No. 07-____

IN THE
SUPREME COURT OF THE UNITED STATES

MARK A. BRISCOE and SHELDON A. CYPRESS

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the Confrontation Clause of the Sixth Amendment by providing that the accused has a right to call the analyst as his own witness?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Mark A. Briscoe and Sheldon A. Cypress respectfully petition for a writ of *certiorari* to the Supreme Court of Virginia to review the judgment against them in *Magruder v. Commonwealth*, Record Nos. 070815 (Briscoe) and 070817 (Cypress).

OPINION BELOW

The opinion of the Supreme Court of Virginia (App.A1-A20) is reported at 275 Va. 283, 657 S.E.2d 113. The opinions and orders of the Court of Appeals of Virginia (App.A21-A26 (Briscoe), App. A27-A31 (Cypress)) and the relevant trial proceedings and orders (App. A45-A76 (Briscoe), A85-A94 (Cypress)) are unpublished.

JURISDICTION

The Supreme Court of Virginia issued its decision on February 29, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor."

Virginia Code § 19.2-187, the text of which is set out in relevant part in the Appendix at A32, provides that in a criminal trial, in prescribed circumstances, certain certificates of analysis

reporting the results of laboratory analysis "shall be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein."

Virginia Code § 19.2-187.01, the full text of which is set out in the Appendix at A32a, provides that certain reports of laboratory analysis "shall be prima facie evidence in a criminal or civil proceeding as to the custody of the material described therein from the time such material is received by an authorized agent of such laboratory until such material is released subsequent to such analysis or examination."

Virginia Code § 19.2-187.1 provides in relevant part:

> The accused in any hearing or trial in which a certificate of analysis is admitted into evidence pursuant to § 19.2-187 . . . shall have the right to call the person performing such analysis or examination or involved in the chain of custody as a witness therein, and examine him in the same manner as if he had been called as an adverse witness. Such witness shall be summoned and appear at the cost of the Commonwealth.

STATEMENT OF THE CASE

This case presents a critical issue in the development of the Confrontation Clause, one on which the states are deeply divided. If the question presented by the petition is resolved against the Petitioner, the immediate effect will be virtually to nullify the confrontation right in a very large and significant body of cases. The ultimate effect may be not only to impair the confrontation right in general but to alter fundamentally the traditional method by which criminal cases in this nation are tried.

Under the statutory scheme involved in this case, a prosecutor may introduce a certificate of the results of a forensic laboratory test, without producing the live testimony of the analyst who performed the test, or indeed of any other witness who can testify about the conduct of the test or

the chain of custody of the materials tested. The Supreme Court of Virginia assumed that such certificates are testimonial in nature within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004). Nevertheless, it held that admission of the certificates in these cases was acceptable because of another portion of the statutory scheme, which explicitly gives the accused the right to call the analyst, or a person "involved in the chain of custody," as his own witness at trial, at the expense of the Commonwealth. The question presented, one on which the lower courts are sharply and irreconcilably divided, is whether such a burden-shifting scheme violates the Confrontation Clause.

The facts of these cases are easily summarized, because each fits the same mundane pattern: The petitioner was tried on charges related to the distribution of cocaine. At trial, the key question was whether substances seized by the police (from Briscoe's apartment and from a car in which Cypress was a passenger) contained cocaine, and if so how much. The principal evidence against the petitioner was a certificate of analysis (two in Briscoe's case) prepared by a forensic analyst of the Commonwealth's Department of Criminal Justice Services, Division of Forensic Science. The certificate reported test results purporting to show that the seized sub-stances contained large quantities of cocaine (36.578 grams in the case of Briscoe, App. A79-80, and 60.5 grams in the case of Cypress, App. A124-A125). The accused objected to introduction of the certificate, contending that it would violate the Confrontation Clause. App. A47 (Briscoe), A85-A86, A109-A110 (Cypress). The trial court overruled the objection and admitted the certificate. App. A66-A67, A70 (Briscoe), A92 (Cypress). The petitioner declined to call the analyst as his own witness, nor did he present any other evidence. The petitioner was convicted, and was sentenced to a lengthy term of imprisonment (20 years, with 14 years, 4 months

suspended for Briscoe; 15 years, with 10 years suspended, plus a fine of $1,000, for Cypress). The Court of Appeals affirmed, App. A21-26 (Briscoe), A27-31 (Cypress), and the petitioner then appealed to the Supreme Court of Virginia.

The appeals of these two petitioners were consolidated in that court with one other similar appeal. By a 4-3 vote, the court affirmed all three convictions. *Magruder v. Commonwealth*, 657 S.E.2d 113, 275 Va. 283 (2008), App. A1. The majority operated under the assumption that the certificates are testimonial in nature. App. A6-A7. Nevertheless, it squarely held that Virginia's statutory scheme does not violate the Confrontation Clause:

> Because the procedure provided in Code § 19.2-187.1 adequately protects a criminal defendant's rights under the Confrontation Clause and because the defendants in these appeals failed to utilize that procedure, we conclude that they waived the challenges under the Confrontation Clause to the admissibility of the certificates of analysis.

App. A3. In the course of its discussion, the majority addressed directly and bluntly rejected the contention

> that the statutory procedure, by its terms, shifts the burden of producing evidence and requires a criminal defendant to call the forensic analyst in order to exercise his right to confront that witness.

"This argument," the majority said, "is not cognizable under the Confrontation Clause." App. A10.[1]

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[1] The majority also said that the defense contention raised due process concerns that were not properly before the court because no defendant subpoenaed the analyst and then said that the analyst could not testify unless the Commonwealth called him. App. A10. Whatever the merits of this avoidance argument, *see* App. A19 (Keenan, J., dissenting) ("the majority confuses the issue whether a defendant may be required to produce evidence in a criminal trial with the issue whether the statutory mechanism at issue in this case, which requires a defendant to produce evidence, is capable of preserving his Confrontation Clause rights"), it is irrelevant to petitioners' Confrontation Clause contention, which (1) the court indisputably considered and rejected, (2) is the only point raised by this petition, and (3) is the issue on which the state high courts a re irreconcilably divided.

This petition follows.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL AND STATE COURTS ARE SHARPLY DIVIDED ON THE QUESTION PRESENTED BY THIS PETITION.

At least three state high courts, in addition to the Supreme Court of Virginia, have held that, given that the accused has a right to subpoena the analyst who prepared a laboratory report, the Confrontation Clause allows the prosecution to introduce the report itself without presenting the analyst as a live trial witness. *State v. Campbell*, 719 N.W.2d 374 (N.D.2006), *cert. denied*, 127 S.Ct. 1150 (2007) (applying N.D.C.C. § 19-03.1-37, under which, as explained by the court, "defendants may subpoena the report's author," 719 N.W.2d at 378, but which provides that only an indigent may subpoena a laboratory director or employee at no cost to himself: "Because neither [defendant] attempted to subpoena the forensic scientist as provided by statute, they have waived their ability to complain of a constitutional violation.");[2] *State v. Hughes*, 713 S.W.2d 58, 62 (Tenn. 1986) (applying Tenn. C. § 55-10-410: "[T]he lab technician may be subpoenaed by the accused at the State's expense and called to the stand and cross examined as a hostile witness where the State does not elect to do so. . . . [T]he accused waives the right of confrontation if the

[2] In denying *certiorari* in *Campbell*, the Court may have concluded that the validity of burden-shifting statutes governing laboratory reports should not be decided until the underlying question of whether such reports are testimonial has been resolved. *Campbell* itself was a poor vehicle for resolving the underlying issue, because the North Dakota Supreme Court had not needed to decide that issue, given its holding that the burden-shifting scheme was permissible. 719 N.W.2d at 377-78. Now, however, the underlying issue is before the Court, in *Melendez-Diaz v. Massachusetts*, No. 07-591, *cert. granted,* Mar. 17, 2008, and it presumably will be resolved in the 2008 Term.

laboratory technician is not subpoenaed, or not called to the witness stand by either party.");[3] *State v. Smith*, 323 S.E.2d 316, 328 (N.C. 1984) (applying N.C.G.S. § 20-139.1(e1): "[T]he defendant is entitled to subpoena the analyst and examine him as an adverse witness, as on cross-examination"; "[f]ailure to summon the analyst results in a waiver of any right to examine the analyst and contest the findings").

Several state high courts, however, have expressly rejected that view. Recently, for example, in *State v. Belvin*, ___ So.2d ___, 2008 WL 1901674 (Fl. May 1, 2008), the Florida Supreme Court held unconstitutional a statutory provision, Fl. St. § 316.1934(5), that (a) purported to render admissible an affidavit of the results of a test on the alcohol content of blood or breath, but (b) provided that such admissibility "does not abrogate the right of the person tested to subpoena the person who administered the test for examination as an adverse witness" at trial. The majority first held that such an affidavit is testimonial, and that the opportunity to take a discovery deposition of the analyst did not satisfy the Confrontation Clause. And then, over the dissent of two justices who would have followed the decision of the Supreme Court of Virginia in this case, 2008 WL 1901674 at *13 (Wells, J., joined by Bell, J., concurring in part and dissenting in part), the majority held,

> Furthermore, even though section 316.1934(5) gives a defendant the right to subpoena the breath test operator as an adverse witness at trial, the statutory provision does not

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[3] *Hughes* still controls in Tennessee. State v. Kemper, 2004 WL 2218471, at *3 (Tenn. Crim. App. Sept. 30, 2004), *appeal denied* (Jan. 24, 2005) ("The rule in *Hughes* controls. The defendant has waived any right of confrontation by his failure to subpoena [the testing scientist] as a witness at trial."); *but cf.* State v. Drake, 2005 WL 1330844, at *17 (Tenn.Crim.App. Jun 06, 2005) (in a case in which the technician testified at trial, interpreting *Hughes*, inaccurately, as holding that "the legislature intended to avoid any confrontation violation by providing that admissibility of test results are [*sic*] dependent on presence of laboratory technician who performed tests).

> adequately preserve the defendant's Sixth Amendment right to confrontation. Importantly, the burden of proof lies with the state, not the defendant.

2008 WL 1901674 at *8.

To similar effect are two other post-*Crawford* high-court decisions, *Thomas v. United States*, 914 A.2d 1 (D.C. 2006), and *State v. Birchfield,* 157 P.3d 216 (Or. 2007), explicitly rejected by the Supreme Court of Virginia in the present case. App. A10, A13. In *Thomas*, the prosecution introduced a report by a Drug Enforcement Administration chemist, declaring that bags purchased by an undercover officer contained cocaine, but the prosecution did not present the live testimony of the witness. The District of Columbia Court of Appeals held that the report was testimonial, and that the Confrontation Clause was consequently violated, notwithstanding D.C. Code § 48-905.06. That statute provides, in terms substantively similar to those of the Virginia statute involved here, "In the event that the defendant or his or her attorney subpoenas the chemist for examination, the subpoena shall be without fee or cost and the examination shall be as on cross-examination." According to the court, the prosecution's theory that the statute satisfied the Confrontation Clause by allowing the accused to call the chemist was

> contrary . . . to the plain language of the Sixth Amendment. The Confrontation Clause guarantees the accused the right "to be confronted with the witnesses against him." This language, employing the passive voice, imposes a burden of production on the prosecution, not on the defense.

914 A.2d at 16. If the accused were forced to call adverse witnesses, the court continued, "[u]ltimately the effect could be to blur the presumption of innocence and the principle that the burden of proof on the prosecution 'never shifts throughout the trial.'" 914 A.2d at 17, *quoting in part* CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, Instruction No. 2.08 ("Burden of Proof-Presumption of Innocence") (4th ed. rev. 2004).

The contrast with *Birchfield* is even starker. An earlier, pre-*Crawford* Oregon case, *State v. Hancock*, 854 P.2d 926 (Or. 1993), had held that if the accused subpoenaed the criminalist who prepared a laboratory report the accused could insist that the prosecution, rather than the accused himself, would make the criminalist a witness. *Birchfield*, 157 P.3d at 218. And yet, post-*Crawford*, the Oregon Supreme Court sharply rejected the argument that this ability to subpoena the criminalist satisfied the Confrontation Clause:

> The right to meet an opposing witness face to face cannot be transformed into a duty to procure that opposing witness for trial. It is the state that seeks to adduce the evidence as to which the criminalist will testify. The defendant has a constitutional right to confront the proponent of that evidence, the criminalist. The legislature may require the defendant to assert that right or to design a procedure to determine whether the defendant agrees that a written report will suffice. But, to require that a defendant do more changes the right to insist that the state present evidence the "old-fashioned way" into an obligation to procure a witness for the state.

157 P.3d at 220.

Other states in which the high courts have resolved the matter in conflict with the decision of the Supreme Court of Virginia in this case include Illinois, Mississippi, and New Hampshire. *People v. McClanahan*, 729 N.E.2d 470 (Ill. 2000) ("Trial by affidavit is the primary evil that the confrontation clause was designed to prevent. . . . We emphatically reject any notion that the State's constitutional obligation to confront the accused with the witnesses against him can be satisfied by allowing the accused [under § 725 I.L.C.S. 5/115-15] to bring the State's witnesses into court himself and then cross-examine them as part of his defense"); *State v. Coombs*, 821 A.2d 1030, 1033 (N.H. 2003) (holding that the defendant's ability to subpoena a forensic examiner "is beside the point" because "[t]he duty to confront a defendant with witnesses falls upon the State") (internal quotation omitted); *Barnette v. State*, 481 So. 2d 788, 792 (Miss. 1985)

(holding that to allow a prosecutor, over defendant's objection, to introduce laboratory report in place of live testimony, as permitted by former Miss. Code § 13-1-114, "impermissibly lessens the constitutionally required burden which is on the state to prove each element of the offense beyond a reasonable doubt, and violates the defendant's right of confrontation").

The lines thus staked out are not limited to the setting of forensic laboratory reports. In the context of a statute providing for admissibility of a child's pre-recorded statement, for example, the Missouri Supreme Court refused to find a problem if the accused were "permitted only direct, not cross, examination, in order to confront the witness"; the negative reaction of the jury to "vigorous examination of a child witness," the court believed, was inherent in the confrontation of a child witness irrespective of which party calls her to testify." *State v. Schaal*, 806 S.W.2d 659, 663 (Mo. 1991), *cert. denied*, 502 U.S. 1075 (1992).[4] But the United States District Court for the Western District of Missouri granted a habeas petition, and the United States Court of Appeals for the Eighth Circuit affirmed, holding clearly:

> [T]he State never called the child to testify on direct examination and Schaal, a defendant in a criminal case, cannot be expected to bear the burden of taking affirmative action to make the State's use of the videotape constitutional. . . . We agree with the District Court that this type of burden-shifting is impermissible and not sufficient to satisfy the Confrontation Clause.

Schaal v. Gammon, 233 F.3d 1103, 1106-07 (8th Cir. 2000). Numerous federal and state decisions are in accord. *See, e.g., Lowery v. Collins*, 996 F.2d 770, 771-72 (5th Cir. 1993) ("the Sixth Amendment is complied with when the *prosecution* calls the witness first, and *then* the defendant, for tactical or other reasons, voluntarily limits or chooses to forego cross-examination.

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[4] *See also Howell v. State*, 278 Ga.App. 634, 637-38, 629 S.E.2d 398, 404 (Ga.App. 2006) ("Howell cannot decide not to call the victim as a witness at trial, then complain on appeal that his right to confrontation was violated.").

The first step – the prosecution's initial call for the witness to testify – is crucial to the instant inquiry. Only when that is done does the failure of the defense to cross-examine the witness constitute a waiver."); *Snowden v. State*, 867 A.2d 314, 332 (Md. 2005) ("In a criminal trial, the State is required to place the defendant's accusers on the stand so that the defendant both may hear the accusations against him or her stated in open court and have the opportunity to cross-examine those witnesses."); *Long v. State*, 742 S.W.2d 302 (Tex. Crim. 1987), *overruled on other grounds*, *Briggs v. State*, 789 S.W.2d 918 (Tex. Crim. 1990); *State v. Rohrich*, 939 P.2d 697, 700-01 (Wash. 1997) ("The opportunity to cross examine means more than affording the defendant the opportunity to hail the witness to court for examination. It requires the State to elicit the damaging testimony from the witness so the defendant may cross examine if he so chooses."). In other contexts as well, courts have recognized that "calling a declarant as a defense witness is no substitute for cross-examining that declarant as a state's witness." *State v. Fisher*, 563 P.2d 1012, 1017 (Kans. 1977).

In short, the conflict among the courts on the question presented by this petition can only be resolved by this Court. And that question is part of a broader one of immense significance, whether a prosecutor may introduce an out-of-court testimonial statement while shifting to the accused the burden of presenting the maker of the statement as a live witness at trial.

II. THE DECISION OF THE SUPREME COURT OF VIRGINIA POSES A FUNDAMENTAL THREAT TO THE CONFRONTATION RIGHT.

The decision of the Supreme Court of Virginia poses a fundamental threat to the confrontation right – immediately, within the context of forensic laboratory reports, and ultimately in general.

The Sixth Amendment gives the accused "the right . . . to *be confronted with* the witnesses against him." (Emphasis added.) The use of the passive voice in the Confrontation Clause is not adventitious. *See Thomas*, *supra*, 914 A.2d at 16 ("This language, employing the passive voice, imposes a burden of production on the prosecution, not on the defense. *State v. Snowden*, 385 Md. 64, 867 A.2d 314, 332 n. 22 (2005) (rejecting the theory that the defendant could call his accusers to the stand because 'the burden of production . . . is placed on the State [by the Confrontation Clause] to produce affirmatively the witnesses needed for its prima facie showing of the defendant's guilt')."); *Magruder*, App. A18 (Keenan, J., dissenting). As this Court has made clear, the Confrontation Clause, governing the process for witnesses *against* the accused, stands in sharp contrast to the Compulsory Process Clause, which allows the accused to bring to trial witnesses "in his favor." The right accorded by the latter Clause "is dependent entirely on the defendant's initiative"; the confrontation right, however, like most of the others granted by the Sixth Amendment, "arise[s] automatically on the initiation of the adversary process and no action by the defendant is necessary to make them active in his or her case." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988); *see also id.* at n.14.

The difference is not a mere theoretical nicety. It has immense practical significance, going to the essence of the criminal trial process – and that is true even if, as under the Virginia

statutory scheme, the expense of bringing the witness to court is imposed on the prosecution and the accused may then ask leading questions. Even given those accommodations, it remains as true now as it did more than six decades ago that "[o]nly a lawyer without trial experience would suggest that the limited right to impeach one's own witness is the equivalent of that right to immediate cross-examination which has always been regarded as the greatest safeguard of American trial procedure." *New York Life Ins. Co. v. Taylor*, 147 F.2d 297, 305 (D.C. Cir. 1944); *accord, e.g., Magruder*, App. A18-A19 (Keenan, J., dissenting) ("The opportunity for effective cross-examination of prosecution witnesses, however, presupposes that a defendant has an opportunity to cross-examine those witnesses during the prosecution's case."). It is fanciful to suggest that the two opportunities are equivalent. One cannot say that petitioners waived the confrontation right; on the contrary, petitioners vigorously demanded that they be accorded the right, and at most they waived the inferior opportunity Virginia offered them in lieu of the right. *See Magruder*, App. A19 (Keenan, J., dissenting) ("While a defendant's failure to act under Code § 19.2-187.1 may constitute a waiver of his statutory right under that Code section to call the forensic scientist in the defendant's case, the fact that he chooses not to exercise this statutory right is insufficient to establish a waiver of his separate constitutional confrontation right that is guaranteed to him throughout his criminal trial.").

To see the difference, compare the tactical decisions facing defense counsel in the two basic scenarios at issue here. The first scenario is the one that, petitioners contend, is called for by the Confrontation Clause, and so will here be labeled the Confrontation Scenario: The prosecution presents the live testimony of the lab technician, and defense counsel may then cross-examine. The second is the one provided by the Virginia statutory scheme, and will be labeled the

Subpoena Scenario: The prosecution presents a certificate of the lab results and the accused may subpoena the technician to be a live witness as part of his case. The differences are numerous and critical.

1. In the Confrontation Scenario, when counsel decides whether, and how, to examine the witness, the witness has just testified on direct.

In the Subpoena Scenario, by contrast, some time, perhaps substantial, has passed since the witness's (written) testimonial statement has been presented to the trier of fact, and presumably a much greater time since the witness made that statement. The time gap may be critical, as explained in the oft-quoted language of *State v. Saporen*, 285 N.W. 898, 901 (Minn. 1939):

> The chief merit of cross examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot.

Accord, Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 578-79 (1978) ("Were the hearsay introduced as part of the prosecution's presentation, the jury might form an initial impression which the defense could not later counteract by examining the declarant in person once the state rested. . . . If such witnesses are to be examined at all about the truth of their statements, it should be the prosecution's duty to examine them in the first instance.").

2. In the Confrontation Scenario, immediately before cross-examination begins, the attention of the trier of fact is presumably already focused on the testimony of the witness.

In the Subpoena Scenario, by contrast, to conduct examination of the technician the defense must in effect first remind the trier of fact of the adverse statement made by the witness.

Note, *Right of Confrontation: Admission of Declaration by Co-Conspirator*, 85 HARV. L. REV. 188, 195 (1971) ("even a direct examination successful from the defendant's perspective is less effective than cross-examination because . . . the damaging hearsay will have to be repeated during the examination, thereby increasing its impact").

3. In the Confrontation Scenario, given that the witness is already on the stand, the trier of fact will not take it amiss that, at the conclusion of the prosecution's direct examination, defense counsel will in turn ask some questions.

In the Subpoena Scenario, by contrast, calling to the stand a witness whose statement has already been admitted may be annoying to the trier of fact and may appear to be harassment of the witness. E.g., *Lowery v. Collins*, 988 F.2d 1364, 1369 (5th Cir. 1993) ("The State would . . . impermissibly impose on the defendant the Catch-22 . . . of either calling the child-complainant to the stand at the 'risk [of] inflaming the jury against [himself]' or avoiding the risk of thus inflaming the jury at the cost of waiving his constitutional right to confront and cross-examine the key witness against him.") (alteration in original) (footnote omitted) (*quoting Lowrey v. State*, 757 S.W.2d 358, 359 (Tex.Crim.App. 1988)).

4. In the Confrontation Scenario, defense examination of the technician will come in the middle of the prosecution's case. If cross-examination disrupts the smooth presentation of that case, defense counsel will not be perturbed.

In the Subpoena Scenario, by contrast, assuming the defense presents other evidence, it must disrupt its own case if it wishes to examine the technician, and give the prosecution an opportunity to examine a witness friendly to it in the middle of the defense case. Janeen Kerper, *The Art and Ethics of Direct Examination*, 22 AM. J. TRIAL ADVOC. 377, 411 (1998). To avoid

giving too prominent a position to an adverse witness, the defense will probably find it best to adhere to the advice that, if one must present such a witness, it is best to do so in the middle of one's case, rather than at the beginning or end. *Id.* And if the defense does *not* present other evidence, then the adverse witness will necessarily be *both* at the beginning and at the end of the defense case.

5. In the Confrontation Scenario, if the direct testimony has been harmful to the defense – as it almost certainly has been in the case of a lab technician – counsel will nearly always find it advantageous to ask at least a few questions on cross-examination, in an attempt to chip away where possible at the testimony and to introduce some element of doubt. *See* Irving Younger, *The Art of Cross-Examination*, AMERICAN BAR ASSOCIATION, SECTION OF LITIGATION, MONOGRAPH SERIES, No. 1 (1975), at 1 (before discussing "destructive cross-examination," noting that even "if here is nothing to be done," counsel "may ask a couple of questions, just for show, and sit down"). By taking small, careful steps, counsel can ensure that even disappointing answers do not create significant damage. *See* EDGAR LUSTGARTEN, VERDICT IN DISPUTE (1950), at 251 (describing a careful cross-examination, in which counsel "cannot foresee the terms of [the witness's] reply: "he needs to approach the question circumspectly, advancing only one step at a time, and at every stage leaving channels of escape which he can use without grave loss of face"). Accordingly, even the hope of modest gains will make the decision to cross-examine a sound one.

In the Subpoena Scenario, by contrast, by calling to the stand an adverse witness – and one whose written testimonial statement has already been admitted against the defendant – counsel inevitably raises expectations: Why would she do this unless she expects to make a major gain? Absent such a gain, she will look foolish, having wasted time and effort, her own and that

of others, and done little but secured a re-affirmation of harmful testimony. Almost inevitably, the risk of failure will be so great that counsel will not dare take it. *See Reardon v. Manson*, 806 F.2d 39, 43 (2d Cir. 1986) ("We think it entirely plain that petitioners chose not to subpoena the chemists who assisted Dr. Reading because they perceived, as we do, that the possibility of benefit from such testimony was remote and the more likely result would have been the corroboration of Dr. Reading's testimony.").

Petitioner Cypress's case provides a vivid illustration of the difference. The critical evidence against him was the certificate purporting to report a significant quantity of cocaine in form suitable for use by a dealer in the substances seized from the car. Given the statutory scheme, the Commonwealth had no need to present the live testimony of the author of the report, and the Petitioner did not call the author to the stand. But the prosecution also presented another certificate, one indicating that no fingerprints had been found on the seized materials. Despite the Commonwealth's resistance on grounds of practicality to bringing in lab technicians, it did just that in that instance, so that the technician could explain that failure to recover fingerprints was not surprising. App. A92-93. Peripheral though this witness was to the case, defense counsel cross-examined him rather extensively, largely with respect to chain-of-custody issues that applied as well to the certificate reporting the presence of cocaine. App. A102, Tr. Tr. 57-59.

6. In the Confrontation Scenario, defense counsel may cross-examine the technician and still decide not to present an affirmative case, relying instead on a clean, uncluttered argument that the prosecution has failed to satisfy its burden of persuasion.

In the Subpoena Scenario, by contrast, the defense is forced to elect – either decline to examine the technician, or abandon (or at least severely undercut) the burden-of-proof argument.

See, e.g., Thomas, supra, 914 A.2d at 16 ("the 'available to the accused' theory of the Confrontation Clause is flawed because it 'unfairly requires the defendant to choose between his right to cross-examine a complaining [or other prosecution] witness and his right to rely on the State's burden of proof in a criminal case.' *Snowden*, 867 A.2d at 332-33 (quoting *Lowery v. Collins*, 988 F.2d 1364, 1369-70 (5th Cir. 1993)).").

The proof of the pudding is in the eating, or lack thereof. Defense lawyers accorded a chance to cross-examine a witness who has given damaging testimony almost always take the opportunity; if instead the witness's testimony has been admitted without the witness appearing at trial, counsel almost never exercises the opportunity to call the witness on behalf of the defense.

Moreover, in the Confrontation Scenario, the accused is guaranteed the ability to cross-examine. The witness is on the stand, and cross-examination follows immediately; if the witness should suddenly become unavailable before the accused had an adequate opportunity for cross, the testimony would have to be stricken. *See Crawford, supra*, 541 U.S. at 68 (opportunity for cross essential for admissibility of testimonial statement, even given unavailability of witness). At least in Virginia's version of the Subpoena Scenario, by contrast, it appears that if the witness becomes unavailable after preparing the certificate and before trial the accused is completely out of luck; the certificate is admitted and the accused has no opportunity at all to examine the witness.[5]

For all these reasons, statutory schemes like Virginia's work a fundamental transformation

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[5] *See Gray v. Commonwealth*, 265 S.E.2d 705 (1980) (preparer of certificate unavailable as a witness at trial, the failure of the Commonwealth to comply with the filing provisions of § 19.2-187 held fatal to admissibility – the apparent implication being that had the Commonwealth filed in a timely manner the certificate would have been admissible notwithstanding the preparer's unavailability).

in traditional criminal procedure within their scope of application. The effect is to turn the heart of the trial into a presentation of affidavits. To recognize fully the significant of the threat to criminal procedure that this poses, several considerations must be taken into account.

First, because forensic laboratory reports are such an essential part of the routine of modern criminal procedure, the question presented here arises many times every day.[6]

Second, the Virginia statutory scheme is not limited to proving the *results* of a laboratory test. Section 19.2-187.01, App. A32a, applies to proof of the chain of custody of the tested materials – and it was used for that purpose here. App. A75 (Briscoe), A110-A117 (Cypress).

Third, statutory authorization is not essential for a court to implement a scheme like Virginia's. If Virginia's scheme is valid, a prosecutor and a court could replicate it even absent a burden-shifting statute. The hearsay rule would not pose a serious obstacle; if the jurisdiction does not have a special-purpose hearsay exception to cover the certificate, then its exceptions for business and public records could easily do so, and if necessary the residual exception could be invoked. *Cf.* Fed. R. Evid. 803(6) (business records), (8) (public records), 807 (residual exception). The Compulsory Process Clause would in itself give the accused the right to subpoena the author of the certificate. The prosecutor could offer to pay for the cost of producing the witness if the accused decides to subpoena him, or the court could make such

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[6] To get some sense of the scope of the issue, note that there are about a million felony convictions in state court per year, about one-third of them involving drug offenses. Bureau of Justice Statistics, *State Court Sentencing of Convicted Felons, 2004 – Statistical Tables*, <http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04101tab.htm>. Crime laboratories processed nearly 2.5 million requests for forensic laboratory services during 2002; nearly 1.3 million requ
ests during the year, or about half of all requests, were for identification of controlled substances. Bureau of Justice Statistics, *Federal, State and Local Crime Lab Backlog Reached 500,000 in 2002* (2005), < http://www.ojp.gov/bjs/pub/press/cpffcl02pr.htm>.

payment a condition of admissibility. Finally, given that the author would be a hostile witness, the court would presumably allow the accused to ask leading questions. *Cf.* Fed. R. Evid. 611(c) (providing that "interrogation may be by leading questions" when a party calls a hostile witness). Thus, the resolution achieved by Va. Code § 19.2-187.1 could be reached without need for a comparable statute – which means that the problem posed by the decision in this case can arise in *any* state, not just those that have provided by legislation for burden-shifting.

Fourth, if the principle accepted by the Supreme Court of Virginia – that the ability of the accused to call a witness as his own may substitute for the opportunity to cross-examine – is accepted in the context of laboratory reports, there is no sound basis on which to stop it from spreading to other contexts as well. That court explicitly declined to consider the problem, App. A12-A13 n.5, perhaps because to do so would reveal the danger of the course on which it has started. It did suggest that the opportunity to cross-examine would not be worth the inconvenience created by calling the lab technician to testify. *Id.* But that is nothing more than a resuscitation of the rejected regime of *Ohio v. Roberts*, 448 U.S. 56 (1980).

The factual premise of the court's *Roberts*-style argument is faulty: Lab reports cannot be deemed so inherently trustworthy that cross-examination is of minuscule value. Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 494 (2006) ("laboratory error and operator error exist even with the most well-established or unassailable scientific method"). But of course, more fundamentally, the argument is constitutionally irrelevant. *California v. Trombetta*, 467 U.S. 479, 490 (1984) (emphasizing defendant's "right to cross-examine the law enforcement officer who administered [a breath] test, and to attempt to raise doubts in the mind of the factfinder whether the test was properly administered"). Trials could be held much more

expeditiously without *any* live witnesses, or without juries or lawyers. Such a system would not comport with the Constitution, however. Virginia could not successfully contend that it could decline to furnish counsel to indigent defendants because there are too few willing defense lawyers in the Commonwealth; nor should it prevail in contending that a system designed to limit the extent to which lab technicians testify subject to confrontation is constitutional because the Commonwealth has hired too few trained lab technicians.

The court's efficiency-oriented language is highly revealing. It suggests that Virginia's statutory scheme saves money because defendants *will not invoke the right* to call lab technicians as their own witnesses. Why not? Logically, there are only two possibilities. Either (1) the opportunity to cross-examine would be of such minuscule value that the accused would not ordinarily invoke it, or (2) though an opportunity for cross-examination might have substantial value, the opportunity offered by the statutory scheme is so far inferior that the accused would not invoke it. But if the first possibility were plausible, the cost-saving benefit could be achieved by providing that a certificate of lab results is admissible unless the accused makes a timely demand for the author of the report to appear as a witness, and that if he does so then the *prosecution* must call the author as a witness or forgo use of the certificate.

Such systems are common. For example, the District of Columbia Court of Appeals construed the District's statute as operating in this manner, because it recognized that the statute would be unconstitutional if construed as operating like the Virginia scheme. *Thomas, supra*, 914 A.2d at 16, 18. *See also, e.g., Hinojos-Mendoza v. People,* 169 P.3d 662, 668 (Col. 2007) (upholding Col. Rev. Stat. §16-3-309(5), which provides that laboratory report is admissible unless a party makes a timely request that witness "testify in person at a criminal trial on behalf of

the state": "The statute provides the opportunity for confrontation-only the timing of the defendant's decision is changed."); *State v. Cunningham,* 903 So.2d 110 (La. 2005) (citing cases endorsing such statutes); Vt. R. Evid. 804a(b) ("Upon motion of either party in a criminal or delinquency proceeding, the court shall require the child or mentally retarded or mentally ill person to testify for the state."); *State v. Laturner*, 163 P.3d 367 (Kans. App. 2007) (review granted Dec. 18, 2007). Petitioners believe such a "notice and demand" statute, if properly drafted, is constitutionally unobjectionable. *Cf. State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006) ("although there may be legitimate public policy reasons to advance the time to assert confrontation rights to a reasonable time before trial, such a shift cannot be constitutionally accomplished without adequate notice to the defendant that his failure to request the testimony of the analyst will result in the waiver of his confrontation rights, especially when the report is offered to prove an element of the offense with which the defendant is charged"); Metzger, *supra*, 59 VAND. L. REV. at 516-518 (criticizing "demand-waiver" statutes). It ensures that the lab technician will be required to testify subject to confrontation only when the accused has a strong enough interest in cross-examining him to be worth the cost to him of making the technician's testimony, presented live, far more vivid than a certificate. Such a statute satisfies the state's legitimate interest in preventing gratuitous expense. Any incremental savings generated by a burden-shifting scheme such as Virginia's must be the result of impairing the right of the accused to examine the lab technician.

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR DECISION OF THE QUESTION PRESENTED.

For several reasons, this case presents an ideal vehicle for resolution of the question presented by the petition.

First, there is no doubt as to the jurisdiction of this Court; this petition seeks review of the final decision of a state supreme court. Moreover, the case comes here on direct appeal, simplifying the question presented.

Second, the Confrontation Clause issue is clearly preserved for review by this Court. At trial, petitioners objected vigorously on Confrontation Clause grounds to admission of the certificates. The trial courts, the court of appeals, and the state supreme court all considered and rejected their arguments.

Third, there can be no plausible contention of harmless error. The certificates provided the crucial evidence for conviction, showing – if believed – not only the presence of cocaine in the materials seized but also the quantity and (in Cypress's case) the quality of cocaine, crucial issues for conviction on dealership charges. App. A104-A106 (expert testimony); A119 (prosecutor's closing argument).

Fourth, petitioners raise before this Court no other issues that might result in reversing the convictions or mitigating the sentences. The case revolves entirely on the question presented by the petition, which the Supreme Court of Virginia described as the "dispositive issue" before it. App. A6.

Finally, deciding this case would allow the Court to continue the prudent, step-by-step approach to Confrontation Clause doctrine that it has pursued beginning with its transformative decision in *Crawford*. A predicate for the question presented by this petition is the proposition that certificates of forensic laboratory reports such as those involved here are testimonial within

the meaning of *Crawford*. The question whether that proposition is true is now pending before the Court, in *Melendez-Diaz v. Massachusetts*, No. 07-591, *cert. granted*, Mar. 17, 2008. If, as petitioners expect, the Court decides that such reports are indeed testimonial, then it will be necessary for the Court to decide whether a state may shift to the accused the burden of producing a live witness at trial, as Virginia has done by the statutory scheme at issue here. There will be no reason for delay in deciding that issue. As discussed in Section I above, several states have considered the issue, post-*Crawford*, and are in irreconcilable conflict. The decisions, including that of the Virginia Supreme Court in this case, operate on the assumption that the reports are testimonial; assuming this Court's decision in *Melendez-Diaz* validates that assumption, therefore, it should not be necessary to await further consideration by the state courts or the federal courts of appeal. The question presented here will be ripe for prompt consideration, without a remand of this case, and given the massively routine recurrence of the question, further delay would be against the public interest.

The decision of the Virginia Supreme Court and others like it make clear that, as before *Crawford,* many lower courts are still treating the Confrontation Clause as a mere annoyance, to be avoided if it threatens to create substantial inconvenience. This Court must set them straight, as only it can do. All the criminal courts in the nation must understand that the Confrontation Clause is one of the central protections of our criminal justice system, and it is clearly violated when the State proves essential aspects of a case by certificate, shifting to the accused the burden of calling the witness to furnish live testimony at trial.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 29th day of March, 2008.

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