No. 09-10876

In The

Supreme Court of the United States

DONALD BULLCOMING,

Petitioner,

v.

THE STATE OF NEW MEXICO,

Respondent.

On Writ Of Certiorari To The Supreme Court Of New Mexico

BRIEF OF RICHARD D. FRIEDMAN, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

RICHARD D. FRIEDMAN
Counsel of Record, Pro Se
625 South State Street
Ann Arbor, Michigan 48109
Telephone: (734) 647-1078
Facsimile: (734) 647-4188
E-mail: rdfrdman@umich.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL RULES OF EVIDENCE

SECONDARY SOURCES

INTEREST OF *AMICUS CURIAE*[1]

Amicus is a legal academic holding the title of Alene and Allan F. Smith Professor of Law at the University of Michigan Law School. Since 1982 he has taught Evidence law, among other subjects. He is general editor of THE NEW WIGMORE: A TREATISE ON EVIDENCE, author of THE ELEMENTS OF EVIDENCE (3d ed. 2004), and co-author of EVIDENCE (11th ed. 2009; with Jon Walz and Roger C. Park).

Much of the academic work of *amicus* has dealt with the right of an accused under the Sixth Amendment "to be confronted with the witnesses against him." He has written many articles and essays on that right, and since 2004 he has maintained The Confrontation Blog, www.confrontationright.blogspot.com, to report and comment on developments related to it. *Amicus* successfully represented the petitioners in *Hammon v. Indiana* (decided together with *Davis v. Washington*, 547 U.S. 813 (2006)), and *Briscoe v. Virginia*, 130 S.Ct. 1316 (2010).

As he has previously done in *Giles v. California*, 128 S.Ct. 2678 (2008), *Melendez-Diaz v. Massachusetts*,

---

[1] Each party has filed with the clerk a global consent to the filing of any *amicus* brief on the merits of this case. Part of the cost of preparing and submitting this brief was paid for by research funds provided by the University of Michigan Law School to *amicus* and under his control. The brief does not necessarily reflect the views of that Law School or of any of its faculty other than *amicus*. Except as just noted, no persons or entities other than the *amicus* made any monetary contribution to the preparation or submission of this brief, which was not authored in any part by counsel for either party.

129 S.Ct. 2527 (2009), and *Michigan v. Bryant* (No. 09-150), *amicus* submits this brief on behalf of himself only; he has not asked any other person or entity to join in it. He is doing this so that he can express his own thoughts, entirely in his own voice. In some cases, as in *Giles*, his views principally favor the prosecution; in others, as in this case, his views principally favor the defense. His desire, in accordance with his academic work, is to promote a sound understanding of the confrontation right, one that recognizes the importance of the right in our system of criminal justice and at the same time is practical in administration and does not unduly hamper prosecution of crime.

Amicus believes that the doctrine of the Confrontation Clause would be seriously distorted if it incorporated the theory adopted by the New Mexico Supreme Court. In this case, the prosecution introduced a testimonial statement into evidence against the accused, without offering him an opportunity to be confronted with the witness – that is, the person who made that statement. Accordingly, the accused's confrontation right was plainly violated. Offering a surrogate for confrontation has no basis in law and does not satisfy the confrontation right. Nor is the use of a surrogate witness necessary to allow criminal justice systems to operate efficiently.

SUMMARY OF ARGUMENT

Absent the Confrontation Clause, witnesses could testify against an accused in any number of ways – giving testimony to judicial officials behind closed doors, or to police at the station-house, or in the witness's living room, or by signing a written statement. As *Crawford v. Washington*, 541 U.S. 36 (2004), recognized, the Clause prescribes that only one method of testifying against an accused is acceptable – giving the testimony subject to the accused's opportunity for confrontation and, if reasonably possible, at open trial.

An essential question in a case of this sort, therefore, is this: Is there a person who made a testimonial statement that was used as proof of the accused's guilt notwithstanding the fact that the accused did not have a chance to be confronted with that person? If the answer is in the affirmative, then, with narrow qualifications not present here, the Confrontation Clause has been violated.

In *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), this Court held that a forensic laboratory report indicating that a suspect substance was cocaine was a testimonial statement. Accordingly, the Commonwealth violated the Confrontation Clause in that case by introducing the report without the live testimony of the person who made it.

Like *Melendez-Diaz*, this case involves a forensic laboratory report, which the state supreme court recognized as testimonial. Nevertheless, the State failed to present live testimony by the analyst who prepared the report. Nor did the State take a proper

corrective measure, such as deleting the name of the original author from the report and having another witness, who could testify from personal knowledge to the events and conditions recorded in it, adopt it as his own statement. Instead, the State presented the live testimony of another witness, who had no personal knowledge of those events and conditions but in effect relayed them to the jury. This is a blatant violation of the Confrontation Clause.

The theory adopted by the state supreme court – that the analyst who prepared the report was a "mere scrivener," the "true 'accuser'" being the gas chromatograph machine used to test his blood alcohol level – has no merit. In fact, the statement by the absent witness did far more than simply report a machine's read-out; rather, the witness made assertions about the condition of the sample when he received it and the entire process by which he conducted the test. More fundamentally, even if the witness did no more than report what he saw – a report necessary to convey the information generated by the machine to court – that would not diminish the testimonial quality of his statement in the slightest; many witnesses do no more than report what they see.

In short, this is a simple straightforward case: Curtis Caylor made a testimonial statement, that statement was introduced against Petitioner, and Petitioner was never given an opportunity to be confronted with him. Other situations present arguments against applicability of the Confrontation Clause that are not available here – for example, if one lab analyst testifies as to facts observed by another, but without attributing the report to the other analyst, or if one analyst testifies in part on the basis of facts

reported to her by another but without testifying as to those facts. But the Court should not attempt in this case to resolve the law governing these different situations.

The conclusion that the Confrontation Clause requires a given procedure does not depend on a demonstration that the costs of adopting that procedure are reasonable. But *amicus* understands that in determining whether the Clause does in fact require a given procedure the Court might take exorbitant costs as a negative signal; the Clause was not intended to impose unreasonable burdens on prosecutors. In fact, data from *amicus*'s home state of Michigan, which adheres to constitutional procedures, demonstrate that the burden is a modest one, which can be borne easily and without great controversy. Moreover, a state can take various measures to lessen the cost of these procedures.

ARGUMENT

I. CURTIS CAYLOR MADE A TESTIMONIAL STATEMENT THAT WAS ADMITTED AGAINST PETITIONER EVEN THOUGH PETITIONER WAS NEVER OFFERED AN OPPORTUNITY TO BE CONFRONTED WITH HIM. ACCORDINGLY, PETITIONER'S CONFRONTATION RIGHT WAS VIOLATED.

Absent constitutional constraint, a witness could testify against an accused in any number of ways. She might do so in writing, in the manner used by the later

Athenians.[2] *Cf. Melendez-Diaz*. She might do so by making a statement behind closed doors to judicial officials, in the manner used by the old civil law. Or she could make a statement to police officers, in the station-house, *cf. Crawford v. Washington*, 541 U.S. 36 (2004), or in her living room, *Hammon v. Indiana* (decided together with *Davis v. Washington*, 547 U.S. 813 (2006)). Absent constitutional constraint, no particular formality would be necessary to give testimony against an accused; a person might give her evidence very informally, without taking an oath, but under the full understanding that her statement was likely to be used in prosecuting an accused of crime.

Of course, the Confrontation Clause of the Sixth Amendment to the Constitution prescribes that (unless the accused consents) none of these manners of giving testimony is acceptable. The accused has a constitutional right that is violated if the witnesses against him give their testimony in any manner other than the one long required in the common law courts – formally, under oath, face-to-face with the accused, subject to cross-examination, and, if reasonably possible, at the trial itself. *Crawford*.

Accordingly, when the accused contends that his confrontation rights have been violated by introducing a statement made out of court, the essential question is this: Has a statement testimonial in nature been used against the accused even though the accused has

[2] STEPHEN TODD, THE SHAPE OF ATHENIAN LAW 128-29 (1993); 2 DEMOSTHENES, PRIVATE ORATIONS 46:6, at 247-49 (A.T. Murray trans. 1939). ("The laws ... ordain that [a witness's] testimony must be committed to writing in order that it may not be possible to subtract anything from what is written, or to add anything to it.").

not had an opportunity for confrontation with the witness who made the statement?

This question may be broken down into four parts. First, *was the statement in question testimonial?* It is true, of course, that "the word 'testimonial' . . . does not appear in the text of the Clause." *Melendez-Diaz*, 129 S.Ct. at 2544 (Kennedy, J., dissenting). But the Clause speaks of witnesses, and giving testimony is what witnesses do. Indeed, in many languages, the words for witness and testimony have similar roots. For example, in Spanish they are, respectively, testigo and testimonio; in French, témoin and témoignage; in German, Zeuge and Zeugenaussage. If *Crawford* had spoken of "statements made acting as a witness," the link to the text of the Clause would have been undeniable – but the word commonly used in the English language to express this idea is "testimonial."

There is no doubt that the statement involved here was testimonial; *Melendez-Diaz* establishes that a laboratory report is testimonial if it transmits the information the author would expect to provide if he were called as a witness at trial. 129 S.Ct. at 2532. And *Melendez-Diaz* strongly implies that the critical consideration in deciding whether statements are testimonial for purposes of the Confrontation Clause is whether they were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.*[3] As in *Melendez-Diaz* itself, there can be no

[3] As *amicus* has recently contended in a brief filed in this Court, this useful shorthand summary might be something of a simplification. Instead of anticipated use *at trial,* one might speak somewhat more broadly of anticipated use for *prosecutorial purposes*, or for *investigation or prosecution of*

doubt that this standard is met by the statement at issue in this case. Indeed, the state supreme court acknowledged that the statement here is testimonial. Joint Appendix ("JA") at 2, 11-12.

Second, *who made the statement?* In some cases, that may be ambiguous, but not here: The statement at issue was signed by Curtis Caylor. It is plainly his statement; it does not purport to transmit the statement of anyone else. Given that his statement was testimonial, Caylor may be referred to as a witness.

Third, *was the statement used as proof against the accused?* Again, in some cases there may be ambiguity – a statement may effectively be used as proof against the accused even though it is not formally admitted into evidence. *See, e.g., Douglas v. Alabama*, 380 U.S. 415 (1965) (reading of co-defendant Lloyd's confession as part of attempt to impeach Lloyd held to violate confrontation rights of Douglas, notwithstanding the fact that the statement was not admitted against either; reading of the confession "may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement," and "the jury might improperly infer both that the statement had been made and that it was true."). But there is no question

---

a crime. Brief of Richard D. Friedman as *Amicus Curiae*, *Michigan v. Bryant*, No. 09-150, at 5 n.3. A more theoretically precise, but perhaps less practicable approach, would be phrased in terms of the anticipation of a reasonable person in the speaker's position on the hypothetical assumption that the statement would be admissible at trial. *Id.* at 12 n.11. In this case, there is no need to resolve any such complexity; the report was clearly intended for use at trial.

here; the statement was formally admitted into evidence, over Petitioner's objection, and in closing argument the prosecutor referred to it. JA 44-47, 57; Petitioner's Brief at 8.

Considering the second and third questions together, it bears emphasis that the critical factor is not that Caylor performed the blood test. Rather, the critical factor is that it was Caylor's statement that was used as proof against the accused. Put another way, a court need not ask "who the analyst is," *cf. Melendez-Diaz*, 129 S.Ct. at 2546 (Kennedy, J., dissenting), but rather, "Who is the witness whose testimonial statement was introduced against the accused?" In this case, that was clearly Caylor. And in this case, only Caylor *could* have given acceptable testimony on the matter in question, because only he observed the performance of the test.[4] But suppose that, though only Caylor *performed* the test, another person also *observed* the performance of it. Then at trial that person could testify instead of Caylor to the performance of the test. Indeed, he could adopt the

[4] It is a fundamental principle that a witness can testify to a fact only if he has personal knowledge of it. *See, e.g.,* Fed. R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 889 (Chadbourn rev. 1979) ("[W]hat the witness represents as his knowledge must be an impression derived from the *exercise of his own senses*, not from the reports of others – in other words, must be founded on personal observation. [¶] This general rule, to which contrary instances can be only casual exceptions, has long been regarded as fundamental . . . .").

report as his own statement.[5] *Amicus* understands it is for this reason that routine practice in some jurisdictions is to have two medical examiners present during an autopsy in a case of suspected murder; if the one who writes the autopsy report is unable to testify at trial, the other one could. Alternatively, in a case involving durable samples, if the prosecution wanted an analyst who was not present for the original test to testify, that analyst could repeat the test.

Finally, *did the accused have an adequate opportunity to be confronted with the witness?*[6] Again, there is no doubt: Petitioner was never given a chance to be confronted with Caylor. Giving Petitioner an opportunity to be confronted with someone else is plainly inadequate. *See Melendez-Diaz*, 129 S.Ct. at 2546 (Kennedy, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second . . . .").

---

[5] If the report is introduced in these circumstances, though, some step should be taken to ensure that as presented to the trier of fact the report constitutes a statement only by the in-court witness and not one by the original author. The safest way of doing this is to delete the name of the original author.

[6] Even if the answer to this question were in the affirmative, the Confrontation Clause would not tolerate use of the out-of-court statement unless Caylor were proven to be unavailable at the time of trial. *Crawford*, 541 U.S. at 68. The prosecution offered no such proof; Caylor was on unpaid leave, JA 58, which certainly made him an unattractive witness from the prosecution's standpoint but did not render him unavailable. Because there is no doubt that Petitioner was never offered an opportunity to be confronted with Caylor, the question of unavailability need not be reached.

Accordingly, this is a simple, straightforward case. Caylor made a testimonial statement that was introduced against Petitioner, even though Petitioner was never given a chance to be confronted with him. The violation of the Confrontation Clause is clear. The Court can therefore decide this case without addressing more complex factual situations that arise in some cases involving forensic laboratory reports.

Suppose, for example, a witness who performed a forensic laboratory test testifies at trial to her observations; she also includes in her testimony a report of observations made known to her by other laboratory technicians, perhaps without identifying them. Is there a violation of the Confrontation Clause?[7]

Or suppose the in-court witness expresses an opinion drawn in part on the basis of information reported to her by other technicians, but does not include that other information in her direct testimony. Federal Rule of Evidence 703 and its state counterparts purport to allow an expert to testify in this manner, provided that the information is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject" – but would application of that Rule, a creation of the late 20th century, violate the

[7] *Amicus* believes there would be a violation *if* the report of the absent analyst – whether identified or not – to the in-court witness is testimonial in nature. *Cf., e.g., United States v. Williams,* 2010 WL 4071538 (D.D.C. Oct. 18, 2010) (expert "may testify as to his own independent opinion . . . even if that opinion is based in part on the inadmissible autopsy report.").

Confrontation Clause in this context?[8]

Or suppose the in-court witness testifies from personal knowledge about the test that she performed – but she lacks personal knowledge of crucial facts linking the sample to the accused, and the prosecution fails to present any evidence making the link. Given that "gaps in the chain [of custody] *normally* go to the weight of the evidence rather than its admissibility," *Melendez-Diaz*, 129 S.Ct. at 2532 n.1, *quoting United States v. Lott*, 854 F.2d 254, 250 (7th Cir. 1988) (emphasis added), could this gap be so great as to create a constitutional problem – and if so could the gap be filled by the witness asserting without personal knowledge that the sample is linked to the accused?[9]

---

[8] *Amicus* believes that – again assuming that the communication from the absent technician to the in-court witness was testimonial – application of the Rule may be unconstitutional; it can amount to using the in-court witness as a conduit for the absent technician's testimony, while suppressing the fact that the absent technician is in fact providing crucial proof against the accused.

[9] *Amicus* believes that in some such situations there could be a confrontation problem. If an in-court witness were allowed to testify without personal knowledge to a factual proposition on the basis of information learned through the testimonial statement of a person who does not testify subject to confrontation, then an enormous loophole in the Confrontation Clause would be opened: A witness could provide testimony against an accused without subjecting himself to confrontation simply by passing it along to another person who would incorporate it in her trial testimony.

On the other hand, no confrontation violation is created if there are gaps in the chain of custody that are small enough that they can be bridged by reasonable

The Court may have to deal with these questions in the future. But this case does not pose them. The Court should treat this case as the simple one that it is – one in which a witness made a testimonial statement that was admitted against an accused but the accused never had an opportunity to be confronted with him.

II. VIOLATION OF THE CONFRONTATION CLAUSE CANNOT BE EXCUSED ON THE GROUND THAT CAYLOR REPORTED THE RESULTS OF A MECHANICAL PROCESS.

The state supreme court paid lip service to the holding in *Melendez-Diaz* that forensic laboratory reports prepared in anticipation of prosecutorial use are testimonial, but immediately attempted to avoid the significance of that holding. The court declared that Caylor

> simply transcribed the results generated by the gas chromatograph machine. He was not required to interpret the results, exercise independent judgment, or employ any particular methodology in transcribing the results from the gas chromatograph machine to the laboratory report.

---

inferences on the part of the trier of fact. And that may be true even if during those gaps the substance in question is in the possession of a custodian who not only holds the substance but performs some process on it and who does not testify at trial, so long as the testimony that *is* presented at trial does not effectively incorporate a testimonial statement made by that custodian.

JA 13. Thus, the court said, Caylor was "a mere scrivener," and Petitioner's "true 'accuser' was the gas chromatograph machine"; therefore, it concluded that the live testimony "of a separate qualified analyst" satisfied the confrontation right. JA 13-14. The court erred both on the facts and on the law.

As a matter of fact, Caylor did far more than transcribe the results indicated by the machine. He also asserted that received the sample in question with the seal unbroken and that on *that* particular sample he performed a particular test, according to a protocol described in detail. JA 62-65. These were all matters to which Caylor assertedly could testify from personal knowledge; Razatos, the substitute witness offered by the prosecution, could not, never having observed the sample or the test.

Moreover, *if* Caylor had only transcribed the results indicated by the machine, proof of the test would have been completely deficient. If that is all he had done, the evidence would have been nothing more than numbers on a page. How did those numbers come to be generated? It is crucial to prove that they were yielded by performing a given process on a given substance. Without proof on those points, the prosecution would be offering nothing but numbers in the air. And because only Caylor observed the test, only he was in a position to provide the proof on those points.

Even more fundamentally, the state supreme court erred in concluding that if Caylor did nothing but record the results generated by the machine he would be exempt from confrontation. The output of the machine was a factual condition that Caylor assertedly observed first-hand. When he reported on that condition, in circumstances leading a reasonable

person to recognize that the report would be used for prosecutorial purposes, he testified to it. There is obviously no rule that testimony about a factual condition that a witness observes falls outside the reach of the Confrontation Clause; testifying about factual conditions and events that they have observed is what the largest class of witnesses – percipient witnesses – do. One is "not required to interpret . . . results, exercise independent judgment, or employ any particular methodology" to report, for example, "The door was open," or "I heard a scream." But there is no doubt that testimonial reports of these facts are governed by the Confrontation Clause.

Or suppose the prosecution attempts to prove when a murder victim died through the testimony of a witness that maggots were present on the victim's body at a given time. Clearly the witness's testimony would be subject to the Confrontation Clause. One could not say in a rigorous sense that the "true accuser" was the maggots.[10] The witness against the

[10] One could speak that way informally, of course. *See* JESSICA SNYDER SACHS, CORPSE: NATURE, FORENSICS, AND THE STRUGGLE TO PINPOINT THE TIME OF DEATH (2001) (ch. 5 titled *The Witness Was a Maggot); see also* Atul Gawande, *The Maggot Talks*, N.Y. Times Book Rev., Sept. 10, 2000, p. 20 (forensic scientists "use the insects at the scene as witnesses to the crime"). But this would not have legal significance; that is, it would not suggest that because the critical evidence was of the presence of maggots the accused had no right to be confronted with the witness who reported on that fact; similarly, in some cases critical evidence is provided by the reactions of bloodhounds, *see, e.g.*, Andrew E. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, 42 HASTINGS L.J. 15 (1990), or even parrots. *See, e.g., Parrot May Have the Answer to a Killing*,

accused, the one with whom he has a right to be confronted, is the human being who reports on the factual condition. The same is true here. In each case, there has been a physical process that has, according to the report of a human witness, led to a given condition (the presence of maggots in one case, a printout of certain numbers in the other). The prosecution's contention in each case is that the process leading to that result (the life cycle of maggots and the principles of gas chromatography, respectively) is sufficiently understood as to indicate a particular factual condition at a prior time (death and an elevated blood alcohol content, respectively). Neither the state of the maggots nor the output of the machine is itself testimonial, but that is of no significance if these conditions are not reported by a proper witness.[11] In each case, the predicate for the critical deduction is the testimony of a human witness to an observed factual condition. That witness is subject to the Confrontation Clause.

It is apparent that at base the state supreme court's

N.Y. Times, Nov. 12, 1993, at B20. No serious contention could be made that these animals should be deemed to be the "true accusers" and that the accused has no right to be confronted with the witness who reports on those reactions.

[11] Thus, in *People v. Dinardo*, 2010 WL 3984545 (Mich.App. Oct. 12, 2010), the Michigan Court of Appeals held that there was no Confrontation Clause violation when an officer testified to the results yielded by a Datamaster machine without presenting the original ticket printed by the machine. The court held properly that the output of the machine was not testimonial – but in that case, unlike this one, the officer who performed the test (and immediately recorded the results) testified at trial.

"mere scrivener" theory rests on the perception that, though a forensic lab report is concededly testimonial, the report of a machine's output is so unlikely to be infected with error that cross-examination would be of little use. But that, of course, is nothing more than the reliability-centered regime of *Ohio v. Roberts*, 448 U.S. 56 (1980), which was properly rejected by *Crawford*.

III. ADOPTION OF AN UNJUSTIFIED SURROGATE WITNESS REGIME IS NOT NECESSARY TO PRESERVE AN EFFICIENT CRIMINAL JUSTICE SYSTEM.

The argument above is sufficient to demonstrate that, given that Petitioner asserted his rights under the Confrontation Clause, the prosecution could not properly present Caylor's testimonial report without Petitioner having an opportunity to be confronted with Caylor. An assessment of costs and benefits is not necessary to justify that result. *Melendez-Diaz*, 129 S.Ct. at 2540. At the same time, *amicus* recognizes that if a first analysis of a Confrontation Clause issue appeared to yield absurd and impractical consequences, the Court might well reconsider whether the analysis was correct.[12] But the consequences of holding that New Mexico violated the Confrontation Clause in this case are neither absurd nor impractical. *Amicus* understands that a large group of criminal defense lawyers, in another *amicus* brief, is presenting

[12] *Cf.* JOHN RAWLS, A THEORY OF JUSTICE 48 (1971) (using "reflective equilibrium" to refer to an interactive process of adjusting intuitions and general principles in moral reasoning).

extensive evidence demonstrating that many jurisdictions conduct their criminal justice systems efficiently without resorting to an unconstitutional system of surrogate witnesses. This brief will offer some additional evidence and a few supplementary points.

Through a group of student research assistants, *amicus* has conducted an extensive study of trials in Michigan involving charges relating to drugs, of operating under the influence of liquor (OUIL), and rape with penetration.[13] He chose the first two categories because they are the ones in which prosecutors most commonly present evidence of laboratory results, and the last because DNA evidence, one of the most complex forms of laboratory evidence, is presented with considerable frequency in rape prosecutions. He chose Michigan because it is his home state and because it is among those states in which, absent consent by the accused, a prosecutor wishing to prove laboratory results must do so by presenting live testimony – and cannot satisfy this obligation by presenting a surrogate witness who has no personal knowledge of the conduct of the test. The appellate courts have held strictly to this principle[14]

---

[13] For a fuller description of the study, including a spreadsheet presenting its results in detail, see Richard D. Friedman, *Is there a multi-witness problem with respect to forensic lab tests,* http://confrontationright.blogspot.com/2010/12/is-there-multi-witness-problem-with.html.

[14] This was true even before *Melendez-Diaz*. *People v. Lonsby,* 707 N.W.2d 610 (Mich. App. 2005) (opinion signed by one judge, the other two silently concurring in the result). It has remained true afterwards. *People v. Payne*, 774 N.W.2d 714 (Mich. App. 2009) (plain error); *People v.*

and, it represents the virtually universal practice of prosecutors.[15] Michigan thus presents a useful forum to study whether rejecting the view adopted in this case by the New Mexico Supreme Court is likely to result in intolerable demands on the judicial system. *Cf. Melendez-Diaz*, 129 S.Ct. at 2544 (suggesting that multiple persons "play a role in a routine test for the presence of illegal drugs").

The study shows – as did a previous one conducted by *amicus* in conjunction with his representation of Petitioner in *Briscoe v. Virginia*, 130 S.Ct. 1316 (2010) – that in the great majority of drug cases there is no need for it to bring in a witness from the lab; sometimes it does not present lab results, and when it does the defense often stipulates to admissibility of a report without live testimony from a lab witness. When the prosecution does bring in a lab witness (in at

---

Dendel, 2010 WL 3385552 (Mich. App. Aug. 24, 2010) (concluding that testimony based on a report prepared by non-testifying forensic analysts violated accused's confrontation right, but that error was harmless). In *People v. Horton*, 2007 WL 2446482 (Mich. App. 2007), decided before *Melendez-Diaz*, the court concluded, relying on *Lonsby*, that the trial court had committed plain error by admitting testimony describing laboratory reports and findings of two out-of-court analysts. The state supreme court decided to review the case, 742 N.W.2d 124 (Mich. 2007), but after *Melendez-Diaz* it vacated that decision and denied leave to appeal, 772 N.W.2d 46 (Mich. 2009).

[15] As explained in Friedman, *Is there a multi-witness problem . . . ?*, *supra* note 13, this is the experience reported by lawyers from the State Appellate Defender Organization – and they have only rarely felt the need to challenge what they have regarded as Confrontation Clause violations created by failure to bring a lab witness to trial.

least some cases, and perhaps in most, because the prosecution itself wishes to present live testimony), it never, in the drug cases studied, had to bring in more than one witness for a single test. (In some cases, the prosecution presented the results of more than one test, and most often different analysts had performed those tests.) In all, in the 154 drug cases studied, the prosecution presented a total of 71 lab witnesses at trial – an average of .46 per trial. And, of course, only a very small percentage of cases go to trial.

The picture is much the same in OUIL cases. The percentage of trials in which a lab witness testifies is somewhat higher in these cases than in drug cases. An explanation seems apparent: Only a tiny percentage of OUIL cases goes to trial. Given the relative simplicity of these cases, when one does go to trial it is often because the defense hopes that reasonable doubt may be raised about the lab results – perhaps the chain of custody was not well preserved, or the test was performed so badly that its results are unpersuasive. Nevertheless, it is still true that only in fewer than half the cases – 26 of 55 – did one or more lab analysts testify live at trial, and in the great majority of those cases it was only one lab analyst who did. In only one case did more than one lab witness testify live to a given test result. (In one other case, one lab witness testified live, and three others testified by video conference.) In all the other cases in which more than one lab analyst testified live at a single trial, they were testifying to multiple tests. In sum, in 55 cases a total of 30 lab witnesses testified live, for an average of .55 lab witnesses per trial.

Rape cases provide a different type of context, but in respects material here the picture is largely the

same. In the great majority of the rape cases studied, the prosecution did not present DNA results. DNA testing is more complex than the types of tests typically involved in the other types of cases studied. But the Michigan State Police Laboratory, which does nearly all of the DNA testing used in Michigan prosecutions, is more vertically integrated than many others.[16] And, as in other contexts, it is often true with respect to a given analyst that the prosecution prefers not to present live testimony and the defense does not insist on it. Thus, in some of the rape cases studied, the prosecution presented DNA results without calling a lab witness to testify live. Sometimes it called one live lab witness to present DNA evidence, and sometimes two; it never had to call a long chain of live witnesses from a lab. In sum, in the 104 rape cases studied, 31 lab witnesses testified live – to DNA and other lab results – for an average of about .30 witnesses per case.

The bottom line is clear: When all is said and done, no intolerable burden if created by recognizing that the Confrontation Clause does not proof of a laboratory test to be given, over the objection of the accused, by the testimony of a witness with no personal knowledge of the conduct of the test.

The point is underlined by recognizing that even assuming that the accused insists on his full confrontation rights, a prosecutor has options other than presenting trial testimony of the analyst who initially performed the test.

---

[16] Telephone conversation of *amicus* with John Collins, Director, Michigan State Police Forensic Science Division, December 6, 2010.

First, if it is more efficient, the prosecutor may, so far as the Confrontation Clause is concerned, take a deposition to preserve the witness's testimony.[17] (The laws of various jurisdictions may impose additional constraints on the taking of depositions, but of course those jurisdictions may if they wish make depositions more readily available.) If the witness is unavailable to testify at trial, the deposition may then be introduced. If the deposition was video-recorded, the deposition may be introduced by playing the video at trial. Determination of unavailability under the Clause is a flexible matter.[18] In the view of *amicus*, if a lab witness gives a deposition subject to confrontation and the incremental value of having her testify live does not appear substantial, a court can justifiably be reasonably lenient in determining that factors such as distance and inconvenience render her unavailable to testify at trial.

Amicus also believes that, in some cases, depositions may be taken to preserve testimony even before charges are brought. Consider, for example, *State v. Craig*, 853 N.E.2d 621 (Ohio 2006), *cert. denied*, 549

---

[17] As explained by the Florida Supreme Court in *Lopez v. State*, 974 So.2d 340 (Fl. 1978), however, granting the accused an opportunity to take a discovery deposition of the witness – as opposed to the prosecution taking a deposition for the specific purpose of preserving testimony – does not satisfy the confrontation right.

[18] *See, e.g., Barber v. Page*, 390 U.S. 719, 724-725 (1968) (requiring "good-faith effort to obtain [witness's] presence at trial"); *California v. Green*, 399 U.S. 149, 189 n.22 (1970) (Harlan, J., concurring) ("The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.").

U.S. 1255 (2007).[19] In that case, Craig was charged with murder several years after the crime; he had been the primary suspect from the start, but before advances in DNA testing technology there was inadequate evidence to bring charges. At trial, the prosecution proved the time of death, a crucial factor in the case, by introducing an autopsy report through a medical examiner who had not been present at the autopsy. This practice should now, in light of *Melendez-Diaz*, be recognized to violate the Confrontation Clause.[20] But *amicus* believes that, if the state was afraid at an earlier time that it might not be able to present at an eventual trial live testimony of the medical examiner who did perform the autopsy, it could have preserved the examiner's testimony by taking his deposition after having given due notice to Craig. In some cases, an ultimate defendant might be able to show that he lacked sufficient incentive or ability at the earlier time to cross-examine the examiner adequately, but that was not true in *Craig*: Craig would have known that he was the primary suspect in a murder case. And he would have had substantially all the information he later had to try to undercut the report's assertion that the decedent died at a time that, other evidence suggested, made him the probable killer.[21]

---

[19] *Amicus* represented Craig in his unsuccessful petition for *certiorari*.

[20] The Ohio Supreme Court has perhaps suggested that it realizes this by, *sua sponte,* ordering briefing on the question of whether in light of *Melendez-Diaz* admissibility of the autopsy report violated Craig's confrontation right. *State v. Craig*, 934 N.E.2d 347 (Ohio 2010).

[21] In *People v. Wilkey*, 2004 WL 576659 (Mich. App. 2004),

Second, if the test is on a substance that has not degraded in a material respect, the prosecution may, if it prefers not to present the live testimony of the original analyst, have another analyst re-test the substance and testify at trial. Indeed, *amicus* also understands that in some jurisdictions many lab tests are routinely repeated by a second analyst, thus improving reliability and minimizing the chance that no witness will be available to testify at trial to test results.

Third, as noted above, any qualified witness who *observed* the conduct of the test may testify to it even if she did not actually *perform* the test. In some contexts, it may be impractical to have a second qualified analyst present when the test or examination is conducted. In autopsies, though, it is not only practical but standard practice in some jurisdictions.

Fourth, in some autopsy cases a carefully done video-tape of the entire examination could obviate the need for a live trial witness who had been present at the time of the examination. If the recording is a continuous one that shows the face of the decedent and the entire exam, it may be possible for a witness at trial to identify the decedent and for a qualified expert witness to examine the video and draw material conclusions from it.

These considerations demonstrate that, even in the case of autopsies performed long before an eventual trial, prosecutors can often protect themselves against the loss of evidence without abandoning the principle that the accused has a right to be confronted with a

---

appeal denied, 691 N.W.2d 454 (Mich. 2005), the court went so far as to appoint an attorney to take a deposition, of the elderly widow of a victim of felony murder, on behalf of the ultimate but then-unknown accused.

witness whose testimonial statement is used against him. *Amicus* concedes that nevertheless there might be occasional cases in which evidence is lost because the prosecution has no feasible method of offering the accused a chance to be confronted with the witness before the witness becomes unavailable, and no satisfactory substitute. But laboratory witnesses are hardly unique in this respect: Any witness in a long-delayed case may impair the prosecution by becoming unavailable by the time of trial. That is one of the costs that we bear as a consequence of the confrontation right: Assuming that the accused has not wrongfully rendered the witness unavailable, it is the prosecution, which wants to use the evidence against the accused, rather than the accused, who has the right to be confronted with the witness, who bears the risk of that unavailability. Occasional cases, unfortunate as they are, in which genuine unavailability of a witness causes the loss of what may have been a valid prosecution should not provide an excuse for a broad denigration of the accused's fundamental right to demand that witnesses against him testify face to face.

CONCLUSION

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

Respectfully submitted,

RICHARD D. FRIEDMAN
Counsel of Record, Pro Se
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 647-1078

December 7, 2010