

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 LUIS E. MELENDEZ-DIAZ, :

4 Petitioner :

5 v. : No. 07-591

6 MASSACHUSETTS. :

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8 Washington, D.C.

9 Monday, November 10, 2008

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11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 1:00 p.m.

14 APPEARANCES:

15 JEFFREY L. FISHER, ESQ., Stanford, Cal.; on behalf of

16 the Petitioner.

17 MARTHA COAKLEY, ESQ., Attorney General, Boston, Mass.;

18 on behalf of the Respondent.

19 LISA H. SCHERTLER, ESQ., Assistant to the Solicitor

20 General, Department of Justice, Washington,

21 D.C.; on behalf of the United States, as amicus

22 curiae, supporting the Respondent.

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4	On behalf of the Petitioner
5	MARTHA COAKLEY, ESQ.
6	On behalf of the Respondent
7	LISA H. SCHERTLER, ESQ.
8	On behalf of the United States, as amicus
9	curiae, supporting the Respondent
10	REBUTTAL ARGUMENT OF
11	JEFFREY L. FISHER, ESQ.
12	On behalf of the Petitioner
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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 07-591, Melendez-Diaz v. Massachusetts.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Mr. Chief Justice, and may it please the Court:

In Crawford v. Washington, this Court made clear that the right to confrontation, at its core, is a protection against a system of trial by affidavit. It is an ancient procedural guarantee that requires the prosecution to prove its case through live witnesses who testify before the jury and who are subject to cross-examination.

Introducing forensic laboratory reports, such as the certificates at issue in this case, is the modern equivalent of trial by affidavit. The documents are sworn formal statements. They are crafted purposefully for the express purpose of proving a fact that is an element of a criminal offense, and, as the State forthrightly admits in its brief, they are introduced in lieu of having the analyst called as a witness to the stand. They are therefore

1 quintessentially testimonial evidence.

2 Massachusetts --

3 CHIEF JUSTICE ROBERTS: You say -- you say
4 "the analyst." I suppose it doesn't have to be the
5 analyst but whoever they decide to call. So if you had
6 a supervisor who runs the cocaine testing lab and he is
7 the one whose report is submitted, I take it he is the
8 one who would have to show up.

9 MR. FISHER: That's right. Our position --
10 our position is that whoever the Commonwealth wants to
11 use to prove the fact that they are trying to prove is
12 the person that needs to take the stand. In this case,
13 it would be the analyst.

14 JUSTICE SCALIA: But -- but you would ask --
15 if a supervisor did it, what would you ask the
16 supervisor? You'd say, you know, did you -- did you do
17 this? Can you testify to your own knowledge that this
18 is what the analysis showed? And he would have to say,
19 no, it was one of my subordinates who did it, but I can
20 tell you he was a very reliable person. How would that
21 -- I don't understand how that would work.

22 MR. FISHER: I took the Chief Justice's
23 hypothetical to be that the supervisor had actually done
24 the testing, but if the supervisor had not --

25 CHIEF JUSTICE ROBERTS: No. No. No. No,

1 I'm saying that he would testify, I guess: I run the
2 lab, these are the people I hire, they know you how to
3 do these tests, and this guy did the test. And since he
4 was the one that the Government decided to -- on whose
5 affidavit they decided to rely, that's the only person
6 you could get.

7 Now, you could -- to impeach him, you say,
8 well, did you do the test? No. But you say, well --
9 but I mean you don't have a right to an analyst at a
10 particular level.

11 MR. FISHER: That's right. There is no
12 substantive right. I think everything you've said is
13 right as far as it goes. It just depends what the
14 Commonwealth wants to put in in terms of evidence.

15 JUSTICE KENNEDY: Well, suppose --

16 MR. FISHER: If they want to put in --

17 JUSTICE KENNEDY: Suppose the tests were by
18 John Smith, assistant lab technician, and you call John
19 Smith, and you say, "Is this your signature?" "Yes."
20 "Do you remember doing this test?" And he says, "I do
21 thousands of tests. I don't remember. I'll tell you
22 the way I always do them." I mean, is that what you
23 want?

24 MR. FISHER: Well, if that's what -- at a
25 minimum, that's what we want, Justice Kennedy. This

1 Court has made clear in California --

2 JUSTICE KENNEDY: Well, that's what you're
3 usually going to get, isn't it?

4 MR. FISHER: Well, we don't know what we are
5 going to get. In some cases, unquestionably --

6 JUSTICE KENNEDY: Well, you know what you're
7 going to get by looking, number one, at the States which
8 allow this, where this happens all the time. You know
9 what you're going to get in the States where the
10 defendant -- where the defense can subpoena the witness.

11 Now, if there are new tests, complex DNA
12 tests and so forth, I suppose there is a lot to ask
13 about. Standard blood alcohol, not much to ask about.

14 MR. FISHER: But even in a test where the
15 analyst doesn't remember and, as you put it, it's a
16 standardized test, there are still plenty of questions
17 the defendant might want to ask, such as what test was
18 performed? We don't even know from the record what test
19 was performed in this case. What's the error rate on
20 that test? How do your protocols work? What are your
21 experience and credentials in analyzing those? There's
22 plenty of questions the defendant might ask.

23 JUSTICE KENNEDY: You can raise all those
24 questions from the fact of the -- from the document.
25 Tell the jury, "This doesn't show what tests were

1 performed." It's there on the document.

2 MR. FISHER: Well, I think that's a choice
3 that defense counsel could make, as the defense counsel
4 always has a choice in a criminal case to decide whether
5 to press the prosecution's evidence or to simply stay
6 silent and then later argue at closing the prosecution
7 hasn't given you enough to prove the case.

8 But to the extent the Commonwealth is taking
9 the position that cross-examining would be fruitless in
10 a situation like this, the very basis of this Court's
11 Crawford decision is that's not for courts to decide.
12 It is up to the defense counsel to -- if he wishes, to
13 insist on live testimony that he can cross-examine and
14 then --

15 JUSTICE GINSBURG: Well, then why -- why
16 isn't it an adequate substitute to say that, if the
17 defendant wants this testimony, the defendant can call
18 the analyst and cross-examine the analyst as an adverse
19 witness?

20 MR. FISHER: Well, three reasons, Justice
21 Ginsburg: First, if that were correct, then I don't see
22 anything that would stop the prosecution in every
23 criminal case simply from putting a pile of affidavits
24 on a judge's desk and saying it's up to the defense to
25 call whatever witnesses he wants and cross-examine them.

1 But even as a matter of text and structure
2 of the Constitution, as a textual matter, the right to
3 confrontation is a passive right in the defendant's
4 hands. It requires the prosecution to arrange for the
5 confrontation, and that's bolstered structurally by the
6 Compulsory Process Clause. Remember, the Compulsory
7 Process Clause gives the defendant the very right that
8 you just explained, that the defendant can subpoena
9 witnesses into court and ask them questions. And surely
10 the Confrontation Clause adds something on top of that.

11 And I think this Court's decision in Taylor
12 against Illinois is the best explanation of the
13 difference between the two clauses. This Court said
14 that the Confrontation Clause arises simply by the
15 nature of adversary proceedings, and it's a -- it's a
16 rule that governs the way the prosecution must introduce
17 its case. As I said at the opening here, it's a
18 requirement that the prosecution put its live witnesses
19 on the stand for the jury to observe them. The defense,
20 of course, has the decision whether to cross-examine
21 those witnesses, or if witnesses are not called by the
22 prosecution that he would wish to be part of the case,
23 he can subpoena them. But we would vigorously oppose
24 any attempt to shift the burden on the defense to call
25 witnesses like this.

1 JUSTICE GINSBURG: But you would say that
2 what they call the notice-and-demand type statute, that
3 that's all right?

4 MR. FISHER: There is a variety of
5 notice-and-demand type statutes, Justice Ginsburg, and I
6 think the law professors' brief lays it out the best of
7 what we have before you. We agree with the Solicitor
8 General that a plain notice-and-demand statute that
9 requires the defense to do nothing more than assert his
10 right in advance of trial to have the prosecution put a
11 live witness on the stand would be constitutional, I
12 think, under this Court's jurisprudence. Under the
13 Compulsory Process Clause, under the jury right, there
14 are plenty of constitutional rights that, with fair
15 notice, a Defendant can be required to assert in advance
16 of trial.

17 Now, there are other types of statutes that
18 other States call "notice and demand" that require
19 something more of the defendant, whether it be that the
20 defendant himself call the witness, whether it be the
21 defendant himself make some kind of good faith or prima
22 facie showing in order to have the prosecution call the
23 witness. Those types of statutes, I think this Court,
24 to the extent in this opinion it would mention
25 notice-and-demand statutes, it would want to be careful

1 to leave for another day, because, again, we would agree
2 with the Solicitor General that those would raise more
3 difficult constitutional questions.

4 JUSTICE KENNEDY: In your answer, you said,
5 well, there would be this stack of affidavits and that's
6 all the State would have to do. I think, Mr. Fisher,
7 that was not quite responsive because the question here
8 is whether or not there is an exception for business
9 records. Nobody is talking about affidavits, witnesses,
10 and so forth. We are talking about business records
11 done in the ordinary course.

12 It's true that it -- that the core principle
13 is whether that confrontation is required, but the
14 question is whether or not business records should be
15 treated as something that are not testimony because they
16 are done based on other protocols with other procedures
17 where there is substantial insulation from the facts of
18 the particular case because it's a routine scientific
19 exercise.

20 So I think your answer, I would agree, is
21 responsive based on your theory of the case, but as a
22 matter of practice and as a matter of the issue that's
23 before the Court, I don't think it addresses it.

24 MR. FISHER: Okay. Thank you.

25 I -- I took Justice Ginsburg's question to

1 be asking whether giving the defendant the right to
2 subpoena the witness would be adequate under the
3 Confrontation Clause if these documents were
4 testimonial.

5 Now, your question is whether they might not
6 be testimonial at all viewed through the lens of whether
7 they are a business record.

8 So, as a historical matter, I think it's
9 plain that no documents prepared in contemplation of
10 litigation were ever considered to be business records.
11 And this Court's decision in *Palmer v. Hoffman* in 1943 I
12 think lays that out very, very clearly.

13 So there is no historical argument that
14 business records would fit -- would be exempted from the
15 testimonial rule as a class. And, of course, this Court
16 said in *Crawford v. Washington* that even if a State
17 under a modern hearsay exception, whether it be a
18 business-record rule or in the State of Massachusetts's
19 case a special, brand-new hearsay rule -- just because
20 that might be okay in the run-of-the-mill cases doesn't
21 exempt it from the right to confrontation.

22 JUSTICE KENNEDY: Well, but the railroad
23 case was an accident report. This is a scientific
24 analysis.

25 MR. FISHER: Well, I think that is best

1 characterized, with all due respect, as an argument for
2 its reliability. And it may well be that judges and
3 juries think that certain scientific processes yield
4 more reliable results in terms of reports and testimony
5 and assertions. But we think, again -- and this Court's
6 decision in Crawford says quite strongly -- that a judge
7 cannot decide just on the basis of reliability to exempt
8 a given record or a class of records from the
9 Confrontation Clause.

10 And I think, Justice Kennedy, another
11 analogy that makes it even more clear is police reports.
12 Police reports, just like the lab report in this case,
13 are -- are sworn documents created by public servants
14 who are sworn to tell the truth, sworn to find evidence
15 whether it exonerates, whether it incriminates, and to
16 write up a report. And I don't think anyone has ever
17 suggested that police reports describing a crime scene
18 -- for example, no matter how objective the facts
19 relayed, such as there is a blood stain on the carpet,
20 there is -- the door was wide open when I got there --
21 those kinds of assertions would be exempted from the
22 Confrontation Clause.

23 It may well be that they are likely to be
24 correct, that they are assertions of fact that can be
25 verified, but we've never understood that to fall

1 outside of the ambit of the Confrontation Clause.

2 JUSTICE KENNEDY: But if you had what we can
3 call an independent lab, that certainly-- you certainly
4 can distinguish that from a police report. It's a
5 line-drawing question, I'll admit, but I think it's
6 easily distinguished.

7 MR. FISHER: Well, I think if you had -- in
8 contrast to this case, if you had a laboratory that was
9 a private lab being used by the police, that would raise
10 the question whether police agents who are private
11 individuals but -- but asked by the police to create
12 something like this, would generate testimonial evidence
13 just as well. And I think the answer would be yes.

14 In fact, in Davis this Court already
15 addressed the situation, although it reserved in the
16 footnote, but it assumed that the 911 operator in that
17 case, who was a private individual working for a private
18 company hired by the -- by the police --

19 JUSTICE SCALIA: Mr. Fisher, how many States
20 do things the way -- the way you would have them done?
21 I mean, how many States don't have these -- these notice
22 laws, but in fact bring in the analyst to -- to give the
23 information?

24 MR. FISHER: Well, let me give you a few
25 categories, Justice Scalia.

1 There are six States, it is our
2 understanding, including big populous States like
3 California, Illinois and Georgia, that have no special
4 hearsay law whatsoever, that bring in witnesses if
5 defendants demand it.

6 There is another category of States --

7 JUSTICE SCALIA: Well, they bring in
8 witnesses if -- if defendants demand, but --

9 MR. FISHER: I'm sorry, I misspoke. I
10 misspoke. That in the ordinary course need to bring in
11 witnesses. Now, that was --getting ahead to my next --
12 my next category, there are at least nine or ten other
13 States that have the kind of bland notice-and-demand
14 regime that I was discussing with Justice Ginsburg. And
15 so that's another category.

16 And then you have -- since Crawford there is
17 another, I believe, five additional States where their
18 State supreme courts have held that Crawford applies to
19 lab reports like this. So at least for the past couple
20 of years they have been doing it the way that we would
21 urge.

22 JUSTICE KENNEDY: I wonder -- and correct me
23 if I'm wrong -- if you -- if you didn't state your case
24 strongly enough with reference to California. I thought
25 California followed the rule that you advocate here.

1 MR. FISHER: That's what I meant to say if I
2 didn't say it that way. Yes.

3 JUSTICE BREYER: Is there anything else? I
4 -- I think you're quite right that -- that, look, I
5 can't find anything in the history that suggest lab
6 reports would be admitted because they would be
7 considered being prepared for trial. But business
8 records are kept out.

9 So we have here a source that's unlikely to
10 be particularly biased, the University of Massachusetts
11 labs. And we have the checks of the discipline, the
12 scientific discipline. On the other hand, it's being
13 prepared for this trial.

14 So it seems to me some things go one way;
15 some things go the other way. I don't know exactly what
16 the predominant things are. That's what I'd like you to
17 address as much as possible.

18 And when I look at the definition of
19 "business records hearsay exception" today, it seems to
20 me that the "hearsay exception" does cover today some of
21 the things under "business records" that would be
22 prepared particularly for trial. You could have a
23 company that goes and measures lines on the street, or
24 tread marks, or a variety of things. And I guess they
25 come in under the "business records exception." Do

1 they? I mean, is that right?

2 MR. FISHER: They might, Justice Breyer, and
3 I'd -- I'd be willing to assume for purposes of argument
4 that they would. But to the extent that they would be
5 offered by the prosecution in a criminal case, the fact
6 that they were a business record would not answer the
7 confrontation question as to whether --

8 JUSTICE BREYER: Well, of course, it
9 wouldn't.

10 MR. FISHER: Yes.

11 JUSTICE BREYER: And that's why -- and maybe
12 you have nothing else you want to say on this point.
13 It's the same as Justice Kennedy raised.

14 MR. FISHER: I think I do, Justice --

15 JUSTICE BREYER: It seems like there are
16 some things going one way, and some things going the
17 other on the issue of whether to call it "testimonial."

18 MR. FISHER: But I do want to -- with all
19 respect, I did want to add something to what you said
20 about the rigors of the lab or of science. It may well
21 be that those add to the truth, the reliability of
22 reports. Let me say two things about that.

23 First of all, the Confrontation Clause
24 doesn't exempt bishops and nuns, or -- or anyone who we
25 know or who we would think just as well would obviously

1 be telling the truth. It's, again, for the defendant to
2 decide and not for the court to decide whether
3 cross-examination would be useful.

4 But let me add to that, Justice Breyer, that
5 the Innocence Project brief in this case and plenty of
6 other sources widely available I think very, very, very
7 persuasively explain that lab reports are not quite as
8 reliable as we might want to think they are, and not --

9 JUSTICE BREYER: There have been bad
10 instances. You are absolutely right.

11 MR. FISHER: Yes.

12 JUSTICE BREYER: But what -- what I'm trying
13 to work out in my mind is not necessarily what happened
14 in the year 1084. I'd -- I'd be quite interested in
15 your views on what's a workable rule. And when I look
16 across the country on this, it seems most States have
17 worked with a rule that has allowed the defendant to
18 call the witness if he wants. There is not a particular
19 unfairness to that. If he can get ahold of the witness,
20 no problem. But they said: We are not going to make
21 the State do this because it's a waste of time, for the
22 most part. It just delays the trial, and there is
23 really nothing at issue.

24 MR. FISHER: Well, to the extent that is the
25 prominent practice, it's one that grew up under this

1 Court's Roberts jurisprudence.

2 JUSTICE BREYER: That's true.

3 MR. FISHER: I think --

4 JUSTICE BREYER: But if I assume -- I'm
5 really uncertain as to whether it has covered
6 "testimonial" or not. And also, I'm not enamored
7 particularly of seeing on a close question what happened
8 in ancient history.

9 MR. FISHER: I understand.

10 JUSTICE BREYER: All right. Now, is there
11 anything else you want to add to me on those
12 assumptions?

13 MR. FISHER: Yes, that -- that, again, it is
14 -- it is not for the court; it's for the defendant to
15 decide. We think the definition of "testimonial"
16 generally speaking ought to be that when a document is
17 prepared in contemplation of prosecution, or more
18 specifically in this case to prove a fact that is an
19 element of a criminal case, because that's what these
20 reports say, then they should fall under the
21 Confrontation Clause.

22 And to the extent that these are in some
23 realms and in some places reliable pieces of evidence,
24 there is every reason to believe it's not going to cause
25 any problem, because defendants aren't going to want to

1 challenge them very often. If you look at the
2 statistics in the law professors' brief, they say in
3 States like California that -- first of all, we have a
4 huge category of cases that go away in plea bargains.
5 And then even within the category of cases that go to
6 trial, it's 10 percent of the time or less --

7 CHIEF JUSTICE ROBERTS: Well, a good defense
8 lawyer would love to have the guy there. The first
9 thing you say is: Do you remember testing Mr. Diaz's
10 sample? The guy is going to say no. Just as was
11 pointed out, I, you know, test thousands of samples.
12 Well, how long have you been working with the lab? You
13 know, just what -- what was your scientific background?
14 When did you -- how does this test work? You put three
15 drops of the acid in there. It turns color, whatever it
16 does. How do you know that? What is the chemical? I
17 mean, you spend three hours with the guy until the jury
18 just doesn't think there is anything to the case at all.

19 MR. FISHER: Well, the best I can do to
20 answer that, Mr. Chief Justice, is to say that
21 empirically apparently that just doesn't happen. And I
22 think the reason why is explained in some of the defense
23 manuals that we have cited in our brief, which say that
24 if your theory of the case has nothing to do with
25 whether the scientific report being introduced by the

1 prosecution is correct or not, very often the defense
2 isn't going to do itself any favors by -- by insisting
3 that that person take the stand, recite his credentials,
4 recite the testing, and recite the damning evidence.

5 JUSTICE ALITO: What does that fact support
6 -- why does that fact support your argument, that in all
7 of those cases you're arguing for what's going to be an
8 empty exercise?

9 MR. FISHER: No, I would very much resist
10 that it will always be an empty exercise.

11 JUSTICE ALITO: No. But in -- in the
12 instance where the defendant doesn't think it would be
13 worthwhile to subpoena the -- the recordkeeper, the
14 person who performed the test, but simply wants to put
15 the prosecution through the effort of getting the person
16 there to testify, it's -- what is achieved?

17 MR. FISHER: Well, as I said, I think that
18 through notice-and-demand regimes and stipulations,
19 often that is not going to happen. But if it is
20 achieved, what is achieved is the same thing that is
21 achieved in any criminal trial where a defendant insists
22 periodically that the prosecution be put to its proof.

23 After all, we are talking about putting
24 somebody away for many years in a typical --

25 JUSTICE BREYER: I absolutely see that

1 point. So that - all right, go back to the plea
2 bargaining, which is your first thing, which makes me a
3 little nervous for the reason that I see this bargaining
4 system as a system where the prosecutor makes a charge,
5 the prosecutor controls the sentence, then the defense
6 bar would like to have an added weapon, and this added
7 weapon is if you actually go to trial, I'm going to
8 insist that you call these people. You don't even know
9 where they are. I'm not going to accept the lab report.
10 And then maybe the prosecutor will lower the requirement
11 or maybe the prosecutor raised it in the first place
12 because he thought you would say something like that.

13 So I'm not -- is there anything you can say
14 about how this works in the presence of plea bargaining?
15 Do we know any -- do we have any information on that?

16 MR. FISHER: I don't know of any empirical
17 study where you might say what the price of this is. Of
18 course, it happens already every day with other
19 witnesses. You're going to have to bring in other
20 witnesses, and this is one more witness. But again,
21 even in a case where that's all that's going on, it's no
22 different than all the other legal rights the defendant
23 has.

24 JUSTICE KENNEDY: I'm not sure it's one more
25 witness. Labs are backed up with DNA. You know, the

1 Federal budget for the courts, for the Federal courts,
2 is \$6 billion. Well, \$1 billion of that is spent under
3 the Criminal Justice Act for experts and translators and
4 counsels. This -- this is a very, very substantial
5 burden if we tell every State in the country that
6 every -- in every drug case you are -- the State must
7 produce the expert.

8 MR. FISHER: Remember, Justice Kennedy,
9 that -- that if you look at the States where this
10 exists, that's not what happens and that's not what we
11 are insisting on. All we are insisting is that the
12 prosecution in a case where the defendant demands it,
13 whether it be through a notice and demand regime or
14 whether it be because the prosecution simply calls the
15 defense on the phone two weeks before trial and says,
16 I'd like to do this through documentary evidence -- and
17 then these repeat players remember who -- who -- one
18 thing I think it's worth keeping in mind in all this, is
19 that in the criminal justice system, by and large,
20 especially in drug cases like this, we are talking about
21 repeat players.

22 CHIEF JUSTICE ROBERTS: You're talking about
23 the defendants or the lawyers?

24 MR. FISHER: I'm talking about the
25 lawyers --

1 (Laughter.)

2 MR. FISHER: -- by and large, Your Honor.
3 They have every -- they have incentives not to, as you
4 might say, yank the chain of the other side.

5 JUSTICE SCALIA: Mr. Fisher, I am interested
6 in the history since that's what the Court held in
7 Crawford, that the content of the Confrontation Clause
8 is not what we would like it to be, but what it
9 historically was when it was enshrined in the
10 Constitution. As a matter of history, was there a
11 business records exception, not from the hearsay rule
12 but from the Confrontation Clause?

13 MR. FISHER: Not that I'm aware of. The
14 best -- the best source that I believe exists is the
15 Wigmore treatise, which both sides have cited. It says
16 there was a shop-book rule that allowed shop-book
17 ledgers and entries at the common law. But there is
18 no -- there's no suggestion that that was --

19 JUSTICE SCALIA: Why isn't that a business
20 records exception? I don't --

21 MR. FISHER: It is a business records
22 exception, but it's not an exception to the right to
23 confrontation because no one would have considered
24 ordinary business records created without contemplation
25 of litigation to be -- to be testimonial evidence. What

1 we have here --

2 JUSTICE SCALIA: Oh, wait. You say it's --
3 that business records would often or usually not be
4 testimonial?

5 MR. FISHER: I think all of the business
6 records that were admissible at the time of the founding
7 would have been nontestimonial.

8 JUSTICE SCALIA: Would have been
9 nontestimonial. So they'd come in on that basis, not
10 because they were business records?

11 MR. FISHER: In a criminal case -- well, the
12 typical regime -- and I'm going to assume that it exists
13 at the time of founding, but you need some evidentiary
14 rule to get a piece of evidence in in the first place,
15 whether it be business records or whether it be just an
16 ordinary rule of relevance. But, yes, they would have
17 been admissible at the time of -- ordinary business
18 record like a shop book would have been admissible at
19 the time of the founding, but would have not raised a
20 confrontation problem even in a criminal cause because
21 it would have been nontestimonial.

22 JUSTICE STEVENS: Mr. Fisher, I just want to
23 be about -- clear about one thing. We are talking about
24 drug cases primarily. But the rule that we are fighting
25 about is not limited to drugs. Doesn't it apply to

1 laboratory reports on DNA, blood tests, all sorts of
2 evidence? Isn't that correct?

3 MR. FISHER: That's right, Justice Stevens.
4 And you can you look at the Massachusetts own decisions.
5 The State courts in Massachusetts already extended their
6 rule in their day to ballistics tests, for example,
7 which are notoriously unreliable in terms of empirical
8 studies that have been -- that have been conducted about
9 them. And my understanding -- I think you're right --
10 is that nothing in the Commonwealth's rule distinguishes
11 one kind of forensic report from another.

12 The United States is offering a slightly
13 different analysis that appears to ask, to some degree,
14 the degree of interpretation involved in a given
15 forensic laboratory report. I don't know how you would
16 administer that rule, but I can say that to whatever
17 extent interpretation would be required, this is clearly
18 on the interpretive side of the ledger.

19 And again, if I could point the Court to a
20 source for that, the Scientific Evidence treatise by
21 Giannelli and Imwinkelried that the both parties cite at
22 section 23.030(c) lays out the mass spectrometry way of
23 testing for drugs that the Commonwealth tells you was
24 the test used in this case and describes in great detail
25 the amount of expertise, care, skill and interpretive

1 methods that need to be brought in that kind of a test.

2 CHIEF JUSTICE ROBERTS: How do we know that
3 this was prepared in contemplation of litigation? I
4 mean, let's suppose the lab occasionally does analyses
5 for other -- research purposes. They get a sample, they
6 want to know what it's -- they want to test it, however
7 they do it. Are we just assuming that it's prepared in
8 contemplation of litigation because it usually is, or --
9 you can imagine a situation where the analyst really has
10 no idea, other than perhaps supposition, why he is being
11 asked to test the sample.

12 MR. FISHER: The easiest answer in this
13 case, Mr. Chief Justice, is it's required by
14 Massachusetts law that -- that these tests be done in
15 contemplation of prosecution. The law itself says that
16 the police officer can give it to an analyst, and the
17 analyst can certify a report if it's to be used for law
18 enforcement purposes. So there is a statutory
19 requirement. Now, you --

20 CHIEF JUSTICE ROBERTS: Well, the question
21 is it could be law enforcement purposes to test it for
22 the police to use and educational programs that want the
23 rookies to know what the cocaine looks like.

24 MR. FISHER: Well, to the degree it's not
25 answer ed in this case by statute, undoubtedly this

1 Court as it works through this jurisprudence will need
2 to ask a question of common sense, whether the actors
3 involved -- as this Court did in Davis -- whether the
4 actors involved would understand what they are doing is
5 creating evidence for a criminal case?

6 If there are no more questions --

7 CHIEF JUSTICE ROBERTS: So -- I'm sorry. Go
8 ahead.

9 MR. FISHER: Okay. I'll reserve my time.

10 CHIEF JUSTICE ROBERTS: Thank you.

11 JUSTICE GINSBURG: May I -- may I just ask,
12 you would extend this to a -- a breath test, a blood
13 test, fingerprints, urinalysis? All of those would be
14 covered by your position?

15 MR. FISHER: To the extent that the
16 prosecution wanted to introduce a report certifying a
17 reporting result of a test, yes, it would be covered by
18 ours.

19 JUSTICE GINSBURG: And you answered the
20 question that a supervisor wouldn't be an adequate
21 substitute for the analyst. But suppose the lab says:
22 We are very busy in this place; could we schedule a
23 deposition; we'll present the analyst at a time mutually
24 agreeable to both sides, rather than have the analyst on
25 the hook to show up on a trial date?

1 MR. FISHER: That would work to preserve the
2 evidence in case the analyst became unavailable at the
3 time of trial. And then under this Court's
4 jurisprudence that deposition would be admissible.

5 JUSTICE GINSBURG: But only if the analyst
6 wasn't there on the day of trial?

7 MR. FISHER: Then you -- then I don't think
8 it would substitute for live testimony.

9 But let me say one other way that this
10 problem can be addressed by States is that they could
11 have a supervisor take the stand and rely on raw data --
12 on raw data and give his or her explanation of raw data.
13 It's just that the person cannot take the stand and
14 relay somebody else's conclusion to the jury.

15 And if there are no more questions, I'll
16 reserve.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 Mr. Fisher. We'll give you your full rebuttal time.
19 General Coakley.

20 ORAL ARGUMENT OF MARTHA COAKLEY

21 ON BEHALF OF THE RESPONDENT

22 MS. COAKLEY: Mr. Chief Justice, and may it
23 please the Court:

24 The drug analysis certificates at issue in
25 this case are not testimonial statements that have been

1 covered by the Confrontation Clause. That is, they are
2 not the statement of a percipient witness who has
3 observed past behavior of the defendant.

4 Indeed, what they are are official records
5 of objective identified -- it's independently verifiable
6 facts that are -- that were admissible at common law.

7 JUSTICE SOUTER: What is your answer to
8 Mr. Fisher's argument that if that proposition of yours
9 is -- is -- is, in fact, sound in response to this case,
10 the State can put in its entire case by -- in a
11 circumstantial evidence case, by way of affidavit and,
12 in effect, satisfy the Confrontation Clause by saying,
13 well, you can call the witness as part of the defense
14 case and cross-examine there?

15 MS. COAKLEY: Because clearly, the kinds of
16 affidavits that are the subject of Confrontation Clause
17 analysis could not be submitted by that. I think this
18 is an exception to that. And so --

19 JUSTICE SOUTER: Well, then that's what you
20 have got to explain to me. Why is it an exception?

21 MS. COAKLEY: Because first of all, although
22 the Court has not addressed it so far with Mr. Fisher,
23 these are really not testimonial statements. None of
24 the cases that have dealt with Confrontation Clause
25 analysis -- before Ohio, through Ohio, through in fact

1 Giles -- deal with the kind of statement that we are
2 talking about here. It's really a report of a scientist
3 test.

4 JUSTICE SOUTER: Well, what about the -- the
5 blue car going down the street statement? In a
6 circumstantial evidence case the witness comes in and
7 says yes, I saw a blue car go down the street at 10
8 o'clock. Is that testimonial?

9 MS. COAKLEY: It is, Your Honor.

10 JUSTICE SOUTER: And the distinction between
11 that and the lab report saying the substance that was
12 shown to me which I analyzed was cocaine, what's the --
13 what's the distinction?

14 MS. COAKLEY: In the first instance you have
15 a witness to an event in a particular case that can be
16 tied to, perhaps, behavior of the defendant that's
17 deemed to be criminal. It's -- it's classic hearsay and
18 subject to confrontation, if it's, you know, is going to
19 be used by the prosecution.

20 In this instance, though, we have a protocol
21 set up by a State statute that indeed does test
22 substances other than those definitely headed for
23 litigation.

24 JUSTICE SCALIA: I don't see the difference
25 between the two. I mean, the one, he saw the blue car

1 going down the street, which through other evidence can
2 be connected to the defendant; and here the witness says
3 this is cocaine, which through other evidence is going
4 to be connected to the defendant. And in both cases
5 that -- that connected fact is deemed essential by the
6 prosecution for the conviction. I don't see the
7 difference between the two.

8 MS. COAKLEY: Well, I think there are
9 several differences, Your Honor, but one of which is
10 that it is identifiable and it can be verified outside
11 of what the scope of the Confrontation Clause is. In
12 other words, the defendant has a chance to test it ahead
13 of time, have his own independent witness. This doesn't
14 change. Whether it is cocaine before, during or after
15 the trial is testable.

16 JUSTICE SOUTER: Well, why --

17 MS. COAKLEY: And it's not true of a witness
18 statement.

19 JUSTICE SOUTER: Why does that make a
20 difference? In other words, the -- Justice Scalia said
21 a moment ago, you know, the -- the statement about the
22 blue car is -- is tied in in the hypothetical case by
23 another witness who said yes, at -- at 10:01 when I
24 heard the gun go off there was a blue car there. In
25 this case the cocaine is tied in by saying, yes, the

1 cocaine which I delivered to X, about which he has
2 testified, is cocaine that I took out of the pocket of
3 the defendant.

4 There is -- there is a temporal and physical
5 path worked out in both cases. And it seems to me your
6 attempt to distinguish them is to say well, the temporal
7 path can be extended by one more step in the cocaine
8 case because you can take the cocaine or take something
9 from the cocaine sample and let the defense expert
10 testify to it; which of course is true, but I don't see
11 what that has got to do with the Confrontation Clause or
12 the definition of testimonial evidence.

13 MS. COAKLEY: I -- I think that that's
14 significant, Your Honor, because it can be tested and
15 verified and isn't dependent upon a cross examination at
16 trial.

17 JUSTICE SOUTER: But aren't you really
18 saying that the confrontation right is therefore not so
19 important because you have a greater opportunity in the
20 cocaine case of coming up with -- with rebutting
21 evidence, if indeed rebutting evidence can be found.

22 In other words, if -- if -- if the State's
23 witness is wrong, you've got a better shot at proving
24 him wrong than in the blue car case. But if that is
25 your argument, I don't see what it's got to do with --

1 with the basic confrontation right.

2 MR. FISHER: Well, I think I go back, Your
3 Honor, to looking at all the kinds of statements that
4 this Court has looked at within the scope of the
5 Confrontation Clause. This kind of public record,
6 official record, laboratory report, has never been the
7 subject of this kind of analysis and indeed it's not
8 sufficient.

9 JUSTICE SOUTER: Well, have we ever had --
10 have we ever had a -- a kind of lab report, public
11 record kind of case in -- in which the record was
12 prepared expressly for trial?

13 MS. COAKLEY: I think that if you look at
14 Dutton, for instance, and the concurring opinion by
15 Justice Harlan talking about laboratory reports deemed
16 to be whatever the analysis was, a business record, that
17 would have been --

18 JUSTICE SOUTER: Yes, but Justice Harlan did
19 not take the majority view. I mean you -- I don't know
20 where you get authority for the proposition that the
21 public record prepared for the purpose of litigation
22 would have come in under the, in effect, the founding
23 era -- or would have been outside the founding era
24 definition of testimonial.

25 MS. COAKLEY: Except the public record, for

1 instance of a coroner's result -- not the coroner's
2 verdict that involves Marian-type depositions, but the
3 results of a coroner's verdict that says somebody is
4 dead and this is the cause and manner and means of
5 death -- would have been admissible at the time with --
6 that kind of --

7 JUSTICE SCALIA: For the indictment, not --
8 not as -- not as independent evidence in the
9 prosecution. It would form the basis for the
10 indictment, as I understand what the history is. It
11 would not be introduced and -- and -- and shown to the
12 jury as evidence that -- that indeed the cause of death
13 was thus and so.

14 MR. FISHER: But autopsy results -- my
15 understanding, Your Honor, is that autopsy results --
16 again not a coroner's verdict, which -- in the reply
17 brief we believe that counsel has conflated what would
18 be a verdict between the fact of an official record, an
19 autopsy report of the death, manner and means of
20 death -- have been and still admissible.

21 JUSTICE KENNEDY: It seems to me -- and tell
22 me if this is not the way you want to argue. It seems
23 to me to make your case you have to say of course this
24 is hearsay; and the question is whether it's
25 testimonial.

1 MS. COAKLEY: Yes, Your Honor.

2 JUSTICE KENNEDY: And it's not testimonial
3 because these are laboratory protocols, subject to
4 ongoing, objective, repeated standards; that's different
5 from testimony that it was a blue car, which is specific
6 to the case. That's the kind of framework of the
7 argument you have to make.

8 MS. COAKLEY: That's --

9 JUSTICE KENNEDY: And that as a result of
10 that it is not testimonial because "testimonial" is a
11 legal term that's subject to interpretation. I -- I
12 guess that's the argument you're making and that you
13 have to make.

14 MS. COAKLEY: Well, that's correct, Your
15 Honor.

16 JUSTICE KENNEDY: As I see it.

17 MS. COAKLEY: And I think that that is
18 certainly consistent with the way in which this Court in
19 looking at the series of cases from Crawford since, have
20 looked at what a testimonial statement is. Admittedly,
21 you haven't addressed this kind of statement, and I
22 would argue because it doesn't fall within the principal
23 evil that the Confrontation Clause is designed to
24 prevent.

25 JUSTICE KENNEDY: Of course the problem was

1 in -- I think it was Hammond was the companion case to
2 David.

3 MS. COAKLEY: Yes.

4 JUSTICE KENNEDY: The -- the 911 call was
5 done for other -- really other purposes. It wasn't
6 testimonial because it wasn't really directed to trial.
7 This does seem more directed to trial, so then you have
8 to tell us why even if it is, there are some independent
9 guarantees of -- of reliability that means that we
10 should say it's not testimonial as a legal matter.

11 MS. COAKLEY: Well, I agree, Your Honor. I
12 think that you cannot pull one of these qualities out
13 and say that because it's prepared in anticipation of
14 trial means that therefore it is testimonial. There
15 have been several criteria that this Court has looked
16 at, including -- there are other kinds of analogies to
17 this that are akin to this kind of record. For
18 instance, in an assault case, a gun which is the real
19 evidence -- remember the cocaine is the real evidence
20 here -- the Commonwealth would introduce a certificate
21 saying this is a working gun, and that is in lieu of the
22 analyst coming in. When we have to prove public way,
23 when we have to prove school zone, when we have to prove
24 in some instances --

25 JUSTICE SCALIA: Ballistics as well? You

1 would extend this to ballistic tests?

2 MS. COAKLEY: If --

3 JUSTICE SCALIA: You -- you don't have to
4 bring in the ballistic expert? You can just --

5 MS. COAKLEY: Not to prove it's a working
6 firearm, Your Honor. In order to make a comparison -- I
7 would agree with counsel that once you get into the
8 discretionary areas that you need to make comparisons
9 and analysis, but this is not that case.

10 JUSTICE SCALIA: I don't understand that
11 difference.

12 CHIEF JUSTICE ROBERTS: Well, I'm looking at
13 footnote 10 in your brief on page 30. And you concede
14 that some interpretation of the machine-generated data
15 ordinarily is required. Now why isn't that a suggestion
16 that there is some leeway and subjective interpretation,
17 and you might have different analysts coming out
18 differently and so you need to get the fellow there and
19 ask him well, how often do you -- how often do one of
20 your fellow analysts disagree with your conclusion?

21 Or this is subjective; I guess some people
22 read it one way or the other one way; which way do you
23 always read it? That kind of stuff.

24 MS. COAKLEY: Well, interestingly, Your
25 Honor, that argument wasn't raised in this case below

1 and really hasn't been raised in this case before the
2 Court. In fact this is one of the straightforward
3 objective tests that says you put this material into the
4 machine, and the Solicitor General also deals with this.
5 The 100 percent accuracy by and large from that result
6 says this is cocaine; this is heroin, this is --

7 CHIEF JUSTICE ROBERTS: Well, I didn't -- I
8 didn't go back and read the scientific treatise you
9 cite, but you say some interpretation is required. So
10 what type of interpretation?

11 MS. COAKLEY: The interpretation that
12 because of the way that the machine works, the chemicals
13 are separated out. And so a chemist, if properly
14 trained, can say by the separation of the chemicals
15 these three, or four or whatever the elements are, equal
16 cocaine.

17 JUSTICE KENNEDY: Well, do you have to have
18 a machine? I mean, what about -- what about ballistics?
19 "This bullet came from that gun." Does that involve
20 sufficient discretion, sufficient judgment that the
21 expert has to be there, while the blood -- blood or drug
22 testing doesn't?

23 It seems to me that's where you have to draw
24 the line.

25 MS. COAKLEY: Well, I believe that that's --

1 JUSTICE KENNEDY: And to say that that
2 wasn't raised in the case, this is precisely the
3 question we are going to have to decide if you're going
4 to prevail. I don't think it helps to say it wasn't
5 raised in the case.

6 MS. COAKLEY: Well, I --

7 JUSTICE KENNEDY: We are raising it.

8 MS. COAKLEY: I agree, Your Honor. But that
9 has to do with how satisfied the Court is whether here
10 or in other jurisdictions that is a reliable result, and
11 I hesitate to use the word "reliable." I don't mean it
12 in the Ohio v. Roberts sense. We are talking about the
13 scientific test that is or is not reliable, and
14 therefore does it require some other test, whether
15 Confrontation Clause or not?

16 JUSTICE BREYER: How can we administer
17 something like that? His point I think is, look, you
18 can't make any distinction either of something that is
19 evidence was prepared with an eye towards trial or it
20 wasn't. And if it was prepared with an eye towards
21 trial, well, then call the person and have him testify.
22 That's it. And if that encompasses every test under the
23 sun, so be it, because there is no way to draw a
24 reasonable line.

25 You start talking about reliability and

1 their amicus brief is filled with horror stories of how
2 police labs or other labs have really been way off base
3 and moreover really wrong. And you say, oh, distinguish
4 between a police lab and University of Massachusetts?
5 Try going down that road of which one is reliable, which
6 one isn't reliable. How do we know?

7 MS. COAKLEY: Well, Your Honor --

8 JUSTICE BREYER: That's his point. No
9 workable way to do it. There can be horrors on both --
10 in both areas, and so follow what the history was where
11 there was no history on this being admissible.

12 MS. COAKLEY: Your Honor, I disagree because
13 the issues around many of those wrongful convictions
14 related to suggestive identification procedures, other
15 kinds of issues. I'm not aware of any wrongful
16 convictions that came about because --

17 JUSTICE BREYER: Aren't there some things I
18 read in the paper all the time, about these laboratories
19 in various places, and they lost the results, they got
20 it all wrong? That just doesn't happen?

21 MS. COAKLEY: I'm not saying that, Your
22 Honor, but I'm saying there are certain evils that the
23 Confrontation Clause is designed to prevent. Either
24 abuse at the laboratory stage or misconduct by
25 prosecutors prior to trial or analysts is not one that

1 the Confrontation Clause is either designed to or is
2 specifically very good at getting at.

3 JUSTICE SCALIA: Why not? I know I prefer
4 one thing, the custody. It's very important to know
5 whether indeed this was the particular substance that
6 was taken from the defendant. And to establish that,
7 you have to establish a line of custody. And you can't
8 do that without getting in the person who did the test.

9 MS. COAKLEY: Well, Your Honor, I agree the
10 chain of custody is crucial and it relates to the
11 careful procedure that a police officer used, who by the
12 way is the confrontation witness that you worry about
13 because the behavior is the buying, selling, possession
14 of drugs. The element of whether it is cocaine or not
15 really becomes almost secondary to the case. The issue
16 is was the behavior criminal? So the officer who seized
17 the drugs is available for confrontation. The drug is
18 then clearly marked so the Commonwealth has to create
19 that chain of custody for the court, and indeed if the
20 defendant, who is in the best position to think that
21 perhaps this is involving something other than cocaine
22 or heroin, has all the opportunities that he needs to
23 make sure that he gets a fair trial.

24 JUSTICE SCALIA: He says -- the policeman
25 says, "And I gave it to the University of Massachusetts

1 lab."

2 MS. COAKLEY: And they marked it in a
3 particular way that identified --

4 JUSTICE SCALIA: "And I watched when they
5 marked it in a particular way."

6 MS. COAKLEY: And the --

7 JUSTICE SCALIA: How do I know that that
8 thing is the one that got to the desk of the analyst who
9 wrote this report?

10 MS. COAKLEY: I think that whether you
11 brought the analyst in or not, you would have the same
12 establishment of the chain of custody and, indeed, that
13 piece of evidence as to whether it's the same drug
14 relates to the officer in this case testified the
15 packaging. He could identify it. It comes back --

16 JUSTICE SCALIA: So you say you can require
17 witnesses to show that, right up to the analyst who did
18 the testing, you can require witnesses to testify? All
19 the way up to there but not the analyst himself?

20 MS. COAKLEY: I think, Your Honor, that the
21 issue between chain of custody and whether the
22 Confrontation Clause is implicated are different issues
23 --

24 JUSTICE SOUTER: No, but you say that, it
25 seems to me, because you are -- and I think consistently

1 -- making a distinction between credibility issues and
2 reliability issues. And I think you are implicitly
3 saying the Confrontation Clause is there to test
4 credibility but not reliability.

5 MS. COAKLEY: I think --

6 JUSTICE SOUTER: The machine is reliable;
7 therefore, it's outside of confrontation. And I don't
8 understand the validity of this distinction that is
9 implicit in your answers.

10 MS. COAKLEY: I think perhaps if the Court
11 looks at accuracy rather than reliability and gets
12 outside the realm of the kinds of statements --

13 JUSTICE SOUTER: Well, accuracy --

14 MS. COAKLEY: -- that we looked at.

15 JUSTICE SOUTER: -- is an aspect of it.

16 MS. COAKLEY: But accuracy goes to what this
17 Court has always allowed in referring to, for instance,
18 a business records exception or a public records
19 exception. The reason they are admissible is precisely
20 because we believe them to be accurate, and more
21 importantly in this case --

22 JUSTICE SCALIA: No. No. They are
23 admissible in criminal cases as far as the Confrontation
24 Clause is concerned because they are not testimonial.

25 MS. COAKLEY: And they are related, however,

1 Your Honor, because the roots of whether it's hearsay or
2 not and the Confrontation Clause arguments come from the
3 same concern that somebody get a fair trial, that he or
4 she has the right to confront the witness --

5 JUSTICE SCALIA: We are back to Roberts
6 then.

7 JUSTICE KENNEDY: I do wish you would
8 comment on the argument that the State of California --
9 a huge state with many, many drug prosecutions -- seems
10 to get along all right under the rule that the
11 Petitioner proposes.

12 MS. COAKLEY: I did join the amicus brief,
13 Your Honor. I believe and -- though I think it's too
14 early to tell because I, certainly from my own
15 experience, know that the number of cases that go to
16 trial is not an indication of what the work is that is
17 involved, and I know that in Massachusetts it would --

18 JUSTICE KENNEDY: If the State of California
19 and other populous States have for, I take it, some
20 number of years been able to function quite effectively
21 under the rule that the Petitioner proposes, it seems to
22 me that's something that you have to address.

23 MS. COAKLEY: And I address that, Your
24 Honor, by saying that for Massachusetts it would be an
25 undue burden with very little benefit to the defendant.

1 JUSTICE KENNEDY: Why would it be undue for
2 California and not for -- are you accepting the fact
3 that in California it's a workable rule and it's caused
4 no problems?

5 MS. COAKLEY: I -- I can't disagree with
6 that, Your Honor. I don't have enough information about
7 the way California works or doesn't work. I know that
8 as a practical matter --

9 JUSTICE STEVENS: Well, it seems to me it's
10 a very important point.

11 MS. COAKLEY: Well, as a practical matter in
12 Massachusetts, it would mean that district court
13 misdemeanor drug prosecutions would essentially grind to
14 a halt, and the value to the defendant -- and this Court
15 has looked at in Inadi and in other situations where
16 there does not seem to be the real issue involved with
17 Confrontation Clause.

18 JUSTICE GINSBURG: Then you're predicting
19 that grind to a halt, but there are going to be a large
20 number that wash out because they are plea bargained.
21 So they won't get into the picture at all. There will
22 probably be a goodly number in which defense counsel
23 will stipulate that the drug quantity -- the drug type
24 was such and such and quantity such and such. So you
25 don't know in how many cases the defendant would take

1 advantage of this confrontation right?

2 MS. COAKLEY: No, and they often will not
3 stipulate, Your Honor, until the day of trial when they
4 realize that the chemist is there. That's from my own
5 experience and that's a commonsensical rule. The
6 question is --

7 JUSTICE SCALIA: Don't these people have to
8 appear before the same judge again and again? The point
9 made these are repeat attorneys, and I don't think you
10 make friends and influence people among judges by
11 insisting upon testimony in criminal cases where it is
12 obviously not needed.

13 MS. COAKLEY: Well, two points, Your Honor:
14 In Massachusetts, we do have a circuit court and a
15 superior court so judges move around. And the second
16 thing is that -- my experience is that defendants,
17 whether appointed or otherwise, are extremely vigorous
18 in protecting their rights, and if I were defense
19 counsel and I had a strategic advantage, I would insist
20 on it.

21 JUSTICE SOUTER: Do you see any reason --

22 CHIEF JUSTICE ROBERTS: I think California
23 did not join the amicus brief.

24 MS. COAKLEY: Then I misspoke.

25 JUSTICE SOUTER: Do you see any reason why a

1 notice-and-demand statute wouldn't satisfy your concern?

2 MS. COAKLEY: Well, the -- the Petitioner
3 agreed that --

4 JUSTICE SOUTER: A bland notice-and-demand
5 statute --

6 MS. COAKLEY: We would argue that
7 Massachusetts' statute is the functional equivalent of a
8 notice-and-demand statute and complies with whatever
9 concerns the Court may have about the right to
10 confrontation.

11 CHIEF JUSTICE ROBERTS: What if it's the
12 central issue in the case? The defense says, "That
13 stuff I was carrying was not cocaine. Either I was
14 trying -- you know, I was going to stiff the person I
15 was selling it to or whatever." That's the sole
16 defense. That's not cocaine. All you've got to do is
17 submit an affidavit from the lab guy saying, "I tested
18 it; it is"?

19 MS. COAKLEY: Well, from the prosecution's
20 point of view that would be a bad strategic decision.
21 That's an instance where you would bring in the analyst
22 because you want to --

23 JUSTICE KENNEDY: That's a non- answer. We
24 are asking what's the rule?

25 MS. COAKLEY: The rule --

1 JUSTICE KENNEDY: Can you submit it on the
2 affidavit, as the Chief Justice said under your theory
3 of the case?

4 MS. COAKLEY: Yes.

5 JUSTICE KENNEDY: You'd try to have some
6 different hypothesis?

7 MS. COAKLEY: Yes, because the defendant has
8 plenty of opportunity to both have an independent exam,
9 to subpoena the witness in himself, to make sure that if
10 that is a true issue at trial -- in many instances --
11 most instances it's not, but he will have the
12 opportunity to cross-examine.

13 CHIEF JUSTICE ROBERTS: Thank you, General.
14 Ms. Schertler.

15 ORAL ARGUMENT OF LISA H. SCHERTLER

16 ON BEHALF OF THE UNITED STATES,

17 AS AMICUS CURIAE,

18 SUPPORTING THE RESPONDENT

19 MS. SCHERTLER: Mr. Chief Justice, and may
20 it please the Court:

21 The Confrontation Clause is not implicated
22 when a human being merely authenticates for trial the
23 instruments-generated result of a scientific test. That
24 is because the direct output of an instrument is not
25 testimonial and human assertions that merely establish

1 the foundation for admitting nontestimonial evidence do
2 not themselves trigger Confrontation Clause rights.

3 JUSTICE GINSBURG: Well, maybe if you were
4 just -- if you were just putting in the machine, the raw
5 information from the machine. But here what speaks is
6 the certification by the analyst, so you don't have
7 simply a machine-generated result; you have a human
8 person who seems to be testifying: I certify that this
9 is an accurate report.

10 MS. SCHERTLER: If I could draw an analogy,
11 Justice Ginsburg, to a historical example that we think
12 illustrates our point, historically records custodians
13 -- public records custodians have been permitted to
14 certify through, when they have express authority at the
15 common law, and -- and into present day that they did a
16 records search, that they found a document within the
17 public records of an agency, and that the document that
18 they are attaching is a true copy of what they found.

19 Those are statements by humans that really
20 set forth the conditions for -- under which the evidence
21 is being presented to the jury.

22 JUSTICE SCALIA: But --

23 MS. SCHERTLER: But those have always been
24 accepted.

25 JUSTICE SCALIA: It's not material prepared

1 for trial. It's not material that was generated
2 precisely in order to prosecute an individual.

3 MS. SCHERTLER: The underlying material in
4 the public records case is not testimonial because it
5 was not prepared for trial.

6 JUSTICE SCALIA: Exactly.

7 MS. SCHERTLER: In this case, Justice
8 Scalia, we would submit that the underlying material is
9 also not testimonial, albeit for a separate reason; and
10 that is that it is an instrument-generated result and
11 therefore not the statement of a witness.

12 JUSTICE SCALIA: Let's, let's assume that
13 it's critical to a particular murder prosecution what
14 time the shot was fired, okay? And you mean to tell me
15 if -- if somebody says I heard the clock strike 12 at
16 the time the shot was fired, that would not be
17 testimony? Yes, the clock is a machine, right?

18 MS. SCHERTLER: No.

19 JUSTICE SCALIA: He is just reciting what
20 the clock said.

21 MS. SCHERTLER: My analogy would be, Justice
22 Scalia, if that clock had in itself a trigger mechanism
23 that would detect when a gunshot was fired; and if that
24 clock delivered, as you have in the cases of a drug
25 analysis, a result, a reading that one could submit into

1 court that says shot detected at 12 p.m., that that
2 nontestimonial evidence could be submitted consistently
3 with Confrontation Clause principles, but it would still
4 require authentication.

5 Some person may have to establish that this
6 clock was set up, it was operating properly, it was
7 calibrated the way it had to. Those all go to the same
8 sorts of foundational facts that are akin to the public
9 records certificate.

10 JUSTICE BREYER: Well, you make me think the
11 public certificate. Let's imagine birth and death
12 records. There is a whole building full of them; they
13 are on microfiche. Now, I am not sure how Massachusetts
14 works, but I suppose if you want to introduce one you
15 call up the -- the keeper and the keeper looks it up,
16 produces it, and has a separate piece of paper or maybe
17 written beneath it which says: "This is a true copy of
18 the," and you don't call in the keeper.

19 Now that statement on a piece of paper,
20 "this is a true copy of the birth certificate of John
21 Smith," that was prepared specifically for this trial.

22 MS. SCHERTLER: Yes, Justice Breyer.

23 JUSTICE BREYER: So I take it that has
24 nothing -- I mean we'll find out, but if they win, every
25 one of those cases, every document you have to bring in

1 the person to make clear that the document that says
2 that this is a copy of the document --

3 MS. SCHERTLER: Our --

4 JUSTICE BREYER: Is that what -- is that the
5 point?

6 MS. SCHERTLER: Well, that is -- that is our
7 point. That it is too -- it is too simplified to say,
8 as Petitioner does here, that if it's an affidavit or a
9 certificate, and it's prepared for trial, that's the end
10 of the analysis.

11 JUSTICE KENNEDY: But you have to have some
12 boundaries, you have to have some framework, you have to
13 have some explanation. You started talking about a
14 machine. There is no machine in Justice Breyer's
15 hypothetical, so it seems to me you have two different
16 rationales floating around here and -- and neither are
17 tethered to a specific rule.

18 MS. SCHERTLER: Well, Justice Kennedy, this
19 is why I would bring those two rules together. In the
20 public records example, what you have is underlying
21 evidence going into the jury that is nontestimonial. In
22 that instance, it was because it was a public record not
23 prepared for trial but has always been accepted from --
24 has always been viewed as nontestimonial.

25 Your Honor is correct. In this case we

1 don't have that, but what we do have is an underlying
2 evidentiary item that is nontestimonial for a separate
3 purpose, and that is that it is a machine-generated
4 result.

5 JUSTICE KENNEDY: Well --

6 JUSTICE BREYER: You're going to work
7 either. Because the person -- Sir Walter Raleigh's
8 accusers wanted to testify about something that was
9 nontestimonial: what happened on the day. So what we
10 are looking for -- I mean, I agree with you that it is a
11 very peculiar result that's going to have every public
12 document in the United States suddenly have the keeper
13 of that document having to come into court.

14 On the other hand, I'm having a hard time
15 figuring out what the distinction is between that and
16 all these other things.

17 MS. SCHERTLER: Well -- yes, Justice Breyer.
18 Let me just add that in the public records custodian
19 situation, there is always the possibility that the
20 public records custodian who is signing that certificate
21 was careless, is a liar; and those certificates yet have
22 always been viewed as simply foundational vehicles for
23 getting to the jury nontestimonial evidence. The
24 defense is not --

25 JUSTICE STEVENS: Ms. Schertler, please

1 clarify one thing for me. Is the rule you're seeking
2 one limited to tests performed by machines?

3 MS. SCHERTLER: The rule that I have
4 articulated so far, yes. It is -- it would be --

5 JUSTICE STEVENS: So would you agree the
6 Confrontation Clause would apply if it were an
7 independent expert's test -- test results and testimony.

8 MS. SCHERTLER: Justice Stevens, we also
9 have an alternative argument --

10 JUSTICE STEVENS: Just tell me yes or no.

11 MS. SCHERTLER: No. I would not. Because
12 we have an alternative --

13 JUSTICE STEVENS: Well, then we shouldn't
14 talk about just machines.

15 MS. SCHERTLER: Well, we hope to rely on one
16 of the same arguments that Massachusetts does, which is
17 that there was a broad exception at common law for
18 official records, those created by public officers doing
19 their duty.

20 JUSTICE KENNEDY: It seems to me you have to
21 do that because there is all sorts of machines that have
22 to be interpreted. There -- a chromatic spectrum
23 analysis; the person has to say what he saw there, what
24 she saw there.

25 MS. SCHERTLER: I --

1 JUSTICE KENNEDY: So just because the
2 machine is involved it seems to me we cannot make a
3 sensible rule based on that.

4 JUSTICE SCALIA: And there was not a broad
5 exception at common law for public records created in
6 anticipation of criminal litigation.

7 MS. SCHERTLER: Well, we have -- I mean, we
8 have looked for that limitation in the authorities and
9 we simply have not found it.

10 JUSTICE SCALIA: Have you found cases where
11 the material was admitted as a public record despite the
12 fact that it was a public record created for
13 prosecution?

14 MR. FISHER: The difficulty with that,
15 Justice Scalia, is I don't know of equivalent or
16 comparable records that were being created at that time
17 for purposes of litigation.

18 JUSTICE SCALIA: Well --

19 JUSTICE SOUTER: These other records, no,
20 you haven't found them.

21 MS. SCHERTLER: No. I have -- I have not.

22 Yet, if I could go back to Justice Kennedy's
23 question, there is no record here about how this test in
24 particular was done, but there -- there -- I can tell
25 the Court that actually technology in the controlled

1 substance area is to the point where an instrument does
2 in fact provide an answer to the analyst. It provides a
3 mass spectrum of the unknown and a --

4 JUSTICE STEVENS: Yes but the rule, the
5 issue is not limited to drug cases. Murder cases, all
6 sorts of cases where there is scientific evidence.

7 MS. SCHERTLER: Well, the -- the narrower
8 rule that we are discussing here would be limited to
9 those situations in which the underlying evidence to be
10 presented to the jury is nontestimonial because it is
11 instrument-generated and did not require human analysis.

12 CHIEF JUSTICE ROBERTS: So is your -- what
13 is your answer to the question I posed to the Attorney
14 General? The only issue in the case is whether the
15 powder is or is not cocaine. You think you get by if
16 the law says you can admit this with an affidavit?

17 MS. SCHERTLER: Yes, Mr. Chief Justice for
18 the following reason. Just as in the case of the
19 records custodians, a defendant may believe that that is
20 not an authentic record; and nothing about the rule we
21 propose would prevent the defense from challenging the
22 authenticity or the circumstances, the correctness of
23 the testing procedures that were used.

24 CHIEF JUSTICE ROBERTS: But you can't --

25 MS. SCHERTLER: It's just a question of

1 whether -- whether the Confrontation Clause requires
2 that that challenge occur in the Government's case on
3 cross-examination, or as in these record custodian's
4 cases, if the defense wants to challenge the
5 authenticity of the underlying nontestimonial evidence,
6 he must do so in his case.

7 JUSTICE KENNEDY: Could you comment on the
8 California experience, please?

9 MS. SCHERTLER: I would -- I would be happy
10 to, Justice Kennedy.

11 I -- I don't have information about
12 California. I do have information about the District of
13 Columbia. And I can tell the court that in the time
14 period since the District of Columbia Court of Appeals
15 held that these sorts of certificates of analysis were
16 testimonial, that the court appearances that have been
17 required of DEA chemists at the Mid-Atlantic laboratory
18 have increased by 500 percent, from seven to 10
19 appearances per month to routinely over 50 per month,
20 and that the corresponding time that it takes to analyze
21 substance has increased.

22 Thank you, Your Honor.

23 CHIEF JUSTICE ROBERTS: Thank you counsel.
24 Five minutes, Mr. Fisher.

25 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

1 ON BEHALF OF THE PETITIONER

2 MR. FISHER: Let me start, Your Honors: If
3 there is any doubt remaining about the machine-generated
4 theory that the Solicitor General was putting forward
5 today, again I would refer the court back to the
6 scientific evidence treatise.

7 The raw data of a mass spectrometer looks --
8 looks something like a heart monitor. It's a printout
9 of the squiggly line across the page that a person needs
10 to look at and then analyze as to what it shows about
11 the molecular composite of the substance that the
12 machine was operating. We have no objection if
13 prosecutors in criminal cases want to introduce machine
14 generated data. They can do that.

15 But what they can't do is introduce --
16 introduce affidavits certifying as to their -- you know,
17 their interpretation of what a machine did or simply
18 what a machine says, because there is no difference --

19 JUSTICE SCALIA: So you say they could
20 introduce the squiggly line and put on the stand an
21 analyst who says what that squiggly line shows is that
22 this was cocaine?

23 MR. FISHER: They could do that, Justice
24 Scalia.

25 JUSTICE KENNEDY: What's your distinction

1 with the recordkeeper?

2 MR. FISHER: Pardon me?

3 JUSTICE KENNEDY: What's your distinction
4 from your own theory of the recordkeeper? Does the
5 recordkeeper all have to -- do they all have to testify
6 to testify that this is indeed the record?

7 MR. FISHER: My understanding of the common
8 law on that, as the solicitor general put it, is that
9 that was a foundational requirement that was not
10 necessarily considered evidence.

11 JUSTICE BREYER: No, no, there's a
12 hearsay -- there is a hearsay aspect. I'm not saying
13 it's the only thing. There is a chain and so forth but,
14 there is a hearsay aspect to that which you see, okay.
15 The certificate says this is Joe Jones' birth
16 certificate. That's what the -- now, that's that person
17 outside of court who made that little piece of paper for
18 purposes of this case. And moreover, the statement that
19 it certifies to is directly relevant; indeed, the whole
20 thing falls without it.

21 So, are you going to say the same thing
22 applies, your rule, and you have to call the
23 recordkeeper in or not? And I think you're going to say
24 not. And if you're going to say not, I want to know
25 what the distinction is?

1 MR. FISHER: As a general matter, yes, our
2 rule is consistent. Now, if you look at Wigmore,
3 Wigmore --

4 JUSTICE BREYER: You are going to calling
5 in -- you're going to --

6 MR. FISHER: I'm trying to answer. What
7 Wigmore says is that something like a public
8 recordkeeper's seal was not considered evidence, per se.
9 It was a foundational requirement to put evidence in.
10 And so, in this Court's words in the Dowdell case, it's
11 something like a court reporter's transcript that goes
12 up to a Court of Appeals and then is looked at. It's
13 not considered evidence against a criminal defendant.

14 Now, in stark contrast to this case where
15 the document is expressly citing to a statute of
16 Massachusetts law and saying this element of the
17 criminal charge is satisfied. It is a very big
18 difference.

19 JUSTICE KENNEDY: The graph, spectrograph
20 or -- or -- or the -- the chart is introduced. Chain of
21 custody is either stipulated or established. Can a
22 person who did not make the test testify as to what that
23 line -- what that graph means, and would that be
24 sufficient to convict?

25 MR. FISHER: So long as chain of custody was

1 satisfied, yes, Justice Kennedy, that someone could take
2 the stand and do that. But remember, the reports in
3 this case do not just report -- even if you accepted the
4 solicitor's general's version that they are reporting
5 what the machine said about the substance, they also
6 have a paragraph before that, and this goes to Justice
7 Scalia's question, say, these are -- these are the
8 substances that were taken from the defendant in this
9 case and given to me by this officer, and so, that is
10 additional information that is being sworn to in the
11 affidavit in this case that is also testimony.

12 JUSTICE SOUTER: Why don't you insist, even
13 in that case, on the confrontation right to examine the
14 person who actually conducted the test itself and
15 generated the papers that the later expert testifies on
16 in order to determine the admissibility of the -- of
17 the -- the test results themselves?

18 MR. FISHER: I think the defendant may have
19 that right. I understood Justice Kennedy's hypothetical
20 to suggest that that chain of custody was stipulated to
21 or otherwise agreed.

22 JUSTICE SOUTER: Okay. All I wanted to know
23 was whether you were giving that away or not.

24 JUSTICE KENNEDY: No, but chain of custody
25 is -- is quite different from the quantitative analysis

1 and the professional opinion. My question is only chain
2 of custody has been established, that's gone to the
3 laboratory, the paper is produced, an outside witness
4 testifies to what the paper means. I thought you said
5 that that suffices.

6 MR. FISHER: I did. So I think I'm --
7 here's what I'm saying.

8 JUSTICE SOUTER: Let me ask you this. There
9 are -- there are -- there are three possibility
10 subjects: Chain of custody, conduct of test,
11 significance or meaning of the squiggles. As I
12 understand it, you have said if the chain of custody is
13 established and if the squiggles are admitted in
14 evidence, an expert who did not do the test can testify
15 about the significance of the squiggles. But that
16 leaves the question of the -- the evidence about the
17 conduct of the test itself.

18 And I understood you to say to me that you
19 were not conceding that you did not have a -- a
20 confrontation right to examine the person who did the
21 test itself in order to determine admissibility.

22 MR. FISHER: I think what we are doing here
23 is disagreeing slightly over where chain of custody
24 begins and ends. To the extent chain of custody gets
25 you to the point at which the substance is put into the

1 machine, and that was stipulated to or otherwise not
2 thought about, then, yes, the printout could be
3 introduced into evidence and anyone could testify as to
4 what that printout means. But to the extent that there
5 was a gap between the drugs getting into the laboratory
6 and being put into the machine by somebody that the
7 defendant was not stipulating to, then whoever did
8 that -- if the State were going to assert this is who
9 did it and this is the drugs that we had -- that would
10 be something that would be subject to cross-examination.

11 JUSTICE SOUTER: Okay.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 The case is submitted.

14 (Whereupon, at 2:04 p.m., the case in the
15 above-entitled matter was submitted.)

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