IN THE SUPREME COURT OF THE UNITED STATES

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LUIS E. MELENDEZ-DIAZ, :

Petitioner :

v. : No. 07-591

MASSACHUSETTS. :

- x

Washington, D.C.

Monday, November 10, 2008

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

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

MARTHA COAKLEY, ESQ., Attorney General, Boston, Mass.; on behalf of the Respondent.

LISA H. SCHERTLER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondent.

C O N T E N T S

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

quintessentially testimonial evidence.

Massachusetts --

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

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

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

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

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

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

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

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

JUSTICE KENNEDY: Well, suppose --

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

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

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

Court has made clear in California --

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

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

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

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

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

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

performed." It's there on the document.

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. FISHER: Okay. Thank you.

I -- I took Justice Ginsburg's question to

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

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

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

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

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

MR. FISHER: Well, I think that is best

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

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

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

outside of the ambit of the Confrontation Clause.

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

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

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

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

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

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

There is another category of States --

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

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

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

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

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

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

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

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

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

they? I mean, is that right?

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

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

MR. FISHER: Yes.

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

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

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

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

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

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

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

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

MR. FISHER: Yes.

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

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

Court's Roberts jurisprudence.

JUSTICE BREYER: That's true.

MR. FISHER: I think --

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

MR. FISHER: I understand.

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: I absolutely see that

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

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

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

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

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

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

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

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

(Laughter.)

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

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

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

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

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

we have here --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If there are no more questions --

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

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

CHIEF JUSTICE ROBERTS: Thank you.

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Fisher. We'll give you your full rebuttal time.

General Coakley.

ORAL ARGUMENT OF MARTHA COAKLEY

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

MS. COAKLEY: It is, Your Honor.

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

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

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

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

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

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

JUSTICE SOUTER: Well, why --

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

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

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

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

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

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

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

with the basic confrontation right.

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

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

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

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

MS. COAKLEY: Except the public record, for

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

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

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

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

MS. COAKLEY: Yes, Your Honor.

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

MS. COAKLEY: That's --

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

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

JUSTICE KENNEDY: As I see it.

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

JUSTICE KENNEDY: Of course the problem was

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

MS. COAKLEY: Yes.

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

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

JUSTICE SCALIA: Ballistics as well? You

would extend this to ballistic tests?

MS. COAKLEY: If --

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

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

JUSTICE SCALIA: I don't understand that difference.

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

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

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

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

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

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

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

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

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

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

MS. COAKLEY: Well, I --

JUSTICE KENNEDY: We are raising it.

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

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

You start talking about reliability and

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

MS. COAKLEY: Well, Your Honor --

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

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

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

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

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

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

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

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

lab."

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

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

MS. COAKLEY: And the --

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

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

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

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

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

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

MS. COAKLEY: I think --

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

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

JUSTICE SOUTER: Well, accuracy --

MS. COAKLEY: -- that we looked at.

JUSTICE SOUTER: -- is an aspect of it.

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

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

MS. COAKLEY: And they are related, however,

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

JUSTICE SCALIA: We are back to Roberts then.

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

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

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

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

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

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

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

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

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

advantage of this confrontation right?

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

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

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

JUSTICE SOUTER: Do you see any reason --

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

MS. COAKLEY: Then I misspoke.

JUSTICE SOUTER: Do you see any reason why a

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

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

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

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

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

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

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

MS. COAKLEY: The rule --

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

MS. COAKLEY: Yes.

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

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

CHIEF JUSTICE ROBERTS: Thank you, General.

Ms. Schertler.

ORAL ARGUMENT OF LISA H. SCHERTLER

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE,

SUPPORTING THE RESPONDENT

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

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

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

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

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

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

JUSTICE SCALIA: But --

MS. SCHERTLER: But those have always been accepted.

JUSTICE SCALIA: It's not material prepared

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

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

JUSTICE SCALIA: Exactly.

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

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

MS. SCHERTLER: No.

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

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

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

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

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

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

MS. SCHERTLER: Yes, Justice Breyer.

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

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

MS. SCHERTLER: Our --

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

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

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

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

Your Honor is correct. In this case we

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

JUSTICE KENNEDY: Well --

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

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

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

JUSTICE STEVENS: Ms. Schertler, please

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

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

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

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

JUSTICE STEVENS: Just tell me yes or no.

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

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

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

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

MS. SCHERTLER: I --

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

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

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

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

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

JUSTICE SCALIA: Well --

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: But you can't --

MS. SCHERTLER: It's just a question of

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

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

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

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

Thank you, Your Honor.

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

REBUTTAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

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

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

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

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

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

JUSTICE KENNEDY: What's your distinction

with the recordkeeper?

MR. FISHER: Pardon me?

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

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

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

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

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

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

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

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

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

MR. FISHER: So long as chain of custody was

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOUTER: Okay.

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

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