No. 09-866

IN THE

Supreme Court of the United States

RICHARD PENDERGRASS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Indiana

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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February 22, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTION PRESENTED

Whether the Confrontation Clause permits the prosecution to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and appropriate application of criminal statutes in accordance with the United States Constitution. Consistently advocating for the fair and efficient administration of criminal justice, members of the NACDL have a keen interest in knowing whether testifying witnesses may be used to introduce reports and other evidence prepared exclusively by non-testifying witnesses.

In the wake of *Crawford* v. *Washington*, 541 U.S. 36 (2004), and *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527 (2009), courts have routinely wrestled with the question of whether the Confrontation Clause

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certifies that counsel of record for both parties received notice of *amicus curiae*'s intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

permits this form of surrogate testimony. This practice poses serious problems because it fundamentally alters the structure of a criminal trial, hampers its truth-seeking function, and ultimately threatens the integrity of our criminal justice system. To delay intervention will perpetuate confusion and facilitate injustice in a substantial number of criminal cases nationwide.

I. THE INDIANA SUPREME COURT'S DECISION IS CONTRARY TO THE SIXTH AMENDMENT.

1. This Court's opinion in *Melendez-Diaz* v. *Massachusetts* means what it said, and said what it means: "[a] witness's testimony against a defendant is . . . inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." 129 S. Ct. 2527, 2531 (2009). In the instant case, Daun Powers, the analyst who tested the DNA evidence linking Mr. Pendergrass to C.D.'s aborted child and prepared the reports documenting those tests, did not appear at trial. See Pet. App. 2a-3a. Moreover, the State has never claimed that Mr. Pendergrass had another opportunity to cross-examine Ms. Powers. Instead, Ms. Powers' DNA reports—which the Indiana Supreme Court held were testimonial in nature—were introduced into evidence through the testimony of Lisa Black, Powers' supervisor at the Indiana State Police Laboratory. See Pet. App. 2a, 22a.

Those stark facts notwithstanding, a bare majority of the Indiana Supreme Court concluded that no Sixth Amendment violation occurred because the prosecution called two other witnesses—one familiar with Ms. Powers' general work habits and compliance with lab procedures, the other a DNA expert who concluded on the basis of Powers' report that Mr. Pendergrass was the father of C.D.'s aborted child. Pet. App. 9a-10a. In essence, this innovative approach dictates that the Confrontation Clause is satisfied so long as *someone* knowledgeable about the testimony and familiar with its author's general work habits takes the stand. See Pet. App. 15a-16a (Rucker, J., dissenting).

Such an approach is plainly inconsistent with the text of the Sixth Amendment, which guarantees a defendant the right to "be confronted with *the* witnesses against him," U.S. Const. amend. VI (emphasis added), and the holding in *Crawford* v. *Washington* that "[t]estimonial statements of witnesses absent from trial" may only be admitted when "*the declarant* is unavailable" and "the defendant has had a prior opportunity to cross-examine." 541 U.S. 36, 59 (2004) (emphasis added). Although the administrative ease offered by the Indiana Supreme Court's rule has superficial appeal, "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." *Id.* at 54.

2. In addition to its inconsistency with the text and this Court's precedents, the Indiana Supreme Court's rule would also encourage prosecutors to consistently call professional witnesses with only an indirect connection to the forensic testing at issue. *Amicus* and its members hold a strong interest in ensuring that courts' truth-seeking function is not undermined by the use of witnesses whose professional reputations hinge on the competence and accuracy of their subordinates, or who are specially trained to evade difficult questions on cross-examination.

The instant case illustrates this concern. Lisa Black, the witness used by the State to introduce Ms. Powers' test results, serves as a senior supervisor within the Indiana State Police Laboratory. See Pet. App. 3a, 22a; *Patterson* v. *State*, 729 N.E.2d 1035, 1040 (Ind. Ct. App. 2000) (identifying Ms. Black as the "DNA supervisor for the North Zone of the Indiana State Police Laboratory"). In this capacity, Ms. Black regularly testifies in Indiana criminal

trials. See, *e.g.*, *Glenn* v. *State*, No. 45A05-0808-PC-462, 2009 WL 1099255, at *11-12 (Ind. Ct. App. Apr. 22, 2009); *Parish* v. *State*, 838 N.E.2d 495, 501 (Ind. Ct. App. 2005); *Miller* v. *State*, 702 N.E.2d 1053, 1061 (Ind. 1998); *Tapia* v. *State*, 569 N.E.2d 655, 657 (Ind. 1991). By 2000, Ms. Black had "testified in court approximately eighty times as a forensic examiner." *Patterson*, 729 N.E.2d at 1040. Further, courts have noted Ms. Black's impressive credentials, including a bachelor's degree in biochemistry, ten years of experience in forensic serology, and FBI training in DNA analysis. *Id.*

These qualities make Ms. Black an extremely knowledgeable and by all accounts, convincing, witness. They do not, however, include the one thing the Confrontation Clause requires: authorship of the testimonial evidence introduced at trial.[2] See *Melendez-Diaz*, 129 S. Ct. at 2537-38. Allowing supervisors such as Ms. Black to testify regarding forensic tests conducted by third party analysts such as Ms. Powers would, in effect, strip defendants of the opportunity to probe the analyst's "honesty, proficiency, and methodology;" thus making it impossible to "weed out" fraudulent analysts as well as incompetent ones. *Id.* Likewise, allowing experienced supervisors to testify in place of new, thinly credentialed analysts may give test results a veneer of credibility they do not deserve in some cases. This problem is compounded by the fact that supervisors may be particularly solicitous of the work done by employees in their charge or reluctant to share doubts about that work lest doing so reflect

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[2] Indeed, "[t]here is no evidence Ms. Black did anything more than rubber stamp the results of Ms. Powers' work." Pet. App. 15a (Rucker, J., dissenting).

poorly on the supervisor's own skill and standing as a manager.[3]

Conversely, the approach advocated by Petitioner—requiring the analyst who actually prepared the statements introduced into evidence to testify at trial—would permit precisely the kind of cross-examination contemplated by the Confrontation Clause and underscored in *Melendez-Diaz*. See Pet. App. 24-26. Importantly, this approach would place no additional burden on the state, since it would not require *additional* witnesses. Instead, Petitioner's straightforward rule would simply require a *different* witness than Ms. Black.

3. This case, like *Melendez-Diaz*, represents a "rather straightforward application" of this Court's holding in *Crawford*. *Melendez-Diaz*, 129 S. Ct. at 2532. Both cases make it clear that the State was not free to introduce Ms. Powers' test results unless Ms. Powers either testified at trial or was otherwise available to be cross-examined. To the extent there is any ambiguity on that point, the deleterious effect of the Indiana Supreme Court's rule on courts' truth-seeking function provides a clear rationale for disallowing surrogate forensic testimony. As a result, the Indiana Supreme Court's decision clearly contradicts the Sixth Amendment and warrants review by this Court.

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[3] *Cf.* Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 24 (2009); Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 500 (2006) (citing a report indicating that a lab analyst's supervisors "may have ignored or concealed complaints of his misconduct").

II. THE INDIANA SUPREME COURT CONSTRUED THIS COURT'S DECISION IN *MELENDEZ-DIAZ* V. *MASSACHUSETTS*, MAKING THIS CASE RIPE FOR REVIEW.

Recently, in *Briscoe* v. *Virginia*, this Court granted certiorari, vacated the decision below, and remanded for further consideration in light of the decision in *Melendez-Diaz*. See No. 07-11191, 2010 WL 246152 (U.S. Jan. 25, 2010) (per curiam). The lower court decision in *Briscoe* was issued prior to, and thus did not consider, this Court's decision in *Melendez-Diaz*. See *Magruder* v. *Virginia*, 275 Va. 283, 657 S.E.2d 113 (2008), *cert. granted sub nom. Briscoe* v. *Virginia*, 129 S. Ct. 2858 (2009). The same holds true for several other Confrontation Clause decisions ultimately vacated and remanded after *Melendez-Diaz* was decided. See *People* v. *Barba*, No. B185940, 2007 Cal. App. Unpub. LEXIS 9390 (Cal. Ct. App. Nov. 21, 2007), *vacated*, 129 S. Ct. 2857 (2009); *State* v. *Crager*, No. 9-04-54, 2008 WL 2582591 (Ohio Ct. App. June 30, 2008), *vacated*, 129 S. Ct. 2856 (2009).

In contrast to each of these cases, the Indiana Supreme Court clearly construed *Melendez-Diaz* when it decided the instant case. The opinion below cites *Melendez-Diaz* thirteen times and is premised explicitly on an interpretation of *Melendez-Diaz*'s admonition that the class of analysts who must testify in order to satisfy the Confrontation Clause does not include "everyone who laid hands on the evidence" at issue. See Pet. App. 9a (quoting *Melendez-Diaz*, 129 S. Ct. at 2532 n.1). On this basis, a majority of the Indiana Supreme Court concluded that the testimony of "a supervisor with direct involvement in the laboratory's technical processes" was sufficient to meet the Confrontation Clause test

set forth in *Melendez-Diaz*. Pet. App. 10a.

Because the Indiana Supreme Court—unlike the lower courts in *Barba*, *Briscoe*, and *Crager*—carefully considered *Melendez-Diaz* when deciding the Sixth Amendment question, the instant case presents an ideal vehicle for further clarification of the extent to which expert witnesses may be used to admit testimony prepared by third parties.

III. THE SPLIT OF AUTHORITIES REGARDING THE CONSTITUTIONALITY OF SURROGATE TESTIMONY HAS CONTINUED TO DEEPEN SINCE THE PETITION FOR CERTIORARI WAS FILED.

In the brief period that has elapsed even since Mr. Pendergrass filed his petition for certiorari (filed on January 19, 2010), the split of authorities regarding the compatibility of surrogate testimony with the Confrontation Clause has grown deeper. In addition to the numerous cases cited in the petition, see Pet. for Cert. 12-19, the Fifth Circuit and two California appellate courts have also recently addressed the question of whether testimonial statements of a non-testifying witness may be introduced via the in-court testimony of an expert witness.[4]

1. In *United States* v. *Martinez-Rios*, No. 08-40809, 2010 U.S. App. LEXIS 2051 (5th Cir. Jan. 28, 2010) (per curiam), the Fifth Circuit addressed the

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[4] A North Carolina appellate court has also recently ruled on this issue. In *State* v. *Conley*, No. COA09-456, 2010 WL 157554 (N.C. Ct. App. Jan. 19, 2010), the Court of Appeals of North Carolina followed the North Carolina Supreme Court's earlier decision in *State* v. *Locklear*, 681 S.E.2d 293 (N.C. 2009), and held that a testifying agent's repetition of, and reliance upon, a non-testifying agent's forensic findings constituted a Sixth Amendment violation. *Conley*, 2010 WL 157554, at *7-8.

admissibility of a Certificate of Non-existence of Record ("CNR") through surrogate testimony. The CNR, which was used to demonstrate that the defendant had not obtained consent to re-enter the United States, was prepared by a U.S. Citizenship and Immigration Services (USCIS) employee who did not testify at trial. Rather, the prosecution introduced the CNR through the testimony of a Border Patrol agent who "explained how a CNR is processed." *Id.* at *4. The trial court admitted the CNR into evidence pursuant to the Fifth Circuit's decision *United States* v. *Rueda-Rivera*, which classified CNRs as ordinary business records rather than testimonial statements subject to the Confrontation Clause. 396 F.3d 678, 680 (5th Cir. 2005) (per curiam).

On appeal, the Fifth Circuit held that *Melendez-Diaz* had overruled *Rudea-Rivera* for three reasons. First, *Melendez-Diaz* singled out record certifications as testimonial in nature, since such certifications "would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched." *Martinez-Rios*, 2010 U.S. App. LEXIS 2051, at *9-10 (quoting *Melendez-Diaz*, 129 S. Ct. at 2539). Second, the court reasoned that CNRs "are not routinely produced in the course of government business but instead are exclusively generated for use at trial." *Id.* at *10. Third, the CNR, like the certificate of analysis at issue in *Melendez-Diaz*, was used to establish a fact necessary to convict the defendant (the absence of authorization for the defendant to re-enter the United States). *Id.* (citing *Melendez-Diaz*, 129 S. Ct. at 2533). Because the CNR was testimonial in nature, and because the USCIS employee who prepared it did not testify at trial, the court held that

the defendant's Sixth Amendment confrontation right was violated. *Id.* at *11-12.[5]

2. A pair of recent cases from the California Courts of Appeal adds to the already significant confusion among the lower courts regarding the proper application of *Melendez-Diaz* to surrogate testimony.

In the first of these two cases, *California* v. *Schwarz*, No. C059021, 2010 Cal. Ct. App. Unpub. LEXIS 378 (Cal. Ct. App. Jan. 21, 2010), the police found what appeared to be illegal drugs during a search of the defendant's home and subsequently charged the defendant with possession of methamphetamine. *Id.* at *1. An employee of the Sacramento County District Attorney's Laboratory of Forensic Services analyzed the substance seized from the defendant's home and prepared a report identifying the substance as methamphetamine. *Id.* at *3-5. At trial, the employee's supervisor, rather than the employee, testified regarding the methamphetamine, and the employee's report was introduced into evidence. *Id.* On this basis of this

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[5] Two recent federal court of appeals decisions point in opposite directions on this issue. In addressing whether an I-213 immigration form is testimonial, the Eleventh Circuit concluded in passing that CNRs are not testimonial. *See United States* v. *Caraballo*, No. 09-10428, 2010 U.S. App. LEXIS 1873 (11th Cir. Jan. 27, 2010). Citing *Rudea-Rivera* as its basis, the court expressly distinguished CNRs from the testimonial certificate of analysis at issue in *Melendez-Diaz*. *See id.* at *33-34. *United States v. Norwood*, a Ninth Circuit case on remand from this Court, took the opposite approach. There, the United States conceded that under *Melendez-Diaz*, a CNR-like agency report "should not have been admitted without [its author] presenting herself at trial for examination." *United States* v. *Norwood*, No. 08-30050, 2010 U.S. App. LEXIS 3042, at *7-8 (9th Cir. Feb. 17, 2010).

evidence *alone*, a jury found the defendant guilty of methamphetamine possession. *Id.* at *1, 8.

The Court of Appeal overturned that conviction on Sixth Amendment grounds, since the defendant "had no effective means to challenge whether . . . the laboratory analyst[ ] correctly performed the tests reflected by her written report." *Id.* at *8. While the supervisor had nearly three decades of experience with analysis of controlled substances and knew the analyst well, the court held that under *Melendez-Diaz* the employee who had actually analyzed the evidence had to testify in order to satisfy the Confrontation Clause. *Id.* (citing *Melendez-Diaz*, 129 S. Ct. at 2531-32).

In *California* v. *Gutierrez*, No. B213488, 2010 Cal. App. Unpub. LEXIS 425 (Cal. Ct. App. Jan. 21, 2010), the Court of Appeal encountered a nearly identical Confrontation Clause question and reached the opposite conclusion. In *Gutierrez*, authorities recovered several tissue samples from a rape victim. *Id.* at *4-5. A "criminalist"—California's term for a state-employed forensic analyst—extracted male DNA from the samples, "typed" the DNA, and prepared a report discussing his findings. *Id.*

At trial, a different criminalist, not involved in any of the procedures described above, testified regarding the DNA evidence. *Id.* at *6-7. According to the Court of Appeal, this testifying criminalist "informed the jury" of the non-testifying criminalist's findings and "rel[ied] on the DNA profile [the non-testifying criminalist] created to form his opinion regarding the DNA match." *Id.* at *13-15. The court found that this surrogate testimony did not constitute a Sixth Amendment violation for three reasons. First, the court cited *People* v. *Geier*, 161 P.3d 104 (Cal. 2007), for the proposition that an analyst's report "noting

carefully each step of the DNA analysis,. . . [does] not 'bear witness' against [the] defendant." *Id.* at 140. Second, the court opined that the non-testifying criminalist's report was accurate, since it had been subject to peer review. *Id.* at 138-39. Third, the court indicated that the testifying criminalist, who concluded that a DNA match existed, was subject to cross-examination. *Id.*

3. *Schwarz* and *Gutierrez* cannot be reconciled. While the former holds that the analyst who prepared and actually examined the forensic evidence must testify, the latter requires only that a supervisor familiar with the analyst's reports and methods do so. As a result, these cases—decided on the same day by appellate courts within the same state—illustrate the widespread and growing confusion among the lower courts with regard to surrogate forensic testimony.

The California Supreme Court has granted review in several recent Confrontation Clause cases.[6] Regardless of how that court ultimately resolves the surrogate testimony question, its decision will add to the existing nine-to-four split among state high courts and federal courts of appeals. See Pet. for Cert. 19.[7] If the California Supreme Court follows *Gutierrez*, its decision would also conflict with the Ninth Circuit's resolution of the Confrontation Clause

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[6] *See People* v. *Rutterschmidt*, 98 Cal. Rptr. 3d 390, 411-12 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009); *People* v. *Gutierrez*, 99 Cal. Rptr. 3d 369 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009); *People* v. *Dungo*, 98 Cal. Rptr. 3d 702 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009); *People* v. *Lopez*, 98 Cal. Rptr. 3d 825 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009).

[7] At the time the Petition was filed, the split stood at eight-to-four. Pet. for Cert. 19. The Fifth Circuit's recent decision in *Martinez-Rios*, described above, brings the total to nine-to-four.

question in *Norwood*. Compare *Gutierrez*, 2010 Cal. App. Unpub. LEXIS 425, *14-15, *with United States* v. *Norwood*, No. 08-30050, 2010 U.S. App. LEXIS 3042, at *7-8 (9th Cir. Feb. 17, 2010). More generally, the sharp contrast between *Schwarz* and *Gutierrez* is illustrates both the fast-developing and divergent views of the Sixth Amendment requirements in this area and the broader and irreconcilable spilt that cannot be resolved other than through this Court's review. The Fifth Circuit's decision in *Martinez-Rios*, for example, underscores this point on the broader scale, as lower courts need guidance in cases involving non-forensic forms of surrogate testimony as well.

Amicus and its members regularly encounter the question posed by *Pendergrass* in criminal trials and strongly believe that the criminal justice system would benefit from resolution of that question. As the cases surveyed above demonstrate, the split of authorities regarding the admissibility of surrogate testimony is deep and shows no signs of resolving itself in the near future. Indeed, the split itself is entrenched and growing with time. As a result, only prompt review by this Court can provide the guidance necessary to resolve the Confrontation Clause question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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