outlining these statutes is attached as Appendix A.

statutory scheme, as well as the use of qualified surrogate witnesses, ensures a defendant's opportunity to cross-examine a laboratory technician. But the reality is that in a vast majority of drug cases—this one included—the defendant will *not* contest the composition of the substance at trial. In these uncontested cases, no one's interest is served by a constitutional requirement that the States waste public funds by producing an unwanted witness.

SUMMARY OF ARGUMENT

Since the Framing, the Court has never extended the bounds of the Confrontation Clause beyond statements given in a courtroom or in response to inquisitorial practices. This is not the case to do so.

1. The Court's present boundary for testimonial statements is supported by the history and purpose of the Confrontation Clause. The Clause was targeted at statements taken during *ex parte* examinations, primarily because examination-based statements were (1) susceptible to prosecutorial bias and (2) granted a statutory exemption from the common law's exclusionary rule for hearsay statements. Other, non-examination-based (*i.e.* "non-testimonial") hearsay statements were sufficiently governed by common law hearsay rules during the Framing era; thus, they were not targets of the Confrontation Clause.

The laboratory reports in the present case fall outside the scope of the Confrontation Clause for two independent reasons. First, the lab reports fit within the hearsay exception for non-testimonial public records as it existed at the time of the Framing. Second, the lab reports are fundamentally different

than statements taken during examinations under the Marian Bail and Committal Statutes, which were the target of the Confrontation Clause. Thus, the admissibility of the lab reports is governed by the flexibility of state hearsay law.

2. The States need this flexibility to deal with the ever-growing number of drug analysis requests. If the Court deems the lab reports in this case to be "testimonial," it should reject Petitioner's absolutist approach to the Confrontation Clause, which deems the "opportunities to cross-examine" provided by state law to be irrelevant and would require the States to produce the testing analyst at every drug-related trial. Adoption of Petitioner's rule would cause systemic gridlock in the State courts and forensic laboratories.

ARGUMENT

Not one of the 19 cases in which the Court has found confrontation to be required presented circumstances that resemble the facts of this case. Seven times the statement in question was gained in the presence of law enforcement.[3] Eleven times the

[3]*See Davis v. Washington*, 547 U.S. 813 (2006)(victim's affidavit completed in the presence of police); *Crawford v. Washington*, 541 U.S. 36 (2004)(victim's statements made during police interrogation); *Lilly v. Virginia*, 527 U.S. 116 (1999)(accomplice's statements made during police interrogation); *Lee v. Illinois*, 476 U.S. 530 (1986)(co-defendant's written confession given to police at his arrest); *Roberts v. Russell*, 392 U.S. 293 (1968)(co-defendant's confession to police); *Bruton v. United States*, 391 U.S. 123 (1968)(co-defendant's statements given during interrogations at city jail); *Douglas v. Alabama*, 380 U.S. 415 (1965)(accomplice's written confession to police).

statement was given in a court proceeding.[4] And, once, the statement was secured by a physician's sustained questioning of a 2-year-old child who had been taken into police "custody . . . for protection and investigation." *Idaho v. Wright*, 497 U.S. 805, 809 (1990). In each case, the declarant was either the victim (*Davis, Crawford, Wright, Mancusi, Berger,* and *Pointer*), an accomplice (*Lilly, Lee, Green, Russell, Bruton, Barber, Brookhart, Douglas, Motes,* and *Kirby*), or a witness with personal knowledge of the crime (*Roberts, Mattox,* and *Reynolds*). In other words, every statement deemed "testimonial" by the Court emanated from a person conveying personal knowledge of the crime directly to a judge, jury, police officer, or examiner working in conjunction with the police.[5]

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[4]*See Ohio v. Roberts*, 448 U.S. 56 (1980)(witness's preliminary hearing testimony); *Mancusi v. Stubbs*, 408 U.S. 204 (1972)(victim's previous trial testimony); *California v. Green*, 399 U.S. 149 (1970)(accomplice's preliminary hearing testimony); *Berger v. California*, 393 U.S. 314 (1969)(victim's testimony at preliminary hearing); *Barber v. Page*, 390 U.S. 719 (1968)(co-defendant's testimony at a preliminary hearing); *Brookhart v. Janis*, 384 U.S. 1 (1966)(co-defendant's written confession and witness testimony at trial); *Pointer v. Texas*, 380 U.S. 400 (1965)(victim's testimony from a preliminary hearing); *Motes v. United States*, 178 U.S. 458 (1900)(accomplice's written statement taken at a preliminary hearing); *Kirby v. United States*, 174 U.S. 47 (1899)(record of accomplice's guilty pleas in preceding trial); *Mattox v. United States*, 156 U.S. 237 (1895)(witness testimony from previous trial); *Reynolds v. United States*, 98 U.S. 145 (1879)(witness testimony from previous trial).

[5]The physician's inquisition in *Wright* was an act of law enforcement, or certainly akin to one, because the child declarant had been taken into State custody "for protection and investigation," 497 U.S. 805, 809, and the doctor "questioned

Recording the results of a laboratory test is fundamentally different. Neither the machine that generates the data, nor the technician who records it, witnessed or took part in the crime. The looming specter of judges or the police is not present. There is no interrogation. Simply put, there is no "testimony."

I. THE LABORATORY REPORTS IN THIS CASE ARE NOT TESTIMONIAL.

In *Crawford v. Washington,* 541 U.S. 36 (2004), the Court identified the "principal evil" targeted by the Confrontation Clause: "the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 50. This conclusion stemmed from the Eighteenth-Century elimination of the statutory hearsay exception provided for *ex parte* examinations under the Marian Bail and Committal Statutes, 1 & 2 Phil. & M., c. 13 (1554), and 2 & 3 Phil & M., c. 10 (1555), and their state equivalents. *Crawford*, 541 U.S. at 42-50.

In this case, the flip-side of this Framing-era history is equally important. Marian-style examinations were not the only pre-Framing hearsay exception. When the general exclusionary rule against hearsay solidified after *King v. Paine*, 5 Mod. 163, 87 Eng. Rep. 584 (1696), several "classes of hearsay statements continued to be received as before;" that is, without confrontation. 5 J. Wigmore, *Evidence*, § 1426 (Chadbourn rev. 1974). Included within this inaugural class of hearsay exceptions

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the child with a preconceived idea of what she should be disclosing." *Id.* at 818; *cf. Davis*, 547 U.S. at 823 (considering the questions asked by a 911 operator "to be acts of the police").

were "dying declarations," *Crawford*, 541 U.S. at 56, n.6, "statements in furtherance of a conspiracy," *id.* at 56, "business records," *id.*, and "official records." *Id.* at 76 (Rehnquist, C.J. dissenting). *See also* Wigmore, *supra*, § 1426 (listing fourteen hearsay exceptions that "began to be recognized during the 1700's," and a "few remaining ones [that] were not recognized until the 1800's."). Unlike the Marian statutory exception, each of these exceptions applied with full force after the Framing. *See id.*

The States deem this history important for two reasons. First, it shows that out-of-court statements falling within a surviving common law hearsay exception cannot be deemed "testimonial" because the law continued to accept their admission, without confrontation, after the Framing. Second, it suggests the boundary of the Confrontation Clause: statements generated through use of *ex parte* examinations. If (1) "[n]ot all hearsay implicates the Sixth Amendment's core concerns," *Crawford,* 541 U.S. at 51, and (2) the sole change to the common law of hearsay in the Framing era was the elimination of the statutory exception for *ex parte* examinations, then history suggests that the class of hearsay statements "implicated" by the Clause is limited to statements taken in a manner with a "striking resemblance" to Marian-style *ex parte* examinations. *Id.* at 52; *Davis*, 547 U.S. at 830.

Against this backdrop, the States offer two alternative reasons why the Court should not extend the boundaries of the term "testimonial" to encompass the lab reports in this case. First, the reports fall within a surviving common law hearsay exception. Second, the reports bear no resemblance

to statements taken in a Marian-style *ex parte* examination.

A. The Laboratory Reports in this Case Are Non-Testimonial Public Records.

Public records constituted a common law hearsay exception because (1) a "presumption [existed] that public officials do their duty," Wigmore, *supra* § 1632, and (2) without the exception, "hosts of officials would be found devoting the greater part of their time to attending as witnesses in court . . . [and] the work of administration of government and the needs of the public having business with officials would suffer as a consequence." *Id.* at § 1631. Had Petitioner's case arisen "at the time of the Founding," *Giles v. California*, 128 S. Ct. 2678, 2682 (2008), Massachusetts's lab reports would have been admissible without confrontation for the same two reasons. The lab reports must therefore be non-testimonial.

1. Public Records Are Inherently Non-Testimonial.

In *Crawford,* the Court left open the question of whether statements falling under the common law public records exception are testimonial. *See Crawford*, 541 U.S. at 56. ("Most of the hearsay exceptions covered statements that by their nature were not testimonial."). That said, the Court essentially affirmed that they are not.

The Court noted in *Crawford* that "[t]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless . . . the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54. Addressing the

public records exception after the Framing, this Court stated, "Such writings are admissible in evidence on account of their public nature, though their authenticity be not confirmed by the usual tests of truth; namely, the swearing and the cross-examination of the persons who prepared them." *Gaines v. Relf*, 12 How. (53 U.S.) 472, 570 (1851). If (1) testimonial statements must have been subjected to cross-examination to be admissible at the time of the Framing and (2) public records were admissible without being subjected to cross-examination shortly after the Framing, then public records must be non-testimonial.

2. The Laboratory Reports in this Case Would Have Been Public Records at the Time of the Founding.

That leaves the dispositive question: Would the lab reports in this case have qualified as public records "at the time of the Founding"? *Giles*, 128 S. Ct. at 2682. To answer this question, we turn to the "[c]ases and treatises of the time" to find the elements of the Framing-era public records exception. *Id.* at 2684.

In his 1802 treatise, Leonard McNally stated the exception as follows: "The books of public offices, and of public bodies, which of course are not interested in the event of the trial, are admissible evidence."[6] Leonard MacNally, *The Rules of Evidence on Pleas of the Crown, Trials and Cases* 475-77 (1802). In his

[6]In addition to books, the public records exception embraced "a single document made separately for each transaction," including documents "given out by [the official] to an applicant for the latter's use." 5 J. Wigmore, *Evidence* § 1636 (Chadbourn rev. 1974).

1827 treatise, Thomas Starkie similarly stated that "[c]ertificates and other documents made by persons [e]ntrusted with authority for the purpose . . . are evidence against all, to the extent of the author's authority, of the facts which he is directed to certify." 1 Thomas Starkie, *Evidence* 172 (1826).

These post-Framing treatises fall in line with a criminal case decided shortly before the Framing. In *King v. Aickles*, 168 Eng. Rep. 297, 1 Leach 390 (1785), the defendant was charged with prematurely returning from overseas exile after being discharged from prison. To prove Aickle's date of discharge, the court admitted a copy of a turnkey's entry showing Aickle's release date. The court's decision was affirmed because "whatever acts [public officials] do in discharge of their duty may be given in evidence and shall be taken as true. . . . In the present case, [the clerk of papers] has no private interest whatsoever in this book to induce him to make fictitious entries in it." *Id.*[7]

Taken together, these sources establish the following test for the common law public records exception:

1. The creator of the document is a public servant who has a public duty to perform;
2. The statement contained within the document relates to the performance of the creator's public duty; and,

[7]As quoted in J. Wigmore, *Select Cases on the Law of Evidence*, 637 (1912).

3. The creator of the report cannot have a private or special interest in the record or in the trial in which the record is introduced.[8]

See also Wigmore, *supra* § 1633 (outlining the same essential factors).

The lab reports in this case meet this three-part Framing-era test and are therefore non-testimonial. First, the state lab technicians had a public duty to conduct the test. *See* Mass. Gen. Law. ch. 111, § 12. Second, the reports were created as a result of the required testing. Pet. App. at 24a-29a. And, third, the lab technicians had no special or private interest in Petitioner's case.

That the technicians had no "special interest or motive to misrepresent," the results in Petitioner's case is apparent for at least two reasons. Wigmore, *supra* § 1633(7). First, the technicians had no idea Petitioner was personally involved with the tested substances; his name appeared nowhere on the submitted forms. Pet. App. at 24a-29a. Second, Massachusetts lab technicians can and do submit findings *against* the prosecutorial interest of the Commonwealth in drug-related cases. In *Commonwealth v. Verde*, 827 N.E. 2d 701 (Mass. 2005)—the very decision relied upon by the court below, Pet. App. at 8a—the state laboratory determined that a submitted substance was not illegal, and the defendant used the lab's report at trial to attack the integrity of the Commonwealth's investigation. Pet. App. at 13a-14a.

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[8]Wigmore phrased the private interest rule as a requirement against a "special interest or motive to misrepresent." 5 J. Wigmore. *Evidence* at § 1633(7)(Chadbourn rev. 1974).

3. Petitioner's Own Authority Suggests that the Laboratory Reports in this Case Would Have Been Admissible Sixty Years after the Founding.

Petitioner counters that the public records exception rejects "certifications prepared with an eye toward litigation." Pet'rs. Br. at 23. This argument fails because it lacks a "historical pedigree" in the Framing era. *Giles*, 128 S. Ct. at 2687.

After *Giles*, the law is clear: When dealing with the Confrontation Clause, hearsay exceptions are snapshots of the law as it existed "at the time of the Founding." *Id.* at 2682. Petitioner cites no cases or treatises within fifty years of the Framing to support his argument. Nor do any of Petitioner's post-1840 cases hold that a public servant's anticipation of trial required exclusion of his written report.[9] Pet'rs Br. at 23 n.3-4.

Of his cited cases, *People v. Bromwich*, 93 N.E. 933, 387-89 (N.Y. 1911), presents the facts most favorable to Petitioner's argument. In *Bromwich*, the New York Court of Appeals found the Confrontation Clause to be violated in a prosecution for false registration when the trial court admitted several clerks' certifications that the defendant had not been naturalized. Clearly, the clerks had foreknowledge that their certificates were being gathered for use at the defendant's trial. Yet,

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[9]Nor did any of the late-1800's and early-1900's cases cited within *Commonwealth v. Slavski*, 140 N.E. 465, 469 (Mass. 1923), and relied upon by amicus Professor Richard Friedman to forward the same argument, reject a public record due to the public official's foreknowledge of trial. Br. of Amicus Prof. Friedman at 12-13.

Bromwich fails to validate an "eye toward trial" exception to the public records doctrine because the court never mentioned the clerks' anticipation of trial as a rationale for its holding.

Whatever substance the *Bromwich* decision provides Petitioner's argument is undone by Petitioner's reliance on *State v. Parker*, 7 La. Ann. 83, 1852 WL 3553 (La. 1852), a case nearly sixty years its senior. Pet'rs Br. at 23 n.3. Like *Bromwich*, *Parker* did not specifically address the issue of whether foreknowledge of trial affected the admissibility of public records.

Parker did, however, address the admissibility of contemporary forensic reports (*i.e.* coroner's inquests) and found that they *were* admissible without confrontation. That the coroner's inquest was made with an eye toward trial is beyond question: "[I]t is expressly declared, that the inquest, signed by the coroner and members of the jury, shall be sent to the clerk's office, to be a record of the facts to be used before the grand jury, in case a prosecution takes place." 1852 WL 3553 at *2.

The *Parker* court divided coroner's inquest results into two categories. *Id.* at *1-2. First, the court deemed "mere physical facts . . . [recorded] upon inspection by a public officer and intelligent men" to be admissible without confrontation because the facts were "evidence of neither guilt nor innocence, and have no direct tendency to implicate the accused, nor anyone else." *Id.* at *1. In support of this finding, the court cited Wigmore and McNally for the proposition that inquest results were admissible "matters of public and general concern" (*i.e.* public records) under "[t]he ancient rules of the common

law." *Id.* at *2. Second, the court deemed "that part of the coroner's inquest, which tends to trace the death to a person accused of the deed" to be inadmissible "because it tends to show guilt in him to the exclusion of others; and, therefore, he has the constitutional right of meeting the witnesses face to face." *Id.* at *2. Included in this group of inadmissible documents were the "deposition[s] of the witnesses before the inquest." *Id.*

Parker's significance is two-fold. First, it dispels Petitioner's "eye toward litigation" argument. *Parker* demonstrates that, as many as sixty years after the Framing, public records generated with an eye toward trial could be admitted, without confrontation, in criminal prosecutions. *Id.* at *1-2.

Second, *Parker* sheds light on how modern-day forensic lab reports would have been treated "at the time of the Founding" and shortly thereafter. *Giles*, 128 S. Ct. at 2682. American courts had "flatly rejected" the use of witness *depositions* taken during a coroner's inquest by at least the 1840's. *Crawford*, 541 U.S. at 47 n.2. *Parker* reflects that decision. *Id.* at *2. That the *Parker* court admitted the *forensic findings* of a coroner's inquest in 1852 suggests that a coroner's forensic report was still treated as a common law public record years after the Framing, as long as coroner's factual findings had "no direct tendency to implicate the accused, nor anyone else." *Parker*, 1852 WL 3553 at *1.

Whether *Parker* reflects a special rule for coroner's inquests or a post-Framing addition to the public records exception (*i.e.* that the facts within the public record "have no direct tendency to implicate the accused") is unclear. *Id.* But, for present

purposes, further clarity on that issue is unnecessary because the lab reports in this case fit within the common law's framework and *Parker's* framework. Just as the coroner's factual findings in *Parker* (*i.e.* that the deceased was killed by a pistol shot) did not "implicate the accused, nor anyone else," the factual findings contained in the present lab reports (*i.e.* the weight and composition of the seized cocaine) did not directly implicate Petitioner for possessing or trafficking cocaine. *Id.*

In short, *Parker* supports a Framing-era distinction between *ex parte* depositions or affidavits taken from a witness and the *ex parte* forensic findings of a public servant: The former were subject to the Confrontation Clause; the latter were not. The lab reports in this case are the "functional equivalent" of a coroner's forensic findings, much more so than a witness's "*ex parte* affidavit" as Petitioner contends. Pet'rs. Br. at 4, 11, 16. Accordingly, *Parker* suggests that the present lab reports would have been considered non-testimonial public records "at the time of the Founding" and at least 60 years beyond. *Giles*, 128 S. Ct. at 2682.

B. The Laboratory Reports in this Case Are Fundamentally Different from the *Ex parte* Depositions and Affidavits Targeted by the Confrontation Clause.

Even if the present laboratory reports do not fit within the Framing-era public records exception, the statements contained within the reports are not testimonial for either of two reasons.

1. The Laboratory Reports Were Not the Products of an *Ex parte* Examination.

The Court has yet to define the term "testimonial statement." But four factors suggest that, to be deemed "testimonial" for Sixth Amendment purposes, a statement must have been given under circumstances resembling an *ex parte* examination conducted under the Marian bail and committal statutes.

First, the "use of *ex parte* examinations as evidence against the accused" was the "principal evil at which the Confrontation Clause was directed." *Crawford*, 541 U.S. at 50. And for good reason: "The Marian system imparted a strong prosecutorial bias" in magistrates, making them "a partisan rather than a truth seeker." John H. Langbein, *The Origins of Criminal Advocacy*, 43 (2003). Justices of the peace took statements at committal hearings with a "prosecutorial cast by recording either the full story 'or as much thereof as shall be material to prove the felony.'" John H. Langbein, *Prosecuting Crime in the Renaissance*, 18 (1974)(quoting 2 & 3 Phillip & Mary c. 10 (1555)). Justices of the peace also "policed the land" outside their courtrooms, rounding up additional witnesses and recording their accusatory statements. *Id.* at 6; *see also* John H. Langbein, *Shaping the 18th-Century Criminal Trial: A View From the Ryder Sources*, 50 U. Chi. L. Rev. 1, 60-76 (1983)(describing the examination and policing system created by the Fielding Brothers, who served as justices of the peace in London in the mid-1700's). Most importantly, these inquisitorial practices were vilified because they created admissible evidence in statutory-derogation of the common law. *Crawford*, 541 U.S. at 42-50. That the use of *ex parte* examinations as evidence ended during the Framing era, while the admission of other hearsay statements

such as public and business records persisted, indicates that the Confrontation Clause was directed at statements taken under the Marian procedure.

Second, the Court's body of Confrontation Clause precedent reflects this targeting of Marian-style examinations. As outlined *supra* at pages 4-5, each of the statements the Court has treated as "testimonial" to date was generated during court proceedings or out-of-court interrogations. In other words, each "testimonial" statement was given under circumstances resembling a Marian examination.

Third, resemblance to a Marian-style *ex parte* examination was the deciding factor in *Crawford*, *Davis,* and *Hammon* (*Davis*'s companion case). In all three cases, the declarant was a victim or eyewitness whose statement contained detailed accounts of the crime. *See Crawford*, 541 U.S. at 38-40; *Davis*, 547 U.S. at 817-21. In all three cases, the statement was used to convict the defendant. *See id.* Yet, the Court reached different conclusions on the "testimonial" question. In *Crawford* and *Hammon*, the Court held that the declarants' responses to police interrogation were testimonial because modern-day police interrogations bear a "striking resemblance" to the *ex parte* examinations conducted under the Marian statutes. *See Crawford,* 541 U.S. at 52; *Davis*, 547 U.S. at 830. In *Davis,* the Court held that a telephone call to a 911 operator was not testimonial because the "primary purpose" of the call was to cry for help. *Id.* at 823-29. In other words, giving a statement to an interrogating police officer resembled "testifying" before a Marian magistrate; conveying an emergency to a 911 operator did not.

Finally, the quartet of testimonial settings listed by the Court in *Crawford*—*i.e.* preliminary hearings, proceedings before a grand jury, former trials, and police interrogations—share a common thread: Each bears a "striking resemblance" to the circumstances in which magistrates took *ex parte* statements under the Marian statutes. *Crawford*, 541 U.S. at 68.

The recording of lab results, on the other hand, bears no resemblance to an *ex parte* examination. There is no "prosecutorial bias" in the examiner because there is no examiner. Langbein, *The Origins of Criminal Advocacy*, 43. Nor is there a "careless scribe [to] make a witness speak what he never meant," 3 William Blackstone, *Commentaries on the Law of England*, 373 (1786), because there are no "inquisitorial practices" to transcribe. *Crawford*, 541 U.S. at 51. There is no judge, jury, or police officer. There is only a machine and a technician generating data through a mechanized process that produces "nearly infallible" results. *Taylor v. O'Grady*, 888 F.2d 1189, 1192 n.4 (7th Cir. 1989)("[s]urveys have rated the [gas chromatographer/mass spectrometer] as 'nearly infallible'").

Because the production of lab results bear no resemblance to a Marian-style *ex parte* examination, the lab reports in this case fall outside the Confrontation Clause's "core [and] its perimeter." *Davis*, 547 U.S. at 824.

2. The Statements Within the Laboratory Reports Were Not Made by a "Witness Against" the Petitioner.

The "primary object" of the Confrontation Clause was to terminate the admissibility of *ex parte* examinations and thereby provide a defendant with

the 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 v. United States*, 156 U.S. 237, 242-43 (1895). When applied to human witnesses who must recall "potentially criminal past events," this objective works well. *Davis*, 547 U.S. at 830.

But that is not the case here. At least, we cannot be sure. By waiting until the last moment to object to Massachusetts's introduction of the lab reports (J.A. 29, 32), Petitioner silenced the record on who made the statements in question, and under what circumstances. The States address both possibilities: man and machine.

One fact is certain: The statements contained in the lab reports—*i.e.* "The Substance was found to contain Cocaine," Pet. at 24a, 26a, 28a, "Net Weight: 2.41 grams," Pet. at 24a, "Net Weight: 2.34 grams," Pet. at 26a, and "Net Weight: 22.16 grams," Pet. at 28a—are not human recollections of a past criminal event. Perhaps most appropriately, they should be deemed the "purely mechanical" findings of a gas chromatographer/mass spectrometer ("GC/MS"). Mass. Br. at 7-8, 32; *State v. Christian*, 895 P.2d 676, 683 (N.M. 1995). When testing a substance in a gas chromatographer, once a technician shoots a sample into the machine, the machine does the rest. *Christian*, 895 P.2d at 683 ("[O]nce the sample was prepared and put on, into the gas chromatograph for analysis, the entire testing procedure is done electronically or mechanically."). Essentially, the

machine is the declarant, and the technician is the reporter who transcribes its data.

"[T]he witnesses with whom the Confrontation Clause is concerned are *human witnesses*." *United States v. Lamons*, 532 F.3d 1251, 1263 (11th Cir. 2008). While it may work on humans, placing a machine into the "crucible of cross examination" will not satisfy any of the Confrontation Clause's objectives. *Crawford*, 541 U.S. at 26. A machine has no "conscience" to "sift," and its "demeanor on the stand" will invariably match its demeanor in the lab. *Mattox*, 156 U.S. at 242. A machine's statement will never waiver. Stated simply, cross-examining a machine is utterly pointless. The Court should reject an extension of the Confrontation Clause to require confrontation of machine-generated data. *See United States v. Washington*, 498 F.3d 225 (4th Cir. 2007)(holding that "raw data generated by the machines were not hearsay statements as implicated by the Confrontation Clause").

While the GC/MS procedure is "purely mechanical," *Christian*, 895 P.2d at 683, the States acknowledge that human technicians likely interpreted the machine's raw data in some fashion. But even if the record in this case established that technicians channeled raw data into a final conclusion, the technicians were not acting as "witnesses against" Petitioner in the Constitutional sense. U.S. Const. amend. VI. When the technicians created the lab report in Petitioner's case, they were not "testifying," they are *working*—on one of a thousand faceless samples. Unlike the examination of victims, accomplices, and other witnesses with personal knowledge of the crime, cross-examining technicians about a particular defendant's case—like

cross-examining any public servant who creates unmemorable public records—would provide little, if any, insight into the composition of the drugs in question beyond what is contained in the report. At best, the defendant would receive an "incidental benefit," that fails to outweigh the "considerations of public policy" that spawned the States' certificate of analysis statutes. *Mattox*, 156 U.S. at 243.

* * *

On a final note, Petitioner's fears that determining lab reports are non-testimonial will open the floodgates to "trials-by-affidavit" are unfounded. Pet'rs. Br. at 15, 33. The admissibility of lab reports is still governed by modern hearsay law.

Their admissibility is in good hands. As outlined *infra* at pages 28-33, every state that has a statutory hearsay exception for lab reports also provides the defendant with an opportunity to cross-examine the technician. The states using qualified surrogate witnesses to interpret the original test data provide a similar opportunity. Placing the admissibility of lab reports within the flexibility of state hearsay laws in these ways serves both the interest of the defendant (*i.e.* summoning a technician when his presence is desired) and the interest of the public (*i.e.* leaving the technician in the lab when it is not).

II. THE COURT SHOULD REJECT PETITIONER'S ABSOLUTIST APPROACH TO THE CONFRONTATION CLAUSE.

If the Court determines that the lab reports were "testimonial," Massachusetts requests the Court either (1) affirm because Petitioner voluntarily disregarded the "opportunity to cross examine"

provided by Massachusetts law or (2) remand this case for a harmless error determination. Mass. Br. at 54-59, 66-68. The States agree with both requests, but focus the remainder of their brief on the former due to its impact on the States.

Massachusetts law provided Petitioner with the opportunities to (1) cross-examine the technicians at a pre-trial admissibility hearing and (2) compel their presence at trial. *See* Mass. Br. at 55-59. Petitioner chose neither, and the parties differ on the effect of Petitioner's choice.

Massachusetts argues that Petitioner's failure to avail himself of the state-law "opportunity to cross-examine" precludes a finding that the Confrontation Clause was violated. Mass. Br. at 55-59. We agree. And, under certain circumstances, so do Petitioner's amici law professors. Br. of Amici Law Profs. at 15.

Petitioner takes a more hard-line approach. When faced with this question at the cert-stage, Petitioner argued that his opportunity to cross-examine the technicians "in a pre-trial *Daubert*-type hearing [was] beside the point." Pet'rs Cert. Reply Br. at 4. According to Petitioner, once he raised a *Crawford* objection during the middle of trial (J.A. 29, 32), "the Confrontation Clause command[ed] that reliability be assessed in a particular manner: by testing in the crucible of cross-examination before the jury." Pet'rs Cert. Reply Br. at 4. In other words, to ensure the admissibility of laboratory analyses, Petitioner would require the States to keep the testing analyst at their beck and call, in the courtroom, at trial—just in case the defendant raises a last-second *Crawford* objection. The opportunities provided by state law to cross-examine a technician

at an earlier proceeding, or to compel his presence at trial, are irrelevant.

Again, Petitioner's amici law professors reject Petitioner's "absolutist approach" (Mass. Br. at 59) and instead focus their brief on minimizing the effects of reversal here. Br. of Amici Law Profs. at 5-26. In addressing the professors' primary arguments (*i.e.* the use of stipulations, notice-and-demand statutes, surrogate witnesses, and the percentage of pleaded felonies), the States show that Petitioner's interpretation of the Confrontation Clause is not only wrong, it would be practically devastating to the States if adopted by the Court.

A. Adoption of Petitioner's Absolutist Approach Would Require the States to Produce a Technician at Every Drug-Related Trial.

First, the States dispel the amici professors' belief that the use of stipulations when lab results are "compatible with the defendant's theory of the case" would minimize the effects of a reversal here. Br. of Amici Law Profs. at 12. As proved by the facts and consequences of this case, the professors' faith in conciliatory defense tactics to alleviate the States' burden is misguided.

Petitioner's theory of the case was that he could not be connected to the cocaine seized by police. J.A. 11, 43-48. Consistent with that theory, Petitioner admitted in his opening statement and his closing argument that the substances were drugs. J.A. 11, 45-47 . But Petitioner stipulated to nothing. J.A. 7-8. Having nothing to lose, he instead used *Crawford* as a last-second, pocket-veto against the State's

introduction of the lab reports. J.A. 29. And here we are.

If Petitioner is correct that the introduction of a lab report without technician testimony warrants reversal—despite the defendant's failure to seek (or even want) the technician's presence at trial—he will have sketched the blue-print for all future defendants: Stipulate to nothing and force the State's hand. At worst, the State produces the technician, and the defendant stipulates to his findings or offers to plead guilty moments before the technician takes the stand. At best, the State cannot secure the technician's presence, and the defendant successfully prevents any evidence of the analysis. Either way, the defendant has no incentive to stipulate to the analysis results until the technician walks through the courthouse doors, *after* the State has expended time and money getting him there. With regard to protecting the public's resources, stipulations are rather meaningless at that point.

This is not a game in which the States can play. In the CSI-era, we have no realistic choice but to introduce scientific evidence of a substance's weight and composition, whether by lab report or live testimony. Jurors expect nothing less. *See* Andrew P. Thomas, *The CSI Effect: Fact or Fiction*, 115 Yale L.J. Pocket Part 70 (2006)(outlining a survey in which "38% [of prosecutors] believed they had at least one trial that resulted in either an acquittal or hung jury because forensic evidence was not available").[10] Defendants know this, and if Petitioner prevails here, it is knowledge they will use

[10]Available at http://www.thepocketpart.org/2006/02/thomas.html.

against the States, with the by-product being an unnecessary drain on public funds. To believe that Defendants will freely toss aside this trump card to convenience the State is out-of-touch with the realities of an adversarial system.

B. Adoption of Petitioner's Absolutist Approach Would Cause Systemic Gridlock in State Courts and Laboratories.

In 2006, state and federal law enforcement agents arrested 1,889,810 persons in the war on drugs. *See* Uniform Crime Report, *supra,* at Table 29. That same year, 1,935,788 drug items were analyzed by state and local forensic laboratories. *See* NFLIS, *supra,* at 6-7. Stating the obvious, it was the States' duty to pay for these tests and the resulting prosecutions.

The amici professors try to minimize the impact of these numbers by citing an FBI statistic that only 5% of felony convictions result from actual trials. Brief of Amici Law Profs. at 7-8. We agree that a large majority of drug cases end without trial. Clearly they do. But the professors miss the big picture: Even if only 5% of drug cases culminate in trial, as long as the number of yearly drug arrests and analysis abides in the millions, the burden on the States is oppressive.

The only way for the Court to truly appreciate the effect of Petitioner's interpretation of the Confrontation Clause, which would require the States to produce a technician at every drug-related

trial, is to first recognize the burden we currently face *without* such a requirement.[11]

- *New Mexico*: In 2006, 5,775 persons were arrested in New Mexico for drug abuse violations. *See* Office of National Drug Control Policy, *State of New Mexico, Profile of Drug Indicators* (April 2008). One state laboratory, the Scientific Laboratory Division "SLD," handled the resulting caseload. *See* Court Statistics Project, *State Court Caseload Statistics, 2006*, 46 (National Center for State Courts 2007). The SLD employs ten technicians (App. 4a) to perform the laboratory's drug analyses and appear before New Mexico's eighty-four district judges and sixty-five magistrate judges. *Id.* In 2007, the SLD's ten technicians spent 3,782 hours answering discovery orders and subpoenas, preparing for court, and traveling to present live testimony. App. 4a. In other words, "the time lost to prosecution-related activities in 2007 was equivalent to losing 4.5 [of the 10] employees from the laboratory." App. 4a. And matters are worsening. Through June of 2008, the number of discovery orders and subpoenas received by the SLD increased 40% and 30% respectively in comparison to the same time period in 2007. App. 5a.

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[11]While they are public information, statistics regarding the current number of court hours worked by state laboratory technicians are not generally published in a citable format. Accordingly, to assist the Court, the States have followed Petitioner's lead, Pet'rs. Br. at 1a-2a, by gathering and presenting these statistics as answers to information requests. *See infra* pp. 4a-10a.

- *Alabama*: In 2006, 18,930 persons were arrested for drug violations in Alabama. *See* Alabama Criminal Justice Information Center, *Crime in Alabama, 2007*, 11 (2007). The next year, the thirty-six scientists of Alabama's Department of Forensic Sciences Drug Chemistry unit analyzed approximately 60,538 items in 30,053 cases, and they made 186 court appearances at the cost of 654 laboratory hours. App. 6a. The disparity between the arrests made in 2006 (18,930) and the number of cases worked in 2007 (30,053) is not an anomaly. It's the result of a testing backlog that, as far back as 2003, constituted fourteen months in drug cases. *See State v. Johnson*, 900 So. 2d 482 (Ala. Crim. App. 2004)(reversing dismissal on speedy-trial grounds because "the delay in this case was caused by a [14-month] delay in testing by the Alabama Department of Forensic Sciences"); *see also Department of Justice Oversight: Funding Forensics Sciences – DNA and Beyond*: *Testimony Before the Senate Judiciary Subcommittee on Administrative Oversight and the Courts*, 108th Cong. (2003)(testimony of Randall Hillman)(testifying that the Alabama Department of Forensic Sciences had a backlog of "almost 12,000 drug analysis cases").

- *Alaska*: If the Court adopted Petitioner's interpretation of the Confrontation Clause, Alaska would likely be hardest hit. Covering 663,267 square miles (most of which are mountainous, frozen, or both), Alaska is the nation's largest state. *See* The World Almanac

> and Book of Facts 2008, 555. One crime lab, the Alaska Scientific Crime Detection Laboratory "SCDL," handles all testing of illegal substances, and it serves fifty-seven courts across the state. App. 8a-9a. In fiscal year 2008, twenty-two technicians performed 3,380 tests. App. 8a. That same year, these technicians appeared in approximately 157 courtrooms, costing the SCDL "102 *days* of productive lab time." App. 9a (emphasis added). The reason is simple: Due to Alaska's geography and weather, the SCDL "spends an average of 42 hours of travel/wait time for every five hours of testimony." App. 10a. In other words, "one hour of court testimony [costs] 8.4 hours in productive lab time." *Id.*

The professors do cite one extremely relevant piece of "[a]necdotal evidence:" Lab technicians are only called to testify in approximately eight to ten percent of cases in which they are subpoenaed. Br. of Amici Law Profs. at 8. If lab technicians only appear in 10% of drug-related trials currently, and Petitioner is right that the Confrontation Clause requires the State to produce them in 100% of cases with positive results (to protect against the off-chance that the defendant *might* raise a last-second *Crawford* objection), the effects on the States would be devastating. While a ten-fold increase in technician's trial appearances may not occur, the statistics above establish that even a conservative four or five-fold increase would cause systemic gridlock throughout State courts and laboratories.

C. Adoption of Petitioner's Absolutist Approach Is Unnecessary Because the States Are Protecting a Criminal

Defendant's "Opportunity to Cross-Examine."

While we may quibble over the details, the States agree with the professors that "notice-and-demand statutes" (Br. of Amici Law Profs. at 13-15) and the use of "surrogate experts" (*id.* at 20-26) can constitutionally satisfy a defendant's opportunity to cross-examine a technician.[12] *See Douglas v. Alabama*, 380 U.S. 415, 418 (1965)("an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation"); *Brookhart v. Janis*, 384 U.S. 1, 4 (1966)(the right to confrontation may be waived if knowing and voluntary).

Below, the States offer a glimpse at the myriad of statutes and practices we have devised to balance our interest in avoiding the wasteful production of unwanted witnesses with the defendant's interest in cross-examining a laboratory technician. No matter the regime chosen by the State, the defendant maintains the "opportunity to cross-examine."

1. *Notice-and-Demand*: As the name implies, a notice and demand statute (1) requires the State to give notice of its intent to introduce a certificate of analysis *in lieu* of live testimony and (2) requires the defendant to subsequently demand the technician's presence.

- *Ohio*: Ohio requires a prosecutor to serve a copy of the certificate on the defendant before trial with an explanation of the defendant's right to demand confrontation

[12]The States do not agree with the restrictions the professors place on these practices. Br. of Amici Law Profs. at 15, 23.

and the manner in which to make that demand. *See* Ohio Rev. Code Ann. § 2925.51(B), (D) (West 2008). The State must produce the technician who signed the certificate if the defendant demands his presence within seven days of receiving notice. *Id.* at § 2925.51(C).[13]

- *Texas*: Texas requires the State to file a copy of the certificate to be introduced with the clerk of the court and to deliver a copy to the defendant at least twenty days in advance of trial. *See* Tex. Code Crim. Proc. Ann art. 38.41 (Vernon 2003). The certificate is not admissible if the defendant demands the technician's presence in the same manner at least ten days before trial. *See id.*

2. *Anticipatory Demand*: 'Anticipatory demand' statutes do not require notice by the State. While these statutes may sound less protective than 'notice and demand' statutes at first blush, it must be remembered that, in drug cases, the certificate of analysis will invariably be included within pre-trial discovery, thereby providing notice.

- *Colorado*: Colorado allows admission of a certificate of analysis *in lieu* of live testimony unless a defendant demands presence "at least ten days before the date

[13]The Ohio Court of Appeals has held that a defendant's failure to demand the technician's presence after receiving proper notice could waive the defendant's right to confront. *State v. Smith*, No.1-05-39, 2006 WL 846342, at *5-8 (Ohio Ct. App. Apr. 3, 2006)(reversing because the State's notice was not proper).

of such criminal trial." *See* Colo. Rev. Stat. Ann. § 16-3-309 (West 2008).[14]

- *Oregon:* Oregon requires a defendant to file written notice with the court and the district attorney of his intent to object to a report's findings "not less than 15 days prior to trial." Or. Rev. Stat. § 475.235(5).[15]

3. *Defense Subpoenas:* Like notice-and-demand statutes, these statutes require the State to notify the Defendant of its intent to offer a lab report *in lieu* of live testimony. The difference is that the defendant must subpoena the technician to secure his presence for trial, instead of filing a demand with the court.

- *Rhode Island:* At least ten days before trial, Rhode Island prosecutors must notify the defendant of their intent to introduce a lab report. *See* R.I. Gen. Law § 9-19-43 (2007). Section 9-19-43 provides that "nothing . . . shall be construed to limit" (1) the defendant's right to "summon" the technician for cross-examination, (2) the defendant's right to "summon any other

[14]The Supreme Court of Colorado has held that a defendant can waive his confrontation right by failing to avail himself of the statutory demand procedure. *Hinojos-Mendoza v. People*, 169 P.3d 662, 667-70 (Colo. 2007), *petition for cert. filed* __ U.S.L.W. __ (U.S. Feb. 4, 2008).

[15]The Oregon Court of Criminal Appeals has held that a defendant may waive his right to confront by failing to follow Oregon's statutory demand procedure. *State v. Miller*, 144 P.3d 1052, 1060-61 (Or. Ct. App. 2006)(reversing due to "prosecutorial error" in failing to secure witnesses' presence after giving assurance that he would) *adh'd to on recons*. 149 P.3d 1251 (Or. Ct. App. 2006).

person" to testify regarding the test results, or (3) the trial court's ability to require the technician's presence at trial. *Id.*

4. *Automatic Admission*: These statutes allow lab reports to be introduced without prior notice. As shown in this case, however, the defendant is provided a copy of the certificate during discovery, and he has the same general opportunities to confront the technician provided by other statutes.

- *Massachusetts*: Like Petitioner, defendants are given a copy of the lab report before trial. J.A. 5. The defendant may subpoena the technician, *see* Mass. R. Crim. P. 17, and seek discovery concerning the methods and qualifications of the technician. *See* Mass. R. Crim. P. 14. The defendant may also request a pre-trial evidentiary hearing to challenge the validity of the scientific techniques. *See Commonwealth v. Lanigan*, 641 N.E.2d 1342, 1349 (Mass. 1994). And as proved in *Verde*, a defendant may hire his own expert to inspect the state lab and conduct his own test of the substance in question. Pet. App. at 14a-15a.

5. *Surrogate Witnesses*: Finally, many states—including the states that do not presently have admissibility statutes—produce a qualified laboratory employee, *in lieu* of the testing analyst, to explain the drug analysis procedure and to offer an opinion based on the original test data. *See State v. Geier*, 161 P.3d 104 (Cal. 2007)(holding that a defendant's Sixth Amendment right was not violated when a laboratory supervisor testified *in lieu* of the

testing analyst). This practice is vital to the States because it takes into account that, in many cases, (1) an analyst may become truly unavailable due to death or change of employment or (2) a team of analysts was involved in the handling and testing process, and it would be unduly burdensome to produce the entire team to present cumulative testimony.

* * *

To be clear, the States are not advocating a particular type of statute or practice. We leave that task to our legislatures. The States merely request the Court reject Petitioner's contention that these statutes and procedures categorically fail to satisfy the "opportunity to cross-examine" guaranteed by the Sixth Amendment.

CONCLUSION

The Court should affirm the decision of the Massachusetts Court of Appeals that the laboratory reports in this case were non-testimonial.

Respectfully submitted,

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September 9, 2008

APPENDIX

APPENDIX A

State Forensic Analysis Admissibility Statutes[1]

State	Statute
Alabama	Ala. Code §§ 12-21-300, -301, -302
Alaska	Alaska Stat. § 12.45.084
Arizona	Ariz. Rev. Stat. § 36-254
Arkansas	Ark. Code Ann. § 5-64-707 Ark. Code Ann. § 12-12-313
Colorado	Colo. Rev. Stat. § 16-3-309
Connecticut	Conn. Gen. Stat. Ann. § 21a-283
Delaware	Del. Code Ann. tit. 21 § 4177(h) Del. Code Ann. tit. 10 § 4330
District of Columbia	D.C. Code Ann § 48-905.06
Florida	Fla. Stat. Ann. § 316.1934 Fla. Stat. Ann. § 327.354
Idaho	Idaho Code § 37-2745
Iowa	Iowa Code § 691.2
Kansas	Kan. Stat. Ann. § 22-2902a Kan. Stat. Ann. § 22-3437
Kentucky	Ky. Rev. Stat. § 189A.010
Louisiana	La. Rev. Stat. Ann. § 15:500 La. Rev. Stat. Ann. § 15:501 La. Rev. Stat. Ann. § 32:662 La. Rev. Stat. Ann. § 32:663

[1]Includes drug and blood-alcohol analyses.

State	Statute
Maine	Me. Rev. Stat. Ann. tit. 17-A, § 1112 Me. Rev. Stat. Ann. tit. 29-A, § 2431
Maryland	Md. Code Ann., Cts. & Jud. Prod § 10-1001, -1002, -1003
Massachusetts	Mass. Gen. Laws ch. 111 § 13 Mass. Gen. Laws ch. 22C §§ 39,41 Mass. Gen. Laws ch. 90B § 8
Michigan	Mich. Comp. Laws § 257.625a
Minnesota	Minn. Stat. §§ 634.15, -.16
Missouri	Mo. Rev. Stat. § 577.022 Mo. Rev. Stat. § 577.037
Montana	Mont. R. Evid. 803(6), (8)
Nebraska	Neb. Rev. Stat. § 28-1439
Nevada	Nev. Rev. Stat. §§ 50.315, 50.320
New Hampshire	N.H. Rev. Stat. Ann. § 265-A:12 N.H. Rev. Stat. Ann. § 318-B:26-a
New Jersey	N.J. Stat. Ann. § 2C:35-19
New Mexico	N.M. Stat. Ann. § 66-8-110 N.M. Stat. Ann. § 66-13-11
New York	N.Y. Veh. & Traf. Law § 1195 N.Y. C.P.L.R. 4518, 4520
North Carolina	N.C. Gen. Stat. § 20-139.1, N.C. Gen. Stat. § 90-95(g)

State	Statute
North Dakota	N.D. Cent. Code § 19-03.1-37 N.D. Cent. Code § 39-20-07
Ohio	Ohio Rev. Code Ann. § 2925.51
Oklahoma	Okla. Stat. Ann. tit. 22 § 751 Okla. Stat. Ann. tit. 22 § 751.1
Oregon	Or. Rev. Stat. § 475.235
Pennsylvania	75 Pa. Cons. Stat. Ann. § 1547
Rhode Island	R.I. Gen. Laws § 9-19-43
South Carolina	S.C. R. Crim. P. 6
South Dakota	S.D. Codified Laws § 1-49-6
Tennessee	Tenn. Code Ann. § 55-10-407
Texas	Tex. Crim. Proc. art. 38.41
Utah	Utah Code Ann. § 41-6a-515 Utah Code Ann. § 72-10-503
Vermont	Vt. Stat. Ann. tit. 23 § 1202, Vt. Stat. Ann. tit. 23 § 1203
Virginia	Va. Code Ann. § 18.2-268.7 Va. Code Ann. §18.2-268.9 Va. Code Ann. § 19.2-187 Va. Code Ann. § 19.2-187.01 Va. Code Ann. § 19.2-187.02 Va. Code Ann. § 19.2-187.2
Washington	Wash. St. Sup. Ct. Crim. R. 6.13 Wash. Rev. Code § 46.20.308
West Virginia	W. Va. Code § 17C-5A-1
Wyoming	Wyo. Stat. Ann. § 31-6-105

APPENDIX B

[*Letterhead: New Mexico Department of Health*]

Office of the Attorney General
11 South Union Street
Montgomery, AL 36130

August 5, 2008

Re: Request for SLD Statistics

Dear Attorney General King:

I write in response to your request for information concerning the Toxicology Bureau of the Scientific Laboratory Division ("SLD") of the New Mexico Department of Health. The SLD is the central laboratory that performs state-wide drug testing in support of the New Mexico Implied Consent Act, and has 10 laboratory technicians who perform drug analysis testing. The following spreadsheet shows the amount of time lost from analytical work by the Toxicology Bureau staff at SLD in 2007 due to the prosecution of drug cases across the state:

Prosecution Burden on Toxicology Operation at SLD

	Hours/year
Discovery Orders	332
Subpoenas	1057
Court and Travel	1313
Prep Time for Court	540
Pre-Trial Conferences	540
Total	**3782**

The time lost to prosecution-related activities in 2007 was equivalent to losing 4.5 employees from the laboratory, based upon an estimate of 833 hours of

productive analytical time per employee per year. These statistics were compiled by SLD employees from SLD records for the year 2007. In the first six months of 2008, the numbers of discovery orders and subpoenas received by SLD increased 40% and 30%, respectively, vs. the same time period in 2007.

If you would like more information about the SLD, please visit our website at: www.newmexico.gov under the heading for the Department of Health.

Sincerely,

<s> .
David E. Mills, PhD HCLD
Director
Scientific Laboratory Division

[FOOTER: DAVID MILLS'S CONTACT INFORMATION]

APPENDIX C

[*Letterhead: AL Department of Forensic Sciences*]

August 18, 2008

Corey L. Maze
Asst. Attorney General
11 South Union Street/Suite 310
Montgomery, Alabama 36130-0152

Dear Mr. Maze:

Per your request, this letter contains 2007 data concerning the Alabama Department of Forensic Sciences Drug Chemistry division. In summary, the data reports 30,053 individual cases completed. Chemists appeared in court 186 times totaling 654 hours out of the laboratory.

2007 calendar year

# cases worked		30,053
Approximate # of items analyzed		60,538
# of reporting scientists at end of 2007		36
# appearances in State court		171
	hours out of lab	582
# appearances in Federal court		15
	hours out of lab	72
Totals	186 Appearances	654 Hours

If you need further information, please do not hesitate to contact me.

Sincerely,

<s>
Michael F. Sparks
Director

APPENDIX D

[*Letterhead: State of Alaska Department of Public Safety: Scientific Crime Detection Laboratory*]

August 8, 2008

Office of the Alabama Attorney General
11 South Union Street
Montgomery, AL 36130

Dear Sir,

In response to your request for information concerning the Alaska Scientific Crime Detection Laboratory (henceforth AK SCDL or Crime Lab) lab personal worked collectively to provide the following information for FY08[1]:

1. Number of requests for analysis: 4633
2. Number of analyses conducted: 3380
3. Number of technicians/analysts who conducted tests: 22
4. Number of state crime labs: 1
5. Number of state courts or locations traveled to: 57
6. Current backlog:

Latents	205
DNA	450
Crime Scene	65
Bio Screening	130

[1] The numerical figures given in items 1-3 were obtained through the AK SCDL LIMS Database. Current backlog numbers provided in item 6 were provided by the AK SCDL Manager, Orin Dym.

FA/TM	128
Blood Alcohol	61
Total	1,039

7. There is only one state crime laboratory serving the entire state of Alaska. The Anchorage Police Department (APD) has one crime lab serving the Municipality of Anchorage. APD's lab conducts fingerprint analysis. The AK SCDL does some fingerprint and all other testing for APD.

The Department of Public Safety AK SCDL serves at minimum 43 Trooper Posts under 5 Detachments, 15 offices under ABADE (alcohol & drug enforcement) and ABI (AK Bureau of Investigations)[2] and 50 police departments[3], covering 586,412 square miles. The AK SCDL receives requests for lab services from 3 local Federal Bureau of Investigation Alaska Field Offices, the U.S. Bureau of Alcohol, Tobacco and Firearms, and the Drug Enforcement Agency, providing assistance to the Federal Government primarily in drug, bootlegging, and firearms cases. Additionally, the AK SCDL occasionally provides analysis for the Alaska Wildlife Troopers.

The Crime Lab serves 57 courts, 4 Districts, and 13 District Attorney Offices in the state of Alaska.[4] At the time of this writing the Crime Lab has approximately 647 active subpoenas amongst 26

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[2] http://www.dps.state.ak.us/

[3] http://www.dps.state.ak.us/Ast/domesticviolence/policedepts.aspx

[4] http://www.state.ak.us/courts/courtdir.htm

analysts and technicians.[5] In FY08, 23 analysts/technicians testified in court throughout Alaska[6]. Their testimony consisted of approximately 157 court appearances consuming 102 days of productive lab time (7.5 hours=one day).[7] In FY07 the numbers were significantly higher. Excluding all appearances within driving distance of the lab (the Anchorage Municipality, Matanuska-Susitna Municipality, and the Anchorage Federal court system consisting of 4 courts) there were 99 court appearances involving flight travel throughout Alaska consuming 152 days of productive lab time.[8]

A snapshot of our Crime Scene, Latents, Shoe and Tire Section shows that section spends an average of 42 hours of travel/wait time for every 5 hours of testimony. This translates into one hour of court testimony costing 8.4 hours in productive lab time.[9]

With the exception of identified database report extractions from the AK SCDL LIMS database and internet websites clearly noted, the information provided for this response was compiled through the combined efforts of the AK SCDL's Forensic Laboratory Manager, Quality Assurance Manager, Paralegal, Supervisors, Analysts and Technicians. This included compiling individually documented

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[5] Hand counted from current individual analyst/technician subpoena files.

[6] Data retrieved from the LIMS database, AK SCDL court calendar records and Travel Authorization (TA) files.

[7] Each Section Supervisor compiled local court attendance information for their Section and that information was combined with information compiled after hand counting all TAs for court travel completed by lab analysts/technicians.

[8] TAs for FY07—court travel completed only.

[9] Section Supervisor Lesley Hammer.

local court appearances, wait times and actual testimony times; a review of all completed Travel Authorizations for the included Fiscal Years (2007 and 2008); previously compiled backlog data; and a hand count of current subpoena files for each analyst and technician.

All data not extracted from the database or obtained through governmental websites should be considered approximations. Those approximated numbers are provided to the best of the Crime Lab's collective knowledge and should be considered under inclusive.

If you have any questions, or require additional information, please feel free to contact us directly.

Respectfully submitted,

<s>_____.
Antoinette Otten
Legal Section
907 269-3983