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 Indiana Supreme Court

REPLY BRIEF FOR PETITIONER

Jeffrey E. Kimmell
ATTORNEY AT LAW
218 West Washington
Street, Suite 600
South Bend, IN 46601

Thomas C. Goldstein
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Avenue, NW
Washington, DC 20036

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@law.stanford.edu

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Avenue
Bethesda, MD 20814

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

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Blank Page

REPLY BRIEF FOR PETITIONER

The State does not, and cannot, dispute that the forensic analysis that its employees performed here was typical of those regularly done in laboratories across the country. An analyst, Daun Powers, extracted specimens from physical evidence and conducted several scientific procedures on them. Pet. 3-4. Those procedures ultimately generated a series of computerized images (here, "ladder-like visual[s]," BIO 2; in another case, the images might be graphs or color stains) that the analyst "interpret[ed]." Tr. 167.[1] The analyst then prepared two written reports detailing the evidence she had handled, the procedures she had performed, and the conclusions she had drawn (here, that the specimens contained particular DNA segments of certain lengths). Pet. App. 48a-51a. After the analyst completed her work, her supervisor, Lisa Black, reviewed the "paperwork" and initialed the reports, Pet. App. 3a, without any indication that she personally examined the physical specimens or the "ladder-like visuals" to independently interpret them.[2]

---

[1] For an example of such a DNA image, see http://upload.wikimedia.org/wikipedia/commons/6/60/Gel_electrophoresis_2.jpg. For a description of how to interpret one, see http://www.life.illinois.edu/molbio/geldigest/photo.html.

[2] Lest there be any confusion about what exactly Black did, the State elicited the following explanation from Black at trial:

> Q. And who was the analyst that conducted that testing?
>
> A. Daun Powers.
>
> . . . .

This case, therefore, turns on a purely legal question: whether the Confrontation Clause permitted the State to introduce one analyst's forensic reports through the in-court testimony of a different analyst. The State does not dispute that the permissibility of such surrogate testimony is an important and recurring constitutional issue. The State nevertheless urges this Court to deny certiorari on the grounds that: (1) the conflict among lower federal and state courts on the issue actually turns on factual distinctions; (2) the Indiana Supreme Court's decision is "allowed by *Melendez-Diaz* [*v. Massachusetts*, 129 S. Ct. 2527 (2009)]," BIO 9; and (3) given how recently *Melendez-Diaz* was decided, "[t]he only rationale for taking another forensic-test case at this point would be to reconsider *Melendez-Diaz* itself," BIO 18. None of these arguments

---

> Q. . . . Can you identify [Exhibit 1], please?
>
> A. This is the Certificate of Analysis that was prepared by Daun Powers on her results.
>
> Q. Okay. And was that – you said that you were the supervisor involved in this case; is that correct?
>
> A. That is correct.
>
> Q. And is that document prepared at or near the time Daun is conducting the analysis?
>
> A. Yes, it was.
>
> Q. And reviewed then by you as the supervisor?
>
> A. Yes. And that's indicated down at the bottom. It says reviewed by and it has my number 4774 which is my public employee number which indicates that I did review it.

Tr. 127, 130-31 (Oct. 1, 2007).

provides reason to delay resolving the escalating split of authority.

1. Courts have acknowledged the conflict over whether the prosecution may introduce one forensic analyst's report through the in-court testimony of another. *See United States v. Blazier*, 68 M.J. 439, 444 (2010); *United States v. Rose*, 587 F.3d 695, 701 n.4 (5th Cir. 2009), *cert. denied*, 2010 WL 545453 (2010). Nine state supreme courts or federal courts of appeals hold that the import of *Melendez-Diaz* and *Crawford v. Washington*, 541 U.S. 36 (2004), is straightforward and clear cut: The only person through whom the prosecution may introduce a forensic report into evidence is the report's author. *See* Pet. 12-15, 17-18; *United States v. Martinez-Rios*, 595 F.3d 581, 586 (5th Cir. 2010). By contrast, five other state supreme courts permit prosecutors to introduce a nontestifying analyst's report through the in-court testimony of a different analyst. *See* Pet. 15-16, 18-19; *State v. Bullcoming*, 226 P.3d 1, 8-9 (N.M. 2010), *pet'n for cert. filed* (May 12, 2010) (No. 09-10876); *see also State v. Lopez*, ___ N.E.2d ___, 2010 WL 703250, at *12 (Ohio App. Mar. 1, 2010) (same).[3]

Contrary to the State's arguments, this conflict cannot be explained by differences in (a) the testifying analyst's level of involvement in producing

---

[3] The North Dakota Supreme Court similarly has held that *Melendez-Diaz* allows the prosecution to introduce an affidavit establishing a link in the chain of custody of forensic evidence without putting the declarant on the stand. *State v. Gietzen*, ___ N.W.2d ___, 2010 WL 1855952, at *4 (N.D. May 11, 2010).

the forensic reports; or (b) the type of forensic testing at issue.

a. According to the State, courts prohibit surrogate testimony only where the testifying analyst did not "play[] any role" in the production of the report, whereas courts allow such testimony where, as here, the testifying analyst "reviewed" the nontestifying analyst's forensic report. BIO 7-9. This is not so.

The courts that bar surrogate testimony in fact have adopted a categorical rule: the Confrontation Clause prohibits the prosecution from introducing one person's testimonial statements through the in-court testimony of another. *See, e.g., Martinez-Rios*, 595 F.3d at 586 (Confrontation Clause violated when the defendant is "unable to cross-examine the person who . . . prepared a testimonial statement"); *Smith v. State*, 28 So.3d 838, 854-55 & n.12 (Fla. 2009) (same), *pet'n for cert. filed* (May 10, 2010) (No. 09-10755); *Commonwealth v. Avila*, 912 N.E.2d 1014, 1029 (Mass. 2009) (same). Under these courts' reasoning, it does not matter whether a testifying witness reviewed the reports at issue. The only relevant question is whether the prosecution introduced an analyst's forensic report without putting *that analyst* on the stand. That is exactly what the prosecution did here.

In any event, courts *have* found confrontation violations in cases identical to petitioner's. Here, Black, the testifying analyst, "oversees the general quality control of the work performed at the lab," and "performed a technical review of Daun Powers' tests." BIO at 7. The testifying analyst in *State v. Johnson*, 982 So.2d 672 (Fla.), *cert. dismissed*, 129 S. Ct. 28

(2008), likewise was a "supervisor" who "testif[ied] about the general procedures used . . . in preparing" the type of forensic report at issue; he also reviewed the nontestifying's analyst report. *Smith*, 28 So.3d at 854 (quoting lower court opinion in *Johnson*); Br. for Pet'r at 2, *Johnson*, 982 So.2d 672 (No. SC06-86), 2006 WL 1028700 at *2. Similarly, the testifying analyst in *Martinez-Rios* "explained how [the report at issue] is ordinarily prepared" and "personally reviewed" the report that the nontestifying analyst prepared. 595 F.3d at 586.

Contrary to the State's assertion (BIO 17), intermediate court decisions from North Carolina confirm that *State v. Locklear*, 681 S.E.2d 293 (N.C. 2009), likewise bars surrogate testimony under these circumstances. In *State v. Brewington*, ___ S.E.2d ___, 2010 WL 1957477 (N.C. App. May 18, 2010), the prosecution, just as here, introduced one analyst's report through the testimony of another who was able to testify regarding general lab procedures but who did not herself assess the physical evidence or conduct any testing on it. *Id.* at *2, *9; *compare* Pet. App. 4a (Black testified regarding "general procedures followed at the laboratory" but "d[idn't] have any knowledge" regarding the actual steps taken here). The prosecution argued, just as here, that the surrogate testimony did not violate the Confrontation Clause because the testifying analyst "reviewed the testing procedures . . . and the results of the examinations." *Brewington*, 2010 WL 1957477, at *2. The court rejected this argument, in terms that explain why the "role in the analysis" distinction the State proposes here lacks any grounding in this Court's precedent:

> It is clear from the testimony of [the testifying analyst] that she . . . [did not] conduct any independent analysis of *the substance*. She merely reviewed the reported findings of [the nontestifying analyst], and testified that if [that analyst] followed procedures, and if [that analyst] did not make any mistakes, and if [that analyst] did not deliberately falsify or alter the findings, then [the testifying analyst] would have come to the same conclusion that she did. As the Supreme Court clearly established in *Melendez-Diaz*, it is precisely these "ifs" that need to be explored upon cross-examination to test the reliability of the evidence.
>
> . . . .
>
> Under *Melendez-Diaz* and *Locklear*, we are bound to conclude this testimony was admitted in violation of defendant's right under the Confrontation Clause of the Sixth Amendment.

Id. at *9; *accord State v. Galindo*, 683 S.E.2d 785, 788 (N.C. App. 2009).

The cases the State cites do not suggest otherwise. In those cases, the North Carolina Court of Appeals distinguished *Locklear* on the ground that the testifying analysts never referenced the nontestifying analysts' reports "for the proof of the matter asserted." *State v. Hough*, 690 S.E.2d 285, 291 (N.C. App. 2010); *accord State v. Mobley*, 684 S.E.2d 508, 512 (N.C. App. 2009). The State does not even contend that the testifying analysts in this case so limited their testimony. Nor could it, since the

analysts' testimony depended on the accuracy of the reports, and the State itself urged the jury "to look at the lab report[s]" as substantive proof of its charges. Pet. 6-7 (quoting trial transcript); *see also* Pet. 28-30. When the prosecution introduces forensic reports in this manner, the North Carolina courts, as well as eight other state and federal courts, hold that it violates the Confrontation Clause.

b. The State also contends that the conflicting cases can be distinguished according to whether the forensic report the prosecution introduced involved "objectively discernible" facts or "subjective conclusions." BIO 11. Here, too, the State is incorrect.

To the extent the State suggests, by its citation to *State v. Appleby*, 221 P.3d 525 (Kan. 2009), that the forensic reports in this case, or any other of the cases in the split, are nontestimonial, this is not so. As the Indiana Supreme Court acknowledged, the reports here are "testimonial [under] the definition of testimony as clarified by *Melendez-Diaz*." Pet. App. 10a. Other courts on both sides of the conflict likewise hold that forensic reports are testimonial, regardless of whether they recite "objectively discernible" data or more subjective conclusions. *Compare, e.g.*, *Bullcoming*, 226 P.3d at 8, *with State v. Mangos*, 957 A.2d 89, 93 (Me. 2008). And rightly so: this Court made clear in *Melendez-Diaz* that forensic reports cannot be deemed nontestimonial on the ground that they supposedly reflect "neutral, scientific testing." 129 S. Ct. at 2536.

To be sure, the court in *Appleby* held that the forensic documents at issue there were nontestimonial. 221 P.3d at 551. But those documents were machine-generated printouts containing no

human assertions. *Id.* at 548-49. The documents, therefore, constituted genuine "raw data," which does not implicate the Confrontation Clause or the question presented here. *See* Pet. 10-11; *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2856 (2009).

Here, by contrast, the State did not simply introduce computer printouts; it did not, for example, introduce the "ladder-like visual[s]," BIO 2, that Powers' tests generated. Instead, the State introduced Powers' written assertions describing the evidence she tested, the procedures she followed, and the results she observed. *See* Pet. App. 48a-51a. Much as the State attempts to imply otherwise, those assertions are *not* "raw data." They are testimonial statements.

The State is equally mistaken to the extent it means to suggest, by its citation to the New Mexico Supreme Court's decision in *Bullcoming*, 226 P.3d 1, that no court would have prohibited surrogate testimony about the testimonial reports here because they contain supposedly "objectively discernible" facts. Courts that prohibit surrogate testimony do not read the requirements of *Crawford* and *Melendez-Diaz* to depend on the nature of the testimonial statements in a forensic report. Rather, courts interpret those decisions as establishing a categorical rule: "when the State seeks to introduce forensic analyses, . . . such evidence is inadmissible" unless the authors themselves testify. *Locklear*, 681 S.E.2d at 305. Thus, courts have found confrontation violations when the prosecution introduced one analyst's objectively discernible assertions though the in-court testimony of another. *See Martinez-Rios*,

595 F.3d at 586 (prosecution introduced report certifying nonexistence of certain immigration records); *Avila*, 912 N.E.2d at 1029 n.19 (prosecution introduced "*facts* and findings" in an autopsy report) (emphasis added).

Contrary to the State's suggestions (BIO 12-13), the high courts in Maine and Florida would also have found confrontation violations on the facts here. In *Mangos*, the Maine Supreme Judicial Court found a confrontation violation where the report introduced through surrogate testimony "describ[ed] how the technician took DNA samples" for testing. BIO 13; *Mangos*, 957 A.2d at 93. That is exactly what Powers' Certificate of Analysis describes here. Pet. App. 48a-50a. In *Johnson*, the Florida Supreme Court found a confrontation violation where a report introduced through surrogate testimony identified a seized substance as containing cocaine. 982 So.2d at 680. While the State claims that "the key was that the report represented another's *subjective conclusions*" instead of objective observations, BIO 12, the Florida Supreme Court never identified this as "the key," or even as a relevant factor. Rather, in a decision after *Melendez-Diaz*, the court made clear that the surrogate testimony in *Johnson* violated the Confrontation Clause simply because "*the person who prepared the report of the relevant results did not testify.*" *Smith*, 28 So.3d at 854 (emphasis in original); *see also id.* at 855 n.12.

Nor would it make any sense for courts to distinguish among instances of surrogate testimony according to the level of subjectivity in the reports at issue. BIO 11. This Court explained in *Melendez-Diaz* that "there is not a . . . category of witnesses,

helpful to the prosecution, but somehow immune from confrontation" on the basis of the supposed objectivity of their assertions. 129 S. Ct. at 2534; *see also id.* at 2537 n.6. Were it otherwise, the prosecution could use surrogate witnesses to introduce testimonial statements that recorded the time on a clock when shots rang out or that transcribed the numbers on a license plate of a getaway car. These assertions are just as "objective" as any assertion in a forensic report might be. But if there is one thing that *Crawford* and *Melendez-Diaz* make clear, it is that courts may no longer deem the Confrontation Clause satisfied merely because they believe a particular statement is so objective or otherwise "obviously reliable" that cross-examining the witness who made it is unnecessary. *Crawford*, 541 U.S. at 62; *Melendez-Diaz*, 129 S. Ct. at 2536.

2. As for the merits of the Indiana Supreme Court's decision, the State does not dispute that the Confrontation Clause generally bars the prosecution from introducing a person's testimonial statements without putting that person on the stand. *See Crawford*, 541 U.S. at 54. But the State contends that footnote one in *Melendez-Diaz* creates an exception to this rule, "le[aving it] to prosecutors to decide" through whom they wish to introduce testimonial statements in forensic reports. BIO at 9.

As the Petition explained (Pet. 27), that footnote does no such thing. Rather, it simply reaffirms that the Confrontation Clause imposes nothing more, and nothing less, than a "procedural" requirement regarding prosecutorial witnesses. *Crawford*, 541 U.S. at 61. The prosecution always has discretion (subject to state laws regulating the elements of

crimes and permissible methods of proving them) to decide which witnesses it chooses to put on the stand at trial. Thus, footnote one makes clear that nothing in the Confrontation Clause requires the prosecution to call "everyone who laid hands on the evidence" that is the subject of a forensic report. *Melendez-Diaz*, 129 S. Ct. at 2532 n.1. At the same time, "what testimony *is* introduced must (if the defendant [invokes the Confrontation Clause]) be introduced live." *Id.* In other words, the prosecution may choose whose testimonial statements concerning forensic evidence it wishes to introduce, but once it elects to introduce a certain analyst's testimonial statements, it must put *that analyst* on the stand. It may not introduce one analyst's testimonial statements through the in-court testimony of another. *See id.* at 2537 n.6 ("The analysts who swore the affidavits" the prosecution introduced "provided testimony against [the defendant], and they are therefore subject to confrontation.").

As this Court emphasized in *Melendez-Diaz*, this procedural mandate is not "an empty formalism." *Id.* Forensic science is subject to error, manipulation, and fraud, *id.* at 2536-37, and DNA testing is no exception. *See, e.g.*, Erin Murphy, *The Art in the Science of DNA: A Layperson's Guide to the Subjectivity Inherent in Forensic DNA Typing*, 58 Emory L.J. 489, 491, 501 (2008). Indeed, one of the steps of forensic testing that the nontestifying analyst's reports record here – that of "interpret[ing] the machine's printout" – "is the one [during forensic testing] most likely to permit human error to affect the test's result." *Melendez-Diaz*, 129 S. Ct. at 2545 (Kennedy, J., dissenting). When the prosecution

introduces such interpretive assertions, the only way the defendant can exercise his constitutional right to explore the declarant's "honesty," "methodology," or "deficiency in judgment" is by cross-examining the actual declarant who made the assertions. *Id.* at 2537-38 (majority opinion). A surrogate witness shields all of that information from adversarial scrutiny. Pet. 20-22.

3. Most revealing of all is the State's assertion that if and when this Court grants certiorari to resolve the conflict over the permissibility of surrogate forensic testimony, it will – as it did earlier this Term as *amicus* in *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) – "make the argument for overturning *Melendez-Diaz*." BIO 19. This assertion, coupled with various arguments elsewhere in the State's brief, makes it plain that Indiana and other states are really just refusing to come to terms with *Melendez-Diaz*. Until this Court reaffirms that it meant what it said in *Melendez-Diaz*, states will continue to urge their courts to transform that decision's straightforward, categorical requirement of live testimony into a malleable, multi-factor test that fails to provide consistent outcomes or predictable guidance to trial courts in their daily encounters with forensic evidence. BIO 6, 18. Especially in light of the division of authority that has already developed on the subject, this is not a recipe for further percolation; it is a circumstance requiring immediate intervention.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Jeffrey E. Kimmell
ATTORNEY AT LAW
218 West Washington Street, Suite 600
South Bend, IN 46601

Thomas C. Goldstein
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@law.stanford.edu

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Avenue
Bethesda, MD 20814

May 26, 2010

Blank Page