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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 LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Amici curiae respectfully submit this brief in support of Petitioner pursuant to Supreme Court Rule 37.3.[1] *Amici* urge the Court to reverse the judgment of the Appeals Court of Massachusetts.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are evidence professors who have published extensively on the Confrontation Clause. Notably, each has written on its interaction with expert testimony or with forensic examinations. This case involves a critical element of Confrontation Clause jurisprudence: whether after *Crawford v. Washington*, 541 U.S. 36 (2004), the Court should consider forensic reports as testimonial. Each *amicus* has devoted a significant portion of his or her research agenda to this topic.

Jennifer Mnookin serves as Vice Dean and Professor of Law at U.C.L.A. Law School. She has written extensively on expert evidence, forensic science evidence, and other topics. Her article, *Expert Evidence and the Confrontation Clause After* Crawford v. Washington, 15 J. L. & POL'Y 791 (2007), examines the intersection between the Confrontation Clause and expert testimony. She is a co-author of one treatise, THE NEW WIGMORE: EXPERT EVIDENCE (2003), and has served as Chair of the Evidence Section of the American Association of Law Schools.

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[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief *amici curiae*, and their consent letters are on file with the Clerk's Office.

Paul C. Giannelli is the Albert J. Weatherhead III and Richard W. Weatherhead Professor of Law at Case Western Reserve University School of Law. He has written nine books on evidence and criminal justice, including the following: PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE (2d ed. 2006); KENNETH S. BROUN, ROBERT P. MOSTELLER & PAUL C. GIANNELLI, EVIDENCE: CASES AND MATERIALS (7th ed. 2007); and PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE (4th ed. 2007).

Edward J. Imwinkelried is the Edward Barrett Jr. Professor of Law at U.C. Davis Law School. He has published numerous books and treatises on evidence, including his co-authored work with Paul Giannelli, SCIENTIFIC EVIDENCE (4th ed. 2007). His article, *"This is Like Deja Vu All Over Again": The Third, Constitutional Attack on the Admissibility of Police Laboratory Reports in Criminal Cases*, 38 N.M. L. REV. (forthcoming 2008), http://ssrn.com/abstract=1080059, examines expert evidence and the Confrontation Clause. In addition to his scholarly contributions, Imwinkelried has served as the Chair of the Evidence Section of the American Association of Law Schools.

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Myrna Raeder is the Justice Marshall F. McComb Professor of Law for 2008-2009 at Southwestern Law School. Professor Raeder is the co-author of two books on evidence in addition to scores of scholarly articles on procedural issues and evidence. Her article, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay and Confrontations after* Davis, 82 IND. L.J. 1009 (2007), considers the testimonial nature of juvenile testimony in child abuse cases.

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SUMMARY OF THE ARGUMENT

Holding that forensic reports are testimonial under *Crawford* will not impose an undue burden upon the government. Few criminal cases actually involve contested expert testimony, and other mechanisms exist—such as stipulations and waivers—that mitigate many administrative costs. *Amici* also suggest that, to the extent the Court deems it necessary, it can creatively reconcile confrontation concerns with the need for the practical administration of justice, by permitting fully confronted video testimony or surrogate experts to

interpret reports authored by genuinely unavailable forensic examiners.

ARGUMENT

This case involves the functional consequences of criminal defendants' evolving Confrontation Clause rights after *Crawford v. Washington*. 541 U.S. 36 (2004). *Amici* adopt Petitioner's well-developed, persuasive argument regarding the testimonial nature of forensic reports. Virtually all of the available scholarship on the question concurs with Petitioner's conclusion that these laboratory reports ought to be deemed testimonial. *See, e.g.*, Edward J. Imwinkelried, *"This is Like Deja Vu All Over Again": The Third, Constitutional Attack on the Admissibility of Police Laboratory Reports in Criminal Cases*, 38 N.M. L. REV. (forthcoming 2008) ("Imwinkelried"), *available at* http://ssrn.com/abstract=1080059; Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 504-05 (2006) ("Metzger"); Jennifer Mnookin, *Expert Evidence and the Confrontation Clause after* Crawford v. Washington, 15 J.L. & POL'Y 791, 797-801 (2007) ("Mnookin"); Recent Case, *Evidence–Confrontation Clause–Second Circuit Holds that Autopsy Reports Are Not Testimonial Evidence–United States v. Feliz*, 467 F.3d 227 (2d Cir. 2006), *cert. denied*, 75 U.S.L.W. 3438 (U.S. Feb. 20, 2007) (No. 06-8777), 120 HARV. L. REV. 1707 (2007); *see also* 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE § 6.04(c) n.233 (4th ed. 2007) ("GIANNELLI & IMWINKELRIED") (collecting cases for the proposition that "lab reports are testimonial in nature"); DAVID KAYE, DAVID BERNSTEIN & JENNIFER MNOOKIN, THE NEW WIGMORE § 3.10 (2007 Supp.).

While strongly agreeing with Petitioner's conclusion, we recognize that requiring live testimony from the authors of such reports will raise a number of practical and conceptual issues that do not have immediately obvious answers. *Amici* seek, therefore, to address only the question of whether requiring in-court testimony by forensic experts will impose undue or insuperable burdens on the government. We believe that it will not, and furthermore, that courts will be able to devise procedures for making the burdens associated with *Crawford*'s extension to forensic reports practically manageable.

Live testimony requirements will likely impose relatively modest burdens because only a small proportion of criminal cases involve contested expert testimony. Moreover, the creative use of technology can reduce the burdens associated with in-court testimony while still preserving the most critical aspects of Confrontation. In addition, in some cases surrogate experts may be able to testify about reports that would otherwise be excluded because of author unavailability. For these reasons, we believe that the government can effectively use forensic reports while adhering to *Crawford*'s requirements without unreasonable inconvenience.

I. RECOGNIZING THE TESTIMONIAL CHARACTER OF FORENSIC EVIDENCE WILL NOT UNDULY BURDEN THE CRIMINAL JUSTICE SYSTEM

Although this Court's precedents make clear that forensic reports are testimonial, the State suggests that this entire category of reports should be

exempted from the requirements of the Confrontation Clause because of the administrative expense of making forensic experts available to testify. (Br. in Opp. at 34.) The principal burdens to the State are the forensic examiners' time and travel costs. *Id.*; *see* Mnookin at 835-36 (recognizing that "[i]t may be a significant drain on limited forensic science budgets to require that every forensic test be presented in court by whoever actually performed the test, unless that examiner is unavailable and the defendant had a prior opportunity for cross-examination").

While the State's administrative and fiscal concerns are legitimate, they cannot control the scope of the "bedrock procedural guarantee," *Crawford*, 541 U.S. at 42, provided by the Confrontation Clause. The fact that a safeguard guaranteed a criminal defendant is costly or time-consuming is not a sufficient basis for denying that protection, if it is constitutionally required. For example, the rights to the assistance of counsel, and to the services of a psychiatrist, are undoubtedly costly to the public, but those costs must be borne as the natural consequence of the constitutional guarantee. *See Gideon v. Wainwright*, 372 U.S. 335, 340 (1963) (holding "that the Fourteenth Amendment requires appointment of counsel in a state court, just as the Sixth Amendment requires in a federal court"); *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (requiring the State to "assure the defendant access to a competent psychiatrist" to assist in his defense when his "sanity at the time of the offense is to be a significant factor at trial"). Indeed, *Ake* is strikingly parallel; in *Ake* as here, the State argued that it would be a "staggering burden" to provide psychiatric assistance to indigent criminal

defendants. 470 U.S. at 78. The Court rejected this argument, holding that the State's interest "in its economy" did not outweigh "[t]he private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk . . . ." *Id.* at 78-79.

Moreover, the State's administrative concerns should not be exaggerated. While *Crawford* does lead to some practical difficulties, these may often not be so severe as is feared by courts and prosecutors understandably anxious about change. Although the data are not completely clear, only a relatively small portion of criminal cases would ever require live expert witness testimony. Furthermore, as we suggest below, there are procedures that the prosecution may employ, consistent with the core right of confrontation, to further obviate the need for forensic examiner testimony.

A. Only A Tiny Fraction Of Criminal Cases Is Likely To Be Affected

Live forensic testimony is likely to be unnecessary in most cases, because very few criminal prosecutions actually proceed to trial. In 2004, approximately 1.15 million defendants were convicted of felony crimes nationwide; about 67,000 of those convictions, or 6%, were in the federal courts. Bureau of Justice Statistics, Dep't of Justice, Felony Sentences in State Courts, 2004, at 2 (2007). The vast majority of those cases never went to trial. In state courts, around 95% of all convictions in 2004 were obtained through a guilty plea. *Id.* Similarly, 96% of those individuals convicted in the federal courts in 2004 pleaded guilty. Bureau of Justice Statistics, Dep't of Justice, Compendium of Federal

Justice Statistics, 2004, at 62 (2006). This figure has remained relatively constant over the past decade. Bureau of Justice Statistics, Dep't of Justice, Sourcebook of Criminal Justice Statistics Online, at tbl.5.22.2007 (2008), *available at* http://www.albany.edu/sourcebook/pdf/t5222007.pdf (last visited June 16, 2008). Furthermore, in 2007, of the 88,014 total defendants prosecuted in federal court, only 2,917, or 3% of all cases, actually proceeded to trial. *Id.* Thus, of the 1.15 million convictions nationwide, only a very small fraction are obtained through a criminal trial, where a defendant's Confrontation Clause rights have practical import.

Anecdotal evidence suggests that forensic examiners are actually called to testify in a small proportion of cases in which they could be called to testify. For instance, the Supreme Court of Louisiana has cited statistics demonstrating that forensic experts testified in a mere 10% of the cases in which subpoenas were issued. *State v. Cunningham*, 903 So. 2d 1110, 1120 (La. 2005). This figure is consistent with testimony presented to the Senate Judiciary Committee by the Kansas Bureau of Investigation, whose toxicology and chemistry analysts testified in only 8% of the cases in which they were subpoenaed. Brief of Kansas Attorney Gen. as *Amicus Curiae* at 4, *Kansas v. Crow*, 974 P.2d 100 (Kan. 1999) (No. 97-79287-5) (citing Kansas Assistant Attorney General Kyle G. Smith, Testimony Before the Senate Judiciary Committee (Feb. 19, 1993)).

The simple explanation for these figures is that in the typical case, a defendant impairs rather than

enhances his case by insisting upon an extended and substantially uncontroverted presentation of scientific evidence on a critical element of the government's proof. As *Old Chief v. United States* illustrates, it is often counterproductive for the defense to demand that the prosecution present live testimony available to it. 519 U.S. 172, 189 (1997). Experienced defense counsel do not insist on the live presentation unless there is some reason to believe the evidence is susceptible to challenge. Thus, as the ensuing sections explain, criminal defendants frequently seek to avoid the prosecution's harmful forensic evidence through stipulations and "notice-and-demand" procedures. *See State v. Hancock*, 825 P.2d 648, 651 (Or. Ct. App. 1992) (emphasizing a legislative determination that "the accuracy of the chemical analysis of an alleged control substance by [a forensic] laboratory is almost never challenged"); Brief for the Commonwealth of Mass. as *Amicus Curiae* at 7, *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005) (No. SJC-09320) ("Generally, defendants do not object to the admission of drug certificates most likely because there is no benefit to the defendant from such testimony.").

B. Burdens Relating To Forensic Evidence Are And Will Continue To Be Alleviated By Stipulations And Waivers

Confrontation rights, like many other constitutional rights, can be waived. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966). There are at least two cost-saving mechanisms by which a criminal defendant could effectively waive his right to confront a forensic examiner: stipulations and "notice-and-demand" statutes. Both mechanisms preserve

defendants' confrontation rights while alleviating the burdens on the government. Indeed, many states have already implemented some form of notice-and-demand statute, ostensibly to prevent a drain upon the public fisc.

1. Stipulations

Stipulations, which are used in criminal as well as civil cases, "take a number of forms." 22 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5194 (1978 & Supp. 2008) ("WRIGHT & MILLER"). First, "[t]he parties or their counsel can agree that certain facts shall be taken as true for purposes of the litigation." *Id.* Second, the parties may stipulate "to the admission of evidence." 2 PATRICK L. MCCLOSKEY & RONALD L. SCHOENBERG, CRIMINAL LAW DESKBOOK § 16.07[4] (2007). Third, "[t]he agreement can take a less conclusive form, as when it is stipulated that a certain witness, if called, would have testified to particular facts." 22 WRIGHT & MILLER § 5194.

Stipulations are routinely used in criminal cases to establish facts that are necessary to the prosecution's case that the defendant cannot effectively dispute. In particular, they are often used in the context of expert testimony concerning forensic evidence. *See, e.g.*, *United States v. Olivares-Vega*, 495 F.2d 827, 829-30 (2d Cir. 1974) (defendant agreed not to contest "that a laboratory analysis would show that the white powder [found in his luggage] was cocaine"); *United States v. Spann*, 515 F.2d 579, 580 (10th Cir. 1975) (defendant stipulated that if the government's chemist were called at trial, "he would

testify that in his opinion the substance" confiscated "was 'marihuana.'")

Stipulations are so common because they often benefit the courts, criminal defendants, and prosecutors alike. From the courts' perspective, stipulations serve the critical purpose of "judicial efficiency." 22 WRIGHT & MILLER § 5194. With trial court judges facing heavy caseloads, it is hardly surprising that "the general policy of the Civil and Criminal Rules is to encourage [evidentiary] stipulations," thereby saving time and lessening the potential for error. *Id.*

Prosecutors often benefit from forensic stipulations as well. If the defendant is willing to stipulate to a fact that the prosecution would otherwise have to prove, or to testimony that the prosecution would otherwise have needed to offer, the prosecution is relieved of that burden. When a criminal defendant is willing to stipulate to facts in a forensic report, or to the testimony that the government's forensic examiner is expected to give, the State's anticipated burdens may be eliminated *entirely*.

For defendants, absent a specific basis in fact for contesting the correctness of an expert's conclusion, there is little to gain and much to lose in requiring an articulate, well-credentialed expert to appear to prove an undisputed technical detail of an alleged crime. *See* Gary Muldoon, *Use of Stipulation in Criminal Cases*, 4 ISSUES IN NEW YORK CRIMINAL LAW No. 10, *available at* http://www.mcacp.org/issue38.htm (last visited June 16, 2008) (noting that, through stipulations, criminal defendants can avoid

"a parade of unfavorable witnesses called by the prosecutor," as well as the risk that the jury will "be more impressed with [a] witness's credentials than the subject matter testified to"). Instead, through a stipulation, the defendant may be able to narrow the dispute, and shift the focus of the trial to more realistically winnable issues. By doing so, the defendant may enhance his credibility and focus greater attention on the issues that are central to a plausible defense. 4-App. E2-1 CRIMINAL LAW ADVOCACY § App. E2-1.03 Form 2A-3.

Although confrontation serves a critical function in some criminal trials, in others the defendant has no credible basis—and thus no strategic reason—for challenging facts as stated in forensic reports, or for trying to undermine the testimony that a forensic examiner would offer. For example, as was perhaps the case in *Spann* and *Olivares-Vega*, there may be no real debate over the identity or quantity of a controlled substance found upon the defendant. The defendant may therefore seek to minimize the impact of those facts, and to focus upon other, more promising battlegrounds. Hence, the defendant might agree to stipulate to "the fact that drugs were sold," but contest the charges on the ground of "mistaken identity," 4-App. E2-1 CRIMINAL LAW ADVOCACY § App. E2-1.03 Form 2A-4, insanity, or any number of other defenses. The stipulated fact or testimony may be "totally compatible with [the defendant's] theory of the case." *Id.* Form 2A-3; *see State v. Miller*, 790 A.2d 144, 153 (N.J. 2002) (noting that in the "vast majority" of drug cases involving forensic reports, the defendant does not oppose the admission of the laboratory certificate).

While stipulations generally ease the potential burdens presented by live forensic testimony, that burden can be further reduced by procedural provisions which encourage or require pretrial resolution of stipulation issues. *See* Metzger at 529-30 (providing a model statute with stipulation procedures to be used for forensic reports and testimony). When the prosecution knows in advance that live forensic testimony will be unnecessary, the government is in an even better position to plan a succinct, coherent case-in-chief.

2. Notice-and-Demand Statutes

Another method of reducing the potential burden entailed by the presentation of forensic expert evidence is utilization of "notice-and-demand" statutes, which create an orderly mechanism by which prosecutors may save time and effort, while affording the defendant a full, fair opportunity to confront his accusers. Under these statutes, if the prosecution intends to use forensic evidence at trial in lieu of live testimony from the forensic examiner, the prosecution must serve "notice" to the defense of its intent to rely on such evidence. The defendant then has the opportunity to object to the introduction of the laboratory report as evidence and to "demand" that the prosecution produce the forensic witness at trial. *See* Mnookin at 797-98.

In the typical notice-and-demand statute, the prosecution must first provide timely notice of its intent to rely on a forensic certificate. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 10-306(b)(1)(ii) (West 2008) ("[I]f the State decides to offer the test results without [live testimony], it shall, at least 30 days

before trial, notify the defendant . . . ."). The prosecution must also give the defense a copy of the certificate. *See, e.g.*, MICH. COMP. LAWS § 600.2167(3) (2008) (requiring the prosecutor to provide a copy of the forensic report to the defense no fewer than five days prior to a preliminary examination). Following proper notice, the defense must then make timely demand to cross-examine the expert. Timeliness can be explicitly defined by statute. *See, e.g.*, DEL. CODE. ANN. tit. 10, § 4332(a)(1) (2008) (requiring written demand filed by the defense "at least 5 days prior to the trial"). Upon timely demand by the defendant, live testimony is required in lieu of the certificate. Several states employ this type of notice-and-demand procedure.[2]

Like stipulations, notice-and-demand statutes can benefit prosecutors, while still protecting confrontation rights. Under these statutes, prosecutors must present live testimony from forensic examiners only in cases in which criminal defendants affirmatively choose to exercise their confrontation

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[2] Those states are Delaware, DEL. CODE. ANN. tit. 10, §§ 4330-4332 (2008); Illinois, 725 ILL. COMP. STAT. 5/115-15 (2008); Iowa, IOWA CODE § 691.2 (2008); Maryland, MD. CODE. ANN., CTS. & JUD. PROC. §§ 10-306, 10-914 (West 2008); Michigan, MICH. COMP. LAWS § 600.2167 (2008); Nevada, NEV. REV. STAT. §§ 50.315, 50.320, 50.325 (2007); Ohio, OHIO REV. CODE ANN. § 2925.51 (West 2008); Oklahoma, OKLA. STAT. ANN. tit. 22, § 751.1(B) (2008); Texas, TEX. CODE CRIM. PROC. ANN. art. 38.41 (Vernon 2007); and Washington, WASH. ST. SUPER. CT. CR. 6.13 (2008). *See* Metzger at 481-82 (criticizing these "notice and demand" statutes, but finding them to be "[t]he most 'benign'" of the various forms of "*ipse dixit*" statutes that permit the introduction of forensic reports without live testimony from the examiner).

rights. When the defendant fails to exercise his right, live testimony need not be presented, and the administrative and fiscal burdens on the government are lessened.

To be sure, notice-and-demand procedures are more burdensome to defendants than stipulations; a defendant may lose his ability to cross-examine a forensic examiner by failing to satisfy the statutory demand obligations. *See, e.g.*. Metzger at 531 (discussing notice-and-demand statutes, and noting that "[l]egislators rely on . . . defen[dants'] failures [to satisfy the demand requirement] to help prosecutors get cheaper convictions."). The critical point, however, is that the defendant retains the opportunity to exercise his rights under the Confrontation Clause, and to choose when and whether to waive those rights, as the Constitution permits.[3]

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[3] These narrow notice-and-demand statutes should be distinguished from statutes that require anything more extensive than mere objection before mandating live testimony. Specifically, some states have requirements that defendants "show[] cause," before the court will compel an expert to testify. *See, e.g.*, ALASKA STAT. § 12.45.084(d) (West 2008). Tennessee, for instance, only requires live testimony "upon seasonable objection and for good cause." TENN. CODE ANN. § 40-35-311 (2008). Other statutes require counsel to affirm an actual intent to cross-examine as a prerequisite for demanding live testimony. *See, e.g.*, ALA. CODE § 12-21-302 (2008); LA. REV. STAT. ANN. § 15:501 (2008). Such "notice and demand-plus" statutes, *see* Metzger at 482-83, raise Confrontation Clause concerns, and *Amici* suggest that there is a significant difference between those and the narrow, limited statutes described in this section. Only statutes that unambiguously guarantee the defendant the opportunity to cross-examine forensic experts upon a simple demand to do so satisfy *Crawford*'s admonition that no law

C. Burdens Can Arguably Be Further Mitigated by Scheduling Arrangements and by the Use at Trial of Fully-Confronted Videotape Records of Expert Testimony

Because of the criminal justice system's extensive reliance on plea bargaining and stipulation, the disposition of the vast majority of criminal cases does not involve in-court forensic testimony. Even when the defendant asserts his Confrontation rights and insists upon forensic science testimony, courts may be able to devise procedures to reduce the burden on the government and its experts.

Courts possess inherent authority to control their dockets and the manner in which they dispose of cases. *See, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 706 (1997); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962).[4] Courts exercise this authority for the "economy of time and effort for itself, for counsel, and

(continued…)

shall deprive a defendant "'of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination.'" *Crawford*, 541 U.S. at 57 (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)).

[4] For state authorities recognizing the courts' inherent power to control their dockets, see for example *Washington v. State*, 844 A.2d 293, 295 (Del. 2004) ("Trial courts have significant control over and discretion in the management of their dockets and the scheduling of cases."); *Fields v. State*, 879 So. 2d 481, 484 (Miss. Ct. App. 2004); *In re Jade G.*, 30 P.3d 376, 382 (N.M. Ct. App. 2001); *People v. Grove*, 566 N.W.2d 547, 559 (Mich. 1997); *Williams v. Commonwealth*, 347 S.E.2d 146, 148 (Va. Ct. App. 1986).

for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (Cardozo, J.). Most courts also enjoy constitutional or statutory authority to promulgate rules regulating matters of procedure. *See, e.g.*, FED. R. CRIM. P. 57; *Scheehle v. Justices of Supreme Ct. of Ariz.*, 120 P.3d 1092, 1099 (Ariz. 2005); *McDougall v. Schanz*, 597 N.W.2d 148, 157 n.17 (Mich. 1999); *State v. Templeton*, 59 P.3d 632, 641 (Wash. 2002). In the past, this authority has often enabled the courts to respond creatively to the recognition of new procedural rights to ensure the orderly administration of justice, while preserving constitutional safeguards.

By exercising their procedural discretion, courts could develop new processes to mitigate the costs of in-person testimony. For instance, live satellite uplinks, *see Harrell v. State*, 689 So. 2d 400 (Fl. 1997), and closed circuit television, *see Maryland v. Craig*, 497 U.S. 836 (1990), empower the jury to assess witness credibility. By showcasing a witness's tone of voice, facial expressions, and general demeanor, these technologies break down any simple dichotomy between transcripts and in-court statements. Unlike transcripts, the video image captures body language, eye contact, and affect—factors that juries evaluate when considering the reliability of testimony. These technologies afford opportunities to modernize traditional Confrontation Clause thinking by providing information the Framers thought necessary to ensure effective trials without mandating in-court testimony. These video options preserve essential information for the evaluation of credibility and demeanor that written materials lack.

Live video testimony is only one of a number of in-person substitutes that might be employed to provide the jury with a possible replacement for in-court testimony. Recorded videos, for instance, from a past hearing, might similarly alleviate administrative costs. Courts could designate specific days on which parties can examine expert witnesses. On those days, the defense counsel could conduct his cross-examination in the defendant's presence before a judge and under oath. The examination could be videotaped and played for the jury at trial. From the camera's orientation in the jury box, these videos would capture significant elements of the courtroom experience—including the defendant's reaction to testimony and the conduct of the attorneys. This form of evidence satisfies the essence of the defendant's Confrontation Clause right to an "adequate" and "prior opportunity for cross-examination." *Crawford*, 541 U.S. at 54, 57. Moreover, this procedure could minimize the expense and inconvenience to the government of producing forensic experts for cross-examination on the day of trial. This approach could also significantly reduce the disruption of laboratory analysts' work schedules.

The pretrial use of such a procedure renders the testimony permissible under *Crawford* if the forensic scientist in question were unavailable at trial. Without unavailability, it is admittedly a much more difficult question. The *Crawford* opinion did not consider this form of testimony, which so closely resembles in-court statements. 541 U.S. at 38, 54. Video alleviates many of the concerns—namely, the ability to assess witness credibility through nonverbal communication—that animated the

Framers' adoption of the Confrontation Clause. The eighteenth century sources cited by the *Crawford* Court never dreamt of a type of out-of-court statement that could convey to the jury virtually everything the jurors would have seen or heard had they been present at the time of the statement. Playing a video of earlier testimony before the jury gives the trier of fact significantly more information than a cold, one-dimensional transcript.

Our point is this: Finding forensic reports to be testimonial, but developing novel procedures for reconciling confrontation with efficiency concerns, would be far more confrontation-protecting than the alternative of writing a critical category of evidence altogether out of the Confrontation Clause's protective ambit.

None of this is to say that these alternatives obviously pass constitutional muster. Nor would we suggest that in this case, the Court must resolve all the doctrinal issues raised by these possible substitutes. Rather, we merely wish to emphasize that even if Court determines that forensic reports are testimonial under *Crawford*, courts remain well-equipped to design procedures that simultaneously guarantee the confrontation right and ensure the efficient administration of justice. The possibilities for procedural innovation reinforce our belief that allowing criminal defendants the right to cross-examine forensic experts will result in, at most, modest administrative inconvenience to the government.

II. *CRAWFORD*'S REASONING MAY PERMIT SURROGATE EXPERT TESTIMONY REGARDING FORENSIC REPORTS, FURTHER REDUCING THE PRACTICAL IMPACT OF A HOLDING THAT FORENSIC REPORTS ARE TESTIMONIAL

Precluding reports written by unavailable witnesses may necessitate that some forensic evidence that currently reaches juries no longer be admitted.[5] To that end, *Amici* suggest that *Crawford*'s reasoning—particularly its express acceptance in specified circumstances of a second-best substitute for in-court testimony—may permit a surrogate expert to introduce and testify to an unavailable expert's report.

Crawford acknowledges that to a degree, necessity has a legitimate role to play in Confrontation Clause analysis. More specifically, in *Crawford*, the Court permitted the introduction of a now-unavailable witness's testimonial statements if the defendant had a prior opportunity to cross-examine the witness. 541 U.S. at 54. Within *Crawford*'s schema, a prior opportunity to cross-examine the witness is a second-best solution—not a perfect replacement for cross-examination in front of the current jury. This conclusion is both a matter of common sense and implicit in *Crawford*'s logic: If a

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[5] We should note, first, that this issue does not arise on the facts of this case. There is no evidence whatsoever of the unavailability of the forensic scientists who conducted the analysis of the controlled substance at issue in this case. *See* Petition for Writ of Certiorari at 8. However, we recognize that with some regularity, the expert who conducted the analysis at issue will, in fact, genuinely be unavailable.

prior opportunity to cross-examine were the evidentiary equivalent of contemporaneous cross-examination, there would be no justification for imposing an unavailability requirement before its use. The Court found the existence of a prior opportunity for cross-examination as constitutionally adequate in the face of the necessity produced by the witness's unavailability. *Crawford*, therefore, indicates that at least in some circumstances in which there is a meaningful but imperfect substitute for contemporaneous cross-examination, the Constitution does not command wholesale exclusion.

There may be other circumstances in which necessity coupled with a satisfactory substitute can similarly justify an exception to *Crawford*'s mandate. One of the arguments levied by lower courts to suggest that *Crawford* should not extend to forensic reports is the claim that the opportunity to cross-examine the expert has little value. Arguably, if the expert has written hundreds of similar reports, he may be unlikely to remember the specific test documented in the report; in testifying, the expert will have to rely almost exclusively on the report's contents. *Cf. Commonwealth v. Carter*, 932 A.2d 1261, 1267 (Pa. 2007) ("[C]ross-examining the chemist about the specifics of one test out of perhaps hundreds of identical tests would have been of little utility . . . ."). Some courts have invoked this argument to justify the use of a certificate in lieu of live testimony; others have relied upon it to permit reports introduced by an expert who played no role in the actual testing process. *See* Imwinkelried at 33 n.239.

Although *Amici* recognize that at times experts will not have a specific memory of the forensic tests that they have conducted, we strongly disagree that this justifies doing away with confrontation altogether, which the use of certificates of analysis in effect allows. Nor, in our view, should the possibility of a lack of specific memory justify the routine use of surrogate experts who played no part in the actual testing process. While the expert who conducted the test at issue may not always have a specific memory, there is no doubt that he sometimes will. Moreover, examining his recorded report may well jog his memory of particulars not included in the report. In addition, the ability to cross-examine the actual expert—not someone else with similar expertise—offers the factfinder better information about this particular expert's experience, credentials, abilities and credibility. Cross-examining the actual expert who conducted the test also may increase the chances of ferreting out any potential misconduct or fraud. Therefore, *Amici* propose focusing on a narrower category of instances involving a much clearer showing of unavailability.

We recognize that experts may not always be available to testify to their reports. Experts may die or leave their forensic employment and move away from the jurisdiction or otherwise be unable to testify for a multitude of reasons. The more time has passed between the forensic test and its use in court, the greater the chance that the expert who conducted the test will no longer be available. Several of the lower court cases facing such unavailability have addressed, for example, autopsies establishing the cause of death, conducted many years earlier. *See,*

e.g., *Rollins v. State*, 897 A.2d 821 (Md. 2006). The original autopsy is not only likely to be the best available evidence regarding cause of death, but it is also unlikely that there will be any substitute, non-testimonial equivalent forms of evidence to establish the cause. The unavailability of the original medical examiner is in no way the fault of the State. In this circumstance, we submit that there may be alternatives to wholesale exclusion that, while second-best, may meet the constitutional mandate for confrontation.

When the scientist who conducted the original test is unavailable, having another expert retest the materials certainly represents the optimal means for protecting a defendant's Confrontation rights. In many instances, though, as with a years-old autopsy, retesting will be impracticable or literally impossible, and the necessity issue resurfaces. In narrowly circumscribed circumstances—(1) conducting another test is infeasible; (2) the original test was conducted in accordance with regularized procedures and documented in sufficient detail for another expert to understand, interpret, and evaluate the results, and (3) the original expert is now unavailable—a plausible argument exists that surrogate testimony by another qualified expert ought to be constitutionally permissible. *See* Mnookin, at 854-55.

This framework gives necessity and unavailability a larger role in confrontation analysis than *Crawford* expressly contemplates, but we submit that this proposal accords with *Crawford*'s spirit. Just as the Court permits the introduction of testimony from a prior hearing conditioned upon unavailability, the Court might permit a surrogate

expert to testify conditioned upon both unavailability and the adequacy of the documentation and procedures followed by the original expert. If the original expert detailed his procedures with elaborate care, a surrogate can both describe the tests conducted and critically evaluate the results. This is, to be sure, a second-best solution, and ought not to be resorted to without unavailability. Nor ought necessity and unavailability to be adequate grounds for making use of non-scientific testimonial statements introduced through a surrogate witness. Forensic science can rely on regularized routines and processes which can be documented in sufficient detail to permit meaningful interpretation and evaluation by others with appropriate expertise. It is the special, data-driven nature of scientific processes and scientific practice that makes the use of a surrogate expert arguably adequate when necessity demands it.

For example, suppose that an autopsy report includes not only bottom-line conclusions, but also photographs, measurements, careful descriptions of what tests were conducted, and descriptive detail to support the conclusions. While a surrogate cannot provide first-hand descriptions of conducting this particular autopsy, on cross-examination he can meaningfully respond to questions about the conclusions reached by the original examiner. The surrogate possesses the expertise to opine on the appropriateness of the tests and the soundness of the original expert's conclusions. Based on his expertise and the substantive detail provided, the surrogate can assess the legitimacy of those interpretations. Defense counsel can cross-examine him about

alternative hypotheses, tests that were not conducted, or uncertainties relating to his interpretations. Compared to cross-examining the original analyst, something of value is lost, certainly, but much is also retained.

Indeed, if the Court were to decide at some point that, while forensic reports are testimonial under *Crawford*, a surrogate expert can be used in lieu of an unavailable expert if and only if the report were sufficiently detailed to allow the surrogate to interpret it meaningfully, such a rule would have salutary effects on the practices of forensic science in general. Prosecutors and experts would have the incentive to generate forensic reports that were more detailed and more informative—reports which would permit other forensic scientists genuine insight into the underlying scientific analyses. Historically, in contrast, many expert reports produced in criminal cases have included only bottom-line conclusions. *See* GIANNELLI & IMWINKELRIED § 3.03.[6]

The Court's adoption of this position will pressure experts to generate reports that would enable a later expert to testify discerningly about the original expert's procedures and reasoning. *Amici* do not presume to prescribe a specific set of procedures to satisfy this threshold, but other parties certainly will attempt to improve standardization and documentation as this iterative process evolves.

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[6] The same holds true for many certificates of analysis, including those at issue in this case, which provided no detail whatsoever about what specific tests were conducted in order to reach the conclusion that the substance at issue was cocaine. *See* Pet. App. 24a.

This issue of unavailable experts goes well beyond the scope of what is of greatest concern in this case. *Amici* believe, however, that it requires attention, because so many lower courts have been misled by concerns regarding these relatively atypical cases such as the years-old autopsy. We wish to emphasize that concerns about a potential "parade of horribles" should not prevent the Court from holding that forensic reports are testimonial. The practical consequences of that conclusion, although not negligible, are manageable. This management may take the form of encouraging stipulations and permitting notice-and-demand statutes. It may involve considering the effects of the availability of video technology on the scope of the Confrontation right. It may also require thinking through whether there are ever circumstances in which the Court would consider a surrogate expert as a constitutionally adequate substitute for an unavailable expert. These techniques will, to the extent it proves necessary, provide mechanisms that address *Crawford*'s central concerns while remaining practically manageable and principled.

CONCLUSION

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

Respectfully submitted,

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