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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This is not a complicated case. In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court held that, absent a declarant's unavailablity and a prior opportunity for cross-examination, the prosecution may not introduce the declarant's testimonial statements into evidence without putting the declarant on the stand. And in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), this Court held that assertions in forensic lab reports are testimonial statements. Yet here, even though Curtis Caylor was never deemed unavailable and the defendant never had a prior opportunity to cross-examine him, the prosecution introduced Caylor's assertions in a forensic lab report without putting him on the stand. This constituted a straightforward violation of the Confrontation Clause.

The State's brief attempts to salvage the judgment below on various grounds – all but three pages (Resp. Br. 56-59) of which ignore, or flatly contradict, the New Mexico Supreme Court's reasoning. But all of the State's new arguments run squarely counter to *Melendez-Diaz* and other basic confrontation principles.

Even less persuasive are amici's arguments based on invoking expert-witness rules, introducing machine-generated printouts, and the prospects of calling multiple forensic witnesses to the stand or prosecuting "cold cases." This case involves none of those things. Rather, it involves the prosecution electing to introduce one analyst's forensic report, describing procedures he allegedly followed and

results he allegedly obtained, through the in-court testimony of another analyst. Petitioner does not contend that the State needed to present any extra witnesses; it merely needed to present the *right* witness – and that witness was perfectly available. If *Melendez-Diaz* means anything, the decision below must be reversed.

ARGUMENT

I. Caylor's Assertions In The Forensic Report Are Testimonial.

In *Melendez-Diaz*, law enforcement officers provided seized evidence "to a state laboratory required by law to conduct chemical analysis upon police request." 129 S. Ct. at 2530. Lab analysts tested the evidence and prepared "certificates of analysis" reporting that the evidence contained an illegal substance. *Id.* at 2531. This Court held that the certificates contained testimonial statements because each statement was "incontrovertibly a solemn declaration or affirmation made for the purpose of establishing or proving some fact" in a criminal prosecution. *Id.* at 2532 (internal quotation marks and citation omitted).

This Court granted certiorari in this case based on the premise that the certificate at issue here is likewise testimonial. Pet. for Cert. i. The State nevertheless argues that the lab report here is nontestimonial because: (1) it was "unsworn"; (2) it was supposedly "non-adversarial"; and (3) Caylor's statements allegedly simply reported machine-generated results. None of these arguments provides the slightest basis for distinguishing *Melendez-Diaz.*

1. As the New Mexico Supreme Court recognized, "'the absence of [an] oath [i]s not dispositive' in determining if a statement is testimonial." JA 12 (quoting *Crawford*, 541 U.S. at 52). Indeed, this Court has called it "implausible that a provision which concededly condemn[s] trial by sworn *ex parte* affidavit [would deem] trial by *unsworn ex parte* affidavit perfectly OK." *Crawford*, 541 U.S. at 52-53 n.3. Such a rule would render the right to confrontation so easily manipulated as to be meaningless. *See Davis v. Washington*, 547 U.S. 813, 830-31 n.5 (2006); *id.* at 838 (Thomas, J., concurring in the judgment in part and dissenting in part) ("Because the Confrontation Clause sought to regulate prosecutorial abuse occurring through the use of *ex parte* statements as evidence against the accused, it also reaches the use of technically informal statements when used to evade the formalized process.").

Here, the lab report is identical to those in *Melendez-Diaz* in all material respects. Just as in *Melendez-Diaz*, a law enforcement officer provided seized evidence to a state laboratory required by law to assist in police investigations. Resp. Br. 23; N.M. Stat. § 29-3-4. Just like the analysts in *Melendez-Diaz*, Caylor tested the evidence and prepared a "certificate of analyst" reporting that it contained a certain chemical composition. JA 62. Just like the certificate in *Melendez-Diaz*, Caylor's certificate is "formalized into [a] signed document[]," *Davis*, 547 U.S. at 837 n.2 (Thomas, J., concurring in the judgment in part and dissenting in part), called a "report." JA 62. Finally, the report notes at the bottom that it is an official form approved by the New Mexico Rules of Criminal Procedure for use as

evidence in criminal trials. *Id.*[1] These formalities are more than enough to render Caylor's assertions testimonial under any standard. In fact, the absence of an oath makes his report *more* offensive to the Confrontation Clause, not less.

2. The holdings of *Melendez-Diaz* and *Crawford* squarely foreclose the State's argument (Resp. Br. 21-41) that Caylor's assertions in the lab report are nontestimonial because they are somehow not "adversarial" or "inquisitorial." Any document that is created for an "evidentiary purpose," or to aid the investigative or prosecutorial process, is testimonial. *Melendez-Diaz*, 129 S. Ct. at 2532. It is irrelevant whether such statements are made to government officers who are supposedly "neutral." *Melendez-Diaz*, 129 S. Ct. at 2533-34, 2536; *Crawford*, 541 U.S. at 66. (Indeed, governmental officers need not even be involved in the creation of such statements; purely "volunteered" statements can be testimonial. *Davis*, 547 U.S. at 822-23 n.1; *accord Melendez-Diaz*, 129 S. Ct. at 2535.) The lab report easily satisfies this "evidentiary purpose" test. Just like the report in *Melendez-Diaz*, the report here was created by employees in a state department of health in order to

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[1] Although part of the text on the bottom of the report is obscured in this case by an appendix sticker, it reads in full: "SLD 705 (Rules of Procedure for the Municipal Courts, Rule 8-603, Rules of Procedure for the Magistrate Courts, Rule 6-607, Rules of Procedure for . . . ." The rules referenced in the parenthetical provide for the automatic admissibility of certified reports of blood alcohol analyses. SLD 705 is adopted from N.M. CR Form 9-505.

aid a police investigation. *Compare Melendez-Diaz*, 129 S. Ct. at 2530-32, *with* JA 62.[2]

3. *Melendez-Diaz* likewise forecloses the State's argument that "the simple act of copying raw data onto a public record" cannot create testimonial evidence. Resp. Br. 18. When someone "*create[s]* a record for the sole purpose of providing evidence against a defendant," the record is testimonial. *Melendez-Diaz*, 129 S. Ct. at 2539 (emphasis in original). It does not matter whether the record reflects that person's "interpretation" or "judgment." Resp. Br. 16. If it did, then contrary to the reasoning in *Melendez-Diaz*, 129 S. Ct. at 2535, 2538, police reports concerning objective observations (such as addresses or license plate numbers) would be nontestimonial, as would all eyewitness reports of objective facts to the police or prosecutors.

Nor does it matter whether a record can be characterized as a "public or business record" under

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[2] Recognizing, at least in part, that this Court's precedent forecloses its argument, the State asks this Court to overrule *Davis*, suggesting that the "primary purpose" test that an eight-Justice majority adopted in that case has created "controversy and litigation in the state and lower federal courts." Resp. Br. 44. This Court's upcoming decision in *Michigan v. Bryant*, No. 09-150, presumably will clarify aspects of the *Davis* test. At any rate, this Court fully expected that *Crawford* would generate some "interim uncertainty," 541 U.S. at 68 n.10, and that is perfectly natural. Whereas this Court has been applying criminal procedure rights such as the right to counsel and the right against self-incrimination against the states for over 40 years, this Court has applied the traditional conception of the Confrontation Clause against the states for only seven years.

modern hearsay rules. Resp. Br. 18-19. The shop books that the State points to in *Heike v. United States*, 227 U.S. 131, 144-45 (1913), which contemporaneously recorded the amount of sugar a company bought and sold, were nontestimonial not because they were business records but because they were unconnected to any evidentiary objective. *See United States v. Heike*, 192 F. 83, 95-97 (2d Cir. 1911); *compare Melendez-Diaz*, 129 S. Ct. at 2538.

In any event, as petitioner explained in his opening brief, Caylor's statements in the lab report went well beyond copying down what the gas chromatograph supposedly said. Petr. Br. 36-37. The State does not dispute this reality, offering instead only the tepid suggestion that petitioner did not object to the admission of the additional statements concerning the integrity of the sample and its connection to him. Resp. Br. 18 n.1. Petitioner, however, objected below to introducing Caylor's statements in the "document," JA 44 – that is, all of Caylor's statements – not just his statements asserting that the BAC of the blood sample was .21. There can be no doubt, therefore, that the State introduced testimonial statements from Caylor.

II. The State's Failure To Call Caylor To The Stand At Trial Violated The Confrontation Clause's Particular-Witness Rule.

The State argues that its introduction of Caylor's statements in the forensic lab report without putting Caylor on the stand comported with the Confrontation Clause for two reasons: (A) petitioner had the opportunity to retest the blood sample for himself; and (B) petitioner was able to cross-examine

a different analyst, Gerasimos Razatos, who had general "knowledge of laboratory procedures." Resp. Br. 52-59. The State's amici advance two more arguments, contending that the State did not need to put Caylor on the stand because (C) the rules of evidence allow a party to introduce otherwise inadmissible evidence in support of an "expert witness" giving in-court opinion testimony, Br. of NDAA 8-13; Br. of States 24-27; and (D) the Confrontation Clause is overly burdensome as applied to forensic evidence, Br. of NDAA 22-32; Br. of States 5-12; Br. of N.M. Dep't of Health 26-33. None of these arguments withstands scrutiny.

A. A Defendant's Opportunity To Retest A Forensic Sample Does Not Satisfy The Right To Confrontation.

The State argues that an opportunity for retesting satisfies the Confrontation Clause because (1) "the Confrontation Clause does not place the burden on the government to confront witnesses on the defendant's behalf," Resp. Br. 55; and (2) retesting, according to the State, is a "more effective" way to challenge the prosecution's forensic evidence than cross-examination, *id.* at 54-55. *Melendez-Diaz* squarely forecloses each of these contentions.

1. In *Melendez-Diaz*, Massachusetts argued that no confrontation violation occurred "because the [defendant] had the ability to subpoena the analysts." 129 S. Ct. at 2540. This Court rejected the argument, explaining that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses . . . . Its value to the defendant is not replaced by a system in which the prosecution

presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses." *Id.*; *see also Taylor v. Illinois*, 484 U.S. 400, 410 n.14 (1988) (Confrontation Clause's requirement of live testimony applies "in every case, whether or not the defendant seeks to rebut the case against him or to present a case of his own."). So too here. The obligation that the Confrontation Clause imposes on the prosecution to present evidence from its witnesses via "live testimony in court," *Crawford*, 541 U.S. at 43, runs independent of any ability the defendant has, via retesting or any other means besides confrontation, to challenge the testimony that the prosecution offers.

2. It makes no difference whether retesting a sample described in a forensic report would sometimes be a more effective way of challenging a report than is confrontation. As this Court recognized in *Melendez-Diaz*, "respondent and the dissent may be right that there are other ways – and in some cases better ways – to challenge or verify the results of a forensic test. But the Constitution guarantees one way: confrontation. We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available." 129 S. Ct. at 2536. Thus, just as the prosecution must call an investigating police officer to the stand even when a defendant's ability to inspect a crime scene for himself might be a more effective way of challenging objective assertions in the officer's report, the prosecution must call a forensic analyst to the stand regardless of whether retesting is possible.

B. The Ability To Cross-Examine One Witness Does Not Give The Prosecution License To Introduce A *Different* Witness's Testimonial Statements.

The State does not dispute that its refusal to call Caylor to the stand violated three of the four elements of the right to confrontation – namely, the requirements that witnesses provide their testimony under oath, in the presence of the jury, and face-to-face with the accused. *See* Petr. Br. 15-22, 23-24. Nor does the State dispute that its refusal to call Caylor to the stand at least partially deprived petitioner of the fourth element of confrontation (cross-examination). In particular, the State's action rendered petitioner unable to cross-examine Caylor about the testing he claimed he performed; about his familiarity and proficiency with gas chromatograph testing; and – perhaps most importantly – about his work history, including the reason for his recently being put on unpaid leave. *See* Petr. Br. 28-32.

The State nonetheless argues that it satisfied the Confrontation Clause because it partially fulfilled the requirement of cross-examination. Specifically, the State contends that it satisfied the Clause insofar as petitioner had an "opportunity to question" a *different* analyst about general "laboratory procedures." Resp. Br. 56-57. The State is mistaken. Giving a defendant the ability to cross-examine one witness cannot substitute for the prosecution's obligation to confront the defendant with another witness whose testimonial statements it introduces.

1. Both the history of the Confrontation Clause and this Court's decision in *Crawford* make clear

that, absent a declarant's unavailablity and a prior opportunity for cross-examination, the Clause imposes a categorical rule: the prosecution may not introduce the declarant's testimonial statements into evidence without putting *that declarant* on the stand. *See* Petr. Br. 13-15, 23-25. Just like the Sixth Amendment's rights to counsel and to jury trial, this constitutional rule is not subject to suspension based on a court's perception that confrontation of a particular witness would provide little value in any given case. *See Crawford*, 541 U.S. at 61-62; *Melendez-Diaz*, 129 S. Ct. at 2536, 2537 n.6. It is always the defendant's prerogative, not a court's, to decide whether it is worth invoking constitutional protections.

2. The State and its amici seek refuge from this reality in two snippets of this Court's case law. But neither passage offers any help.

a. The State points to this Court's statement in *Mattox v. United States*, 156 U.S. 237, 243 (1895), that "[t]he law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." *See* Resp. Br. 57. But *Mattox* stands for just the opposite of what the State would have it embody. There, this Court allowed the prosecution to introduce prior testimony only when a witness was unavailable. 156 U.S. at 240. And even then, this Court emphasized – consistent with historical requirements – that the defendant "shall under no circumstances be deprived of" the right at least once "of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." *Id.* at 244. Here, Caylor was not unavailable, and petitioner

never had a chance to confront and cross-examine him. Nor does the State even attempt to argue that there is any historical basis for dispensing with those requirements here.

b. The NDAA points to footnoted language in *Melendez-Diaz*, 129 S. Ct. at 2532 n.1, which explains that the prosecution need not call to the stand everyone "whose testimony may be relevant in establishing the chain of custody" of a forensic sample, for "[i]t is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence." *See* Br. of NDAA 14-15, 32. When read in its entirety, however, this footnote directly refutes the New Mexico Supreme Court's holding.

The footnote reaffirms that the Confrontation Clause imposes nothing more, but also nothing less, than a "procedural" requirement regarding prosecution witnesses. *Crawford*, 541 U.S. at 61. The prosecution always has discretion (subject to applicable evidence rules and its burden to prove each element of the crime) to decide which witnesses it puts on the stand to prove a chain of custody or anything else. Thus, the footnote makes clear that nothing in the Confrontation Clause requires the prosecution to call "everyone who laid hands on the evidence" that is the subject of a forensic report. *Melendez-Diaz*, 129 S. Ct. at 2532 n.1.

At the same time, this Court emphasized in the footnote that "what testimony *is* introduced must (if the defendant objects) be introduced live." *Id.* (emphasis in original). The word "testimony" in this sentence obviously encompasses not merely in-court testimony but rather *any* testimonial evidence. (Otherwise, the sentence would be nothing more than

a truism.) Hence, once the prosecution elects to introduce a certain forensic analyst's testimonial statements, it must put that analyst on the stand. *See id.* at 2537 n.6 ("The analysts who swore the affidavits" the prosecution introduced "provided testimony against [the defendant], and they are therefore subject to confrontation.").

The State violated that rule here. In order to introduce Caylor's report, the State needed to put Caylor on the stand. If the State wanted Razatos to testify instead, it could have had him retest the portion of petitioner's blood sample that the lab retained after Caylor's testing, *see* JA 52, 65, and write a new report. But the Confrontation Clause prohibited the State from introducing *Caylor's* report through *Razatos's* in-court testimony.

C. Evidentiary Rules Governing Expert Testimony Do Not Override The Confrontation Clause With Respect To Testimonial Statements That The Prosecution Introduces At Trial.

The State's amici contend that Caylor's report was admissible because Razatos testified as an expert, and "[w]hen scientific evidence is presented as an *independent opinion* formed by a qualified expert witness . . . *that opinion is the evidence* and that expert is the witness for purposes of the Confrontation Clause." Br. of States 13 (emphasis added); *see also id.* 24-27; Br. of NDAA 9-13. This argument does not apply to the facts of this case, and even if it did, it would not change the outcome.

1. The State expressly disclaims any argument that Razatos's testimony provided any "independent opinion" regarding petitioner's blood alcohol content. As the State acknowledges, "[a]side from reading a report that was introduced as an exhibit (JA 55), Mr. Razatos offered *no opinion* about Petitioner's blood alcohol content." Resp. Br. 58 n.15 (emphasis added).[3] Instead, the State introduced Caylor's forensic report as a "business record," and argued without any reference to expert-testimony concepts or any limiting instruction from the trial court that the report alone proved petitioner's unlawful BAC. JA 7, 44-45.

2. Even if the State had proceeded under its local expert testimony rules, it would not have changed the nature of the confrontation violation here

New Mexico Rule of Evidence 11-703 – like Federal Rule of Evidence 703 – provides that a party may introduce facts or data that supply a basis for an expert witness's opinion whenever the facts or data are "of a type reasonably relied upon by experts in

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[3] The relevant portion of Razatos' direct testimony reads as follows:

> Q "And, were the results recorded on this particular document?"
>
> A "Yes, they were."
>
> Q "And, can you tell the jury what the results were of this?"
>
> A "The results were zero point two one grams of alcohol per one hundred milliliters of blood."

JA 54-55.

the particular field in forming opinions or inferences," and the "probative value" of the facts or data "in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." But even accepting the New Mexico Supreme Court's assertion that "the trial court reasonably could have found that the probative value of [Caylor's forensic report] in assisting the jury to evaluate Razatos's testimony" satisfied the requirements of Rule 11-703, JA 17, this reality makes no difference. As this Court has made clear time and again, "[w]here testimonial statements are involved," the Confrontation Clause's application does not turn on "the vagaries of the rules of evidence." *Crawford*, 541 U.S. at 61; *see also id.* at 56-57 n.7 (confrontation concerns "do[] not evaporate" when *ex parte* testimony satisfies a modern rule of evidence, even if that rule is "justifiable in other circumstances"); *Melendez-Diaz*, 129 S. Ct. at 2539-40 (irrelevant whether testimonial statements qualify as "business or official records"); *Davis*, 547 U.S. at 820 (same regarding excited utterances). This principle applies with respect to modern expert witness rules (Fed. R. Evid. 703 was enacted in 1975), the same as it applies to other rules of evidence.[4]

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[4] Because the State introduced Caylor's report into evidence, this case does not present the question whether, or under what circumstances, the Confrontation Clause permits experts to testify based upon others' testimonial statements that the prosecution does not introduce into evidence. Some courts have permitted testifying experts to "present their own independent judgments," even when based in part on reviewing a nontestifying witness's testimonial statements, so long as the

To be sure, the Confrontation Clause "does not apply to statements that are not admitted for the truth of the matter." Br. of NDAA 11 (citing *Crawford*, 541 U.S. at 60 n.9). In *Tennessee v. Street*, 471 U.S. 409 (1985), for example, the defendant argued that his confession was false because the police had read him the written confession of his alleged accomplice and told him to say the same thing. *Id.* at 411. The prosecution countered by introducing the nontestifying accomplice's confession to show that it differed in material ways from the defendant's. Because the accomplice's testimonial statement was introduced for a reason unrelated to whether it accurately recounted information, its introduction did not violate the Confrontation Clause. *Id.* at 413-14.

But contrary to NDAA's wishful thinking, it is simply "nonsense" to claim that a forensic report introduced to provide a basis for an analyst's in-court testimony is not introduced for the truth of the matter asserted. David H. Kaye, et al., *The New Wigmore, A Treatise on Evidence: Expert Evidence* § 4.10.1, at 197 (2d ed. 2011). As the *New Wigmore* treatise, as well as other courts and commentators, have explained:

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prosecution does not introduce those statements and the testifying expert does not repeat them. *See, e.g.*, *United States v. Johnson*, 587 F.3d 625, 635-36 (4th Cir. 2009). But even assuming that this procedure is generally valid, the Confrontation Clause might be violated if an expert testifies in a manner that leads the jury to infer the substance of a nontestifying witness's testimonial statements. *See id.*; *United States v. Mejia*, 545 F.3d 179, 199 (2d Cir. 2008).

> To use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true. If the jury believes that the basis evidence is true, it will likely also believe that the expert's reliance is justified; inversely, if the jury doubts the accuracy or validity of the basis evidence, it will be skeptical of the expert's conclusions.

Id. at 196; *see also People v. Goldstein*, 843 N.E.2d 727, 732-33 (N.Y. 2005) ("The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context."); Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 Geo. L.J. 827, 855-56 (2008) ("[I]t is not logically possible for a jury to use the hearsay statements [in a forensic report] to assess the weight of the expert's opinion other than by considering their truth."). Accordingly, the Confrontation Clause regulates the admission of testimonial "basis evidence" just the same as it regulates other testimonial evidence.[5]

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[5] Because the State introduced Caylor's report instead of any machine-generated printouts, this Court need not decide here whether the prosecution may introduce such printouts as basis evidence to support an expert's in-court testimony. Some judges have held that machine-generated printouts are nontestimonial insofar as they do not contain any human assertions. *See, e.g.*, *United States v. Washington*, 498 F.3d 225, 230 (4th Cir. 2007). Under this view, the prosecution may

D. Any Burden That The Confrontation Clause Imposes In This Context Does Not Justify Dispensing With Confrontation.

Finally, the amici supporting the State argue that enforcing the Confrontation Clause's time-honored requirements in the context of forensic evidence is too burdensome. This Court already rejected this basic argument in *Melendez-Diaz.* To the extent that the amici advance any new arguments specifically applicable to the Clause's particular-witness rule, those arguments do not justify suspending the rule here.

1. The amici contend that the Confrontation Clause should not apply to forensic reports primarily because laboratories sometimes perform thousands of tests per year. Br. of NDAA 22-25; Br. of States 5-8. But this Court already held in *Melendez-Diaz* that "the substantial total number of controlled-substance analyses performed by state and federal laboratories in recent years" provides no license to suspend the Clause's requirement that the prosecution prove its case through live, as opposed to written, testimony. 129 S. Ct. at 2540. As this Court has explained, "[i]t is a truism that constitutional protections have

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introduce at least portions of such printouts free and clear of confrontation restrictions. Others, however, have concluded that machine-generated printouts are entirely "the hearsay statements of the technicians who ran the tests." *Id.* at 232 (Michael, J., dissenting). Under this view, forensic printouts would be considered testimonial statements of the machine operators and the confrontation principles discussed above would restrict their admission. *See id.* at 234.

costs." *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988). Yet "[t]he Confrontation Clause – like . . . other constitutional provisions – is binding, and we may not disregard it at our convenience." *Melendez-Diaz*, 129 S. Ct. at 2540; *see also Blakely v. Washington*, 542 U.S. 296, 313 (2004) ("[O]ur decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice."); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (requiring states to provide attorney for indigent defendants regardless of burden).

2. In light of this Court's holding in *Melendez-Diaz* that, notwithstanding any burden it imposes, the Confrontation Clause requires the prosecution to introduce forensic reports though live witnesses, the only question here is whether enforcing the *particular-witness rule* in the context of forensic evidence imposes any marginal additional burdens that justify suspending that rule. It does not.

As an initial matter, many jurisdictions across the country – from large cites with high crime rates such as Oakland and Detroit, to sparsely populated states such as Alaska and South Dakota – already apply not only the Confrontation Clause's live-testimony rule but also its particular-witness rule in the context of forensic evidence. *See* Br. of Public Defender Service (PDS) et al. 3, 5-15. Most of these jurisdictions have done so for decades. *Id.* at 7. The PDS brief details how these various jurisdictions minimize and mitigate the burdens on their forensic labs, using both statutory tools (such as notice-and-demand statutes) and practical accommodations. *Id.* at 7-25; *see also Melendez-Diaz*, 129 S. Ct. at 2540-42; Br. of Law Profs. 26-31. Neither the NDAA nor

the States dispute any of the empirical assertions in the PDS brief. That fact alone should cause this Court to brush aside their predictions of doom.[6]

At any rate, neither of the burdens that the amici supporting the State allege justifies suspending the particular-witness rule in the context of forensic evidence.

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[6] Indeed, although Massachusetts in *Melendez-Diaz*, similarly tried to scare this Court with "dire predictions" concerning applying the Confrontation Clause to forensic reports, 129 S. Ct. at 2540, a Massachusetts prosecutor commented after the decision in that case was announced:

> Many of you may expect me to get up here today and say, "The sky is falling, this is horrible, this is horrible, we cannot do justice." Well, I'm here to say quite the opposite. . . . [B]ased upon the efforts that have been made since the *Melendez-Diaz* decision, I can say that I think it's going to work out, and I think especially . . . when it comes to drug cases, I'm quite confident that our state and hopefully all states in the country are going to be able to deal with *Melendez-Diaz* in an efficient, appropriate and just way, to hold those accountable but also to afford the constitutional rights to all defendants.

Reply Br. 27, *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) (No. 07-11191), 2009 WL 4709535, at *27 (quoting Patrick M. Haggan, Chief Trial Counsel, Suffolk Cnty. Dist. Attorney's Office, Remarks at New England School of Law Symposium: Confronting Forensic Evidence: Implications of *Melendez-Diaz v. Massachusetts* and *Briscoe v. Virginia* (Nov. 13, 2009)). This prediction is consistent with statistics in the States' brief. *See* Br. of States 7 (showing that analysts in Los Angeles County spend an average of between 2.23 and 6.52 hours per month attending court).

a. *Multiple witnesses.* The States argue that that "[f]orensic science service systems cannot absorb the demands on their resources that would result if *every forensic analyst who generates data* in connection with a criminal case is required to personally testify in order to satisfy the Confrontation Clause." Br. of States 6 (emphasis added).

This argument misapprehends what the Confrontation Clause requires. As this Court explained in *Melendez-Diaz*, the prosecution must merely present the live testimony of anyone whose testimonial statements it wishes to introduce – not "everyone who laid hands on the evidence." 129 S. Ct. at 2532 n.1. If, for example, ten people witness different stages of a bank robbery, the prosecution is obliged to call only those witnesses whose testimonial statements it wishes to introduce at trial – not all ten people who saw the robbery. By the same token, if multiple people have a connection to forensic evidence, the prosecution must call only those persons whose testimonial statements it chooses to introduce.

To be sure, the Confrontation Clause, coupled with the Due Process Clause's beyond-a-reasonable-doubt rule, will sometimes have the effect of requiring a prosecutor to put multiple forensic witnesses on the stand. But again, this reality is no different from other areas of criminal law. If several people witness different components of a white-collar accounting fraud, and the fraud can be proven only by combining all of the components, then the prosecution must put all of those witnesses on the stand.

In fact, the particular-witness rule actually imposes *less* of a burden in the forensic context than in others. Unlike dealing with eyewitnesses after the fact, the government in the forensic context can decide in advance who it wants to be its witnesses and thereby guard to some degree against future unavailability. The government can also decide how it wishes to structure its forensic laboratories, so as to minimize the number of witnesses necessary to introduce forensic reports. It takes, for example, only one analyst to run a test and write a report with respect to BAC and most other kinds of forensic matters (controlled substances, fingerprints, fibers, ballistics, etc.). Any evidentiary burden beyond that is a state's own making.[7]

b. *Unavailable witnesses.* The NDAA asserts that reversing the New Mexico Supreme Court's decision could hamper the prosecution of "cold cases" when an analyst such as a forensic pathologist has died. Br. of NDAA 26-31. The problem of unavailable witnesses, however, is hardly unique to

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[7] The one possible exception appears to be DNA testing, where multiple analysts sometimes are used. But even there, it appears that one analyst is often enough and that two is usually sufficient. *See, e.g.*, *Hamilton v. State*, 300 S.W.3d 14, 19-20 (Tex. Ct. App. 2009) (noting that a single analyst "screened the physical evidence in [defendant's] case for biological material," "developed a DNA profile," "compare[ed] graphs of each DNA profile," and wrote a "report"); *Contreras v. State*, 939 N.E.2d 708, 2010 WL 5395063, at *3 (Ind. Ct. App. Dec. 22, 2010) (one analyst); *Pendergrass v. State*, 913 N.E.2d 703, 705 (Ind. 2009) (one analyst "performed the original laboratory processing" to generate DNA profiles and another drew statistical conclusions from those profiles), *cert. denied*, 130 S. Ct. 3409 (2010).

forensic testimony. Throughout history, when the passage of time has rendered a crucial eyewitness or investigative police officer unavailable, the confrontation guarantee has barred the prosecution from introducing that witness's testimonial statements unless the defendant has had a prior opportunity to cross-examine that witness. *See Crawford*, 541 U.S. at 59; *accord id.* at 54, 68. That rule applies regardless of the reliability of the statements or their importance to the prosecution.

Indeed, as with multiple witnesses, the burden that the Confrontation Clause's particular-witness rule imposes with respect to unavailable forensic witnesses is actually less than with respect to other unavailable witnesses. At least as a prospective matter, laboratories can take steps to ensure that forensic evidence will be admissible, notwithstanding an analyst's later unavailability. For example, laboratories can videotape testing or take photographs that can serve as bases for other analysts to testify; they can have two analysts perform tests jointly so that either one can later testify; or, as New Mexico law requires and the laboratory here did, they can preserve samples for potential retesting by other analysts. *See* Br. of Law Profs. 31-33; N.M. Admin Code § 7.33.2.15(A)(406); JA 52, 65; Br. of Richard Friedman 24.

In any event, any hypothetical cold-case scenarios in which forensic analysts are unavailable and retesting is impossible are irrelevant here. Even the law professors who advocate creating a narrow exception to the particular-witness rule to deal with such cases recognize that an exception could apply "*only* if (1) the original expert is genuinely

unavailable through no fault of either party; (2) re-testing or re-analyzing the materials at issue is not a feasible option; and (3) the original test conditions were documented with sufficient particularity and detail as to permit the surrogate expert to exercise substantial independent judgment in forming an expert opinion." Br. of Law Profs. 6 (emphasis in original). Here, retesting was possible and Caylor was not unavailable; he had merely been "very recently put on unpaid leave" for unspecified reasons. JA 58. If anything, that fact underscores the importance – not the burden – of confrontation, and highlights why petitioner's rights were violated here.

CONCLUSION

For the foregoing reasons, the judgment of the New Mexico Supreme Court should be reversed.[8]

Respectfully submitted,

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[8] If this Court reverses, the State requests (Resp. Br. 59-60) that this Court remand the issue of harmless error, suggesting that petitioner would have received the same "sentence" regardless of whether the lab report had asserted that his BAC was above .16. The State's suggestion is incorrect. Even if petitioner could have received the same sentence with a lower BAC, the lab report here enabled him to be convicted of aggravated DWI instead of simply DWI. *See* N.M. Stat. § 66-8-102(D)(1). Nevertheless, petitioner has no quarrel with the request to leave it to the state courts to determine in the first instance whether the State properly preserved any harmless error argument and, if so, whether the argument is meritorious.