No. 09-

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 Indiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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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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PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard Pendergrass respectfully petitions for a writ of certiorari to the Indiana Supreme Court in *Pendergrass v. State*, No. 71S03-0808-CR-00445.

OPINIONS BELOW

The opinion of the Indiana Supreme Court (App. 1a) is published at 913 N.E.2d 703. The opinion of the Indiana Court of Appeals (App. 20a) is published at 889 N.E.2d 861. The relevant trial court proceedings and order (App. 39a) are unpublished.

JURISDICTION

The opinion of the Indiana Supreme Court was entered on September 24, 2009. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

STATEMENT OF THE CASE

This Court held in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), that the prosecution violates the Confrontation Clause when it introduces forensic laboratory reports into evidence without affording the accused an opportunity to "'be confronted with' the analysts at trial." *Id.* at 2532 (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004)). This case raises the question of whether the prosecution complies with that holding by introducing forensic reports through the in-court testimony of someone, such as a supervisor, who did not perform or observe the testing discussed in the reports. In this case, a bare majority of the Indiana Supreme Court upheld the practice, deepening a square conflict of authority on the issue.

1. In May 2003, petitioner Richard Pendergrass took his daughter C.P. to the doctor, where they learned she was pregnant. C.P. later broke the news to her mother, petitioner's ex-wife. Her mother demanded that C.P. reveal the father's name within a week. Near the end of that week, C.P. told her mother that she thought petitioner was the father. She could not recall any instance of petitioner having intercourse with her. But C.P. said that petitioner had inappropriately touched her in the years leading up to the pregnancy. According to C.P., petitioner sometimes gave her "sleeping pills" at night, after which she would wake up to find petitioner on top of her or digitally penetrating her vagina.

C.P.'s mother relayed these accusations to the police, who then began an investigation. Shortly thereafter, C.P. had an abortion. Officer Steven

Metcalf of the St. Joseph County Police Department retrieved a tissue sample collected from the fetus, so that the police could test the tissue.

When the police questioned petitioner about C.P.'s accusations, petitioner denied them. He also voluntarily provided a blood sample to the police. Finally, petitioner played for Officer Metcalf a phone message C.P. had left for him, stating that her accusations were false. After reviewing this evidence, the police took no further action at that time.

Three years later, however, for reasons not apparent from the record, the police resumed their investigation. Officer Kris Hinton contacted C.P. and collected a cheek swab. The police then sent this swab, petitioner's blood sample, and the tissue from the aborted fetus to the Indiana State Police Laboratory in Lowell.

Daun Powers, one of the laboratory's forensic examiners, conducted a DNA analysis on these three specimens. This type of DNA examination involves several stages of analysis. *See generally* Indiana State Police Laboratory Division, Forensic Biology Unit, *DNA Test Methods and Procedures* (rev. 2003); Seattle-Post Intelligencer, *How DNA is Tested in Crime Labs*, July 22, 2004, *available at* http://www.seattlepi.com/dayart/20040722/DNAtesting.pdf. First, an analyst conducts a fourteen-step procedure that isolates and extracts DNA from the tissue samples. Next, the analyst instigates a polymerase chain reaction (PCR) to generate a workable amount of DNA. PCR is a "complex, multi-step technique" which requires laboratory technicians to "exercise great care to avoid contaminating the

samples and committing other mechanical errors." 2 PAUL GIANNELLI & EDWARD IMWINKELRIED, SCIENTIFIC EVIDENCE § 18.04[a], at 48 (4th ed. 2007). During the third stage, an analyst follows a six-step process to separate sixteen specified areas of the DNA molecule onto a grid called an electropherogram, which the analyst then reads and interprets. In interpreting this grid, the analyst must exercise discretion in separating actual DNA peaks from "spurious peaks or technical artifacts," which can lead to erroneous results. Scientific Evidence § 18.04[b].

After purportedly following all of these protocols, Powers prepared a "Certificate of Analysis," a two-page report identifying the evidence received by the lab and summarizing her test results. App. 48a-51a (reproducing report). Powers also created a second report, titled "Profiles for Paternity Analysis," which purports to set forth (for purposes of conducting a comparison) genetic markers of petitioner, C.P., and the fetus. App. 51a. The laboratory supervisor, Lisa Black, reviewed these documents and initialed the former with her employment number ("4774") and the latter with "LB." The police then forwarded the reports to Dr. Michael Conneally, a retired professor at Indiana University, for statistical paternity analysis. Although the record does not expressly say so, Conneally presumably told the police that he thought, based on the information Powers had provided, that petitioner was the father of the child.

2. The State charged petitioner with two counts of sexual molestation. Ind. Code § 35-42-4-3. Petitioner denied the charges and sought to prove

that there were two other possible fathers of C.P.'s child.

The State put C.P. on the stand and then sought to verify her accusations through its DNA evidence. The State, however, did not call Powers to testify at trial, nor did the State ever assert that she was unavailable for any reason. Instead, the prosecution sought to introduce the Certificate of Analysis and the Profiles for Paternity Analysis that Powers had authored, as State Exhibits 1 and 2, through the testimony of Lisa Black. Petitioner argued that this would violate the Confrontation Clause as construed in *Crawford v. Washington*, 541 U.S. 36 (2004), because it would deprive the defense of any "way of challenging th[e] report[s]." App. 44a. More specifically, petitioner argued that forensic laboratory reports were testimonial evidence because they were prepared as part of the police investigations. Therefore, petitioner continued, the prosecution could not introduce the reports without "hav[ing] the person who did the test come in and [be] subject to cross-examination." App. 44a.

Conceding that petitioner may have a "marvelous appellate argument," the trial court overruled his objection. App. 44a. The trial court reasoned that police laboratory reports could not be testimonial because they are business records. App. 45a. Therefore, according to the trial court, "*Crawford* [did not] mean that the person that did the lab report now has to come in." App. 44a.

Over petitioner's continuing objection, Black testified concerning Powers' laboratory reports. Black explained that as the police laboratory's supervisor, she had reviewed and initialed Powers'

work. But Black's testimony concerning the DNA analysis that Powers claimed to have performed, and the conclusions Powers reached, consisted solely of repeating Powers' assertions made in the reports themselves. App. 4a; *see also* App. 18a (Rucker, J., dissenting) ("There is no evidence that Ms. Black did anything more than rubber stamp the results of Ms. Powers' work."). Furthermore, when the defense pressed Black for specifics concerning Powers' testing sequence beyond what was stated in the reports, Black responded: "I don't have any knowledge of that." App. 4a. And when asked to explain why she thought that Powers would not have had two specimens open at once during her work (a practice contrary to standard protocol for DNA analysis), Black responded, "I know because she is an excellent analyst and that's how she would do it." Tr. 154 (Oct. 1, 2007).

The State later put Dr. Conneally on the stand. Dr. Conneally again recited Powers' findings and testified extensively regarding the content of her work product. He claimed that based on the forensic conclusions she had reached, there was a 99.9999% chance that petitioner was the father of the fetus. App. 4a.

In her closing argument, the prosecution acknowledged that its case was "circumstantial" because C.P. could not testify that petitioner had ever had intercourse with her. But the prosecution contended that the DNA evidence it had presented "confirmed" C.P.'s belief that petitioner had committed the crime. Tr. 546 (Oct. 1, 2007). In particular, the prosecution exhorted the jury to focus on Dr. Conneally's testimony and to "look at the lab

report, and the lab report talks about the different items of evidence that were received, the different items that were tested from each person, and the profiles that were generated from those items that were tested . . . ." Tr. 544 (Oct. 1, 2007). Those reports, the prosecution contended, showed beyond a reasonable doubt that petitioner must have impregnated C.P.

The jury convicted petitioner on both counts. The trial court sentenced him to consecutive terms totaling sixty-five years in prison.

3. The Indiana Court of Appeals affirmed. It upheld the trial court's *Crawford* rulings, but on entirely different grounds. The court of appeals reasoned that Powers' forensic reports were admissible despite her not taking the stand because "the Confrontation Clause does not apply to statements admitted for reasons other than proving the truth of the matter asserted." App. 37a (citing *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) (in turn citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985))). As the court of appeals put it, the reports "were not admitted to prove that Pendergrass molested C.P.," but "instead they merely provided context for Dr. Conneally's opinion." *Id.*

4. The Indiana Supreme Court granted discretionary review. While the case was pending, this Court issued its decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), clarifying that forensic laboratory reports are testimonial under *Crawford*. Three months later, a bare majority of the Indiana Supreme Court affirmed the court of appeals, adopting yet another rationale to justify admitting Powers' forensic reports without calling her to the

stand. Specifically, the Indiana Supreme Court upheld the admission of Powers' testimonial statements on the ground that "it [is] up to the prosecutors to choose among the many ways of proving up scientific results, as long as the way chosen feature[s] live witnesses." App. 12a (citing *Melendez-Diaz*, 129 S. Ct. at 2532 n.1). The court noted that State introduced two live witnesses: Lisa Black, Powers' supervisor, and Dr. Conneally, the prosecution's genetics expert. In the Indiana Supreme Court's view, this "sufficed for Sixth Amendment purposes." App. 12a-13a.

The dissent accused the majority of basing its reasoning on "certain isolated passages from the *Melendez-Diaz* opinion" that, "taken in context," dictated the opposite result. App. 15a-16a. In the dissent's view, *Melendez Diaz* held that "a defendant has a constitutional right to confront at the very least the analyst that actually conducts the tests." App. 19a. The opportunity to cross-examine a supervisor is "no substitute for a jury's first-hand observations of the analyst that performs a given procedure." App. 19a.

REASONS FOR GRANTING THE WRIT

State high courts and federal courts of appeals are deeply and intractably divided over whether the Confrontation Clause, as explicated in *Crawford v. Washington*, 536 U.S. 36 (2004), and *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), allows the government to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of another forensic analyst who did not perform or observe the laboratory analysis described in the statements. This Court should use this case to

resolve this escalating conflict. Forensic evidence plays a central role in many criminal prosecutions. Allowing surrogate analyst testimony prevents scrutiny of the actual analyst's "honesty, proficiency, and methodology," *Melendez-Diaz*, 129 S. Ct. at 2538, in the form guaranteed by the Sixth Amendment: live testimony in front of the accused and the trier of fact, with an opportunity for cross-examination. As such, the court's holding below – that the Confrontation Clause was satisfied by allowing the defendant to cross-examine someone other than the author of the reports the prosecution introduced – is incorrect.

I. The Indiana Supreme Court's Decision Deepens The Conflict Over The Question Presented.

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court held that the prosecution may not introduce "testimonial" hearsay against a criminal defendant unless the defendant has an opportunity to cross-examine the declarant, or unless the declarant is unavailable and the defendant has (or had) an opportunity for cross-examination. *Id.* at 54, 68. Five years later, in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), this Court clarified that forensic laboratory reports are testimonial evidence. *Id.* at 2532. Accordingly, this Court held that the prosecution violates the Confrontation Clause when it introduces a nontestifying analyst's forensic laboratory report through the testimony of a police officer.

This Court further indicated that two important, but distinct, questions concerning forensic evidence must be resolved to implement *Melendez-Diaz.* The

first is whether a state satisfies the Confrontation Clause if it requires defendants to do more than simply demand that the prosecution put an analyst on the stand in order to introduce the contents of a forensic report. *See Melendez-Diaz,* 129 S. Ct. at 2541 n.12. When this Court decided *Melendez-Diaz,* one case touching on this issue was pending on a petition for a writ of certiorari, *Briscoe v. Virginia*, 657 S.E.2d 113 (Va. 2008), *cert. granted*, 129 S. Ct. 2858. This Court immediately granted the petition and is hearing the case this Term.

The second issue concerns whether the prosecution satisfies the Confrontation Clause whenever it calls *some* forensic analyst to the stand. *See Melendez-Diaz,* 129 S. Ct. at 2532 n.1; *id.* at 2444-46 (Kennedy, J., dissenting). When this Court decided *Melendez-Diaz*, several cases touching on this issue – that is, cases in which the courts found no confrontation violations at least in part because the prosecution had called at least some forensic expert to the stand – were pending on petitions for writs of certiorari. The cases fell into three categories. First, some cases involved scenarios in which the prosecution introduced forensic reports while an analyst was on the stand, but those reports were simply machine print-outs and thus were nontestimonial. *See United States v. Washington*, 498 F.3d 225 (4th Cir. 2007) (Supreme Court docket No. 07-8291); *Blaylock v. Texas*, 259 S.W.3d 202 (Tex. Ct. App. 2008) (No. 08-8259). Second, one case involved a scenario in which a laboratory supervisor testified based in part on someone else's forensic reports, but the supervisor never repeated anything in the reports and the prosecution never introduced them into evidence; instead, the supervisor limited

himself to stating his own conclusions without revealing their underlying basis. *State v. O'Maley*, 932 A.2d 1 (N.H. 2007) (No. 07-7577). Third, some cases involved scenarios in which the prosecution introduced nontestifying analysts' forensic reports through the in-court testimony of a different forensic analyst. *People v. Barba*, 2007 WL 4125230 (Cal. Ct. App. Dec. 21, 2007) (unpublished) (No. 07-11094); *State v. Crager*, 879 N.E. 2d 745 (Ohio 2007) (No. 07-10191).

This Court denied certiorari in the first two categories of cases, leaving in place their holdings that the Confrontation Clause had not been violated.[1] But this Court granted, vacated, and remanded the two cases in the third category – the cases that had held that the prosecution could introduce one forensic analyst's testimonial statements through the in-court testimony of another.[2] A split among state supreme courts and a federal court of appeals has quickly developed concerning this issue, which in fact deepens a preexisting conflict on the question. That is the issue this case presents.

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[1] *See Washington v. United States*, 129 S. Ct. 2856 (2009); *Blaylock v. Texas*, 129 S. Ct. 2861 (2009); *O'Maley v. New Hampshire*, 129 S. Ct. 2856 (2009).

[2] *See Barba v. California*, 129 S. Ct. 2857 (2009); *Crager v. Ohio*, 129 S. Ct. 2856 (2009). This Court denied certiorari in one other case involving this fact pattern: *People v. Geier*, 161 P.3d 104 (Cal. 2007), *cert. denied*, 129 S. Ct. 2856 (2009) (No. 07-7770). However, the California Supreme Court had held that even if a Confrontation Clause violation had occurred, any error was harmless. *Geier*, 161 P.3d. at 140.

1. In the wake of *Melendez-Diaz*, two state supreme courts and one federal court of appeals have held that the Confrontation Clause prohibits what might be called "surrogate" forensic testimony – that is, introducing one forensic analyst's testimonial statement through the in-court testimony of another. In *Commonwealth v. Avila*, 912 N.E.2d 1014 (Mass. 2009), the defendant argued that the prosecution violated the Confrontation Clause by permitting one forensic analyst "to recite [another's] findings and conclusions on direct examination." *Id.* at 1027. Drawing on its earlier decision in *Commonwealth v. Nardi*, 893 N.E.2d 1221 (Mass. 2008), which had held that a testifying analyst in such a scenario is "plainly . . . asserting the truth of" the nontestifying analyst's findings in a manner that triggers the defendant's constitutional right to confrontation, *id.* at 1232-33, the court held that *Melendez-Diaz* and *Crawford* require a testifying "expert witness's testimony [to be] confined to his or her own opinions." *Avila*, 912 N.E.2d at 1029. When a forensic examiner, "as an expert witness . . . recite[s] or otherwise testif[ies on direct examination] about the underlying factual findings of [an] unavailable [forensic analyst] as contained in [his forensic] report," the prosecution transgresses the Confrontation Clause. *Id.* at 1029.

Similarly, in *State v. Locklear*, 681 S.E.2d 293, 304-305 (N.C. 2009), the prosecution introduced two forensic analysts' reports through the in-court testimony of a third analyst. Reciting *Crawford*'s basic rule that "[t]he Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless *the declarant* is unavailable to testify and the accused has had a prior opportunity to cross-

examine *the declarant*," the North Carolina Supreme Court held that introducing one forensic analyst's report through the live testimony of a different analyst "violate[s a] defendant's constitutional right to confront the witnesses against him." *Id.* at 304-05 (emphasis added); *see also State v. Galindo*, 683 S.E.2d 785 (N.C. Ct. App. 2009) (finding confrontation violation where supervisor testified concerning someone else's forensic analysis).

The Seventh Circuit likewise has held that has held that although a surrogate forensic analyst may testify based on raw data someone else generated, the "conclusions" of the nontestifying analyst who performed the testing are testimonial statements that must be "kept out of evidence." *United States v. Moon*, 512 F.3d 359, 362 (7th Cir.), *cert. denied*, 129 S. Ct. 40 (2008). Reaffirming that ruling in a case after *Melendez-Diaz*, the Seventh Circuit held that a forensic analyst's testimony based on forensic tests that another analyst performed did not violate the Confrontation Clause because "[the second analyst's] report was not admitted into evidence." *United States v. Turner*, ___ F.3d ___, 2010 WL 92489, at *5 (7th Cir. Jan. 12, 2010). The Confrontation Clause would have been violated if the testifying analyst had "not [been] involved in the testing process" at issue and the prosecution had introduced the second analyst's certificate of analysis. *Id.* at *4-*5.

Intermediate courts in three large states – Texas, Michigan, and California – have likewise held that surrogate forensic testimony violates the Confrontation Clause. *See People v. Payne*, 774 N.W.2d 714 (Mich. Ct. App. 2009); *Wood v. State*, ___ S.W.3d ____, 2009 WL 3230848 (Tex. Ct. App. Oct. 7,

2009); *Hamilton v. State*, ___ S.W.3d ____, 2009 WL 2762487 (Tex. Ct. App. Aug. 31, 2009); *Cuadros-Fernandez*, ___ S.W.3d ____, 2009 WL 2647890 (Tex. Ct. App. Aug. 28, 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).[3] Moreover, while the Michigan Supreme Court has not ruled on the issue, it has denied review in a case holding that surrogate forensic testimony violated the Confrontation Clause and has vacated and remanded three decisions that condoned such testimony. *Compare People v. Horton*, 2007 WL 2446482 (Mich. Ct. App. 2007), *rev. denied,* 772

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[3] Two reported California Court of Appeal opinions have reached a contrary result, reasoning that the California Supreme Court's pre-*Melendez-Diaz* decision in *People v. Geier*, 161 P.3d 104 (Cal. 2007), *cert. denied*, 129 S. Ct. 2856 (2009), dictates that "contemporaneously created" forensic reports are not testimonial and that surrogate forensic testimony does not violate the Confrontation Clause. *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); *accord People v. Bingley,* 2009 WL 3595261 (Cal. Ct. App. Nov. 3, 2009). As explained *supra* in footnote 2, however, this Court's denial of certiorari in *Geier* is readily explainable by the California Supreme Court's alternative harmless-error holding. Indeed, the State of California itself conceded in *Dungo* that "the reasoning in *Melendez-Diaz* undermines some of the rationale of *People v. Geier*," and the State withdrew its "argument that the autopsy report [was] not testimonial because it constitutes a 'contemporaneous recordation of observable events.'" 98 Cal. Rptr. 3d at 711 n.11 (quoting state's supplemental letter brief).

N.W.2d 46 (Mich. 2009), *with People v. Raby*, 2009 WL 839109 (Mich. Ct. App. 2009), *vacated and remanded*, 775 N.W.2d 144 (Mich. 2009); *People v. Dendel*, 2008 WL 4180292 (Mich. Ct. App. 2008), *vacated and remanded,* 773 N.W.2d 16 (Mich. 2009); *and People v. Lewis*, 2008 WL 1733718 (Mich. Ct. App. Apr. 15, 2008), *vacated and remanded,* 772 N.W.2d 47 (Mich. 2009). These post-*Melendez-Diaz* orders strongly suggest that the Michigan Supreme Court views the practice of surrogate forensic testimony as untenable.

2. In direct contrast, three state high courts have held, based on the two distinct theories the Indiana appellate courts adopted below, that introducing one forensic analyst's testimonial statement through the in-court testimony of another does not violate the Confrontation Clause.

a. Two state supreme courts have reasoned that surrogate forensic testimony satisfies the Confrontation Clause because it gives defendants the opportunity to cross-examine someone who is generally knowledgeable about the analyses involved, even if not the analyst who authored the forensic reports the prosecution seeks to introduce. In this case, the Indiana Supreme Court followed this theory, reasoning that "the [*Melendez-Diaz*] majority insisted that it would be up to the prosecutors to choose among the many ways of proving up scientific results, as long as the way chosen featured live witnesses." App. 12a (citing *Melendez-Diaz*, 129 S. Ct. at 2532 n.1). At least when the live witness the prosecution chooses is familiar with the laboratory as well as with the analyst who authored the report at issue, this, in the Indiana Supreme Court's view,

"suffice[s] for Sixth Amendment purposes." App. 10a-11a, 13a.

The Georgia Supreme Court has also adopted the "good enough to suffice" rationale. *See Rector v. State*, 681 S.E.2d 157 (Ga. 2009). So long as a forensic analyst whom the prosecution puts on the stand has "reviewed the data and testing procedures to determine the accuracy" of another analyst's report, the testifying analyst may tell the jury the absent analyst's conclusions and say that he endorses them. *Id.* at 160.

b. The Illinois Supreme Court – like the Indiana Court of Appeals in this case, *see* App. 37a-38a – has held that forensic analysts, as expert witnesses, can repeat testimonial statements of nontestifying analysts on the theory that such statements, even when the sole basis for the experts' opinions, are not offered for the truth of the matter asserted. *People v. Lovejoy*, ___ N.E.2d ____, 2009 WL 3063366 (Ill. Sept. 24, 2009). In *Lovejoy*, a medical examiner testified that another toxicologist detected six different types of drugs in the victim's body after conducting blood tests, indicating that poisoning caused the victim's death. *Id.* at *21-*23. Relying on footnote nine in *Crawford*, which reaffirmed that the Confrontation Clause is not implicated when out-of-court statements are introduced for reasons other than establishing the truth of the matter asserted, the Illinois Supreme Court held that the medical examiner's testimony repeating the nontestifying analyst's conclusions was not admitted for its truth but rather was introduced "to show the jury the steps [the examiner] took prior to rendering an expert

opinion in th[e] case." *Id.* at *22-*23 (citing *Crawford*, 541 U.S. at 59 n.9).[4]

3. The post-*Melendez-Diaz* conflict concerning surrogate forensic testimony deepens a pre-existing split over whether, as a more general matter, testimonial statements of a nontestifying witness can be introduced through the in-court testimony of an expert witness.

The Second Circuit, three state supreme courts, and the District of Columbia's highest court have held that introducing the testimonial statements of a nontestifying witness through the in-court testimony of an expert witness violates the Confrontation Clause. *See United States v. Mejia*, 545 F.3d 179 (2d Cir. 2008) (admission of testimonial statements through the in-court testimony of a gang expert); *Roberts v. United States*, 916 A.2d 922 (D.C. 2007) (admission of forensic laboratory reports through DNA expert's testimony); *State v. Johnson*, 982 So. 2d 672 (Fla. 2008) (admission of lab report through supervisor's testimony); *State v. Mangos*, 957 A.2d 89

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[4] Footnote nine in *Crawford* referenced *Tennessee v. Street*, 471 U.S. 409 (1985), reaffirming that the Confrontation Clause is not implicated when the prosecution offers hearsay (even testimonial hearsay) for a purpose other than establishing the truth of the matter asserted. In *Street*, the defendant argued that his confession was false because the police had simply given him the confession of his alleged accomplice and told him to repeat it. *Id.* at 411-12. The prosecution countered by introducing the nontestifying accomplice's confession to show that it differed in material ways from the defendant's. Because the accomplice's confession was not offered for its truth, this did not violate the Confrontation Clause. *Id.* at 417.

(Me. 2008) (admission of statements concerning creation of DNA swabs through supervisor); *People v. Goldstein*, 843 N.E.2d 727 (N.Y. 2005) (admission of testimonial statements through psychologist's testimony), *cert. denied*, 547 U.S. 1159 (2006).[5]

In contrast, in *State v. Tucker*, 160 P.3d 177 (Ariz. 2007), *cert. denied*, 552 U.S. 923 (2007) a prosecutorial expert witness (a "materials expert") repeated statements on the stand that another, nontestifying expert had told him in an investigatory interview.[6] The Arizona Supreme Court did not dispute that the nontestifying expert's statements were testimonial. But the court refused to find a *Crawford* violation, reasoning that "a testifying expert witness may, for the limited purpose of showing the basis of his or her opinion, reveal the substance of a non-testifying expert's statements." *Id.* at 193. "Such statements do not violate the Confrontation Clause," the court continued, "because they are not admissible for their truth." *Id.*

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[5] The Fourth Circuit, in an opinion by Judge Wilkinson, recently agreed with the Second Circuit's *Mejia* decision, explaining that "[a]llowing a [prosecution] witness simply to parrot out-of-court testimonial statements . . . directly to the jury in the guise of an expert opinion would provide an end run around *Crawford*." *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009). But the Fourth Circuit held that the Confrontation Clause was not violated in the case it was considering because the expert did not repeat or refer to any testimonial statements to the jury.

[6] The petition for certiorari in this case did not raise this Confrontation Clause issue.

The Arizona Court of Appeals has applied *Tucker* following *Melendez-Diaz* to hold that the prosecution may present an expert forensic analyst to testify concerning the results of tests performed by others. *State v. Gomez*, 2009 WL 3526649, at *4-5 (Ariz. Ct. App. Oct. 29, 2009).

4. Although *Melendez-Diaz* is a recent decision, this conflict over surrogate testimony is now firmly entrenched and ripe for resolution. The split among state high courts and the federal courts of appeals now stands at eight-to-four. Five of those decisions post-date *Melendez-Diaz*, and they are divided three-to-two. There is no prospect that this split will resolve itself, nor any reason to believe that further percolation or anything this Court says in its forthcoming *Briscoe* decision will reveal any new arguments or considerations relevant to the dispute.[7]

II. This Issue Is Important To The Proper Administration Of Criminal Trials.

This Court should not allow the conflict over surrogate witnesses to persist.

1. The question presented implicates practices in several states across the country. Crime laboratory analyses play a central evidentiary role in a large number of criminal trials, and prosecutors in numerous jurisdictions rely on surrogate witnesses to present the analysis of nontestifying analysts. Prosecutors, defense lawyers, and judges need to

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[7] Of course, if this Court, out of an abundance of caution, wishes to hold this case pending the outcome in *Briscoe*, petitioner would have not objection to that.

know as soon as possible whether surrogate testimony satisfies the Confrontation Clause.

2. The question presented also directly implicates the truth-seeking function of trial. As this Court noted in *Melendez-Diaz*, forensic reports, just like other *ex parte* testimony created by law enforcement agents, presents "risks of manipulation." 129 S. Ct. at 2536. Indeed, investigative boards, journalists, and interest groups have documented numerous recent instances of fraud and dishonesty in our nation's forensic laboratories. *Id.* at 2536-38.[8] This Court also has recognized that "a forensic analyst responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution." *Melendez-Diaz*, 129 S. Ct. at 2536. Even an entirely honest and objective forensic analyst may suffer from a "lack of proper training or deficiency in judgment," *id.* at 2537, or may place undue analytical weight on a suspect methodology, *id.* at 2538.

Surrogate witnesses fail to address – and may actually aggravate – the problems posed by an analyst's potential fraud, incompetence, or flawed methodology. A recent case from California vividly illustrates the point. In *People v. Dungo,* 98 Cal. Rptr. 3d 702 (Cal. Ct. App. 2009), *rev. granted* (Cal.

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[8] For the most recent such example, see Jeremy W. Peters, *Report Condemns Police Lab Oversight*, N.Y. Times, Dec. 18, 2009 (describing "pervasively shoddy forensics work," as well as routinely "falsified test results," over a fifteen year period in the New York State crime laboratory).

Dec. 2, 2009) the prosecution introduced an autopsy report to prove that a certain amount of time had elapsed before the victim's death, a hotly contested issue at trial. The medical examiner who had authored the report, however, had since been fired. He had also been forced to resign "under a cloud" from another job, and was blacklisted by law enforcement in two more counties for falsifying his credentials. *Id.* at 704. Finally, the examiner had been known to base his conclusions on police reports instead of forensic methods. *See People v. Beeler*, 891 P.2d 153, 168 (Cal. 1995); Scott Smith, *S.J. Pathologist Under Fire Over Questionable Past,* THE RECORD, Jan. 7, 2007, *available at* http://www.recordnet.com/apps/pbcs.dll/article?AID=/20070107/A_NEWS/701070311#STS=g329z7h5.134t.

In light of this problematic track record, the prosecution put the medical examiner's supervisor on the stand instead of the examiner. As the supervisor explained during the preliminary hearing, "[t]he only reason they won't use [the examiner himself] is because the law requires the District Attorney to provide this background information to each defense attorney for each case, and [the prosecutors] feel it becomes too awkward to make them easily try their cases." *Dungo*, 98 Cal. Rptr. 3d at 708 (alterations in original). The California Court of Appeal held that this surrogate testimony violated *Crawford*, observing that the "prosecution's intent" had been to "prevent[] the defense from exploring the possibility that the [medical examiner] lacked proper training or had poor judgment or from testing [his] 'honesty, proficiency, and methodology.'" *Id.* at 714 (quoting *Melendez-Diaz*, 129 S. Ct. at 2538).

Under the Indiana Supreme Court's holding in this case, however, the prosecution would have been permitted to hamstring the defense in this manner. Even in cases seemingly involving less dramatic facts, allowing surrogate testimony would effectively insulate forensic analysts' work from scrutiny. In the field of ballistics and toolmark analysis, even good faith forensic conclusions "involve subjective qualitative judgments by examiners, and [] the accuracy of the examiners' assessments is highly dependent on their skill and training." *United States v. Taylor,* ___ F. Supp. 2d ___, 2009 WL 3347485, at *7 (D.N.M. Oct. 9, 2009) (quoting Committee on Identifying the Needs of the Forensic Sciences Community; Committee on Applied and Theoretical Statistics, National Research Council, *Strengthening Forensic Sciences in the United States: A Path Forward,* 5-20 (2009). Yet there is little hope for defense counsel to find out through questioning supervisors which ballistics and toolmark reports are faulty; only questioning the analysts who authored incriminating reports can reveal whether the analysts actually understand the science at issue and whether they exercised appropriate care and followed necessary protocols in reaching their conclusions.

III. This Case Is An Excellent Vehicle For Considering The Question Presented.

This case presents an excellent vehicle for resolving the split of authority over the question presented.

1. This case raises the question presented free from any waiver or collateral review complications. It comes to this Court on direct review, and petitioner

clearly and unambiguously objected at trial, arguing that the introduction of the forensic reports through the testimony of a witness other than the one who authored them violated the Confrontation Clause. App. 2a-3a; App. 41a-45a. Petitioner also preserved this issue by contending at each level of the Indiana appellate courts that the admission of the analyst's reports violated the Sixth Amendment. *See* Petr. Ind. C.A. Br. at 8-11; Petr. Ind. Sup. Ct. Br. at 3. Finally, the Indiana courts resolved this issue on the merits. App. 13a-14a.

2. This case clearly and cleanly presents the question of whether the prosecution may introduce one forensic analyst's testimonial statements through the testimony of a different forensic analyst. The forensic reports at issue are unquestionably testimonial under *Melendez-Diaz*, and the statements in the reports were unquestionably relayed to the jury. In fact, the prosecution introduced the reports directly into evidence. Moreover, the shortcomings of using a surrogate witness were perfectly encompassed in the supervisor's assertion that she "kn[e]w" the analyst had followed standard procedures "because she is an excellent analyst and that's how she would do it." Tr. 154 (Oct. 1, 2007).

3. Finally, the forensic reports at issue played a central role at trial. Acknowledging the "circumstantial" nature of its case, the prosecution told the jury that the DNA reports "confirmed" the victim's testimony. *Id.* at 544. Indeed, the prosecution urged jurors to "look at" the nontestifying analysts' lab reports, emphasizing that "the lab report talks about the different items of evidence that

were received, the different items that were tested from each person, and the profiles that were generated from those items that were tested." *Id.* If this Court concludes that petitioner's confrontation rights were violated, he would be entitled to a new trial.[9]

IV. The Indiana Supreme Court's Decision Is Incorrect.

1. The Indiana Supreme Court erred in holding that the government may introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of another forensic analyst. The Sixth Amendment guarantees a defendant the right "to be confronted with *the* witnesses against him." U.S. Const. amend VI

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[9] Concurring in the judgment of the court of appeals, one judge expressed his belief that C.P.'s testimony "would, on its own, have been sufficient to support [petitioner's] conviction." App. 39a (Baker, C.J., concurring in the judgment). Even accepting this assessment as true, an assessment of "whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of" cannot establish harmless error. *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963); *see also United States v. Lane*, 474 U.S. 438, 450 n.13 (1986) ("[T]he harmless-error inquiry is entirely distinct from a sufficiency-of-the-evidence inquiry.") (internal quotation marks and citation omitted). Rather, "the government must demonstrate beyond a reasonable doubt that the tainted evidence did not contribute to the conviction." *United States v. Alvarado-Valdez*, 521 F.3d 337, 342 (5th Cir. 2008); *accord Fields v. United States*, 952 A.2d 859, 867-68 (D.C. 2008); *see generally Chapman v. California*, 386 U.S. 18 (1967). The government cannot do that when, as here, its own closing argument stressed the importance of the evidence.

(emphasis added). The use of the definite article in this constitutional provision is not adventitious. Instead, it dictates that if the State decides to introduce testimonial evidence, it must afford the defendant the opportunity be confronted with the specific creator of that evidence – that is, the person who actually made the statement or authored the document at issue. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Accordingly, this Court has repeatedly held that the government violates the Confrontation Clause if it introduces a witness's testimonial statements through the in-court testimony of a different person, such as a police officer. *See id.*; *Davis v. Washington*, 547 U.S. 813 (2006); *Melendez-Diaz*, 129 S. Ct. at 2532; *id.* at 2546 (Kennedy, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second . . . .").

Nothing about the status of an in-court witness as a forensic supervisor or similar type of person alters this analysis. It is true that a supervisor may be a "competent witness" to answer general questions regarding someone else's forensic declarations, such as "systemic problems with the laboratory processes" that the person used. App. 11a. But the Confrontation Clause guarantees more than that. As this Court explained in *Melendez-Diaz*, the Clause guarantees an opportunity to test the "honesty, proficiency, and methodology" of the actual author of a forensic report that the prosecution seeks to introduce into evidence. 129 S. Ct. at 2538. Indeed, an analyst "who provides false results may, under oath in open court, reconsider his false testimony.

And, of course, the prospect of confrontation will deter fraudulent analysis" and "weed out . . . incompetent [analysts] as well." *Id.* at 2537 (citations omitted).

The holding of *Melendez-Diaz*, in fact, effectively resolves the question presented here. There, this Court explained that "[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. at 2531 (emphasis added); *see also id.* at 2532 ("petitioner was entitled to 'be confronted with' *the analysts* at trial") (emphasis added); *id.* at 2537 n.6 ("The analysts who swore the affidavits provided testimony against Melendez-Diaz, and *they* are therefore subject to confrontation . . . .") (emphasis added). The inescapable implication of this holding – as even the dissent acknowledged – is that the analyst who wrote "those statements that are actually introduced into evidence" must testify at trial. 129 S. Ct. at 2545 (Kennedy, J., dissenting). Surrogate forensic testimony does not satisfy the Confrontation Clause.

2. Neither of the rationales that courts have offered for avoiding this straightforward conclusion withstands scrutiny.

a. The Indiana Supreme Court concluded that surrogate forensic testimony "suffice[s] for Sixth Amendment purposes" based on a footnote in *Melendez-Diaz* concerning how the Confrontation Clause regulates prosecutorial attempts to prove a chain of custody. Quoting this Court's statement that its ruling "does not mean that everyone who laid hands on the evidence must be called," 129 S. Ct. at

2532 n.1, the Indiana Supreme Court asserted that "the majority [of this Court] insisted that it would be up to the prosecutors to choose among the many ways of proving up scientific results, as long as the way chosen featured live witnesses." App. 12a.

This Court did not suggest, much less insist upon, any such thing. The full quote from the footnote at issue was as follows:

> While the dissent is correct that "[i]t is the obligation of the prosecution to establish the chain of custody," *post,* at 2546, this does not mean that everyone who laid hands on the evidence must be called. . . . It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live.

Melendez-Diaz, 129 S. Ct. at 2532 n.1. The import of the full passage is unambiguous: prosecutorial discretion with respect to proving some fact lies in choosing whose testimonial statements to present, not in deciding whom to put on the stand for purposes of admitting a particular testimonial statement. Once the prosecution has decided to introduce a particular person's testimonial statements (whether it is in the form of a forensic report or anything else), the prosecution must present the person who made those statements to testify live in court.

At bottom, the Indiana Supreme Court's reasoning – like the Massachusetts courts' reasoning

in *Melendez-Diaz* itself – "is little more than an invitation to return to [this Court's] overruled decision in [*Ohio v. Roberts*, 448 U.S. 56 (1980)]." *Melendez-Diaz,* 129 S. Ct. at 2536. The Indiana Supreme Court asserted: "If the chief mechanism for ensuring reliability of evidence is to be cross-examination, Pendergrass had that benefit here." App. 11a. But *Crawford* does not simply require an opportunity for cross-examination of *someone* who can discuss, or even vouch for, the reliability of the testimonial evidence introduced. It requires the prosecution to make the declarant of testimonial evidence available for cross-examination, so the defendant can probe the reliability of the declarant's statements directly. *Crawford*, 541 U.S. at 61. Hence, as a leading treatise explains, "*Crawford*'s language simply does not permit cross-examination of a surrogate when the evidence in question is testimonial." D.H. KAYE ET AL., THE NEW WIGMORE: A TREATISE ON EVIDENCE-EXPERT EVIDENCE § 3.10.3, at 57 (Supp. 2009).

b. The "not for the truth" rationale that the Indiana Court of Appeals advanced here, and that other courts have relied upon, fares no better.

> To use [testimonial] information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true. If the jury believes that the basis evidence is true, it will likely also believe that the expert's reliance is justified; conversely, if the jury doubts the accuracy or validity of the basis evidence, that presumably increases

> skepticism about the expert's conclusions.

THE NEW WIGMORE, *supra*, § 3.10.8, at 53. Thus, as courts and commentators have recognized, it is simply "nonsense" to claim that a forensic report introduced to provide a basis for some other analyst's in-court testimony is not introduced for the truth of the matter asserted. *Id.* at 54; *see also People v. Goldstein*, 6 N.Y.3d 119, 128 (N.Y. 2005) ("The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context."); Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 GEO. L.J. 828, 855-56 (2008) ("[I]t is not logically possible for a jury to use the hearsay statements to assess the weight of the expert's opinion other than by considering their truth").

This case illustrates the point. It strains all sense of reason to suggest that the DNA reports that Powers authored were not introduced for their truth. Almost all of Black's direct examination was focused on establishing the credibility of Powers' work, and when Conneally testified that there was a 99.9999% chance that the petitioner was the father, his estimate was based exclusively on the testimonial evidence provided by Powers. If the jury could not accept Powers' reports as true and correct, it would have had no way to credit Black's testimony or Conneally's statistical conclusions. That is why the prosecutor specifically told the jury in her closing argument, to "look at the lab report, and the lab report talks about the different items of evidence that were received, the different items that were tested

from each person, and the profiles that were generated from those items that were tested . . . ." Tr. 544.

To be sure, modern rules of evidence generally allow expert witnesses to offer opinions based on information of the type that is customarily relied upon by other experts in the field, regardless of whether that information is independently admissible. *See, e.g.*, Fed. R. Evid. 703. But it is now well established that the Confrontation Clause does not depend on "the vagaries of the rules of evidence." *Crawford,* 541 U.S. at 61. Thus, in a criminal case "[w]here testimonial hearsay is involved, the Confrontation Clause trumps [expert] rules of evidence." *People v. Dungo,* 98 Cal. Rptr. 3d at 713 n.14. Such is the case here.

The "not for truth" justification for surrogate testimony, in short, is "an effort to make an end run around a constitutional prohibition by sleight of hand." Jennifer Mnookin, *Expert Evidence and the Confrontation Clause after* Crawford v. Washington, 15 J.L. & POL'Y 791, 822 (2007). This Court should not allow it to stand.

CONCLUSION

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

Respectfully submitted,

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