No. 07-591

IN THE
Supreme Court of the United States

LUIS E. MELENDEZ-DIAZ,
Petitioner,

v.

MASSACHUSETTS,
Respondent.

On Petition for Writ of Certiorari to the Appeals Court of Massachusetts

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* BY PROFESSORS PAMELA R. METZGER, JENNIFER L. MNOOKIN, AND ANDREW E. TASLITZ, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE INNOCENCE PROJECT, THE NATIONAL COLLEGE FOR DUI DEFENSE, THE COMMITTEE FOR PUBLIC COUNSEL SERVICES, AND THE MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Amici curiae include Professors of Law with expertise in issues of forensic science, criminal procedure, and constitutional law, the National Association of Criminal Defense Lawyers ("NACDL"), a non-profit association of criminal defense lawyers with a national membership of more than 10,000 attorneys, the National College for DUI Defense, a non-profit professional organization with approximately 850 members which sponsors or co-sponsors at least four major continuing education programs annually specializing in issues relating to the defense of persons charged with driving under the influence, the Committee for Public Counsel Services, a statewide agency in Massachusetts responsible for the delivery of court-appointed criminal defense services to indigent adults and children facing juvenile or criminal prosecutions, the Massachusetts Association of Criminal Defense Lawyers ("MACDL"),

a non-profit association devoted to protecting the rights of the accused and to serving as a voice for the defense before state and federal courts, and the Innocence Project, a leader in the exoneration of the wrongfully convicted, respectfully request leave of this Court to file the following brief in the above captioned matter. In support of its motion, *Amici* state as follows:

1. The petitioner granted its consent in writing. Petitioner's written consent is being filed simultaneously with this Brief and Motion. Respondent refused consent "as a matter of policy."

2. *Amici* in support of petitioner in this matter represent a unique combination of practitioners who, in trials around the country and in Massachusetts itself, are involved each day with issues surrounding admission of forensic evidence in the form of laboratory reports or summaries, as well as distinguished law professors who have studied how these issues are resolved in a wide variety of jurisdictions. As such, *amici* offer a broad and unique perspective on an important issue of constitutional dimension that affects the conduct of criminal trials at one of its most basic and important levels—the manner in which evidence is presented to fact finders and the ability of the defense to test that evidence. The numerous and diverse *amici* appearing on this brief have worked diligently to file a single brief in the interest of speaking forcefully and efficiently on the Confrontation Clause issues discussed herein.

Respectfully submitted,

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QUESTION PRESENTED

Whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is "testimonial" evidence subject to the demands of the Confrontation Clause as set forth in *Crawford* v. *Washington*, 541 U.S. 36 (2004).

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INTEREST OF *AMICI CURIAE*

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[1] No counsel for any party authored any part of this brief, and no person or entity, other than *Amici*, has made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *Amici's* intention to file this brief. Accompanying this brief is a letter of consent from Petitioner to its filing.

As scholars training future practitioners and practitioners representing clients, *Amici* have a keen interest in knowing whether and how the Sixth Amendment's Confrontation Clause applies to state forensic examiner reports. [2]

In the wake of *Crawford* v. *Washington*, 541 U.S. 36 (2004), and *Davis* v. *Washington*, 126 S. Ct. 2266 (2006), the most widespread subject of controversy with respect to the confrontation guarantee concerns the constitutionality of allowing the prosecution to introduce state forensic laboratory certifications in lieu of live 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.

SUMMARY OF ARGUMENT

Amici support Petitioner's reasons for granting the petition in full. *Amici* write separately to explain the practical import of the right to confrontation in operation, where the prosecution must affirmatively present live witness testimony to sustain its burden of proof and the defense, absent a knowing and intelligent waiver, always has the opportunity to confront and cross-examine that witness as it sees fit, if it sees fit. Specifically, *Amici* explain how the

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[2] Professors Metzger, Mnookin and Taslitz have published extensively on topics related to these issues. NACDL has appeared as *amicus curiae* in *Crawford* and also appeared with the Public Defense Service for the District of Columbia as *amicus curiae* in *Davis*.

traditional construction of the confrontation guarantee allocates risks, creates incentives, and ultimately promotes the truth-seeking function of a criminal trial. Statutes such as the one at issue in Massachusetts, which substitute out of court certification for live testimony on dispositive issues of proof, cannot serve these purposes.

Amici also write to alert the Court to the systemic problems with unreliable scientific data that coincided with the permissive practice under *Ohio* v. *Roberts*, 448 U.S. 56 (1980), *abrogated by Crawford* v. *Washington*, 541 U.S. 36 (2004), of admitting at trial unconfronted, purportedly reliable information. The demonstrated fallibility of state and federal forensic evidence, particularly when it is regularly exempted from the rigors of adversarial testing, reinforces the importance of the questions presented by Petitioner and militates in favor of this Court's review.

REASONS FOR GRANTING THE PETITION

I. THE CONFRONTATION GUARANTEE ENSURES THE FUNDAMENTAL WORKINGS OF OUR ADVERSARIAL CRIMINAL JUSTICE SYSTEM AND ITS TRUTH-SEEKING FUNCTION.

In *Crawford*, this Court decoupled the right to confrontation from hearsay rules and held that a defendant's right to confrontation was implicated whenever the prosecution sought to introduce "testimonial" evidence. But the Court did not expressly resolve, because the issue was not squarely before it, how to determine if forensic evidence is "testimonial" such that the confrontation guarantee must be satisfied.

Traditionally, the Confrontation Clause has been interpreted to require (absent a valid waiver[3]) that the prosecution "confront" a defendant "with" its witnesses in the prosecution's case-in-chief. U.S. Const. amend. VI. Under this construction of the confrontation guarantee, there are always a variety of factors that will impede the admission of erroneous, incomplete, or fraudulent evidence. Indeed, the purpose of the Confrontation Clause is to ensure an opportunity for the defendant to challenge the reliability of the prosecution's evidence. See Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 501 (2006).

The Confrontation Clause operates to provide the defense with procedural devices to challenge the reliability of the evidence presented by the prosecution. Most fundamentally, the prosecution must sustain its burden of proof by presenting inherently revealing, live testimony. Thus, the prosecution, which presumably knows the strengths and weaknesses of its evidence and its witnesses, cannot simply conduct a trial-by-affidavit, putting out-of-court written statements before the fact-finder that say no more and no less than the prosecution wants them to say. Rather, the prosecution is obliged to put a live witness on the stand and bear the risk that this witness may provide, even on direct examination, some information that is inconsistent with prior statements or otherwise damaging to the prosecution's case.

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[3] The traditional system does not require confrontation in every case. It is always the prosecution's prerogative to ask the defense to stipulate to the admission of unconfronted out-of-court statements. However, if the defense declines such a request, the prosecution retains the burden of production and the defense the opportunity for cross-examination.

Moreover, under the traditional system, even when a defendant chooses not to cross-examine a prosecution witness, his right to confrontation still provides an *opportunity* for adversarial testing. Before the prosecution's first witness takes the stand, the traditional system of confrontation and cross-examination gives prosecution witnesses prophylactic incentives to exercise greater care in the creation or maintenance of prosecution evidence—to set up and follow protocols that adhere to best practices, to ensure all staff are properly trained, to properly document everything, and to strive in all ways to operate in a manner that is beyond reproach—and thereby to minimize if not avoid entirely damaging impeachment. See Metzger, 59 Vand. L. Rev. at 501. Similarly, the specter of cross-examination prompts good prosecutors to rigorously vet their cases—to strengthen those cases that do go to trial by thoroughly reviewing the evidence with their witnesses and ensuring that errors, omissions, and oversights will be addressed and remedied before the witness testifies in open court, and to dismiss cases based on flawed evidence before the trial ever begins. Without incentives to encourage scrutiny, the prosecution may unwittingly rely on conclusions that are faulty or without foundation. The prosecution will be less inclined to probe the bases for a report's conclusions—the methodology and protocols the examiner used—because without a realistic probability of confrontation, they will never become an issue at trial.

Even a prudent prosecutor may have little ability to learn more about the forensic examiner and his actions in the case. The report itself is likely to be cursory. Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 Vand. L. Rev. 791,

803 (1991) (lab reports often merely "summarize[ ] the results of an unidentified test conducted by an anonymous technician' (internal quotation and citation omitted)).[4] Therefore, in addition to the lack of incentives, there may be a lack of information for which to question forensic certifications. Prosecutors may rely on such certifications because of their believed reliability, but "[d]ispensing with confrontation" because such reports are "obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Crawford*, 541 U.S. at 62.

Certainly, when the prosecution then calls its witness to the stand, it fulfills a number of the components of the confrontation guarantee, even if the defense chooses not to cross-examine the witness. These benefits include (1) "face-to-face" confrontation with the defendant, *id.* at 57; (2) open presentation of evidence "in the presence of all mankind," Sir William Blackstone, 3 *Commentaries on the Laws of England* 373 (1765-69 ed.) and (3) the fact-finder's first-hand "opportunity [to] observ[e] the quality, age, education, understanding, behavior, and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing." *Id.* at 374. Additionally, the combination of

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[4] The defendant is afforded little opportunity to discover a forensic report before trial. *See also* Giannelli, 44 Vand. L. Rev. at 810 n.121 (current rules requiring discovery of scientific reports generally do not specify the information that must be included; suggesting changes that require "(a) a description of the analytical techniques used in the test . . . (b) the quantitative or qualitative results with any appropriate qualifications concerning the degree of certainty surrounding them, and (c) an explanation of any necessary presumptions or inferences that were needed to reach the conclusions" (internal citation omitted)).

being face-to-face with the accused and the possibility of cross-examination will likely deter prosecution witnesses from over-statement and misleading omissions when they are on the stand, especially where they have been instructed that such tactics will likely only backfire. Metzger, 59 Vand. L. Rev. at 501 n.122 ("almost all state employees who may be called to testify in criminal trials receive training" on how to be a good witness).

The timing of the defendant's confrontation right to cross-examination is a critical aspect of adversarial testing, because it ensures that the defendant has a genuine and informed opportunity, to challenge the prosecution's evidence as he sees fit, if he sees fit. The defendant is not obligated to choose whether or how to question the prosecution witness until *after* that witness has testified on direct and after the prosecution has presumably obtained from the witness whatever inculpatory information the witness possesses. At this point, the defense can make an informed decision to cross-examine the prosecution witness to expose holes, inconsistencies, biases, or untruths in the witness' testimony.

Alternatively, the defense may decide to forego cross-examination—for any number of legitimate reasons. It may be that the witness (1) now under oath, failed to testify in a way that undermines the defense, (2) actually testified poorly for the prosecution (and thus favorably for the defense), and might only qualify his answers on cross-examination, or (c) in anticipation of cross-examination, was so scrupulous in his testimony that cross-examination would only emphasize the strength of the prosecution's evidence.

And precisely because the traditional construction of the confrontation right ensures a routine and

uniform opportunity for the defense to confront and cross-examine prosecution witnesses, it creates an incentive structure for the prosecution and its witnesses to ensure at every stage of the prosecution that the evidence is accurate and reliable in order to limit defense opportunities for impeachment. The spectra of cross-examination thus provides an incentive for the prosecution to present a complete warts-and-all picture of its case to "draw the sting" from any attempt at impeachment—which in turn allows the fact-finder to render its verdict with more complete information.

In short, the very structure of the traditional conception of the confrontation guarantee promotes the truth-seeking function of a criminal trial in our adversarial system. But a number of states, Massachusetts among them, and a federal circuit, do not consider forensic laboratory certifications to be testimonial, and thereby do not afford defendants *any* confrontation rights in connection with such evidence.[5] This eviscerates the protections of the

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[5] *See, e.g., United States* v. *Ellis*, 460 F.3d 920, 925 (7th Cir. 2006) (noting that while circumstances of test might lead examiner to believe her report might be used in prosecution, they do not "transform what is otherwise a nontestimonial business record into a testimonial statement implicating the Confrontation Clause"); *People* v. *Geier*, 161 P.3d 104 (Cal. 2007), ("[w]e conclude therefore that the DNA report was not testimonial"), *petition for cert. filed*, No. 07-7770 (U.S. Nov. 14, 2007); *State* v. *Forte*, 629 S.E.2d 137, 143 (N.C.) (laboratory report on DNA test not testimonial because such reports are routine, neutral and do not bear witness against the defendant), *cert. denied*, 127 S. Ct. 557 (2006); *Commonwealth* v. *Verde*, 827 N.E.2d 701, 705 (Mass. 2005) (holding that drug certificates "merely state the results of a well-recognized scientific test determining the composition and quantity of the substance" and are akin to public records); *State* v. *Dedman*, 102 P.3d 628, 636

Confrontation Clause, and makes the prosecutor the only functional "gatekeeper" against the admission of unreliable evidence.

As this Court explained in *Crawford*, while the Confrontation Clause's ultimate goal may be to ensure reliability of evidence, "it is a *procedural* rather than a *substantive* guarantee . . . reflect[ing] a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can *best be determined.*" *Crawford,* 541 U.S. at 61 (emphasis added). Reliability cannot "best be determined" in an adversarial system by having the very party in opposition to the defendant—the prosecutor—responsible for the reliability of critical evidence. Statutes that permit forensic certification as prima facie evidence "virtually eliminate judicial inquiry into the reliability of the general scientific methodology or the particular scientific test." Metzger, 59 Vand. L. Rev. at 489.

Upon receiving a forensic certification and choosing whether to present it as evidence, the prosecutor subsumes the role of gatekeeper—deciding whether the evidence is reliable. When, as here, the certification is presented as evidence of an essential element of the crime—drug type and weight—presentation of this evidence effectively "rewards the state with a prima facie presumption that the prosecution has proven the truth of the report." *Id.* at 490. In effect, the prosecutor becomes the "referee"

(N.M. 2004) (holding blood alcohol report not testimonial and within public records exception because it was prepared by public health agency, rather than law enforcement, and therefore was neither investigative nor prosecutorial).

in a game that he has an interest in winning, and thus has every incentive to use "shortcut[s] to the process of proof." Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After* Crawford *v.* Washington, 15 J.L. & Pol'y 791, 800 (2007).

But by removing the defendant's opportunity to confront, before the fact-finder, the presentation of forensic evidence to prove an essential element of the crime, the certification system robs the adversarial system of many of the incentives that promote the truth-finding function of a criminal trial. The declarant of an out-of-court statement in support of the prosecution does not have the same incentives that are present under the traditional construction of the confrontation guarantee to cautiously and conscientiously create and preserve evidence from the outset in order to avoid the possibility of later impeachment. Rather, with statements submitted in writing, information can easily be spun, misrepresented, omitted or fabricated precisely because no follow-up questioning is afforded. As one commentator aptly observed, "[p]ractically speaking, these statutes mean that the fact that a substance found on the defendant's person was tested and determined to be cocaine of a specified quantity might, at the prosecutor's prerogative, be proven by waving an official-looking paper that says so before the jury." Mnookin, 15 J.L. & Pol'y at 798.

Amici believe that use of the certification system impermissibly bypasses the confrontation right in a manner that is wholly inconsistent with our adversarial system. See *Barefoot* v. *Estelle*, 463 U.S. 880, 899 (1983) (our "adversary system" is designed to permit the factfinder to "uncover, recognize and take due account" of the "shortcomings" of expert

evidence), *superseded by statute*, Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2253, *as recognized in Slack* v. *McDaniel*, 529 U.S. 473 (2000); see also *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993) (endorsing "[v]igorous cross-examination" as a means of attacking scientific evidence). *Amici* urge the Court to grant review in this case and to declare that the traditional method of fulfilling the confrontation guarantee is the only constitutionally acceptable method.

This issue goes well beyond the unconfronted admission of state forensic examiner reports. It is the nature of our adversarial system that the prosecution will constantly push to limit its confrontation obligations. Thus, the recognition by a number of states of any rule for state forensic examiners more lenient than one requiring the prosecution to present live testimony subject to cross-examination by the defense creates a dangerous slippery slope. If it is permissible to bypass the Confrontation Clause by labeling forensic evidence certifications non-testimonial, then it would presumably no more offend the Constitution to allow the prosecution to prove its entire case by affidavit, no matter the precise type of out-of-court statement at issue. See *People* v. *McClanahan*, 729 N.E. 2d 470, 477 (Ill. 2000) (acknowledging this danger); see also, *e.g.*, *Starr* v. *State*, 604 S.E.2d 297, 299 (Ga. Ct. App. 2004) (permitting introduction of alleged victim's videotaped statement in lieu of live testimony where defense could have called her as a witness). In other words, the certification rule threatens not only to undo the importance of the *Crawford* and *Davis* decisions, which reaffirmed importance of live testimony, in court, subject to cross-examination, but also to "dramatic[ally] change . . . the way we conduct

criminal trials." Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L. J. 1011, 1038 (1998). With such basic principles at stake, the Court's corrective intervention is urgently needed.

II. WHETHER STATE FORENSIC EXAMINER EVIDENCE IS TESTIMONIAL AND SUBJECT TO TRADITIONAL CONFRONTATION GUARANTEES IMPLICATES THE INTEGRITY OF OUR CRIMINAL JUSTICE SYSTEM.

We need only look back to recent history for proof that the integrity of our criminal justice system is at stake. During the *Roberts* era, a defendant's right to confrontation and cross-examination of a prosecution witness was downgraded from a categorical constitutional guarantee to a highly arbitrary judicial determination of evidentiary reliability. At the same time, some states (erroneously) concluded that the mechanism for fulfilling the confrontation obligation, in the more limited instances that obligation was recognized under *Roberts,* could be altered in such a way as to further constrict the scope of the right. In particular, some states endorsed the use of purportedly reliable forensic examiner reports in lieu of live testimony so long as a defendant had an opportunity to subpoena the examiner to testify. From the vantage of hindsight, the result was predictable; the *Roberts* era coincided with widespread crime laboratory failures around the country.

Lest history repeat itself, this Court should use Petitioner's case as a vehicle to expressly reject the permissive admission of unconfronted forensic evidence and affirm that the traditional strictures of the confrontation right regulate the admission of such

evidence. The Court's constitutional holding in *Crawford* means little in practice if States can avoid that holding by simply categorizing vital prosecution evidence used to prove elements as "non-testimonial." Now that the *Roberts* regime has been rejected, reliance on a forensic certification in lieu of live testimony will be the most attractive option for bypassing the rigors of its traditional confrontation obligations. Moreover, state legislatures have the incentives of increased conviction rates and decreased costs to create systems like the one used in Massachusetts, that employ certification as proof of prima facie evidence of an element of a crime.

The ability to confront and probe scientific evidence is critical because it is often the most powerful evidence in the prosecution's arsenal, and is considered to be extremely reliable and persuasive by juries. In a survey of potential jurors in the District of Columbia, respondents said that, on a scale of one to ten, fingerprint and DNA evidence rated 8.3 and 9 respectively for general persuasiveness, and 8.6 and 9 for general reliability; likewise 94% of those polled deemed "important" laboratory and scientific tests performed by the government that provided favorable evidence to the defense, and 91% of those polled said that they would be concerned if the prosecution withheld this information from the defense. See Survey of D.C. Jurors conducted by the Public Defender Service in December 2003, questions 3, 6, 17, 20, 57, & 71.[6]

This reliance is potentially dangerous because this sort of evidence is no more immune to human error or

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[6] *Available at* http://www.pdsdc.org/Special Litigation/SLD SystemResources/Brady%20Poll%20Results,%20December%202003.pdf.

bias than any other type of evidence. Thus, in the review of the first 74 DNA exoneration cases analyzed by the Innocence Project, *one third* involved "tainted or fraudulent science." Barry Scheck et al., *Actual Innocence: When Justice Goes Wrong and How to Make It Right*, 365 (2003); see also Maurice Possley, *Crime Lab Disorganized, Report Says Consultant Alleges Meager Supervision, Inadequate Training*, CHI. TRIB., Jan. 15, 2001, at 1 (examination of first 200 exoneration cases since 1986 revealed than "more than a quarter involved faulty crime lab work or testimony"). Indeed, our *Roberts*-era history suggests that forensic evidence, just like any other type of evidence, is more susceptible to human error and misrepresentation when it is shielded from confrontation.

During the *Roberts* era, the confrontation guarantee turned on judicial estimations of evidentiary reliability and in-court confrontation was generally devalued. See *Roberts*, 448 U.S. 56. At the same time, the practice of allowing the prosecution to introduce a state forensic examiner's report against the accused as a substitute for the forensic examiner's live testimony gained currency and proliferated rapidly. Conclusory declarations about the results of a "wide range" of forensic tests—including drug tests, "DNA tests, microscopic hair analyses, fingerprint identifications, coroners' reports, [and] ballistics tests," were exempted from the strictures of the Confrontation Clause. Metzger, 59 Vand. L. Rev. at 479; *id.* at 479 n.12. Demonstrating the influence of *Roberts*, the oft-cited justification for the permissive use of these unconfronted forensic laboratory reports was their inherent reliability. *Id.* at 480 n.15.

Ironically, the *Roberts*-era attitude that confrontation was discretionary and dispensable for "reliable" evidence can only have created an atmosphere which facilitated the creation and admission of unreliable evidence at trial precisely because the work of state forensic examiners was largely insulated from meaningful scrutiny. It would be an overstatement to say that confrontation is the cure-all for faulty forensic evidence; there will always be some people who are willing to take the stand and affirmatively lie or withhold information that might expose their testimony to be falsely premised or unreliable. But in-court confrontation works in concrete ways to deter the creation and use in court of sloppy, inaccurate, or falsified forensic work. See Point I *supra*; see also *Crawford*, 541 U.S. at 61 (confrontation identified as the procedural mechanism through which "reliability *can best be* determined") (emphasis added).

And, in fact, the practice of insulating the work of state forensic examiners from the crucible of adversarial testing coincided with a disconcerting number of systemic laboratory errors and failures around the country. Flaws with the administration and operation of state forensic laboratories and the evidence they generated during this time have been uncovered in virtually every state or locality in the country, as well as in the federal system, and are well-documented in Baltimore, Boston, Chicago, Cleveland, Los Angeles, Montana, Oklahoma City, Texas (Houston, Fort Worth, and West Texas), Virginia, Washington, and West Virginia. See generally Appendix of Sample Crime Laboratory Failures from Around the Country During the *Roberts* Era ("App. of Crime Lab Failures"). In these jurisdictions, the same types of human error that can

undermine the reliability of any other type of evidence—overwork, inattention, bias, lack of training, outright dishonesty—compromised the reliability and probity of laboratory tests and the reports of those test results. *Id.*

A guarantee of routine in-court confrontation might have averted problems like these. Confrontation might have prompted the crime laboratories in these jurisdictions to act with greater care from the outset. Part of the problem is that many of the lab failures documented above would not be discernable from state forensic examiner reports used by the prosecution. As noted above, and as was the case below, see Point I *supra*, these reports often incorporate only the examiner's bare conclusions without providing any information about the tests performed, the manner in which tests were conducted, laboratory protocols, departure from these protocols and the reasons therefore, or error rates. Thus the act of writing the report does not require self-scrutiny by the examiner, and hence provides little incentive either to conduct tests properly and carefully or to report results accurately. The expectation of in-court confrontation provides these incentives, however, and thus can reduce the susceptibility of this evidence to error.

If it did not preempt them, a guarantee of routine confrontation could have also prompted or hastened the in-court exposure of these systemic problems. The types of errors and problems that have been discovered—disregard for protocols in conducting lab tests, lack of meaningful protocols, falsification of credentials by forensic examiners, fabrication of test results, utilization of junk science techniques or other flawed forensic methodology, pro-government bias, misreporting of actual test results, see App. of Crime

Lab Failures—are the very types of mistakes and misconduct that the crucible of adversarial testing is generally designed to deter and reveal. A forensic examiner may think twice about making unsupported, inaccurate or false statements when testifying in open court. In addition, defense counsel has the opportunity with the examiner on the stand to contrast inadequate protocols and methodologies with best practices, expose error rates and bias, question training, and reveal all the inconsistencies and implausibilities inherent in testimony that lacks adequate foundation or contains actual falsehoods. See, *e.g.*, *Kyles* v. *Whitley*, 514 U.S. 419, 447 (1995) (through cross-examination defense counsel could have "laid the foundation for a vigorous argument that the police had been guilty of negligence");[7] *Delaware* v. *Van Arsdall*, 475 U.S. 673, 678-79 (1986) (right to confrontation encompasses right to cross-examine prosecution witnesses for bias); *United States* v. *Davis*, 14 M.J. 847, 848 n.3 (A.C.M.R. 1982) (cross-examination of a "chemist may reveal the possibility of laboratory error due to the carelessness").

Without in-court confrontation, there is little assurance that defense counsel will be able to probe any of these matters effectively, if at all. Indeed, it is

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[7] The prosecution is obliged to turn over Brady information to defense counsel for this precise purpose. *Kyles*, 514 U.S. at 446 n.15 (When "the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it."); *Smith* v. *Secretary of New Mexico Dep't of Corr.*, 50 F.3d 801, 830 (10th Cir. 1995) (*Brady* obligation encompasses information "would also have been useful in discredit[ing] the caliber of the investigation") (internal citation and quotation omitted) (alteration in original).

telling that, although the crime laboratory errors and problems documented above occurred almost exclusively in criminal prosecutions, they were uncovered largely outside of the criminal trial process. Often long after the fact, the unreliability of laboratory test results and reports relied on in criminal trials was brought to light by media exposés, civil suits and post-conviction proceedings that afforded meaningful discovery, whistleblowers, and innocence commissions examining the causes of wrongful convictions. See App. of Crime Lab Failures.

Even in the smaller subset of cases under *Roberts* where it was deemed necessary, in-court confrontation revealed laboratory errors and problems, thus demonstrating the very efficacy of adversarial testing to "beat[ ] and bolt[ ] out the Truth." *Crawford*, 541 U.S. at 62 (internal citation and quotation omitted). The cross-examination of a police chemist about her testing of blood evidence in a Baltimore County, Maryland case is illustrative. The chemist acknowledged that "she did not understand the science behind many of the tests that she performed," and "she did not perform a number of standard tests on the blood samples in the case." Stephanie Hanes, *Chemist Quit Crime Lab Job After Hearing, Papers Show; She Acknowledged Report Was 'Worthless' In 1987,* BALT. SUN, Mar. 19, 2003, at B1. She also "agreed that other tests she had completed were useless" and "acknowledged that she had failed to record the results of some testing steps needed to ensure accuracy in blood typing." *Id.* Finally, she acknowledged at the conclusion of cross that, "as a result of all this" "there [wa]s not one finding, one result in this report that [wa]s usable" and that her "entire report . . . [her] entire analysis

[wa]s absolutely worthless." *Id.*[8] Cross-examination had similarly beneficial results in *Ragland* v. *Kentucky*, 191 S.W.3d 569, 581 (Ky. 2006), where an FBI bullet lead composition analyst was caught in a lie by defense counsel on cross-examination, confronted with her earlier statements, and eventually forced to admit that her prior statements were false. Later, the analyst admitted, "[i]t was *only after the cross-examination at trial* that I knew I had to address the consequences of my actions." *Id.* (emphasis added).

The errors and failures of forensic evidence detailed above expose the bankruptcy of the argument that confrontation is unnecessary in the area of forensic science because of its inherent reliability. They also demonstrate how concerns about the "cost" of presenting live-witness testimony by forensic examiners are, at best, penny-wise and pound-foolish. Time away from the laboratory and transportation to the courthouse are not the only costs implicated. There are also real costs to a suspension of confrontation: wrongful convictions, attendant civil suits, loss of public trust, and, in some cases, the failure to apprehend the true perpetrator. See *In Re Investigation of West Virginia State Police Crime Lab., Serology Div.*, 438 S.E.2d 501, 508 (W.Va. 1993) (systemic forensic failures "stain our judicial system and mock the ideal of justice under [the] law"). The recent and extensive history of laboratory errors and failures demonstrates why it is critical for this Court

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[8] This chemist also tested blood evidence in DNA-exoneree Bernard Webster's case, but the prosecutor opted not to call her as a witness because he "didn't want to complicate" the case by allowing the defense to conduct what he anticipated would have been "a nasty cross-examination." Hanes, *Chemist Quit Crime Lab, supra.*

to determine post-*Crawford*, whether state forensic examiner evidence is testimonial and thus subject to the traditional strictures of the confrontation clause, a question this Court should expressly answer in the affirmative.

CONCLUSION

For all the reasons set forth above, the Petition should be granted.

Respectfully submitted,

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