No. 07-591

In The

Supreme Court of the United States

LUIS E. MELENDEZ-DIAZ,

Petitioner,

v.

MASSACHUSETTS,

Respondent.

On Writ Of Certiorari To The Appeals Court Of Massachusetts

BRIEF OF RICHARD D. FRIEDMAN, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

RICHARD D. FRIEDMAN
Counsel of Record, Pro Se
625 South State Street
Ann Arbor, Michigan 48109
Telephone: (734) 647-1078
Facsimile: (734) 647-4188
E-mail: rdfrdman@umich.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTE

RULE

SECONDARY SOURCES

INTEREST OF *AMICUS CURIAE*[1]

Amicus is a legal academic holding the title of Ralph W. Aigler Professor of Law at the University of Michigan Law School. Since 1982 he has taught Evidence law. He is general editor of THE NEW WIGMORE: A TREATISE ON EVIDENCE, and author of THE ELEMENTS OF EVIDENCE (3d ed. 2004).

Much of the academic work of *amicus* has dealt with the right of an accused under the Sixth Amendment "to be confronted with the witnesses against him." He has written many articles and essays on that right, and since 2004 he has maintained The Confrontation Blog, www.confrontationright.blogspot.com, to report and comment on developments related to it. In 2005-06, *amicus* successfully represented the petitioner in *Hammon v. Indiana* (decided together with *Davis v. Washington*, 126 S.Ct. 2266 (2006)).

In the present case, as in *Giles v. California*, No. 07-6053, *amicus* filed a brief in support of the petition for *certiorari*. In *Giles*, *amicus* also filed a brief on the merits, in support of the respondent State. In the present case, his views favor the position of the

[1] *Amicus* has given the parties more than ten days' notice of his intention to file this brief. Petitioner has filed with the clerk a global consent to the filing of any *amicus* brief on the merits of this case. Respondent has granted consent to the filing of this brief, and a written statement of respondent's consent has been filed with the clerk. Part of the cost of preparing and submitting this brief was paid for by research funds provided by the University of Michigan Law School to *amicus* and under his control. The brief does not necessarily reflect the views of that Law School or of any of its faculty other than *amicus*. Except as just noted, no persons or entities other than the *amicus* made any monetary contribution to the preparation or submission of this brief, which was not authored in any part by counsel for either party.

petitioner, the accused.

Representing two convicted defendants, *amicus* has recently filed a petition for *certiorari* in *Briscoe v. Virginia*, No. 07-11191. That petition presents the question whether a state violates the Confrontation Clause if it provides that a certificate of laboratory results may be introduced against an accused and also that the accused may, at the expense of the state, call the author of the report as his own witness. If the Court decides the present case in favor of the petitioner, the question presented by the *Briscoe* petition would be ripe for decision.

As in *Giles*, *amicus* submits this brief on behalf of himself only; he has not asked any other person or entity to join in it. He is doing this so that he can express his own thoughts, entirely in his own voice. His desire, in accordance with his academic work, is to promote a sound understanding of the confrontation right, one that recognizes the importance of the right in our system of criminal justice and at the same time is practical in administration and does not unduly hamper prosecution of crime.

Amicus believes that this is an easy case – certificates of the type at issue here are plainly testimonial in nature. But, recognizing that sometimes "easy cases make bad law," *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 804 (1980) (Blackmun, J., concurring in judgment), his concern goes beyond the question presented by this case. He believes that it is important for a proper conception of the confrontation right that some of the factors that make this an easy case not be deemed essential for a statement to be deemed testimonial.

SUMMARY OF ARGUMENT

The question presented by the petition is whether a state forensic analyst's laboratory report, prepared for use in a criminal prosecution, is a "testimonial" statement within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004). The Appeals Court of Massachusetts, following binding precedent of the state's Supreme Judicial Court, *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005), effectively answered in the negative. *Amicus*, like petitioner, believes that such reports are clearly testimonial.

The refusal of many courts to recognize the testimonial character of laboratory reports like the one involved here reflects a tendency that predates *Crawford*, to treat the Confrontation Clause as little more than an obstacle to efficient truth-determination. Laboratory reports prepared by government agents for the purpose of assisting prosecution can be deemed to be non-testimonial only by discarding the fundamental framework that *Crawford* established and returning in effect to the regime of *Ohio v. Roberts*, 448 U.S. 56 (1980).

Forensic reports of the type involved here should be deemed testimonial because they are clearly prepared in contemplation of use in prosecution. Such reports are highly formal, but any statement made in anticipation of prosecutorial use should satisfy any applicable formality requirement. Similarly, though government officials were involved in the creation of these reports – and indeed were the authors of them – that should not be deemed essential for them to be deemed testimonial.

Characterizing a forensic report as a business or official record, or as non-discretionary, non-adversarial, or non-accusatory, does not negate its testimonial character. Nor does the fact that the reports purported to relate the current condition of the substances being tested.

Ultimately the Commonwealth's argument is that providing confrontation of the author of forensic laboratory reports is impractical. This contention is legally immaterial and factually inaccurate.

Because laboratory evidence is an important, and growing, part of prosecution evidence, cases holding that laboratory reports prepared for use in prosecution are not testimonial signal more than a theoretical misunderstanding of *Crawford*. They also threaten a wholesale change in our system of criminal justice, to one in which the key witness against the accused testifies out of court, in writing, not necessarily under oath, and not in the presence of the accused or subject to examination by him.

ARGUMENT

Crawford v. Washington, 541 U.S. 36 (2004), transformed the doctrine governing whether introduction of an out-of-court statement against an accused violates the Confrontation Clause. Under *Crawford*, the central question in making that determination is whether the statement is testimonial in nature. If it is, then for purposes of the Clause the declarant was acting as a witness in making the statement; if not, as the Court has subsequently made clear, the declarant is deemed *not* to have been acting as a witness, and the

Clause does not apply to the statement. *Davis v. Washington*, 547 U.S. 813, 823-26 (2006); *Whorton v. Bockting*, 127 S.Ct. 1173, 1183 (2007).

Crawford listed a few categories of statements that lay at the core of the category of testimonial statements. 541 U.S. at 52, 68. It also recited three definitions of "testimonial" that had been proposed, *id.* at 51-52. But, because the statement involved in the case would "qualify under any definition," *id.* at 52, the Court declined to adopt one. Quite the contrary, it said explicitly, "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" 541 U.S. at 68.

Two years later, in *Davis*, the Court returned to the field. The *Davis* decision resolved a pair of cases involving fresh accusations of domestic violence made in response to interrogations by police agents. Once again, the Court made its decision "[w]ithout attempting to produce an exhaustive classification of all conceivable statements." 547 U.S. at 822. Indeed, the Court declined even to produce an exhaustive definition of "all conceivable statements in response to police interrogation." *Id.*

Amicus believes that perhaps the most important and pressing remaining issue for the Court to resolve with respect to the meaning of the term "testimonial" is the one presented by this case – whether the term encompasses statements, such as laboratory reports, routinely produced by government agents as part of the investigatory and prosecutorial process. This is not an important and pressing issue because it is difficult. *On the contrary, amicus* believes the issue is clear-cut: Like the statement in *Crawford*, a forensic laboratory

report prepared for use in a criminal case "qualif[ies] under any definition" of "testimonial." 541 U.S. at 52. This means that the doctrine of the Confrontation Clause will be seriously weakened if decisions holding otherwise are allowed to stand.

I. Forensic laboratory reports like the ones in this case are testimonial because they are prepared in contemplation of use in prosecution.

A forensic laboratory report of the type at issue here is clearly prepared in anticipation of use in the prosecutorial process. The Commonwealth essentially admits this fact. Brief in Opposition [hereinafter "BIO"] at 25 ("the analysts probably knew their test results would be used as evidence in a criminal prosecution"). It could hardly do otherwise, given that the governing statute provides for performance of the test when the Department of Public Health is requested to do so by police authorities, if the Department "is satisfied that the analysis is to be used for the enforcement of law." Mass. Gen. L. Ch. 111, § 12. In the view of *amicus*, this consideration should control the determination, as it does under the first and third definitions recited in *Crawford*.[2] *Amicus* has made the argument at length elsewhere, Richard D. Friedman, *Grappling with the Meaning of "Testimonial"*, 71 BROOK. L. REV. 241 (2005) [hereinafter "*Grappling*"], at 243, 251-59, and will present only a very brief sum-

[2] (1) The report is a pretrial statement similar to an affidavit "that declarants would reasonably expect to be used prosecutorially." (3) The statement was made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." 541 U.S. at 51-52.

mary here.

The purpose of the Confrontation Clause is to prevent establishment of a system by which witnesses may testify against a criminal defendant out of the presence of the defendant and not subject to examination by him. But just such a system would be created if the Clause tolerated admission against the accused of any statement made with the anticipation that it will be used in prosecution. Whatever the form or audience of the statement, if the declarant understands that the statement will likely be used in prosecuting crime, then the declarant is consciously creating prosecution evidence – and so making a statement of that type has become an accepted form of providing evidence that can help convict an accused.

The Commonwealth, however, relies on *Davis* to contend that the test for determining whether a statement is testimonial cannot depend on the reasonable expectation of the declarant. "If this were the standard," the Commonwealth says, "the Court in *Davis* would have held that the 911 call from the victim reporting a domestic disturbance was testimonial because a reasonable person would know that the result of such a call would be the arrest and prosecution of the perpetrator." BIO at 24. This conclusion is incorrect. *Amicus* has argued elsewhere that this portion of *Davis* is best understood as adopting a "heat-of-the-moment" variation, rather than an "armchair" variation, of the reasonable-expectation test in the context of statements made in response to an emergency: A person with the information that was available to the declarant, but calmly analyzing the situation in the later comfort of an armchair, would almost certainly realize that the report would likely

lead to the prosecution of the defendant. But the *Davis* Court evidently regarded as decisive what it perceived to be the situation of the declarant as she was at the actual time she made the statement, in the heat of the moment and in clear distress. Richard D. Friedman, Crawford, Davis, *and Way Beyond*, 15 J. L. & Pol. 553 (2007) [hereinafter "*Way Beyond*"], at 562-63. In that situation, it is far less likely that the declarant would focus on the possible legal consequences of her statement. The 911 case was, according to the *Davis* opinion itself, a difficult case, 527 U.S. at 829 (characterizing *Hammon*, involving a statement to a responding officer, deemed testimonial, as "much easier" than the 911 case). The Court's resolution of that case should not control the standard in unrelated contexts for determining whether a statement is testimonial.

II. The certificates satisfied any applicable requirement of formality – but a statement made in anticipation of use in prosecution should satisfy any such requirement.

There is no doubt that the laboratory report in this case, signed under oath pursuant to the statutory requirement, was a formal statement; on this ground, it plainly satisfies the second of the three definitions presented by *Crawford*, 541 U.S. at 51-52 ("extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in

judgment)). But *amicus* believes that this formality was not required for the statement to be characterized as testimonial. Had the analyst reported the test results to the prosecutor in a telephone conversation, or by passing along hand-written markings on a notepad, the statement would have been equally testimonial. The key factor is that the report was made with the anticipation that it would be used in prosecuting crime.

Amicus believes that, if there is a formality requirement for a statement to be deemed testimonial, "it adds nothing to the requirement that the statement be made in anticipation of prosecutorial use," *Way Beyond*, *supra*, 15 J. L. & Pol. at 569:

> [F]ormalities, including the oath and opportunity for cross-examination, are required conditions of acceptable testimony. A statement is not rendered non-testimonial by the absence of formalities; rather, if the statement is genuinely testimonial in nature, the lack of formalities makes the statement unacceptable. A rule that only formal statements will be characterized as testimonial is therefore theoretically backwards. Moreover, it creates a perverse incentive: those wanting to give or take testimony without it being subjected to confrontation could simply do so informally.

Id. at 567.

Amicus therefore submits that development of a sound conception of the Confrontation Clause will be best promoted by avoiding the suggestion of an independent formality requirement. That is, if the

statement was made in anticipation that it would be used in investigation or prosecution of crime, characterizing it as informal should not cause it to be deemed non-testimonial.[3]

III. Government officials were authors of the reports involved here – but government involvement in creation of the reports was not essential to characterize them as testimonial.

Another addition that some courts have incrusted onto the definition of "testimonial" is that a statement cannot be testimonial unless a government agent was involved in its creation. *E.g., People v. Vigil*, 127 P.2d 916 (Col. 2006). That is not an issue here, because a government official was the *author* of the report.[4] But

---

[3] Note, for example, that in *Hammon v. Indiana*, No. 05-5705, decided together with *Davis*, this Court said, "It was formal enough that Amy's interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his 'investigat[ion].'" 547 U.S. at 830. *Davis* also said that it is not "conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition." *Id.* at 826. *Amicus* recognizes, of course, that in *Davis* the Court also said, "We do not dispute that formality is indeed essential to testimonial utterance." *Id.* at 830 n.5. Friedman, *Way Beyond, supra,* 15 J. L. & Pol. at 566-71, offers an extended argument that the best understanding of this passage is that "[i]f there is a formality requirement, it is satisfied by demonstrating that it was objectively apparent to the declarant that the interrogation was being held for prosecutorial purposes."

[4] Similarly, a theoretical issue that arises in the context of police interrogations – whether the testimonial quality of the statement should be judged from the perspective of the declarant or from

amicus submits that it is important to avoid any suggestion that government involvement in creation of a statement is necessary for the statement to be characterized as testimonial. A statement furnished to a prosecutor for use in prosecution should be considered testimonial even though the prosecutor played no role in creating the statement. *See Davis*, 547 U.S. at 822 n.1 ("The Framers were no more willing to exempt from cross-examination volunteered testimony . . . than they were to exempt answers to detailed interrogation."). And the same is true of a statement made to a private individual who is used as a conduit for passing the statement along to prosecutorial authorities. Friedman, *supra*, *Grappling* 71 BROOK. L. REV. at 247, 259-63.

IV. Characterizing a forensic laboratory report as a business or official record does not negate its testimonial character.

In concluding that forensic lab reports are not testimonial, some courts, including the Massachusetts Supreme Judicial Court, have drawn on the reference in *Crawford* to the fact at the time of the adoption of the Sixth Amendment there were already several exceptions, including one for business records, that "by their nature were not testimonial." 541 U.S. at 55.[5] Records fitting within the limited "shop book" rule extant as of 1791, *see* 5 JOHN HENRY WIGMORE,

---

that of the interrogator, *e.g.*, *Way Beyond*, *supra*, 15 J. L. & Pol. at 559-63 – does not arise here.

[5] *See* Commonwealth v. Verde, 827 N.E.2d 701, 703 (Mass. 2005) ("a drug certificate is akin to a business record and the confrontation clause is not implicated by this type of evidence").

EVIDENCE IN TRIALS AT COMMON LAW (J.H. Chadbourn rev. 1974) [hereinafter "EVIDENCE"], at 429-30, were "by their nature . . . not testimonial" *because they were not prepared with litigation in mind.* Neither this rule nor *Crawford*'s reference to it can justify evading the Confrontation Clause by admitting classes of statements that *are* prepared for litigation.

The same is true of what is now sometimes referred to as the hearsay exception for official documents. The Commonwealth contends that there is an "ancient principle . . ., recognized at the time of the adoption of the Constitution," that admits records made by a public officer in performing his duty. *Commonwealth v. Slavski*, 140 N.E. 465, 469 (Mass. 1923), quoted in *Commonwealth v. Verde*, 827 N.E.2d 701, 705 (Mass. 2005), and BIO at 26. Of course, there is no unlimited principle of that type. *Slavski* itself makes this clear. The opinion cites numerous cases that admit official records – such as "weather records kept by officers under the law, the records of a postmaster, town and city records of enlistments in military service, certificate of discharge from military service on surgeon's certificate of disability, return of enumeration of proprietors by overseers, [and] record of certificate of marriage as showing residence of the husband," 140 N.E. at 468 (citations omitted). And the opinion also notes numerous categories of official records and reports that were not admissible, including "the report of an autopsy of a medical examiner giving his opinion as to the cause of death, the report of an investigation by state fire marshal as to the cause of a fire, [and] report of an inquest as to the cause of death." *Id.* (citations omitted). Even though *Slavski* indiscriminately cited criminal and civil cases, and

even though the cases it cited were all decided long after the Framing, the pattern is clear: Routine official statements not made in contemplation of litigation were readily admitted; statements made in anticipation of use in litigation almost never were. The extent to which, and the time at which, some such litigation-oriented statements were admitted is not important to resolve for present purposes. Before, during, and long after the Framing era, a prosecutor was not allowed to introduce a report that was made by a government agent with the anticipation that it would be used in prosecution of a crime.[6] *Amicus* knows of no case in the Framing era, or for many years afterwards, in which a prosecutor was allowed to introduce such a report. Even though such reports were allowed by some cases in more modern times, before *Roberts* signaled greater leniency, a rule to that effect has never been well established. *See, e.g.,* Fed. R. Evid. 803(8), subsecs. B (excluding "in criminal cases matters observed by police officers and other personnel"), C (not applicable to evidence offered by the Government in criminal cases).

A state may expand its hearsay exceptions for business and official records as far as it likes, but that will not alter the constitutional status of such records. If a document is prepared for litigation, it is testimonial in nature whether or not the state chooses

[6] Thus, according to Wigmore, magistrates' notes of testimony taken by them at committal hearings were inadmissible (even though valid proof of the testimony would be admissible, as for impeachment), in the absence of the magistrate (or of the clerk, if he could use the notes as an aid to refresh his memory) through the 18th century; the earliest case cited by Wigmore admitting such notes, without calling the magistrate or clerk, was decided in 1834. 5 WIGMORE, EVIDENCE, *supra,* at 780.

to label it a business or official record. C*f. Palmer v. Hoffman*, 318 U.S. 109, 114 (1943) (refusing to apply hearsay exception to reports for which the "primary utility is in litigating, not in railroading"). And if documents of that type are routinely prepared for litigation, that simply means that the state, by admitting them against a criminal defendant absent live testimony of the authors, has countenanced a practice that routinely violates the confrontation right.

V. That the certificates purported to relate the current condition of the substances being tested does not negate their testimonial character.

The Commonwealth contends that the certificates are not testimonial because they purport to relate the current condition of the substances being tested rather than any past event. BIO at 27-28. *Cf. People v. Geier*, 161 P.3d 104, 139 (Cal. 2007) (report "constitute[s] a contemporaneous recordation of observable events rather than the documentation of past events."). But that fact is immaterial. There is no principle that a statement that would otherwise be testimonial is removed from the scope of the Confrontation Clause because it reports on a contemporaneous condition or event.[7] If that were the law, there would be no need for live testimony describing a crime scene; the report of a police officer (or of anyone else) made while observing the scene

[7] *Davis*, in holding that statements made "to enable police assistance to meet an ongoing emergency," 547 U.S. at 822, does not suggest that any statement made about any contemporary event or condition is not testimonial.

could be introduced instead. Indeed, if the Commonwealth's theory were correct, the Confrontation Clause would allow a prosecution expert to present to a jury her assessment of the current condition of an object or material before her, and then leave the courtroom without ever subjecting herself to cross-examination – because her courtroom statement would not be considered testimonial in nature.

VI. Characterizing the certificates as non-discretionary, non-adversarial, or non-accusatory does not negate their testimonial nature.

The Commonwealth argues that the testing reported in the certificates "was performed in a non-adversarial setting," BIO at 28 – a strange characterization for testing of suspected cocaine performed at the request of police in a state laboratory. *Cf. Crawford*, 541 U.S. at 66 ("The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers."). It also argues that the certificates did not in themselves "accuse Petitioner of any crime," BIO at 29 – though of course they were offered to prove elements of the crime charged. And the Massachusetts Supreme Judicial Court has said that certificates of this sort are "neither discretionary nor based on opinion," *Verde supra*, 827 N.E.2d at 705. None of these arguments has any merit.

Application of the Confrontation Clause is not limited to witnesses who might be considered

adversaries of the accused. Indeed, Sylvia Crawford, wife of the defendant Michael Crawford, clearly was not an adversary of his.

Nor is application of the Clause limited to testimony that is accusatory in nature; the Clause gives the accused person the right to be confronted with "the witnesses against him," not merely with "his accusers." The Clause obviously applies to a witness who testifies to nothing more than the presence of the accused near the scene of a crime, even though that testimony is utterly non-accusatory.

Finally, testimony that is neither discretionary nor based on an opinion plainly falls within the heart of the Clause: An eyewitness who is asked to do nothing more than relate what she saw is the paradigmatic example of a witness subject to the Clause.

VII. Arguments based on the supposed reliability of the evidence and impracticality of providing confrontation are legally immaterial and factually inaccurate.

Amicus believes that the arguments presented above demonstrate clearly in principle that the certificates are testimonial. Ultimately, the Commonwealth's argument comes down to one of practicality, based on three assertions:

(a) that the certificates are highly reliable, BIO at 26 ("the analysts . . . were state officials simply recording the 'results of a well-recognized scientific test,'" quoting in part *Verde*, *supra*, 827 N.E.2d at 705);

(b) that confrontation of the analysts is of little

value, BIO at 28 ("had the analysts been called to testify, they 'would merely have authenticated the document' and likely would have been 'unable to recall from actual memory information related to [the certificate's] specific contents,'" quoting in part *State v. O'Maley*, 932 A.2d 1, 13 (N.H.), *petition for cert. filed*, No. 07-7577 (Nov. 7, 2007); and

(c) that providing for confrontation would be unduly expensive. BIO at 34-38 (bright-line rule characterizing forensic lab reports as testimonial, and therefore imposing "the burden of having the laboratory personnel called as witnesses in every criminal case where forensic evidence is at issue," "threatens the efficient administration of justice").

All three of these propositions are legally immaterial and factually incorrect.

(1) That characterizing a statement as reliable does not relieve it from the requirements of the Confrontation Clause is the central holding of *Crawford*. 541 U.S. at 61 ("Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. "). And the vulnerabilities of lab reports are well established, Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 491-500 (2006); such reports are far less reliable than has often been supposed.

(2) The Constitution does not make the accused's right to be confronted with a prosecution witness dependent on a judicial assessment of the likely value of the confrontation. *Crawford*, 541 U.S. at 67 ("The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we . . . lack authority to replace it with one of our own

devising.").

Moreover, confrontation of the analyst does in fact have great potential value, *even assuming* the analyst does not remember the particular test at issue. At the very least, it allows the accused to cross-examine the analyst about the laboratory's general procedures. Doing so could well reveal significant and pervasive problems. And the prospect of facing searching cross-examination tends to make forensic laboratories careful to adhere to proper procedures; put another way, removing that prospect will almost certainly tend to make laboratories laxer in implementing sound standards and procedures.

Furthermore, even though some forensic reports may be so mundane that the analyst is unlikely to remember them for long, that is not so in all circumstances. *See, e.g., State v. Craig*, 853 N.E.2d 621 (Oh. 2006), *cert. denied*, 127 S.Ct. 1374 (2007) (gruesome autopsy report).

Finally, to the extent that the analyst suffers memory loss between the time the test is performed and the time he testifies subject to confrontation, the Commonwealth has the ability to mitigate or eliminate the problem. It can hold trials promptly, and it can offer the accused an early opportunity for confrontation at a pretrial deposition or other proceeding. That the Commonwealth fails to take reasonable steps to ensure that the accused can exercise the confrontation right in a timely manner is not a ground for dispensing with the right altogether.

(3) The criminal justice system would, no doubt, be cheaper and more efficient (at least in the short run) if the confrontation right did not exist. So too would it be

cheaper and more efficient if it did without juries, or lawyers, or even judges, or the need to present evidence. But our system of criminal justice requires these procedures, and does not make them subject to a case-specific cost-benefit analysis. "Dispensing with confrontation" because it would be too expensive, like dispensing with it "because testimony is obviously reliable," is similar to "dispensing with jury trial because a defendant is obviously guilty" – and it "is not what the Sixth Amendment prescribes." *Crawford*, 541 U.S. at 62. The petitioner was sentenced to three years in prison, and the reports at issue here – which were offered to prove not only the presence but also the quantity of cocaine – were a crucial part of the evidence. The Constitution is not unreasonable in demanding that the witness who prepares these critical reports testify in person in the presence of the accused.

Besides, a state has ample means of limiting cost and yet allowing the accused to be confronted with the author of a forensic report. First, it can provide an opportunity for confrontation quite efficiently, before trial, by deposition. Indeed, even if the state chooses to use a limited number of analysts, so that often the analyst who prepares a report lives and works a considerable distance from the place of trial, depositions can reduce cost considerably, because the analyst could give several in one city on a single day. Especially if the deposition is video-taped, so that it preserves evidence of the witness's demeanor, the courts should then be rather generous in treating the author as unavailable to testify at trial, by virtue of distance or lack of memory or both. Given that the witness had testified subject to an opportunity for

cross-examination, the Confrontation Clause would then pose no obstacle to admission of the report or of the deposition testimony.

Second, a state can validly provide that if an accused does not make a timely demand for confrontation, then a lab report may be admitted without the analyst testifying. *Cf. State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006) (providing criteria for such statutes). If in fact the confrontation would have little value for the accused, then the accused would often decline to make the demand, and so waive the right.[8]

The Confrontation Clause sets out a basic principle of criminal trial procedure. Often it applies to testimony that a court might deem reliable, and often it necessarily entails considerable expense. The administration of justice has not ground to a halt in those states that, unlike Massachusetts, have recognized that this central protection of our system contains no exemption for officials who prepare critical prosecution evidence by writing laboratory reports.

CONCLUSION

Forensic laboratory reports prepared for use in prosecution have become a pervasive part of our criminal justice system. This development holds out

[8] *Amicus* does *not* believe that a state can satisfy the Confrontation Clause by providing that if the accused wishes confrontation he must subpoena the analyst as his own witness. Indeed, the pending petition for *certiorari* in *Briscoe and Cypress v. Virginia*, No. 07-11191, in which *amicus* is counsel for petitioners, challenges the validity of this burden-shifting procedure, which would eviscerate the confrontation right.

the possibility of improved crime detection and increasing accuracy in fact-finding. But it also means that if decisions like the one below, approving the introduction of reports of tests without the author of the report testifying subject to adverse examination, our criminal justice procedure will have been fundamentally altered: Trial by certificate will become a prominent fixture in it. The witness providing the information essential to conviction will testify out of court, in writing, not necessarily under oath, and not in the presence of the accused or subject to examination by him.

It therefore should be clear that forensic lab reports are testimonial, but Massachusetts is far from alone in holding to the contrary. Many courts still appear to regard *Crawford* as an obstacle that can be avoided by new forms of words rather than as a fundamental reassertion of one of the central protections of our criminal justice system. This Court should not only set these courts straight but also ensure that the transformation wrought by *Crawford* is not seriously undermined.

For the foregoing reasons, the Court should reverse the decision of the Appeals Court of Massachusetts.

Respectfully submitted,

RICHARD D. FRIEDMAN
Counsel of Record, Pro Se
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 647-1078

June 23, 2008