

IN THE SUPREME COURT OF OHIO

|                      |   |                              |
|----------------------|---|------------------------------|
| STATE OF OHIO        | ) | CASE NO. 2007-2443           |
|                      | ) |                              |
| Appellant            | ) | On Appeal from the Ashtabula |
|                      | ) | County Court of Appeals,     |
| vs.                  | ) | Eleventh Appellate District  |
|                      | ) |                              |
| THOMAS A. PASQUALONE | ) |                              |
|                      | ) |                              |
| Appellee             | ) |                              |

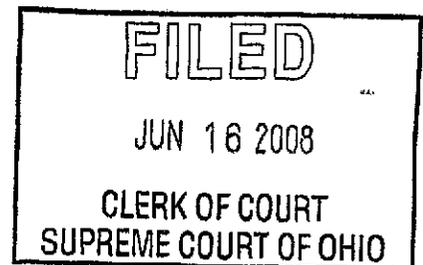
---

**MERIT BRIEF OF APPELLEE, THOMAS A. PASQUALONE**

---

**Deborah L. Smith (#0065414)**  
**Guarnieri & Secrest, P.L.L.**  
151 East Market Street  
Warren, Ohio 44482  
Telephone: (330) 393-1584  
Email: [debsmith@netdotcom.com](mailto:debsmith@netdotcom.com)  
ATTORNEY FOR APPELLEE,  
THOMAS A. PASQUALONE

**THOMAS L. SARTINI (#0001937)**  
**ASHTABULA COUNTY PROSECUTOR**  
**Shelley M. Pratt (#0069721) (Counsel of Record)**  
**Assistant Prosecutor**  
Office of the Ashtabula County Prosecutor  
25 W. Jefferson Street  
Jefferson, Ohio 44047  
Telephone: (440) 576-3664  
ATTORNEYS FOR APPELLANT,  
STATE OF OHIO



**TABLE OF CONTENTS**

|   | <u>Page</u>           |
|---|-----------------------|
| TABLE OF AUTHORITIES .....  | ii                    |
| STATEMENT OF FACTS .....  | 1                     |
| ARGUMENT.....   | 3                     |
| <br><b><u>First Proposition of Law:</u></b>   |                       |
| <b>Admission of a laboratory analysis report pursuant to R.C. 2925.51 does not violate a defendant’s right to confrontation under the Sixth Amendment to the United States Constitution. ....</b> | <b>3</b>              |
| <br><b><u>Second Proposition of Law:</u></b>  |                       |
| <b>A defendant’s waiver is knowing, intelligent, and voluntary when the prosecution complies with the procedure set forth in R.C. 2925.51(B).....</b>   | <b>13</b>             |
| <br>CONCLUSION.....   | <br>19                |
| CERTIFICATE OF SERVICE.....   | 20                    |
|   | <br><u>Appx. Page</u> |
| <br>APPENDIX  |                       |
| United States Constitution, Sixth Amendment .....   | 1                     |
| Petition for a Writ of Certiorari filed by Petitioner in <i>Melendez-Diaz</i> case, 2008 WL 4287355. ....   | 2                     |

**TABLE OF AUTHORITIES**

**CASES:**

*Brookhart v. Janis* (1966), 384 U.S. 1 ..... 13, 15

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

*Johnson v. Zerbst* (1938), 304 U.S. 458. .... 15

*Melendez-Diaz v. Massachusetts* (2008), 128 S. Ct. 1647. .... 4

*Ohio v. Roberts* (1980), 448 U.S. 56. .... 6, 8, 12

*Pointer v. Texas* (1965), 380 U.S. 400. .... 3

*State v. Crager*, 116 Ohio St.3d 369, 2007-Ohio 6840. .... 5, 11

*State v. Pasqualone*, 11<sup>th</sup> Dist. No. 2007-A-0005, 2007-Ohio-6725. .... 18

*State v. Smith*, 3<sup>rd</sup> Dist. No. 1-05-39, 2006-Ohio-1661 ..... 8, 15

*State v. Stahl*, 111 Ohio St. 3d 186, 2006-Ohio-5482. .... 11

*United States v. Cooper* (7<sup>th</sup> Cir. 2001), 243 F.3d 411 ..... 18

*United States v. Olano* (1993), 507 U.S. 725, 733. .... 13

**CONSTITUTIONAL PROVISIONS; STATUTES:**

United States Constitution, Sixth Amendment. .... passim

Ohio R.C. 2925.51 ..... 13, 14

Evid. R. 803(6) ..... 5,6, 8

## STATEMENT OF FACTS

Defendant-Appellee Thomas A. Pasqualone, (hereinafter "Pasqualone" or "Appellee"), was charged and convicted, following a jury trial, of Possession of Cocaine, a felony of the fifth degree in violation of Ohio R.C. 2925.11(A)(C)(4)(A).

The trial commenced on September 11, 2006, at which the State presented only one witness, the testimony of Trooper Jason Bonar.

Trooper Bonar testified that on November 9, 2005, Appellant was driving a vehicle southbound on Myers Road in Geneva Township, Ashtabula County, Ohio. (T.p. 125-127.) Trooper Jason Bonar of the Ohio State Highway Patrol was traveling northbound when he passed the vehicle being driven by Appellant in the opposite direction. (T.p. 125-127.) Trooper Bonar heard a loud exhaust from the vehicle and, observed in his rearview mirror, that the vehicle did not have its rear license plate illuminated. (T.p. 125-126.) Trooper Bonar turned around, followed the vehicle briefly, and pulled the vehicle over. (T.p. 126.) He then approached the vehicle and asked the driver for his driver's license. (T.p. 127.) The driver, which Trooper Bonar later identified as Pasqualone, replied that he was not allowed to have a driver's license. (T.p. 127.) Trooper Bonar confirmed this through dispatch and placed Pasqualone under arrest. (T.p. 127.) Trooper Bonar conducted a search of Pasqualone incident to that arrest and testified that he found, in Pasqualone's left front jeans pocket, a cellophane wrapper from a pack of cigarettes which contained a large white rock. (T.p. 128 – 129.) Trooper Bonar continued with the arrest, read him his Miranda rights, and at some point questioned Pasqualone, asking him "What is this? Is it meth or crack?" to which Pasqualone replied "I'm not sure what they gave me." (T.p. 129.) Trooper Bonar used a

narcotics identification kit to field test the rock and it was a positive test for cocaine base. (T.p. 129.) The evidence was secured, and ultimately sent to the Ohio State Highway Patrol Crime Laboratory where it was further analyzed and a laboratory analysis report was generated detailing the results, that the material was 0.446 gram of Cocaine. (See Exhibit 2.) The State offered into evidence the laboratory analysis report pursuant to Ohio R.C. 2925.51 over the objection of Pasqualone. (T.p. 137-139; 146-148.) The trial court overruled the objection and admitted it into evidence. (T.p. 148-149.)

Pasqualone was found guilty by the jury and was sentenced on December 27, 2007, to eight months' imprisonment. Pasqualone was also informed that he may be subject to a period of post release control of up to three years.

Pasqualone pursued an appeal of that conviction to the Eleventh District Court of Appeals, which reversed the conviction and remanded the matter for a new trial. The State of Ohio filed a timely Notice of Appeal and Memorandum in Support of Jurisdiction and this Court has accepted jurisdiction to hear the case and allow the appeal.

## ARGUMENT

### APPELLANT'S FIRST PROPOSITION OF LAW

ADMISSION OF A LABORATORY ANALYSIS REPORT PURSUANT TO R.C. 2925.51 DOES NOT VIOLATE A DEFENDANT'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

### AMICUS CURIAE ATTORNEY GENERAL'S FIRST PROPOSITION OF LAW

LABORATORY REPORTS AND OTHER SCIENTIFIC TESTS CONDUCTED AND MAINTAINED IN THE REGULAR COURSE OF BUSINESS ARE NONTTESTIMONIAL BUSINESS RECORDS, SO ADMISSION OF THOSE DOCUMENTS INTO EVIDENCE DOES NOT VIOLATE A DEFENDANT'S CONFRONTATION CLAUSE RIGHTS UNDER *CRAWFORD V. WASHINGTON* (2004), 541 U.S. 36.

The Sixth Amendment's Confrontation Clause is a bedrock procedural guarantee that applies to both federal and state prosecutions. *Crawford v. Washington* (2004), 541 U.S. 36, 42, citing *Pointer v. Texas* (1965), 380 U.S. 400, 406. "Nothing can be more essential than the cross-examining [of] witnesses, and generally before the triers of fact in question. . . [W]ritten evidence . . . [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth." *Crawford v. Washington*, supra at 49, citing R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787), reprinted in 1 B. Schwartz, *The Bill of Rights: A Documentary History* 469, 473.

In *Crawford v. Washington*, the United States Supreme Court held that the Confrontation Clause under the Sixth Amendment prohibits the prosecution's introduction of a "testimonial" out-of-court statement by a witness against an accused unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. However, while offering guidance, the *Crawford* court "[le]ft for another

day any effort to spell out a comprehensive definition of testimonial.” *Crawford v. Washington*, supra at 68. Thus, the issue which has developed after *Crawford v. Washington*, is whether or not the offered evidence is “testimonial” in nature. If it is, then the defendant must receive certain procedural guarantees afforded to him by the Confrontation Clause of the Sixth Amendment, namely, the opportunity to confront and cross-examine the witness against him.

First, it is significant to note that the particular question presented in this case is not only before this Court, but has been before a number of state and federal courts which are “deeply divided” over the question of whether crime laboratory reports are “testimonial” for purposes of *Crawford v. Washington*. Now, the question will be decided by the highest court. On March 17, 1998, the United States Supreme Court granted the Petition for a Writ of Certiorari in the case of *Melendez-Diaz v. Massachusetts* (2008), 128 S. Ct. 1647. The question presented is *directly* the issue presented in this case: “Whether a state forensic analyst’s laboratory report prepared for use in a criminal prosecution is “testimonial” evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004).” *Melendez-Diaz v. Massachusetts* (2008), 128 S. Ct. 1647. *See*, Petition for a Writ of Certiorari filed by Petitioner in *Melendez-Diaz* case, 2008 WL 4287355.

In the Petition for Writ filed on behalf of Melendez-Diaz, the Petitioner correctly noted that “crime laboratory reports play a central evidentiary role in a large number of criminal trials,” and that “the unchecked use of state crime laboratory reports in place of live testimony undermines the integrity of the justice system.” In fact, as scientific evidence plays a greater and greater role in convictions, this is an “especially appropriate

time to put drug testing under the microscope.” Petition for a Writ of Certiorari filed by Petitioner in *Melendez-Diaz* case, 2008 WL 4287355, at p. 16, citing 2 Paul C. Giannelli & Edward J. Imwinkelried, Scientific Evidence Section 23.01 (4<sup>th</sup> ed. 2007.) Given all the potential for error rates, courts must demand that the accused’s rights of confrontation be preserved so that the evidence may be subjected to the test of cross-examination.

Within that context, this Court must decide the same issue. Under Appellant’s First Proposition of Law, the first issue is whether or not the written laboratory analysis report admitted into evidence invokes the procedural safeguards of the Confrontation Clause under the Sixth Amendment. If it does *not*, then the Second Proposition of Law is never reached. If it *does*, then the next issue - Appellant’s Second Proposition of Law - is whether or not the defendant has knowingly, intelligently and voluntarily waived his right.

Appellant asserts that the laboratory report is not subject to these procedural safeguards because it is not “testimonial” evidence under *Crawford*, but rather is a “business record” and therefore admissible pursuant to Evid. R. 803(6).

Appellant’s argument rests on the idea, developed under by a prior decision of this Court in *State v. Crager*, 116 Ohio St.3d 369, 2007-Ohio 6840, that under *Crawford*, “business records” generally are not within the scope of Confrontation Clause concerns, and crime laboratory reports constitute “business records.”

The idea that “business records” are not testimonial evidence for purposes of *Crawford* stems from a comment made in the decision in *Crawford v. Washington*. However, that comment needs to be reviewed and placed in context. In reviewing the history of the rules of evidence the *Crawford* Court indicated that, admittedly, there were

always exceptions to the general rule of exclusion of hearsay evidence, “[b]ut there is scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case. Most of the hearsay exceptions covered statements that by their nature were not testimonial – for example, business records or statements in furtherance of a conspiracy.” *Crawford v. Washington*, *supra* at 56.

This and other courts have used this comment to reach the conclusion that if the crime laboratory report meets the state’s definition of a “business record”, which, in Ohio is set forth under Evid. R. 803(6), then the report is necessarily not testimonial for purposes of application of the Confrontation Clause. That conclusion is erroneous.

Historically, the Sixth Amendment has required the prosecution to present the findings of its forensic examiners through live testimony at trial. *See*, Petition for a Writ of Certiorari filed by Petitioner in *Melendez-Diaz* case, 2008 WL 4287355, and cases cited therein. After the United States Supreme Court decision in *Ohio v. Roberts* (1980), 448 U.S. 56, which “conflated the Confrontation Clause with hearsay law,” crime laboratory reports began to be characterized as “business records” or “public records,” and the focus became the reliability of the testimony in order to exempt such reports from the reach of the Confrontation Clause under the Sixth Amendment. *Id.* at 3 *citing* Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 508 & n. 165 (2006). Many legislatures have enacted statutes, such as Ohio R.C. 2925.51, which expressly made laboratory reports admissible in a prosecution’s case without the necessity of the analyst’s testimony. *Id.* at 4. Then came the decision in *Crawford v. Washington* which “returned the Confrontation Clause to its traditional mode of operation – that is, to a procedural provision that forbids the government from introducing ‘testimonial’ hearsay

in place of live testimony at trial.” *Id.* at 4, citing Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 Ohio St. L. J. 671, 674-75 (1988). Yet, based on the *Crawford* comment – referencing the historical categorization of business records - courts have concluded that crime laboratory reports meet the *current* definition of “business records” under the *current* rules of evidence and therefore are not testimonial. The *Crawford* Court expressly rejected that type of analysis, stating “we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon ‘the law of Evidence for the time being.’” *Crawford v. Washington, supra* at 50-51. The Court cautioned that “[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitional practices” and that “*ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.” *Id.* at 51. Stated another way, under *Crawford*, this Court may not simply turn to the rules of evidence to determine if the defendant’s confrontation rights are implicated.

Under *Crawford*, this Court may not rest its conclusion on a simple review of the definition of “business records” set forth in the current rules of evidence to determine if the crime laboratory report is “testimonial.” The conclusion drawn by this Court in *State v. Crager* – that under the present law of evidence in Ohio, crime laboratory reports are “business records” - may or may not be accurate. However, whether or not crime laboratory reports are “business records” under Ohio evidence law is not the relevant inquiry. The relevant question is whether or not crime laboratory reports are

“testimonial.” Thus, even if a crime laboratory report currently meets the definition of a “business record” under Evid. R. 803(6) of the Ohio Rules of Evidence, that classification does not automatically equate to a determination that the report is therefore not testimonial for purposes of *Crawford*.

To further illustrate this point, a witness’s statement to the police reduced to written summary and contained within the police records and files could certainly be defined as a “business record” under Evid. R. 803(6) of the Ohio Rules of Evidence. That written summary of a witness’s statement is certainly kept within the ordinary course of a regularly conducted business activity. Even if the scenario is changed and now the witness produces his own written statement and that statement is maintained with the records and files of a loss prevention department at a store, again, it would certainly appear to fit the definition under Evid. R. 803(6). Yet it most certainly would be a “testimonial” statement under *Crawford*.

In *State v. Smith*, 3<sup>rd</sup> Dist. No. 1-05-39, 2006-Ohio-1661, the court correctly applied the *Crawford* analysis and noted that the *Crawford* decision “changed the legal landscape surrounding Confrontation Clause issues.” Now, the focus is no longer one of the reliability of the statement as it had been under *Ohio v. Roberts*, *supra*. Rather, the focus is once again on the procedural nature of the guarantee because the United States Supreme Court has concluded that “where testimonial statements are at issue, the *only* *indicium* of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” *Crawford v. Washington*, *supra* at 68-89. Confrontation is the singular method for determining reliability. *State of Smith*, *supra* at 31. No longer are the reports admissible under the Ohio “business records”

exception to the hearsay rule simply because they are deemed reliable under the auspices of the rules of evidence. As stated, the fact that Ohio may deem the reports to be inherently reliable under its rules of evidence is entirely irrelevant to the determination. The United States Supreme Court in *Crawford* noted that “[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’” Rather, the adversarial testing of evidence “beats and bolts out the Truth much better.” *Crawford v. Washington, supra* at 62.

Thus, whether or not the offered evidence – in this case, the laboratory report – is “testimonial” under *Crawford* does not turn on whether or not the offered evidence could meet or does meet the definition of a “business record” under the Ohio hearsay exception set forth at Evid. R. 803(6) or any other rule of evidence. *Crawford* tells us that the inquiry is whether or not the offered evidence is “testimonial.”

Given that landscape, the question of whether or not the report is a “business record” need not be addressed by this Court in any manner, and the only argument left for the prosecution to make is either (1) that the crime laboratory report was not “testimonial” for purposes of *Crawford v. Washington* or (2) that the defendant waived his right.

In fact, the *Crawford* decision gives this Court some real guidance on determining what is and what is not “testimonial” for purposes of application of the Confrontation Clause. Pursuant to *Crawford*, the Confrontation Clause applies to “witnesses against the accused – in other words, those who “bear testimony.” In turn “[t]estimony is typically ‘a solemn declaration or affirmation made for the purpose of establishing or proving

some fact.” *Crawford v. Washington, supra* at 51, citing 2 N. Webster, An American Dictionary of the English Language (1828). The DNA report under *Crager* bore testimony against the accused. The contents made a solemn declaration or affirmation *for the purpose of establishing or proving some fact* – that the DNA found was properly collected, analyzed, and matched to the defendant. The drug laboratory report in this case bore testimony against the accused. The contents of the report made a solemn declaration or affirmation *for the purpose of establishing or proving some fact* – that the drugs found on the defendant were properly collected, analyzed and identified by content and weight. The *Crawford* court, in an attempt to further define what is “testimonial” explained that “an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” It stated:

“Various formulations of this core class of ‘testimonial’ statements exist: ‘*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,’ Brief for Petitioner 23; ‘extrajudicial statements. . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions,’ *White v. Illinois*, 502 U.S. 346, 365, 112 S.Ct. 736, 116 L. Ed.2d 848 (1992) (THOMAS, J., jointed by SCALIA, J., concurring in part and concurring in judgment); ‘statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,’ Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3. These formulations all share a common nucleus and then define the Clause’s coverage at various levels of abstraction around it.”

Notably, the laboratory report admitted in this case is *precisely* what is defined above – it not only “bore testimony” against the accused, it is also an affidavit prepared at the request of and *for* prosecution and thus certainly reasonably expected to be used prosecutorially. It is also formalized testimonial material in the form of an affidavit. To

argue that a crime laboratory report is produced for *any other reason* other than for criminal prosecution is absurd. It's a crime lab report prepared by a crime lab technician. The lab, the technician's job, and the report would not exist but for the need to test and analyze evidence of a crime. Crime laboratory reports are created at the request of police officers for the enforcement of law. Furthermore, the fact that BCI or the Ohio State Highway Patrol Crime Laboratory or whichever agency performs the analysis has the purpose of ensuring accurate analysis, the fact that the technician performed the analysis during a routine non-adversarial process, the fact that the laboratory is not itself an "arm" of the law, and the fact that the technician had no interest in the outcome of the trial is irrelevant to whether or not the report is "testimonial" evidence. While those facts may all be relevant to the reliability of the report which, reliability is no longer the subject of the analysis under *Crawford*.

This Court also has guidance in defining what is "testimonial" by one of its own prior decisions. As noted by the dissent in *State v. Crager, supra*, the holding in *State v. Crager* conflicts with this Court's decision in *State v. Stahl*, 111 Ohio St. 3d 186, 2006-Ohio-5482, wherein this Court concluded that for Confrontation Clause purposes, a testimonial statement includes one made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* Using the *Stahl* test in this case, the laboratory analyst objectively had to believe that his findings would be used at trial against a known defendant – the defendant in this case. The primary purpose of the report is to establish or prove facts potentially relevant to later criminal prosecution. Thus, it is clearly testimonial in nature.

Crime laboratory reports fall squarely within the definition of “testimonial” evidence and thus invoke the Confrontation Clause and Sixth Amendment procedural safeguards. The reliability of the crime laboratory report is no longer the question. Whether or not the report is “business record” under current state evidentiary law answers reliability questions. It does not provide the answer to whether or not it is testimonial evidence.

In abrogating *Ohio v. Roberts, supra*, the *Crawford* Court rejected the reliability analysis and stated that “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with [a] jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.” *Crawford v. Washington, supra* at 62. The Framers of our Constitution, based on their knowledge and experience and the history of the common law tradition, have chosen the method in which the reliability of evidence is to be determined – in the crucible of cross-examination.

The perceived “obvious reliability” of the laboratory report and the bending and stretching of the definition of “business records” to include crime laboratory reports to fit into the reliability analysis under *Ohio v. Roberts* has been abrogated by *Crawford*. The question now is not whether the report is reliable or whether the report fits under a hearsay exception set forth under the Ohio Rules of Evidence. The question under *Crawford* is whether the report is “testimonial.” If answered in the affirmative, which this Court must logically do, then this Court must proceed with the Second Proposition of Law, as the defendant’s rights under the Confrontation Clause of the Sixth Amendment, like all opportunities and rights afforded a criminal defendant, can be waived.

**APPELLANT'S SECOND PROPOSITION OF LAW**

A DEFENDANT'S WAIVER IS KNOWING, INTELLIGENT, AND VOLUNTARY WHEN THE PROSECUTION COMPLIES WITH THE PROCEDURE SET FORTH IN R.C. 2925.51(B).

**AMICUS CURIAE ATTORNEY GENERAL'S  
SECOND PROPOSITION OF LAW**

A DEFENDANT'S WAIVER OF CONFRONTATION CLAUSE RIGHTS IS KNOWING, INTELLIGENT AND VOLUNTARY AND THEREFORE PROPER, WHEN WAIVED BY COUNSEL, SO LONG AS THE PROSECUTION HAS COMPLIED WITH THE PROCEDURES OF R.C. 2925.51(B).

The right to confront witnesses is a fundamental right. *Brookhart v. Janis* (1966), 384 U.S. 1. Fundamental rights can nonetheless be waived or forfeited. *United States v. Olano* (1993), 507 U.S. 725, 733. Once this Court properly determines that the laboratory report was "testimonial" in nature and therefore invoked the procedural safeguards of the Confrontation Clause under the Sixth Amendment, the next question is whether Pasqualone knowingly, intelligently and voluntarily waived that procedural safeguard.

Under Ohio R.C. 2925.51, a defendant is deemed to have waived or forfeited his right to confrontation of the laboratory analyst or his opportunity to contest the admission of the report by his inaction under the statute. The statute provides that in a criminal prosecution a laboratory report "from the bureau of criminal identification and investigation" or "another law enforcement agency" is prima-facie evidence of the content, identity, and weight of the substances. The statute requires there to be an attachment to the report which "shall be a copy of a notarized statement by the signer of

the report” giving the name of the signer, that the signer is an employee of the laboratory, that performing the analysis is part of the signer’s duties, outlining his/her education, training and experience, and attesting that the tests were performed with due caution and the evidence handled under accepted standards. The statute also requires the prosecuting attorney to serve a copy of the report on the attorney of record for the accused, or on the accused if the accused has no attorney, “prior to any proceeding in which the report is to be used against the accused other than at a preliminary hearing or grand jury proceeding where the report may be used without having been previously served upon the accused.” The statute also governs the circumstances under which the report may be used as prima facie evidence, as follows:

“(C) The report shall not be prima-facie evidence of the contents, identity, and weight or the existence and number of unit dosages of the substance if the accused or the accused’s attorney demands the testimony of the person signing the report, by serving the demand upon the prosecuting attorney within seven days from the accused or the accused’s attorney’s receipt of the report. The time may be extended by a trial judge in the interests of justice.”

The statute also requires that the report contain notice of the right of the accused to demand, and the manner in which the accused shall demand, the testimony of the person signing the report.

However, under the *Crawford* decision, because the laboratory report is testimonial, Ohio R.C. 2925.51 can be constitutionally applied *only if* the defendant either (1) demands the testimony of the analyst and has the actual opportunity to cross-examine the analyst, or (2) properly waives his right to confrontation. Therefore, as it pertains to the constitutionality of Ohio R.C. 2925.51, the waiver requirement has become even more important because, after *Crawford*, it is now the only manner in which the statute can be applied constitutionally.

The Ohio notice and demand statute impermissibly requires a defendant to take affirmative action to secure a right that he has already been constitutionally guaranteed. If he does not take that action and does not do so within a limited period of time, he is deemed to have waived that right. The constitution does not permit the legislature to make a defendant's confrontation rights contingent upon action by the defendant. This Court must find that a defendant's constitutional protections cannot and should not be bypassed by a set of presumptions resulting in a deemed or automatic waiver. In this case, the Eleventh District Court of Appeals correctly analyzed and determined that those procedures may not, in a given case, pass constitutional muster. The Eleventh District Court of Appeals properly determined that merely following the procedures set forth in the statute failed to establish a knowing, voluntary, and intelligent waiver of a defendant's confrontation rights.

The question of a waiver of a defendant's confrontation right, a federally guaranteed constitutional right, is a federal question controlled by federal law. *Brookhart v. Janis, supra* at 4. For a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." *Id.* citing *Johnson v. Zerbst* (1938), 304 U.S. 458.

As suggested by the court in *State v. Smith, supra*, the statute can constitutionally require that a defendant assert his right at an earlier time. Furthermore, the action requested of the defendant – to merely demand the testimony of the laboratory analyst – is not burdensome. However, the waiver of the confrontation right before trial must demonstrate an intentional relinquishment or abandonment of a known right. It must be made knowingly, intelligently, and voluntarily.

This Court can not accept the presumption that the service of the report upon the defendant's legal counsel serves as a replacement for a knowing and intentional waiver. An effective intentional waiver or relinquishment requires actual, not presumed knowledge of what is being waived. The defendant must be fully aware of what he is doing and must make a conscious, informed choice to relinquish the known right. The "waiver" presumed under the Ohio statute is constitutionally inadequate because it shifts the burden on the defendant to take affirmative action or the right is waived.

Contrary to the arguments raised by *Amicus Curiae*, the deemed waiver resulting from a defendant's inaction under Ohio R.C. 2925.51 is not at all like a defendant's deemed waiver which arises as a result of his failure to examine a witness at trial, his failure to conduct cross-examination of witnesses at trial, or his decision to enter into stipulations. In a trial situation, the defendant is always present to see which witnesses are examined or cross-examined and to hear the stipulations placed on the record. At trial, when the witness has finished testifying for the prosecution, the judge provides the defendant with an actual and immediate opportunity to ask questions at that moment and the defendant either proceeds or waives. The decision not to proceed to cross-examine is inaction, but it is intentional and is a clear indication of a voluntary, knowing, and intentional waiver.

There is no similarity between a waiver created by choosing not to examine a witness who just finished testifying at trial and a waiver created by the presumption which arises under Ohio R.C. 2925.51 due to inaction by the defendant, whether personally or through his legal counsel. A defendant's inaction in a trial situation is a clear indication of waiver. A defendant's inaction under Ohio R.C. 2925.51 is

ambiguous. It could mean the defendant was aware of the statute and the requirement that he demand the testimony and has chosen not to demand the testimony. It could just as easily also mean that the defendant was unaware of the statute and the requirement that he demand the testimony, and that he was expecting the prosecution to produce the laboratory analyst to testify at trial and fully intended to cross-examine the analyst. There is no way to know for certain – and therein lies the problem. If there is no way to know, then the deemed waiver under the statute can not pass muster as a knowing, intelligent and intentional waiver of the defendant’s confrontation right.

The *Amicus Curiae* also argues that requiring the defendant’s express personal waiver is burdensome and providing the report to the defendant himself rather than to the defendant’s attorney potentially violates ethical rules.

Whether or not something is “burdensome” is irrelevant to the discussion. *Crawford* removed the ability of the courts to balance the state’s interests against the defendant’s confrontation right. Confrontation is a procedural, not a substantive requirement, because the Confrontation Clause demands not that the evidence be reliable, but that the reliability of the evidence be assessed in a particular manner, “by testing in the crucible of cross-examination.” *Crawford v. Washington, supra* at 61. The confrontation through with the opportunity for cross-examination itself is what must occur. Under *Crawford*, it must occur unless validly waived.

Furthermore, no great burden is placed on the prosecution or the court to accomplish a valid waiver. To effectuate a constitutionally valid waiver, there is no reason that the report would need to be provided to the defendant himself rather than to his legal counsel, so long as the record reflects that the defendant is aware of the report

and the effect of not demanding the analyst's testimony. Furthermore, there is no reason that the waiver must be made by the defendant personally saying "I waive" rather than through his legal counsel. In this case, the Eleventh District Court of Appeals acknowledged that an attorney may make a limited waiver of a defendant's constitutional rights, such as under Crim. R. 23, so long as the defendant is personally informed of the necessity to take affirmative action to avoid waiver of that right. *State v. Pasqualone*, 11<sup>th</sup> Dist. No. 2007-A-0005, 2007-Ohio-6725. For purposes of argument, even if it given, as argued by *Amicus Curiae*, that many courts have found that a defendant's attorney can waive his client's Sixth Amendment confrontation right "so long as the defendant does not dissent from his attorney's decision and so long as it can be said that the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy," that did not occur in this case. *See*, Merit Brief of *Amicus Curiae* Office of the Attorney General at p.12, citing *United States v. Cooper* (7<sup>th</sup> Cir. 2001), 243 F.3d 411, 418. The fact that a defendant need not waive the right personally does not justify undermining the defendant's right.

Under Ohio R.C. 2925.51, it would not be burdensome for a judge to make the appropriate inquiry prior to the trial – i.e., to reference the statute and inquire of the defendant's attorney, *in the presence of the defendant*, as to whether or not the defendant demands the prosecution to produce the testimony of the laboratory analyst. An indication by the defendant's attorney in the defendant's presence in the negative, i.e., that no demand is made would appear to produce a voluntary, knowing and intentional waiver and would ensure compliance with the defendant's constitutional right to confrontation. A 30 second colloquy between the judge and the defendant's counsel in

the presence of the defendant is all it would take. This is of minimal inconvenience to the prosecution or to the court to permit the prosecution to make use of the legislatively enacted shortcut given to it and to avoid the necessity of presenting the testimony of the laboratory analyst.

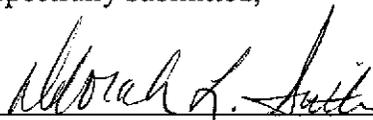
The presumption of waiver under the statute operates to automatically waive a fundamental right without any voluntary, knowing and intentional act by the attorney or the defendant. In this case, the record is silent as to knowledge and intent. In fact, as noted by the Eleventh District Court of Appeals, the record in this case demonstrates the state's intention to call the analyst as a witness. The analyst was subpoenaed on two separate occasions and the State filed two motions to continue due to the unavailability of the analyst. Pasqualone could have reasonably assumed that the analyst was going to be called as a witness by the State at trial. Regardless, Pasqualone's inaction was ambiguous in this case, and therefore Ohio R.C. 2925.51 was unconstitutional as applied.

### **CONCLUSION**

Ohio R.C. 2925.51 provides the State with a shortcut to avoid the necessity of the expense and inconvenience of requiring the personal testimony of the laboratory analyst as a witness in a criminal trial in order to prove the content, identity and weight of an alleged illegal substance. That statute has not been determined to be unconstitutional on its face. However, merely following the procedures set forth in the statute fails to establish a knowing, voluntary, and intelligent waiver of a defendant's confrontation rights afforded to him by the Confrontation Clause of the Sixth Amendment to the United States Constitution. Thus, it may be unconstitutional as applied unless the record demonstrates an intentional relinquishment of a known right by the defendant. The

record does not demonstrate such a waiver in this case. The decision of the Eleventh District Court of Appeals was correct and should be affirmed.

Respectfully submitted,



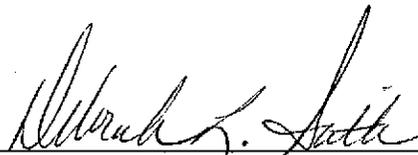
Deborah L. Smith (#0065414)  
Guarnieri & Secrest, P.L.L.  
151 East Market Street  
Warren, Ohio 44482  
Telephone: (330) 393-1584  
Email: debsmith@netdotcom.com  
ATTORNEY FOR APPELLEE,  
THOMAS A. PASQUALONE

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing instrument was sent via ordinary U.S. Mail this 13<sup>TH</sup> day of June, 2008, to:

Shelley M. Pratt  
Assistant Prosecutor  
Office of the Ashtabula County Prosecutor  
25 W. Jefferson Street  
Jefferson, Ohio 44047

William P. Marshall  
Deputy Solicitor  
Office of the Ohio Attorney General  
30 East Broad St, 17<sup>th</sup> Floor  
Columbus, Ohio 43215



Deborah L. Smith (#0065414)  
Guarnieri & Secrest, P.L.L.

## APPENDIX

U.S.C.A. Const. **Amend. VI**-Jury Trials

**C** United States Code Annotated Currentness

Constitution of the United States

Annotated

Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)

**→ Amendment VI. Jury trials for crimes, and procedural rights**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Westlaw

2007 WL 3252033 (U.S.)

Page 1

For Opinion See 128 S.Ct. 1647

Supreme Court of the United States.  
Luis E. MELENDEZ-DIAZ, Petitioner,  
v.  
MASSACHUSETTS.  
No. 07-591.  
October 26, 2007.

On Petition for a Writ of Certiorari to the Appeals  
Court of Massachusetts

Petition for a Writ of Certiorari  
Mary T. Rogers, Attorney at Law, P.O. Box 47,  
Salem, MA 01970. Thomas C. Goldstein, Akin,  
Gump, Strauss, Hauer & Feld LLP, 1333 New  
Hampshire Ave., NW, Washington, DC  
20036. Jeffrey L. Fisher, Counsel of Record, Pamela  
S. Karlan, Stanford Law School Supreme, Court  
Litigation Clinic, 559 Nathan Abbott Way, Stan-  
ford, CA 94305, (650) 724-7081. Amy Howe, Kevin  
K. Russell, Howe & Russell, P.C., 4607 Asbury Pl.,  
NW, Washington, DC 20016.

## QUESTION PRESENTED

Whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is "testimonial" evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004).

## \*ii TABLE OF CONTENTS

|   |
|---|
| QUESTION PRESENTED ... i                |
| TABLE OF CONTENTS ... ii                |
| TABLE OF AUTHORITIES ... iv             |
| PETITION FOR A WRIT OF CERTIORARI ... 1 |
| OPINION BELOW ... 1                     |
| JURISDICTION ... 1                      |

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS ... 1

INTRODUCTION ... 3

STATEMENT ... 4

REASONS FOR GRANTING THE WRIT ... 9

I. The Decision Below Implicates an Irreconcilable Conflict Among Federal and State Courts. ... 9

II. The Question Presented Significantly Impacts the Administration of Criminal Justice. ... 15

III. This Case Is an Excellent Vehicle for Considering the Question Presented. ... 18

IV. The Decision Below Misconstrues the Confrontation Clause. ... 20

CONCLUSION ... 25

APPENDIX A, Memorandum and Order of the Appeals Court of Massachusetts ... 1a

APPENDIX B, Order of the Massachusetts Supreme Judicial Court Denying Review ... 11a

\*iii APPENDIX C, Opinion of the Massachusetts Supreme Judicial Court in *Commonwealth v. Verde* ... 12a

APPENDIX D, Forensic Laboratory Reports Introduced as Commonwealth's Exhibits 10, 11, and 13 ... 24a

## \*iv TABLE OF AUTHORITIES

Cases

*California v. Trombetta*, 467 U.S. 479 (1984) ... 22*City of Las Vegas v. Walsh*, 124 P.3d 203 (Nev. 2005) ... 12, 14*Commonwealth v. Shea*, 545 N.E.2d 1185 (Mass.

- App. 1989) ... 4
- Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005) ... passim
- Crawford v. Washington*, 541 U.S. 36 (2004) ... passim
- Davis v. Washington*, 126 S. Ct. 2266 (2006) ... passim
- Deener v. State*, 214 S.W.3d 522 (Tex. App. 2006), rev. denied (Tex. Crim. 2007) ... 13
- Diaz v. United States*, 223 U.S. 442 (1912) ... 3, 22
- Hinojos-Mendoza v. People*, \_\_\_ P.3d \_\_\_, 2007 WL 2581700 (Colo. Sept. 10, 2007) ... 12, 14, 15, 21
- Johnson v. State*, 929 So.2d 4 (Fla. Dist. Ct. App. 2005), rev. granted, 924 So.2d 810 (Fla. 2006) ... 13
- Mattox v. United States*, 156 U.S. 237 (1895) ... 20
- Ohio v. Roberts*, 448 U.S. 56 (1980) ... 3
- Palmer v. Hoffman*, 318 U.S. 109 (1943) ... 23
- People v. Geier*, 161 P.3d 104 (Cal. 2007) ... 11, 12, 15, 24
- People v. Meekins*, 828 N.Y.S.2d 83 (N.Y. App. Div. 2006) ... 11
- People v. Salinas*, 146 Cal. App. 4th 958 (Cal. App. Ct.), rev. dismissed, 167 P.3d 25 (Cal. 2007) ... 11
- Pruitt v. State*, 954 So.2d 611 (Ala. Crim. App. 2006) ... 11
- State v. Campbell*, 719 N.W.2d 374, 376 (N.D. 2006), cert. denied, 127 S. Ct. 1150 (2007) ... 12, 19
- \*v *State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006) ... 12, 14, 19, 21
- State v. Dedman*, 102 P.3d 628 (N.M. 2004) ... 11, 22
- State v. Forte*, 629 S.E.2d 137 (N.C. 2006) ... 11, 23
- State v. Henderson*, 554 S.W.2d 117 (Tenn. 1977) ... 3
- State v. Laturner*, 163 P.3d 367 (Kan. Ct. App. 2007) ... 13
- State v. March*, 216 S.W.3d 663 (Mo.), cert. dismissed, 128 S. Ct. \_\_\_ (Oct. 5, 2007) ... 12, 14, 15
- State v. Miller*, 144 P.3d 1052 (Or. Ct. App. 2006), opinion adhered to on reconsideration, 149 P.3d 1251 (Or. Ct. App. 2006) ... 13, 23
- State v. Moss*, 160 P.3d 1143 (Ariz. Ct. App. 2007) ... 13
- State v. O'Maley*, 932 A.2d 1 (N.H. 2007) ... 11, 12, 15
- State v. Smith*, 2006 WL 846342 (Ohio Ct. App. 2006) ... 13
- Thomas v. United States*, 914 A.2d 1 (D.C. 2006) ... 12, 14
- United States v. Ellis*, 460 F.3d 920 (7th Cir. 2006) ... 11
- United States v. Oates*, 560 F.2d 45 (2nd Cir. 1977) ... 24
- United States v. Wade*, 388 U.S. 218 (1967) ... 3, 22
- Statutes
- Mass. Gen. Laws ch. 22C § 39 ... 5
- Mass. Gen. Laws ch. 94C § 32A ... 7
- Mass. Gen. Laws ch. 94C § 32E(b)(1) ... 7
- Mass. Gen. Laws ch. 111 § 12 ... 1, 4, 21

Mass. Gen. Laws ch. 111 § 13 ... 2, 5, 21

\*vi Rule

Fed. R. Evid. 803(8) ... 24

Other Authorities

Advisory Committee's Notes, Note to Paragraph (8) of Rule 803, 56 F.R.D. 313 (1972) ... 24

Giannelli, Paul C. & Imwinkelried, Scientific Evidence (4th ed. 2007) ... 16

Giannell, Paul C., Ake v. Oklahoma: *The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 Cornell L. Rev. 1305 (2004) ... 17

Giannelli, Paul C., *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 Ohio St. L.J. 671 (1988) ... 4

Metzger, Pamela R., *Cheating the Constitution*, 59 Vand. L. Rev. 475 (2006) ... passim

Saltzman, Jonathan & Ellement, John R., *Crime Lab Mis handled DNA Results*, Boston Globe, Jan. 13, 2007, at A1 ... 17

Scheck, Barry et al., *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* (2000) ... 16

Thomas, Jack, *Two Police Officers Are Put on Leave: Faulty Fingerprint Evidence Is Probed*, Boston Globe, April 24, 2004, at B1 ... 17

Ungvarsky, Edward J., *Remarks on the Use and Misuse of Forensic Science to Lead to False Convictions*, 41 New Eng. L. Rev. 609 (2007) ... 17

U.S. Dep't of Justice, *Project Advisory Committee, Laboratory Proficiency Testing Program, Supplementary Report - Samples 6-10* (1976) ... 16

#### \*1 PETITION FOR A WRIT OF CERTIORARI

Petitioner Luis E. Melendez-Diaz respectfully petitions for a writ of certiorari to the Appeals Court of

Massachusetts in *Commonwealth v. Melendez-Diaz*, No. 05-P-1213.

#### OPINION BELOW

The memorandum and order of the Appeals Court of Massachusetts (App. 1a-10a) is reported at 69 Mass. App. Ct. 1114, 870 N.E.2d 676, and is unpublished. The order of the Massachusetts Supreme Judicial Court denying review (App. 11a) is reported at 449 Mass. 1113, 874 N.E.2d 407. The relevant trial court proceedings and order are unpublished.

#### JURISDICTION

The Massachusetts Supreme Judicial Court denied review of this case on September 26, 2007. App. 11a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

#### RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...."

Chapter 111 of the General Laws of Massachusetts provides in relevant part:

"§ 12. **Analyses of narcotic drugs, poison, drugs, medicines, or chemicals.** The department [of \*2 public health] shall make, free of charge, a chemical analysis of any narcotic drug, or any synthetic substitute for the same, or any preparation containing the same, or any salt or compound thereof, and of any poison, drug, medicine or chemical, when submitted to it by police authorities or by such incorporated charitable organizations in the commonwealth, as the department shall approve for this purpose; provided, that it is satisfied that the analysis is to be used for the enforcement of law.

§ 13. **Certificate of result of analysis of narcotic drugs, poisons, drugs, medicines, or chemicals;**

**evidence:** The analyst or an assistant analyst of the department [of public health] ... shall upon request furnish a signed certificate, on oath, of the result of the analysis provided for in the preceding section to any police officer or any agent of such incorporated charitable organization, and the presentation of such certificate to the court by any police officer or agent of any such organization shall be prima facie evidence that all the requirements and provisions of the preceding section have been complied with. This certificate shall be sworn to before a justice of the peace or notary public, and the jurat shall contain a statement that the subscriber is the analyst or an assistant analyst of the department. When properly executed, it shall be prima facie evidence of the composition, quality, and net weight of the narcotic or other drug, poison, medicine, or chemical analyzed or the net weight of any mixture containing the narcotic or other drug, poison, medicine, or chemical analyzed, and the court shall take judicial notice of the signature of the analyst or assistant analyst, and of the fact that he is such."

### \*3 INTRODUCTION

This case presents a pressing issue concerning the administration of criminal justice across the country, and over which the federal and state courts are openly and deeply divided: whether state forensic laboratory reports prepared for use in criminal prosecutions are "testimonial" evidence, and thus subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004). The Appeals Court of Massachusetts, following a binding decision from the Massachusetts Supreme Judicial Court, held in this case that they are not.

Until quite recent times, this Court and others generally assumed that the Sixth Amendment required the prosecution, absent a stipulation from a defendant, to present the findings of its forensic examiners through live testimony at trial. See, e.g., *United States v. Wade*, 388 U.S. 218, 227-28 (1967) (forensic analyses of fingerprints, blood and hair samples, etc.); *Diaz v. United States*, 223 U.S. 442,

450 (1912) (autopsy reports); *State v. Henderson*, 554 S.W.2d 117, 120 (Tenn. 1977) (surveying lower courts). However, following this Court's decision in *Ohio v. Roberts*, 448 U.S. 56 (1980), which conflated the Confrontation Clause with hearsay law, many states began to exempt crime laboratory reports from the reach of the Sixth Amendment by labeling them as "business records" or "public records." See Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 508 & n.165 (2006). Even in jurisdictions that resisted characterizing crime laboratory reports as business or public records, many legislatures enacted - and courts condoned - laws specifically making \*4 such reports admissible in the prosecution's cases-in-chief in lieu of live testimony. See *id.* 478 & n.9.

This departure from traditional practice raised a serious constitutional question even during the *Roberts* era. See, e.g., Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 Ohio St. L.J. 671, 674-75 (1988). But the constitutionality of prosecutors' submitting forensic laboratory reports in lieu of live testimony has become especially suspect in the wake of this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* returned the Confrontation Clause to its traditional mode of operation - that is, to a procedural provision that forbids the government from introducing "testimonial" hearsay in place of live testimony at trial. A classic form of testimonial hearsay is an *ex parte* affidavit, *id.* at 43-49, and modern forensic laboratory certificates closely resemble such affidavits.

### STATEMENT

1. Massachusetts law requires a forensic analyst, upon a police officer's representation "that the analysis is to be used for the enforcement of law," to test evidence for the presence of illegal drugs or other chemicals. Mass. Gen. Laws ch. 111 § 12. The forensic analyst does not need to test all specimens that are part of a group from a common source; "[i]t is enough to make representative

tests." *Commonwealth v. Shea*, 545 N.E.2d 1185, 1189 (Mass. App. 1989). Once testing is complete, Massachusetts law requires the forensic analyst, upon a police officer's request, to recount the results of his examination on a "signed certificate, on \*5 oath" and to furnish the certificate to the officer. Mass. Gen. Laws ch. 111 § 13.

Massachusetts, like many other states, allows prosecutors to introduce such forensic analysts' certifications as substitutes for live testimony at trial. Specifically, a Massachusetts statute directs courts to admit sworn crime laboratory reports "as prima facie evidence of the composition, quality, and the net weight of the narcotic or other drug, poison, medicine, or chemical analyzed or the net weight of any mixture containing the narcotic ... or chemical analyzed." *Id.*, see also Mass. Gen. Laws ch. 22C § 39 (providing same when police department instead of department of health performs chemical analysis). "The purpose of [this statute] is to reduce court delays and the inconvenience of having the analyst called as a witness in each case." *Commonwealth v. Verde*, 827 N.E.2d 701, 704 n.1 (Mass. 2005). Accordingly, prosecutors need not call as witnesses the forensic analysts who prepare these reports, even if defendants request that they do so.

2. In November of 2001, the loss prevention manager of a Boston-area K-Mart called the police to report the suspicious activities of a store employee, Thomas Wright. According to the manager, Wright would sometimes leave the store, take short rides in a blue sedan, and return about ten minutes later.

The police came the store later that day. Shortly after arriving, they observed Ellis Montero drive up in a blue sedan, with petitioner Luis Melendez-Diaz riding in the front passenger seat. Wright got into the back seat of the sedan, and the three men drove \*6 forward a short distance and stopped. The officers never noticed whether anything changed hands between the car's occupants, but, looking through the car's back window, the officers saw Wright lean forward and then back. When Wright got out of the car and began walking towards K-

Mart, one officer stopped and searched him. The officer found four small bags in Wright's front pocket. Two of the bags contained white powder, and two contained light yellow powder with small clumps. Suspecting that a drug transaction had just taken place, officers arrested Wright, Montero, and Petitioner.

Officers then drove Wright, Montero, and Petitioner to the police station. While the three men were being booked, the officers inspected the police cruiser that had transported Montero and Petitioner. In the back seat, they found nineteen plastic bags containing dark yellow powder with large clumps.

The police officers submitted the plastic bags from Wright's pocket and from the back seat of the cruiser to the state crime laboratory for testing. Approximately two weeks later, two state-employed forensic analysts issued three sworn reports on letterhead from the Massachusetts Department of Public Health. The first two reports asserted that the four bags taken from Wright contained a total of 4.75 grams of a substance containing cocaine. The third report asserted that the nineteen bags found in the police cruiser contained 22.16 grams of a substance containing cocaine.

The reports, which are reproduced at App. 24a-29a, are largely conclusory. They do not describe the \*7 qualifications or experience of the analysts who conducted the testing. They do not indicate whether any recordkeeping or storage measures had been taken to preserve the integrity of the items for testing. They do not identify the testing method the analysts used to arrive at their conclusions or describe any difficulties (and accompanying error rates) associated with the particular method(s) the analysts used to test for cocaine. Nor do the reports specify the percentages of cocaine allegedly present in the substances tested or otherwise address the differences in the samples that account for why some of the bags contain white powder and others contain dark yellow solids. The reports do, however, provide what the Commonwealth needed to prosecute a criminal case against Petitioner: de-

clarations from state forensic analysts that the packages seized in connection with Petitioner's arrest weighed over fourteen grams and all contained cocaine.

3. The Commonwealth charged Petitioner with distributing cocaine and with trafficking in cocaine in an amount between fourteen and twenty-eight grams. See Mass. Gen. Laws ch. 94C §§ 32A & 32E(b)(1).

At trial, the prosecution offered the laboratory reports during a police officer's testimony as proof that the four bags recovered from Wright and the nineteen bags found in the police cruiser contained, respectively, 4.75 and 22.16 grams of substances containing cocaine. Petitioner objected and specifically cited *Crawford v. Washington*, 541 U.S. 36 (2004), to signal that introducing these reports without also calling to the stand the analysts who prepared them would violate his Sixth Amendment right to confrontation. Tr. at 2/81, 2/98. The trial court overruled the \*8 objection without explanation and admitted the reports into evidence. *Id.* at 2/81. The Commonwealth never called the state forensic examiners to the stand or asserted that they were unavailable to testify.

After being instructed that the laboratory reports alone permitted it to conclude that the bags the officers seized contained cocaine, Tr. 3/69, the jury found Petitioner guilty on both counts. The court sentenced him to three years in prison, the mandatory minimum for trafficking in over 14 grams of substances containing cocaine, and to three years' probation.

4. The Appeals Court of Massachusetts affirmed. As is relevant here, the appellate court rejected Petitioner's *Crawford* argument on the basis of the Massachusetts Supreme Judicial Court's prior holding in *Commonwealth v. Verde*, 827 N.E.2d 279 (Mass. 2005), that introducing "certificates of drug analysis" in lieu of live testimony does not "deny a defendant the right of confrontation." App. 8a n.3. (The *Verde* decision is reproduced at App.

12a-23a.)

5. Petitioner sought discretionary review of this decision in the Massachusetts Supreme Judicial Court. He argued, among other things, that "*Verde* is contrary to the holding in *Crawford* and the United States Supreme Court's *post-Verde* decision in *Davis v. Washington* because the primary purpose of the analyses was to produce evidence for use in a criminal prosecution." Petr. Br. for Further Appellate Review in Mass. S.J.C. at 15-16. The Massachusetts Supreme Judicial Court denied review without comment.

#### \*9 REASONS FOR GRANTING THE WRIT

This Court held in *Crawford v. Washington*, 541 U.S. 36 (2004), that the Confrontation Clause prohibits the prosecution from introducing "testimonial" hearsay against a criminal defendant unless the declarant is unavailable and the defendant has (or had) an opportunity for cross-examination. Federal courts of appeals and state courts of last resort are now divided six-to-five over whether state forensic laboratory reports prepared for use in criminal prosecutions are testimonial.

This Court should use this case to resolve this conflict. Forensic reports are an integral part of a large number of criminal prosecutions. Exempting them from the rigors of the adversarial process poses a significant threat of wrongful convictions. And the holding below - namely, that a state forensic analyst's sworn report analyzing evidence the police seized at a crime scene is not testimonial - is incorrect. *Crawford* and this Court's subsequent decision in *Davis v. Washington*, 126 S. Ct. 2266 (2006), dictate that such formalized statements made for prosecutorial purposes are quintessentially testimonial.

#### I. The Decision Below Implicates an Irreconcilable Conflict Among Federal and State Courts.

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court held that the prosecution may not intro-

duce "testimonial" hearsay against a criminal defendant unless the declarant is unavailable and the defendant has (or had) an opportunity for cross-examination. *Id.* at 54, 68. This Court "[e]ft] for another day any effort \*10 to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68. Nonetheless, this Court did provide some guidance concerning the concept. It emphasized that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure" - particularly "its use of *ex parte* examinations" and "sworn *ex parte* affidavits" as evidence against the accused. *Id.* at 50, 52 n.3. Accordingly, "formal statement[s] to government officers" and other statements produced with the "[i]nvolvement of government officers ... with an eye toward trial" are paradigmatically testimonial statements. *Id.* at 51, 56 n.7. At the same time, this Court noted that certain hearsay evidence that was admissible at the time of the Founding was nontestimonial. Such hearsay included "business records [and] statements in furtherance of a conspiracy." *Id.* at 56.

Since *Crawford*, state supreme courts and the federal courts of appeals have become deeply divided over whether forensic examiners' drug analysis certificates and similar laboratory reports - which are formalized, evidentiary documents prepared with an eye toward trial, but which also are sometimes classified under modern hearsay law as business records - are testimonial.

1. In this case, the Appeals Court of Massachusetts applied the binding decision of the Massachusetts Supreme Judicial Court in *Commonwealth v. Verde*, 827 N.E.2d 701 (2005), to hold that forensic reports certifying under oath that a substance the police seized is an illegal drug are not testimonial. The *Verde* court offered two reasons for this conclusion. First, citing *Crawford's* mention of the admissibility of \*11 business records at the time of the Founding, the Massachusetts Supreme Judicial Court asserted that a drug analysis certificate "is akin to a business record and the confrontation clause is not implicated by this type of evidence."

*Id.* at 702, App. 12a. Second, the Massachusetts Supreme Judicial Court reasoned that drug analysis reports "are neither discretionary nor based on opinion," but rather are a product of a "well-recognized scientific test." *Id.* at 705, App. 17a.

Four other state supreme courts and one federal appeals court likewise have held that forensic laboratory reports prepared in contemplation of prosecution are not testimonial. See *United States v. Ellis*, 460 F.3d 920 (7th Cir. 2006) (police-directed blood test indicating the presence of methamphetamine); *State v. O'Maley*, 932 A.2d 1 (N.H. 2007) (blood alcohol analysis); *People v. Geier*, 161 P.3d 104 (Cal. 2007) (DNA analysis);<sup>FN1</sup> *State v. Forte*, 629 S.E.2d 137 (N.C. 2006) (DNA analysis); *State v. Dedman*, 102 P.3d 628 (N.M. 2004) (blood alcohol analysis). Intermediate courts in two other states also have also held that such laboratory reports are nontestimonial. See *Pruitt v. State*, 954 So.2d 611 (Ala. Crim. App. 2006) (certificate of drug analysis); *People v. Meekins*, 828 N.Y.S.2d 83 (N.Y. App. Div. 2006) (DNA analysis).

FN1. See *also People v. Salinas*, 146 Cal. App. 4th 958 (Cal. App. Ct.) (finding laboratory reports identifying the presence of methamphetamine to be nontestimonial), *rev. dismissed*, 167 P.3d 25 (Cal. 2007) (review dismissed "in light of [*Geier*]").

In addition to the business record and reliability rationales in *Verde*, the California and New Hampshire Supreme Courts have advanced one other reason for holding that the Confrontation Clause does not \*12 apply in this setting. Drawing on this Court's post-*Crawford* decision in *Davis v. Washington*, 126 S. Ct. 2266 (2006), which held that statements describing an ongoing emergency to a 911 operator are not testimonial, these courts have reasoned that forensic laboratory reports are nontestimonial because they "constitute [the analyst's] contemporaneous recordation of observable events." *Geier*, 161 P.3d at 139; see also *O'Maley*, 932 A.2d 1, at 11-12 (following *Geier*).

2. In direct contrast, five state supreme courts have held that forensic laboratory reports prepared in contemplation of prosecution are testimonial. See *Hinojos-Mendoza v. People*, \_\_\_ P.3d \_\_\_, 2007 WL 2581700 (Colo. Sept. 10, 2007) (laboratory report identifying presence of illegal drug); *State v. March*, 216 S.W.3d 663 (Me.) (same), *cert. dismissed*, 128 S. Ct. \_\_\_ (Oct. 5, 2007);<sup>[FN2]</sup> *Thomas v. United States*, 914 A.2d 1 (D.C. 2006) (same); *State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006) (same); *City of Las Vegas v. Walsh*, 124 P.3d 203 (Nev. 2005) (affidavit from nurse who drew blood to conduct blood alcohol analysis).<sup>[FN3]</sup> Intermediate courts in six other states also have held that such laboratory reports are testimonial. See \*13 *State v. Laturner*, 163 P.3d 367 (Kan. Ct. App. 2007) (report certifying presence of illegal drug); *State v. Moss*, 160 P.3d 1143 (Ariz. Ct. App. 2007) (report alleging presence of illegal drugs in blood sample); *State v. Smith*, 2006 WL 846342 (Ohio Ct. App. 2006) (report certifying that substance contained illegal drug); *Johnson v. State*, 929 So.2d 4 (Fla. Dist. Ct. App. 2005) (certificate of chemical analysis), *rev. granted*, 924 So.2d 810 (Fla. 2006); *State v. Miller*, 144 P.3d 1052 (Or. Ct. App. 2006) (same), *opinion adhered to on reconsideration*, 149 P.3d 1251 (Or. Ct. App. 2006); *Deener v. State*, 214 S.W.3d 522 (Tex. App. 2006) (same), *rev. denied* (Tex. Crim. 2007).

FN2. The State of Missouri filed a petition for certiorari in *March*, raising the same question presented here. But the State later moved to dismiss the petition as moot because it had entered into a plea bargain with the defendant.

FN3. One other state supreme court has stated that a forensic laboratory report "bears testimony in the sense that it is a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact'" but did not ultimately render a holding on whether such a report is testimonial. *State v. Campbell*, 719 N.W.2d

374, 376 (N.D. 2006) (quoting *Crawford*, 541 U.S. at 51), *cert. denied*, 127 S. Ct. 1150 (2007).

The courts holding that forensic reports are testimonial have provided a more uniform rationale than courts on the other side of the conflict. These courts reason that such reports are created solely for use in criminal prosecutions and present *ex parte* attestations aimed at helping to prove the defendant's guilt. The Missouri Supreme Court, for example, explained:

Under the definitions of "testimony" and "testimonial" in *Crawford*, as well as the "primary purpose" test in *Davis*, it is clear that the laboratory report in this case constituted a "core" testimonial statement subject to the requirements of the Confrontation Clause. The laboratory report was prepared at the request of law enforcement for [the defendant's] prosecution. It was offered to prove an element of the charged crime - *ie.*, that the substance [the defendant] possessed was cocaine base. The \*14 report was a sworn and formal statement offered in lieu of testimony by the declarant. Use of sworn *ex parte* affidavits to secure criminal convictions was the principal evil at which the Confrontation Clause was directed. *Crawford*, 541 U.S. at 50. A laboratory report, like this one, that was prepared solely for prosecution to prove an element of the crime charged is "testimonial" because it bears all the characteristics of an *ex parte* affidavit.

*March*, 216 S.W.3d at 666; *see also Hinojos-Mendoza*, 2007 WL 2581700, at \*5 (report testimonial because it is a document "prepared at the direction of the police ... in anticipation of criminal prosecution"); *Caulfield*, 722 N.W.2d at 309 ("The report conforms to the types of statements about which the Court in *Crawford* expressed concern - affidavits and similar documents admitted in lieu of present testimony at trial."); *Thomas*, 914 A.2d at 13 ("The use of such *ex parte* affidavits to secure criminal convictions was 'the principal evil at which the Confrontation Clause was directed.' We agree with *amicus* that 'it is difficult to imagine a statement

more clearly testimonial.’ ” (citation omitted)); *Walsh*, 124 P.3d at 207.

This conflict over the nature of forensic examiners' crime laboratory reports is deeply entrenched. Nothing could be gained from further percolation. Courts have had ample time to digest *Crawford*, and they have continued to reach conflicting decisions after *Davis*. Indeed, recent opinions simply acknowledge the division of authority over this issue and choose a side. See, e.g., *March*, 216 S.W.3d at 667 n.2; \*15*Hinojos-Mendoza*, 2007 WL 2581700, at \*4; *Geier*, 161 P.3d at 134-38; *O'Maley*, 932 A.2d 1, at 10-13. It is time for this Court to step in.

## II. The Question Presented Significantly Impacts the Administration of Criminal Justice.

For at least three reasons, this Court should not allow the conflict over whether forensic laboratory reports are testimonial to persist.

1. Crime laboratory analyses play a central evidentiary role in a large number of criminal trials. Prosecutions that lack direct evidence identifying the perpetrator depend heavily on scientific evaluations of circumstantial evidence. Forensic analyses, of course, also are at the center of many drug prosecutions, such as the one here. And given the onward march of technology, criminal prosecutions in the future promise to rely even more on scientific analysis. The new practice of prosecutorial DNA testing is only a glimpse of what is likely to come.

2. The question presented implicates practices across the country. Forty-four states and the District of Columbia have hearsay exceptions permitting courts to admit forensic examiners' certified reports to establish the identity of controlled substances. See *Metzger*, 59 Vand. L. Rev. at 478 & n.9. Numerous states also allow the admission of forensic certificates as hearsay evidence to proffer “the results of DNA tests, microscopic hair analyses, fingerprint identifications, coroners' reports, ballistics tests, and a wide range of other tests conducted by a

crime laboratory.” *Id.* at 479; see *id.* at 479 n. 12 (collecting citations).

\*16 3. The unchecked use of state crime laboratory reports in place of live testimony undermines the integrity of the criminal justice system. Recent reports have shown that “tainted or fraudulent science” contributes to a large proportion - perhaps as much as one-third - of wrongful convictions. See Barry Scheck et al., *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* 246 (2000); see also *Metzger*, 59 Vand. L. Rev. at 491-500 (detailing numerous examples). The leading treatise on scientific evidence further observes:

This is an especially appropriate time to put drug testing under the microscope. There have been recent indications that drug identification testimony is sometimes erroneous or worse. Despite the extensive experience of drug tests, there seems to be a significant error rate in drug testing conducted by some American laboratories ....

2 Paul C. Giannelli & Edward J. Imwinkelried, *Scientific Evidence* §23.01 (4th ed. 2007).

These error rates derive from several factors. First, many prosecutorial crime laboratories use protocols that generate undependable results. One study revealed that 30% of state forensic examiners asked to test a substance for the presence of cocaine rendered incorrect results. See U.S. Dep't of Justice, *Project Advisory Committee, Laboratory Proficiency Testing Program, Supplementary Report - Samples 6-10*, at 3 (1976). Even the FBI's most sophisticated laboratories have been plagued by startling error rates. See *Paul C. Giannelli, \*17Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 Cornell L. Rev. 1305, 1320 (2004) (describing a 1997 report by the Department of Justice Inspector General). Second, a substantial number of crime laboratories are not even required to follow any standardized procedures. “[O]f the 400-500 laboratories conducting forensic examinations for criminal trials, only 283 are accredited.” *Metzger*, 59 Vand. L. Rev. at 494.

Finally, many forensic examiners, as employees of state police and other law enforcement departments, are prone to prosecutorial bias. *See, e.g.,* 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). This bias can subconsciously influence examiners' conclusions or cause them outright to manipulate evidence. Recent scandals in Baltimore, Phoenix, and Houston have revealed rampant falsification of evidence in those cities' crime laboratories. *See Metzger*, 59 Vand. L. Rev. at 495 & n.83.<sup>[FN4]</sup>

FN4. Massachusetts' forensic laboratories also have faced recent criticism for mishandling evidence and issuing erroneous reports. *See* Jonathan Saltzman & John R. Ellement, *Crime Lab Mishandled DNA Results*, Boston Globe, Jan. 13, 2007, at A1; Jack Thomas, *Two Police Officers Are Put on Leave: Faulty Fingerprint Evidence Is Probed*, Boston Globe, April 24, 2004, at B1.

These realities demand that state forensic examiners' evidentiary certifications be subject to the customary processes of direct and cross-examination. If state forensic examiners understand that they may have to present and defend their work in front of judges and juries at public trials, they are more likely to be careful and conscientious, and to use the best \*18 available testing methods. And when examiners do make mistakes or commit malfeasance, our judicial system's traditional adversarial process is more likely than a system of trial-by-affidavit to uncover the truth. There is no doubt our Framers understood this, and the time has come to reaffirm this time-tested principle.

### III. This Case Is an Excellent Vehicle for Considering the Question Presented.

This case presents an excellent vehicle for resolving the split of authority over the question presented.

1. This case raises the question presented free from any waiver or collateral review complications. The case comes to this Court on direct review, and Petitioner unambiguously objected at trial that introducing the forensic laboratory reports without the live testimony of the analysts would violate his federal constitutional right to confrontation. Tr. at 2/81, 2/98. Petitioner also preserved this issue by contending at each level of the Massachusetts appellate courts that the admission of the reports violated the Sixth Amendment. *See* Petr. Mass. C.A. Br. at 37; Petr. Br. for Further Appellate Review in Mass. S.J.C. at 15-16. Finally, the Massachusetts courts resolved the issue on the merits. App. 8a n.3.

2. The Sixth Amendment issue here turns exclusively on whether the forensic laboratory certification is testimonial. Unlike some other states, Massachusetts does not have any statutory procedure that allows defendants to demand before trial that the prosecution call a forensic examiner to the stand or even that advises that defendants must subpoena such \*19 examiners if they wish them to appear at trial. *Compare Verde*, 827 N.E.2d at 706, App. 19a (resolving Sixth Amendment challenge solely on testimonial issue), *with Caulfield*, 722 N.W.2d at 310, 313, 317-18 (holding unanimously that forensic laboratory reports are testimonial but dividing over whether Minnesota's statutory "notice and demand" procedure otherwise satisfied Sixth Amendment); *State v. Campbell*, 719 N.W.2d 374, 377 (N.D. 2006) (avoiding testimonial question on the ground that North Dakota's statutory "notice and demand" procedure satisfied the Sixth Amendment), *cert. denied*, 127 S. Ct. 1150 (2007). Accordingly, there can be no claim that some procedural aspect of state law satisfied Petitioner's right to confrontation.

3. This case aptly illustrates the dangers of allowing the government to introduce lab reports in place of live testimony subject to cross-examination. When the police arrested Petitioner, they seized twenty-three bags that they suspected contained cocaine. The four bags that the police seized from Wright

contained white and light yellow powder. The nineteen bags, by contrast, that the officers later recovered from the patrol car contained a dark yellow, chunky substance. The question whether those nineteen bags contained cocaine is critical, for the certified weight of the substance in those bags transformed the charges against Petitioner from drug distribution, which carries no mandatory jail time, into a drug trafficking offense, which carries a three-year mandatory minimum prison sentence. Yet the Commonwealth did not present any evidence besides the forensic analyst's certification to support its allegation that the substance in the nineteen bags contained cocaine.

**\*20** What is more, nothing even in forensic reports explains whether the chunky substance in the nineteen bags could have come from the same source as the powder in the four bags seized from Wright. If the substances in the different bags had different origins and chemical compositions, it is takes more of a leap to infer, as the prosecution asked the jury to do, that Petitioner sold Wright the substance in the four bags. Had an analyst taken the stand at trial, Petitioner's counsel could have observed his testimony, demeanor, and attentiveness to detail, and decided whether to press the analyst with respect to his testing procedures and proffered findings.

#### IV. The Decision Below Misconstrues the Confrontation Clause.

This Court's precedents dictate that a laboratory report, prepared by a state forensic examiner to further a criminal investigation, is testimonial evidence.

1. In *Crawford*, this Court observed that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." 541 U.S. at 50; *see also Mattox v. United States*, 156 U.S. 237, 242 (1895) (clause intended to prohibit "*ex parte* affidavits" in place of live testimony). The Framers

directed the Clause at this method of creating and presenting evidence because the "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse - a fact borne out time and again throughout a history with which the Framers were keenly **\*21** familiar." *Crawford*, 541 U.S. at 56 n.7. In *Davis v. Washington*, this Court further explained that statements made to police officers "are testimonial when the circumstances objectively indicate ... that the primary purpose ... is to establish or prove past events potentially relevant to later criminal prosecution." 126 S. Ct. at 2273-74.

State forensic examiners' crime laboratory reports fall squarely within this class. Forensic examiners in Massachusetts, as elsewhere, create such laboratory reports at the behest of police officers "for the enforcement of law." Mass Gen. Laws ch. 111 § 12; *see also Hinojos-Mendoza*, 2007 WL 2581700, at \*14 (drug certificates are created "in anticipation of criminal prosecution"). The reports are formal, sworn statements. Mass. Gen. Laws ch. 111 § 13; *see App. 24a-29a*. And they are forthrightly offered "in lieu of present testimony at trial." *Caulfield*, 722 N.W.2d at 309; *see also Verde*, 827 N.E.2d at 704 n.1, App. 14a n.1 (certificates are offered to avoid "having the analyst called as a witness in each case"). They thus are exactly the kind of "solemn declaration[s] or affirmation[s]" that *Crawford* and *Davis* characterized as quintessentially testimonial. *Crawford*, 541 U.S. at 51; *Davis*, 126 S. Ct. at 2274.

Further, although this Court has never squarely decided the issue, it has assumed on several occasions that the prosecution may not introduce a crime laboratory report as a substitute for presenting live testimony from a forensic examiner. As early as 1912, this Court stated that certain pretrial "testimony," including an autopsy report, "could not have been admitted without the consent of the accused ... because **\*22** the accused was entitled to meet the witnesses face to face." *Diaz v. United States*, 223 U.S. 442, 450 (1912).<sup>[FN5]</sup> Years later,

this Court noted that when the government performs "scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like[,] ... the accused has the opportunity for a meaningful confrontation of the Government's case at trial." *United States v. Wade*, 388 U.S. 218, 227-28 (1967). Similarly, in refusing to recognize a due process right to have the government preserve breath samples, this Court observed that "the defendant retains the right to cross-examine the law enforcement officer who administered the Intoxilyzer test, and to attempt to raise doubts in the mind of the factfinder."

490 (1994).

FNS. This Court in *Diaz* was discussing the Philippine Constitution's counterpart to the Confrontation Clause, but the Court proceeded on the basis that the provisions confer the same protection.

2. None of the three rationales that the Massachusetts Supreme Judicial Court and other courts have invoked to characterize forensic examiners' laboratory reports as nontestimonial provide any reason to retreat from this straightforward application of the Confrontation Clause.

a. The Massachusetts Supreme Judicial Court held that forensic reports identifying controlled substances are not testimonial in part based on the supposed reliability of such scientific tests, reasoning that they are "neither discretionary nor based on opinion." *Verde*, 827 N.E.2d at 705, App. 16a; see also *Dedman*, 102 P.3d at 636 (finding forensic reports nontestimonial\*23 because "the process [of their creation] is routine, non-adversarial, and made to ensure an accurate measurement"); *Forte*, 629 S.E.2d at 143 (same). This is nothing more than *Roberts redux*. Even if these courts' assessment of the reliability of forensic testing were correct, but see *supra* at 16-17, this Court expressly rejected such legal reasoning in *Crawford*: "Dispensing with confrontation because testimony is obviously reli-

able is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." 541 U.S. at 62. Defendants have a right to insist that prosecutorial testimony be presented through the adversarial process, regardless of whether judges surmise that cross-examination would likely bear fruit.

b. Nor does *Crawford's* reference to business records support deeming forensic reports nontestimonial. The common law "shop book rule" exception for regularly kept business records, to which *Crawford* adverted, see 541 U.S. at 56, did not remotely encompass reports generated for prosecutorial use. See *Palmer v. Hoffman*, 318 U.S. 109, 113-14 (1943), (explaining that records "calculated for use extrajudicially in the court" or whose "primary utility is in litigating" fall outside of common law rule, and declining to expand federal exception to allow their admission); *State v. Miller*, 144 P.3d 1052, 1058-60 (Or. Ct. App. 2006) (tracing history of business records exception and concluding that state crime laboratory reports fall outside historical exception). Even as recently as the 1970s, the drafters of the Federal Rules of Evidence declined to expand the "public records" exception in criminal cases to include "matters observed by police officers and other law enforcement personnel" and \*24 "factual findings resulting from an investigation." Fed. R. Evid. 803(8). They took this action "in view of the almost certain collision with confrontation rights which would result from [such records'] use against the accused in a criminal case." Advisory Committee's Notes, Note to Paragraph (8) of Rule 803, 56 F.R.D. 313 (1972). See generally *United States v. Oates*, 560 F.2d 45, 68-73 (2nd Cir. 1977).

It makes no difference that some jurisdictions, such as Massachusetts, have since decided to characterize laboratory reports as "akin to" business records, 827 N.E.2d at 702, App. 12a, or that others have gone so far as to expand their statutory definitions of business records expressly to include state crime laboratory reports. As this Court emphasized in *Crawford*, the reasons for subjecting testimonial

statements to confrontation procedures “do [] not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.” 541 U.S. at 56 n.7. In other words, “*ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.” *Id.* at 51. Accordingly, jurisdictions may no more insulate state crime laboratory reports from confrontation scrutiny by labeling them business records as they could by giving the same label to transcripts of custodial interrogations, which, after all, police conduct in their ordinary course of business.

c. Finally, this Court’s decision in *Davis* does not support courts’ attempts to classify laboratory reports as nontestimonial on the ground that they are “contemporaneous recordation[s] of observable events.” \*25 *Geier*, 161 P.3d at 139. *Davis* involved a drastically different scenario than is at issue here - namely, a crime victim calling 911 in the midst of an ongoing emergency. To the extent that timing matters in that context, *Davis* holds that a declarant’s statements are nontestimonial when they narrate threatening, criminal events while they are actually happening. Nothing in that decision suggests that a state official’s formalized description of evidence that police seized days or weeks before is not testimonial, especially when the forensic report’s express purpose is to build a case for prosecution.

The crux of *Davis*, like *Crawford* before it, is that statements gathered for “the primary, if not indeed the sole, purpose of ... investigat[ing]” a past crime are testimonial. *Davis*, 126 S. Ct. at 2278; *see also id.* at 2273-74; *Crawford*, 541 U.S. at 53 (statements obtained by police officers serving an “investigative and prosecutorial function” are testimonial). That is the undeniable purpose of sworn forensic reports. This Court should not wait any longer to make clear that the Confrontation Clause applies to such evidence.

#### CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Melendez-Diaz v. Massachusetts  
2007 WL 3252033 (U.S.)

END OF DOCUMENT