No. 09-10876

IN THE

Supreme Court of the United States

DONALD BULLCOMING,

Petitioner,

v.

NEW MEXICO,

Respondent.

On Writ of Certiorari
to the New Mexico Supreme Court

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Confrontation Clause permits the prosecution to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements.

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BRIEF FOR PETITIONER

Petitioner Donald Bullcoming respectfully requests that this Court reverse the judgment of the New Mexico Supreme Court.

OPINIONS BELOW

The order of the New Mexico Supreme Court (JA 1-27) is reported at 147 N.M. 487, 226 P.3d 1 (2010). The opinion of the New Mexico Court of Appeals (JA 28-42) is published at 144 N.M. 546, 189 P.3d 679 (Ct. App. 2008). The relevant trial court proceedings and order (JA 43-47, 50-51) are unpublished.

JURISDICTION

The judgment of the New Mexico Supreme Court was entered on February 12, 2010. Petitioner filed a timely petition for a writ of certiorari on May 12, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

STATEMENT

In the course of prosecuting and convicting petitioner Donald Bullcoming for driving while intoxicated (DWI), the State of New Mexico introduced a forensic report asserting that gas chromatograph testing had determined his blood alcohol level to have been .21 – a level that not only satisfied the State's DWI statute but that also qualified as aggravated DWI and subjected petitioner to an extended prison term. The State did not, however, present live testimony from the lab analyst who conducted the test and wrote the report. While petitioner's appeal was pending in the New Mexico Supreme Court, this Court held in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), that authors of forensic reports are "witnesses" under the Sixth Amendment and "are therefore subject to confrontation." *Id.* at 2531-32, 2537 n.6. The New Mexico Supreme Court nonetheless rejected petitioner's Confrontation Clause claim and affirmed his conviction, holding that the State satisfied its confrontation obligations at petitioner's trial because it presented testimony from a *different* forensic analyst – one who had nothing to do with the test at issue here.

1. In August 2005, petitioner Donald Bullcoming accidentally rear-ended a pickup truck that was stopped at an intersection in Farmington, New Mexico. No one was injured, and the other vehicle sustained only minor damage. When the other driver exited his vehicle to exchange insurance information, he noticed that petitioner's eyes were bloodshot, and he thought that petitioner's breath smelled of alcohol.

The other driver instructed his wife to call the police and informed petitioner that the police were on their way. Petitioner then excused himself to the restroom and left the scene.

When the responding police officer arrived, petitioner was still absent. After a brief search, the officer found petitioner a short distance away. They returned to the scene in the officer's patrol car. Having noticed that petitioner appeared intoxicated, the officer asked him to perform a series of field sobriety tests, which he failed. Petitioner also declined to take a breath test. The officer arrested petitioner for DWI and took him to the police station for booking.

The officer then drove petitioner to a local hospital where a nurse drew his blood and sent the sample to the New Mexico Department of Health Scientific Laboratory Division for determination of petitioner's blood alcohol concentration (BAC). Under New Mexico law, a BAC of at least .08 is sufficient to prove DWI, N.M. Stat. § 6-8-102(C)(1), whereas a BAC of .16 or more constitutes aggravated DWI, *id.* § 6-8-102(D)(1).

2. New Mexico forensic laboratories analyze BAC levels using gas chromatograph machines, which require specialized knowledge and skill to operate. Under New Mexico's standard operating procedures for gas chromatograph testing, a forensic analyst is supposed to "open[] one of the [blood] vials," take "two samples of the blood" and put them in a "vial with an internal standard, which is used for the actual testing." JA 53. Next, the analyst is supposed to "cap the sample[s]" and "crimp them with an aluminum top." JA 53-54. The analyst then is

supposed to place the samples inside the gas chromatograph, in a receptacle with slots somewhat like a carousel for a slide projector. A single chromatograph can test over a dozen samples at a time.

The machine then analyzes the various samples and prints out the results on documents called chromatograms. Sometimes a chromatogram contains simply a line with peaks and valleys that the analyst must interpret, and sometimes it also contains a number indicating the sample's purported BAC. Although nothing in the record explains what chromatograms in the lab at issue here look like, the New Mexico Department of Health asserted in an amicus brief in the New Mexico Supreme Court (at page 6) that the chromatograms its machines produce contain both graphs and numbers. At any rate, even when a chromatogram contains both graphs and numbers, an analyst still must interpret the graph to determine whether a valid test occurred.

The analyst next must compare the results of both samples at issue – one of which supplies the "quantitative value" and the other of which serves as a control – to determine whether the reported concentrations are within 5% of each other. If the reported concentrations vary by more than 5%, then the samples must be reanalyzed. If not, then the analyst "transpose[s]" the quantitative value from the printout to a Department of Health "report of blood alcohol analysis." JA 56, 62. Finally, the lab mails the results to the police. The lab typically retains the unused part of the blood sample for at least six months so that the analyst or "someone else who wants to test it" can do so. JA 52.

3. Upon receiving petitioner's blood sample, a lab employee signed it in and stored it in a refrigerator. The next day, the lab assigned Curtis Caylor to test the sample's BAC. JA 53, 58.

On a Department of Health report of blood alcohol analysis, Caylor stated that he tested the sample. JA 62, 64. In a "block" on the report reserved for the forensic analyst he wrote that petitioner's blood sample contained an alcohol concentration of .21 grams per hundred milliliters. JA 62. He also declared that "[t]he seal of this sample was received intact and broken in the laboratory." JA 62. Caylor further "certif[ied]" that he "followed the procedures set out on the reverse of this report, and the statements in [his] block [we]re correct." JA 62. The reverse of the report provides, among other things, that "[w]hen the blood sample is received by the analyst," the analyst:

- "makes sure the laboratory number on the container corresponds with the laboratory number" on the forensic report, JA 64;
- "makes sure the analysis is conducted on the sample which accompanied this report at the time the report was received," JA 64;
- "retains the sample container and the raw data from the analysis," JA 65; and
- notes "any circumstance or condition which might affect the integrity of the sample or otherwise affect the validity of the analysis," JA 65.

Other blocks in the forensic report contain signatures and certifications from others involved in the chain of custody and the testing. The police

officer who arrested petitioner certified that he had, in fact, arrested him and brought him to the hospital to initiate a BAC analysis. JA 62. The nurse who drew petitioner's blood certified to this effect. JA 62. The employee at the lab who received the delivery of petitioner's blood sample certified that she received it and logged it into the lab's system. JA 62. Finally, the analyst who reviewed Caylor's results certified that Caylor was qualified to conduct BAC analyses and that, as far as he knew, established procedures had been followed in this case. JA 62.

4. The State charged petitioner with DWI under N.M. Stat. § 6-8-102. JA 1. At trial, the State sought to introduce the forensic report (but not any of the underlying chromatograms) as part of its evidence. Of the five people who had signed the report, the State called two of them to testify: the arresting officer and the nurse who drew petitioner's blood. (Petitioner offered to stipulate to the latter's testimony, JA 16, but the State insisted on putting her on the stand.) Petitioner had no objection to allowing the written certifications from two of the others: the lab's intake employee and the reviewing analyst. That left Caylor, the analyst who actually tested petitioner's blood sample and asserted it had a BAC of .21, as the sole remaining witness respecting the report.

On the day of trial, the State informed petitioner that it intended to call Gerasimos Razatos, another analyst with the Department of Health, to testify in lieu of Caylor. JA 46. The State did not claim that Caylor was unavailable to come to court or that there was any other reason why it was seeking to call Razatos instead of him. Nor could the State claim

that Razatos had any personal connection to the testing Caylor claimed to have done; Razatos neither supervised nor reviewed Caylor's work. Instead, the State sought to use Razatos simply as a conduit for introducing Caylor's assertions in the forensic report.

Petitioner objected that allowing the State to call Razatos in place of Caylor would violate his rights under the Confrontation Clause. JA 44.[1] As explicated in *Crawford v. Washington*, 541 U.S. 36 (2004), the Confrontation Clause forbids the prosecution from introducing a witness's out-of-court testimonial statements unless that witness testifies at trial – or unless the witness is unavailable and the defense has had a prior opportunity for cross-examination, *id.* at 59, neither of which was the case here. The trial court, however, overruled the objection. JA 45. It reasoned that admission of the forensic report was not "prohibited by *Crawford*" because the report was not testimonial. JA 45. It then admitted the forensic report into evidence "as a business record," JA 45, and allowed Razatos to testify based on its contents.

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[1] This day-of-trial objection was timely because it was the first time petitioner learned that the State intended to introduce Caylor's report without presenting live testimony from him. Unlike many states, New Mexico does not have a "notice and demand" regime. *See Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2541 (2009) (approving of notice and demand systems "requir[ing] the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial").

On direct examination, Razatos described the lab's "standard operating procedure" for gas chromatograph testing, JA 53, and stated that "[t]he results [of the test in this case] were zero point two one grams of alcohol per one hundred milliliters of blood." JA 55. On cross-examination, Razatos acknowledged that he had not "observe[d] [Caylor] conduct the analysis" or "review[ed] his analysis" in the lab. JA 58. He also conceded that "you don't know unless you actually observe the analysis that someone else conducts, whether they followed the protocol in every instance." JA 59. Finally, Razatos acknowledged that Caylor, the analyst who had actually tested petitioner's blood sample, "was very recently put on unpaid leave." JA 58. When defense counsel asked Razatos why the State had placed Caylor on unpaid leave, he replied that he did not know. JA 58.

In his closing argument, the prosecutor relied on Caylor's assertions in the forensic report, noting that petitioner was "still registering a point two one blood alcohol in his system" approximately two hours after he was arrested. Tr. 190 (Nov. 16, 2005). The jury found petitioner guilty, and the trial court ultimately entered a judgment convicting him of aggravated DWI. Petitioner was sentenced to two years in prison.

5. The New Mexico Court of Appeals affirmed. JA 29. As is relevant here, the appeals court rejected petitioner's Confrontation Clause argument on the ground that "the blood alcohol report in the present case was non-testimonial and prepared routinely with guarantees of trustworthiness." JA 38.

6. The New Mexico Supreme Court granted review. While the case was pending, this Court held in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), that forensic reports are "testimonial statements" inasmuch as analysts who create such reports are "witnesses" for purposes of the Sixth Amendment. *Id.* at 2532.

In light of that decision, the New Mexico Supreme Court acknowledged that Caylor's forensic report in petitioner's case constituted testimonial evidence. JA 12. Yet the New Mexico Supreme Court refused to hold that the report's admission violated the Confrontation Clause, reasoning that Razatos's in-court testimony gave petitioner "the opportunity to meaningfully cross-examine a qualified witness regarding the substance of [Caylor's report]." JA 16. In particular, the New Mexico Supreme Court opined that when forensic evidence is at issue, "live, in-court testimony of a separate qualified analyst" – even one, as here, who has no personal knowledge of, or connection to, the testing that was supposedly done – "is sufficient to fulfill a defendant's right to confrontation" because such an analyst can answer general questions about how the lab operates. JA 14. Second, the court asserted that Caylor had "simply transcribed the results generated by the gas chromatograph machine." JA 13. Thus, according to the court, Caylor's statements, in contrast to those at issue in *Melendez-Diaz*, did not "present[] a risk of error that might be explored on cross-examination." JA 13 (quoting *Melendez-Diaz*, 129 S. Ct. at 2537-38).

7. This Court granted certiorari. 131 S. Ct. 62 (2010).

SUMMARY OF ARGUMENT

The State violated the Confrontation Clause by introducing one analyst's testimonial statements in a forensic report through the testimony of a different analyst who did not perform or observe any of the laboratory tasks or analysis described in the statements.

I. The foundational rule of the Confrontation Clause – which has been established for centuries and applies across every kind of testimony – is that if the prosecution wishes to introduce a witness's testimonial statements, then the defendant is entitled to be confronted with *that particular witness*. Confrontation of a particular witness serves four primary purposes: (1) it enables cross-examination concerning the witness's factual assertions, his believability, and his character; (2) it guarantees that the witness gives his testimony under oath; (3) it allows the trier of fact to observe the witness's demeanor; and (4) it ensures that the witness testifies in the presence of the defendant. Confrontation with what might be called a "surrogate witness" thwarts all four of these objectives.

II. There is no good reason why the Confrontation Clause's particular-witness rule should not apply here.

A. There is no exception to the particular-witness rule based on the defendant's ability to cross-examine a different witness. Cross-examination is only one of the four components of confrontation, and even full cross-examination cannot justify dispensing with the other three components when it is possible to effectuate them. But even with respect to cross-

examination, the text and history of the Confrontation Clause make clear that it is not for a court to say – as the New Mexico Supreme Court asserted here, JA 16 – that questioning one witness regarding the substance of another's testimonial statements provides a "meaningful[]" enough opportunity for cross-examination. Once someone is a "witness" under the Confrontation Clause (as Caylor was here), the Clause imposes a categorical requirement that the defendant be confronted with *that witness.* No further constitutional analysis is necessary or permissible.

B. Even if the particular-witness rule were subject to an exception based on the defendant's ability to cross-examine a different witness, no such exception would apply here.

1. There is no "forensic evidence" exception to the Confrontation Clause's bar against surrogate testimony. When this Court held two Terms ago in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), that forensic reports are testimonial, it explained that the prosecution there had violated the Confrontation Clause not simply because it had introduced forensic reports without putting *an* analyst on the stand but rather because "[t]he analysts who swore the affidavits provided testimony against Melendez-Diaz, and *they* are therefore subject to confrontation . . . ." *Id.* at 2537 n.6 (emphasis added); *accord id.* at 2532. This holding makes perfect sense. Forensic analysts – just like other witnesses – sometimes give erroneous information to law enforcement due to carelessness, poor judgment, pressure from police, or outright fabrication. Confrontation with the analyst whose

report is introduced into evidence guards against these possibilities and enables the defendant to probe at trial whether any of them occurred in his case. Surrogate testimony, by contrast, stymies this adversarial process and can even allow the prosecution to shield potentially damning information from the trier of fact – as occurred in this very case when the State's surrogate witness revealed on cross-examination that the analyst who wrote the forensic report at issue "was very recently put on unpaid leave" but was unable to say why this had occurred. JA 58.

2. Nor is there an exception to the bar against surrogate testimony for testimony that supposedly reports machine-generated results. Almost all witnesses testify regarding things that they claim to have observed. Reporting numbers from a machine print-out is thus no different, for example, than claiming to have seen a certain license plate number, an address on an apartment, a phone number that came up on a caller ID, or indeed any objective physical item. In all of these instances, confrontation of the actual witness whose testimonial statements the prosecution seeks to introduce – with the witness under oath and in the presence of the jury and the defendant – allows the defendant to test whether the witness really observed what he claims to have observed, or whether the witness manipulated objects in a manner that caused the observations he reported to be misleading.

In any event, the analyst's testimonial statements in the forensic report here went far beyond purporting merely to transcribe machine-generated results. The analyst also "certified" that

petitioner's blood sample had not been contaminated and that he had followed various protocols in testing it. Those statements required confrontation with the analyst instead of a surrogate even under the New Mexico Supreme Court's erroneous conception of the Confrontation Clause.

ARGUMENT

I. If The Prosecution Introduces A Witness's Testimonial Statements, The Confrontation Clause Entitles The Defendant To Be Confronted With That Particular Witness.

A. The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The point of this provision is to regulate "the manner in which [the prosecution's] witnesses give testimony in criminal trials." *Crawford v. Washington*, 541 U.S. 36, 43 (2004). Specifically, the Clause requires the prosecution to follow the common-law method of "open examination of witnesses *viva voce*" at trial. 3 William Blackstone, Commentaries on the Laws of England *373 (1768). Put in modern terms, the Clause requires the prosecution to present "live testimony" from its witnesses "in court subject to adversarial testing." *Crawford*, 541 U.S. at 43. And in order to enforce that rule, the Clause forbids the prosecution from presenting "[t]estimonial statements of witnesses absent from trial" unless "the declarant is unavailable" and the core requirement of confrontation has already been satisfied – that is,

"the defendant has had a prior opportunity to cross-examine." *Id.* at 59; *accord id.* at 54, 68.

The use of the definite article in the text of the Sixth Amendment ("*the* witnesses") and in *Crawford*'s exclusionary rule ("*the* declarant") is not adventitious. Instead, as this Court has observed with respect to other legal provisions, the definite article "indicates that there is generally only one proper" person or object to which the law refers. *Padilla v. Rumsfeld*, 542 U.S. 426, 434 (2004); *see also Rapanos v. United States*, 547 U.S. 715, 732 (2006). In the context of confrontation, the word "the" dictates that if the prosecution decides to introduce testimonial evidence, it must afford the defendant the opportunity to be confronted with *the particular creator of that evidence* – that is, the person who actually made the statement or authored the document at issue.

Any other rule would contravene the history and purpose of the right to confrontation. As Sir Matthew Hale explained roughly three centuries ago, the "Opportunity of confronting the adverse Witnesses" arises from the "*personal Appearance* and Testimony of Witnesses." Matthew Hale, The History of the Common Law of England 258 (1713) (emphasis added). This Court echoed this sentiment in one of its earliest confrontation opinions, making clear that confrontation entails a "personal examination" of "the witness," "subjecting him to the ordeal of cross-examination." *Mattox v. United States*, 156 U.S. 237, 242, 244 (1895). Subjecting *someone else* to cross-examination obviously is not a substitute for such "personal" questioning. After all, even Sir Walter Raleigh, whose "notorious" trial in

1603 served as a rallying cry for the right to confrontation, *Crawford*, 541 U.S. at 44, was "perfectly free to confront those who read Cobham's confession in court," *id.* at 51.

B. In light of this text, history, and constitutional purpose, this Court has repeatedly held that the prosecution violates the Confrontation Clause when it introduces a witness's testimonial statements through the in-court testimony of a different person. *See Davis v. Washington*, 547 U.S. 813, 826 (2006) (finding violation because "a note-taking policeman recite[d] the unsworn hearsay testimony of the declarant") (emphasis omitted); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2546 (2009) (Kennedy, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second."); *Crawford*, 541 U.S. at 68 (finding violation because "the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine *her*") (emphasis added).

Presenting a nontestifying witness's testimonial statements through the in-court testimony of what might be called a "surrogate witness" thwarts all four "elements of confrontation" that this Court has identified: (a) "cross-examination"; (b) the giving of testimony under oath; (c) "observation of [the declarant's] demeanor by the trier of fact;" and (d) "physical presence" of the defendant during the witness's testimony. *Maryland v. Craig*, 497 U.S. 836, 846 (1990).

1. *Cross-examination.* Cross-examination, as this Court has often observed, is the "greatest legal

engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (internal quotation marks and citation omitted). This procedure enables the defendant to test the prosecution's witnesses in four ways, none of which is possible if a surrogate testifies in place of a declarant.

First, cross-examination allows the defendant to "test the recollection of the witness," *Dowdell v. United States*, 221 U.S. 325, 330 (1911), and to inquire into the circumstances under which he made any prior recorded recollections that are introduced into evidence. It obviously is impossible to test the recollection of a declarant by questioning a surrogate witness. One person cannot access the memory of someone else.

Second, cross-examination promotes truthful testimony. At trial, cross-examination allows the defendant to "sift[] the conscience of the witness" testifying against him, to expose any lies or misleading statements. *Mattox*, 156 U.S. at 242. And even before trial, the prospect of facing cross-examination deters witnesses from making false testimonial statements in the first place. Sifting the conscience of a surrogate witness, however, is a futile act. A surrogate witness typically lacks personal knowledge regarding a declarant's out-of-court assertions, and thus cannot know whether the assertions are true. Furthermore, the deterrent effect of cross-examination would disappear if surrogates could testify in place of declarants, for declarants would be relieved of the prospect of having to defend their assertions under questioning in court.

Third, when a witness has made prior statements that the prosecution wishes to introduce

into evidence, cross-examination allows the defendant to "force the declarant to clarify ambiguous phrases and coded references," as well as any "inconsisten[cies]" between the statements and the witness's in-court testimony. *United States v. Inadi*, 475 U.S. 387, 407 (1986) (Marshall, J., dissenting). Such questioning, in turn, sometimes allows the witness to "correct and explain his meaning, if misunderstood," 3 Blackstone, Commentaries, at *373, or it can also reveal accidental exaggerations or intentional distortions. Once again, this iterative process would be frustrated by surrogate testimony. It is often very difficult for one person to decipher or to explain what someone else meant in making prior statements.

Fourth, cross-examination enables a defendant to attack the credibility of a witness by probing areas such as his personal history, experience, sensory perceptions, and motives. *See Davis v. Alaska*, 415 U.S. 308, 316 (1974). Such information and characteristics are personal – sometimes deeply personal – in nature. Accordingly, a defendant is typically unable to elicit them from someone other than the declarant. A surrogate witness, for instance, is unlikely to have personal knowledge of exactly why someone was fired from a previous job or whether someone has a history of substance abuse.

2. *The oath.* The Confrontation Clause also requires witnesses to provide their testimony under oath, "impressing [them] with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury." *Craig*, 497 U.S. at 845-46. Indeed, from its very inception, the right to confrontation has banned the prosecution from

presenting testimony absent "the Solemnities of an Oath." Geoffrey Gilbert, The Law of Evidence 152 (1756); *see also* 2 William Hawkins, A Treatise of the Pleas of the Crown 434 (1721) ("Evidence for the King must in all Cases be upon Oath."); *Raleigh's Case*, 2 How. St. Tr. 1, 16 (1603) (Raleigh complaining that Cobham never "avouched" his accusation). This Court, therefore, has made clear that as offensive as "trial by sworn *ex parte* affidavit" may be to the Confrontation Clause, a system of "trial by *unsworn ex parte* affidavit" would be even worse. *Crawford*, 541 U.S. at 52-53 n.3; *accord Davis*, 547 U.S. at 826.

Introducing out-of-court testimonial statements through surrogate witnesses would enable just such a system. A witness could provide the prosecution with unsworn testimonial statements before trial and avoid ever having to swear to their truth. The witness would also avoid a possible prosecution for perjury if the prosecution later found out that he had lied.

3. *The jury's observation of the witness.* The process of confrontation further ensures that the jury has the opportunity to "observ[e] the quality, age, education, understanding, behaviour, and inclinations of the witness," 3 Blackstone, Commentaries at *373-74, and to "judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox*, 156 U.S. at 242-43. As courts have recognized across a variety of settings, "[t]he 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." *Broad. Music, Inc. v. Havana Madrid Rest. Corp.*, 175 F.2d

77, 80 (2d Cir. 1949) (internal quotation marks omitted). In particular, when a witness testifies before the jury:

> To [the trier of fact] appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson, or the itching overeagerness of the swift witness, as well as honest face of the truthful one, are alone seen by [the trier of fact].

Creamer v. Bivert, 113 S.W. 1118, 1120 (Mo. 1908); *see also United States v. Yida*, 498 F.3d 945, 950 (9th Cir. 2007) ("Live testimony gives the jury (or other trier of fact) the opportunity to observe the demeanor of the witness while testifying."); *Government of the Virgin Islands v. Aquino*, 378 F.2d 540, 548 (3d Cir. 1967) (a witness's live testimony may provide "innumerable telltale indications" that are more reliable indicators of falsity than the "literal meaning of his words"); Hale, The History and Analysis of the Common Law of England 257-58 (1713) ("[T]he very Manner of a Witness's delivering his Testimony will give a probable Indication whether he speaks truly or falsely.").

Calling a different person to the stand to relay a declarant's testimonial statements deprives the jury of the ability to observe the declarant. Indeed, allowing a surrogate to testify in place of a declarant could allow the prosecution to actually mislead the

jury, insofar as the jury may impute the surrogate witness's believability to that of the declarant. This, in turn, could create a prosecutorial incentive to call so-called "professional witnesses" – eloquent and polished performers – to court instead of real ones.

The everyday occurrence of police reports illustrates the concern. When a homicide detective visits a crime scene, he writes a report memorializing his investigatory observations. Such reports are written according to established office procedures, and one assumes that they are usually accurate. Indeed, within a report, an officer might record several objective and seemingly incontrovertible facts, such as the presence of blood spatter on the wall, broken furniture in the kitchen, or an open window in the bathroom. Nevertheless, the Confrontation Clause does not permit one officer to take the stand and relay another's purported observations of objective facts in a police report. Such surrogate testimony would not only deprive the defendant of the opportunity to cross-examine the officer who wrote the report about the various assertions therein, but it also would deprive the jury of the ability to observe that officer's "attitude," "demeanor," and "competence," which prosecutors have acknowledged that juries sometimes find more revealing than anything else. Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. Rev. 1, 63-64 & n.254 (2002).

4. *Testifying face-to-face with the defendant.* Finally, confrontation traditionally guarantees a "face-to-face encounter between witness and accused." *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988).

As this Court has observed, there is "something deep in human nature" – as well as our legal history – "that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial.'" *Id.* (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965)). A face-to-face encounter with a defendant facing the prospect of years in prison (or even death) helps ensure that the witness fully realizes the import of his testimony. Moreover, "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'" *Coy*, 487 U.S. at 1019. A witness testifying in court, of course, need not look at the defendant, but if he chooses not to, "the trier of fact will draw its own conclusions." *Id.*

The presence of a surrogate witness fails to create a face-to-face encounter between the defendant and the declarant. Accordingly, it deprives the defendant of the opportunity of having someone who lied or was careless in making prior testimonial statements face the full import of his words.

Imagine, for example, that a man looking out his family room window observes an altercation between two neighbors. The man's wife is in the next room but does not see the fight. The man knows that one of the neighbors is particularly aggressive, but he does not see who actually started the fight. When the police question the husband and wife the following day, the man asserts (in testimonial statements) that he believes that the aggressive neighbor started the fight by throwing the first punch, but he does not clarify that his statement is based on an assumption rather than his own observation. If the prosecution wants to use those testimonial statements at trial, the Confrontation Clause prohibits it from calling the

wife to testify in place of her husband. As a surrogate witness, the wife could recount the circumstances under which her husband witnessed the event, and she could also respond to a good number of questions about his character, sensory abilities, and personal history. But having the wife testify would be no substitute for requiring the husband to give his testimony in the presence of his neighbor. Confronted in this way with the grave consequences of his testimony, the husband might think about his observations more carefully and admit that he did not actually see who threw the first punch.

II. The New Mexico Supreme Court Erred By Refusing To Enforce The Particular-Witness Rule In This Case.

The New Mexico Supreme Court acknowledged that the Confrontation Clause generally prohibits the prosecution from introducing out-of-court testimonial statements "unless *the declarant* is unavailable to testify, and the defendant had had a prior opportunity for cross-examination." JA 7-8 (emphasis added) (internal quotation marks and citation omitted). The court also recognized that the statements at issue here – assertions in a forensic report – were testimonial because they were created for the purpose of proving a fact in a criminal prosecution. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009). JA 12. Finally, there is no evidence that the forensic analyst who wrote the report, Caylor, was unavailable to testify or that petitioner had ever had any prior opportunity to cross-examine him. The New Mexico Supreme Court

nevertheless held that petitioner's "right of confrontation was preserved" because he "had the opportunity to meaningfully cross-examine a qualified witness [Razatos] regarding the substance" of Caylor's testimonial statements. JA 16.

This reasoning is unsound for two reasons. First, the Confrontation Clause's bar against surrogate testimony applies regardless of whether a court believes that a defendant's opportunity to question the surrogate about the nontestifying witness's testimonial statements provides a meaningful opportunity for cross-examination. Second, even if the Confrontation Clause's ban on surrogate testimony were subject to such an exception, it would not apply in this case.

A. The Confrontation Clause's Particular-Witness Rule Is Not Subject To An Exception Based On The Ability To Cross-Examine A Different Witness.

There is no exception to the Confrontation Clause's prohibition against surrogate testimony for cases in which a court believes that a defendant's ability to question a testifying witness about a nontestifying witness's testimonial statements provides a meaningful opportunity for cross-examination. Cross-examination is only one of the four elements of confrontation. Thus, even if the New Mexico Supreme Court were correct that questioning one witness with respect to another declarant's testimonial statements could satisfy the right to cross-examination, it still would not satisfy the Confrontation Clause where nothing in the record suggests that it would have been impossible to have

the declarant testify under oath, in the presence of the jury, and face-to-face with the defendant.

More fundamentally, as this Court has noted, "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." *Crawford*, 541 U.S. at 54. Nor is it "the role of courts to extrapolate from the words of the [Confrontation Clause] to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values." *Giles v. California*, 128 S. Ct. 2678, 2692 (2008). Accordingly, just as the Confrontation Clause does not tolerate "[d]ispensing with confrontation because" a court believes that "testimony is obviously reliable," *Crawford*, 541 U.S. at 62, the Clause does not tolerate dispensing with confrontation because a court believes that questioning one witness about another's testimonial statements provides a fair opportunity for cross-examination. "[T]he guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider 'fair.'" *Giles*, 128 S. Ct. at 2692.

Indeed, this Court has recently rejected the New Mexico Supreme Court's mode of reasoning not only in the context of the Confrontation Clause but also with respect to the Sixth Amendment right to counsel. In *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), the Government argued that illegitimately denying a defendant his counsel of choice did not violate the Sixth Amendment so long as "substitute counsel's performance" did not demonstrably prejudice the defendant in some way. *Id.* at 144-45. Expressly analogizing to the *Crawford*

line of cases, *id.* at 145-46, this Court rejected that argument. "It is true enough," this Court explained, "that the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." *Id.* at 145. If a "particular guarantee" of the Sixth Amendment is violated, no substitute procedure can cure the violation, and "[n]o additional showing of prejudice is required to make the violation 'complete.'" *Id.* at 146 (footnote omitted).

The same is true here. Just as substitute counsel cannot satisfy the Sixth Amendment, neither can confrontation of a substitute witness.

To the extent the State wished Razatos, instead of Caylor, to be the forensic analyst whom it presented at trial for purposes of proving petitioner's BAC, it had the option of using him while complying with the Confrontation Clause. All the State had to do was have Razatos retest the part of petitioner's blood sample that the lab had retained. *See* JA 65. But when the State elected instead to introduce Caylor's report, Caylor became a "witness" against petitioner under the Confrontation Clause. And when the State refused to put Caylor on the stand, it violated the Confrontation Clause's basic requirement of live testimony. That should be the end of the matter.

B. Even If The Particular-Witness Rule Were Subject To An Exception Based On The Ability To Cross-Examine A Different Witness, Such An Exception Would Not Apply Here.

Even if the Confrontation Clause's prohibition against surrogate testimony were not absolute, there would be no grounds for creating an exception to the rule here. The New Mexico Supreme Court held that the surrogate testimony of Razatos satisfied the Confrontation Clause for two supposed reasons: (1) a defendant can accomplish as much by cross-examining any "qualified analyst" as he can get out of questioning the particular analyst who wrote the forensic report that the State seeks to introduce; and (2) the testimonial statements in the report here merely "transcribed" machine-generated results, requiring no "independent judgment." JA 13-14. Neither contention withstands scrutiny.

1. There Is No Exception For Forensic Reports.

This Court's precedent, as well as good sense, dictates that there is no "forensic evidence" exception to the Confrontation Clause's bar against surrogate testimony.

a. This Court's decisions make clear that the Confrontation Clause's prohibition against introducing a nontestifying witness's testimonial statements through the in-court testimony of another applies fully in the context of forensic evidence. In the course of holding in *Melendez-Diaz* that forensic reports are testimonial, this Court repeatedly stated that, if the defendant objects, "the analyst who

provide[d] [the] results" must testify. 129 S. Ct. at 2537; *see also id.* at 2532 n.1 ("what testimony *is* introduced must (if the defendant objects) be introduced live") (emphasis in original); *id.* at 2531 (a "witness's testimony against a defendant is . . . inadmissible unless *the witness* appears at trial or, if *the witness* is unavailable, the defendant had a prior opportunity for cross-examination") (emphasis added). Accordingly, the Court did not simply hold that the Commonwealth of Massachusetts violated the Confrontation Clause by failing to present *a* witness along with its forensic report. It held, instead, that "[t]he analysts who swore the affidavits provided testimony against Melendez-Diaz, and *they* are therefore subject to confrontation." *Id.* at 2537 n.6 (emphasis added); *see also id.* at 2532 ("petitioner was entitled to 'be confronted with' *the analysts* at trial") (emphasis added).

The dissent in *Melendez-Diaz* recognized as much. Summarizing the import of the majority's holding, the dissent explained that, at the very least, "the . . . analyst who must testify is the person who signed the certificate." *Id.* at 2545 (Kennedy, J., dissenting). The dissent added that "[i]f the signatory is restating the testimonial statements of the true analysts – whoever they might be – then those analysts, too, must testify in person." *Id.* at 2546 (Kennedy, J., dissenting).

Indeed, long before *Crawford* and *Melendez-Diaz* were decided, this Court observed in *California v. Trombetta*, 467 U.S. 479 (1984), that when the prosecution introduces a police officer's report of breathalyzer results, the defendant has the right to confront "*the law enforcement officer who*

administered the Intoxilizer test, and to attempt to raise doubts in the mind of the factfinder whether the test was properly administered." *Id.* at 490 (emphasis added). Having a different police officer in court to explain how Intoxilizer tests are *typically* administered would not allow a defendant to probe "whether the test [in his case] was properly administered." *Id.*

b. Even if this Court's precedent did not resolve the issue, it would contravene good sense to create a "forensic evidence" exception to the Confrontation Clause's ban on surrogate testimony.

i. As this Court noted in *Melendez-Diaz*, forensic reports face the same "risk of manipulation" and error, 129 S. Ct. at 2536, as other *ex parte* testimony. Furthermore, "[a] forensic analyst responding to a request from a law enforcement official may," like other witnesses, "feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution." *Id.* at 2536. An analyst could also simply be careless or hurried while preparing a sample for testing; programming or setting up a machine; checking controls; or checking a machine's calculations against accompanying graphs. These are no small matters: According to one source, 93% of errors in laboratory tests for BAC levels are human errors that occur either before or after machines actually analyze samples. *See* Donald J. Bartell et al., Attacking and Defending Drunk Driving Tests § 16:80 (2007).

The only person whom a defendant can question effectively respecting these issues is the actual analyst who wrote the report that is introduced against him. In fact, a well-represented defendant

may have numerous questions to ask an analyst about the work he purportedly did in coming to his conclusions. *See* Amicus Br. of NACDL. A surrogate witness who lacks personal knowledge regarding whether the analyst skipped or botched important steps in the forensic process stymies all of these inquiries. Indeed, in this very case, the State's surrogate witness, Razatos, acknowledged that he had not "observe[d] [Caylor] conduct the analysis" or "review[ed] his analysis" in the lab. JA 58. He also conceded that "you don't know unless you actually observe the analysis that someone else conducts, whether they followed the protocol in every instance." JA 59.

It is equally imperative that defendants have the right to confront particular analysts whose reports prosecutors introduce against them in order to root out whether those reports are deliberately false. Investigative boards, journalists, and independent organizations have documented numerous recent instances of fraud and dishonesty in our nation's forensic laboratories. *Melendez-Diaz*, 129 S. Ct. at 2536-38; *see also* Amicus Br. of Innocence Network. "While it is true," as this Court observed, "that an honest analyst will not alter his testimony when forced to confront the defendant, the same cannot be said of the fraudulent analyst." *Melendez-Diaz*, 129 S. Ct. at 2536 (internal citation omitted). Furthermore, "[l]ike the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony." *Id.* at 2537. This cannot happen with a surrogate on the stand, since a surrogate who lacks personal knowledge of the

analyst's actions cannot know for sure whether the analyst is simply lying.

ii. Even if the analyst who wrote the report does not remember conducting the particular test, an opportunity to confront and cross-examine that analyst – as opposed to someone else – is still vital.[2] As an initial matter, confrontation of the analyst who wrote the report requires that analyst to swear under oath to the accuracy of his purported findings and his other representations regarding the purity of the sample and the various testing procedures he employed – something the State itself emphasizes the analyst here never did. JA 12; Br. in Opp. 17, 24. In addition, as this Court observed in *Melendez-Diaz*, an analyst's results may be affected by a "lack of proper training or deficiency in judgment," *id.* at 2537, or by placing undue analytical weight on a suspect methodology, *id.* at 2538. Cross-examination in the presence of the jury and the defendant thus allows the defendant to "test[]" the analyst's "proficiency" regarding the scientific procedures he claims to have employed. *Id.* at 2538.

All of this is impossible to do with a surrogate witness. A surrogate may not know anything about the analyst who wrote the report. Even if he does, the surrogate would likely be unable to speak from

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[2] Because Caylor did not testify, we do not know whether he would have remembered performing the forensic test at issue here. But he may well have remembered the test, for it is relatively rare for blood tests to be performed in the part of the State where this case arose. Almost all DWI cases in that region are prosecuted by means of breathalyzer results.

personal knowledge about the analyst's training, skill, or attention to detail – or to demonstrate the analyst's professionalism or knowledge of laboratory procedures. And the jury would be unable to observe the analyst in order to gauge those attributes for itself.

This very case illustrates the importance of having live testimony from the analyst who wrote the report in order to probe his credibility. At petitioner's trial, the surrogate witness admitted on cross-examination that the actual analyst did not testify because the State had "very recently put [him] on unpaid leave." JA 58. When petitioner's attorney asked the surrogate why the actual analyst was placed on unpaid leave, the surrogate replied that he did not know. JA 58. This lack of personal knowledge prevented petitioner from discovering whether the analyst who purportedly determined that his BAC was over legal limits had been disciplined for erroneous or fraudulent work. It also prevented the jury from evaluating the actual analyst's integrity, which could have influenced its assessment of the accuracy of his forensic report.

A recent case from California underscores the point. In *People v. Dungo*, 98 Cal. Rptr. 3d 702 (Cal. Ct. App.), *rev. granted* (Cal. 2009), the prosecution introduced an autopsy report to prove a hotly contested issue at trial – that a certain amount of time had elapsed before the victim's death. The medical examiner who had authored the report, however, did not testify at trial because he had been blacklisted from testifying in several California counties, including the county where the trial took place. *Id.* at 704. The examiner had also falsified his

credentials, performed incompetent work, and been fired and forced to resign "under a cloud" in other California counties. *Id.* at 714. Finally, the examiner had been known to base his conclusions on police reports instead of forensic methods. *See People v. Beeler*, 891 P.2d 153, 168 (Cal. 1995); Scott Smith, S.J. Pathologist Under Fire Over Questionable Past, *The Record*, Jan. 7, 2007, *available at* http://www.recordnet.com/apps/pbcs.dll/article?AID=/20070107/A_NEWS/701070311.

In light of this problematic track record, the prosecution decided to put the medical examiner's supervisor on the stand instead of the examiner. As the supervisor explained during the preliminary hearing, "[t]he only reason they won't use [the examiner himself] is because the law requires the District Attorney to provide this background information to each defense attorney for each case, and [the prosecutors] feel it becomes too awkward to make them easily try their cases." *Dungo*, 98 Cal. Rptr. 3d at 708. The California Court of Appeal held that this surrogate testimony violated the Confrontation Clause, observing that the "prosecution's intent" in failing to call the actual medical examiner had been to "prevent[] the defense from exploring the possibility that [he] lacked proper training or had poor judgment or from testing [his] 'honesty, proficiency, and methodology.'" *Id.* at 714 (quoting *Melendez-Diaz*, 129 S. Ct. at 2538). If the State of New Mexico were to prevail in this case, however, such underhanded prosecutorial tactics would be perfectly permissible.

2. There Is No Exception For Testimony Concerning Machine-Generated Results.

For two independent reasons, this Court should also reject the New Mexico Supreme Court's suggestion that surrogate testimony was acceptable here because Caylor, the analyst who performed the forensic test and wrote the report, "simply transcribed the results generated by the gas chromatograph machine." JA 13. First, the ordinary rules of confrontation apply even when a witness's testimonial statements purport simply to transcribe data. Second, the declarations in Caylor's forensic report went far beyond mere transcriptions.

a. The ordinary rules of confrontation apply when a witness's testimonial statements purport to do nothing more than write down a number that was displayed on the screen of (or on a piece of paper generated by) a machine.

Almost all witnesses testify about something that they claim to have observed. For example, a witness may claim that he observed a particular phone number on a caller ID, saw a certain color car speeding down his street, or saw a specific person commit a crime. Yet any of these claims – like a witness's claim that a machine generated certain numbers – is only as strong as the word of the witness. If the machine did not actually display the purported numbers, then the witness's statement is false. The New Mexico Supreme Court, however, utterly ignored that possibility, assuming instead from the forensic report that the machine actually displayed what Caylor claimed it did. JA 13. That is

the very fact that the defendant may be most likely to want to challenge on cross-examination.

Even apart from testing a witness's truthfulness, there may be other reasons to doubt the accuracy of a transcription. A witness might transpose numbers[3]; he might write down data connected to a different piece of evidence; or he might have a history of carelessness or malfeasance. A defendant can explore these matters related to a witness's "proficiency" only by questioning the actual declarant. *Melendez-Diaz*, 129 S. Ct. at 2538. A surrogate witness cannot respond to such inquiries – especially when, as here, the prosecution declined to introduce print-outs that the witness supposedly transcribed.

If witnesses who report numbers or other objective data were exempted from the ordinary rules of confrontation, the ramifications would extend far beyond the context of forensic evidence. Under the New Mexico Supreme Court's reasoning, for example, if a witness recorded the license plate number of a getaway car or the time on a digital clock after the commission of a crime and then gave the piece of paper to the police, a prosecutor wanting to introduce the witness's testimonial statements could introduce them through a surrogate witness who simply could

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[3] For instance, one physician who mixed drugs for lethal injections in Missouri admitted in litigation involving the constitutionality of that practice that he was dyslexic and "ha[d] difficulty with numbers and oftentimes transpose[d] numbers." *Taylor v. Crawford*, 2006 WL 1779035, at *7 (W.D. Mo. June 26, 2006).

explain how license plates can be read from afar or could describe the characteristics of that particular digital clock. In both of those instances, the testimonial statements at issue do nothing more than transcribe numbers. Similarly, under the New Mexico Supreme Court's reasoning, nearly every police report could be introduced through a surrogate witness. If the report recorded objective facts (*e.g.*, the read-out of a radar gun, the address above the front door of a house, or really any other objective physical data), the report would be admissible so long as another officer testified regarding any technology the original officer deployed and the department's standard operating procedures.

The only reason the New Mexico Supreme Court provides to suggest that its "mere scrivener" rule would not upend all of the settled law forbidding surrogate testimony under these other circumstances is its assertion that Caylor's creation of the forensic report did not require any "interpret[ive]" skill and thus did not "present[] a risk of error that might be explored on cross-examination." JA 13 (internal quotation marks and citation omitted).[4] But even if this prediction concerning the usefulness of cross-examination here distinguished the non-forensic examples above, this reasoning would be flatly impermissible. This Court has already made abundantly clear that the traditional guarantees of

[4] This assertion is highly dubious as a factual matter. Even when a chromatogram produces a number along with graphs, an analyst must interpret the graphs to be sure that the machine conducted a valid test. *See* NACDL Amicus Br.

the Confrontation Clause cannot be "dispens[ed] with" simply because a testimonial statement is "obviously reliable." *Crawford*, 541 U.S. at 62; *accord Melendez-Diaz*, 129 S. Ct. at 2536. This is because the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. Accordingly, analysts who write reports that the prosecution introduces are personally "subject to confrontation," even if they have "the veracity of Mother Teresa." *Melendez-Diaz*, 129 S. Ct. at 2537 n.6. The same must be true here, even if the analysts supposedly did nothing more than write down what a machine said.

b. Even if the Confrontation Clause did permit surrogate testimony when a nontestifying witness "was a mere scrivener," JA 13, the State still could not prevail here. As a factual matter, Caylor's testimonial statements in the forensic report that the State introduced went far beyond merely transcribing the purported machine-generated BAC reading of .21.

In the forensic report, Caylor certified by his signature that the seal of petitioner's blood sample "was received intact and broken in the laboratory." JA 62. He also certified that he made sure the forensic report number and the sample number "correspond[ed]." JA 64. Caylor further attested that he "conduct[ed] a chemical analysis," JA 64, according to the "gas chromatograph method" of testing. JA 63. And, by leaving the "[r]emarks" section of the form blank, Caylor implicitly certified that there was not "any circumstance or condition that might [have] affect[ed] the integrity of the

sample or otherwise affect[ed] the validity of the analysis." JA 65.

These statements describe past events and human actions, not machine-generated data. What is more, these statements constituted powerful evidence against petitioner. Among the leading reasons for forensic errors are contaminations of samples, switching samples, and running the wrong kinds of tests. Caylor's assertions that none of these things occurred here thus provided fodder for potentially important cross-examination. Yet because the State put an analyst other than Caylor on the stand, it insulated Caylor's testimonial assertions from adversarial testing. This violated the Confrontation Clause under any reasonable interpretation of the provision.

CONCLUSION

For the foregoing reasons, the judgment of the New Mexico Supreme Court should be reversed.

Respectfully submitted,

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