No. 07-591

IN THE

Supreme Court of the United States

LUIS E. MELENDEZ-DIAZ,

Petitioner,

v.

MASSACHUSETTS,

Respondent.

On Writ of Certiorari
to the Appeals Court of Massachusetts

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ASSOCIATION OF FEDERAL DEFENDERS, AND NATIONAL COLLEGE FOR DUI DEFENSE IN SUPPORT OF PETITIONER

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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*[1]

Amicus curiae the National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation of more than 10,000 attorneys and 28,000 affiliate members in all 50 States. The American Bar Association ("ABA") recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

Founded in 1958, NACDL promotes research in the field of criminal law, disseminates and advances knowledge relevant to that field, and encourages integrity, independence, and expertise in criminal defense practice. NACDL works tirelessly to ensure the proper administration of justice, an objective that this case directly impacts in light of its overarching importance to ensuring that criminal convictions are accurate and based upon reliable forensic evidence. NACDL's membership has long relied upon cross-examination as one of the vital means of ensuring accuracy. As such, NACDL is uniquely qualified to offer assistance to this Court in this matter.

Amicus curiae, the National Association of Federal Defenders ("NAFD"), was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, nonprofit, volunteer organization whose membership includes attorneys who work for federal public and community defender organizations authorized under the Criminal Justice

[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation of this brief.

Act. One of the guiding principles of the Association is to promote the fair adjudication of justice by appearing as *amicus curiae* in litigation relating to criminal-law issues, particularly as those issues affect indigent defendants in federal court. The Association has appeared as *amicus curiae* in litigation before the Supreme Court and the federal courts of appeals. The Association joins in this brief because of the importance to its members of the issues presented by this case. Convictions in federal court routinely rest on documents such as laboratory chemical reports and other reports regarding matters ranging from ballistics analyses to the results of medical tests. NAFD is therefore uniquely qualified to address the importance of subjecting these reports to thorough cross-examination.

Amicus curiae the National College for DUI Defense is a non-profit professional organization with approximately 850 members, specializing in issues related to the defense of persons charged with driving under the influence.

SUMMARY OF ARGUMENT

Attorneys for criminal defendants, like *amici*, are persistently forced to contend with the automatic admission of laboratory or other forensic reports, upon which much of the government's case rests. Prepared at the behest of law enforcement, these forensic reports are used to establish critical facts, including the identification of a defendant through fingerprint or DNA analysis, and the identification of a weapon used in a crime through ballistics analysis. In drug case such as this one, a forensic analysis is the sole means by which to prove the contraband nature of the substance, along with its type and quantity. Such critical facts can establish not only a

defendant's guilt, but also the range of punishment to which the defendant is exposed.

To be certain, only a limited number of criminal proceedings will ever involve contested expert testimony. See Br. of *Amicus Curiae* Law Professors in Supp. of Pet. But in those few cases where a defendant seeks to challenge the accuracy of forensic evidence, that evidence, as with all other forms of testimony, must be subject to the adversary process, including cross-examination of a forensic examiner.

In this case, the Commonwealth of Massachusetts secured a conviction against Petitioner by relying on forensic chemical reports that were prepared in anticipation of litigation and that purported to establish that Petitioner possessed a certain quantity of cocaine. Despite indications that the forensic reports were unreliable, Petitioner was never afforded the opportunity to cross-examine the forensic examiners about the bases of their conclusions regarding the type and quantity of drug. The jury was instructed that the laboratory reports alone permitted it to conclude the seized bags contained cocaine. It found Petitioner guilty of distributing and trafficking in cocaine.

Permitting convictions on the basis of evidence that is untested by the crucible of cross-examination plainly flouts the Sixth Amendment guarantee that a criminal defendant be "confronted with the witnesses against him," and is contrary to this Court's decisions in *Crawford* v. *Washington*, 541 U.S. 36 (2004), and *Davis* v. *Washington,* 547 U.S. 813 (2006). See Merits Br. of Pet'r at 13-18. Admitting laboratory reports like these subverts the Confrontation Clause's mission "to advance . . . the accuracy of the truth-determining process in criminal trials." *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970) (plurality opinion).

To avoid errors and falsifications, the Government should be required to provide the defense with an opportunity to cross-examine live witnesses who present this evidence. The prospect of cross-examination will provide a powerful incentive for witnesses to exercise more care in preparing forensic documents and in giving testimony before and during trial. The prospect of cross-examination will also encourage prosecutors to thoroughly vet their cases, cautiously collect forensic evidence, and closely examine error rates. Finally, cross-examination will serve as an invaluable aid to the jury in its role as trier of fact.

ARGUMENT

I. THE CONFRONTATION CLAUSE ENSURES THE RELIABILITY OF FORENSIC REPORTS.

The cornerstone of just criminal process is truth. It is for this purpose that the Confrontation Clause exists. But far from being a lofty guarantee of truth, the Confrontation Clause grants a defendant a procedural right to test the reliability of evidence in a particular manner: through "testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61-62. It reflects the Framers' practical judgment "about how reliability can best be determined," *id.*, at a criminal trial, i.e., "by subjecting" that evidence "to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland* v. *Craig*, 497 U.S. 836, 845 (1990). As this Court has observed, "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials." *Dutton*, 400 U.S. at 89.

These procedural guarantees—i.e., requiring accusers to both appear in court before the defendant and to subject themselves to the defendant's questions—are practical aids for determining the truth. In particular, the Confrontation Clause enhances the reliability of the fact-finding process by serving two key interests: the need to encourage witnesses to carefully prepare their testimony and the need to give the Government an important incentive to vet its cases and its evidence. Both interests are implicated when the challenged hearsay evidence is laboratory reports.

The very possibility of confrontation encourages witnesses to more carefully prepare their testimony for trial and to be able to defend their viewpoint. To be sure, even with cross-examination, there will always be witnesses who lie or withhold information that might have exposed their testimony as falsely premised or unreliable. Nevertheless, the potential for confrontation, of having to defend one's statement before a jury and a defendant, makes such dissembling less likely, because it taps into "something deep in human nature" that makes lying about the deeds of another more difficult when said "'to his face' than 'behind his back.'" *Coy* v. *Iowa*, 487 U.S. 1012, 1017-20 (1988); see also *Mattox* v. *United States*, 156 U.S. 237, 242-43 (1895) (observing that "the primary object" of the Confrontation Clause is to afford the "accused . . . an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief"); *Broad. Music, Inc.* v. *Havana Madrid Rest. Corp.*, 175 F.2d 77, 80 (2d Cir. 1949)

("The liar's story may seem uncontradicted to one who merely reads it, yet it may be contradicted . . . by his manner . . . which cold print does not preserve." (internal quotations omitted)) (Frank, J.). As defense lawyers keenly understand, witnesses anticipating possible cross-examination tend to think twice before engaging in overstatement or omission, to avoid being embarrassed or impeached.

Inculpatory written reports, on the other hand, cannot be persuaded to tell the truth. Without the promise that the experts who prepared them will be subject to cross-examination, written statements can easily contain misrepresentations, omissions, fabrications, or mistakes. Indeed, it was the Framers' distrust of written documents—*ex parte* written affidavits in criminal proceedings—that led to the adoption of the Confrontation Clause. See *California* v. *Green*, 399 U.S. 149, 156 (1970) ("[T]he particular vice that gave impetus to the confrontation clause was the practice of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions secured by the examining [English] magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact.").[2]

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[2] *See also Lilly* v. *Virginia*, 527 U.S. 116, 124 (1999) (plurality opinion) (referring to the "'particular abuse [of] prosecuting a defendant through the presentation of *ex parte* affidavits'"); *White* v. *Illinois*, 502 U.S. 346, 362 (1992) (Thomas, J., concurring) (stating "the primary purpose of the [Confrontation] Clause was to prevent the abuses that had occurred in England"); *Mattox*, 156 U.S. at 242 ("The primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . . .").

As one prominent Anti-Federalist put it, "'[w]ritten evidence . . . [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth.'" *Crawford*, 541 U.S. at 49 (omission and second alteration in original) (quoting R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787)). This historical distrust of *ex parte* written testimony has a practical foundation: An "artful or careless scribe" may "make a witness speak what he never meant." 3 William Blackstone, *Commentaries on the Laws of England* *373 (1768). By contrast, "many times the very Manner of a Witness's delivering his Testimony will give a probable Indication whether he speaks truly or falsely." Mathew Hale, *The History And Analysis of the Common Law of England* 257-58 (1713). These past observations are no less true now in the daily practice of criminal law. Requiring witnesses to physically face a defendant yields far more careful and reliable testimony than the proffer of those merely writing letters to distant courts about faceless defendants.

Despite the patina of reliability that science can sometimes lend them, forensic laboratory reports are as susceptible to unreliability as the *ex parte* affidavits the Confrontation Clause was designed to prohibit. Forensic analysis remains a product of human discretion and judgment that is no less prone to inaccuracy than other forms of evidence. As a practical matter, forensic testing errors can be caused by sample contamination, lack of a proper laboratory protocol or methodology, failure to follow that protocol, lapses in the chain of custody, changes in the science governing the test, or the carelessness of a technician. See *United States* v. *Washington*, 498 F.3d 225, 235 (4th Cir. 2007) (Michael, J., dissenting), *petition for cert. filed*, No. 07-8291 (U.S. Dec. 14, 2007); see

also *United States* v. *Davis*, 14 M.J. 847, 848 n.3 (A.C.M.R. 1982); Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 499-500 (2006) ("Deficient laboratory procedures [and i]nstitutional management failures [by] . . . supervisors, who 'may have ignored or concealed complaints of his misconduct,' produce institutional outcome failures.") (citing *In re Investigation of W. Va. State Police Crime Lab., Serology Div.*, 438 S.E.2d 501, 504 (W. Va. 1993)).

Moreover, "on rare occasions laboratory technicians have 'engage[d] in long-term systematic, and deliberate falsification of evidence in criminal cases.'" *Washington*, 498 F.3d at 235 (Michael, J., dissenting) (alteration in original) (quoting Metzger, *supra*, at 499); see also *In Re Investigation of W. Va. State Police Crime Lab., Serology Div.*, 438 S.E.2d at 508 (systemic forensic failures "stain our judicial system and mock the ideal of justice under [the] law"). Indeed, forensic laboratories are not even required to maintain accreditation with a standard-bearing organization, such as the American Society of Crime Laboratory Directors. Here, Petitioner's forensic analysis was *not* performed by an accredited laboratory. Because the forensic analyst who prepared the report was not present for cross-examination, Petitioner could not even inquire about this and other deficiencies.

Without cross-examination, the defense has no opportunity to meaningfully probe the reliability of forensic evidence before the fact-finder. As a result, the prosecution and fact-finder may rely on faulty or inadequately founded conclusions of a forensic analyst. Absent potential cross-examination, the prosecution has less incentive and less expertise to independently probe the scientific bases and methodological underpinnings of forensic conclusions.

Without thorough adversarial testing, these questions and possible errors have little chance of coming to light.

Defense counsel's cross-examination may force a forensic analyst to explain methodology and reveal problems or errors that might otherwise remain undisclosed. *Washington*, 498 F.3d at 235 (Michael, J., dissenting) (noting that the "best way to expose errors or falsification in testing is through cross-examination of the laboratory technician."). A technician may be asked to explain on the record the laboratory protocols for various tests, toward revealing not only any flaws in the routine protocol but a possible failure in its application.

As an illustration, drug weight is typically calculated by including any "mixture or substance" containing a detectible amount of the drug. See *Chapman* v. *United States*, 500 U.S. 453, 461 (1991); cf. United States Sentencing Guidelines Manual § 2D1.1(c), n.A (2008). However, several circuits have since held that materials which must be sorted or eliminated before the drug can be used may not be included in the overall weight measurement. See *United States* v. *Stewart*, 361 F.3d 373, 377-79 (7th Cir. 2004). Thus, for example, excess moisture content of fresh marijuana cannot be included in the weight calculation because that marijuana must be dried prior to use. Accordingly, defense counsel could ask a forensic analyst whether the laboratory accounted for possible excess moisture or whether the sample was dried out to avoid an inflation of drug quantity. See *United States* v. *Campbell*, 295 F.3d 398, 401 (3d Cir. 2002) (observing that, when defense counsel was given opportunity to cross-examine lab chemist, counsel asked whether excess moisture could have affected weight calculation); see also

Davis, 14 M.J. at 848 n.3 ("The defense may further wish to ask what other substances were used in the sample and how those would affect a true test reaction.").

More generally, a forensic analyst may be asked to explain those procedures used to avoid mistakes or minimize the margins of error, including whether particular testing procedures are repeated on different equipment. *Id.* (cross-examination "may reveal the possibility of laboratory error due to the carelessness of the chemist sharing a limited area with others and due to the large numbers of samples being tested."). This line of inquiry is particularly critical in those cases where defects in the forensic analysis may be the defendant's only opportunity to demonstrate reasonable doubt as to guilt or to the level of offense.

Cross-examination not only enhances the reliability of evidence through its effect on witnesses, it serves as a critical *ex ante* incentive for the government to carefully vet the cases it seeks to prosecute. Absent cross-examination, prosecutors may rely exclusively on curt or conclusory forensic certificates, or try to prove an essential element of the crime by merely "waving an official-looking paper that says so before the jury." Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After* Crawford v. Washington, 15 J.L. & Pol'y 791, 798 (2007). Because forensic analysis is often the pivotal piece of evidence in modern criminal prosecutions, prosecutors anticipating cross-examination of the forensic examiner will look preemptively for weaknesses in their witnesses' testimony. With finite time and resources, prosecutors will be disinclined to spend time on cases with little chance of success owing to unreliable forensic evidence. *Id.* at 801. For this

reason as well, the Confrontation Clause ensures the reliability of evidence at trial.

II. CROSS-EXAMINATION IS CRITICALLY IMPORTANT FOR THE JURY'S ROLE AS TRIER-OF-FACT.

Viewing live testimony and seeing that testimony tested on cross-examination are critical means by which a jury evaluates the evidence before it. See *Green*, 399 U.S. at 161.

Seeing and hearing *how* a live witness responds to questions is essential to the fact-finding process. Indeed, live observation may sometimes be as important as the answers themselves. Cross-examination may raise and answer questions that the fact-finder might ask herself in her efforts to reconsider and weigh conflicting evidence. As this Court observed with respect to psychiatric experts, the adversary process serves to aid a jury "sort out the reliable from the unreliable evidence." *Barefoot* v. *Estelle*, 463 U.S. 880, 901 (1983), *superseded on other grounds by statute*, Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2253, *as recognized in Slack* v. *McDaniel*, 529 U.S. 473 (2000). This is no less true with forensic laboratory reports. See Merits Br. of Pet'r at 31-33 (discussing error rates and the seventeen different methods of testing substances); see also *Barefoot*, 463 U.S. at 902 ("'[I]t is a fundamental premise of our entire system of criminal jurisprudence that the purpose of the jury is to sort out the true testimony from the false, the important matters from the unimportant matters, and, when called upon to do so, to give greater credence to one party's expert witnesses than another's.'"). Indeed, for these reasons, failing to give the fact-finder the opportunity to assess, by face-to-face encounter, a witness's credibility "calls into question the ultimate

integrity of the fact-finding process." *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973) (internal quotations omitted).

The Commonwealth's response—that the fact-finder is "free to disregard the certificates of analysis entirely," Br. in Opp'n at 1—is, practically speaking, no solution at all. This view misapprehends the undeserved authority a jury frequently attaches to a forensic report. "Since laboratory reports only state general conclusions, they may be given far more significance in court than they rightfully deserve." *Davis*, 14 M.J. at 848 n.3.

Indeed, this Court has prohibited the admission of written statements in a joint trial even when the jury was similarly and directly instructed to disregard an accomplice's confession when considering the defendant's guilt. See *Bruton* v. *United States*, 391 U.S. 123 (1968). Regardless of its wording, an instruction is no substitute for live testimony, subject to cross-examination before the jury. Instructing the jury regarding the weight it may give a report does nothing to promote the fact-finder's ability to evaluate the reliability of such evidence, because the very factors upon which reliability is based are absent. *Crawford*, 541 U.S. at 50-52.

* * * * *

Guaranteeing criminal defendants the right to cross-examine forensic examiners would not require that the right be exercised in connection with every use of a laboratory report. Although most defendants would not choose to exercise this right, see *Washington*, 498 F.3d at 235 (Michael, J., dissenting), cross-examination of laboratory technicians would, as in Petitioner's case, provide an essential tool for assessing the reliability of evidence. The mere

prospect and occasional use of cross-examination would improve the reliability of forensic evidence by serving as a prophylactic incentive to forensic analysts and prosecutors alike, and would improve the reliability of forensic evidence. For more than two hundred years, the right to cross-examine has served as an "engine of truth," driving criminal trials towards more accurate results. Given the central role forensic science has come to play in cases like this one, that right must extend to forensic reports.

CONCLUSION

For the foregoing reasons, as well as those stated in Petitioner's Brief, the judgment below should be reversed.

Respectfully Submitted,

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