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 FOR RESPONDENT

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QUESTION PRESENTED

During Petitioner's trial on drug charges, the Commonwealth introduced certificates establishing the composition and weight of the drugs. The certificates did not accuse Petitioner of criminal conduct, and were prepared by a state laboratory in the regular course of its business as required by statute. Petitioner had multiple opportunities to challenge the certificates and cross-examine the analysts but strategically elected not to do so. Did admission of the certificates violate Petitioner's Sixth Amendment confrontation rights?

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STATEMENT OF THE CASE

1. A Massachusetts jury convicted Petitioner of distributing cocaine and trafficking in 14 grams or more of cocaine in violation of Mass. Gen. Laws ch. 94C, § 32A and § 32E(b)(1). Petitioner and his codefendant, Ellis Montero, sold cocaine to Thomas Wright, a K-Mart store employee whose suspicious short absences from the store triggered the police investigation that led to Petitioner's arrest. Appendix to Petition ("App.") 1a-2a, 6a-7a. Two batches of cocaine were at issue. App. 3a n.1, 4a n.2. The first batch consisted of 4 bags of cocaine that the arresting officer, Detective Robert Pieroway, seized from Wright after he exited the car driven by Montero and Petitioner. App. 3a. The second batch consisted of 19 bags of cocaine that the police found in the backseat area of the police cruiser used to transport Petitioner, Montero, and Wright following their arrests. App. 4a.

In accordance with Mass. Gen. Laws ch. 111, §§ 12-13, the police submitted both batches of cocaine to the state Department of Public Health for analysis. Section 12 requires the Department to "make . . . a chemical analysis of any narcotic drug . . . when submitted to it by police authorities . . . provided, that it is satisfied that the analysis is to be used for the enforcement of law." Section 13, in turn, provides that an "analyst or an assistant analyst of the department . . . shall upon request furnish a signed certificate, on oath, of the result of the [chemical] analysis [of a narcotic drug submitted to it by police authorities]." The certificate must be

sworn and contain a statement identifying the subscriber as an analyst or assistant analyst of the department. *Id.*

These statutes are intended "to simplify proof of chemical analyses performed routinely and accurately by a public agency and to reduce court delays and the inconvenience of having busy public servants called as witnesses" in every case where drug analysis evidence is presented. *Commonwealth v. Johnson*, 589 N.E.2d 328, 330 (Mass. App. Ct. 1992). When the statutory requirements are met, the certificate is "admissible only as prima facie evidence of the composition . . . and weight of the substance . . . , which a defendant may rebut if he doubts its correctness. . . ." *Commonwealth v. Verde*, 827 N.E.2d 701, 705 (Mass. 2005).

As *prima facie* evidence, the certificate "carries no particular presumption of validity." *Commonwealth v. Berrio*, 687 N.E.2d 644, 645 (Mass. App. Ct. 1997). Rather, "the weight to be accorded [it] is a matter left entirely to the jury's discretion." *Id.* The jury, if it so chooses, may disregard the certificate entirely, even when no contrary evidence is presented. *Id.* at 646.

2. Prior to trial, the Commonwealth provided Petitioner with copies of the certificates prepared in connection with the cocaine seized from Wright and the backseat area of the cruiser. *See* Joint Appendix ("J.A.") 5. Petitioner did not seek to rebut the correctness of the certificates, although he had the right to do so. *See Verde*, 827 N.E.2d at 705. He did

not, for instance, seek any discovery concerning the testing methods underlying the certificates or the qualifications of the analysts who performed the testing, as he could have pursuant to Mass. R. Crim. P. 14. Nor did he seek any funds to pay for his own independent chemical analysis, as authorized by Mass. R. Crim. P. 41 and Mass. Gen. Laws ch. 261, § 27B. In addition, Petitioner did not request a pre-trial evidentiary hearing to challenge the validity of the testing methods used in preparing the certificates or the qualifications of the analysts who prepared the certificates, even though Massachusetts law provides a procedure for doing so. *See Commonwealth v. Patterson,* 840 N.E.2d 12, 28-29 (Mass. 2005). Above all, Petitioner did not subpoena the analysts to appear at trial, as Mass. R. Crim. P. 17 permits.

Petitioner did none of these things because his overall trial strategy was not to dispute the composition or weight of the drugs, but to persuade the jury that there was no evidence directly linking him – as opposed to Wright or Montero – to the cocaine. *See* J.A. 11, 43-48. Petitioner's counsel argued in closing: "[T]he amount of drugs isn't in question. What is in question is who possessed those drugs." J.A. 47; *see also* J.A. at 11 (defense opening statement: the "whole issue in the case" is who possessed the drugs). The composition and weight of the drugs, in short, were not contested issues at Petitioner's trial.

Consistent with this strategy, Petitioner failed to object to testimony establishing both the

composition and weight of the 4 bags of cocaine recovered from Wright. Wright, for instance, told Pieroway that "he had four bags of cocaine on his person." App. 3a; J.A. 35. Pieroway, an experienced drug enforcement officer who had seen cocaine similar to this "in excess of two thousand times during his career," testified that each of the 4 bags contained "at least" a gram of cocaine. J.A. 26-27. Sergeant Detective Paul Murphy, a veteran police officer with more than 19-years experience and an expert on street-level drug dealing, likewise testified that the 4 bags were all "about the same size" and appeared to contain the "same amount of cocaine." J.A. 11, 17-20, 28.

Petitioner also neither disputed nor objected to testimony that the 19 bags recovered from the backseat area of the cruiser contained cocaine and were "identical" to the cocaine seized from Wright. J.A. 33-34, App. 5a. Pieroway, for instance, testified that, after Petitioner, Montero, and Wright got out of the cruiser, a police officer found "a plastic bag that contained [19] plastic bags of cocaine" in the area where they were sitting. J.A. 31.[1] Murphy similarly testified that the 19 bags each contained about the same amount of cocaine as the 4 bags seized from

[1]On cross-examination, Pieroway appeared to acknowledge that, apart from the laboratory reports, he had no "real knowledge" of what was in the bags. J.A. 35. This concession, however, reflected merely that Pieroway's testimony that the bags each contained about a gram of cocaine was based not on any scientific analysis, but on his training and experience as a narcotics officer. *See* J.A. 26-27.

Wright. J.A. 18-20. Another police officer likewise testified that the 19 bags contained "drugs," J.A. 37, which his partner identified as "cocaine." J.A. 40.

In addition to this direct testimony establishing the composition and weight of the drugs, the Commonwealth presented circumstantial evidence as well. At the time of Petitioner's arrest, cocaine was "packaged primarily in plastic bags, a corner of a sandwich bag . . . and the amount [was] put in there and wrapped and knotted and cut off." J.A. 17, 34. The packaging of the cocaine recovered from Wright and the backseat area of the cruiser was consistent with how cocaine ordinarily was packaged for sale. J.A. 33-34.

Murphy further testified, based on his experience in conducting hundreds of drug surveillance operations, that drug dealers operating at the time of Petitioner's arrest frequently conducted their transactions in cars to avoid detection. J.A. 12-16. The dealers would pick up the buyer in their car and then "take basically a meaningless ride" for a short distance to complete the transaction. J.A. 14-15. Petitioner and Montero's sale to Wright fit this pattern. App. 1a-4a.

Drug dealers, at the time of Petitioner's arrest, also often relied on pagers and cell phones to maintain contact and arrange drug sales. J.A. 15-16. And, following their arrest, police often found that dealers possessed cash in a variety of denominations. J.A. 16. During the booking process, police recovered two cell phones and $301 from Montero,

and a pager and $157 from Petitioner. App. 4a. In addition, police found $320 on the ground outside the cruiser – "the same amount that Wright had paid for his purchase of the [4] bags of cocaine. . ." *Id.* at 4a-5a.

3. Notwithstanding this substantial, uncontested evidence establishing the composition and weight of the drugs recovered from Wright and the backseat area of the cruiser, Petitioner's counsel objected, merely mentioning "*Crawford [v.] Washington*" without explanation, when the prosecutor asked Pieroway the results of analysis conducted on the bags. J.A. 29, 32. The judge overruled the objection and admitted the certificates. *Id.*; App. 24a-29a. The certificates confirmed that the 4 bags recovered from Wright contained 4.75 grams of cocaine, J.A. 30; App. 24a-27a, and that the 19 bags recovered from the backseat area of the cruiser contained 22.16 grams of cocaine. J.A. 32, App. 28a-29a.

In preparing drug analysis certificates, the Department of Public Health follows the methodology recommended by the Scientific Working Group for the Analysis of Seized Drugs ("SWGDRUG").[2] In this Court, Petitioner relies on SWGDRUG's recommendations to contend that drug

[2] *See* Letter of Julianne Nassif, Director, Division of Analytical Chemistry, Executive Office of Health and Human Services, Massachusetts Department of Public Health, to David J. Nathanson, Esq. (May 30, 2008) (reproduced in Petr.'s Br. App. 1a-2a).

analysis is "hardly a simple, objective or foolproof enterprise," and he relies on outdated sources, including a 32-year old study, to suggest that testing errors are pervasive. Petr.'s Br. at 31-33. Because he failed to contest the composition or weight of the drugs at trial, however, the record is silent as to the precise testing techniques used by the laboratory.

Had Petitioner sought to challenge the Department's drug analysis, the Commonwealth would have responded with detailed explanations of the analysis' validity. Contrary to Petitioner's suggestions in this Court, commonly-used testing techniques enjoy broad scientific acceptance. For instance, gas chromatography/mass spectrometry ("GC/MS") is one of the most common specific (Category A) techniques recommended by SWGDRUG. See 2 P. Giannelli & E. Imwinkelried, *Scientific Evidence*, § 23.03[c] (4th ed. 2007); SWGDRUG Recommendations 14 (3d ed. 2007), *available at* http://www.swgdrug.org/approved.htm.

The GC/MS technique is the "gold standard" in chemical analysis. *Goebel v. Warner Transp.*, 612 N.W.2d 18, 22 (S.D. 2000); E. Imwinkelried, *Should the Courts Incorporate a Best Evidence Rule Into the Standard Determining the Admissibility of Scientific Testimony?*, 50 Case W. Res. L. Rev. 19, 31-32 (1999). The suspected drugs are separated from other components that may be present in the sample and then bombarded by small particles, causing disintegration of the drug molecule into smaller fragments. *See* 2 P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 23.03[c]. "The

identity of the original chemical can be confirmed by computerized analysis of the fragmentation pattern with essentially 100% accuracy." D. Greenblatt, M.D., *Urine Drug Testing: What Does it Test?*, 23 New Eng. L. Rev. 651, 655 (1988-89); *see also Taylor v. O'Grady*, 888 F.2d 1189, 1192 n.4 (7th Cir. 1989) ("surveys have rated [the GC/MS] as nearly infallible"). Indeed, this Court has described GC/MS analysis as "highly accurate." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672 n.2 (1989).[3]

Although Petitioner alleges that the prosecutor "emphasized" the significance of the drug analysis certificates in his closing argument, *see* Petr.'s Br. 8, the prosecutor, in fact, referred to the certificates only twice, and then only briefly. *See* J.A. 48-58. He noted that the 4 bags of cocaine seized from Wright had been "analyzed as such" and, even more indirectly, that the cocaine recovered from the backseat area of the cruiser weighed 22.16 grams. J.A. 50. Consistent with his strategy throughout trial, Petitioner failed to object to these fleeting comments. *Id.*

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[3]Relying on a public records response that is not part of the state-court record, Petitioner states that the Department's laboratory is not accredited by any external organization. *See* Petr.'s Br. at 6 & n.1. But, neither SWGDRUG nor any other professional association requires accreditation for drug analysis. *See* Brief of Amici Curiae National Association of Criminal Defense Lawyers, et al. ("Amici NACDL Br.") at 8. Instead, any accreditation is purely voluntary.

The judge instructed the jury that, in considering whether Petitioner was guilty of trafficking in cocaine, the drug analysis certificates should be considered "with all other evidence in deciding whether or not the Commonwealth ha[d] met its burden of proving that this was, in fact, cocaine." J.A. 59. The judge cautioned, however, that "from that certificate of analysis *you're permitted but you're not required to conclude that the substance was cocaine*. *It is entirely up to you to decide*." *Id.* (emphasis added). Shortly thereafter, the judge provided a substantively similar instruction in connection with the distribution charge. J.A. 61. The jury convicted Petitioner on both counts. App. at 1a.

4. On appeal, Petitioner argued that admission of the drug analysis certificates was contrary to *Crawford v. Washington*, 541 U.S. 36 (2004). *Id.* The Massachusetts Appeals Court rejected this argument because the state's highest court previously held that "certificates of drug analysis did not deny a defendant the right of confrontation and were, therefore, not subject to the holding in *Crawford*. . . ." *Id.* at 8a n.3 (citing *Verde*, 827 N.E.2d at 705).

In *Verde*, the Massachusetts Supreme Judicial Court explained that drug analysis certificates had "very little kinship to the type of hearsay the confrontation clause intended to exclude, absent an opportunity for cross-examination." *Verde*, 827 N.E.2d at 706. Instead, certificates were "well within the public records exception to the

confrontation clause" and akin to the types of business records that *Crawford* "stated [were] not testimonial in nature." *Id.* at 705-06.

SUMMARY OF ARGUMENT

A. The vast majority of courts have correctly concluded that laboratory reports, like the drug analysis certificates here, are nontestimonial and, thus, not subject to the Confrontation Clause. These reports differ from the types of testimonial statements this Court has held are the Confrontation Clause's core concern in two significant respects.

First, they are not accusatory. The history and purpose of the Confrontation Clause establish that its focus is on out-of-court statements accusing the person now on trial, *i.e.,* "the accused," of having engaged in criminal wrongdoing. This accusatory focus is reflected in the Sixth Amendment's text and all of the Court's prior Confrontation Clause decisions. It is decidedly lacking here because drug analysis certificates do not accuse anyone of anything criminal; instead, they merely establish the current physical composition and weight of a chemical substance. These neutral, objective facts become inculpatory only when a testifying witness, who is properly subject to confrontation, provides the necessary evidentiary links to connect the substance tested in the laboratory to the accused's past criminal conduct.

Second, drug analysis certificates do not implicate the "principal evil" the Confrontation Clause was designed to avoid: the "use of *ex parte* examinations as evidence against the accused." *Crawford,* 541 U.S. at 50. The Clause prohibits the government's use of hearsay statements documenting a witness's subjective observations of a defendant's past criminal conduct. Those concerns are inapplicable where, as here, the hearsay statement is not the product of any official examination and merely reports the results of objective, and largely mechanical, scientific testing performed by a state laboratory as required by law.

B. Admission of drug analysis certificates without live testimony is further supported by the common law's treatment of official and business records, including coroner's reports. In *Crawford*, the Court indicated that because these exceptions were established at the time of the founding and were nontestimonial by nature, no confrontation right attached to the admission of these records. *See Crawford*, 541 U.S. at 54, 56.

Drug analysis certificates are well within the common law official records exception because they are prepared by state officials pursuant to a duty imposed by law. In addition, the certificates are akin to types of business records generally admissible at common law because they are prepared in the ordinary course of the laboratory's day-to-day business. *Id.*

The treatment of coroners' reports at common law is illustrative. Like a coroner's report, which sets forth the coroner's findings about the physical condition of a decedent's body, a drug analysis certificate reports the analyst's findings about the physical state of a chemical substance. A coroner's findings about the physical condition of the body did not trigger confrontation rights at common law, and the same should hold true for an analyst's findings about the physical state of a chemical substance.

C. Even if the drug analysis certificates were deemed testimonial, no confrontation violation exists here because Petitioner had multiple opportunities to challenge the validity of the certificates and cross-examine the analysts, but strategically elected not to do so. An absolute rule requiring live testimony in every case where drug analysis is performed would be particularly nonsensical given that in the vast majority of drug cases – Petitioner's included – the test results are not even contested. Compulsory process and other available state-law procedures are fully adequate to ensure that those defendants who genuinely desire to challenge the validity of test results may do so, with only minimal burden.

D. In all events, if admission of the drug analysis certificates without live testimony be held to have violated Petitioner's confrontation rights, the state courts should be permitted to determine in the first instance whether the error was harmless beyond a reasonable doubt. A remand on this limited basis is amply supported by the record.

ARGUMENT

The "vast majority" of courts have concluded, like the Massachusetts courts here, that laboratory reports are nontestimonial. *See* M. Graham, *Crawford/Davis "Testimonial" Interpreted, Removing the Clutter; Application Summary*, 62 U. Miami L. Rev. 811, 836 (2008).[4] Although no single rationale has been adopted, the emerging consensus

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[4]*See, e.g., United States v. De La Cruz*, 514 F.3d 121, 133-34 (1st Cir.) (autopsy), *petition for cert. filed*, 77 U.S.L.W. 3009 (U.S. June 23, 2008) (No. 07-1602); *United States v. Feliz*, 467 F.3d 227, 237 (2d Cir. 2006) (autopsy), *cert. denied*, 127 S. Ct. 1323 (2007); *United States v. Washington*, 498 F.3d 225, 229-30 (4th Cir.) (drug-alcohol analysis), *petition for cert. filed*, No. 07-8291 (U.S. Dec. 14, 2007); *United States v. Ellis*, 460 F.3d 920, 926-27 (7th Cir. 2006) (blood-urine); *Pruitt v. State*, 954 So.2d 611, 616 (Ala. Crim. App. 2006) (marijuana and cocaine); *People v. Geier,* 161 P.3d 104, 140 (Cal.) (DNA), *petition for cert. filed*, No. 07-7770 (U.S. Nov. 14, 2007); *People v. Johnson*, 18 Cal. Rptr. 3d 230, 233 (Cal. Ct. App. 2004) (cocaine); *State v. Musser*, 721 N.W.2d 734, 753-54 (Iowa 2006) (HIV); *Verde*, 827 N.E.2d at 706 (cocaine); *State v. O'Maley*, 932 A.2d 1, 13-14 (N.H.) (blood alcohol), *petition for cert. filed,* No. 07-7577 (U.S. Nov. 7, 2007); *State* v. *Dedman*, 102 P.3d 628, 636 (N.M. 2004) (blood alcohol); *People v. Rawlins*, 884 N.E.2d 1019, 1035 (N.Y.) (DNA), *petition for cert. filed*, No. 07-10845 (U.S. May 9, 2008); *State v. Forte*, 629 S.E.2d 137, 143 (N.C.) (DNA), *cert. denied*, 127 S. Ct. 557 (2006); *State v. Cao*, 626 S.E.2d 301, 305 (N.C. Ct. App. 2006) (cocaine); *State v. Crager*, 879 N.E.2d 745, 754 (Ohio 2007) (DNA), *petition for cert. filed*, No. 07-10191 (U.S. Mar. 26, 2008); *State v. Craig*, 853 N.E.2d 621, 638 (Ohio 2006) (autopsy), *cert. denied*, 127 S. Ct. 1374 (2007); *State v. Malott*, Nos. 2007-02-006-8, 2008 WL 1932428, at *2 (Ohio Ct. App. May 5, 2008) (cocaine); *State v. Cutro*, 618 S.E.2d 890, 896 (S.C. 2005) (autopsy); *Campos v. State*, 256 S.W.3d 757, 762-66 (Tex. Ct. App. 2008) (autopsy and DNA); *Denoso v. State*, 156 S.W.3d 166, 180-82 (Tex. Ct. App. 2005) (autopsy).

is that laboratory reports differ in two important respects from the sort of testimonial statements the Confrontation Clause was designed to address. First, laboratory reports do not accuse any individual of criminal conduct but merely record the results of objective, scientific testing. Second, laboratory reports do not implicate the historic evil the Confrontation Clause was designed to prevent but, instead, are prepared by state officials in the regular course of the laboratory's business pursuant to a duty imposed by law. *See* Part A *infra*. In this respect, laboratory reports are precisely the sort of official or business records that were admissible without confrontation at the time of the founding. *See* Part B *infra*. And, even if these records were deemed testimonial, here Massachusetts law afforded Petitioner ample alternative means for obtaining cross-examination, without resort to an absolute rule requiring the needless production of live testimony in every case where drug analysis is presented. *See* Part C *infra.*

A. Drug analysis certificates are nontestimonial and do not implicate the principal evil the Confrontation Clause was intended to prevent.

The Sixth Amendment secures a criminal defendant's right to confront "the witnesses against him." U.S. Const. amend. VI. The Court has consistently rejected an absolutist reading of this language as covering every possible statement that might be relevant to a criminal case. *See, e.g., Davis v. Washington*, 547 U.S. 813, 821 (2006); *Idaho v. Wright*, 497 U.S. 805, 813 (1990). Rather, to define

the core meaning and reach of the Confrontation Clause, the Court has looked to the history surrounding its adoption. *Crawford*, 541 U.S. at 43-50.

Based on this historical record, the Court concluded that the "principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. . . ." *Id.* at 50. It stressed that the "Sixth Amendment must be interpreted with this focus in mind[,]" and that the Confrontation Clause reflects an "especially acute concern with a specific type of out-of-court statement." *Id.* That concern is "[o]nly" with "testimonial" statements that cause a declarant to be a witness against the accused. *Davis,* 547 U.S. at 814, 821; *see also White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring) (the Confrontation Clause was aimed "only" at a "discrete category" of "formalized testimonial materials" and should "not be construed to extend beyond the historical evil to which it was directed").

The Court has declined to "spell out a comprehensive definition of 'testimonial,'" *Crawford*, 541 U.S. at 68, or "produce an exhaustive classification of all conceivable [testimonial] statements" subject to confrontation. *Davis*, 547 U.S. at 822. But, "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Crawford*, 541 U.S. at 68. It is these "modern practices," the

Court explained, that have the "closest kinship to the abuses at which the Confrontation Clause was directed." *Id.*

In *Davis*, the Court elaborated that a statement is "testimonial" when its "purpose . . . [is] to nail down the truth about past criminal events." *Davis*, 547 U.S. at 830. Where, in contrast, a statement describes current events and is made to obtain emergency or medical assistance, the statement is nontestimonial. *See id.* at 827-30.

Crawford and *Davis*, therefore, counsel that the determination of whether a particular statement is testimonial and, thus, subject to confrontation is highly dependent on the context in which the statement was made. Although the relevant factors may vary depending on the particular circumstances involved, two factors are controlling here: drug analysis certificates are neither accusatory nor prepared in a manner resembling the historic evil the Confrontation Clause was designed to avoid. *See Rawlins*, 884 N.E.2d at 1033.

1. **Drug analysis certificates are nontestimonial because they merely establish the physical nature of a substance and do not accuse anyone of wrongdoing.**

Drug analysis certificates like the ones introduced in Petitioner's trial merely attest to the chemical composition and weight of physical evidence. These facts are entirely neutral and do not

directly accuse anyone of any criminal conduct. The source of the accusation against the defendant is not the analyst, but other witnesses who testify about the historical facts linking the substance that was tested in the laboratory to the person now on trial. Confrontation is required for these accusers, but not for the analyst, who makes no accusation at all.

Although *Crawford* did not expressly state that the distinction between a testimonial and nontestimonial statement turns on whether the statement is accusatory, that condition is implicit in the Court's decision. The Court referred repeatedly to the right of the accused to confront his accusers.[5] In addition, in explaining the "principal evil" the Confrontation Clause was intended to avoid, the Court quoted an early treatise on criminal law, which described the Confrontation Clause's origins in unmistakably accusation-based terms: "The proof [in criminal trials under early English law] was usually given by reading depositions, confessions of accomplices, letters, and the like; and this

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[5]*See, e.g., Crawford*, 541 U.S. at 43 ("The right to confront one's *accusers* is a concept that dates back to Roman times.") (emphasis added); *id.* at 44 ("Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear . . . 'Call my *accuser* before my face. . . .'") (emphasis added); *id.* at 47 ("Early in the 18th century, . . . the Virginia Counsel protested against the Governor for having 'privately issued several commissions to examine witnesses against particular men *ex parte*,' complaining that 'the person accused is not admitted to be confronted with, or defend himself against his defamers.'"); *id.* at 51 ("An accuser who makes a formal statement to government officers bears testimony. . . .").

occasioned frequent demands by the prisoner to have his *'accusers,' i.e., the witnesses against him*, brought before him face to face. . . ." 1 J. Stephen, *History of the Criminal Law of England* 326 (1883) (quoted in *Crawford*, 541 U.S. at 43) (emphasis added).

The Sixth Amendment's text itself supports an accusation-based focus. As one respected commentator has observed: the "modified repetition of the word *accused* [in the Sixth Amendment's speedy trial, right to counsel, confrontation, and compulsory process clauses] strongly confirms that the Sixth Amendment as a whole is *accusation-based*." A. Amar, *The Constitution and Criminal Procedure First Principles* 102-03 (1997) (emphasis in original). This same focus is reflected in the Confrontation Clause's text, which refers specifically to "witnesses against" the accused, not any "witness with relevant testimony."

The limited history surrounding adoption of the Confrontation Clause provides further support for an accusation-based focus.[6] By inserting the phrase "witnesses against him" in the final version of the Clause, the Framers "intended to permit the defendant to confront both all those who in fact

[6] *Cf. White*, 502 U.S. at 359 (Thomas, J., concurring) ("[t]here is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean"); *California v. Green*, 399 U.S. 149, 173-74 (1970) (Harlan, J., concurring) ("[T]he Confrontation Clause comes to us on faded parchment.").

testified (witnesses) and also those who had made accusations against the defendant upon which the prosecution depended (accusers)." R. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. Ill. L. Rev. 691, 748 (1993); *see also* R. Jonakait, *"Witnesses" in the Confrontation Clause: Crawford v. Washington, Noah Webster, and Compulsory Process*, 79 Temp. L. Rev. 155, 181 (2006) (same); 30 C Wright & K. Graham, *Federal Practice and Procedure* § 6347 at 764 (1997) (same). In other words, "all witnesses who testify are subject to the clause." R. Mosteller, 1993 U. Ill. L. Rev. at 749. But, not all declarants whose out-of-court statements are offered against a defendant are "witnesses against him," because that status is limited to those who make accusations against the accused. *Id.*; K. Graham, *Confrontation Stories: Raleigh on the Mayflower*, 3 Ohio St. J. Crim. L. 209, 220 (2005) ("[T]he Founders wanted a right to confront not only the 'witnesses' who appeared at trial but the 'accusers' who lurked in the shadows.").

The Court's pre-*Crawford* Confrontation Clause decisions reflect this same focus on out-of-court accusations. In *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988), for instance, the Court stressed that the Confrontation Clause's focus is on forcing accusers to deliver their charges against the accused face-to-face. Shakespeare, the Court noted, was "describing the root meaning of confrontation when he had Richard the Second say: 'Then call them to our presence – face to face, and frowning brow to brow, ourselves will hear the accuser and the accused

freely speak. . . .'" *Id.* (citation omitted); *see also id.* at 1026 (Blackmun, J., dissenting; emphasis added) ("the essence of the right protected is the right to be shown that the *accuser* is real and the right to probe *accuser* and *accusation* in front of the trier of fact"). Similarly, in *Lee v. Illinois*, 476 U.S. 530, 540 (1986), the Court held that the Confrontation Clause's core purpose is to "promote to the greatest possible degree society's interest in having the accused and accuser engage in an open and even contest in a public trial." The Confrontation Clause advances this goal, the Court explained, "by ensuring that convictions will not be based on the charges of unseen and unknown – and hence unchallengeable – individuals." *Id.*; *see also Pennsylvania v. Ritchie*, 480 U.S. 39, 71 (1987) (Brennan, J., dissenting; emphasis in original) ("The right of a defendant to confront an accuser is intended fundamentally to provide an opportunity to subject *accusations* to critical scrutiny.").

The Court's prior decisions, therefore, establish that the only "charges" the Confrontation Clause was intended to guard against are out-of-court accusations that the person now on trial – "the accused" – committed a crime. *See* M. Graham, *Handbook of Federal Evidence*, § 802:2.2 (6th ed. Supp. 2008) (quoting *Webster's* definition of "accusation" as a "charge of wrongdoing, delinquency, or fault; the declaration containing such a charge"). In fact, all of the cases in which the Court has found a Confrontation Clause violation

involved just such paradigmatic accusatory statements.[7]

This interpretation of the Confrontation Clause is supported by decisions reached by an increasing number of state appellate courts, which have utilized a similar accusation-based focus in determining whether a particular out-of-court statement is testimonial or nontestimonial. *See, e.g.*, *Rawlins*, 884 N.E.2d at 1026 ("*ex parte accusatory* statements" are the "common nucleus" in *Crawford*'s various formulations of testimonial evidence); *Michels v. Commonwealth*, 624 S.E.2d 675, 678 (Va. Ct. App. 2006) ("the Confrontation Clause is aimed at protecting criminal defendants from those people making accusations against them"). Decisions from federal appeals courts support this focus as well. The Second Circuit, for instance, has succinctly

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[7]*See e.g., Crawford*, 541 U.S. at 40 (wife's statement rebutted husband's claim that stabbing was in self-defense); *Lilly v. Virginia*, 527 U.S. 116, 121 (1999) (accomplice's confession accused defendant of stealing guns during a robbery and using one of the guns to shoot victim); *Williamson v. United States*, 512 U.S. 594, 596 (1994) (accomplice's confession identified defendant as the "owner" of the cocaine he was charged with possessing); *Wright*, 497 U.S. at 809-11 (child victim accused petitioner of sexual abuse); *Lee*, 476 U.S. at 532-35 (nontestifying codefendant's confession accused defendant of playing leading role in double murder); *Bruton v. United States*, 391 U.S. 123, 124 (1968) (nontestifying codefendant's confession accused defendant of participating in armed robbery); *Douglas v. Alabama*, 380 U.S. 415, 417 (1965) (accomplice's confession accused defendant of being the person who fired shotgun); *Pointer v. Texas*, 380 U.S. 400, 401 (1965) (victim's statement identified defendant as the man who robbed him at gunpoint).

stated that "[t]he Confrontation Clause targets only that testimony that contains accusations against the defendant." *Ryan v. Miller*, 303 F.3d 231, 247 (2d Cir. 2002); *see also United States v. Beasley*, 438 F.2d 1279, 1281 (6th Cir.) (no right to confront fingerprint technician who did not accuse defendant of anything), *cert. denied*, 404 U.S. 866 (1971).

Scholarly commentators likewise agree that both the text and history of the Confrontation Clause support an accusation-based focus in determining whether a statement is testimonial.[8] Even some of the amici law professors, who have submitted a brief in support of Petitioner, acknowledge that the Confrontation Clause's history and purpose support an accusation-based focus.[9]

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[8] *See, e.g.,* M. Graham, 62 U. Miami L. Rev. at 829 ("The 'charge of wrongdoing' that the Confrontation Clause was designed to curb is an out-of-court declaration charging the accused . . . of having committed a crime."); 30A C. Wright & K. Graham, *Federal Practice and Procedure* § 6371.3 (Supp. 2007) (an accusation-based focus is "historically correct"); A. Torchin, *A Multidimensional Framework for the Analysis of Testimonial Hearsay under Crawford v. Washington*, 94 Geo. L. J. 581, 591 (2006) ("the Confrontation Clause is directed at a more specific type of testimonial hearsay – that of an accusatory witness"); T. Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. Fla. L. Rev. 863, 870-71 (1988) ("only witnesses who make statements that are directed against the defendant and that accuse him or her of wrongdoing must confront the defendant").

[9] *See, e.g.,* J. Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & Pol'y, 791, 848 (2007) ("[l]imiting the Confrontation Clause's operation to accusations . . . would not be inconsistent with the principles that underlie *Crawford*"); R. Mosteller, 1993 U. Ill. L.

A drug analysis certificate bears no resemblance to the types of accusations that historically have been the "core concern of the Confrontation Clause." *See* 30A C. Wright & K. Graham, *Federal Practice and Procedure* § 6371.2. An accusation "typically focuses" on historical facts, explaining "when, where, why, how, with whom, to whom, and so on." A. Amar, *Sixth Amendment First Principles*, 84 Geo. L. J. 641, 688 (1996); *see also Davis*, 547 U.S. at 822, 827-28 (statements "describing past events" are testimonial). Chemists who prepare drug analysis certificates have no knowledge of these historical facts. *See* M. Graham, 62 U. Miami L. Rev. at 837. Their job, instead, is to study the current physical state of a substance, confirming both its chemical composition and weight. *See* B. Morin, *Science, Crawford, and Testimonial Hearsay: Applying the Confrontation Clause to Laboratory Reports*, 85 B.U. L. Rev. 1243, 1258 (2005) (analysts study "faceless samples of physical evidence"). The certificates they prepare reflect only these objective or neutral facts. *See, e.g., O'Maley*, 932 A.2d at 14; *Rawlins*, 884 N.E.2d at 1031. They do not charge anyone with past criminal conduct and, thus, are not accusatory. *See Geier*, 161 P.3d at 140 ("'Records of laboratory protocols

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Rev. at 751 ("Limiting the clause to apply to those making accusations can be supported by the text and does not appear inconsistent with history."); R. Mosteller, *"Testimonial" and the Formalistic Definition –The Case for an "Accusatorial" Fix*, 20 Crim. Just. 14, 16-17 (2005) (history and purpose of the Confrontation Clause support an accusatorial focus).

followed and the resulting raw data acquired are not accusatory.'") (quoting *Forte*, 629 S.E.2d at 143).

The statements contained in drug analysis certificates become incriminating only when other witnesses subsequently link the substances that were tested to the particular charges against the accused. The Court, however, has distinguished between statements that are "'incriminating on [their] face'" and those that become so "'only when linked with evidence introduced later at trial.'" *Gray v. Maryland*, 523 U.S. 185, 191 (1998) (quoting *Richardson v. Marsh*, 481 U.S. 200, 208 (1987)). Confrontation is required for the former but not the latter. *Id.*

In this case, Detective Pieroway was the principal witness who established that the cocaine tested in the laboratory was, in fact, the same cocaine that Petitioner was accused of trafficking and distributing. Pieroway — not the lab analysts — provided the historical facts linking Petitioner to the crimes by supplying the jury with answers to the questions "when, where, why, how, with whom, to whom, and so on." *See* A. Amar, 84 Geo. L. J. at 688. Pieroway, of course, testified at trial and, thus, was subject to cross-examination. The Confrontation Clause requires nothing more. *See, e.g., Geier*, 161 P.3d at 140 ("the accusatory opinions in this case – that defendant's DNA matched that taken from the victim's vagina . . . were reached and conveyed not through the nontestifying technician's laboratory notes and report, but by the testifying witness").

California v. Trombetta, 467 U.S. 479, 490 (1984) – a case cited by Petitioner – is in full accord. *See* Petr.'s Br. at 12. There, the police officer personally administered an Intoxilyzer breath test to a suspected drunk driver. *Trombetta*, 467 U.S. at 482. The breath test established that, at the time of his arrest, defendant had a blood-alcohol level over the legal limit. *Id.* Unlike the lab analysts here, the police officer in *Trombetta* did not merely report the results of a neutral scientific test but, instead, provided affirmative testimony linking those test results to an identified accused. *See id.* at 482, 490. Because the officer was an accusatory witness in every sense of the term, confrontation was properly required. *See id.* The same cannot be said here.

Petitioner nonetheless contends that *Crawford* and *Davis* establish a bright-line rule that any formal statement, including a drug analysis certificate, prepared for use at trial is testimonial and, therefore, subject to the Confrontation Clause. Petr.'s Br. at 10-12. He relies on a passage from *Crawford* noting that one possible formulation of "testimonial" comprises statements "made under circumstances which would lead an objective witness reasonably to believe that [they] would be available for use at a later trial." *Crawford*, 541 U.S. at 51-52 (quoting amicus brief for the National Association of Criminal Defense Lawyers).

Petitioner stretches the analysis from *Davis* and *Crawford* too far. In *Davis*, the Court focused on the "primary purpose" of a statement (whether it was to report an ongoing emergency or describe past

criminal conduct) to determine if the declarant was a "witness." *Davis*, 547 U.S. at 828. It concluded that "no 'witness' goes into court to proclaim an emergency and seek help." *Id.*

But, just being a "witness" does not automatically render the person a "witness against" the defendant for purposes of the Confrontation Clause. *See Maryland v. Craig*, 497 U.S. 836, 864 (1990) (Scalia, J., dissenting) (not every person "who knows or sees anything" is a witness within the meaning of the Confrontation Clause). The Court had no occasion to assess the full reach of the phrase "witness against" in *Davis* and its companion case, *Hammon*. In *Davis*, the 911 caller was describing events as they actually happened to seek emergency help and was therefore not a "witness" at all, *Davis*, 547 U.S. at 828; while in *Hammon*, the declarant told police about past events that directly accused her husband of a violent assault, *id.* at 820-21, 829-30. Similarly, *Crawford* involved historical, accusatory statements by a wife to police that "implicated her husband in Lee's stabbing and at least arguably undermined his self-defense claim." *Crawford*, 541 U.S. at 65. Thus, nothing in *Davis* or *Crawford* supports the conclusion that the possible use of a non-accusatory out-of-court statement at trial automatically makes the declarant a "witness against" the accused.

If anything, *Davis* "confirms that the proper focus [about whether an out-of-court statement is subject to confrontation] is not on the mere reasonable chance that an out-of-court statement

might later be used in a criminal trial." *Geier,* 161 P.3d at 139. As the Seventh Circuit explained: "it cannot be that a statement is testimonial in every case where a declarant reasonably expects that it might be used prosecutorially." *Ellis*, 460 F.3d at 926. If this were the standard, the Court in *Davis* would have held that the 911 call from the victim reporting a domestic disturbance was subject to confrontation because a reasonable person would know that the result of such a call would be the arrest and prosecution of the perpetrator. *Id.*

There is, in short, a world of difference between a declarant who says: "I saw John Doe rob Mrs. Smith at gun point" and a declarant who merely says "I saw a blue car drive down the road." *See* Petr.'s Br. at 30 (positing this hypothetical). The former statement directly accuses an identifiable person of criminal conduct and, thus, implicates the Confrontation Clause's core purpose of preventing trials by anonymous accusers. *See Michels*, 624 S.E.2d at 680; M. Graham, 62 U. Miami L. Rev. at 829; K. Graham, 3 Ohio St. J. Crim. L. at 220-21. The latter statement, in contrast, is neutral on its face. It does not directly accuse any identifiable individual of any wrongdoing and, thus, raises no constitutional concerns. *See id.*; *see also Lilly*, 527 U.S. at 142 (Breyer, J., concurring) ("[i]t is not obvious" that the admission of a "scrawled note, 'Mary called,'" requires confrontation). Instead, the question of the latter statement's admissibility is properly resolved under traditional hearsay rules, not the Confrontation Clause. So too with a laboratory report that says simply the "substance is

cocaine." 30A C. Wright & K. Graham, *Federal Practice and Procedure* § 6371.2 at p.60.

2. Drug analysis certificates are non-testimonial because they do not involve, and are not analogous to, *ex parte* examinations of witnesses – the principal evil the Confrontation Clause was designed to prevent.

Drug analysis certificates also differ from traditional testimonial statements in another key respect: they are not prepared under any circumstances remotely implicating "the principal evil at which the Confrontation Clause was directed." *Crawford*, 541 U.S. at 50. In *Crawford,* the Court identified that "principal evil" as the historical practice of government officials conducting *ex parte* examinations of witnesses, reducing the witnesses' out-of-court statements to writing, and then offering those written statements at trial as evidence against the accused. *See id.; see also Green*, 399 U.S. at 156 (the "particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of ex parte affidavits or depositions secured by the examining magistrates"). "The involvement of government officers in the production of [such] testimonial evidence presents the same risk, whether the officers are police or justices of the peace," *Crawford*, 541 U.S. at 53, because a "witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal." 3 W. Blackstone, *Commentaries on the*

Laws of England 373 (1786). In addition, there is the danger that "an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language." *Id.*

Those concerns are inapplicable where, as here, the out-of-court statements reflect the results of neutral, scientific testing performed by government officials pursuant to a statutory duty. *See* M. Graham, 62 U. Miami L. Rev. at 837. Confrontation violations arise where the prosecution seeks to use hearsay accounts from witnesses who observed past events – accounts that are not objectively verifiable and, thus, are inherently prone to distortion or manipulation. *See, e.g.*, *Crawford*, 541 U.S. at 65 (in response to "often leading" police questioning wife "implicated her husband in Lee's stabbing"). The Clause was designed to prohibit the use of these second-hand hearsay accusations, not official or business records, which were recognized exceptions to confrontation at the time of the founding. *See* Part B *infra.*

Here, in keeping with duty imposed by state law, the analysts prepared the certificates in response a request submitted by the police. *See* Mass. Gen. Laws ch. 111, § 12. But, the scientific testing recorded on the certificates was not obtained through any sort of inquisitorial methods. There was no dialogue at all – formal, informal, or voluntary – between the police and the analysts, let alone any dialogue about Petitioner's role in the crime. *Cf. Davis*, 547 U.S. at 822 & n.1, *Crawford*,

541 U.S. at 53 n.4; *Giles v. California*, 128 S. Ct. 2678, 2693 (2008) (Thomas, J., concurring). In fact, the certificates in this case did not refer to Petitioner at all. *See* App. at 24a-29a.

In addition, the testing results recorded on the certificates speak for themselves; unlike witness accounts, they cannot be, as Blackstone feared, "dress[ed] up" by police officers passing along hearsay testimony. *See Rawlins*, 884 N.E.2d at 1031 ("police or prosecutorial involvement is unlikely to have any impact on [scientific] test[] results"). Indeed, where chemical analysis is confirmed by mechanical testing such as GC/MS, the primary source of the statement is not even the analyst, but the machine itself. *See Washington*, 498 F.3d at 229-30. This is "[b]ecause once the sample was prepared and put . . . into the gas chromatograph for analysis, the entire testing procedure is done electronically or mechanically. The analyst no longer intervenes in the analytical process . . . and the results that were produced were produced by the instrument." *State v. Christian*, 895 P.2d 676, 683 (N.M. 1995). Thus, the certificates are not a "weaker substitute for live testimony." *See Davis*, 547 U.S. at 828; *see also Washington*, 498 F.2d at 229-30 (machine-generated data are not testimony).[10]

[10]Although some interpretation of the machine-generated data ordinarily is required, *see* 2 P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 23.03[c], "[a]ny competent chemist would infer from these data that the tested substance was cocaine." *United States v. Moon*, 512 F.3d 359, 362 (7th Cir.), *petition for cert. filed*, 76 U.S.L.W. 3557 (U.S. Apr. 2, 2008) (No. 07-1251).

Like Blackstone, this Court has emphasized that "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" *Coy*, 487 U.S. at 1017 (internal citation omitted). When a witness accuses a defendant of criminal wrongdoing, confrontation may cause an accuser to "feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts." *Id.* at 1019 (quoting Z. Chafee, *The Blessings of Liberty* 35 (1956)). But, one would not reasonably expect a laboratory professional – required by law to perform a largely mechanical, scientific test on a chemical substance – to "feel quite differently" about the results of his scientific test by having to look at the defendant. *See Rawlins*, 884 N.E.2d at 1031. An analyst is, and should be, focused only on the chemical substance he is duty-bound to test, not any individual defendant. Neither the long history behind the Confrontation Clause nor its animating principles support its application to this type of objective, scientific testing. [11]

[11]The cases involving the use of fabricated scientific evidence, as chronicled in the National Innocence Network's amicus brief, are deplorable. But, it is a fallacy to impugn all scientists based on the isolated misdeeds of a few, however inexcusable the actions of those few may be. Furthermore, the Due Process Clause provides a sufficient deterrent and remedy against the use of any such fabricated evidence. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959). An expansion of the Confrontation Clause beyond its core purposes is not warranted.

3. The Court's decisions do not support Petitioner's overbroad interpretation of the Confrontation Clause.

Petitioner offers several formulations that stretch the Confrontation Clause's scope well beyond this Court's decisions or the Clause's historical roots. First, he argues that the Clause applies to any statement likely to be used in a criminal trial, *see* Petr.'s Br. at 10-11, a view that lacks support in *Davis* and *Crawford*. *See* Part A(1) *supra*.

Next, he selectively quotes part of a passage from *Cruz v. New York*, 481 U.S. 186, 190 (1987), to claim that the Confrontation Clause is not limited to accusatory witnesses but, rather, extends to any witness whose "testimony is part of the body of evidence that the jury may consider in assessing [the accused's] guilt." *See* Petr.'s Br. at 30. But, the Court's statement in *Cruz* was made in the context of a nontestifying codefendant's powerfully incriminating confession admitted at a joint trial. *See Cruz*, 481 U.S. at 190. Even though the jury was instructed to consider the confession only as evidence against the declarant, and not against the accused, the confession nevertheless was among the most devastating types of out-of-court accusations that could be offered against a defendant in a criminal trial. *Id.* *Cruz*, therefore, is not a departure from the Confrontation Clause's historical accusation-based focus. If *Cruz* had established such a sweeping rule applying to any witness whose statements are offered at trial, this Court's entire

opinion in *Crawford* would have been unnecessary. *See Crawford*, 541 U.S. at 42-43.

Petitioner suggests, alternatively, that confrontation rights attach to any statements that establish an element of the offense, relying on *Kirby v. United States*, 174 U.S. 47 (1899). *See* Petr.'s Br. at 17. There, the defendant was charged with receipt of stolen property. To prove that the property was, in fact, stolen, the prosecution offered the record of conviction obtained in a separate proceeding against the three individuals accused of stealing the property. Kirby, however, was not a party to this prior proceeding, and the Court held that the record was not properly admitted against him. *Kirby*, 174 U.S. at 54-55. Justice Harlan later explained that it was "not a confrontation case at all, but a matter of the substantive law of judgments." *Dutton v. Evans*, 400 U.S. 74, 98 (1970) (Harlan, J., concurring). "Indeed, the *Kirby* Court indicated that lack of confrontation was not at the heart of its objection when it said that the record would have been competent evidence of the fact of conviction" had Kirby been a party to the prior proceeding. *Id.* at 98-99; *Kirby*, 174 U.S. at 54, 59.[12]

[12]Records of prior conviction are routinely admitted in criminal cases where the defendant is the same person named in the record, even when that record is used to establish an element of the offense. *See, e.g., State v. King*, 146 P.3d 1274, 1279 (Ariz. Ct. App. 2006) (record of conviction used to establish second and subsequent DUI offense; collecting cases from other jurisdictions). Records of prior conviction, of course, are just one example of the types of official and business records that are not testimonial and were common law exceptions to confrontation. *See* Part B *infra.*

Furthermore, even if *Kirby* was properly viewed as a confrontation case, it is inapposite. The statute there made a record of conviction obtained against a principal accused of stealing government property "conclusive evidence" in a separate prosecution against the alleged receiver that the property was, in fact, stolen. *Kirby,* 174 U.S. at 48. But, as the Court noted, a record of conviction establishes only that the person named in the record was convicted. *Id.* at 60. That fact, however, "was not necessary to be established in the case against the alleged receiver." *Id.* Because the government failed to offer any other evidence proving that the property was, in fact, stolen, the Court reversed Kirby's conviction. *Id.* at 58-61. Nothing remotely similar is at issue here.

Ultimately, Petitioner's effort to craft some type of a broad bright-line rule based on a statement's possible use at trial strays too far from the historical approach dictated by *Crawford*.[13] The Court has resisted endorsing likely use at trial or any other specific formulation of what is a

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[13]Petitioner also seeks to derive support from *dicta* contained in *Diaz v. United States*, 223 U.S. 442, 451-53 (1912) and *United States v. Wade*, 388 U.S. 218, 228 (1967). *See* Petr.'s Br. at 3, 12-13. Those cases were decided long before *Crawford* and did not address, directly or indirectly, the testimonial or nontestimonial nature of laboratory reports. Although the Court in both cases made passing reference to a defendant's ability to confront the authors of an autopsy or other type of scientific report at trial, Petitioner properly characterizes those comments as mere "general" assumptions, not pertinent holdings. *See* Petr.'s Br. at 3.

testimonial statement. *Davis*, 547 U.S. at 822. Indeed, *Crawford*'s historical approach left open the possibility that the Sixth Amendment might not cover "testimonial" dying declarations even when made to government officials for possible use at trial. *Crawford*, 541 U.S. at 55-56 & n.6.

As in *Crawford* and *Davis*, the Court here need not delineate the complete, precise boundaries of the Confrontation Clause. It is enough to conclude that the drug analysis certificates admitted at trial do not constitute accusatory evidence against the Petitioner, and that they were not obtained through methods or under circumstances resembling the *ex parte* examinations that the Confrontation Clause was intended to preclude. Even though the certificates were prepared for possible use in a criminal trial, they are not "testimonial" evidence that triggers confrontation rights.

B. Drug analysis certificates are akin to the types of official and business records admissible at common law, including coroner's reports about the physical condition of a body.

The admission of drug analysis certificates without live witness testimony also is supported by the common law treatment of official and business records, including coroner's reports about the physical condition of a decedent's body. In *Crawford*, the Court stated that "[m]ost of the hearsay exceptions [established at the time of the founding] covered statements that by their nature were not testimonial – for example, business records. . . ."

Crawford, 541 U.S. at 56. Additionally, Chief Justice Rehnquist, in his concurring opinion, confirmed that "the Court's analysis of 'testimony' excludes at least some hearsay exceptions, such as business records and official records. . . . To hold otherwise would require numerous additional witnesses without any apparent gain in the truth-seeking process." *Id.* at 76 (Rehnquist, C.J., concurring).

1. The common law official records exception covered all records made pursuant to a duty imposed by law.

At common law, official records were an exception to confrontation and, thus, were admissible without calling the official who made the record. *See Heike v. United States*, 192 F. 83, 95 (2d Cir. 1911) (official records are "admissible without calling the persons who made them, and have been so admissible from a time anterior to the adoption of the Constitution"), *aff'd*, 227 U.S. 131 (1913); *Verde*, 827 N.E.2d at 705 ("One acknowledged exception to the confrontation clause is a public record, 'an ancient principle of the common law recognized at the time of the adoption of the Constitution.'") (quoting *Commonwealth v. Slavski,* 140 N.E. 465, 468 (Mass. 1923)); *State v. Dowdy*, 58 S.E. 1002, 1004 (N.C. 1907) (admission of "official certificates" was an exception to confrontation at time of founding); 1 T. Cooley, *Treatise on Constitutional Limitations* 666 (8th ed. 1927) (same). Most of the leading evidence treatises from the founding era recognized the official records exception. *See, e.g.,* T.

Peake, *Compendium of the Law of Evidence* 83 (5th ed. 1822); 1 J. Chitty, *Practical Treatise on the Criminal Law* 575-76 (2d ed. 1826); 1 T. Starkie, *Practical Treatise on the Law of Evidence* 177 (1826); *see also* 5 J. Wigmore, *Evidence in Trials at Common Law* § 1398 (Chadbourn ed. 1974) (same).

Official records were admissible at common law in a wide variety of cases on the ground that the act was being done pursuant to a public duty or for a public purpose and, as such, was "entitled to a degree of credit to which no act of an individual is." T. Peake, *Law of Evidence* at 83. "Certificates, and other documents made by persons intrusted with authority for the purpose," therefore, qualified as official records at common law, and were "evidence against all, to the extent of the officer's authority, of the facts which he is directed to certify." 1 T. Starkie, *Law of Evidence* at 172. Consistent with this broad exception, "'a record of a primary fact made by a public officer in the performance of official duty is . . . competent prima facie evidence as to the existence of that fact.'" *Verde*, 827 N.E.2d at 705 (quoting *Slavski*, 140 N.E. at 469); 1 T. Cooley, *Treatise on Constitutional Limitations* at 666 (same).

A leading English criminal case, decided shortly before the Bill of Rights was adopted, explained the theory behind the official records exception in similar terms:

> The law reposes such a confidence in public officers that it presumes that they

> will discharge their several trusts with accuracy and fidelity; and therefore whatever acts they do in discharge of their public duty may be given in evidence and shall be taken to be true.

The King v. Aickles, 168 Eng. Rep. 297, 298 (1785). There, Aickles was prosecuted for returning from transportation before the time for his exile on a prior sentence had elapsed. To prove the date of his discharge from prison, the court allowed the prosecutor to admit a log book maintained by prison officials pursuant to their official duty. *Id.*

As *Aickles* demonstrates, the common law official records exception applied to criminal cases. *See* 1 Chitty, *Criminal Law* at 575-76; 4 W. Hawkins, *Treatise on Pleas of the Crown* 430 (7th ed. 1795). Indeed, contrary to Petitioner's suggestion, *see* Petr.'s Br. at 29, evidence in common law criminal cases was "regulated by nearly the same principles as in civil cases." 2 Z. Swift, *System of the Laws of the State of Connecticut* 399 (1795); 4 W. Blackstone, *Commentaries on the Laws of England* 356 (1786) (same); 1 Chitty, *Criminal Law* at 555 (same); 1 J. Wigmore, *Evidence in Trials at Common Law* § 4(2) (Tillers ed. 1983) (same). *See also United States v. Johns*, 4 U.S. 412, 415 (1806) (copy of ship's manifest that custom-house officers were required to maintain was "clearly admissible" in criminal prosecution).

The only relevant limitation on the admissibility of official records recognized at

common law was that the public officer not have any "private interest" in the litigation. *See Aickles*, 168 Eng. Rep. at 298; L. MacNally, *Rules of Evidence on Pleas of the Crown* 475 (1802) ("books of public offices, and of public bodies, which of course are not interested in the event of the trial, are admissible evidence"). This limitation was consistent with the usual common law rule that "a man cannot make evidence for himself." 5 J. Wigmore, *Evidence* § 1518. It was intended to apply only where the official was shown to have some "special interest," giving him a "strong motive to misrepresent." *Id.* § 1633.

In all other cases, the common law generally favored admission of official records because of the "great probability" that a public official "does his duty and makes a correct statement," and the inconvenience that would result from having officials "devoting the greater part of their time to attending as witnesses in court. . . ." *Id.* §§ 1631-1632; *see also Schell v. Fauche*, 138 U.S. 562, 565 (1891) ("With regard to the conduct of a public office, the presumption is that everything is done properly, and according to the ordinary course of business. . . .").[14] In *Aickles*, for instance, the court stressed that the official had "no private interest whatsoever in [the record] to induce him to make fictitious entries in it.

[14]Official records were admissible at common law even when the officials were not legally required to make the record so long as they did so "in the discharge of a public duty." *Evanston v. Gunn*, 99 U.S. 660, 666 (1878); 1 T. Starkie, *Law of Evidence* at 177 (citing *Aickles,* 168 Eng. Rep. at 298).

He is a public officer recording a public transaction." *Aickles,* 168 Eng. Rep. at 298.

The analysts who prepared the drug analysis certificates in this case (and countless other drug cases) likewise were acting in the ordinary course of their official business and had no private or special interest that would motivate them to "make fictitious entries" on the certificates they were statutorily compelled to prepare. Instead, pursuant to their official duty, they recorded the "results of a well-recognized scientific test determining the composition and quantity of the substance." *Verde*, 827 N.E.2d at 705. They had no interest or stake in the outcome of Petitioner's prosecution; their only interest was to faithfully discharge the duty imposed on them by law to accurately record the results of their scientific testing. *See* I. Stone*, Capabilities of Modern Forensic Laboratories,* 25 Wm. & Mary L. Rev. 659, 674 (1984) ("The forensic scientist does not serve as an advocate for the plaintiff, prosecution, or defendant; he serves as an advocate for an opinion or conclusion based on objective physical evidence.").

Indeed, analysts sometimes determine that the substances submitted for testing are not drugs at all. *See Verde*, 827 N.E.2d at 703; *see also Geier*, 161 P.3d at 140 (results of laboratory tests have the "power to exonerate as well as convict"). Of course, the information in the certificates often will support the prosecution's case against a defendant, as did the prison log book in *Aickles*. The certificates are, nonetheless, official records under the "ancient" common law principle because of the "special and

weighty duty" that the law imposes on the analysts to make an accurate record. *See* 5 J. Wigmore, *Evidence* § 1632; *see also* 1 T. Starkie, *Law of Evidence* at 172-73 ("For where the Law has appointed a person for a specific purpose, the Law must trust him as far as he acts under its authority."); G. Gilbert, *Law of Evidence* 19-20 (1801) (same).

Petitioner, however, seeks to impose an additional requirement on the common law rule: namely, that the official record not be prepared for potential use in litigation. *See* Petr.'s Br. at 21. But, none of the cases or treatises from the founding era imposed this particular limitation, and Petitioner provides no authority to show otherwise. The absence of any cases or treatises from the founding era imposing a similar "prepared for litigation" exception is a strong indication that no contrary interpretation of the Confrontation Clause was intended. *Cf. Giles*, 128 S. Ct. at 2684 (citing the absence of commentary from the founding era as evidence that no contrary interpretation of confrontation right was intended).

Furthermore, contrary to Petitioner's claim that courts historically did not treat laboratory reports as official records, over time courts have, in fact, rejected confrontation clause challenges to certificates of analysis similar to those at issue here, including when those certificates were prepared for use in criminal prosecutions. *See, e.g., Slavski*, 140 N.E. at 469 (alcohol analysis); *State v. Torello*, 131 A. 429, 430 (Conn. 1925) (same); *Bracey v.*

Commonwealth, 89 S.E. 144, 145 (Va. 1916) (same); *but see Torres v. State*, 18 S.W.2d 179, 180 (Tex. Crim. App. 1929).[15] Indeed, prior to the adoption of Fed. R. Evid. 803(8), most federal and state courts agreed that laboratory reports like those at issue here qualified as official records and, thus, were admissible without live testimony. *See* P. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 Ohio St. L. J. 671, 673 (1988).[16]

Following adoption of the Federal Rules of Evidence, courts debated whether the limitation imposed by Rule 803(8)(B), which precludes "matters observed by police officers and other law enforcement personnel" from being admitted against defendants in criminal cases, applied to laboratory reports. *Compare United States v. Gilbert*, 774 F.2d 962, 965 (9th Cir. 1985) *with United States v. Oates*,

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[15]*See also Belford, Clarke & Co. v. Scribner*, 144 U.S. 488, 505-06 (1892) (certificate of the Librarian of Congress establishing date when new publication was received was "competent evidence" in copyright infringement action).

[16]*See, e.g.*, *Beasley*, 438 F.2d at 1281 (fingerprints); *Kay v. United States*, 255 F.2d 476, 480-81 (4th Cir.) (blood alcohol), *cert. denied*, 358 U.S. 825 (1958); *Robertson v. Cox*, 320 F. Supp. 900, 900 (W.D. Va. 1970) (seminal fluid); *Commonwealth v. Harvard*, 253 N.E.2d 346, 352 (Mass. 1969) (marijuana); *State v. Snider*, 541 P.2d 1204, 1209 (Mont. 1975) (marijuana); *State v. Larochelle*, 297 A.2d 223, 225-26 (N.H. 1972) (breathalyzer); *Robertson v. Commonwealth*, 175 S.E.2d 260, 262 (Va. 1970) (seminal fluid); *State v. Kreck*, 542 P.2d 782, 786-88 & n.3 (Wash. 1975) (lab report establishing presence of chloroform in blood).

560 F.2d 45, 78-79 (2d Cir. 1977). The Advisory Committee's Notes to Rule 803(8) explain that "the reason for [this limitation] is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases."

But, those concerns are not at play with the type of scientific testing at issue here. As one commentator explained, "[i]n creating this [hearsay limitation] Congress was concerned with confrontation rights and the adversarial positions of the defendant and the policeman 'on the scene.' This relation does not exist with a chemist or someone with similar duties. He does not face the defendant and is not on the streets." J. Grant, *Trustworthiness Standard for the Public Records and Reports Hearsay Exception*, 12 W. St. U. L. Rev. 53, 78 (1984). The "factors likely to cloud the perception of an official engaged in the more traditional law enforcement functions of observation and investigation of crime are simply not present." *United States v. Quezada*, 754 F.2d 1190, 1194 (5th Cir. 1985).

An analyst in a state laboratory does not exercise any of the powers associated with traditional law enforcement personnel. *See* J. Grant, 12 W. St. U. L. Rev. at 78; *see also Dedman*, 102 P.3d at 635. Rather, the analyst is charged with recording routine, objective observations about the

physical condition of a substance, and reporting those findings as part of the every-day function of the laboratory. *See Rawlins*, 884 N.E.2d at 1035. These functions "differ[] significantly from that of the public officers whose actions or methodology implicated confrontation issues at common law." *State v. Norman*, 125 P.3d 15, 19 (Or. Ct. App. 2005). An analyst, in other words, simply has "no subjective interest in the test's outcome, and could hardly affect the result in any event. . . ." *Rawlins*, 884 N.E.2d at 1031. And, this is true regardless of whether the analyst knows that the test "was requested as a part of a criminal investigation and . . . might be used against a person accused of a crime." *Gilbert*, 774 F.2d at 965.

Petitioner's contrary argument is primarily derived from the minority approach adopted by the Second Circuit in *Oates*. There, the Court of Appeals held that a laboratory report identifying a substance as heroin was inadmissible under Fed. R. Evid. 803(8) because it constituted a factual finding made in connection with a law enforcement investigation. *Oates*, 560 F.2d at 67-68. *Oates*, however, has been "severely criticized" by other courts, including most other federal courts of appeal. *See Bohsancurt v. Eisenberg*, 129 P.3d 471, 481-82 (Ariz. 2006) (collecting state and federal cases); *Garcia v. Texas*, 833 S.W.2d 564, 568-69 (Tex. Ct. App. 1992) (same). Indeed, its reasoning "has been questioned by the very court rendering the decision in that case." *State v. Smith*, 323 S.E.2d 316, 327 (N.C. 1984); *see also United States v. Rosa*, 11 F.3d 315, 332-33 (2d Cir. 1993) ("Notwithstanding the breadth of certain

dicta in *Oates*," declining to apply Rule 803(8)(B)'s limitation to employees of a medical examiner's office), *cert. denied*, 511 U.S. 1042 (1994).

Furthermore, even if *Oates'* interpretation of Fed. R. Evid. 803(8)(B) were correct, it would not control resolution of the constitutional issue presented here. Interpretation of the Confrontation Clause is not governed by modern-day hearsay rules. *See Crawford*, 541 U.S. at 51. Rather, the Clause is "most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Id.* at 54. As shown above, drug analysis certificates are "well within" the common law official records exception and, thus, not subject to confrontation. *Verde*, 827 N.E.2d at 705.

2. The common law business records exception was not limited to a party's shopbooks but extended to all regular entries.

Drug analysis certificates also would be admissible under the common law business records exception. At common law, there were two separate branches to the business records exception. 5 J. Wigmore, *Evidence* § 1517. One branch was the "narrower" exception for a party's account or shopbooks referenced in Petitioner's brief. *See* Petr.'s Br. at 11, 20. The other branch was a "general exception in favor of regular entries made in the course of business." *Id.* Both branches share a "common origin," but the history of their

development in the United States was not identical. 5 J. Wigmore, *Evidence* §§ 1517-1518.

Statutes allowing a party's shopbooks to be admitted in evidence were in place in most of the Colonies, including Massachusetts, and, thus, firmly established at the time of the founding. *See id.* § 1518. The historical record is less clear about precisely when the general exception for regular entries gained acceptance in United States. *Id.* The most that can be said is that there are no reported decisions applying that branch of the common law rule in the United States until 1819. *See id.* (citing *Welsh v. Barrett*, 15 Mass. 380, 385 (1819)).

Nevertheless, the Framers were surely aware of the regular entries branch. "Many colonial lawyers . . . trained in London and thus were directly exposed to English practices and ideas." R. Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 Brook. L. Rev. 493, 522 (2007). The exception for regular entries was, as noted above, "closely related in principle" to the shopkeeper exception; in fact, both branches shared a "common origin." 5 J. Wigmore, *Evidence* § 1517. The landmark English case establishing the regular entries branch of the common law rule was decided in the early 1700s. *Id.* § 1518 (citing *Price v. Lord Torrington*, 2 Ld. Raym. 873 (1703)). There, the court admitted regular entries made by a party's clerk. *See id.* At or around this same time, other courts extended the rule to records regularly kept by third parties in the ordinary course of business. *See id.* at n.8 (citing *Smart v. Williams*, Comb. 247

(1694); *Woodnoth v. Lord Cobham*, Bunb. 180 (1724); *Sutton v. Gregory,* Peake Add. Cas. 150 (1797)); *see also* 2 J. Strong, *McCormick on Evidence* § 285 (5th ed. 1999) ("[d]uring the 1700s, a broader [business record] doctrine began to develop in the English common law courts"). "Because colonial lawyers were directly exposed to English practices and ideas," the Framers likely were aware of these developments in the English common law, "whether or not [those developments] appeared in a published treatise or case report shipped to the colonies." *See* R. Kry, 72 Brook L. Rev. at 522.[17]

In all events, it is inconceivable that this Court, in *Crawford*, intended its references to the nontestimonial nature of business records to include only the narrow shopkeeper branch of the common law exception. *See Crawford*, 541 U.S. at 54, 56. That branch has all but disappeared from use and been subsumed into the general rule applicable to regular business entries. *See* 5 J. Wigmore, *Evidence* § 1517. Thus, for the Court's reference to the nontestimonial nature of business records to have any practical meaning, it must by necessity encompass the general common law rule for regular entries as well as shopbooks.

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[17]None of the courts that has endorsed Petitioner's narrow view of the common law as being limited to a party's shopbooks considered the likelihood that the Framers were exposed to these developments. *See, e.g.*, *Thomas v. United States*, 914 A.2d 1, 13 (D.C. 2006), *cert. denied*, 128 S. Ct. 241 (2007); *Radtke v. Taylor*, 210 P. 863, 866-67 (Or. 1922).

Before *Crawford*, the majority of courts concluded that laboratory reports were properly admitted as business records because of the routine nature of the tests performed. *See* P. Giannelli, 49 Ohio St. L. J. at 673.[18] And, notwithstanding Petitioner's contrary suggestion, that trend has largely continued after *Crawford*. Many (but not all) courts have concluded that laboratory reports, like the drug analysis certificates here, are properly admitted as business records because they are prepared in the ordinary course of the laboratory's business.[19] As such, they are "not testimonial in

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[18]*See, e.g.*, *United States v. Frattini*, 501 F.2d 1234, 1236 (2d Cir. 1974) (cocaine); *United States v. Ware*, 247 F.2d 698, 699-700 (7th Cir. 1957) (heroin); *United States v. Roulette*, 75 F.3d 418, 422 (8th Cir.) (cocaine), *cert. denied*, 519 U.S. 853 (1996); *United States v. Baker*, 855 F.2d 1353, 1359 (8th Cir. 1988) (drug analysis); *United States v. Parker*, 491 F.2d 517, 520-21 (8th Cir. 1973) (heroin); *United States v. Garnett*, 122 F.3d 1016, 1018-19 (11th Cir. 1997) (drug analysis); *United States v. Evans*, 45 C.M.R. 353, 356 (C.M.A. 1972) (LSD); *State v. Cosgrove*, 436 A.2d 33, 39-44 (Conn. 1980) (marijuana); *People v. Tsombanidis*, 601 N.E.2d 1124, 1133 (Ill. Ct. App. 1992) (cocaine); *State v. Taylor*, 486 S.W.2d 239, 242 (Mo. 1972) (debris from burglary), *abrogated by State v. March*, 216 S.W.3d 663 (Mo.), *cert. dismissed*, 128 S. Ct. 1441 (2007); *Christian*, 895 P.2d at 680 (blood alcohol); *People v. Porter*, 362 N.Y.S.2d 249, 255 (N.Y. App. Div. 1974) (blood alcohol); *Kreck*, 542 P.2d at 784-85 (blood); *State v. Sosa*, 800 P.2d 839, 843 (Wash. Ct. App. 1990) (heroin). *But see, e.g., Miller v. State*, 472 S.E.2d 74 (Ga. 1996).

[19]*See, e.g., De La Cruz*, 514 F.3d at 133-34 (autopsy); *Feliz*, 467 F.3d at 236 (autopsy); *Ellis*, 460 F.3d at 926-27 (medical report establishing presence of drugs); *Pruitt*, 954 So.2d at 616 (cocaine and marijuana); *Crager*, 879 N.E.2d at 757 (DNA); *Commonwealth v. Carter*, 932 A.2d 1261, 1267-68

nature." *Verde*, 827 N.E.2d at 706 (citing *Crawford*, 541 U.S. at 56); *see also Feliz*, 467 F.3d at 236.

Petitioner contends that these rulings are incorrect because the business record exception generally excludes records prepared in anticipation of litigation. *See* Petr.'s Br. at 20-21 (citing *Palmer v. Hoffman,* 318 U.S. 109, 113-15 (1943)). In *Palmer*, the Court held that a report prepared in connection with a railroad's investigation into the causes of an accident was inadmissible because it was not made "for the systematic conduct of the enterprise" but, instead, was prepared "for use essentially in the court." *Id.* Petitioner contends that the same rule should apply here because the drug analysis certificates were prepared after petitioner's arrest for possible use in his criminal trial.

Palmer, however, did not create a "blanket rule" excluding all documents prepared with an eye toward trial. 2 *McCormick on Evidence* § 288. Rather, "what the case has come to stand for is that a record otherwise meeting the requirements of the exception . . . ought not be admitted if there was a substantial motive to misrepresent when the report was prepared." *Bohsancurt*, 129 P.3d at 477 n.4; *see also* 2 *McCormick on Evidence* § 288 ("The existence of a motive and opportunity to falsify the record . . .

(Pa. 2007) (cocaine); *Forte*, 629 S.E.2d at 144 (DNA); *Cao*, 626 S.E.2d at 305 (mechanical testing of controlled substance); *Malott*, 2008 WL 1932428, at *2 (cocaine). *But see, e.g., State v. Johnson*, 982 So.2d 672, 678 (Fla.), *petition for cert. filed*, 77 U.S.L.W. 3075 (U.S. July 29, 2008) (No. 08-132).

is of principal concern."). Federal Rule of Evidence 803(6) incorporates this interpretation of *Palmer* by permitting the admission of records that otherwise comply with the requirements of the rule, "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Accordingly, "[w]here the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed," the record is admissible, even if it concerns a matter destined for litigation. See 5 J. Wigmore, *Evidence* § 1422; 2 *McCormick on Evidence* § 288.

Drug analysis certificates are prepared under these circumstances. The "business" of the analysts is to perform routine tests on substances and record the results of that testing on standard certification forms. Analysts perform these tasks, not in anticipation of litigation, but because their job requires them to do it. *See Cosgrove*, 436 A.2d at 41. Indeed, if a chemical test proves negative, there will not even be a trial.

Merely that testing is performed at the request of the local police does not render the certificates inadmissible as business records. *See Carter*, 932 A.2d at 1267 n.6. Analysts retain complete "independence to objectively test and analyze the samples" they receive, without outside interference. *See Crager,* 879 N.E.2d at 753-54; *Rawlins*, 884 N.E.2d at 1035. Moreover, the "potential for bias is very small" because analysts are employed to function as "neutral and objective" scientists.

Carter, 932 A.2d at 1268. *Palmer*, therefore, does not preclude the admission of drug analysis certificates as business records, which by their nature are nontestimonial and, thus, not subject to confrontation. *Crawford*, 541 U.S. at 54, 56.

Furthermore, Petitioner's assertion that drug analysis certificates would be inadmissible under the general Massachusetts business records statute because they were prepared after the start of a criminal case is misplaced. *See* Petr.'s Br. at 26-27 (citing Mass. Gen. Laws ch. 233, § 78). The certificates are admissible under an entirely separate statutory provision, Mass. Gen. Laws ch. 111, § 13, that imposes no similar restriction. In all events, Mass. Gen. Laws ch. 233, § 78 was not enacted until 1913, *see* St. 1913, ch. 288, and, thus, cannot define the scope of the confrontation right that existed at the time of the founding. *See Crawford*, 541 U.S. at 54.

3. The common law treatment of coroner's reports also supports the admission of drug analysis certificates without live testimony.

Further support for the admission, without live testimony, of drug analysis certificates can be found in the treatment of coroner's reports at common law. As the Court has noted, depositions taken at coroners' inquests appear to have been a common law exception to confrontation. *Crawford*, 541 U.S. at 47 n.2; *Giles*, 128 S. Ct. at 2706 (Breyer, J., dissenting). One theory advanced for this exception

is that coroner's inquests were "in the nature of a proceeding *in rem*." W. McNeill, *The Testimony Taken Before a Corner Considered as Evidence*, 42 Am. L. Register & Rev. 264, 265 (1894). The coroner was required to hold the inquest "*super visum corporis," i.e.,* upon view of the corpse. *Id.* at 267; S. Rapalje & R. Lawrence, *Dictionary of American and English Law* 1239 (1888). Unlike criminal proceedings, the object of a coroner's inquest was to determine the cause of death by, among other things, examining the body's physical condition. *See* S. Phillips, *Treatise on the Law of Evidence* 280 (1816) (a coroner's "proceeding is not so much an accusation on an indictment, as an inquisition of office to inquire truly, how the party came to his death"); W. McNeill, 42 Am. L. Register & Rev. at 280 (same).

The same, of course, is true of modern-day drug analysis certificates. The object of the laboratory analysis is not to accuse anyone of wrongdoing but, instead, to confirm the physical nature of the substance. Thus, like the common law treatment of coroner's inquests (where the focus was to determine the physical condition of the corpse), no confrontation right attaches to the admission of drug analysis certificates (where the focus is to determine the physical condition of the substance).

Although the "special status" for coroner's *depositions* "failed to survive the Atlantic voyage," *Giles*, 128 S. Ct. at 2706 (Breyer, J., dissenting), the same cannot be said about the coroner's findings concerning the physical condition of the body. *See* W. McNeill, 42 Am. L. Register & Rev. at 267 (a

coroner's inquest was "conclusive against the world"); J. Mnookin, 15 J.L. & Pol'y at 853 n.98 ("Perhaps coroner's physical findings (rather than reports of what others said at an inquest) were permitted even when the coroner did not testify.") As one early American case explained:

> That part of the inquest which ascertains the death of a person and its precise causes, establishes mere physical facts, which are to be ascertained, according to law, for public purposes. . . . The facts, in themselves, are evidence of neither guilt nor innocence, and have no direct tendency to implicate the accused, nor anyone else. There can be no evil resulting from the admission of the record of those facts in evidence, as it can be controverted by the accused, if material to his defence . . . .

State v. Parker, 7 La. Ann. 83, 83 (La. 1852).[20]

This treatment, of course, is consistent with the common law's treatment of other types of official

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[20]Where, in contrast, findings contained in a coroner's report link the death to the "person accused of the deed" and "tends to show guilt in him," confrontation is properly required. *Id.* In *Parker*, for instance, the coroner's report "contained the opinion that the accused fired the pistol which caused the death of the decedent." *Id.* This part of the report should not have been admitted without confrontation because it was directly accusatory. *See id.*

records prepared pursuant to a legal duty. *See* Part B(1) *supra*; *see also* J. Jervis, *Archbold's Summary of the Law Relating to Pleading and Evidence in Criminal Cases* 159 (1846) (noting that "the coroner is an elective officer, appointed on behalf of the public to make inquiry of matters within his jurisdiction, who therefore is presumed to [act] fairly and impartially"). Drug analysis certificates should be treated similarly.

C. Admission of drug analysis certificates did not offend the Confrontation Clause because Petitioner had the opportunity to challenge the analysis and confront the analysts who prepared the certificates.

Even if drug analysis certificates were treated as "testimonial," the trial court's admission of those certificates without live testimony did not violate Petitioner's rights under the Confrontation Clause. Petitioner had ample opportunity under Massachusetts law to challenge the validity of the certificates and confront the individual analysts who prepared them, but he strategically elected not to do so. It is enough under the Sixth Amendment to provide such opportunity, without requiring the adoption of a specific type of "notice and demand" statute or requiring live testimony in every case involving drug analysis.

1. Petitioner had ample opportunity to challenge the validity of the test results and confront the analysts but chose not to do so.

Petitioner, like defendants in the "vast majority" of drug cases prosecuted nationwide, recognized that there was little or no utility in challenging the validity of the test results. *See State v. Miller,* 790 A.2d 144, 153 (N.J. 2002). Indeed, as the amicus briefs submitted in support of Petitioner acknowledge, "[f]ew criminal cases actually involve contested expert testimony." Brief of Amici Curiae Law Professors ("Amici Law. Profs.' Br.") at 3, 5; Amici NACDL Br. at 3 (same). The "simple explanation" behind this common defense strategy is that a "defendant impairs rather than enhances his case by insisting upon an extended and substantially uncontroverted presentation of scientific evidence. . . ." Amici Law Profs.' Br. at 8-9 (*citing Old Chief v. United States*, 519 U.S. 172, 189 (1997)).

Had Petitioner adopted a different defense strategy and opted to challenge the validity of the test results, he would have had multiple opportunities to do so under Massachusetts law. Petitioner certainly cannot claim that he was surprised by admission of the certificates as *prima facie* evidence. The statute governing their preparation and admission has been the law in Massachusetts for nearly a century, *see* St. 1910, ch. 495, §§ 1-2, and the prosecution disclosed the certificates during pretrial discovery. J.A. 5; Mass. R. Crim. P. 14(a)(vii). Petitioner could have

obtained, through pretrial discovery, documentation related to the testing methods reflected in the certificates, as well as information about the qualifications of the analysts who performed the tests. *See* Mass. R. Crim. P. 14(a)(2). Additionally, he could have obtained funds, if necessary, to hire his own expert to independently analyze the cocaine. *See* Mass. R. Crim. P. 41; Mass. Gen. Laws ch. 261, § 27B. And, had his request for funds to hire an expert been denied, he could have sought immediate appellate review. *See* Mass. Gen. Laws ch. 261, § 27D; *Commonwealth v. Zimmerman*, 804 N.E.2d 336, 342 (Mass. 2004).

Furthermore, Petitioner could have challenged the scientific validity of the testing methods and the qualifications of the analysts by filing a pretrial motion *in limine* and requesting an evidentiary hearing. *Commonwealth v. Arroyo*, 810 N.E.2d 1201, 1210 (Mass. 2004). At this "inherently fact-intensive" hearing, the trial judge acts as a "gatekeeper," excluding evidence based on any unreliable scientific methods and "assess[ing] the credibility of [the] various expert witnesses in determining whether proposed scientific [evidence] is reliable." *Canavan's Case*, 733 N.E.2d 1042, 1049 (Mass. 2000). Included within this "gatekeeper role" is the trial judge's affirmative obligation to "determine whether the testing at issue was conducted properly," not just whether the testing method was theoretically reliable. *Commonwealth v. McNickles*, 753 N.E.2d 131, 140 (Mass. 2001). This procedure ensures "not only the reliability of the abstract theory and process underlying an expert's

opinion, but the particular application of that process" to a defendant's case. *Patterson,* 840 N.E.2d at 28-29.

Above all, Petitioner had the opportunity to compel the analysts' presence at trial and subject them to cross-examination. He could have obtained a subpoena pursuant to Mass. R. Crim. P. 17 or used his right to compulsory process, under both the state and federal constitutions, to compel the analysts to testify at trial. *See* art. 12 of the Massachusetts Declaration of Rights. Had Petitioner pursued these options for securing the analysts' presence at trial, he would have been able to cross-examine them in the same manner as if they had been called as part of the prosecution's case. *See Commonwealth v. Mahar*, 722 N.E.2d 461, 467 (Mass. 2000) (adopting the state version of Fed. R. Evid. 806).[21]

The Court has recognized in other contexts that the availability of these options alleviates any confrontation concerns. *See United States v. Inadi*, 475 U.S. 387, 397 & n.9 (1986) (if defendant "independently wanted to secure" declarant's testimony at trial, the Compulsory Process Clause "would have aided" him in doing so); *White,* 502 U.S. at 355 ("the Compulsory Process Clause and evidentiary rules permitting a defendant to treat witnesses as hostile will aid defendants in obtaining

[21]In fact, by relying on the state equivalent of Fed. R. Evid. 806, Petitioner would not have had "to make the showing necessary to have [the analyst] declared a hostile witness, although presumably that option also was available to him." *Inadi*, 475 U.S. at 397 & n.8.

a declarant's live testimony"); *see also Lee*, 476 U.S at 550, n.3 (Blackmun, J., dissenting) ("there was no significant denial of petitioner's right to confrontation, because petitioner herself could have called [the declarant] and questioned him, if necessary, as an adverse witness"). Although the Court in *Crawford* charted a new course for Confrontation Clause analysis, it has not abandoned these earlier decisions. *See Crawford*, 541 U.S. at 58 n.8 & 59 (recognizing prior decisions in *Inadi* and *White*). Nor has it adopted Petitioner's absolutist approach to confrontation.

In these circumstances, it strains logic to conclude that the Commonwealth deprived Petitioner of an opportunity to confront and cross-examine the analysts. *See United Sates v. Owens*, 484 U.S. 554, 559 (1988) ("an *opportunity* for effective cross-examination" is what the Confrontation Clause guarantees) (emphasis in original). Petitioner had multiple opportunities to probe the validity of the drug testing and, if he so desired, cross-examine the analysts. But, he strategically elected not to do so. Whether viewed as the consequence of a deliberate defense tactic or as the Commonwealth's fulfillment of its obligation to provide Petitioner with an *opportunity* for cross-examination, the circumstances of this case provide no credible basis for overturning Petitioner's lawful conviction. *See Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) ("gossamer possibilities of prejudice" should not be used to "set the guilty free"), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964); *United States v. Rith*, 164 F.3d 1323, 1335

(10th Cir.) ("no violation of the Confrontation Clause when the defendant neglected to exercise rights that would have enabled him to confront the witnesses against him"), *cert. denied*, 528 U.S. 827 (1999).

2. The necessities of trial and the adversary process do not support Petitioner's absolutist approach to confrontation.

The procedures available to Petitioner also must be viewed in light of this Court's recognition that "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *see also Craig,* 497 U.S. at 850 (like other Sixth Amendment rights, the Confrontation Clause must be "interpreted in the context of the necessities of trial and the adversary process"). No matter how "beneficent in their operation and valuable to the accused," confrontation rights "must occasionally give way to considerations of public policy and the necessities of the case." *Mattox v. United States*, 156 U.S. 237, 243 (1895).

Petitioner's rigid interpretation of the Confrontation Clause would establish a categorical rule requiring live testimony in every case where drug analysis is performed – even when the defendant, like Petitioner here, has no real intention or desire to cross-examine the analysts. This absolutist approach to the Confrontation Clause would result in a significant waste of public resources, with no apparent gain in the truth-

seeking function. It also would violate the fundamental principle that "the rights of the public [in the prosecution of crime] shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." *Mattox*, 156 U.S. at 243; *see State v. Crow*, 974 P.2d 100, 111 (Kan. 1999) (public has "significant interest in avoiding the unnecessary expense of insuring the presence of laboratory technicians at trials where the content of their testimony will not be challenged by defendants").

The practical reality is that, in the vast majority of drug cases, cross-examination of the analysts who performed the testing is likely be of small utility, given the passage of time and the routine nature of the testing. Months or even years may pass between the testing and trial. *See People v. Durio*, 794 N.Y.S.2d 863, 869 (N.Y. App. Div. 2005). In that time, analysts likely will have performed hundreds, if not thousands, of identical tests as a routine part of their job.[22] No analyst is

[22]"The scientific analysis of suspected contraband drugs constitutes more than 50% of the caseload of many American crime laboratories." 2 P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 23.01 & n.5. In Massachusetts alone, the Department of Public Health analyzes approximately 40,000 drug samples each year. *See* Brief of Amici Curiae Attorney General and Department of Public Health, *Commonwealth v. Verde*, No. SJC-09320, 2004 WL 3421947, at *5 (2004). And, the demand for these services continues to rise. *See* Bureau of Justice Statistics, *Drug and Crime Facts*, *available at* http://www.ojp.usdoj.gov/bjs/dcf/ptrpa.htm (noting that drug prosecutions comprise an increasing proportion of the federal criminal caseload – from 21% in 1982 to 35% in 2004).

likely to recall from "actual memory" information related to any particular test. *See O'Maley*, 932 A.2d at 13. Rather, if called to testify, the analyst most likely would simply look at the machine-generated test results and confirm what the certificate already says. *See* Part A(1) *supra*; *Moon*, 512 F.3d at 362 ("[a]ny competent chemist would infer from [machine-generated] data that the tested substance was cocaine"); *Rawlins*, 884 N.E.2d at 1032 n.13 ("were the actual analysts who participated in the testing to testify, they would likely do no more than read from their own recordings of steps they took. . . ."). The certificate, in other words, is not a "weaker substitute for live testimony," *see Davis*, 547 U.S. at 828, and cross-examination of the analysts would add little, if anything, to the fact-finding process.

Nevertheless, under Petitioner's rigid interpretation of the Confrontation Clause, analysts would be required to travel throughout the state to appear in thousands of cases where defendants have no intention of cross-examining them. This, in turn, "would greatly reduce the amount of time those scientists have to actually conduct the examinations and analyses and would cause even more delays in the criminal justice system." *Pruitt*, 954 So.2d at 615. And, even in the relatively few cases where a defendant might elect to cross-examine the analyst, the examination likely would be of only "incidental benefit . . . to the accused." *Mattox*, 156 U.S. at 243; *see also* J. Mnookin, 15 J.L. & Pol'y at 837 (it seems "especially nonsensical" to require live testimony "when there is little chance that the . . . author of the forensic report[] will still have any independent

memory of conducting the test by the time of trial").[23]

The approach suggested by the Court in *Inadi* and *White*, which emphasized the accused's right to compel the attendance of witnesses as a basis for rejecting Confrontation Clause challenges, better reflects the realities of the adversarial process. *See Inadi*, 475 U.S. at 397-98; *White,* 502 U.S. at 335. There are, as Justice Harlan noted, a small category of situations "where production [of the declarant] would be unduly inconvenient and of small utility to a defendant." *Dutton*, 400 U.S. at 95-96 (Harlan, J., concurring). In these situations, defendants who genuinely desire cross-examination may use their

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[23]The Amici Law Professors attempt to downplay the potential waste of resources by noting that, according to a recent study, 95% of *all* state convictions in 2004 resulted from a plea. *See* Amici Law Profs.' Br. at 7 (citing Bureau of Justice Statistics, *Felony Sentences in State Courts, 2004* (2007)). That study, however, included only *felony* convictions and did not purport to include the hundreds of thousands of additional misdemeanor trials that take place in state courts every day. *See* Bureau of Justice Statistics, *Felony Sentences in State Courts, 2004* at 1-2, http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc04.pdf. Moreover, 34% of the total 1,078,920 state-felony convictions obtained in 2004 were drug offenses, meaning that more than 18,000 state-felony drug convictions obtained in 2004 alone resulted from trials, not pleas. *See id.* At or about the same time, a census of the 50 largest crime labs reported a backlog of 270,000 requests for forensic services at the end of 2002. Bureau of Justice Statistics, *50 Largest Crime Labs, 2002* (2004), *available at* http://www.ojp.usdoj.gov/bjs/abstract/50lcl02.htm. Significantly, requests for testing of controlled substances accounted for about half – 136,000 requests – of this total backlog. *Id.*

right to compulsory process to compel the declarant's attendance at trial. *Id.* Rigid insistence on an absolute right to confrontation is neither required nor in the public interest. *See id.; Mattox*, 156 U.S. at 243. Tellingly, Justice Harlan included a laboratory report as one example (along with other types of business and official records) of the type of situation he believed fell within this category of cases. *Dutton*, 400 U.S. at 96 (citing *Kay*, 255 F.2d 476).

This interpretation of the Sixth Amendment achieves the appropriate balance between its two companion clauses: confrontation and compulsory process. *See* P. Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567, 622 (1978). It also is consistent with the purpose underlying the common law official records exception, which was to avoid the prospect of "hosts of officials . . . devoting the greater part of their time to attending as witnesses in court" rather than carrying out their public duties. 5 J. Wigmore, *Evidence* §§ 1631-32. Additionally, it imposes only a slight burden on those defendants who genuinely want to cross-examine the analysts at trial. *See Magruder v. Commonwealth*, 657 S.E.2d 113, 121-22 (Va.) (no impermissible burden in statutory requirement that defendant demand the presence of analysts at trial), *petition for cert. filed*, No. 07-11191 (U.S. June 6, 2008); *cf. Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1621 (2008) (requiring voters to present identification "does not qualify as a substantial burden on the right to vote"). And,

perhaps most importantly from the public's perspective, it prevents a "defendant from challenging his conviction . . . by protesting the absence of a witness he never genuinely desired to examine." P. Westen, 91 Harv. L. Rev. at 623 n.155.

Even Petitioner's *amici* do not advocate for an absolutist approach to confrontation rights. They suggest, for instance, that a defendant's right to confront analysts in drug cases could be satisfied though increased use of pretrial depositions, closed-circuit televisions, and satellite uplinks. *See* Amici Law Profs.' Br. at 17-18; Brief of Amicus Curiae Richard Friedman at 19-20. But, as the record in this case aptly demonstrates, there appears to be no greater prospect that defendants would utilize these alternative procedures for challenging drug analysis certificates any more than the procedures already available under Massachusetts law.

Similarly, Petitioner's *amici* suggest that Massachusetts could adopt a "notice and demand" statute similar to those enacted in other states. *See* Amici Law Profs.' Br. at 13-15. But, the key features of those statutes – notice and demand – already are available under Massachusetts law. Gen. Laws ch. 111, § 13 provides explicit notice that a drug analysis certificate may be admitted at trial as *prima facie* evidence. Massachusetts rules and practice detail all the pretrial mechanisms available to any defendant who desires to test the validity of the testing methods or the qualifications of the analysts. Further, a defendant may demand the presence of an analyst at trial by obtaining a trial subpoena or

invoking his state and federal constitutional rights to compulsory process. When those rights are exercised, Massachusetts evidence law also ensures that a defendant retains the right to cross-examine the analyst in the same manner as if he had been called by the prosecution.

A notice and demand statute – while certainly a legitimate option for state legislatures – is not constitutionally mandated and, in reality, would add very little substance to a defendant's existing rights under Massachusetts law. Indeed, such a statute could very well reduce the flexibility that Massachusetts law currently affords defendants in shaping their trial strategy. A common feature in most notice and demand statutes is the inclusion of strict time limits within which defendants must use or lose their right to demand the analyst's presence at trial. *See, e.g.,* Ark. Code Ann. § 12-12-313(d)(2) (2008) (10-day demand window); Conn. Gen. Stat. § 21a-283(b) (2006) (5-day demand window). No similar constraint exists under Massachusetts law.

In sum, given the nature of drug analysis, the Sixth Amendment's protections are satisfied where, as here, a state offers a defendant the opportunity to probe and challenge the analysis, including the chance to call and cross-examine the analysts. Nothing more is required.

D. If admission of the drug analysis certificates violated Petitioner's confrontation right, the state courts should determine in the first instance whether the error was harmless beyond a reasonable doubt.

Assuming that admission of the drug analysis certificates without live testimony be held to have violated Petitioner's confrontation rights, the state courts should be permitted to determine in the first instance whether any such error was harmless beyond a reasonable doubt. *See Coy*, 487 U.S. at 1022; *Lee*, 476 U.S. at 547. A remand is particularly appropriate here, given that: the composition and weight of the drugs were not contested issues at trial; the statements contained in the drug analysis certificates were cumulative of other evidence presented at trial that was sufficient to allow the jury to find Petitioner guilty beyond a reasonable doubt; the certificates did not factor heavily in the trial; and the overall case against Petitioner was very strong. *See Delaware v. Van Arsdall,* 475 U.S. 673, 684 (1986).

Under Massachusetts law, "[p]roof that a substance is a particular drug need not be made by chemical analysis and may be made by circumstantial evidence." *Commonwealth v. Dawson,* 504 N.E.2d 1056, 1057 (Mass. 1987). Experienced police officers, for instance, may testify "as to what drug a particular substance was." *Id.* Here, the Commonwealth presented testimony from two highly-experienced narcotics officers and other witnesses attesting to the composition and weight of

the drugs. *See* Statement, Part 2 *supra*. Petitioner never challenged the expertise of these officers or objected to their testimony that the 4 bags seized from Wright and the 19 bags recovered from the backseat area of the cruiser each contained "at least" a gram of cocaine. *See id.*; J.A. 26. In addition, the purchaser of the 4 bags, Wright, admitted to police that the bags contained cocaine. App. 3a; J.A. 35. Wright had no conceivable interest in fabricating such a statement, which directly inculpated him.

The drug analysis certificates were cumulative of this substantial other evidence and did not factor heavily in the case. Petitioner's counsel, in fact, argued that the only issue was who possessed the cocaine, not the weight or composition of the drugs. J.A. 11, 47. Moreover, the prosecutor referred to the certificates only indirectly and in passing in his closing argument. *See* J.A. 48-58. The impact, if any, on the jury of these fleeting references was easily outweighed by the trial judge's explicit instructions – repeated in connection with both the trafficking and distribution charges – that the jury was free to disregard the certificates entirely. J.A. 59-61. The usual "assumption that jurors are able to follow the court's instructions fully applies when rights guaranteed by the Confrontation Clause are at issue." *Tennessee v. Street*, 471 U.S. 409, 415 n.6 (1985).

There also can be, as the state Appeals Court found based on its review of the entire record, "no real question concerning the sufficiency of the Commonwealth's evidence" establishing Petitioner's

guilt as a joint venturer. App. at 6a. The testimony of the police officers and store manager, together with the surveillance photographs taken at the time of the crime, the identical packaging and appearance of the two batches of cocaine, Petitioner's and Montero's "furtive movements" on the ride to the police station, the cash found on the ground next to the cruiser, and Petitioner's possession of a pager, all established beyond a reasonable doubt Petitioner's role as "a willing participant in the distribution of cocaine to Wright." *Id.* at *3a, 6a-7a.*

CONCLUSION

Petitioner's conviction should be affirmed. Alternatively, the Court should remand this case to the state court so it may decide whether the error, if any, was harmless beyond a reasonable doubt.

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