No. 07-1602

In the Supreme Court of the United States

LUIS DE LA CRUZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Confrontation Clause of the Sixth Amendment was violated by the presentation of expert testimony from a medical examiner who based his opinion concerning the decedent's cause of death on information contained in autopsy and related toxicology reports prepared by persons who did not testify at trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 514 F.3d 121.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 2008. On April 21, 2008, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including June 30, 2008. The petition for a writ of certiorari was filed on June 23, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of conspiracy to possess with intent to distrib-

ute and to distribute one kilogram or more of heroin, in violation of 21 U.S.C. 846, and possession with intent to distribute and distribution of heroin, in violation of 21 U.S.C. 841(a)(1). The jury made findings that petitioner's offenses had resulted in the death of Bryan Wallace. Petitioner was sentenced to 240 months of imprisonment, to be followed by five years of supervised release. Gov't C.A. Br. 3. The court of appeals affirmed. Pet. App. 1a-40a.

1. From at least July, 1999 until March, 2001, petitioner led an organization that distributed heroin in and around Lawrence, Massachusetts. Suppliers would provide petitioner with "fingers" of compressed heroin. Petitioner and his assistants would process the bulk heroin and transfer it in powder form into small baggies. A group of ten baggies, called a "bundle," would be packaged together in a sandwich bag for sale. Pet. App. 2a; Gov't C.A. Br. 4-5.

a. On March 8, 2001, Allison Tracy, who was one of petitioner's regular customers, called petitioner to arrange to purchase 25 bundles of heroin. Tracy also arranged to buy an additional 25 bundles from another supplier, Richard Frias. Tracy planned to sell a portion of her heroin purchases to one of her customers, Jesse Flynn. Pet. App. 3a; Gov't C.A. Br. 7-8.

Petitioner delivered 25 bundles (*i.e.*, 250 baggies) of heroin to Tracy. The baggies in some of the bundles were marked with black eagles, and the baggies in other bundles were marked with blue stars. The same day, one of Frias's runners also delivered 25 bundles of heroin to Tracy. The baggies in the bundles from Frias were marked with either red beetles or blue dolphins. Pet. App. 3a; Gov't C.A. Br. 8.

Tracy immediately sold eight of the 50 bundles that she had purchased to Flynn. Four of the bundles that Tracy sold to Flynn were from petitioner and contained baggies marked with blue stars or black eagles. The remaining four bundles came from Frias and contained baggies marked with blue dolphins. Pet. App. 3a; Gov't C.A. Br. 8.

b. The next day, March 9, 2001, Flynn agreed to sell heroin to Bryan Wallace, his childhood friend. To Flynn's knowledge, Wallace had used heroin only once before. At a restaurant in New Hampshire, Flynn and Wallace had dinner and shared a bag of heroin; Flynn then sold two bundles of heroin to Wallace. The baggies in one bundle were marked with blue stars and those in the other bundle were marked with black eagles. Pet. App. 3a-4a; Gov't C.A. Br. 8-9.

That night, Wallace's girlfriend, Shay Kelleher, stopped by Wallace's house. Wallace showed Kelleher some baggies of heroin and said he had bought them from a friend. Kelleher described the baggies as having black birds on them that resembled the Harley-Davidson eagle logo. Kelleher also observed that Wallace looked "unmistakably different" than he had any other time she had seen him, including on prior occasions when Wallace had been high on ecstacy or ketamine. Wallace was sluggish and nonverbal, paler than Kelleher had ever seen him, and his eyes were red and "tight" with very constricted pupils. The symptoms Wallace exhibited are characteristic of heroin use. Pet. App. 4a; Gov't C.A. Br. 9-10.

The next evening, Kelleher again stopped by Wallace's home and found Wallace's dead body. Wallace was face-up on his bed, and blood had pooled in his legs from morbidity. A blood-tinged foam cone had formed

over Wallace's mouth. The police arrived and found inside a garbage can 11 torn and empty baggies marked with either a black eagle or a blue star. The police also found seven unopened baggies marked with blue stars on the kitchen counter. The baggies, as well as drug paraphernalia the police found in Wallace's room, all tested positive for heroin. Pet. App. 4a; Gov't C.A. Br. 10-11.

2. On December 8, 2004, a federal grand jury in the District of Massachusetts returned a two-count second superseding indictment charging petitioner with conspiracy to possess with intent to distribute and to distribute one kilogram or more of heroin, in violation of 21 U.S.C. 846, and possession with intent to distribute and distribution of heroin, in violation of 21 U.S.C. 841(a)(1). The indictment also alleged that both offenses had resulted in Wallace's death. Gov't C.A. Supp. App. 61-65; Pet. App. 6a.

3. The government's evidence at trial included expert testimony from Thomas A. Andrew, M.D., Chief Medical Examiner for the State of New Hampshire, concerning Wallace's cause of death. Pet. App. 18a; 5/3/05 Tr. 39-121. Dr. Andrew did not perform the autopsy on Wallace's body or conduct the related toxicological tests. Dr. Andrew instead reviewed the autopsy and toxicology reports, the death-scene photographs, and the police reports associated with Wallace's death, all of which were materials routinely relied upon by experts in his field to form opinions concerning cause of death. Pet. App. 18a-19a.

a. Petitioner objected to Dr. Andrew's testimony on Confrontation Clause grounds, citing *Crawford* v. *Washington*, 541 U.S. 36 (2004). Petitioner contended that

the autopsy report on which Dr. Andrew had relied was "testimonial evidence prepared by someone whom [petitioner] could not cross-examine." Pet. App. 19a. The district court overruled the objection, noting that petitioner would "be allowed full confrontation rights by the cross-examination" of Dr. Andrew and that Dr. Andrew could properly base his opinion on an autopsy report, "the preparation of which was required by law." *Ibid.*; see Gov't C.A. Br. Add. 5.

Pursuant to Federal Rule of Evidence 703, the prosecutor sought permission to elicit from Dr. Andrew certain factual information contained within the autopsy and toxicology reports on which Dr. Andrew had relied. 5/3/05 Tr. 32.[1] The prosecutor indicated that disclosure of "facts going to the nature and situation of Bryan Wallace's body at the time of his death" would assist the jury to assess Dr. Andrew's testimony and would cause petitioner no prejudice. *Id.* at 32-33. The district court ruled that those facts could be elicited from Dr. Andrew. *Id.* at 37.

b. Dr. Andrew testified that, in forming his opinion concerning Wallace's cause of death, he had reviewed the autopsy report, toxicology reports, police records, and photographs of the scene of the death. 5/3/05 Tr. 49. Dr. Andrew testified that "if sufficient information is in

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[1] Federal Rule of Evidence 703 provides that the facts or data on which an expert relies to form an opinion "need not be admissible in evidence in order for the opinion or inference to be admitted" if they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Rule 703 instructs courts not to permit disclosure of otherwise inadmissible facts or data relied upon by an expert witness "unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." Fed. R. Evid. 703.

those photographs and * * * reports, someone who is experienced and trained in looking at that material can easily reach a conclusion as to what their opinion is on the cause and manner of death." *Id.* at 50-51.

With respect to the photographs of Wallace's body, Dr. Andrew noted that the "small plume of pink-tinged foam" at Wallace's mouth was called "pulmonary edema" and was a "classic * * * finding with certain drug overdoses, and opiate drugs" specifically. 5/3/05 Tr. 54-56. Dr. Andrew also noted that a "jerry-rigged pipe" depicted in another photograph of Wallace's room was a "device that * * * [he was] used to seeing at scenes of drug-related deaths." *Id.* at 59. Dr. Andrew further testified that the torn baggies in Wallace's garbage can were "not an uncommon finding at scenes of death where death occurs relatively suddenly after the use of illicit drugs." *Id.* at 60.

With respect to the autopsy report, Dr. Andrew testified that the condition of Wallace's lungs (which were unusually heavy), his heart (which was enlarged), and his bladder (which was distended with urine) "correlate[d] with" the other evidence of drug use at the scene of the death. 5/3/05 Tr. 62-63. Dr. Andrew also testified that he reviewed two toxicology reports, which showed that Wallace's blood contained 499 nanograms per milliliter of free morphine (the end-product of heroin) and 22 nanograms per milliliter of ketamine. *Id.* at 72-73. Based on his review of the death-scene photographs, the autopsy and related toxicology reports, and the police reports, Dr. Andrew formed the opinion that Wallace

"died of an acute opiate intoxication" as a result of ingesting heroin. *Id.* at 75-78.[2]

c. The jury returned guilty verdicts on both counts and made special findings that Wallace's ingestion of heroin was a but-for cause of his death, that the heroin that caused Wallace's death was distributed as part of the charged conspiracy, and that petitioner was in the chain of distribution for that heroin. Pet. App. 7a-8a.

4. On appeal, petitioner contended, *inter alia*, that Dr. Andrew's testimony violated the Confrontation Clause under *Crawford*, *supra*, because it was based on autopsy and toxicology reports that were prepared by persons who did not testify at trial. Pet. App. 18a. The court of appeals affirmed. *Id.* at 1a-40a.

a. The court of appeals first found that petitioner's discussion of his Confrontation Clause claim in his appellate brief was "perfunctory at best." Pet. App. 20a. The court noted that petitioner had cited "no cases to support his argument" other than *Crawford*, which petitioner had cited only "for the general proposition that the introduction of testimonial hearsay runs afoul of the Confrontation Clause." *Ibid.* The court rejected petitioner's Confrontation Clause claim in part because it was "unaccompanied by some effort at developed argumentation" and thus was waived. *Ibid.* (quoting *United States* v. *Casas*, 425 F.3d 23, 30 n.2 (1st Cir. 2005), cert. denied, 546 U.S. 1199, and 547 U.S. 1061 (2006)).

b. The court of appeals also rejected petitioner's Confrontation Clause claim on the merits. Pet. App.

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[2] Dr. Andrew testified that the level of ketamine detected in Wallace's blood was "fairly insignificant," the symptoms of a ketamine overdose are "quite the opposite" from those present in an opiate overdose, and that he "saw no evidence of [Wallace's death] being a ketamine overdose." 5/3/05 Tr. 76-77.

20a-23a. The court concluded that an autopsy report is "in the nature of a business record, and business records are expressly excluded from the reach of *Crawford*." *Id.* at 20a (citing *Crawford*, 541 U.S. at 56). In support of that conclusion, the court noted that "[a]n autopsy report is made in the ordinary course of business by a medical examiner who is required by law to memorialize what he or she saw and did during an autopsy" and that an autopsy report "involves, in principal part, a careful and contemporaneous reporting of a series of steps taken and facts found by a medical examiner during an autopsy." *Ibid.*

The court of appeals concluded that *Crawford* does not prohibit a medical examiner from testifying about facts contained in an autopsy report prepared by another or "expressing an opinion about the cause of death based on factual reports—particularly an autopsy report—prepared by another." Pet. App. 22a. The court further noted that, "as a matter of expert opinion testimony," a physician's reliance on reports prepared by other medical professionals was "plainly justified in light of the custom and practice of the medical profession." *Id.* at 22a n.5 (quoting *Crowe* v. *Marchand*, 506 F.3d 13, 17-18 (1st Cir. 2007)). The court explained that "[d]octors routinely rely on observations reported by other doctors, and it is unrealistic to expect a physician, as a condition precedent to offering opinion testimony . . . , to have performed every test, procedure, and examination himself." *Ibid.* (quoting *Marchand*, 506 F.3d at 17).

The court of appeals also noted the "practical implications" that would result if an autopsy report were deemed to be testimonial hearsay that could not be relied upon by an expert without testimony from the medical examiner who prepared it. Pet. App. 21a-22a. The

court observed that "[y]ears may pass between the performance of the autopsy and the apprehension of the perpetrator" and that, "[u]nlike other forensic tests, an autopsy cannot be replicated by another pathologist." *Ibid.* (quoting *People* v. *Durio*, 794 N.Y.S.2d 863, 869 (Sup. Ct. 2005), abrogated on other grounds by *People* v. *Rawlins*, 884 N.E.2d 1019, 1027-1029 (N.Y. 2008), petition for cert. pending, No. 07-10845 (filed May 9, 2008)). The court observed that it "would be against society's interests to permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 5) that the Court should grant review to decide whether expert testimony that is "based on and describes the contents and conclusions of case-specific forensic analyses such as autopsy reports which have been prepared by other non-testifying medical examiners and forensic analysts" violates the Confrontation Clause under *Crawford* v. *Washington*, 541 U.S. 36 (2004). Petitioner (Pet. 9) asks the Court to hear this case with *Melendez-Diaz* v. *Massachusetts*, cert. granted, No. 07-591 (oral argument scheduled for Nov. 10, 2008). *Melendez-Diaz* presents the question whether the Confrontation Clause is violated by the admission into evidence of a sworn certificate of the result of a controlled-substance analysis without testimony from the analyst who prepared it.

Further review is unwarranted. The court of appeals rejected petitioner's Confrontation Clause claim on the dual grounds that it was inadequately briefed and that an autopsy report is "in the nature of a business record" and thus is nontestimonial under *Crawford*, *supra*. Pet.

App. 20a-23a. Because the issue in *Melendez-Diaz* differs from the issue here, and because the court of appeals also rejected petitioner's claim on an independent procedural ground, there is no need to hold the petition and further review should be denied.

1. a. The Confrontation Clause of the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const. Amend. VI. In *Crawford*, this Court held that the Confrontation Clause generally bars the admission of a "testimonial" statement from an absent witness in a criminal trial, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. 541 U.S. at 68. Although the Court in *Crawford* did not define the scope of "testimonial" hearsay comprehensively, it noted that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a formal trial; and to police interrogations." *Ibid.* The Court also noted that most of the hearsay exceptions that "had become well established by 1791 * * * covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy." *Id.* at 56 (citation omitted). In *Davis* v. *Washington*, 547 U.S. 813 (2006), the Court applied the "testimonial" standard to statements made to law enforcement personnel during a 911 call and at a crime scene. The Court held that in that context, statements are nontestimonial when the circumstances "objectively indicat[e] that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," and statements are testimonial when there is no ongoing emergency and "the primary purpose of the interrogation is to establish or prove past

events potentially relevant to later criminal prosecution." *Id.* at 822.

b. Petitioner contends (Pet. 5) that further review is warranted to allow the Court to address whether the Confrontation Clause is violated by the presentation of expert testimony "which is based on and describes the contents and conclusions of case-specific forensic analyses such as autopsy reports" that were prepared by a non-testifying witness. Petitioner also appears to challenge (Pet. 10-20) the court of appeals' conclusion that the autopsy and related toxicology reports relied on by Dr. Andrew were nontestimonial. Petitioner's arguments for further review are without merit.

i. As an initial matter, petitioner incorrectly suggests (Pet. 4, 10, 21) that Dr. Andrew was permitted to present to the jury, over petitioner's *Crawford* objection, the conclusion that the non-testifying medical examiner had reached concerning Wallace's cause of death. Dr. Andrew referred to the cause-of-death finding contained in the autopsy report on two occasions, both of which arose when that testimony was elicited *by the defense* on cross-examination.[3] Petitioner cannot claim a Confrontation Clause violation based on testimony he chose to elicit. See *United States* v. *Parikh*,

[3] On the first occasion, defense counsel directed Dr. Andrew to three pages in the autopsy report and asked if there was "anything about toxicology" on those pages. 5/3/05 Tr. 99. Dr. Andrew responded that the only mention of toxicology on the third page was the "acute opiate intoxication" finding by the medical examiner who authored the report, which "obviously indicat[ed] that he saw the toxicology results." *Ibid.* On the second occasion, defense counsel again asked Dr. Andrew whether there was "anything about the toxicology" on a different page of the autopsy report. *Id.* at 101. Dr. Andrew replied that the only reference to toxicology was "the cause of death, which is acute opiate intoxication." *Ibid.*

858 F.2d 688, 695 (11th Cir. 1988); *United States* v. *DiMaria*, 727 F.2d 265, 272 n.6 (2d Cir. 1984). And petitioner failed to assert in the court of appeals that Dr. Andrew had improperly recited the conclusion of the non-testifying medical examiner, so the court did not address the issue. See Pet. App. 22a ("[W]e are unpersuaded that a medical examiner is precluded under *Crawford* from either (1) testifying *about the facts* contained in an autopsy report prepared by another; or (2) expressing an opinion about the cause of death *based on factual reports*—particularly an autopsy report—prepared by another.") (emphasis added).

ii. The court of appeals also did not address or decide whether the Confrontation Clause permits an expert witness to base an opinion on the "testimonial statements" of witnesses who do not testify at trial. Petitioner's contention (Pet. 21) that this case "raises all aspects of the expert basis evidence issue" is therefore incorrect. The court below resolved the merits of petitioner's Confrontation Clause claim by holding (as an alternative to the independent ground that petitioner had waived the claim on appeal) only that an autopsy report is "in the nature of a business record, and business records are expressly excluded from the reach of *Crawford*." Pet. App. 20a. Having determined that "testimonial" statements were neither relied upon nor recited by Dr. Andrew, the court's Confrontation Clause analysis went no further. Nor was it required to go any further. As this Court made clear in *Davis*, testimonial hearsay "mark[s] out not merely [the] 'core[]' [of the Confrontation Clause,] but its perimeter." 547 U.S. at 824. This case thus is an unsuitable vehicle for the Court to consider the Confrontation Clause implications, if any, of an expert's reliance on, or recitation at trial of,

testimonial statements contained in forensic reports prepared by other scientists or professionals.[4]

iii. Petitioner also appears to challenge (Pet. 10-20) the court of appeals' holding that the autopsy and related toxicology reports relied upon by Dr. Andrew were nontestimonial. Petitioner contends (Pet. 19) that forensic reports, including those at issue here, "are clearly testimonial under both *Crawford* and *Davis*" because they are created after a "criminal event" and "for the primary purpose of preparing for criminal prosecution."

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[4] The United States has filed a brief as amicus curiae supporting the respondent in *Melendez-Diaz*, *supra* (No. 07-591), which explains (at 25-29) that when otherwise inadmissible facts or data underlying an expert's opinion are disclosed to the jury under Federal Rule of Evidence 703, they are admitted for the limited purpose of assisting the jury to decide what weight, if any, to give the expert's opinion and may not be considered by the jury as substantive evidence. See Fed. R. Evid. 703 advisory committee's notes to 2000 Amendments (noting also that appropriate limiting instruction must be given by the court upon request). *Crawford* made clear that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U.S. at 60 n.9 (citing *Tennessee* v. *Street*, 471 U.S. 409, 414 (1985)). Thus, the Confrontation Clause is not implicated by expert testimony that relies upon, or recites for a limited non-hearsay purpose, otherwise inadmissible facts or data, regardless of whether those facts or data include "testimonial statements" of witnesses not present at trial. Expert testimony under Rule 703 complies with the Confrontation Clause because the expert witness is available for cross-examination, and the only statement being presented to the jury as substantive evidence is the opinion testimony of that testifying expert. See, *e.g.*, *State* v. *Crager*, 879 N.E.2d 745, 757-758 (Ohio 2007), petition for cert. pending, No. 07-10191 (filed Mar. 26, 2008); *State* v. *Tucker*, 160 P.3d 177, 194 (Ariz.), cert. denied, 128 S. Ct. 296 (2007). As discussed above, however, the court of appeals in this case did not reach that issue because it did not regard the underlying statements on which the expert relied as testimonial.

In *Crawford* and *Davis*, however, this Court applied the "testimonial statement" standard to statements made to police officers by eyewitnesses to alleged criminal conduct. With the exception of the emergency circumstances presented in *Davis*, which the Court held did *not* generate testimonial statements, the scenarios closely resembled the civil-law practice that was the "principal evil" that the Confrontation Clause was intended to curtail: the admission into evidence of the *ex parte* examination of a witness to criminal conduct conducted by a government investigator (formerly magistrates, but now primarily police officers) without providing the accused person the opportunity to cross-examine the witness. See *Crawford*, 541 U.S. at 50. As the court of appeals recognized (Pet. App. 20a-21a), the autopsy and toxicology reports relied upon by Dr. Andrew are unlike the witness statements presented in *Crawford* and *Davis* and more closely resemble nontestimonial business or official records that reflect facts observed and recorded by a public officer pursuant to a legal duty. See, *e.g.*, *United States* v. *Feliz*, 467 F.3d 227, 236-237 (2d Cir. 2006).

In any event, this case is a poor vehicle for further review of the question whether an autopsy report or a related toxicology report constitutes "testimonial" evidence under *Crawford*. The court of appeals rejected petitioner's Confrontation Clause claim on the separate and independent ground that he had waived the argument by failing to brief it adequately. Pet. App. 20a & n.4. Petitioner does not challenge that portion of the court's ruling in this Court. Because the outcome of this case would be unaffected by further review, this Court's intervention is unwarranted.

2. There is no need to hold the petition for a writ of certiorari pending the Court's resolution of *Melendez-Diaz*, cert. granted, No. 07-591 (oral argument scheduled for Nov. 10, 2008). *Melendez-Diaz* presents the question whether the Confrontation Clause is violated by the admission into evidence of a sworn certificate of the result of a controlled-substance analysis without live testimony from the analyst who prepared it. Because drug laboratory reports differ in certain respects from autopsy reports and because no expert testified in *Melendez-Diaz*, the Court's opinion in that case is unlikely to resolve the appropriate analysis under *Crawford* of autopsy and related toxicology reports on which experts rely. In addition, the court of appeals rejected petitioner's Confrontation Clause claim on the alternative and independent ground that petitioner's inadequate briefing of the claim had waived it for purposes of appeal. Accordingly, the Court's resolution of *Melendez-Diaz* will not affect the outcome here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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