No. 07-11191

In The

Supreme Court Of The United States

MARK A. BRISCOE and SHELDON A. CYPRESS

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari
To The Supreme Court of Virginia

AMICI CURIAE BRIEF FOR THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The Public Defender Service for the District of Columbia ("PDS") provides and promotes quality legal representation to indigent adults and children facing a loss of liberty in the District of Columbia. The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit association of criminal defense lawyers with a national membership of more than 10,000 attorneys.[1] Amici have a longstanding interest in ensuring that the right to confrontation is fully realized and protected. Both PDS and NACDL appeared as amicus curiae in *Davis v. Washington*, 126 S. Ct. 2266 (2006) and NACDL appeared as amicus curiae in *Crawford v. Washington*, 541 U.S. 36 (2004) and *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

SUMMARY OF ARGUMENT

Amici write to ensure that the Court has the defender's perspective on the very real differences between the confrontation guarantee and the subpoena alternative for forensic analysts endorsed by the Virginia Supreme Court and codified in a handful of other state codes. A defendant's Sixth Amendment right to be confronted with the prosecution's witnesses is, as this Court explained in *Crawford v. Washington,* 541 U.S. 36, 61 (2004), and

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[1] The parties have consented to the filing of this brief. No counsel for any party authored any part of this brief, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

reaffirmed in *Melendez-Diaz*, 129 S. Ct. at 2536, "a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner." A statutory acknowledgement of a defendant's right to call a prosecution witness in the defense case does not "adequately protect[] a criminal defendant's rights under the Confrontation Clause" as the Supreme Court of Virginia erroneously concluded below, *Magruder v. Commonwealth*, 657 S.E.2d 113, 118 (Va. 2008), because it does not afford the defense the same procedure as the traditionally conceived and constitutionally mandated confrontation right. It does not require the government to bear its burden of presenting to the trier of fact live testimony, under oath, from its forensic analyst in its case in chief. It does not permit the defense to determine whether and how to conduct its cross-examination against the backdrop of the prosecution's case. It does not afford the defense the same opportunity to question the prosecution's forensic analyst selectively or to challenge his inculpatory evidence with the same immediacy. And because of these procedural differences, the subpoena alternative for forensic analysts fails to achieve the same benefits of confrontation – namely, to allocate risks, afford opportunities, and ultimately create incentives for prosecutors and their witnesses to act with greater care and honesty to the advantage of the criminal justice system.

Equating the confrontation guarantee with the very different procedure of the subpoena

alternative is not justified by a sky-will-otherwise-fall rationale. The sky has not fallen in those jurisdictions that require the prosecution to present the live testimony of a forensic analyst if a defendant so desires. In these jurisdictions where prosecutors have shouldered their constitutional burden for years, if not decades, the criminal justice system continues to function: drug cases are prosecuted, guilty pleas are entered, and trials at which forensic analysts testify in person for the prosecution are had. These jurisdictions have accepted that the burden of bringing a forensic analyst to court to testify for the prosecution is simply part of the cost of our criminal justice system. Ensuring that state forensic science departments have adequate resources to fulfill their duties in both the laboratory and the courtroom is the responsibility of the legislature and the executive. In Virginia the General Assembly and the Governor have already taken steps to address the increased demand for testimony by its forensic analysts. Thus, Virginia itself demonstrates that compliance with the Sixth Amendment's right to confrontation is entirely feasible and that replacing the confrontation guarantee with an entirely different subpoena alternative is wholly unnecessary.

ARGUMENT

I. THE STATUTORY SUBPOENA ALTERNATIVE IS NO SUBSTITUTE FOR THE SIXTH AMENDMENT RIGHT TO CONFRONTATION.

A. The Sixth Amendment Confrontation Guarantee Affords a Defendant a Particular Procedure for Challenging the Prosecution's Case Which, Because of the Way it Allocates Burdens to the Prosecution and Affords Opportunities to the Defense, Ultimately Promotes Justice.

The right to confrontation has long been understood to "arise automatically on the initiation of the adversary process" without any action by the defense, *Taylor v. Illinois*, 484 U.S. 400, 410 (1988), and to require that the prosecution "confront" a defendant "with" its witnesses in the prosecution's case in chief. U.S. Const. amend. VI; *see also Melendez-Diaz*, 129 S. Ct. at 2533. There are four components to the confrontation guarantee: (1) it ensures that the defense will meet "face-to-face" with the prosecution's witnesses, *Crawford*, 541 U.S. at 57; (2) it requires those witnesses to testify under oath, *Maryland v. Craig*, 497 U.S. 836, 845-46 (1990); (3) it gives the trier of fact a first-hand "opportunity [to] observ[e] the quality, age, education, understanding, behavior, and inclinations of th[ose] witness[es]; in which points all persons must appear alike, when their depositions are

reduced to writing," Sir William Blackstone, 3 *Commentaries on the Laws of England* *374 (1765-69 ed.); and (4) it gives the defense the "opportunity" to question the prosecution's witnesses on cross-examination, *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987).

It is always the prosecution's prerogative to ask the defense to stipulate to the admission of unconfronted out-of-court statements. A statutory provision that merely formalizes the timetable for such a request does not alter the confrontation procedure and thus does not run afoul of the Sixth Amendment. Certainly, a defendant who knows in advance that there is nothing to be gained from confronting and cross-examining a prosecution witness would do well to attempt to keep that witness off the stand by agreeing to a stipulation.

If, however, the defense declines such a request, the prosecution must fulfill the first three elements of the confrontation guarantee – "physical presence, oath . . . and observation of demeanor by the trier of fact," *Craig*, 497 U.S. at 846 – in the course of the prosecution's case in chief. *Melendez-Diaz,* 129 S. Ct. at 2540 ("the Confrontation Clause imposes a burden on the prosecution to present its witnesses"); *see also Taylor v. Illinois*, 484 U.S. 400, 410 n.14 (1988) (the right "to be confronted with adverse witnesses . . . appl[ies] in every case, whether or not the defendant seeks to rebut the case against him or to present a case of his own") (internal quotation and citation omitted). Thus, the

prosecution at trial bears not only the burden of proof, but also the burden of proving its case in a particular way, through live testimony with all its attendant benefits and pitfalls.

Live testimony is almost always more compelling than a written statement, but there are considerable risks. The witness may fail to appear, leaving a hole in the evidentiary fabric of the prosecution's case. *See Melendez-Diaz*, 129 S. Ct. at 2540 (noting that the "consequences of adverse witness no-shows" are properly borne by the prosecution). This is a possibility with any witness, but should be less of a concern for the prosecution than for the defense when the witness is a state employee, like a forensic analyst. These witnesses are unlikely to unilaterally disregard a request to testify from the prosecution since the laboratory for which they work likely does the bulk of its work for prosecutors and law enforcement officers (as in the case in Virginia[2]), and the analysts and the prosecutors are effectively members of the same team. *Cf. State v. Birchfield*, 157 P.3d 216, 219 (Or. 2007) (noting the greater difficulties for the defense of putting a forensic analyst under subpoena and noting that the analyst, "in all likelihood, could be an

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[2] More than 99% of the work performed by the Department of Forensic Science is for law enforcement, medical examiners, or Commonwealth's Attorneys. *See* Agency Strategic Plan, Department of Forensic Science available online at http://www.vaperforms.virginia.gov/agencylevel/stratplan/spReport.cfm?AgencyCode=778.

adverse witness with no incentive to cooperate in that process").

There is also the risk that the witness who appears in court will make a poor showing for the prosecution on the stand. Documents are the safe choice, particularly when they are prepared in anticipation of litigation and say no more and no less than the prosecution wants them to say, as is certainly the case with a lab analyst's report. By contrast, when a witness takes the stand there is always a possibility that the witness will provide, even on direct, information that is inconsistent with prior statements or otherwise unhelpful to the prosecution or helpful to the defense. Just as important as the information a witness imparts is the witness's demeanor, which will affect how the trier of fact receives and evaluates the witness's testimony. *Delaware v. Van Arsdall*, 475 U.S. 673, 687 (1986) (Brennan, J., dissenting) ("Jurors evaluating the witnesses' demeanor may choose to give great weight to the testimony of one witness while ignoring the similar testimony of another."); 1A *Criminal Defense Techniques* §24A.02[1][d] (Sidney Bernstein *et al.* eds., 2008) ("A case is frequently only as strong as its witnesses."). Among other things, live witnesses may be confusing, inexact, longwinded, pompous, unconfident, obviously biased, or disturbingly cavalier about the subject matter of their testimony.

In short, requiring the prosecution to fulfill the first three elements of the confrontation

guarantee in its case in chief ensures that the prosecution bears the burden of ensuring the presence of its witnesses in court, that these witnesses are clearly identified as prosecution witnesses when they testify, and that any deficiencies with their direct testimony are charged to the prosecution.

Only after the prosecution has shouldered this burden and questioned its witness on direct does the fourth element of confrontation, cross-examination, come into play. *See Davis v. Alaska*, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."). The confrontation guarantee allows a defendant to wait until this point in the trial – after the defense has received the discovery and expert notice it is due, after any prior statements of the witness have been disclosed pursuant to a *Jencks*-type rule,[3] and after the prosecution has presumably elicited from the witness on direct whatever inculpatory information the witness possesses – to make a final assessment about what cross-examination might accomplish and whether it will likely be helpful or harmful to the

[3] *See* 18 U.S.C. § 3500(b) (mandating disclosure of prior statements by government witness to the defense upon defense request "[a]fter a witness called by the United States has testified on direct examination"); *see also* Fed. R. Crim. P. 26.2 (mandating disclosure of a witness's prior statements "on a motion of a party who did not call the witness").

defense to undertake it.

It may be that the defense, having observed the witness testify on direct examination, decides to forego cross-examination. This is a wholly legitimate exercise of the confrontation right. *See State v. Belvin*, 986 So. 2d 516, 525 (Fl. 2008) (holding that Florida's statutory subpoena alternative violated the confrontation guarantee because the defendant "has the right to stand silent during the state's case in chief, all the while insisting that the state's proof satisfy constitutional requirements") (internal quotation and citation omitted). For example, it may be that the witness failed to testify in a way that materially hurts the defendant. Or it may be that the witness actually testified poorly for the prosecution (and thus favorably for the defense), and might only qualify his answers on cross-examination. Or it may be that the witness, in anticipation of cross-examination, was so scrupulous in his testimony that cross-examination would only emphasize the strength of the prosecution's evidence.

But more often than not, a defendant will elect to cross-examine the analyst. Cross-examination may be used to expose holes, inconsistencies, biases, or untruths in a prosecution witness's direct testimony and thereby to undermine the government's case. *United States v. Caudle*, 606 F.2d 451, 457 (4th Cir. 1979) ("The annals of the legal profession are filled with instances in which testimony, plausible when supplied on examination

in chief, has by cross-examination been shown to be . . . faulty or worthless.") (internal quotation and citation omitted). This is no less true for forensic analysts than for other prosecution witnesses. *Melendez-Diaz,* 129 S. Ct. at 2538 (affirming that confrontation of forensic analysts can test their "honesty, proficiency, and methodology"); *id.* at 2536 (noting that "[f]orensic evidence is not uniquely immune from the risk of manipulation"); *id.* at 2537 ("Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination."); *see also Ford v. Wainwright*, 477 U.S. 399, 415 (1986) (Cross-examination may be essential to meaningful evaluation of an expert's conclusions by the fact-finder by "bringing to light the bases for each expert's beliefs, the precise factors underlying those beliefs, any history of error or caprice of the examiner, . . . the expert's degree of certainty about his or her own conclusions, and the precise meaning of ambiguous words used in the report."); *cf. People v. Dungo*, 2009 WL 2596892 (Cal. Ct. App. Aug. 24, 2009) (Sixth Amendment violation where "[t]he prosecution's failure to call [the coroner] as a witness prevented the defense from exploring the possibility that he lacked proper training or had poor judgment or from testing his honesty, proficiency, and methodology. Notably, that was the prosecution's intent.").

Cross-examination may also be used to develop affirmative evidence for the defense. *United States v. Mulinelli-Navas*, 111 F.3d 983, 992 (1st

Cir. 1997) (recognizing that the right to confrontation encompasses right to "develop and present a defense" through cross-examination); *see also Connecticut v. Johnson*, 460 U.S. 73, 77 (1983) (acknowledging that the "defense theory" may be apparent "by the cross-examination of the State's witnesses"); *cf. Richter v. Hickman*, 2009 WL 2425390 at *18 & n.22 (9th Cir. Aug. 10, 2009) (finding a violation of defendant's Sixth Amendment right to effective assistance where counsel failed to elicit on cross-examination information supporting the defense theory of the case from the prosecution's serologist).

To this end, cross-examination may be pursued for reasons other than casting doubt on whether the materials tested were in fact a controlled substance. For example, to support a broader argument that a defendant charged with possession with the intent to distribute is guilty only of simple possession, the defense might want to conduct a limited cross-examination of the chemist focused on the purity of drugs tested to show that the small amount of drugs found on the defendant were mixed with a different cutting agent than the larger stash of drugs found in the vicinity of the defendant at the time of his arrest. Or to support the argument that the drugs were mistakenly linked to the defendant, the defense might want to elicit limited testimony from the chemist about his careful adherence to written protocols to compare his conduct against the less careful conduct and

collection of evidence by the police at the crime scene.

Because the opportunity to cross-examine the prosecution witness comes on the heels of the witness's direct examination, the defense has maximum flexibility pursuing these destructive and constructive goals. In the case of a forensic analyst, the defense can pinpoint the topics on which he wants the trier of fact to focus and precisely limit his cross-examination – unlike the prosecution which must give the trier of fact context for its expert's conclusions. Examined in isolation the information elicited may appear slight, but when amassed in closing argument, it may give the trier of fact a reasonable doubt as to defendant's guilt of the charged crime.

Contemporaneous cross-examination after the prosecution presents its witness on direct examination allows the defense to challenge the witness's testimony while it is still fresh in the jury's mind and before it becomes fixed and unchallengeable. *See* 5 *Wigmore on Evidence* §1368, at 38 (Chadbourne rev. 1974) ("[C]ross-examination *immediately succeeds* in time the direct examination. In this way the modification or the discredit produced by the facts extracted is more readily perceived by the tribunal."). To draw an artistic analogy, when a defendant is afforded the right to confrontation, the government is not allowed to complete its painting for the jury without interruption, thereby presenting a finished and

consequently more compelling picture. Instead, as the prosecution wields its brush, the defense follows immediately behind, challenging and, if successful, changing the picture as it is constructed.

This is the robust procedure acknowledged by the Sixth Amendment to be an end in itself – not simply a dispensable means to an end. And yet it is precisely because the Framers recognized that this procedure is the best means of promoting the truth-seeking function of a criminal trial that they elevated it to a constitutional guarantee. *Crawford*, 541 U.S. at 62 (the Framers recognized that the act of questioning the prosecution's proof "beats and bolts out the Truth much better") (internal citation and quotation omitted).

The constitutionally-guaranteed, routine and uniform opportunity for the defense to confront and cross-examine prosecution witnesses against the backdrop of the prosecution's case has power beyond the criminal trial. It creates incentives for the prosecution and its witnesses to act from the outset in a way that promotes justice. A forensic analyst who is alert to the possibility that he may be called by the prosecution as a witness to explain publicly, in court, under oath and subject to cross-examination what tests he performed, how he performed them and what results he obtained, is more likely to exercise care and exhibit honesty in all aspects of his work. *Melendez-Diaz*, 129 S. Ct. at 2537 ("[O]f course, the prospect of confrontation will deter fraudulent analysis in the first place."). By the

same token, a prosecutor who intends to present the testimony of a forensic analyst in his case in chief is more likely both to vet the evidence he receives from that witness and to insist that the analyst act with the requisite care. Thus the knowledge that a forensic analyst may be required to testify in the government's case in chief, subject to cross-examination by the defense, benefits the criminal justice system as a whole.

B. The Subpoena Alternative Is A Completely Different and Less Effective Means of Adversarial Testing That Diminishes the Accuracy and Reliability of Our Criminal Justice System.

In place of the specific confrontation procedure guaranteed by the Sixth Amendment, the subpoena rule endorsed by the Virginia Supreme Court offers the defense a completely different, far more dangerous, and far less effective mechanism for testing the prosecution's proof.

The subpoena method allows the prosecution to satisfy its burden of proof through presentation of the potentially "misleadingly pristine" affidavit of its forensic analyst, rather than through the live testimony of the witness. *Thomas v. United States,* 914 A.2d 1, 16-18 (D.C. 2006) (holding that the District of Columbia's subpoena alternative violated the Confrontation Clause). If the defense desires a face-to-face, under-oath encounter with the analyst, it must call this prosecution witness to testify in the defense case.

This distinct procedure forces the defense instead of the prosecution to assume the inherent risk of presenting live witness testimony. In the case of a forensic analyst who has already served as an affiant for the prosecution, this risk is magnified because it is certain that the witness, if he takes the stand, will testify in some way as to harm the defense. At the very least, he will adopt the forensic report as his own. To make matters worse, the jury may conclude that the defense is vouching for this adverse witness and sponsoring his damaging testimony. *See* Robert J. Klonoff & Paul L. Colby, *Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials* 36-37 (1990) (juries evaluate evidence by reference to the party introducing it; evidence unfavorable to a party is more damaging when the party introduces it than it is when the party's opponent introduces the same evidence).

The subpoena method also places a defendant's right to confront the prosecution's witnesses in direct conflict with his right not to put on any evidence and to hold the government to its burden of proof. *See In re Winship,* 397 U.S. 358, 361 (1970). The argument that the defense need not offer evidence of innocence and that the jury must look to the government to determine whether guilt has been proved beyond a reasonable doubt is necessarily diluted when the defense opts to put on witnesses in a separate defense case. Moreover, by presenting evidence, the defense invites the jury to compare the quantum and quality of the evidence it has presented against the evidence amassed by the

prosecution – a comparison that generally favors the prosecution and almost certainly would if the only witness the defense called were the forensic analyst.

Even when a defendant intends to present evidence in a defense case, the subpoena method may distort or distract the jury from the defense's main themes and arguments. Calling the analyst in the defense case – as opposed to cross-examining the analyst in the prosecution's case – may give that witness undue prominence. The jury may regard this testimony as the centerpiece of the defense, when in fact, the defense theory lies elsewhere.

The subpoena method also forces the defense to make the decision to take the risky step of putting the forensic analyst on the stand as a defense witness with insufficient information. Of course, and perhaps most importantly, the defendant will not have had the benefit of observing the witness's direct testimony in the prosecution's case in chief. But it is also likely that the defense will not have had the opportunity to interview the analyst pretrial if these witnesses align themselves with the prosecution and decline to cooperate with the defense. *See In re J.W.*, 763 A.2d 1129, 1134-37 (D.C. 2000) (defendant has no right to pretrial interview of government chemist to determine whether or not to subpoena him to testify at trial); *see also* Maurice Possley et al., *Scandal Touches Even Elite Labs: Flawed Work, Resistance to Scrutiny Seen Across U.S.*, Chi. Trib., Oct. 21, 2004 (analyst explains that the attitude in the lab is: "We

work for the good guys. We're the white hats."); *see also* Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 Vand. L. Rev. 791, 799 nn.52 & 53 (1991) (vast majority of crime laboratories in the United States are under police control and only examine evidence submitted by law enforcement); *n.* 2 *supra.*

While the defendant will have the lab report, as the record in this case demonstrates, this report is often cursory. *See* Joint Appendix at 4-8, 84-87 (noting only weight of item and that it contained cocaine, but failing to document, inter alia, the testing method used, the protocols followed, the purity of the drugs, or the cutting agents employed); *see also Melendez-Diaz*, 129 S. Ct. at 2537 ("The affidavits submitted by the analysts contained only the bare-bones statement that '[t]he substance was found to contain: Cocaine.'") (internal citation omitted); Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 Vand. L. Rev. 791, 803 (1991) (lab reports often merely "summarize[] the results of an unidentified test conducted by an anonymous technician") (internal quotation and citation omitted). Beyond the lab report, the defendant may have little or nothing else – not the lab notes, not the analyst's curriculum vitae, not any prior statements made by the analyst.

Finally, questioning a prosecution witness in the defense case is likely to be a very different – and ultimately less effective – enterprise than questioning the prosecution witness on cross-

examination. The defense questioning of the prosecution's witness will not follow immediately after the introduction of the witness's out-of-court statement by the prosecution, and thus may have less impact on the trier of fact. Moreover, the defense cannot use the witness's testimony on direct as a backdrop, focus on discrete topics, and highlight only information that hurts the prosecution or helps the defense. Rather the defense would first have to conduct some version of what would have been the prosecution's direct – to establish for the trier of fact who the witness is and what inculpatory evidence he has to support the prosecution's case before challenging it. For its part, the prosecution will get the benefit of "cross-examining" its own witness and will be able to direct its questions only to information that strengthens its case and undercuts the defense.

For all of these reasons, the very different procedure for ensuring the live in-court testimony of prosecution witnesses afforded by the subpoena method is a risky venture for the defense, and defendants are unlikely to use it. But by making in-court questioning an uncommon, irregular occurrence, the subpoena method robs the adversarial system of many of the incentives that promote accuracy and reliability in our criminal justice system. As discussed above, a forensic analyst who has little expectation of being hailed into court has less incentive to be careful and may feel at greater liberty to omit, misrepresent or even fabricate information in his report because he has no

expectation of follow-up questioning. Likewise, when the prosecution has little or no expectation that its analysts will have to testify in court, it has a reduced incentive to scour its evidence and vet its witnesses. As a consequence, the prosecution may unwittingly rely on conclusions that are faulty or without foundation.

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In sum, the confrontation guarantee and the subpoena method offer two very different procedures for questioning a prosecution witness, only one of which satisfies the Sixth Amendment. *See Melendez-Diaz*, 129 S. Ct. at 2540 (a defendant's power to subpoena a prosecution witness " – whether pursuant to state law or the Compulsory Process Clause – is no substitute for the right of confrontation"); *id.* at 2536 (acknowledging that there may be "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."). Moreover, because the subpoena method imposes unfair burdens on the defense and perverts the incentives of the prosecution and its witnesses, to equate the two procedures would diminish the right to confrontation and weaken our adversarial system of criminal justice.

II. THE VERY DIFFERENT PROCEDURE AFFORDED BY THE SUBPOENA METHOD IS NOT JUSTIFIED BY A SKY-WILL-OTHERWISE-FALL RATIONALE.

A number of states already require the forensic analyst to testify live in the government's case in chief when the government seeks to rely on forensic tests, absent consent or a valid waiver by the defense. Many have done so for years. Others have changed their practice in anticipation of this Court's decisions in *Crawford, Davis* and *Melendez-Diaz*. "Perhaps the best indication that the sky will not fall after" clarification from this Court that the burden to present live testimony under the confrontation clause cannot be shifted to the defense "is that it has not done so already." *Melendez-Diaz*, 129 S. Ct. at 2540.

Numerous state courts have held that, absent a valid waiver by the defense, the burden falls to the prosecution to fulfill the constitutional confrontation guarantee by presenting live testimony of a forensic analyst when it seeks to rely on forensic test results. For example, over twenty years ago, the Supreme Court of Mississippi held in *State v. Barnette*, 481 So. 2d 788 (Miss. 1985), that the defendant's right to confrontation had been violated when the prosecution admitted into evidence the certificate of a non-testifying lab analyst to prove that the substance the defendant was charged with selling was cocaine. The court held that "[t]o allow, without the consent of the defendant, this essential element

to be proven solely by a certificate of the analyst impermissibly lessens the constitutionally required burden which is on the state." *Id.* at 791. Accordingly, the court determined that the certificate of analysis was only admissible if the prosecution presented the testimony of the forensic analyst or if the prosecution and the defense negotiated a stipulation to the contents of the report. *Id.* at 792. Likewise it has been the historical practice in California,[4] New York, and Michigan, *see* Pet.'s Br. at 25 n.10, to require the prosecution to present live testimony of any witness on whose out-of-court testimonial statement it seeks to rely without distinguishing forensic analysts.

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[4] In California, the courts uniformly agree that the prosecution bears the burden of presenting the live testimony of a forensic analyst when it seeks to rely on the results of forensic tests. The question that has produced a split of authority among the lower appellate courts, however, is whether the prosecution must put the author of the report on the stand to fulfill the defendant's right to confrontation or whether it is sufficient for another analyst or supervisor to testify in the author's stead. *See, e.g., Dungo*, 2009 WL 2596892 (Sixth Amendment violation where a pathologist testified in reliance on an autopsy report that he himself did not create); *People v. Carruth*, 2009 WL 2564832 (Cal. Ct. App. Aug. 19, 2009) (unpublished) (Sixth Amendment violation where a forensic toxicologist testified about another forensic toxicologist's curriculum vitae and about the nature of the lab report the other toxicologist generated); *People v. Rutterschmidt*, 2009 WL 2506333 (Cal. Ct. App. Aug. 18, 2009) (No Sixth Amendment violation where the director of the lab testified based on toxicology reports prepared by other analysts).

Similarly, a number of states have over the years determined that a statute like Virginia's that imposes on the defendant "the burden of subpoenaing the State's [forensic analyst] in order to present a full defense and enjoy his constitutionally protected rights under the Confrontation Clause" violates the Sixth Amendment confrontation guarantee. *State v. Clark*, 964 P.2d 766, 772 (Mont. 1998); *see also People v. McClanahan*, 729 N.E.2d 470, 477 (Ill. 2000) ("emphatically reject[ing] any notion that the State's constitutional obligation to confront the accused with the witnesses against him can be satisfied by allowing the accused to bring the State's witnesses into court himself and cross-examine them as part of his defense.")[5]; *Thomas*, 914 A.2d at 16 (observing that "rights of confrontation and compulsory process are not interchangeable"); *State v. Birchfield*, 157 P.3d at 220 (holding that "the right to meet an opposing witness face to face cannot be transformed into a duty to procure that opposing witness for trial"); *Belvin*, 986 So. 2d at 525 (finding it "[i]mportant[]," if not dispositive, that "the burden of proof lies with the state, not the defendant").

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[5] The Illinois Supreme Court also determined that the notice-and-demand statute did not pass constitutional muster because it imposed an obligation on the defendant to take an affirmative step to get the benefit of the confrontation guarantee and did not ensure a voluntary, knowing, and intelligent waiver from the defendant of his right to confrontation. 729 N.E.2d at 477.

The prevalence of "notice-and-demand statutes" provides further evidence that the preservation of the true confrontation guarantee will not be the downfall of our criminal justice system. *Melendez-Diaz*, 129 S. Ct. at 2541. These statutes "in their simplest form require 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." *Id.* If the defendant does object, the prosecution is prohibited from admitting the test results into evidence in the absence of live testimony from the analyst. Maryland passed such a statute in 1973. Md. Code Ann. Cts & Jud. Proc. §10-306(b)(2)(1973). Other states have operated under similar notice and demand statutes or rules for many years. *See,*, *e.g.,* New Hampshire, N.H. Rev. Stat. § 318-B:26a (1981);[6] Colorado, Colo. Rev. Stat. Ann. § 16-3-309 (1984); Iowa, Iowa Code Ann. § 691.2 (1988); New Jersey, N.J. Stat. Ann. § 2C:35-19 (1988);[7] South

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[6] The New Hampshire Supreme Court held that the statutory requirement that the defendant state particular grounds for his objection to the admission of the certificate in the absence of live testimony violated the right to confrontation. *State v. Christensen*, 607 A.2d 952, 953-54 (N.H. 1992).

[7] Although New Jersey's statute requires that the defendant give grounds for his objection to the admission of the unconfronted lab report, the New Jersey Supreme Court correctly held in *State v. Miller*, 790 A.2d 144, 153 (N.J. 2002) that the statute could not be interpreted to impose any

Carolina, S.C. R. Crim. P. 6 (1994); Delaware, 10 Del. C. § 4332(a)(1) (1994); South Dakota, S.D.C.L. § 23-3-19.3 (1996); North Carolina, N.C. Gen Stat. Ann. § 90-95(g) (1997); Washington, Wash. St. Super. Ct. Cr. 6.13 (2000); Maine, Maine Rev. Stat. tit. 17-A, § 1112(1) (2001); Texas, Tex. Code Crim. Proc. Ann. Art. 38.41 §4 (2003); Minnesota, Minn. Stat. § 634.15(2)(a) (2007).

This landscape of historical practice, judicial decisions, and statutory authority demonstrates that the cost of affording defendants their right to be "confronted with the witnesses against" them can be borne. For years prosecutors in these jurisdictions have been shouldering their burden to present live testimony when defendants desire it. Yet these jurisdictions still have functioning criminal justice systems: drug cases are prosecuted, guilty pleas are entered, and trials at which forensic analysts testify in person for the prosecution are had.

Moreover, whatever increased burden realizing the true confrontation guarantee imposes on the states, it is a cost that *must* be borne. It is the cost of doing business in our criminal justice system. This Court in *Melendez-Diaz* acknowledged the hard truth that prosecuting people costs money. 129 S. Ct. at 2540 (noting that a cost-savings rationale for limiting the right to confrontation proves too much as any of the criminal justice

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"barrier, beyond notice, to defendant's exercise of his right to confrontation."

protections of the Constitution could just as easily be scrapped under the same reasoning). Specifically, designating courts as the forum for evaluating the prosecution's evidence and requiring prosecutors to present live testimony from its witnesses in that forum is expensive, but it is the method our forebears insisted upon for assessing a defendant's guilt of a charged crime. *Crawford*, 541 U.S. at 62.

Any argument that forensic analysts are different from other prosecution witnesses because they have pressing duties in the laboratory ignores the forensic analyst's role as an adjunct to the prosecution. No one would argue that the prosecution should be relieved of its burden of calling its police investigators as witnesses in its case in chief because the police need to be out on the street fighting crime and investigating cases. It is accepted that it is part of a police officer's job to act as a professional witness for the prosecution when cases are tried. The same reasoning applies to forensic analysts who test materials to determine if they can be used as evidence in potential criminal prosecutions. When those cases go forward, it is the job of these analysts to testify in court for the prosecution about their test results. *See United States v. Oates*, 560 F.2d 45, 68 (2d Cir. 1977) (noting that the "role of the [DEA] chemist typically does not terminate upon completion of the chemical analysis and submission of the resulting report but participation continues until the chemist has testified as an important prosecution witness at trial").

Whether police are in a position to fulfill both their policing and their testifying duties or forensic analysts can fulfill their testing and testifying duties ultimately turns on staffing and funding decisions that are the province of the other two branches of government. And indeed, in Virginia, the General Assembly and the Governor have already taken swift action to ensure that the Department of Forensic

Science can meet its confrontation obligations post *Melendez-Diaz*. Specifically, to accommodate the new demands on forensic analysts' time, the General Assembly passed a bill (1) authorizing a notice and demand system that permits Commonwealth's Attorneys to rely on certificates of analysis at trial if they give the defense notice at least 28 days before trial and the defense does not object within 14 days, Va. Code Ann. § 19.2-187.1 (A & B); (2) affording prosecutors more leeway to obtain continuances of trial dates if necessary to obtain the testimony of a forensic analyst, Va. Code Ann. § 19.2-187.1(C); and (3) deleting provisions in the Virginia code that required the prosecution to prove by live testimony that breathalyzer machines had been properly calibrated. Va. Code Ann. § 9.1-1101(B)(3); *id.* § 18.2-268.9 (A & B); *id.* § 46.2-341.26:9. The Governor of Virginia signed this bill into law on August 21st, 2009.

The fact that Virginia has already taken the necessary steps to ensure that a defendant's confrontation rights are fully protected further belies any argument that the rule of *Melendez-Diaz* is unworkable and that the Sixth Amendment's confrontation guarantee must be replaced with a wholly different procedure in order to accommodate cost concerns.

CONCLUSION

For all the reasons set forth above, amici respectfully request that the judgment of the Supreme Court of Virginia be reversed.

Respectfully submitted,

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