

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 MASSACHUSETTS APPEALS COURT

BRIEF OF *AMICI CURIAE*
THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AND
DISTRICT, PROSECUTING, AND COUNTY ATTORNEYS IN
SUPPORT OF RESPONDENT

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Amici curiae respectfully submit this brief in support of Respondent pursuant to Supreme Court Rule 37.¹ *Amici* urge the Court to affirm the judgment of the Massachusetts Appeals Court.

INTEREST OF AMICI CURIAE²

Amicus curiae the National District Attorneys Association (“NDAA”) is a nonprofit corporation and the sole national membership organization representing local prosecuting attorneys in the United States. Its members come from the offices of District Attorneys, State’s Attorneys, Attorneys General and county and city prosecutors with responsibility for prosecuting criminal violations in every state of the United States. Its purposes are to foster and maintain the honor and integrity of the prosecuting attorneys of the United States in both large and small jurisdictions by whatever title such attorneys may be known; to improve and to facilitate the administration of justice in the United States; to promote the study of the law and research therein, the diffusion of knowledge thereof and the continuing

¹ *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* has made a monetary contribution to the preparation and submission of this brief. The District Attorney for the Suffolk District was counsel for the Commonwealth of Massachusetts in the state trial and appellate courts, but is not counsel for any party before this Court.

² All parties have consented to the filing of this *amici curiae* brief. Pursuant to Supreme Court Rule 37, a timely letter of consent from Respondent accompanies this filing. *Amici curiae* further rely upon Petitioner’s letter of general consent on file with the Court.

education of prosecuting attorneys, lawyers, law enforcement personnel, and other members of the interested public by various means including, but not limited to, arranging seminars and fostering periodic conventions or meetings for the discussion and solution of legal problems affecting the public interest in the administration of justice; and to cause to be published and to distribute addresses, reports, treatises, and other literary works on legal subjects or other related subjects. The NDAA was formed in 1950 by local prosecutors to give a focal point to advancing their causes and issues at the national level. NDAA representatives regularly meet with the Department of Justice, members of Congress and other national associations to represent the views of prosecutors to influence federal and national policies and programs which impact law enforcement and prosecution. Since its formation, the NDAA's programs of education and training, publications and amicus curiae activity have carried out its guiding purpose of serving as "the Voice of America's Prosecutors and To Support Their Efforts to Protect the Rights and Safety of the People." As such, the NDAA is qualified to offer assistance to this Court in this matter.

Amicus curiae the District Attorney for the Suffolk District, Boston, Massachusetts, is charged by statute and the Massachusetts Constitution with enforcing the criminal laws of the Commonwealth, pursuing justice in all cases under his oversight, and in protecting the rights of the victims of crime. The District Attorney for the Suffolk District is the largest and busiest district attorney's office in the Commonwealth of Massachusetts. The District Attorney has appointed approximately 140 Assistant District Attorneys. In 2007, Assistant District Attorneys in the Suffolk District prosecuted approximately 11,000 matters involving the distribution and possession of

controlled substances at the trial and appellate levels. Crime prevention, public safety, and the swift investigation and prosecution of violent crimes, many of which are related to drug offenses, are priorities of the District Attorney. Drug abuse and trafficking is a persistent plight in the Suffolk District and vigorous prosecution of these offenses is one of the highest priorities for the District Attorney. In response to the numerous narcotic offenses prosecuted in the Suffolk District, the office has established three drug courts. Thus, the District Attorney for the Suffolk District is qualified to assist the Court in assessing the undue burden on the states resulting from an adverse holding by this Court and to assist it in determining whether drug analysis certificates are “testimonial” evidence subject to the mandates of the confrontation clause.

Amicus curiae the Prosecuting Attorney for Cuyahoga County, Cleveland, Ohio, is charged with enforcing the criminal laws of the State of Ohio. The Cuyahoga County Prosecutor’s Office is the largest and busiest prosecutor’s office in the State of Ohio and has approximately 204 Assistant Prosecuting Attorneys. In 2007, the Major Drug Offenders Unit and the General Felony Unit in the Prosecuting Attorney’s Office prosecuted approximately 14,000 matters in violation of the Ohio narcotics statute, O.R.C. 2925, *et seq.* The Cuyahoga County Prosecutor’s Office also provides legal counsel and support to local, state, and federal law enforcement agencies in the investigation and prosecution of individuals trafficking and possessing illegal drugs. Therefore, the Prosecuting Attorney for Cuyahoga County is qualified to assist the Court in assessing the undue burden on the states should the Court determine that live testimony by a drug analyst is required in each and every narcotics case.

Amicus curiae the Prosecuting Attorney for the County of Wayne, Detroit, Michigan, is charged by state statutes and the Michigan Constitution with the responsibility of litigating all criminal prosecutions within Wayne County and has a vital interest in the outcome of all criminal litigation. Wayne County is the largest county in the State of Michigan and the Prosecuting Attorney's Office of Wayne County is among the largest and busiest in the United States. The Prosecuting Attorney for the County of Wayne has appointed approximately 150 Assistant Prosecuting Attorneys in non-supervisory positions. In 2007, Assistant Prosecuting Attorneys prosecuted 64% of all serious felony jury trials, 56% of all lesser felony jury trials, and 52% of all felony matters in the State of Michigan. In 2007, 6,200 cases were initiated by the Prosecuting Attorney's Office for violation of controlled substance prohibitions. These cases are distributed throughout the trial staff, except for what are deemed "major" controlled substance offenses. A special unit attempts to prosecute many of these offenses and is staffed by four attorneys. This unit prosecuted over 250 major drug cases in 2007. Therefore, the Prosecuting Attorney for the County of Wayne is qualified to assist the Court in considering the undue burden on the states should the Court determine that *Crawford* applies to drug analysis certificates.

Amicus curiae the District Attorney for the City of Philadelphia, Pennsylvania, prosecutes the greatest number of drug cases in the Commonwealth of Pennsylvania. The District Attorney's Office has approximately 300 Assistant District Attorneys and is the largest appellate litigator in the Commonwealth of Pennsylvania. In 2007, the District Attorney's Office prosecuted approximately 25,000 various narcotics cases. In the City of Philadelphia, the traf-

ficking of illegal drugs is often at the root of violent crimes including murder and robbery. Victims of drug-related gun violence often include innocent children caught in the crossfire. Prosecuting drug offenses is therefore essential to the protection of the public and is among the highest priorities of the District Attorney. As such, the District Attorney for the City of Philadelphia is qualified to assist the Court in considering the importance of the efficient and effective prosecution of drug violations and the undue burden on the states should the Court hold that live testimony by a drug analyst is required in every narcotics case.

Amicus curiae the District Attorney for the 10th Judicial Circuit, Birmingham, Alabama, is charged with enforcing the criminal laws in the State of Alabama. The District Attorney for the 10th Judicial Circuit has under his employment approximately 43 Assistant District Attorneys. In 2007, the District Attorney's Office prosecuted hundreds of drug related offenses. As such, the District Attorney for the 10th Judicial Circuit is qualified to offer assistance to this Court in assessing the undue burden on the states should live testimony be required in each and every matter related to a controlled substance violation.

Amicus curiae the District Attorney for Clark County, Las Vegas, Nevada, is charged by statute and the Nevada Constitution with prosecuting all felony and gross misdemeanor crimes occurring anywhere within the county and all misdemeanors occurring within the unincorporated parts of the county. Clark County, Nevada, is the fifteenth largest county in the nation and the most populous of the seventeen counties in Nevada. The Clark County District Attorney's Office is the busiest and largest prosecutor's office in the state. There are approx-

imately 161 Deputy District Attorneys appearing regularly in 50 judicial forums. In 2007, the District Attorney prosecuted over 60,000 criminal cases, including numerous controlled substances related matters. Therefore, the District Attorney for Clark County is qualified to offer assistance to this Court in this matter.

Amicus curiae the County Attorney for Maricopa County, Phoenix, Arizona, is charged by statute and the Arizona Constitution with prosecuting all felonies that occur in Maricopa County and all misdemeanors that occur in unincorporated areas. The Maricopa County Attorney's Office is the largest and busiest prosecutor's office in Arizona. The County Attorney's Office has fifteen specialized bureaus and 257 Assistant County Attorneys. In 2007, the Maricopa County Attorney's Office prosecuted nearly 18,000 drug related offenses. In Maricopa County, drug offenses are often times related to violent crimes and gang activities. The successful and vigorous prosecution of drug offenses, and treatment of first and second time nonviolent offenders, is therefore essential to the quality of community life and a priority in the Maricopa County Attorney's Office. Therefore, the Maricopa County Attorney is qualified to assist the Court in considering the undue burden on the states should it determine that *Crawford* applies to drug analysis certificates.

Amicus curiae the Prosecuting Attorney for St. Louis County, Clayton, Missouri, is charged by statute and the Missouri Constitution with enforcing the criminal laws of Missouri. St. Louis County is the most populous county and has the highest crime rates in Missouri. There are currently 54 Assistant Prosecuting Attorneys for St. Louis County. In 2007, the Prosecuting Attorney prosecuted over a thousand drug related felonies. The Gang/Drug Division mon-

itors gang and drug activities in the St. Louis metropolitan area and participates in the activities of the St. Louis County Gang Task Force. This task force is comprised of representatives of various law enforcement agencies, local school districts, and other agencies concerned about the problems created by criminal street gangs. As such, the Prosecuting Attorney for St. Louis County is qualified to assist this Court in considering the undue burden on the states should it hold that live testimony by a drug analyst is required in every narcotics related case.

Amicus curiae the District Attorney General for the 30th Judicial District, Shelby County, Memphis, Tennessee, is charged by statute and the Tennessee Constitution with enforcing the state drug laws in the State of Tennessee. The District Attorney General has appointed approximately 103 Assistant District Attorneys. Shelby County has the highest number of crimes, including drug related offenses, and is the largest county in the State of Tennessee. In 2007, Shelby County was plagued with the continued combination of gangs, guns, and drugs. As such, the District Attorney General's office prosecuted 16,427 drug offenses and an estimated 5,000 drug related matters in 2007. Therefore, the District Attorney General for the 30th Judicial District, Shelby County, is qualified to assist the Court in considering the undue burden on the states should it hold that drug analysis certificates implicate the confrontation clause.

SUMMARY OF ARGUMENT

Amici suggest that holding drug analysis certificates to be testimonial would be contrary to the law

of evidence regarding the admissibility of public records as it existed at, and has been applied since, the adoption of the confrontation clause. Applying the holding of *Crawford* to drug analysis certificates which are prepared pursuant to statutory directive, and are rendered self-authenticating as public records by statute, would be an unprecedented and unnecessary expansion of *Crawford* and of the right to confrontation. Such a modification of the law would impose an undue burden upon the states in enforcing the drug laws in our respective jurisdictions, where tens of thousands of narcotic cases are prosecuted annually. Requiring live testimony for the admission of drug analysis certificates in each and every case would overwhelm the existing judicial, prosecutorial and administrative resources and would bring effective prosecution of narcotics cases to a standstill.

Furthermore, historical records, which demonstrate that the confrontation clause is not offended by the introduction in evidence of self-authenticating government documents or public records, support the conclusion that drug analysis certificates are admissible without violating the confrontation clause. Historically, many government documents, including court records, and birth and marriage certificates, were not deemed testimonial and were never intended to be encompassed by the confrontation clause. These records are admissible without the testimony of their maker as a foundation for the introduction of the record, largely because the maker or keeper of the record will likely not remember the specific events or observations surrounding its creation, thus stripping cross-examination of any useful purpose. In addition, although such documents are probative of some of the facts required for conviction, they are not alone sufficient to convict, and the right

to confront the critical witnesses who establish that defendant possessed the substance about which the record has been made is preserved.

ARGUMENT

REQUIRING TESTIMONY FROM DRUG ANALYSTS WOULD IMPOSE AN UNDUE BURDEN UPON THE STATES AND HAVE CRIPPLING CONSEQUENCES FOR THE EFFECTIVE AND EFFICIENT PROSECUTION OF DRUG CASES IN THE STATE TRIAL COURTS.

A. Significant Delay In The Administration Of Justice Will Occur If Live Testimony By A Laboratory Analyst Is Required In Every Narcotics Case.

It would be difficult for states to comply with a holding that *Crawford v. Washington*, 541 U.S. 36 (2004), applies to drug analysis certificates, and that such certificates are no longer admissible as self-authenticating public records. Compliance with such a holding would require that the foundation for the admission of such a certificate be laid through the testimony of the laboratory chemist who tested the substance and made the record certifying the result of the test in each particular case. This would adversely affect the orderly and efficient administration of justice in all respects. Given the number of tests performed and certificates prepared by each analyst in a given year, the appearance at trial of the chemist who performed the test in each case would be physically impossible.

The Massachusetts laws at issue in this case, Mass. G.L. c. 22C, § 39 and G.L. c. 111, § 13, currently provide that certificates of analysis, prepared by the designated laboratories at the department of public health, the University of Massachusetts medi-

cal school, and the Massachusetts State Police, may, if properly executed, be admitted as prima facie evidence of the composition, quality, and weight of a controlled substance.

The amount of narcotics recovered by law enforcement officers, tested by drug analysts, and subsequently prosecuted by the states is astounding, particularly in large and busy jurisdictions. In 2007, *amicus curiae* the District Attorney for the Suffolk District, Boston, Massachusetts, prosecuted a total of 10,259 narcotics cases in the Commonwealth's district, municipal, and Superior Courts. In fiscal year 2006, 8,665 narcotics related charges were issued in the eight divisions of the Boston Municipal Court.³ In fiscal year 2007, 1,041 narcotics related charges were issued in the Chelsea District Court alone.⁴ The number of charges does not reflect the amount of drugs seized, as there is a high likelihood that multiple charges are issued in any given case. Some cases involve possession or distribution of multiple types of drugs. *See* Mass. G.L. c. 94C, §§ 1, *et seq.* Overall, these numbers reflect an enormous volume of drug cases handled in the district and municipal courts in the Suffolk District.⁵

³ *See* Massachusetts Court System, Boston Municipal Court <http://www.mass.gov/courts/courtsandjudges/courts/bostonmunicipalcourt/2006stats.html> (follow to "Caseload Statistics" PDF Report).

⁴ *See* Massachusetts Court System, Boston Municipal Court, <http://www.mass.gov/courts/courtsandjudges/courts/districtcourt/crimstats2007.pdf>. The Chelsea District Court is one of nine district and municipal courts within the Suffolk District.

⁵ The number of narcotics related charges issued in the District Court Departments of the Commonwealth of Massachusetts totaled 46,685 in 2007. *See* <http://www.mass.gov/courts/courtsandjudges/courts/districtcourt>

Similarly, other *amici* prosecuted an overwhelming amount of drug related cases in 2007, indicative of the incredible volume of drug matters that exist in the state trial courts. The District Attorney's Office for the City of Philadelphia, for example, prosecuted approximately 25,000 narcotics related matters in 2007. Likewise, *amicus curiae* the Prosecuting Attorney's Office for Wayne County, Detroit, Michigan, prosecuted 6,200 controlled substances violations. *Amici* the District Attorney General's Office for Shelby County, Memphis, Tennessee, prosecuted nearly 22,000 drug matters, and the Prosecuting Attorney's Office, Cuyahoga County, Cleveland, Ohio handled approximately 14,000 narcotic violations. *Amicus curiae* the Maricopa County District Attorney's Office, Phoenix, Arizona, prosecuted nearly 18,000 drug related cases in 2007.

In addition, many of the forensic laboratories throughout the country, which conduct substance analyses, are significantly understaffed. The narcotics recovered in the City of Philadelphia, for example, are tested by the Crime Laboratory of the Philadelphia Police Department ("Crime Lab"). In 2007, the Crime Lab's 18 analysts processed approximately 28,000 various types of narcotics. Given these figures and the possibility that live testimony is required for every case involving a drug analysis certificate, each drug analyst in Philadelphia would be expected to testify in approximately 1,389 cases *per annum* in the various trial courts of the City of Philadelphia.

t/crimstats2007.pdf. Of those 46,685 narcotics cases, which involved adult offenders, 8,665 were prosecuted in the Boston Municipal Court. A total of 5,917 narcotics cases were filed in the Massachusetts Superior Court Department.

Likewise, controlled substances recovered in Cuyahoga County, Cleveland, Ohio, are tested by either the Bureau of Criminal Investigation and Identification of the Ohio Attorney General's Office ("BCI") or the Scientific Investigation Unit of the Cleveland Police Department ("SIU"). Analysts in the Chemistry Unit at BCI examine a variety of narcotics, including marijuana, heroin, cocaine, amphetamines, barbiturates, LSD, PCP, and others. Ninety percent of the caseload in the Chemistry Unit involves drug analysis.⁶ BCI employs fourteen full time chemists, who in 2007 analyzed a total of 14,039 cases. Moreover, SIU received 13,668 cases and analyzed 10,474 in 2007.⁷ For this volume of drug analyses, SIU employs four full time and two part time analysts. As is the case throughout the nation, a case submitted to SIU for analysis often contains numerous items, but results in only one laboratory report. Therefore, the number of drugs actually tested by the analysts is much higher than the number of cases received by SIU.

Illegal narcotics recovered in Clark County, Nevada, are analyzed in the Las Vegas Metropolitan Police Department Forensic Laboratory, which is one of two full service forensic laboratories in Nevada, and conducts all controlled substance analyses for the southern half of the state. In 2007, the laboratory received 2,205 requests for the analysis of controlled substances. It had four full time scientists who performed analyses on 2,251 cases, often involv-

⁶ See <http://www.ag.state.oh.us/le/investigation/lab.asp>.

⁷ Given its limited resources, SIU does not test marijuana in misdemeanor cases, unless it is needed for trial. In addition, SIU does not test narcotics that were "property found" and are attributed to unknown suspects.

ing more than one item to be analyzed. Due to the increased popularity of methamphetamines in the southwestern areas of the United States, in the first eight months of 2008, the lab has already received 2,973 requests, almost double the amount of last year, and, so far, 4.5 full time analysts have performed analyses on 1,721 cases, again often involving multiple items.

Furthermore, in Massachusetts, all drugs recovered in the Suffolk District are tested, analyzed, and certified by either the Forensic Services Group, Crime Laboratory System, Drug Unit of the Massachusetts State Police (“Drug Unit”)⁸ or the Massachusetts Department of Public Health (“DPH”) laboratories. Mass. G.L. c. 22C, § 39 and G.L. c. 111, § 13. These laboratories are significantly understaffed with drug analysts. There are currently only eight analysts in the Drug Unit and 15 chemists at DPH. In 2007, the Drug Unit received about 8,000 cases for testing, and DPH analyzed 42,583 items, and multiple tests were performed on each item.⁹ Currently, it takes the laboratory analysts at both the Drug Unit and DPH approximately four months to issue a certificate of drug analysis after the drugs have been seized.

⁸ Pursuant to Mass. G.L. c. 6A, § 18 *et seq.*, the Massachusetts State Police is declared to be within the executive office of public safety and does not answer directly to the state prosecutors.

⁹ 1,598 of the 42,583 items analyzed by DPH were determined not to be a controlled substance. Further, the Drugs of Abuse Laboratory (“DAL”), located at the University of Massachusetts Medical Center in Worcester, analyzes samples brought to it by police departments in Worcester County, Massachusetts. In 2006 and 2007, DAL analyzed 11,586 cases. Of those cases, approximately 4 percent were reported as negative or no controlled substances detected. In addition 15 percent in 2006 and 12% in 2007 were not tested for various reasons.

Given the limited resources in the state laboratories, requiring live testimony in each and every drug-related case would cause significant delays in the administration of justice at every level in the *amici* jurisdictions. First, significant delays will occur in the trial courts. The trial courts in the *amici* jurisdictions all carry a tremendous docket. In order to ensure the orderly and efficient administration of justice, in courtrooms throughout the country, more cases are scheduled for trial each day than can be tried because often a case scheduled for trial will not proceed for various reasons. Another case may be given priority because the defendant is in custody, because there are civilian witnesses who are unavailable to testify on another day, or because the case is older in time. Yet another case may plea immediately before trial, and another case is then called for trial, making it impossible to predict which cases will actually be heard on the day they are scheduled. If a case does not proceed to trial, it will be rescheduled, often as many as four additional times. If an analyst had to testify in every narcotics case, he would have to appear and needlessly wait several hours whenever a narcotics case is scheduled, to see if the case really proceeds to trial. If it does not, the analyst will have to return to court as many as four times for just one case.

Second, if this Court required analysts to testify at each and every drug trial, significant delays would occur in the testing of controlled substances. It would be terribly difficult, if not impossible, for scientific laboratory personnel to complete their tasks while also regularly appearing in court to testify. These appearances by drug analysts would significantly curtail the amount of time available for analyzing drugs, issuing certificates of drug analysis,

and complying with discovery orders to produce those certificates.

Third, applying *Crawford* to drug analysis certificates could conflict with a defendant's right to a speedy trial. Because of the sheer volume of drug cases they analyze, chemists would likely be required to appear in multiple courts in different cities or counties at the same time, and it would be impossible for multiple judges to coordinate trials between courts with the same witness. As a result, trials would be further delayed to accommodate the analysts' schedules, conflicting with efficient case management and the guidelines and time standards set forth by the courts in which a defendant must be brought to trial. Ultimately, the defendant could be denied his right to a speedy trial. *See* Mass. R. Crim. P. 36; Mich. R. Crim. P. 6.004; Pa. R. Crim. P. 600; Ohio Rev. Code Ann. § 2945.71 *et seq.*, Mo. Rev. Stat. § 217.450 *et seq.* Requiring an analyst to testify at every narcotics trial would effectively trump all other priorities balanced by the courts.

Ultimately, however, the requirement that an analyst appear and testify at every trial would essentially nullify the drug violation laws and compromise public safety. If a defendant's right to a speedy trial is violated, he is entitled to dismissal of the charges with prejudice. *See* Mass. R. Crim. P. 36; Mich. R. Crim. P. 6.004; Pa. R. Crim. P. 600; Ohio Rev. Code Ann. §§ 2945.71 *et seq.*, Mo. Rev. Stat. §§ 217.450 *et seq.*, § 554.780, Nev. Rev. Stat. Ann. § 178.556, Ariz. Rev. Stat. Ann. § 13-114. If, therefore, a drug analyst cannot appear for trial, a judge would have the discretion to dismiss the case. *See* Mass. R. Crim. P. 36(c); Ohio R. Crim. P. 48(B); Mich. R. Crim. P. 6.004; Pa. R. Crim. P. 600, Nev. Rev. Stat. Ann. § 178.556, Ariz. R. Crim. P. 8. This result will be particularly likely if the case

has been previously continued for trial. After a case has been dismissed, a prosecutor could then file charges anew or file a motion to reconsider the dismissal. If the case were revived, another trial date would have to be scheduled, adding months of delay to the resolution of drug cases. Furthermore, this consequence would nullify the anti-drug laws that *amici* have been specifically charged to enforce. The duties of law enforcement officers would similarly be thwarted since arrests for drug violations would likely not result in successful prosecutions.

As another palpable consequence of requiring live testimony by analysts, the number of guilty pleas in narcotics cases will decrease significantly. *Amici* law professors' assessment that the effect of live testimony on the prosecution of narcotics cases would be slim is false. *See* Brief of Law Professors as *Amici Curiae* in Support of Pet'r, at 7-9. As *amici* law professors correctly note, about 95% of felony cases in the state courts are currently resolved by way of plea agreements. *See id.*; Bureau of Justice Statistics, Dep't of Justice, *Felony Sentences in State Courts, 2004*, at 1-2 (2007).¹⁰ In 2004, drug offenses (i.e. possession and trafficking) resulted in 34% of all felony convictions in the state courts, amounting to about 362,850 convictions. Bureau of Justice Statistics, Dep't of Justice, *Felony Sentences in State Courts, 2004*, at 2 (2007). Drug offenses by far outnumbered violent offenses (18%) and property offenses, including burglary, larceny, and

¹⁰ Of all felony convictions in the United States, 94% are obtained in state courts, and the remaining 6% in federal courts. Bureau of Justice Statistics, Dep't of Justice, *Felony Sentences in State Courts, 2004*, at 1-2 (2007).

fraud/forgery (29%). *Id.*¹¹ In comparison, rape and sexual assault cases, in which expert witnesses or DNA analysts are frequently required to testify, make up only about 3% percent of all felony cases. *Id.*

Based on the above-mentioned statistics, it is likely that currently also about 95% of all drug cases are resolved via guilty plea. *See* Bureau of Justice Statistics, Dep't of Justice, *Felony Sentences in State Courts*, 2004, at 1-2 (2007). Pleas in drug prosecutions thus lead to about 32.3% percent, or roughly 344,707 of all felony convictions in U.S. state courts. Because insufficient numbers of analysts will be available to testify, the number of guilty pleas in felony cases in the state courts will thus decrease by about one third. As a consequence, court systems throughout the country will be significantly affected and overburdened. Alternatively, in order to obtain any convictions at all in narcotics cases, the prosecution may be forced to agree to lenient plea agreements, creating an undeserved windfall for many defendants.

If live testimony of an analyst were required in each and every drug case, the current criminal justice system would effectively come to a standstill. Knowing that the prosecution could only prove its case if an analyst is present to testify, no defendant would agree to plead guilty, unless the analyst were already present in the courtroom. In fact, any defense attorney who were to advise his or her client to plead guilty in a case where it is not certain that the prosecution can proceed for want of an analyst,

¹¹ Likewise, in the federal courts, drug offenses making up 37% of all convictions, by far outnumbered all other categories of crimes. Bureau of Justice Statistics, Dep't of Justice, *Felony Sentences in State Courts*, 2004, at 2 (2007).

would likely be subject to a claim of ineffective assistance of counsel. Because of the current staffing levels and budgetary restrictions in states throughout the country, it will be highly unlikely that an analyst will in fact be available to testify in every narcotics case. The Massachusetts State Police Drug Unit has estimated, for example, that with their current volume of cases and staffing level, requiring an analyst to testify in court in only 30% of cases would decrease the Drug Unit's productivity by 100%, making it impossible to analyze any more cases. As a result, it is highly unlikely that an analyst will be available to testify in any but the most serious narcotics cases.

B. The Scheme Advanced By The Petitioner Would Increase The Already Staggering Costs Illegal Drugs Inflict On Our Communities.

The American people have expressed a significant interest in curtailing the availability and dissemination of illegal drugs. This is reflected in the introduction to the “Controlled Substances Act,” 21 U.S.C. §§ 801, *et seq.*, where the Congress declared that “[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.” 21 U.S.C. § 801(2). Society’s desire to harshly punish the manufacturing, possession, and distribution of illegal narcotics is likewise reflected in the punishment structure for these offenses at the federal level. *See* 21 U.S.C. § 841(a)-(b). Between 1985 and 2001 “drugs” was consistently one of the top ten answers given by Americans when asked what they thought was the most important problem facing the nation.¹²

Illicit narcotics use is a widespread problem in U.S. society. In 2006, an estimated 20.4 million Americans, or 8.3% of the population aged 12 years old or older, reported being current illicit drug users. *Results from the 2006 National Survey on Drug Use and Health: National Findings*. Department of Health and Human Services (2007), at 16. While

¹² Jonathan P. Caulkins, Peter Reuter, Martin Y. Iguchi, & James Chiesa, *How Goes the "War on Drugs"?: An Assessment of U.S. Drugs Programs and Policy*, RAND DRUG POLICY RESEARCH CENTER (2005), at 1, available at http://www.rand.org/pubs/occasional_papers/2005/RAND_op121.pdf.

marijuana was the most prevalent drug, in 2006, there were approximately 2.4 million cocaine users, about 702,000 of whom used crack cocaine. *Id.* In addition, in 2006, 10.2 million persons, or 4.2% of the population aged 12 years old or older reported having driven under the influence of illicit drugs during the past year. *Results from the 2006 National Survey on Drug Use and Health: National Findings*, Department of Health and Human Services (2007) at 29.

Illicit narcotics use thus comes at a huge annual cost to our communities. The National Drug Intelligence Center reported that, according to the Office of National Drug Control Policy (“ONDCP”), the economic cost of drug abuse to the United States in 2002 amounted to \$180.9 billion.¹³ These staggering economic consequences severely curtail federal, state, and local governmental resources, and, ultimately, those of the taxpayer. *Id.* It has been estimated that in 1999, Americans spent \$36 billion on cocaine, \$11 on heroin, \$10 billion on marijuana, \$5.8 billion on methamphetamines, and \$2.6 billion on all other illegal drugs combined.¹⁴ This \$65.4 billion is being withheld from the lawful economy of the United States.

Furthermore, in 2002, the healthcare related costs of illicit drug use amount to roughly \$16 bil-

¹³ See National Drug Threat Assessment 2006, *The Impact of Drugs on Society*, NATIONAL DRUG INTELLIGENCE CENTER (2006), available at: <http://www.usdoj.gov/ndic/pubs11/18862/impact.htm>; *Economic Costs of Drug Abuse in the U.S. 1992-2002*, Executive Summary, ONDCP at vi.

¹⁴ Jonathan P. Caulkins et al., *How Goes the “War on Drugs”?: An Assessment of U.S. Drugs Programs and Policy*, RAND DRUG POLICY RESEARCH CENTER (2005), at 7.

lion. *Economic Costs of Drug Abuse in the U.S. 1992-2002*, Executive Summary, ONDCP, at ix. According to the Substance Abuse and Mental Health Services Administration (“SAMHSA”), in 2003, 627,923 drug-related visits to hospital emergency rooms occurred nationwide.¹⁵ Of these visits, cocaine alone was responsible for 20%, or 125,921, while marijuana was involved in 79,663 or 13%, and heroin in 47,604 or about 8% of all drug-related emergency room visits. *Id.*

The amount of healthcare related costs generated by drug abuse in the United States makes it “one of the most costly health problems in the United States.” *Id.* at xiii. According to reports created by the National Institutes of Health (NIH), the health-related costs associated with drug abuse (\$124.9 billion in 1995) are comparable to those generated by other major health problems in the United States, such as heart disease (\$183.1 billion in 1999), cancer (\$96.1 billion in 1990), diabetes (\$98.2 billion in 1997), Alzheimer’s disease (\$100 billion in 1997), stroke (\$43.3 billion in 1998), smoking (\$138 billion in 1995), obesity (\$99.2 billion in 1995), alcohol abuse (\$184.6 billion in 1998) and mental illness (\$160.8 billion in 1992). *Id.*

The listed consequences are but a few of those society faces from widespread and uncontrolled use of illicit drugs. Other consequences include the spread of HIV/AIDS and the reduced survival rate of those individuals who contract it through use of infected injection needles, or the fact that children of individuals who abuse drugs are often exposed to

¹⁵ See National Institute on Drug Abuse, *NIDA Info Facts, Hospital Visits*, available at: <http://www.drugabuse.gov/infacts/HospitalVisits.html>.

drugs themselves, or they are abused and neglected as a consequence of the parent's illicit drug use.¹⁶

While in 2006 the rate of drug use among adults aged 18 years old or older was higher for unemployed persons (18.5%) than for those employed full time (8.8%) or part-time (9.4), most illicit drug users were employed. *Results from the 2006 National Survey on Drug Use and Health: National Findings*, Department of Health and Human Services (2007) at 27. Illicit drug use on the job carries with it significant dangers and consequences, including higher rates of accidents and insurance claims, increased absenteeism and lost productivity.¹⁷ Lost productivity, in fact, in 2002 amounted to about 71.2% of the annual cost of illicit drug abuse, or approximately \$127.8 billion. *Economic Costs of Drug Abuse in the U.S. 1992-2002*, Executive Summary, ONDCP at vii-viii & Fig.2. Drug abuse and dependence further “reduce the capacity of individuals to work productively in their workplaces and homes. The shortfall in wages and employment among drug abusers has been estimated at US\$24.9 billion.” William S. Cartwright, *Economic costs of drug abuse: Financial, cost of illness, and services*, 34

¹⁶ See National Drug Threat Assessment 2006, *The Impact of Drugs on Society*, NATIONAL DRUG INTELLIGENCE CENTER (2006), available at: <http://www.usdoj.gov/ndic/pubs11/18862/impact.htm>.

¹⁷ See National Drug Threat Assessment 2006, *The Impact of Drugs on Society*, NATIONAL DRUG INTELLIGENCE CENTER (2006), available at: <http://www.usdoj.gov/ndic/pubs11/18862/impact.htm>; Robert Kaestner & Michael Grossman, *The Effect of Drug Use on Workplace Accidents*, 5 LABOUR ECONOMICS (3), 267-94 (Sept. 1998).

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224-33 (March 2008).

This Court has long recognized the dangers of illicit drug use in the work place. “An idle locomotive, sitting in the round-house, is harmless. It becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs.” *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 628 (1989) (quoting *Railway Labor Executives Ass’n v. Burnley*, 839 F.2d 575, 593 (9th Cir. 1988)). As a result, the Court endorsed drug testing to further the governmental interest of deterring illicit drug use by engineers and trainmen in *Skinner*. *Id.*

The Court has further acknowledged the detrimental effect of illegal narcotics on society in the context of permitting drug testing in public schools for participants in extracurricular activities. *See Board of Educ. v. Earls*, 536 U.S. 822, 839-840 (2002) (Breyer, J. concurring) (“[T]he drug problem in our Nation’s schools is serious in terms of size, the kinds of drugs used, and the consequences of that use both for our children and the rest of us.”); *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995) (“Detering drug use by our Nation’s schoolchildren is at least as important as enhancing efficient enforcement of the Nation’s laws against the importation of drugs.”).

In addition to the economic and social consequences, illicit drug use has a direct effect on the amount of crime in the United States. On the one hand are “drug specific” crimes “such as sales, manufacturing and possession of illicit drugs,” responsible for incarceration of about 330,000 persons in 2002. *Economic Costs of Drug Abuse in the U.S. 1992-2002*, Executive Summary, ONDCP at xi. On the other hand are income generating crimes, such as larceny and burglary, one quarter to one third of

which can be attributed to drug dependent individuals who commit them “in order to finance expensive drug addictions.” *Id.* at xi-xii. In 2002, these crimes resulted in another 135,000 incarcerations. *Id.* at xi.

The numbers of incarcerations for drug specific and income generating crimes indicate that law enforcement plays a significant role in combating the sale and distribution of illegal narcotics as well as its collateral consequences. Specifically, in the jurisdictions of *amici* alone, more than 91,627 prosecutions for the possession, possession with intent to distribute, distribution, and trafficking in illegal narcotics were initiated in 2007. *See* Statements of Interest of *Amici Curiae*, *supra* at 1-8. On the federal level, law enforcement officers over the past five years, have seized 476 tons of cocaine, 3.5 tons of heroin, and 1,192 tons of marijuana.¹⁸ In 2007 alone, 96.7 tons of cocaine, 0.6 tons of heroin, and 356 tons of marijuana were seized.¹⁹ These drugs would otherwise be sold and used in the United States. Because many street level drug dealers are themselves heavy users, their arrests can also result in court-ordered drug treatment and a chance to “break free from drug addiction.” 2008 NAT. DRUG CONTROL STRATEGY ANN. REP., at 39. Law enforcement agencies throughout the United States, including *amici* and the police departments with whom they cooperate, therefore, fulfill their statutory and constitutional duties, which charge them with enforcing the criminal laws in their respective jurisdictions and with pursuing justice in all cases under their oversight. Statements of Interest of *Amici Curiae*, *supra* at 1-8.

¹⁸ <http://www.usdoj.gov/dea/statistics.html#seizures>.

¹⁹ *Id.*

Recent data indicate that the efforts of law enforcement have a direct and palpable effect on the availability of drugs on the streets of the United States. *See, e.g.*, 2008 NAT. DRUG CONTROL STRATEGY ANN. REP., at 35 (“when domestic law enforcement efforts dismantled the world’s largest LSD production organization in 2000, the reported rate of past-year LSD use by young people plummeted – a drop of over two-thirds from 2002 to 2006”). From January to September 2007, “domestic and international law enforcement efforts have combined to yield a historic cocaine shortage on U.S. streets,” including in most of the jurisdictions represented by *amici* (Cleveland, Detroit, Memphis, St. Louis, Philadelphia, Boston, and Phoenix). 2008 NAT. DRUG CONTROL STRATEGY ANN. REP., at 35 & Fig. 16. This shortage, in turn, had a direct effect on society by sharply increasing the purchase price of cocaine, and by decreasing the number of positive workplace drug tests and emergency room admissions for cocaine in 2007. *Id.* at 35-36.

Under the scheme which Petitioner desires, the police and other law enforcement agencies would still be able to seize narcotics in the same fashion they currently do. Without any thrust of effective law enforcement behinds their efforts, they would be degraded, however, to mere collection agencies, their Stygian stable clearing converted to a Sisyphean task. Street level drug dealers and low-level distributors, on the other hand, would be able to operate with the assurance that they will rarely have to face the consequences of their actions. While some positive results may be felt for some time, generally, “prohibition without enforcement invites greater

drug use and harmful consequences.”²⁰ Under the system advocated by the Petitioner, the current practice of narcotics prosecutions, already strained logistically and financially, will face an insurmountable hurdle and come to a halt. The great cost to our communities will become painfully obvious and is sadly unnecessary.

The difficulties our communities face in enforcing the drug laws are well-chronicled. Petitioner seeks the addition of another one by advocating for an incidental benefit for a defendant in the form of live testimony by a drug analyst or chemist who, because of his or her tremendous work load and the routine nature of the tests performed, will not be able to remember the individual case. This Court has said before that this is not what the confrontation clause seeks to protect. “The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.” *Mattox v. United States*, 156 U.S. 237, 243 (1895).

The courts have indeed long recognized this problem and have adjusted the confrontation requirements accordingly. Indeed, within this context, the Framers intended flexibility and did not seek to sacrifice the interests of many in order to preserve incidental benefits for a few.

C. A Brief Historical Perspective

In *Crawford*, this Court reaffirmed that the confrontation clause should be understood and ap-

²⁰ Jonathan P. Caulkins et al., *How Goes the “War on Drugs”?: An Assessment of U.S. Drugs Programs and Policy*, RAND DRUG POLICY RESEARCH CENTER (2005), at 37.

plied as it was at the time the Constitution was adopted. *Crawford*, 541 U.S. at 43. In so doing, this Court recognized that certain exceptions to the hearsay rule did not violate the confrontation clause. *Id.* at 43-50. Nearly two centuries later, this Court is asked to ascertain whether that clause bars the admission of a certificate that sets forth the result of certain empirical tests, namely, the weight and character of a substance. *See* Mass. G.L. c. 111, § 13.

The Petitioner asserts that this statute and similar statutes that permit the use of a chemist's certificate as evidence without the need for the chemist's live testimony was the result of this Court's decision in *Ohio v. Roberts*, 448 U.S. 56 (1980). Br. of Pet'r, p. 3. To give but one example, Petitioner's claim has no historical support in the statutory laws of the Commonwealth of Massachusetts, which have mandated the analyses of alcohol and controlled substances, and have permitted their introduction without live witnesses, since 1875 and 1910, respectively. *See* St. 1875, c. 99, § 21 (analysis in conjunction with licensing boards assuring quality of liquors); St. 1882, c. 221, §§ 55, 56, 57, 58 (use of certificates of analysis of alcohol in forfeiture proceedings); St. 1910, c. 495, §§ 1-3 (testing and certification of cocaine). *See also* 42 Pa. Cons. Stat. § 6108 (1978); *prior enactments*: 28 Pa. Stat. §§ 91a, 91b, and 91d (1939); 28 Pa. Stat. § 63 (1897); 28 Pa. Stat. §§ 107 to 109 (1883).

Over a century ago, much closer in time to the adoption of the Constitution, the Massachusetts Supreme Judicial Court answered a similar challenge to the admissibility of such certificates without the testimony of the assayist or chemist who conducted the test in the negative. *Commonwealth v. Stoler*, 156 N.E. 71, 72-73 (Mass. 1927) (certificates of alcohol content admissible without testimony of assayer

or chemist in prosecution for keeping and exposing for sale of alcohol; noting prior cases had all made use of state assayer or his assistant as a witness). Similarly, the Supreme Judicial Court decided several years prior to *Stoler* that the statute permitting the admission of the certificates without a live witness did not violate the confrontation clause. *Commonwealth v. Slavski*, 140 N.E. 465 (Mass. 1923). The *Slavski* court rightly viewed the certificates as public records of the nature permitted in evidence at the time the Constitution was adopted. *Id.* at 468-69. It is worth noting that Massachusetts jealously guards the confrontation rights of criminal defendants, and that the Declaration of Rights is careful to provide for a face to face confrontation with the accused in open court. Massachusetts Declaration of Rights, article 12. *See Commonwealth v. Amirault*, 677 N.E.2d 652, 660-64 (Mass. 1997). The certificates at issue in the present case, therefore, rightly fall under the general principles of the public records exception to the confrontation clause.

Perhaps more significantly, as a matter of common law, the use of public records as proof of facts in criminal cases was well established at the time the Constitution was adopted. Indeed, the primary purpose for making and keeping these public records was to enforce property rights and to prosecute criminal cases. The *Slavski* Court was careful to enumerate quite extensively the variety and scope of the public records that were admissible after the adoption of the Constitution. *Slavski*, 140 N.E. at 468-69. The Respondent discusses, by way of analogy, coroner's reports. Br. of Resp't, pp. 57-59.

Another example of the application of the admissibility of public records in criminal prosecutions is the use of registries of marriage, which were admitted in a variety of cases, including adultery, bi-

gamy, bastardy, and criminal conversation. The use of the public records has been reported and approved in many jurisdictions. See, e.g., *Williams v. State*, 54 Ala. 131, 134-36 (Ala. 1875) (reviewing Alabama law and noting that parole evidence and certificate of marriage both admissible as proof in criminal and civil cases); *State v. Potter*, 52 Vt. 33, 38-39 (Vt. 1879) (town clerk record of marriage admissible by statute, weight for the jury); *People v. Stokes*, 12 P. 71, 72 (Cal. 1886) (recorded marriage certificate admissible in adultery prosecution); *State v. Schwietzer*, 18 A. 787, 787-88 (Conn. 1889) (marriage certificate admissible in criminal failure to support prosecution); *State v. Behrman*, 19 S.E. 220, 222-23 (N.C. 1894) (authenticated copy of marriage certificate admissible in criminal prosecution); *Stark v. Johnson*, 95 P. 930, 931 (Colo. 1908) (certified copy of marriage register is admissible as direct evidence).

In fact, shortly after the ratification of the confrontation clauses of both the federal and Massachusetts constitutions, the Massachusetts Supreme Judicial Court noted that a clergyman's record of marriage would be admissible in a criminal prosecution for lewd and lascivious association and cohabitation to prove the fact of marriage. *Commonwealth v. Littlejohn*, 15 Mass. 163 (1818). Shortly before, the Court had noted in a prosecution for adultery that the statutory requirement for recording marriages was intended to preserve evidence of the fact of marriage, but that the record was not sufficient to prove that the person married was the same as the person subsequently accused of adultery with another. *Commonwealth v. Norcross*, 9 Mass. 492, 493 (1813). Public records thus were admissible in criminal cases as proof of historical facts and the legal status of persons, but were not sufficient to prove that the accused was one and the same as the person

named in the record. *See generally* THOMAS STAR-
KIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE
AND DIGEST OF PROOFS IN CIVIL AND CRIMINAL PRO-
CEEDINGS (Boston, Wells and Lilly 1826);) 2 S.
MARCH PHILLIPPS, A TREATISE ON THE LAW OF EVI-
DENCE § III (5th ed. 1822. A drug analysis certificate
likewise records a historical observation of an event
or fact, but does not make any assertion about the
identity of the person who had possession of or used
the substance at the time of the alleged crime. The
certificate at bar merely states an empirical fact, and
is useful only in conjunction with eyewitnesses, sub-
ject to confrontation, who can accuse the defendant
as the person who possessed or controlled the sub-
stance tested.²¹

An adverse ruling in this case will call into
question the admissibility of these and other public
records without live testimony. The right to cross-
examination of the accuser is preserved in drug
prosecutions today by the confrontation of the identi-
fying police officers or other witnesses who must es-
tablish that the defendant at bar engaged in crimi-
nal conduct by possessing or using a controlled
substance. The public record made and kept of the

²¹ Furthermore, a police officer with sufficient experience may
also offer his personal opinion that a particular material is co-
caine or some other controlled substance, while the defendant's
identification will always remain an issue subject to testimony
and cross-examination. *See Commonwealth v. Dawson*, 504
N.E.2d 1056, 1057-58 (Mass. 1987); *accord United States v.*
Harrell, 737 F.2d 971, 978-79 (11th Cir. 1984); *United States v.*
Scott, 725 F.2d 43, 45-46 (4th Cir. 1984); *United States v. No-*
lan, 718 F.2d 589, 593-94 (3d Cir. 1983); *United States v.*
Clark, 613 F.2d 391, 406 (2d Cir. 1979); *Howard v. State*, 496
P.2d 657, 660-61 (Alaska 1972); *Pettit v. Indiana*, 281 N.E.2d
807, 807 (Ind. 1972); *State v. Johnson*, 196 N.W.2d 717, 719
(Wis. 1972).

nature of the substance is admissible today, just as the records of marriage and similar facts have always been admissible in criminal prosecutions.

CONCLUSION

For the foregoing reasons, as well as those stated in Respondent's brief, the decision of the Massachusetts Appeals Court should be affirmed.

Respectfully submitted,

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