No. 07-591

In The
Supreme Court of the United States

LUIS E. MELENDEZ-DIAZ,

Petitioner,

v.

MASSACHUSETTS,

Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF RICHARD D. FRIEDMAN AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

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MOTION OF RICHARD D. FRIEDMAN FOR LEAVE TO FILE BRIEF, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 37.2(b), Richard D. Friedman respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the Petition for *certiorari*. *Amicus* has given the parties more than ten days' notice of his intention to file this brief. Petitioner has granted consent, but respondent has refused consent. A written statement of petitioner's consent has been filed with the clerk.

This case raises important questions concerning the scope of the Confrontation Clause of the Sixth Amendment to the Constitution, which is a central aspect of our criminal justice system.

I am a legal academic; I hold the title of Ralph

W. Aigler Professor of Law at the University of Michigan Law School. Since 1982 I have taught Evidence law. I am general editor of THE NEW WIGMORE: A TREATISE ON EVIDENCE, and author of THE ELEMENTS OF EVIDENCE (3d ed. 2004).

Much of my academic work has dealt with the right of an accused under the Sixth Amendment "to be confronted with the witnesses against him." I have written many articles and essays on that right, and since 2004 I have maintained The Confrontation Blog, www.confrontationright.blogspot.com, to report and comment on developments related to it.

In *Lilly v. Virginia*, 527 U.S. 116 (1999), I was one of the principal authors of the American Civil Liberties Union's *amicus* brief, which Justice Breyer discussed in his concurring opinion, 527 U.S. at 140-43, addressing the eventual need for re-evaluating the basis of Confrontation Clause doctrine. In *Crawford v. Washington*, 541 U.S. 36 (2004), I was author of a law professors' *amicus* brief, which was discussed in oral argument, and the Court's decision cited one of my essays. In 2005-06, I successfully represented the petitioner in *Hammon v. Indiana* (decided together with *Davis v. Washington*, 126 S.Ct. 2266 (2006)). In *United States v. Yida*, 498 F.3d 945, 951, 959 (9th Cir. 2007), the court quoted approvingly from an *amicus* brief I had submitted on behalf of myself only. Last week, in *Giles v. California*, No. 07-6053, I filed another solo *amicus* brief (with the consent of the parties) in support of a petition for *certiorari*.

As in *Yida* and *Giles*, I am submitting this brief on behalf of myself only; I have not asked any other person or entity to join in it. I am doing this so that I

can express my own thoughts, entirely in my own voice. I am entirely neutral in this case, in the sense that my interest is not to promote an outcome good for one party or the other, or for prosecutors or defendants as a class. Rather, my interest, in accordance with my 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.

Indeed, while in *Giles* my views on the merits are far more in line with those of the respondent state than with the accused, in this case they are far more in line with those of the accused. As in *Giles*, however, I support the petition for *certiorari*. I believe that my perspective allows me to be of assistance to the Court in demonstrating why the question presented by the petition in this case is perhaps the most pressing issue, both practically and theoretically, concerning the scope of the Confrontation Clause. Accordingly, I respectfully seek leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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BRIEF OF RICHARD D. FRIEDMAN, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

The interest of *amicus* is set forth in the accompanying motion for leave to file this brief *amicus curiae.*

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, effectively answered in the negative. *Amicus*, like petitioner, believes that such reports are clearly testimonial.

Amicus has little or nothing to add to the petition's able showing that the lower courts are in sharp and irreconcilable conflict on this question, and that this case is an excellent vehicle for considering it. The principal goal of this brief is to make clear how great are the consequences, both theoretical and practical, of

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[1] As noted in the accompanying motion, *amicus* has given the parties more than ten days' notice of his intention to file this brief. Petitioner has given consent, but respondent has not. A written statement of petitioner'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.

this question.

The refusal of many courts to recognize the testimonial character of laboratory reports like the one in this case 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 effectively returning to the regime of *Ohio v. Roberts*, 448 U.S. 56 (1980).

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

I. Further Intervention by the Court on the Meaning of "Testimonial" is Needed, and Perhaps the Most Important and Pressing Question is the One Presented by this Case.

Crawford v. Washington, 541 U.S. 36 (2004), transformed the doctrine governing whether introduc-

tion 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*, 126 S.Ct. 2266, 2274-76 (2006); *Whorton v. Bockting*, 127 S.Ct. 1173, 1183 (2007).

Crawford, however, recognized that the Court would soon have to return to the field. The Court's opinion 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. Moreover, it acknowledged that its "refusal to articulate a comprehensive definition" in that case would "cause interim uncertainty." *Id.* at 68 n.10.

Two years later, in *Davis*, the Court did indeed return 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." 126 S.Ct. at 2273. Indeed, the Court declined even to produce an

exhaustive definition of "all conceivable statements in response to police interrogation." *Id.*

Thus, the Court has taken measured steps towards building an understanding of the term "testimonial" and so creating bounds on the Confrontation Clause. This is a prudent course, especially given how new the *Crawford* doctrine is and how dramatically different it is from what preceded it. But a corollary of this approach is that, to achieve ultimate success in building a sound doctrinal framework, the Court will need to decide more cases presenting questions whether given types of statements should be deemed testimonial.

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 – these statements are obviously testimonial in nature – and, as discussed in Section II, this means that the doctrine of the Confrontation Clause will be seriously weakened if decisions holding otherwise are allowed to stand. Indeed, the fact, demonstrated by the petition, that numerous courts have treated these statements as non-testimonial shows that many courts have not yet come to grips with the transformation wrought by *Crawford.* Moreover, as discussed in Section III, cases presenting this issue are extremely common, and they will become more common until the matter is resolved.

II. Because Statements of the Type Involved in this Case are So Clearly Testimonial, Allowing Decisions Like the One Below to Stand Will Weaken the Confrontation Clause.

Like the statement in *Crawford*, a forensic laboratory report prepared for use in a criminal case "qualif[ies] under any definition" of "testimonial."

Such a report is clearly prepared in anticipation of use in the prosecutorial process; in the view of *amicus*, this consideration should control the determination (as it does under the first and third definitions recited in *Crawford*).[2] There can be no plausible contention that under *Davis*, 126 S.Ct. at 2273-74, it was prepared to respond to an "ongoing emergency."

Another factor sometimes deemed essential to a statement being deemed testimonial, and crucial to the second definition offered in Crawford, is formality. *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," Richard D. Friedman, Crawford, Davis, *and Way Beyond*, 15 J. L. & Pol. 553, 569 (2007). But however stringent an independent formality requirement may be, the statement in this case – a forensic laboratory report

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[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.

certified under oath – certainly satisfies it.[3]

Similarly, some courts believe – mistakenly, in the view of *amicus* – 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). But of course that is not an issue here, because a government official was the *author* of the report. And for the same reason, 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 that of the interrogator, *e.g., Way Beyond, supra*, at 559-63 – does not arise here.

How, then, can courts hold forensic laboratory reports to be non-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.[4] Obviously, this reference to the limited "shop book" rule extant as of 1791, *see* 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 429-30 (J.H. Chadbourn rev. 1974), does not allow a state to use a much broader hearsay exception

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[3] Compare *Hammon v. Indiana*, No. 05-5705, decided together with *Davis*, in which the 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].'" 126 S.Ct. at 2278.

[4] *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").

as the means of effectuating a routine violation of the Constitution. A state may expand its hearsay exceptions for business and public records as far as it likes, but that will not alter the constitutional status of such records. If a type of document is routinely prepared for litigation it is testimonial in nature whether or not the state chooses to label it a business record. *Cf. 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").

Nor does the fact that the author of the report is presumably recording her contemporaneous observations take the report out of the Confrontation Clause. *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."). There is no principle that a statement that would otherwise be testimonial is removed from the scope of the Clause because it is reporting on a contemporaneous condition or event. 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) could be introduced instead.

What the matter comes down to, then, is that some courts regard laboratory reports as so reliable that confrontation of the author is dispensable. These courts believe that the Confrontation Clause should not apply because laboratory reports are so trustworthy and the cost of making the authors confront the accused so great.[5] *Amicus* believes that these courts

[5] *See, e.g.*, People v. Geier, 161 P.3d 104, 135 (Cal. 2007) ("Some courts . . . cite the practical difficulties that would ensue were *Crawford* applied to this type of evidence."); Commonwealth v.

are wrong on both matters of fact.[6] But of course the more significant point is that these considerations are inapposite under *Crawford*. Courts generally know to avoid the language of reliability, the keynote of the rejected regime of *Ohio v. Roberts*, 448 U.S. 56 (1980). But however they phrase the point, the substance is the same, and it runs directly contrary to the essence of *Crawford*.

This, unfortunately, is another chapter in an old

Verde, 827 N.E.2d 701, 705 (Mass. 2005) (holding that certificates of chemical analysis are not testimonial because they are "neither discretionary nor based on opinion; rather, they merely state the results of a well-recognized scientific test"); State v. Forte, 629 S.E.2d 137, 143 (N.C. 2006) (reports contain the agent's "objective analysis of the evidence, along with routine chain of custody information" and "are neutral"; the agent "has no interest in the outcome of any trial in which the records might be used"); State v. Lackey, 120 P.3d 332, 351 (Kan.2005) (characterizing autopsy reports as generally making "routine and descriptive observations of the physical body in an environment where the medical examiner would have little incentive to fabricate the results," and declaring that courts have declined to treat them as testimonial because to do so "would have the effect of requiring the pathologist who performed the autopsy to testify in every criminal proceeding").

[6] The vulnerabilities of lab reports are well established, Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 491-500 (2006), and those vulnerabilities are obviously greater if the reports are not exposed to adversarial testing.

A state concerned about cost could allow the author of a report to testify subject to confrontation quite efficiently, before trial, by videotaped deposition. 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.

story. The confrontation right plays a crucial role in maintaining a system of criminal justice that is fair and that, over the long term, is successful in determination of the truth. But in the short term its most salient impact is sometimes either to deprive the process of evidence that is highly probative or to increase the cost of the process by requiring the attendance of witnesses. A court focused primarily on the short-term impact of invoking the right is therefore strongly tempted to construe the right narrowly.

This was true during the *Roberts* era, as demonstrated by two remarkable catalogues included in the *Crawford* opinion. One was of cases that "attach[ed] the same significance to opposite facts" – but always in support of the conclusion that admission of the statement was constitutional. The second was of cases that, while purporting to apply *Roberts*, "admit[ted] core testimonial statements that the Confrontation Clause plainly meant to exclude." 541 U.S. at 63.

The same tendency persisted after *Crawford* discarded the *Roberts* doctrine. It was revealed first in the context of fresh accusations. Some courts disregarded *Crawford* so far as to conclude that if a statement fit within the "excited utterance" exception to the hearsay rule it could not be testimonial. *See, e.g., United States v. Brun*, 416 F.3d 703, 707-08 (8th Cir. 2005) (holding that statements made to responding officer were "excited utterances, and therefore nontestimonial statements"); *accord, e.g., State v. Banks*, 2004 WL 2809070 (Ohio App. 10th Dist. 2004) ("The holding in *Crawford* only applies to statements ... that are not subject to common-law exceptions to the hearsay rule, such as excited utterance or present

sense impression."). Other courts applied a variety of specious theories to avoid the clear command of *Crawford*, such as a rigid formality requirement,[7] or a rule that a statement could not be testimonial if it was initiated by the witness herself.[8] Intervention by this Court was necessary, and resulted in reversal of the state supreme court's decision in *Hammon v. Indiana*, No. 05-5705, which the Court accurately described as being close on its facts to *Crawford* itself. *Davis*, 126 S.Ct. at 2278 (noting that determination of whether statements at issue were testimonial "is a much easier task" in *Hammon* than in companion case, because "they were not much different from the statements we found to be testimonial in *Crawford*.).

The pattern persists. As the petition demonstrates, at 10-12, Massachusetts is far from alone in holding that forensic laboratory reports prepared for use in criminal prosecution are not testimonial. 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. Intervention by this Court is necessary not only to set these courts straight but also to ensure that the transformation wrought by *Crawford* is not seriously undermined.

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[7] *E.g.*, Hammon v. State, 809 N.E.2d 945 (Ind. 2004), *aff'd in relevant part on other grounds*, 829 N.E.2d 844 (Ind. 2005), *reversed sub nom.* Davis v. Washington, 126 S.Ct. 2266 (2006).

[8] *E.g.*, State v. Barnes, 854 A.2d 208, 211 (Me. 2004).

III. Forensic Tests Play a Very Large and Expanding Role in the Criminal Justice System, and if Decisions Like the One Below are Allowed to Stand, Many Criminal Trials Will be Conducted by Certificate.

It has been a commonplace for decades that courts have made "ever-increasing use of scientific evidence." Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *A Half-Century Later,* 80 COLUM. L. REV. 1197, 1199 (1980). As this Court said half a century ago, "Modern community living requires modern scientific methods of crime detection lest the public go unprotected." *Breithaupt v. Abram,* 352 U.S. 432, 439 (1957). At least in the criminal context, the principal importance of scientific, or quasi-scientific, evidence[9] is not the use of novel techniques or theories of the type that spawned *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny. Rather, it is in the routine use of work-a-day tests to determine such matters as the chemical composition of suspected drugs, the presence of alcohol, or the identity of the person who left a fingerprint or a DNA stain at the scene of a crime.

Amicus is not aware of statistics showing the frequency with which various tests are actually offered into evidence, but data on requests for forensic services give a good idea of the magnitude of the phenomenon. According to a study conducted by the Bureau of Justice Statistics in 2003 and 2004,

[9] There is no need to enter here into the debate over whether such techniques as fingerprint evidence should be considered scientific.

> crime laboratories received about 2.7 million requests for forensic laboratory services [during 2002] and were able to process just under 2.5 million of these requests during the year. The most frequently requested forensic laboratory service, the identification of controlled substances, resulted in nearly 1.3 million requests during the year or about half of all requests. Toxicology samples (468,000) and latent print requests (274,000) were the next most common types of samples for which laboratory analyses were requested. Law enforcement agencies submitted about 61,000 requests for DNA analysis — about 2 percent of all requests for laboratory services, to publicly operated crime labs — just under 42,000 of these were processed during the year.

Bureau of Justice Statistics, *Federal, State and Local Crime Lab Backlog Reached 500,000 in 2002* (2005), <http://www.ojp.gov/ bjs/pub/press/cpffcl02pr.htm>.[10]

The role of such forensic tests in the criminal justice system will almost certainly grow. Consider just DNA testing, which as of now is a relatively small part of the overall picture of forensic testing. But its role, at least in absolute terms, is sure to increase. Among the reasons are the following:

• DNA tests are now far more sensitive than they were a decade ago. *See, e.g., State v. Craig*, 853 N.E.2d 621 (Oh. 2006), *cert. denied*, 127 S.Ct. 1374 (2007)

[10] There are about a million felony convictions in state court per year, about one-third of them involving drug offenses. Bureau of Justice Statistics, *State Court Sentencing of Convicted Felons, 2004 – Statistical Tables*, <http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04101tab.htm>.

(insufficient DNA collected to allow identification in 1996; samples tested in 2002 using newer technique, and identification made). That trend will very likely continue. *See* Pamela J. Smith & Jack Ballantyne, *Simplified Low-Copy-Number DNA Analysis by Post-PCR Purification*, 52 J. FORENSIC SCI. 820 (2007) (reporting successful typing of traces of DNA on fingerprints found on paper and glass).

• The Combined DNA Index System (CODIS), a nationwide network of databases of DNA profiles, was assembled beginning in the 1990s. It is growing rapidly; as of May 2007, it included approximately 4.76 million profiles,[11] and by October 2007 that number had already increased to approximately 5.27 million.[12] Greatly expanded criteria for inclusion in the databases will likely promote accelerated growth.[13] Larger databases mean an increased chance of identifying an unknown perpetrator by matching a crime-scene sample with a profile in the database.

• Intimidation of witnesses may induce prosecutors to place greater reliance on forensic testing – and to charge crimes that can largely be proved through such testing. David Kocieniewski, *Keeping Witnesses Off Stand to Keep Them Safe*, N.Y. Times, Nov. 19, 2007, p. A1.

• Jurors have an increased expectation of forensic evidence, which prudent prosecutors must heed. As

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[11] Wikipedia, *Combined DNA Index System* (2007), <http://en.wikipedia.org/wiki/ Combined_DNA_Index_System>.

[12] National DNA Information System, *NDIS Statistics* (2007), <http:// www.fbi.gov/hq/lab/codis/clickmap.htm>.

[13] *See* Cal. Penal Code § 296(a)(2)(C) (West 2005) (providing for DNA testing of all felony arrestees beginning in 2009).

one recent study concluded:

> [T]here are now significant numbers of summoned jurors who expect scientific evidence in every criminal prosecution. . . . [U]nless the prosecution presents some scientific evidence, there are significant numbers of summoned jurors who will acquit defendants in cases of circumstantial evidence and in rape cases. The cause of those increased expectations and demands cannot simply be laid at the feet of television programs. . . . [They are] more likely the result of much broader cultural influences related to modern technological advances, what we have chosen to call a "tech effect."

Donald E. Shelton, et al., *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the "CSI Effect" Exist?*, 9 Vand. J. Ent. & Tech. L. 331, 362 (2006).

Increasingly, then, we can expect that the key issues in criminal cases will be proven by evidence of forensic tests. This development holds out 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 hte 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. This Court should not allow such a system to arise, or even give it any chance to gain momentum.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of *certiorari* and reverse the decision of the Appeals Court of Massachusetts.

Respectfully submitted,

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December 3, 2007