No. 05-824

In The
Supreme Court of the United States

JOSEPH E. NAPIER,

Petitioner,

v.

INDIANA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Indiana First District

BRIEF *AMICUS CURIAE* OF NATIONAL COLLEGE FOR DUI DEFENSE IN SUPPORT OF PETITION OF JOSEPH E. NAPIER

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QUESTION PRESENTED

WHETHER INDIANA'S PROCEDURE IN DRUNK DRIVING CASES, WHICH PERMITS THE ADMISSION AGAINST THE DEFENDANT OF A LETTER OF CERTIFICATION AND A BREATH TEST EVIDENCE TICKET WITHOUT THE OPPORTUNITY FOR CROSS-EXAMINATION, VIOLATES THE CONFRONTATION CLAUSE?

LIST OF INTERESTED PARTIES

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National College for DUI Defense is a non-profit professional organization founded in 1995. The mission of the College includes assisting its members in the defense of their clients charged with drinking and driving offenses and the advancement of liberty through constitutional advocacy. The College has approximately 700 members throughout the United States and 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 College's Summer Program has been continuously presented at the facilities at Harvard Law School since 1996. Winter Sessions have been given every year since 1997. The College also co-sponsors training and educational seminars with the National Association of Criminal Defense Lawyers and the Texas Criminal Defense Lawyers' Association.

The National College for DUI Defense believes that the Confrontation Clause issue raised by Napier's Petition is extremely important due to the unsettled state of the law, the numerous conflicting reported decisions, and the frequency with which this issue occurs in trial courts nationwide. This Court should grant the Petition, reverse the Indiana Court of Appeals, and hold that defendants such as Napier have a Sixth

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Amendment right to cross-examine the technicians and police officers who inspect, test, and operate breath test machines.

REASON FOR GRANTING THE WRIT

INDIANA'S PROCEDURE IN DRUNK DRIVING CASES, WHICH PERMITS THE ADMISSION AGAINST THE DEFENDANT OF A LETTER OF CERTIFICATION AND A BREATH TEST EVIDENCE TICKET WITHOUT THE OPPORTUNITY FOR CROSS-EXAMINATION, VIOLATES THE CONFRONTATION CLAUSE

SUMMARY OF ARGUMENT

The Supreme Court, in *Crawford v. Washington*, 541 U.S. 36 (2004), stated a new rule to determine when and whether the admission of hearsay at a trial violates the Sixth Amendment Confrontation Clause. If the hearsay is "testimonial" it may only be admitted if the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness. Otherwise the witness must be present and subject to cross-examination. As a result of *Crawford*, many courts have had to reexamine previously well-settled law concerning admission of hearsay. In drunk driving cases, there are two types of witnesses who have testimony to offer relevant to the admission of breath and blood alcohol test results. The first kind of witness is usually an officer who administers a breath test, a nurse who draws blood directly from the defendant, or chemist who personally tests the defendant's blood and completes an affidavit detailing what he did or signs a print out or other document bearing test results. The second kind of

witness is the person who examines, tests, and in many jurisdictions, certifies the equipment used in the breath or blood test and prepares an affidavit so stating. This brief will collectively refer to these witnesses as "breath and blood test technicians." This brief argues that both kinds of statements are "testimonial," because: they qualify under general formulations of "testimonial" discussed in *Crawford*, 541 U.S. at 51-52; there is a historical basis for considering these statements to be testimonial, i.e., they are more analogous to coroner statements than mere business records because blood and breath testing is done for purposes of litigation; the better reasoned lower court cases hold that breath and blood technician statements are not "testimonial"; there is a need to cross-examine the breath and blood test technicians in order to challenge the accuracy and reliability of the test result; this Court's due process cases have assumed the ability to cross-examine these witnesses; and cases and news stories contain numerous examples of incompetence, neglect, accident, and fraud, with respect to scientific evidence, which could only be fully uncovered with the aid of cross-examination. Therefore, *Crawford* requires the presence of these witnesses in court for cross-examination, in the absence of unavailability and a prior opportunity to cross-examine, in order for test results to be admitted in evidence.

In *Napier v. State*, 827 N.E.2d 565 (Ind.App. 2005), the Indiana Court of Appeals affirmed a conviction for driving under the influence *per se*,[2] where both an inspection certificate and breath test printout were allowed in

[2] The under the influence *per se* statute under which Napier was convicted prohibits driving with a breath alcohol content of .08 or more and less than .15 grams per 210 liters of breath. Ind. Code § 9-30-5-1(a).

evidence without any opportunity for cross-examination.[3] Because the issue presented by Napier's case is an issue that is litigated frequently in drunk driving cases nationwide with conflicting results, and is not likely to be resolved by the *Crawford* cases this Court has already agreed to review, the Petition for a Writ of Certiorari should be granted.

I. *Crawford v. Washington* requires the statements of breath and blood test technicians to be considered testimonial

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court determined that the admission of "testimonial" hearsay at a trial violates the Sixth Amendment Confrontation Clause unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness, and overruled *Ohio v. Roberts*, 448 U.S. 56 (1980) with respect to testimonial statements. The Court noted that the Framers did not intend for the reliability of a statement to be determined preliminarily by judges, but rather to be made by fact-finders after being tested through cross-examination, *Crawford*, at 61-62, and that other courts had made preliminary reliability determinations under *Roberts* inconsistently and incorrectly. *Id*. at 62-64. The rule in *Roberts*, that a statement admitted under a hearsay exception would not violate the Confrontation Clause if the statement bore adequate indicia of reliability either because the exception was "firmly rooted" or

[3] Napier stipulated to the qualifications of the breath test operator and that he followed the required procedures, but objected to the admission of the breath test printout without an opportunity to cross-examine the operator.

the statement had "particularized guarantees of trustworthiness," remained viable insofar as non-testimonial hearsay was concerned. *Id.* at 68.

While *Crawford* did not define the term "testimonial," it did offer some examples of possible definitions.

> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v. Illinois*, 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition-for example, *ex parte* testimony at a preliminary hearing.

Crawford, at 51-52. The Court also gave other specific examples of kinds of statements that historically either were or were not "testimonial." For example, it noted that coroner statements were not allowed in American courts.

Id. at 47, 49. Police interrogations, the kind of statements at issue in *Crawford*, fall well within any definition of the term "testimonial." *Id*. at 52-53. On the other hand, the Court said that "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial - - for example, business records or statements in furtherance of a conspiracy." *Id*. at 56.

Using these definitions and examples as a guide, affidavits or statements of breath and blood test technicians must be considered to be testimonial. Statements of breath and blood test technicians qualify under all of the formulations referred to by the Court, "'affidavits . . . that the defendant was unable to cross-examine . . . that declarants would reasonably expect to be used prosecutorially,'" "'formalized testimonial materials, such as affidavits,'" and "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Crawford*, at 51-52. With reference to the Court's specific kinds of statements, affidavits of breath and blood technicians are also more analogous to coroner statements than mere business records because they are scientific in nature, and are prepared by the police or state employees pursuant to statute and regulation for use in litigation against the defendant in criminal cases. Only through cross-examination may the defendant uncover mistakes or error in the administration of these tests and the preparation of these reports.

II. The better reasoned cases consider statements of breath and blood test technicians to be "testimonial"

The lower courts are divided on the question presented here: whether the affidavits or statements of

breath and blood test technicians are testimonial. The decisions turn generally on whether the court finds the statement to be a mere business record. For example in the following cases, courts have found statements of blood and breath test technicians to be testimonial. *Las Vegas v. Walsh*, 124 P.3d 203 (Nev. 2005) (nurse who withdrew blood was a testimonial witness, but statute requiring proffer of dispute with testimony prior to confronting witness did not violate Confrontation Clause); *Shiver v. State*, 900 So.2d 615, 618 (Fla. App. 2005) (affidavit prepared by officer that stated that breath test instrument was properly calibrated constituted testimonial hearsay evidence); *Belvin v. State*, ___ So.2d ___, 2005 WL 1336497 (Fla. App. 4th Dist. June 8, 2005) (breath technician's affidavit held to be testimonial). Other courts have reached a similar conclusion regarding affidavits or statements of technicians in drug and other criminal cases. *E.g.*, *People v. McClanahan*, 729 N.E.2d 470 (Ill. 2000) (pre-*Crawford* decision holding Illinois provision allowing drug report in evidence without showing of unavailability of technician violated the Confrontation Clause); *People v. Rogers*, 780 N.Y.S.2d 393 (N.Y.App.Div. 2004) (blood alcohol result of alleged sexual assault victim inadmissible because defendant had right to cross-examine witnesses regarding authenticity of sample and cross-examine regarding the testing methodology); *Johnson v. State*, ___ So.2d ___, 2005 WL 2138714 (Fla.Dist.Ct.App. Sept. 7, 2005) (law enforcement officer who performed lab test on alleged cocaine); *Commonwealth v. Carter*, 861 A.2d 957, 969 (Pa. Super.Ct. 2004) (lab report identifying a confiscated substance as cocaine constituted inadmissible hearsay and its admission violated defendant's right to confront witnesses against him "when the court admitted

the lab report without the testimony of the forensic scientist who performed the mechanics of the testing and prepared the report"); *cf.*, *People v. Hernandez*, 794 N.Y.S.2d 788, 789 (N.Y.Sup.Ct. 2005), (latent fingerprint report is testimonial, though it is a business record, because the fingerprints "were taken with the ultimate goal of apprehending and successfully prosecuting a defendant").

Other courts have reached the opposite conclusion, that such reports, affidavits or statements are business records and therefore non-testimonial, admissible hearsay. *People v. Johnson*, 18 Cal.Rptr.3d 230 (Cal.Ct.App. 2004) (laboratory reports); *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005) (laboratory report on weight of cocaine); *State v. Dedman*, 102 P.3d 628 (N.M. 2004) (blood alcohol content reports); *People v. Brown*, 801 N.Y.S.2d 709 (N.Y.Sup.Ct. 2005) (DNA testing records); *People v. Kanhai*, 8 Misc.3d 447, 797 N.Y.S.2d 870 (N.Y.Crim.Ct. 2005) (breathalyzer test results); *People v. Durio*, 794 N.Y.S.2d 863 (N.Y.Sup.Ct. 2005) (autopsy reports); *Moreno Denoso v. State*, 156 S.W.3d 166 (Tex.App. 2005) (autopsy reports); *Luginbyhl v. Commonwealth*, 618 S.E.2d 347 (Va.App. 2005) (report from breathalyzer machine and technician's certificate of calibration were business records).[4]

The cases holding that such technical affidavits and statements are testimonial are more persuasive for a

[4] This Court has recently accepted two cases for argument to resolve another *Crawford* issue, whether 911 calls are testimonial. *Hammon v. Indiana*, ___ U.S. ___, 126 S.Ct. 552 (2005); *Davis v. Washington*, ___ U.S. ___, 126 S.Ct. 547 (2005). These cases, dealing with the excited utterance exception to the rule against hearsay, are unlikely to resolve the issue presented by Napier.

number of reasons. As noted above, these cases are consistent with *Crawford's* proposed formulations of testimonial hearsay, as well as the historical practice in this country of excluding coroner statements. Breath and blood test technician statements are prepared pursuant to statute and regulation *solely* for the purpose of litigation in criminal cases. Additionally, in drunk driving cases, where the allegation is a violation of a driving under the influence per se statute, the test is quantitative, as opposed to qualitative, and the result constitutes the sole evidence of an element of the offense. In fact, assuming the defendant can be shown to have been driving, the test result essentially *is* the offense. Furthermore, due to the nature of blood and breath testing, there are many issues relating to the accuracy and reliability of the test result which are relevant to admissibility and/or weight of the evidence and which constitute fertile ground for cross-examination.[5] In

[5] These issues are more fully set forth in Section III of this Argument, *infra*. Drunk driving cases are typically comprised of the observations of witnesses, usually police officers, standardized and/or unstandardized field sobriety tests, and a breath test. This evidence is often inherently unreliable, subjective and can be difficult to defend against. The observational evidence is often susceptible to more than one interpretation, consistent with both guilt and innocence. One case analyzing evidence often offered in drunk driving cases, the National Highway Traffic Safety Administration's (NHTSA) standardized field sobriety tests, is *United States v. Horn*, 185 F.Supp.2d 530 (D.Md. 2002). The United States District Court for the District of Maryland comprehensively analyzed these "tests," not as scientific tests, but as involving "technical or other specialized knowledge" under the Federal Rules of Evidence, Rule 702, and concluded that they were too unreliable to satisfy *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Judged against a .10 blood alcohol concentration (BAC) limit, the false positive arrest rates for horizontal gaze nystagmus, walk and turn, and one leg stand, according to NHTSA's own studies were 47% in a 1977 study and 32% in a 1981 Final Report. The *Horn* opinion also considered testimony that field validation studies, for the standardized

(Continued on following page)

order to challenge the accuracy and reliability of any test, the defendant must be able to fully cross-examine the blood and breath technicians.

III. There is a need to cross-examine the breath and blood test technicians in order to challenge the accuracy and reliability of the test result

All alcohol breath testing programs have common foundational elements that must be proven in order for a test result to be admitted in evidence. Many states also have unique statutory or regulatory prerequisites that must be satisfied for a test result to be admitted in evidence. *E.g.*, *State v. Ripple*, 637 N.E.2d 304 (Oh. 1994) (required regulations not enacted); *State v. Tanner*, 457 So.2d 1172 (La. 1984) (regulations did not comply with statute). Conversely, problems with any of these elements can form the basis for an admissibility or weight attack by the defendant. The foundation is necessary to show the test result is accurate and the process by which it was obtained reliable. The extent to which the blood or breath test technician has adhered to common or state specific foundational requirements is always fertile ground for cross-examination.

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field sobriety tests at lower BAC limits were "scientifically unacceptable," because of a high number of unsafe drivers tested, the lack of controls, and multiple variables affecting the arrest decisions. *State v. Lasworth*, 42 P.3d 844 (N.M.App. 2001). Given the highly unreliable nature of this observational evidence, it is critical that a suspect be given a reasonable and realistic opportunity to cross-examine the breath and blood test technicians in order to receive a fair trial.

Many states require breath testing equipment to be approved by the Department of Transportation and/or by a qualified individual who is required by statute or regulation to select the equipment used. *E.g.*, Alaska Stat. § 28.35.033(d); Georgia Code Ann., § 40-6-392(a)(1)(A); Md. Code Ann., Cts. & Jud. Proc. Art. § 10-304(b); Wis. Admin. Code § Trans. 311.04(1); *see*, Conforming Products List of Evidential Breath Measurement Devices, 38 Fed. Reg. 30459, 39 Fed. Reg. 41399, 49 Fed. Reg. 48854, 49 Fed. Reg. 48864, 58 Fed. Reg. 48705, 62 Fed. Reg. 62091, 67 Fed. Reg. 62091, 69 Fed. Reg. 42237. Often statutes or regulations specify procedures that must be adhered to in order for an approval to be issued. *See*, *e.g.*, *Ex parte Mayo*, 652 So.2d 201 (Ala. 1994) (regulations approved by wrong agency); *Manning v. Dept. of Pub. Safety*, 71 P.3d 527 (Ok. Civ. App. 2003) (machine not approved).

In addition to requiring compliance with certain protocols before these breath test devices are used evidentially, many states, like Indiana, have provisions allowing a certificate of the person who certifies the machine to be entered in evidence without the person appearing personally in court *E.g.*, Ind. Code Ann. § 9-30-6-5(c)(1) and (2); Georgia Code Ann., § 40-6-392(f); Md. Code Ann., Cts. & Jud. Proc. Art. § 10-304(d). The validity of these statutes is now in question as a result of *Crawford*.

All breath testing programs require a calibration of the test equipment using a known standard reference solution. The standard reference solution (or dry gas) is or should be traceable to a standard from the National Institute of Standards and Technology (NIST) or some comparable standard (traceable to NIST) tested at precisely 34°C as measured by a thermometer which should also be traceable to NIST. *City of Seattle v. Clark-Munoz*,

93 P.3d 141 (Wash. 2004). If the temperature of the standards is off at the time the instrument is calibrated, erroneous readings of defendant's breath could result. Possible subjects for cross-examination include whether the equipment was properly tested and checked, whether the solutions were properly tested and checked, and whether the solutions and thermometers are traceable to NIST. Additionally, cross-examination can be focused on determining whether any aspect of the calibration, maintenance or testing of the equipment has been marred by incompetence, negligence, accident, or fraud.

All breath test devices contain computer programs which must accurately convert electrical impulses into a measurement of alcohol. The nature and adequacy of the computer programs are also fruit for cross-examination. Currently, manufacturers are refusing to disclose the source codes for the computer software, even in the face of court orders. *See*, Lauren Etter, *Florida Standoff on Breath Tests Could Curb Many DUI Convictions*, Wall Street Journal, Dec. 16, 2005, A1; Geri L. Dreiling, *Dui-Test Fight Blows Through Florida: Defendants Demand Access to Device's Software Code*, ABA Journal Report, Nov. 18, 2005, available at http://www.abanet.org/journal/ereport/n18breath.html.

The tests themselves require the operator to closely observe the testee for fifteen or twenty minutes to make sure the person does not eat or drink anything or regurgitate or belch. *State v. Baker*, 355 P.2d 806 (Wash. 1960) (observation was for fourteen minutes, test suppressed); *State v. Korsakov*, 34 S.W.3d 534 (Tenn.Crim.App. 2000) (officer was doing paperwork, observation insufficient); *State v. McCaslin*, 894 S.W.2d 310 (Tenn.Crim.App. 1994) (officer watching defendant in back seat of patrol car while

driving to the police station did not qualify as proper observation). Otherwise the breath sample may be contaminated by mouth alcohol which can result in a false high reading. M. Mason & K. Dubowski, *Breath as a Specimen for Analysis for Ethanol and Other Low-Molecular-Weight Alcohols*, Medical-Legal Aspects of Alcohol 177, 180 (James C. Garriott ed., 4th ed. 2003). Cross-examining the breath test officer about his diligence in observing the defendant is often a fruitful area for cross-examination. Additionally, if the defendant has gastroesophogeal reflux disease (GERD), dentures, or mouth jewelry observed by the officer, a defense to admissibility or weight may be generated which could be explored on cross-examination. *E.g.*, A.W. Jones, *Reflections on the GERD Defense*, DWI Journal: Law & Science, 3 (Sept. 2005); *People v. Bonutti*, 788 N.E.2d 331 (Ill.App. 2003) (affirming suppression of the breath test where the defendant suffered from GERD). The test protocols usually include testing at 34°C of a control sample that should be traceable to NIST. K.M. Dubowski, *Quality Assurance in Breath-Alcohol Analysis*, 18 Journal of Analytical Toxicology 306, 310 (Oct. 1994). Finally, most states require the state to prove the officer administering the test is properly trained and certified in the use of the equipment. Wis. Admin. Code § Trans. 311.08; Md. Code Ann., Cts. & Jud. Proc. Art. § 10-304(b).

Even assuming breath and blood test technicians are able to establish compliance with all of the necessary prerequisites for a test result to be admitted in evidence, there are many other issues that might be raised in cross-examination of breath and blood test technicians which are within the training and knowledge of these witnesses and could affect the weight the factfinder gives to the test

result. Breath tests constitute evidence that is questioned by many scientists. Scientific studies indicate that breath testing for alcohol is an unreliable way to determine blood alcohol content if the person has not fully absorbed the alcohol into their system. G. Simpson, *Accuracy and Precision of Alcohol Measurements for Subjects in the Absorptive State*, 33 Clin. Chem. 753 (1987). Studies have shown ranges from as low as 12 to as high as 166 minutes, or at the high end almost two and one half hours from the end of drinking until alcohol is fully absorbed into the system. K.M. Dubowski, *Absorption, Distribution and Elimination of Alcohol: Highway Safety Aspects*, 10 J. Stud. Alcohol Suppl. 98, 105 (July 1985). Even if all of the alcohol is absorbed into the body, the breath test device assumes the ratio of blood alcohol to breath alcohol is 2100:1. In order to arrive at a measurement the breath reading is multiplied by 2100. This overestimates BAC in a high percentage of all defendants, since the range of ratios varies according to one study in 99.7% of persons tested from 1555:1 to 3005:1. *Id.* at 102. Persons with a lower than 2100:1 ratio would have their levels overestimated.

Additionally, breath temperature, which is assumed to be 34°C, can affect the reading by 6.5% per degree centigrade. In Alabama, where the breath testing instrument corrects for high temperature readings, between 83 and 91% of all tests reported in one study had to be corrected. D.A. Carpenter, J.M. Buttram, *Breath Temperature: An Alabama Perspective*, 9 IACT Newsletter 16 (July, 1998). Amazingly, even though all breath tests require the defendant's breath temperature to be 34°C, a temperature over 34°C will produce a false high reading, a majority of breath samples as demonstrated by the Alabama study are

over 34°C, and the technology exists to measure breath temperature, *the vast majority of jurisdictions in the United States do not employ breath test machines that can measure the defendant's breath temperature.*

Other factors leading to unreliability in breath test measurements include breathing pattern, A.W. Jones, *How Breathing Technique Can Influence the Results of Breath-Alcohol Analysis*, 22 Med.Sci. Law 275 (1982), and hematocrit,[6] D.A. Labianca, *The Chemical Basis of the Breathalyzer*, 67 Journal of Chemical Education 259, 261 (March 1990).

The legislature's response to this problem in many jurisdictions, has been to redefine impairment in terms of the breath level as opposed to blood. *E.g.*, Ind. Code Ann., § 9-30-5-1; Md. Code Ann., Transp. Art. § 11-103.2 ((a) "Alcohol concentration" means: . . . (2) The number of grams of alcohol per 210 liters of breath."). This change has been criticized by some scientific authors as "the legislation of incorrect science." D.A. Labianca, G. Simpson, *Medicolegal Alcohol Determination: Variability of the Blood- to Breath-Alcohol Ratio and Its Effect on Reported Breath Alcohol Concentrations*, 33 Eur. J. Clin. Chem. Clin. Biochem. 919 (1995). "Unless the law is concerned with convicting the many, while ignoring the few, this case

[6] "The hematocrit represents the fraction of whole blood composed of red cells and is correlated with the aqueous content of blood. The higher the hematocrit, the lower the concentration of water in blood, and vice versa. The average hematocrit for normal, healthy males is 47%, with a range of 40-54%; for females the average is 42% and the range is 36-47%." D.A. Labianca, *The Chemical Basis of the Breathalyzer*, 67 Journal of Chemical Education 259, 261 (March 1990). "Given that the Breathalyzer uses only one partition ratio, Smith and Payne, et al. have predicted that the normal variation in hematocrit can produce errors in breath test results in the 10 to 14% range." *Id.*

demonstrates the desirability of offering all defendants the chance to have their breath-alcohol concentrations checked by analysis of blood or urine." D.J.H. Trafford, H.L.J. Makin, *Breath Alcohol Concentration May Not Always Reflect the Concentration of Alcohol in Blood*, 18 Journal of Analytical Toxicology 225, 228 (Jul.-Aug. 1994); *see generally*, Leonard R. Stamm, *The Top 20 Myths of Breath, Blood, and Urine Testing*, Champion, 20 (Aug. & Sept./ Oct. 2005).

Napier's case illustrates how a statute such as Indiana's permits the State to prove almost its entire case by affidavit. Here the affidavits and tickets proved the proper inspection, calibration, and set-up of the machine, that the machine was in proper working order, and that the Defendant's test result was over the legal limit, as is allowed by Ind. Code Ann. §§ 9-30-6-5(c)(1) and (2) and 9-30-6-5(d).

The questionable reliability of chemical test evidence in drunk driving cases, combined with its heightened importance to the determination of guilt or innocence, and the many foundational facts proven and placed at issue when a simple affidavit is accepted in evidence, require that the defendant be afforded an opportunity to cross-examine the State's breath and blood test technicians in order for the fact-finder to properly assess the reliability of the test result.

IV. This Court's due process cases have assumed the ability to cross-examine breath and blood test technicians

The Supreme Court recognized in *California v. Trombetta*, 467 U.S. 479 (1984) that the state need not preserve potentially exculpatory breath samples because there were

other ways for the defendant to prove his innocence. The Court said:

> Even if one were to assume that the Intoxilyzer results in this case were inaccurate and that breath samples might therefore have been exculpatory, it does not follow that respondents were without alternative means of demonstrating their innocence. Respondents and amici have identified only a limited number of ways in which an Intoxilyzer might malfunction: faulty calibration, extraneous interference with machine measurements, and operator error. See Brief for Respondents 32-34; Brief for California Public Defender's Association et al. as Amici Curiae 25-40. Respondents were perfectly capable of raising these issues without resort to preserved breath samples. To protect against faulty calibration, California gives drunken driving defendants the opportunity to inspect the machine used to test their breath as well as that machine's weekly calibration results and the breath samples used in the calibrations. See supra, at 2530. Respondents could have utilized these data to impeach the machine's reliability. As to improper measurements, the parties have identified only two sources capable of interfering with test results: radio waves and chemicals that appear in the blood of those who are dieting. For defendants whose test results might have been affected by either of these factors, it remains possible to introduce at trial evidence demonstrating that the defendant was dieting at the time of the test or that the test was conducted near a source of radio waves. *Finally, as to operator error, the defendant retains the right to cross-examine the law enforcement officer who administered the Intoxilyzer test, and to attempt to raise*

> *doubts in the mind of the factfinder whether the test was properly administered*.

Id. at 490 (emphasis added).

Thus one of the underpinnings of the *Trombetta* decision was the defendant's ability to cross-examine the breath test operator to establish operator or machine error, a result now under attack under some states' interpretation of *Crawford*. The Court cannot conclude that the State need not produce the breath or blood test technicians for cross-examination and remain faithful to its guarantee of a fair trial in *Trombetta*, where as here, there is no preserved sample of the defendant's breath for him to test.

Since many state courts have apparently forgotten *Trombetta*'s reliance on the defendant's ability to cross-examine the breath test technician, this Court should grant certiorari to address this issue.

V. Cases and news stories contain numerous examples of incompetence, neglect, accident, and fraud, with respect to scientific evidence, which could only be fully uncovered with the aid of cross-examination

Unfortunately, the case law and news are replete with examples of negligence, incompetence, accident, and fraud in crime laboratories across the country. John F. Kelly & Phillip K. Wearne, *Tainting Evidence: Inside the Scandals at the FBI Crime Lab* (The Free Press 1998); Rod Ohira, *FBI Tip Prompts Audit of HPD Serology Lab*, Star Bulletin, September 9, 2000; *Scientist's Cases under Review After DNA Clears Man*, CNN.com, December 15, 2002; *When a Lab Gets It Wrong*, The Washington Post, June 15, 1997; Steve Mills and Maurice Possley, *State Crime Lab*

Fraud Charged, Chicago Tribune, January 14, 2001; Maurice Possley and Steve Mills, *Crime Lab Disorganized, Report Says*, Chicago Tribune, January 15, 2001; James Ewinger, *Lab Practices Questioned*, The Plain Dealer, August 18, 2000; Ruben Castaneda, *Drug Case Dropped After Ruling on Lab*, The Washington Post, November 23, 1999; *Hundreds of Drug Cases May Be in Jeopardy*, Dallas Morning News, July 19, 1996; U.S. Department of Justice, Office of the Inspector General, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases*, April 1997; John Solomon, *FBI Lab Problems*, *New Allegations Target DNA, Bullet Analysis at FBI Lab*, Associated Press, April 15, 2003; *Fed: Private Labs Fake Environmental Experiments, Jeopardize Enforcement*, Associated Press, January 22, 2003.

This list of news stories simply represents the tip of the iceberg. There is no monopoly on fraud, incompetence, negligence and accident in government or private laboratories. A rule that allows the breath and blood test technicians to testify by affidavit without cross-examination ignores the reality that in many cases the information on which such affidavits are based is flawed in some way and that the defendant is being denied an opportunity to develop and present a defense. This Court should grant certiorari to guarantee that if there are to be flaws in the process by which a defendant's conviction is obtained, the inability to examine the witnesses against him is not one of them.

CONCLUSION

For the reasons stated, this Court should grant Napier's Petition for a Writ of Certiorari.

Respectfully submitted,

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