

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 OF *AMICI CURIAE* PUBLIC
DEFENDER SERVICE FOR THE DISTRICT
OF COLUMBIA, ALASKA ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS, ARKANSAS
PUBLIC DEFENDER COMMISSION, ALAMEDA
PUBLIC DEFENDER'S OFFICE, COUNTY OF
SACRAMENTO OFFICE OF THE PUBLIC
DEFENDER, SAN FRANCISCO OFFICE OF
THE PUBLIC DEFENDER, AND 20 OTHER
DEFENDER ORGANIZATIONS
IN SUPPORT OF PETITIONER**

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INTEREST OF AMICI¹

Amici are defender offices and associations from across the country. They include offices and associations of attorneys that provide representation to individuals in criminal cases state-wide: the Alaska Association of Criminal Defense Lawyers, the Arkansas Public Defender Commission, the Connecticut Office of the Chief Public Defender, the Colorado State Public Defender, the Delaware Public Defender, the Maryland Office of the Public Defender, the Michigan State Appellate Defender Office, the Minnesota State Public Defender, the Missouri State Public Defender, the New Jersey Office of the Public Defender, the Virginia Association of Criminal Defense Lawyers, and the Washington Defender Association. They also include offices that provide representation to individuals in criminal cases in particular counties and municipalities: the Public Defender Service for the District of Columbia, the Alameda Public Defender's Office (representing Alameda County, California), the County of Sacramento Office of the Public Defender (representing Sacramento County, California), the San Francisco Office of the Public Defender (representing San Francisco, California), the Solano County Public Defender (representing Solano County, California), the Public Defender, Fifteenth Judicial Circuit of Florida (representing Palm Beach County and handling appeals on behalf of all of the public defenders within the Fourth

¹ Both parties have filed letters with the Court consenting to the filing of amicus curiae briefs in support of either party or neither party. 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.

District Court of Appeal, which includes Broward, Palm Beach, Indian River, St. Lucie, Martin and Okeechobee Counties), the Stone Mountain Judicial Circuit Public Defender (representing Dekalb County, Georgia), the Cook County Public Defender (representing Cook County, Illinois), Marion County Public Defender Agency (representing Marion County/Indianapolis, Indiana), the Orleans Public Defenders (representing Orleans Parish, Louisiana), the Ninth Circuit Public Defender (representing Charleston, South Carolina), the Minnehaha County Public Defender's Office and the Pennington County Public Defender's Office (representing Minnehaha and Pennington Counties, South Dakota, respectively), and the Fairfax County Office of the Public Defender (representing Fairfax County, Virginia).

In amici's jurisdictions, the prosecution routinely relies on forensic analysis to establish the defendant's guilt beyond a reasonable doubt and routinely calls as a witness in its case-in-chief the analyst who drew the conclusions and authored the report containing the incriminating analysis. Amici have an interest in preserving this status quo and ensuring that their clients have the right to confront the actual analyst/author of the report upon which the prosecution seeks to rely.

SUMMARY OF ARGUMENT

Amici routinely represent clients in cases where state prosecutors, like the New Mexico prosecutor in Mr. Bullcoming's case, rely at trial on reports generated by state and municipal forensic laboratories. What brings this diverse collection of criminal defense lawyers together is the prosecution's practice of calling as a witness in its case-in-chief the analyst

who drew the conclusions and wrote the report. Absent a waiver or stipulation by the defense (and many times even when the defense is willing to stipulate to this evidence, simply because these witnesses have powerful incriminating evidence for the prosecution), the state or municipal analyst/author – the person who assessed the blood alcohol content, or identified the seized controlled substance, or made the DNA or fingerprint comparison – comes to court, testifies for the prosecution, and is subject to confrontation and cross-examination by the defense. Amici are thus in a position to report to the Court that requiring the prosecution to fulfill the confrontation guarantee by requiring the analyst/author to testify will not impose an undue burden on the States. Rather, it is a sustainable cost of prosecution that is already borne in the jurisdictions in which amici practice.

In the diverse array of municipalities and states from which amici hail – from Broward County/Fort Lauderdale, Florida, to Washington D.C., to Rapid City, South Dakota, to Oakland, California; from New Jersey to Missouri to Colorado to Washington State – the criminal justice system continues to function. This reflects the reality that the vast majority of criminal defendants plead guilty. In particular, defendants in Driving Under the Influence and in drug possession and distribution cases, which produce the highest demand for forensic testing, plead guilty in droves. And, in the relatively minuscule percentage of cases that ultimately go to trial, defendants may well not contest the validity of the forensic analysis presented by the prosecution and may consent to its admission without live testimony.

In the small number of remaining cases, amici can report that the prosecution manages to bring to court the forensic analyst, just as it manages to bring to court every other witness with critical incriminating evidence, and the instance of the truly unavailable analyst, a municipal or state employee (or contractor), is exceptional. Courts are highly deferential to the analysts' schedules and liberally grant continuances to accommodate their conflicts. Finally, there are mechanisms to minimize the burden of calling the analyst. For example, prosecutors often place these witnesses on call, try to schedule multiple cases in which testimony is required for the same day, or call these witnesses out of order when they arrive in court to minimize wait time. Accordingly, although the Court has already held that the right to confrontation may not be "relax[ed] . . . to accommodate the necessities of trial and the adversary process," *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009) (internal quotation and citation omitted), the experience of amici in our respective jurisdictions demonstrates that there is no need to do so.

ARGUMENT

A DECISION THAT THE CONFRONTATION CLAUSE REQUIRES THE PROSECUTION TO CALL IN ITS CASE-IN-CHIEF THE AUTHOR OF THE FORENSIC REPORT IT SEEKS TO ADMIT AGAINST THE DEFENDANT WOULD NOT IMPOSE AN UNDUE BURDEN ON OUR CRIMINAL JUSTICE SYSTEM.

A. Calling The Forensic Analyst And The Author of The Forensic Report Is Already The Practice In A Diverse Array Of Jurisdictions Across The Country.

There are a number of cases in which appellate courts around the country have held that surrogate analyst testimony violates a defendant's right to confrontation. *See, e.g., Gardner v. United States*, 999 A.2d 55, 59 (D.C. 2010); *State v. March*, 216 S.W.3d 663, 667 (Mo. 2007). But appellate cases provide an incomplete picture of actual trial practices. When such practices satisfy defendants' confrontation needs and are thus not subject to challenge, it is unlikely there will be an appellate record of that fact. Such is the case with respect to the prosecution's introduction of forensic reports in the jurisdictions in which amici practice.

In all of the jurisdictions in which counsel from the undersigned defender offices and associations practice, when the prosecution seeks to present to the fact-finder at trial a report generated by a state or municipal forensic laboratory, it routinely and reliably calls as a witness in its case-in-chief the analyst who examined the evidence, drew the conclusion, and wrote the report. Amici can report that, absent a waiver of confrontation or stipulation by the defense

to the contents of the report, this is the practice in their jurisdictions in all areas in which forensic analysis is performed by state or municipal forensic laboratories.² Thus, when a Driving Under the Influence (DUI)³ case based on a blood or urine test goes to trial in amici's jurisdictions, the toxicologist employed by the state or municipal lab who signs and issues the report concluding that a defendant was under the influence of drugs or alcohol testifies for the prosecution.⁴ Similarly, when a drug possession

² In its 2009 report *Strengthening Forensic Science in the United States: A Path Forward* (2009), the National Research Council discussed the most common areas of forensic inquiry including analysis of controlled substances, biological evidence, friction ridge analysis, other pattern/impression evidence, tool mark and firearms identification, and analysis of hair and fiber evidence. See pp. 127-182. Separate from its discussion of the "forensic science disciplines," the NRC also discussed "medico legal death investigation"/"forensic pathology" but distinguished this as a "subspecialty of medicine." *Id.* at 38, 241-68. In this brief, amici do not address confrontation practices in their jurisdictions vis à vis this medical subspecialty.

³ Such crimes go by different names in different jurisdictions. Amici refers to the category of traffic offenses which prohibit a defendant from driving while impaired due to ingestion of alcohol or drugs, and which typically involve proof that alcohol or drugs were present at a certain level in the defendant's breath, blood, or urine.

⁴ Most jurisdictions have locally available technicians for breath tests who do not work in a forensic laboratory. These technicians are often trained police officers and generally far outnumber laboratory staff. For example, according to the website for Connecticut's Department of Public Safety, in 2003, 3,181 instructors and operators in Connecticut completed training in breath alcohol testing. State of Connecticut, Department of Public Safety, Scientific Services, Controlled Substances/ Toxicology Laboratory, <http://www.ct.gov/dps/cwp/view.asp?a=2155&Q=294434&dpsNav=|>.

or distribution case goes to trial in amici's jurisdictions, the chemist employed by the state or municipal lab who identified the seized substance as an illegal drug and reported that fact testifies for the prosecution. And in a case where the results of DNA, fingerprint, firearms, or handwriting comparisons are introduced into evidence, the analyst or examiner employed by the state or municipal lab who made the comparison takes the stand in the prosecution's case-in-chief.

In the majority of amici's jurisdictions, the routine practice of calling the analyst/author is longstanding, predating this Court's decision in *Melendez-Diaz* or even *Crawford v. Washington*, 541 U.S. 36 (2004). The District of Columbia adopted this practice five years ago, in the wake of *Crawford*. *Thomas v. United States*, 914 A.2d 1 (D.C. 2006). Virginia adopted this practice most recently; by the time this Court vacated the Virginia Supreme Court's decision in *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010), it had changed its practice and had begun calling the actual analyst/author in the prosecution's case-in-chief. See Brief for the Public Defender Service for the District of Columbia and National Association of Criminal Defense Lawyers as Amici Curiae Supporting Petitioner, *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) (No. 07-11191), 2009 WL 2896302, *26-27 (detailing steps Virginia legislature had taken to facilitate this practice).

The long history of this practice in the majority of jurisdictions in which amici practice is attributable to several factors:

First, many amici report that the prosecutors in their jurisdictions recognize the analyst for who she is, i.e., an essential source of incriminating evidence

against the defendant, and have simply never engaged in creative tactics to present this witness's findings and conclusions in the witness's absence.

Second, the reality is that the prosecution often wants this expert on the stand at any trial, because – barring any embarrassing impeachment material (such as circumstances that might result in an analyst being placed on unpaid leave) – this is often the prosecution's most powerful witness. As noted on the Washington State Patrol Forensic Laboratory Services website:

Scientific testimony is often the deciding factor in the judicial resolution of civil and criminal cases. The results of scientific analysis of evidence – blood, semen, shreds of clothing, hair, fibers, glass, paint, soil, bullets or bullet casings, impressions, and other physical indications – left at the scene of a crime can seem more compelling to a jury than the testimony of eyewitnesses.⁵

Thus, in many jurisdictions even before this Court's decision in *Crawford*, the prosecution called the analyst/author to testify to bolster the persuasive power of its case; and it did so regardless of logistical difficulties and on many occasions when the defense would have preferred that the analyst did *not* testify.

⁵ Washington State Patrol Forensic Laboratory Services website: <http://www.wsp.wa.gov/forensics/crimlabs.htm>. Similarly, the website for the Louisiana State Police Crime lab observes that “[a]nalyses performed at the laboratory are often the definitive factor in proving the guilt or innocence of persons charged with criminal acts,” and that “its personnel are available to District Attorneys and City Prosecutors to provide expert testimony in criminal court on their findings.” <http://www.lsp.org/crimelab.html>.

Third, in some jurisdictions, the forensic reports generated by state labs have long been deemed inadmissible hearsay. *See, e.g., Miller v. State*, 472 S.E.2d 74, 80 (Ga. 1996).

Fourth, and relatedly, many jurisdictions in which amici practice have long had notice and demand statutes that render these otherwise hearsay forensic reports admissible while specifically preserving a defendant's right to demand that the prosecution call the author/analyst of a forensic report. Some of these notice and demand statutes specifically acknowledge the defense right to confront the author/analyst of *any* laboratory report upon a timely demand by the defense. Upon such a demand, they explicitly require the prosecution present the testimony of

- the “expert witness” who “performed a test on the substance or object in question,” Wash. Super. Ct. Crim. R. 6.13(b) (1976)(1)&(3);
- “the analyst of the laboratory who performed the analysis,” Ark. Code Ann. § 12-12-313(d)(2) (1979);
- the “employee or technician of the criminalistics laboratory who accomplished the requested analysis, comparison, or identification,” Colo. Rev. Stat. Ann. § 16-3-309(5) (1984);
- “the person in the State Forensic Laboratory or the certified chemist employed by a law enforcement agency within the state, who conducted the examination [to] testify . . . concerning the examination or analysis,” S.D. Codified Laws § 23-3-19.3 (1996);

- “the person signing the report,” who must in turn certify that “he or she conducted the tests shown on the report using procedures approved by the bureau and the report accurately reflects his or her opinion regarding the results,” Ga. Code. Ann. § 35-3-154.1 (2004); or
- the “person who prepared the blood sample report” and in all other cases, the “person who performed the laboratory analysis or examination,” Minn. Stat. § 634.15(2)(a) (2007).⁶

In other states in which amici practice, the notice and demand statutes or rules are specific to drug possession and distribution cases and DUI cases. Thus, upon a timely demand by the defense, the prosecution in these cases in Alaska is required to present the live “testimony of the person signing the report [identifying a controlled substance],” who must in turn be “the person [who] perform[ed] the analysis.” Alaska Stat. Ann. § 12.45.084(a) & (d) (1982). The prosecution in Maryland is required to present testimony of the “technician or analyst who performed the [intoxication] test,” and for drug identification, “the chemist, analyst, or any person in the chain of custody as a prosecution witness.” Md. Code Ann. Cts & Jud. Proc. §§ 10-306, 10-1003 (1973). The prosecution in South Carolina is required to present the testimony “the chemist or analyst who performed the [drug identification] test.” S.C. R. Crim. P. 6(a).

⁶ Minnesota’s use of a notice and demand system predates this iteration of the statute. An earlier version was invalidated by *State v. Caulfield*, 722 N.W.2d 304, 313 (Minn. 2006), because it failed to provide the defense with adequate notice of the prosecution’s intent to rely on the laboratory report, but contained the same language indicating that the prosecution had an obligation to call as a witness the actual analyst/author.

And in the District of Columbia, the statute that, as written, places the burden on the defense to subpoena “the author of the report” in drug identification testing, has been reinterpreted to require the prosecution to call that witness. *Thomas*, 914 A.2d at 5; D.C. Code § 48-905.06 (1981).⁷ These statutes impose an obligation on the defense, in a limited category of cases which generate the highest volume of forensic testing, to make a timely demand to preserve their right to confront the actual analyst/author. But in all other cases where the prosecution seeks to rely at trial on forensic analysis, the actual analyst/author must testify, regardless of a demand.⁸

The jurisdictions in which amici practice are obviously diverse. Geographic size, population size, population density, and topography vary dramatically. For example, Alaska is geographically the

⁷ The District of Columbia also has a statute governing the admissibility of blood, breath and urine tests in DUI cases. As written, D.C. Code § 50-2205.03 (1982) states that a defendant is entitled to the presence of the “technician or police officer who administered the test” upon a timely demand and a showing of good cause, but it has been interpreted post *Thomas* only to require the former.

⁸ Illinois used to have a notice and demand statute for cases in which the prosecution sought to rely at trial on reports identifying a controlled substance or identifying drugs or alcohol in a blood or urine sample. 725 ILCS 5/115-15(a) & (c) (1994) (prosecution required, upon a timely demand by the defense, to present the “testimony of the person signing the report,” who in turn had to swear that he or she had performed the analysis). The Illinois Supreme Court held this statute unconstitutional in *People v. McClanahan*, 729 N.E.2d 470 (Ill. 2000). Thus, for the past ten years in Illinois, the state has operated without a notice and demand statute for any type of forensic analysis, and the actual analyst/author has testified as a matter of course (absent a stipulation or waiver by the defense).

largest state in the nation – it is approximately one-third the size of the continental United States, but it has one of the smallest populations (in 2009 estimated at 698,743⁹) and large portions of the state have no road system. By contrast, the District of Columbia is contained in a mere 61 square miles with an estimated population of 599,657.¹⁰ Its residents complain of potholes but can reach the courthouse with relative ease by car, bus, subway, or foot. The populations of both Alaska and D.C. are, in turn, dwarfed by Cook County, with an estimated population of 5,287,037,¹¹ Broward County, with an estimated population of 1,766,476¹² (the second most populous county in Florida after Miami/Dade) and Alameda County with an estimated population of 1,491,482.¹³

As a consequence of this diversity, the demand for services in the jurisdictions in which amici practice vary, as do the resources allocated to meet this demand. As rural areas have lower crime rates and fewer cases in which forensic analysis is an issue, it

⁹ United States Census Bureau, State and County Quick Facts: Alaska, <http://quickfacts.census.gov/qfd/states/02000.html>.

¹⁰ United States Census Bureau, State and County Quick Facts: District of Columbia, <http://quickfacts.census.gov/qfd/states/11000.html>.

¹¹ United States Census Bureau, State and County Quick Facts: Cook County, Illinois, <http://quickfacts.census.gov/qfd/states/17/17031.html>.

¹² United States Census Bureau, State and County Quick Facts: Broward County, Florida, <http://quickfacts.census.gov/qfd/states/12/12011.html>.

¹³ United States Census Bureau, State and County Quick Facts: Alameda County, California, <http://quickfacts.census.gov/qfd/states/06/06001.html>.

often does not make sense to have locally available trained analysts on staff to do the analysis required in the rare case in which it is needed; by contrast, higher caseloads in more urban areas create economies of scale.

In light of these demand and resources issues, jurisdictions in which amici practice have chosen to provide forensic analysis services in a variety of different ways and have laboratories that vary greatly in size and structure. Some states like Alaska, Arkansas, Connecticut, Delaware, Florida, Illinois, Indiana, Louisiana, Maryland, Michigan, Minnesota, Missouri, New Jersey, South Dakota, Virginia, and Washington State have centralized laboratory systems with one central lab¹⁴ or regional locations that service large population centers or broader geographic areas.¹⁵ Some populous areas, like

¹⁴ <http://www.dps.state.ak.us/crimelab/>;
<http://www.crimelab.arkansas.gov/aboutUs/Pages/default.aspx>;
<http://www.crimelab.arkansas.gov/sectionInfo/Pages/default.aspx>;
<http://www.ct.gov/dps/cwp/view.asp?a=2155&Q=317116&PM=1>;
<http://dsp.delaware.gov/crimelab.shtml>.
<http://doh.sd.gov/Lab/forensic.aspx>

¹⁵ <http://www.fdle.state.fl.us/Content/Forensics/Menu/Forensics-Info-Home.aspx>;
http://dofs.gbi.georgia.gov/00/channel_title/0,2094,75166109_75166180,00.html;
<http://www.in.gov/isp/2628.htm>;
<http://www.isp.state.il.us/Forensics/Forensics.htm> (The Illinois State Police laboratory is the largest state forensic laboratory in the United States and the third largest in the world after the FBI and the Forensic Science Service in Great Britain);

Alameda County, Sacramento County, Denver County, Broward County, Palm Beach County, and Marion County/Indianapolis have their own forensic labs.¹⁶ In the District of Columbia, forensic analysis is provided by a mix of local and federal law enforcement entities.¹⁷

In short, a review of the systems for analyzing forensic evidence in the jurisdictions in which amici

<http://www.lsp.org/crimelab.html>;

<http://www.lsp.org/contact.html>;

<http://www.msa.md.gov/msa/mdmanual/23dsp/html/23agen.html#forensic>; http://www.michigan.gov/msp/0,1607,7-123-1593_3800-15901--,00.html;

<http://www.dps.state.mn.us/bca/lab/documents/Lab-Intro.html>;

<http://www.mshp.dps.missouri.gov/MSHPWeb/DevelopersPages/CLD/laboratoriesIndex.html>;

<http://www.state.nj.us/njsp/divorg/invest/forensics.html>;

<http://www.dfs.virginia.gov/labs/index.cfm>;

<http://www.wsp.wa.gov/forensics/crimlabs.htm>.

¹⁶ http://www.alamedacountysheriff.org/CWS/crime_lab.htm;

<http://www.sacda.org/divisions/crime%20lab/crime%20lab.php>;

<http://www.denvergov.org/tabid/367615/tabid/383680/Default.aspx?>;

http://sheriff.org/about_bso/dle/units/cl.cfm;

<http://www.pbso.org/index.cfm?fa=technicalservices>;

<http://www.indy.gov/eGov/County/FSA/Pages/home.aspx>.

¹⁷ The District of Columbia Metropolitan Police now run the DNA laboratory, and perform all fingerprint and firearms comparisons, but the Mid-Atlantic Laboratory of the United States Drug Enforcement Administration conducts all drug identification analysis.

See <http://mpdc.dc.gov/mpdc/cwp/view,a,1232,q,557833.asp>;

http://mpdc.dc.gov/mpdc/cwp/view,a,1232,q,540935,mpdcNav_GID,1523,mpdcNav,%7C31417%7C.asp.

practice reveal that no two are the same, and all have their own unique demands and challenges. But all of them manage, and many have done so for years if not decades. Consider again Alaska, where undersigned counsel from the Alaska Association of Criminal Defense Lawyers reports:

Our state crime lab is in Anchorage. So when I try a homicide case in Sitka, for example, the DNA technician who actually did the DNA testing gets on an airplane and flies to Sitka (roughly 650 miles away). . . . It seems to me that if Alaska, with its geographic, climate, and travel hurdles, presents such testimony through the person who actually did the testing, there really is no good argument why other states cannot do it either.¹⁸

Certainly the collective experience of this diverse array of jurisdictions is a powerful support for this assertion.

B. Calling The Analyst/Author Is Feasible Because Such Witnesses Only Testify In A Relatively Small Number Of Cases And Systems Are In Place To Alleviate The Burden Of Testifying In Court.

As this Court observed in *Melendez-Diaz*, “perhaps the best indication that the sky will not fall after today’s decision is that it has not done so already.” *Melendez-Diaz*, 129 S. Ct at 2540. In the jurisdictions in which amici practice, there are a number of reasons why this is so, *i.e.*, reasons why it is feasible for the prosecution to call the actual analyst/author

¹⁸ Email from Steven Wells to Catharine Easterly, dated November 18, 2010 (on file with PDS).

to testify at any trial about the result of forensic analysis.

1. Forensic analysis is only an issue at trial in a small number of cases.

To begin with, one must consider when the prosecution is relying on the results of forensic analysis. In amici's experience, the largest category of cases is in high volume drug possession, drug distribution, and DUI cases.¹⁹ Outside this sphere, the prosecu-

¹⁹ Confirmatory data is available from a few state labs. For example, Louisiana State Police Crime Lab website reports that "[a]pproximately 70% of all cases submitted to the lab request analysis for illegal drugs." <http://www.lsp.org/crimelab.html>. Likewise, the Connecticut Forensic Science Laboratory reports that in 2004, it conducted 5,334 examinations of urine, blood, and breath to determine the presence of drugs or alcohol, and it conducted examinations in 4,084 cases to identify controlled substances; by way of comparison, the forensic biology unit (which identifies biological material) receives approximately 780 cases a year. <http://www.ct.gov/dps/cwp/view.asp?a=2155&Q=294434&dpsNav=|>; <http://www.ct.gov/dps/cwp/view.asp?a=2155&Q=315022&PM=1>.

In addition, the Court can extrapolate from conviction and arrest data gathered from the fifty states. According to a Bureau of Justice Statistics Report from 2002, the highest percentage of felons convicted in state courts (32%) were drug offenders (including possession and trafficking), followed by property offenders (30.9%), and then violent offenders, including murder, sexual assault, robbery and aggravated assault (18.8%). Matthew R. Durose and Patrick A. Langan, Ph.D., *Felony Sentences in State Courts, 2002*, <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc02.pdf>. More recent arrest data reflects the same disparity. The Federal Bureau of Investigation's Uniform Crime Reports (UCR) estimated that there were about 1,841,200 state and local arrests for drug abuse violations in the United States in 2007. *See* <http://bjs.ojp.usdoj.gov/content/dcf/enforce.cfm#arrests>. The highest arrest counts were (in descending order) for (1) "drug abuse violations," 1,841,200 ("defined as state and/or local offenses relating to the unlawful possession, sale,

tion relies on forensic evidence with far less regularity either because no forensic evidence exists (*e.g.*, in a typical simple assault) or the results of forensic analysis are not necessary to the prosecution of the case (*e.g.*, where a robbery suspect is identified by the complaining witness and apprehended while in possession of the complaining witness's wallet).

Within the subset of criminal cases in which the prosecution relies on the results of forensic analysis, it is amici's experience – especially in drug and DUI cases – that the overwhelming number are resolved by a guilty plea, dismissal of the charges, deferred prosecution, or some other disposition short of a trial. *Melendez-Diaz*, 129 S. Ct. at 2540 (noting that “nearly 95% of convictions in state and federal courts are obtained via guilty plea”); Bureau of Justice Statistics Bulletin, *Felony Sentences in State Courts, 2002* (Table 9: state court drug offenses disposed of by guilty plea: 96%; state court sexual assault (including rape) charges disposed of by guilty plea: 90%; state court murder charges disposed of by guilty

use, growing, manufacturing, and making of narcotic drugs including opium or cocaine and their derivatives, marijuana, synthetic narcotics, and dangerous nonnarcotic drugs such as barbiturates”); (2) DUIs, 1,427,500; (3) simple assaults, 1,305,700; and (4) larceny thefts, 1,172,800. *Id.* Similarly, UCR data from 2009 shows that the highest arrest counts were for drug abuse violations (estimated at 1,663,582 arrests) and that arrests for violent crimes (defined to include murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault) were far lower, totaling 581,765. <http://www2.fbi.gov/ucr/cius2009/arrests/index.html>. Furthermore, a state-by-state breakdown of violent crime arrests from 2009 shows that arrests for robbery and aggravated assault far outnumber arrests for murder, nonnegligent manslaughter and forcible rape. http://www2.fbi.gov/ucr/cius2009/data/table_05.html.

plea: 68%).²⁰ Indeed, the existence of forensic analysis is itself a great motivator to plead guilty.

Data about the disposition of drug and DUI cases in amici's jurisdictions is confirmatory:

- In Michigan in 2009, out of 62,829 DUI cases, at least 57,768 (92%) were disposed of without a trial in District Court.²¹ An additional 3,289 cases of the 62,829 were bindover/transfer cases, which presumably were disposed of in Circuit Court, where the rate of disposition without trial is also extremely high.²²
- In South Dakota, in 2009, out of 10,147 DUI cases, 10,068 (99.3%) were disposed of without trial.²³

²⁰ Available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc02.pdf>. Recent data for dispositions in the District of Columbia and Alaska are consistent. In the District of Columbia, out of 28,148 criminal cases in D.C. Superior Court in 2009, 26,652 (94.7%) cases were disposed of without a trial. District of Columbia Courts Statistical Summary 2009, <http://www.dccourts.gov/dccourts/docs/DCC2009AnnualReport-StatisticalSummary.pdf>. In Alaska in 2009, 99.4% of misdemeanor cases and 97.3% of felonies were disposed of without trial. <http://www.courts.alaska.gov/reports/annualrep-fy09.pdf> at 43, 101.

²¹ Michigan Supreme Court, 2009 Annual Report, District Court Statistical Supplement, <http://courts.michigan.gov/scao/resources/publications/statistics/2009/districtcaseloadreport2009.pdf>.

²² Michigan Supreme Court, 2009 Annual Report, Circuit Court Statistical Supplement, <http://courts.michigan.gov/scao/resources/publications/statistics/2009/circuitcaseloadreport2009.pdf>.

²³ <http://www.sdjudicial.com/Uploads/downloads/ar/fy2009/crcd.pdf> at p. 45 (showing 79 convictions or acquittals resulting from trial). South Dakota not only has a notice and demand statute that specifically acknowledges the prosecution's obliga-

- In Washington State in 2009, out of 9,789 felony drug cases, 9,307 (95%) were disposed of without any sort of trial.²⁴
- In Palm Beach County, Florida, from June 2008 to June 2009, out of 4,305 felony drug offenses, 4,275 (99%) were disposed of without a trial; out of 25,430 misdemeanors (which include misdemeanor marijuana possession as well as other minor offenses such as battery and trespassing) 25,218 (99%) were disposed of without a trial; and out of 2,724 DUI cases, 2,465 (90%) were disposed of without a trial.²⁵

tion to present the testimony of the actual/analyst author, it also permits the collection of bodily fluids without consent when an officer suspects a person is driving under the influence. S.D. Codified Laws § 32-23-10 (2006). It is amici's experience in Pennington and Minnehaha Counties that law enforcement routinely collects a blood sample.

²⁴ See State of Washington Superior Court Annual Caseload reports, Cases Filed by Type of Case, <http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=s&freq=a&tab=criminal&fileID=crmfilyr> (showing 9,789 cases involving controlled substances filed); Criminal Trial Proceedings by Category of Most Serious Charge at Time of Proceeding, <http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=s&freq=a&tab=criminal&fileID=crmtrlyr> (showing 482 criminal trial proceedings for controlled substance offenses including trial by affidavit and stipulated trials).

²⁵ <http://trialstats.flcourts.org/TrialCourtStats.aspx> (search "Circuit Criminal Defendants," "County Criminal Defendants" and "Traffic" for Palm Beach County from June 2008 to 2009). Data is similar for Broward County, Florida. From June 2008 to June 2009, out of 7,194 felony drug offenses, 7,101 (98%) were disposed of without a trial; out of 27,461 misdemeanors, 27,153 (99%) were disposed of without a trial; and out of 4,389 DUI cases, 4,284 (98%) were disposed of without a trial. *Id.* (search

- In Orleans Parish, Louisiana, in 2009, out of 480 cases in the category that includes DUIs, only one was resolved with a trial.²⁶
- In Dekalb County, Georgia, from January 1, 2010 to November 22, 2010, the Stone Mountain Public Defender's office closed out 940 felony drug cases and 142 misdemeanor drug cases without any jury or bench trials; it closed out 454 DUI and other misdemeanor traffic cases and had only 9 jury trials and no bench trials.²⁷

Finally, even when cases in which forensic analysis has been conducted go to trial, challenging the forensic analysis may not be the focus of the defense case. Amici can confirm that, in the jurisdictions in which they practice, defendants who exercise their right to go to trial stipulate (when asked) regularly, if not frequently, to the admission of forensic analysis. Certainly this is true in drug possession and distribution cases, where the defense is often that the

“Circuit Criminal Defendants,” “County Criminal Defendants” and “Traffic” for Broward County from June 2008 to 2009).

²⁶ Louisiana Public Defender Board, District Defender Reports, 41st Judicial District Report 2009, <http://lpdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/2009/District%2041.pdf> at 639.

²⁷ In the last five years, from January 1, 2005 to November 22, 2010, the Stone Mountain Public Defender's office closed out 7,556 felony drug cases and 948 misdemeanor drug cases and had only 12 jury trials and 3 bench trials; it closed out 3,286 DUI and other misdemeanor traffic cases and had 82 jury trials and 5 bench trials. Closed cases include those in which the defendant subsequently elected to represent himself or to obtain other counsel, but such cases represent a very small percentage of the whole. This data is on file with the Stone Mountain Public Defender Office.

drugs did not belong to the defendant and that the defendant was misidentified as the person who possessed or was selling the drugs. See Brief of Petitioner-Appellant, *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) (No. 07-11191), 2009 WL 2861541, *33 n. 13 (survey of 125 Michigan drug cases that went to trial: analyst testified in 50 (40%); no data indicating in how many instances the prosecution had requested that the defense stipulate to the forensic report). But there are a myriad of other scenarios where the defense is “unlikely . . . [to] insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis.” *Melendez-Diaz*, 129 S. Ct. at 2542.

Thus, even when the defense is routinely and reliably guaranteed the opportunity to cross-examine the analyst/author of a forensic report, as the defense is in the jurisdictions in which amici practice, that opportunity is frequently forgone, and as a result, analysts testify in only a very small percentage of cases. Data from the Michigan State Police confirm this and demonstrate how the universe of cases in which forensic tests are performed are winnowed to a much smaller number in which testimony of a forensic analysis is presented: In 2006, the state police conducted forensic analysis in 108,701 cases, but they only provided expert testimony (either at the behest of the prosecution or the defense) in 805 cases – 0.7%.²⁸

²⁸ Website of Michigan State Police, Forensic Science Division, http://www.michigan.gov/msp/0,1607,7-123-1593_3800-15901--,00.html.

2. There are mechanisms to minimize the burden of testifying.

When forensic analysts testify, there are mechanisms to minimize the burden of time and travel. In the District of Columbia, Sacramento County, and Fairfax County, for example, where analysts are close by, analysts are often placed on call so that they can come to the courthouse just before their testimony is needed and thereby minimize any wait time.²⁹

If an analyst has to travel a significant distance to get to the courthouse, witnesses can also be interrupted or taken out of order, thereby allowing the analyst to testify as soon as (or soon after) she arrives. To reduce travel costs, prosecutors can also make efforts to schedule for the same day multiple cases in which a particular analyst drew the conclusions and wrote a report upon which the prosecution seeks to rely. Testimony via video conferencing may also be an option with the consent of the defense. *See, e.g.*, Ga. Uniform Super. Ct. R. 9.2(C); Va. Code Ann. §19.2-187.1(B1) (2010).

In short, in amici's experience, there are a variety of means to reduce the time and travel costs of live witness testimony. And to the best of their ability, defense counsel work with the prosecution to facilitate the testimony of their witnesses so that the prosecution will afford the defense the same courtesy in return.

²⁹ Allowing prosecutors to place witnesses on call and to represent that a witness is available if needed much reduces the defense's opportunity to strategically demand the presence of the analyst simply to burden the prosecution. Notice and demand statutes, *see pp. 9-11 supra*, have the same effect.

3. Laboratories and the prosecutors do what is necessary to make sure that the analyst is available.

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 serve as a 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.

The state and municipal laboratories in the jurisdictions in which amici practice accept this and make operational and staffing decisions accordingly. Indeed, many of the laboratories expressly include their work in court in the public descriptions of what they do. In Connecticut, the Department of Public Safety explains that its "services" include "[t]he scientific examination and analysis of evidentiary material, and, [t]estimony concerning the analysis of evidentiary material, and interpretation of technical data and laboratory findings."³⁰ In its mission statement, the Arkansas State Crime Laboratory commits "[t]o provid[ing] relevant, professional and impartial testimony in judicial proceedings."³¹ And in Illinois, the State Police explain that "[d]aily crime laboratory

³⁰ <http://www.ct.gov/dps/cwp/view.asp?a=2155&Q=294434&dpsNav=|>.

³¹ <http://www.crimelab.arkansas.gov/aboutUs/Pages/default.aspx>.

work takes place to establish the scientific truth about evidence for court,” and that one of their aims is to “communicate well with one another so they will be able to testify clearly and withstand challenge in court.”³² Accordingly, testifying is not characterized as imposing on analysts an additional demand separable from their case work. For example, the Florida Department of Law Enforcement states that “[c]rime lab analysts are called on a continual basis to provide expert witness testimony in court cases,”³³ and in Washington State, the State Police explain that “[t]oxicologists accession [sic] samples in rotation and spend an average of two days a week testifying in court as experts on alcohol, drugs, and their effects.”³⁴

Witness availability is of course an issue, but no more so for a forensic analyst than any police officer witness, and in amici’s experience far less than for eyewitnesses to street crimes. Because testifying is accepted as part of an analyst’s job, it is amici’s

³² <http://www.isp.state.il.us/Forensics/Special.htm>;

see also http://www.michigan.gov/msp/0,1607,7-123-1593_3800-15901--,00.html (Michigan State Police explain that “[d]ivision employees also appear in court to provide expert testimony regarding the evidence and analytical procedures used”); <http://www.dps.state.mn.us/bca/lab/documents/Lab-Intro.html> (The Minnesota Department of Public Safety explains that “[l]ab scientists provide expert testimony in court regarding their examinations and provide specialized training to law enforcement officers”); <http://www.mshp.dps.missouri.gov/MSHPWeb/PatrolDivisions/CLD/DrugChemistry/drugChemistry.html> (the Missouri State Highway Patrol explains that “as an expert witness, the analyst presents his or her findings in a court of law”).

³³ <http://www.fdle.state.fl.us/Content/Forensics/Menu/Forensics-Info-Home.aspx>.

³⁴ <http://www.wsp.wa.gov/forensics/flsbhome.htm#toxicol>.

experience that appropriate arrangements are made when an analyst is temporarily unavailable. Prosecutors have access to the analysts' schedules and can schedule trial dates accordingly (again, notice and demand statutes facilitate this). When unexpected conflicts arise, prosecutors seek continuances. In amici's experience, trial courts are sympathetic on such occasions and liberally grant these requests. However, to the extent that state legislatures feel that the trial courts are insufficiently accommodating, they can follow Virginia's example and mandate that a continuance be granted. *See* Va. Code Ann. § 19.2-187.1(C) (2009) (when a forensic analyst "is not available for hearing or trial and the attorney for the Commonwealth has used due diligence to secure the presence of the person, the court shall order a continuance").

Likewise, in the rare case when an analyst/author has left the employ of the state or municipal lab in the (often brief) interim between conducting the analysis for a case and any trial, it is amici's experience that the prosecution makes the effort to bring that analyst, who is still easier to locate than many eyewitnesses to street crimes, to court. Thus amici have had cases where the prosecution has flown an analyst back to the jurisdiction to testify or placed an analyst under subpoena. Finally, amici have seen cases where, when necessary, the laboratory retested and/or reanalyzed the available evidence. This is almost always an option in drug possession, drug distribution, and DUI cases, and is increasingly an option in cases where DNA analysis is at issue. (Firearms evidence and latent fingerprints can be re-analyzed an infinite number of times.)

In sum, any concern about the absent analyst cannot be the tail that wags the dog for this Court's interpretation of the confrontation guarantee when results of forensic analysis are presented at a trial and the presence of the analyst has not been waived.

* * *

Amici's experience demonstrates that requiring the prosecution to call the actual analyst/author to testify in the prosecution's case-in-chief is feasible and a cost of prosecution that can be borne for a number of practical and rational reasons. For this reason and for all the reasons set forth in the Petitioner's brief, amici respectfully request that the judgment of the New Mexico Supreme Court be reversed.

Respectfully Submitted,

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