No. 07-591

IN THE
Supreme Court of the United States

LUIS E. MELENDEZ-DIAZ,
Petitioner,
v.
MASSACHUSETTS,
Respondent.

On Petition for a Writ of Certiorari to the Appeals Court of Massachusetts

BRIEF OF *AMICI CURIAE* BY PROFESSORS PAUL C. GIANNELLI, PAMELA R. METZGER, AND ANDREW E. TASLITZ, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE INNOCENCE PROJECT, THE NATIONAL COLLEGE FOR DUI DEFENSE, THE COMMITTEE FOR PUBLIC COUNSEL SERVICES, AND THE MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is "testimonial" evidence subject to the demands of the Confrontation Clause as set forth in *Crawford* v. *Washington*, 541 U.S. 36 (2004).

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INTEREST OF *AMICI CURIAE*

Amici Curiae in support of Petitioner include Professors of Law with expertise in issues of forensic science, criminal procedure, and constitutional law, the National Association of Criminal Defense Lawyers ("NACDL"), a non-profit association of criminal defense lawyers with a national membership of more than 10,000 attorneys, the National College for DUI Defense, a non-profit professional organization with approximately 850 members which sponsors or co-sponsors at least four major continuing education programs annually specializing in issues relating to the defense of persons charged with driving under the influence, the Committee for Public Counsel Services, a statewide agency in Massachusetts responsible for the delivery of court-appointed criminal defense services to indigent adults and children facing juvenile or criminal prosecutions, the Massachusetts Association of Criminal Defense Lawyers ("MACDL"), a non-profit association devoted to protecting the rights of the accused and to serving as a voice for the defense before state and federal courts, and the Innocence Project, a leader in the exoneration of the wrongfully convicted, which, in the course of its work has exposed some of the forensic science failures discussed in this brief. [1]

As scholars training future practitioners and practitioners representing clients, *Amici* have a keen interest in knowing whether and how the Sixth

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1 Accompanying this brief are letters of consent to its filing. 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.

Amendment's Confrontation Clause applies to state forensic examiner reports. [2]

In the wake of *Crawford* v. *Washington*, 541 U.S. 36 (2004), and *Davis* v. *Washington*, 126 S. Ct. 2266 (2006), the most widespread subject of controversy with respect to the confrontation guarantee concerns the constitutionality of allowing the prosecution to introduce state forensic laboratory certifications in lieu of live testimony. This practice poses serious problems because it fundamentally alters the structure of a criminal trial, diminishes its truth-seeking function, and ultimately threatens the integrity of our criminal justice system. To delay intervention will perpetuate confusion and facilitate injustice in a substantial number of criminal cases nationwide.

SUMMARY OF ARGUMENT

Amici support Petitioner's reasons for granting the petition in full. *Amici* write separately to explain the practical import of the right to confrontation in operation, where the prosecution must affirmatively present live witness testimony to sustain its burden of proof and the defense, absent a knowing and intelligent waiver, always has the opportunity to confront and cross-examine that witness as it sees fit, if it sees fit. Specifically, *Amici* explain how the traditional construction of the confrontation guarantee allocates risks, creates incentives, and ultimately promotes the truth-seeking function of a

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[2] Professors Giannelli, Metzger and Taslitz have published extensively on topics related to these issues. NACDL has appeared as *amicus curiae* in *Crawford* and also appeared with the Public Defense Service for the District of Columbia as *amicus curiae* in *Davis*.

criminal trial. Statutes such as the one at issue in Massachusetts, which substitute out of court certification for live testimony on dispositive issues of proof, cannot serve these purposes.

Amici also write to alert the Court to the systemic problems with unreliable scientific data that coincided with the permissive practice under *Ohio* v. *Roberts*, 448 U.S. 56 (1980), *abrogated by Crawford* v. *Washingon*, 541 U.S. 36 (2004), of admitting at trial unconfronted, purportedly reliable information. The demonstrated fallibility of state and federal forensic evidence, particularly when it is regularly exempted from the rigors of adversarial testing, reinforces the importance of the questions presented by Petitioner and militates in favor of this Court's review.

REASONS FOR GRANTING THE PETITION

I. THE CONFRONTATION GUARANTEE IMPLICATES THE FUNDAMENTAL WORKINGS OF OUR ADVERSARIAL CRIMINAL JUSTICE SYSTEM AND ITS TRUTH-SEEKING FUNCTION.

In *Crawford*, this Court decoupled the right to confrontation from hearsay rules and held that a defendant's right to confrontation was implicated whenever the prosecution sought to introduce "testimonial" evidence. But the Court did not expressly resolve, because the issue was not squarely before it, how to determine if evidence is "testimonial" such that the confrontation guarantee must be satisfied.

Traditionally, the Confrontation Clause has been interpreted to require (absent a valid waiver[3]) that the prosecution "confront" a defendant "with" its witnesses in the prosecution's case-in-chief. U.S. Const. amend. VI. Under this construction of the confrontation guarantee, there are always a variety of factors that will impede the admission of erroneous, incomplete, or fraudulent evidence. Indeed, the purpose of the Confrontation Clause is to ensure an opportunity for the defendant to challenge the reliability of the prosecution's evidence. See Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 501 (2006).

The Confrontation Clause operates to provide the defense with procedural devices to challenge the reliability of the evidence presented by the prosecution. Most fundamentally, the prosecution must sustain its burden of proof by presenting inherently revealing, live testimony. Thus the prosecution, which presumably knows the strengths and weaknesses of its evidence and its witnesses, cannot, over defense objection, simply conduct a trial-by-affidavit, putting out-of-court written statements before the fact-finder that say no more and no less than the prosecution wants them to say. Rather, the prosecution is obliged to put a live witness on the stand and bear the risk that this witness may provide, even on direct examination, some information that is inconsistent with prior

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[3] The traditional system does not require confrontation in every case. It is always the prosecution's prerogative to ask the defense to stipulate to the admission of unconfronted out-of-court statements. However, if the defense declines such a request, the prosecution retains the burden of production and the defense the opportunity for cross-examination.

statements or otherwise damaging to the prosecution's case.

Moreover, under the traditional system, even when a defendant chooses not to cross-examine a prosecution witness, his right to confrontation still provides an *opportunity* for adversarial testing. Before the prosecution's first witness takes the stand, the traditional system of confrontation and cross-examination gives prosecution witnesses prophylactic incentives to exercise greater care in the creation or maintenance of prosecution evidence—to set up and follow protocols that adhere to best practices, to ensure all staff are properly trained, to properly document everything, and to strive in all ways to operate in a manner that is beyond reproach—and thereby to minimize if not avoid entirely damaging impeachment. See Metzger, 59 Vand. L. Rev. at 501. Similarly, the spectre of cross-examination prompts good prosecutors to rigorously vet their cases—to strengthen those cases that do go to trial by thoroughly reviewing the evidence with their witnesses and ensuring that errors, omissions, and oversights will be addressed and remedied before the witness testifies in open court, and to dismiss cases based on flawed evidence before the trial ever begins. Without incentives to encourage scrutiny, the prosecution may unwittingly rely on conclusions that are faulty or without foundation. The prosecution will be less inclined to probe the bases for a report's conclusions—the methodology and protocols the examiner used—because without a realistic probability of confrontation, they will never become an issue at trial.

Even a prudent prosecutor may have little ability to learn more about the forensic examiner and his actions in the case. The report itself is likely to be

cursory. Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 Vand. L. Rev. 791, 803 (1991) (lab reports often merely "summarize[ ] the results of an unidentified test conducted by an anonymous technician") (internal quotation and citation omitted).[4] Therefore, in addition to the lack of incentives, there may be a lack of information for which to question forensic certifications. Prosecutors may rely on such certifications because of their believed reliability, but "[d]ispensing with confrontation" because such reports are "obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Crawford*, 541 U.S. at 62.

Certainly, when the prosecution then calls its witness to the stand, it fulfills a number of the components of the confrontation guarantee, even if the defense chooses not to cross-examine the witness. These benefits include (1) "face-to-face" confrontation with the defendant, *id.* at 57; (2) open presentation of evidence "in the presence of all mankind," Sir William Blackstone, 3 *Commentaries on the Laws of England* *373 (1765-69 ed.) and (3) the fact-finder's first-hand "opportunity [to] observ[e] the quality, age, education, understanding, behavior, and inclinations of the witness; in which points all persons must

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[4] The defendant is afforded little opportunity to discover a forensic report before trial. *See also* Giannelli, 44 Vand. L. Rev. at 810 n.121 (current rules requiring discovery of scientific reports generally do not specify the information that must be included; suggesting changes that require "(a) a description of the analytical techniques used in the test . . . (b) the quantitative or qualitative results with any appropriate qualifications concerning the degree of certainty surrounding them, and (c) an explanation of any necessary presumptions or inferences that were needed to reach the conclusions") (internal citation omitted).

appear alike, when their depositions are reduced to writing." *Id.* at *374. Additionally, the combination of being face-to-face with the accused and the possibility of cross-examination will likely deter prosecution witnesses from over-statement and misleading omissions when they are on the stand, especially where they have been instructed that such tactics will likely only backfire. Metzger, 59 Vand. L. Rev. at 501 n.122 ("almost all state employees who may be called to testify in criminal trials receive training" on how to be a good witness).

The timing of the defendant's Confrontation right to cross-examination is a critical aspect of adversarial testing, because it ensures that the defendant has a genuine and informed opportunity, to challenge the prosecution's evidence as he sees fit, if he sees fit. The defendant is not obligated to choose whether or how to question the prosecution witness until *after* that witness has testified on direct and after the prosecution has presumably obtained from the witness whatever inculpatory information the witness possesses. At this point, the defense can make an informed decision to cross-examine the prosecution witness to expose holes, inconsistencies, biases, or untruths in the witness' testimony.

Alternatively, the defense may decide to forego cross-examination—for any number of legitimate reasons. It may be that the witness (1) now under oath, failed to testify in a way that undermines the defense, (2) actually testified poorly for the prosecution (and thus favorably for the defense), and might only qualify his answers on cross-examination, or (c) in anticipation of cross-examination, was so scrupulous in his testimony that cross-examination would only emphasize the strength of the prosecution's evidence.

And precisely because the traditional construction of the confrontation right ensures a routine and uniform opportunity for the defense to confront and cross-examine prosecution witnesses, it creates an incentive structure for the prosecution and its witnesses to ensure at every stage of the prosecution that the evidence is accurate and reliable in order to limit defense opportunities for impeachment. The spectre of cross-examination thus provides an incentive for the prosecution to present a complete warts-and-all picture of its case to "draw the sting" from any attempt at impeachment— which in turn allows the fact-finder to render its verdict with more complete information.

In short, the very structure of the traditional conception of the confrontation guarantee promotes the truth-seeking function of a criminal trial in our adversarial system. But a number of states, Massachusetts among them, and a federal circuit, do not consider forensic laboratory certifications to be testimonial, and thereby do not afford defendants *any* confrontation rights in connection with such evidence.[5] This eviscerates the protections of the

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[5] *See, e.g., United States* v. *Ellis*, 460 F.3d 920, 925 (7th Cir. 2006) (noting that while circumstances of test might lead examiner to believe her report might be used in prosecution, they do not "transform what is otherwise a nontestimonial business record into a testimonial statement implicating the Confrontation Clause"); *People* v. *Geier*, 161 P.3d 104 (Cal. 2007), ("[w]e conclude therefore that the DNA report was not testimonial"), *petition for cert. filed*, No. 07-7770 (U.S. Nov. 14, 2007); *State* v. *Forte*, 629 S.E.2d 137, 143 (N.C.) (laboratory report on DNA test not testimonial because such reports are routine, neutral and do not bear witness against the defendant), *cert. denied*, 127 S. Ct. 557 (2006); *Commonwealth* v. *Verde*, 827 N.E.2d 701, 705 (Mass. 2005) (holding that drug certificates "merely state the results of a well-recognized scientific test

Confrontation Clause, and makes the prosecutor the only functional "gatekeeper" against the admission of unreliable evidence.

As this Court explained in *Crawford*, while the Confrontation Clause's ultimate goal may be to ensure reliability of evidence, "it is a *procedural* rather than a *substantive* guarantee. . . reflect[ing] a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can *best be determined*." *Crawford,* 541 U.S. at 61 (emphasis added). Reliability cannot "best be determined" in an adversarial system by having the very party in opposition to the defendant—the prosecutor—responsible for the reliability of critical evidence. Statutes that permit forensic certification as prima facie evidence "virtually eliminate judicial inquiry into the reliability of the general scientific methodology or the particular scientific test." Metzger, 59 Vand. L. Rev. at 489.

Upon receiving a forensic certification and choosing whether to present it as evidence, the prosecutor subsumes the role of gatekeeper—deciding whether the evidence is reliable. When, as here, the certification is presented as evidence of an essential element of the crime—drug type and weight—presentation of this evidence effectively "rewards the state with a prima facie presumption that the prosecution has proven the truth of the report." *Id.*

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determining the composition and quantity of the substance" and are akin to public records); *State* v. *Dedman*, 102 P.3d 628, 636 (N.M. 2004) (holding blood alcohol report not testimonial and within public records exception because it was prepared by public health agency, rather than law enforcement, and therefore was neither investigative nor prosecutorial).

at 490. In effect, the prosecutor becomes the "referee" in a game that he has an interest in winning, and thus has every incentive to use "shortcut[s] to the process of proof." Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After* Crawford *v.* Washington, 15 J.L. & Pol'y 791, 800 (2007).

But by removing the defenfant's opportunity to confront, before the fact-finder, the presentation of forensic evidence to prove an essential element of the crime, the certification system robs the adversarial system of many of the incentives that promote the truth-finding function of a criminal trial. The declarant of an out-of-court statement in support of the prosecution does not have the same incentives that are present under the traditional construction of the confrontation guarantee to cautiously and conscientiously create and preserve evidence from the outset in order to avoid the possibility of later impeachment. Rather, with statements submitted in writing, information can easily be spun, misrepresented, omitted or fabricated precisely because no follow-up questioning is afforded. As one commentator aptly observed, "[p]ractically speaking, these statutes mean that the fact that a substance found on the defendant's person was tested and determined to be cocaine of a specified quantity might, at the prosecutor's prerogative, be proven by waving an official-looking paper that says so before the jury." Mnookin, 15 J.L. & Pol'y at 798.

Amici believe that use of the certification system impermissibly bypasses the confrontation right in a manner that is wholly inconsistent with our adversarial system. See *Barefoot* v. *Estelle*, 463 U.S. 880, 899 (1983) (our "adversary system" is designed to permit the factfinder to "uncover, recognize and

take due account" of the "shortcomings" of expert evidence), *superseded by statute*, Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 28 U.S.C. § 2253, *as recognized in Slack* v. *McDaniel*, 529 U.S. 476 (2000); see also *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993) (endorsing "[v]igorous cross-examination" as a means of attacking scientific evidence). *Amici* urge the Court to grant review in this case and to declare that the traditional method of fulfilling the confrontation guarantee is the only constitutionally acceptable method.

This issue goes well beyond the unconfronted admission of state forensic examiner reports. It is the nature of our adversarial system that the prosecution will constantly push to limit its confrontation obligations. Thus, the recognition by a number of states of any rule for state forensic examiners more lenient than one requiring the prosecution to present live testimony subject to cross-examination by the defense creates a dangerous slippery slope. If it is permissible to bypass the Confrontation Clause by labelling forensic evidence certifications non-testimonial, then it would presumably no more offend the Constitution to allow the prosecution to prove its entire case by affidavit, no matter the precise type of out-of-court statement at issue. See *People* v. *McClanahan*, 729 N.E. 2d 470, 477 (Ill. 2000) (acknowledging this danger); see also*, e.g., Starr* v. *State*, 604 S.E.2d 297, 299 (Ga. Ct. App. 2004) (permitting introduction of alleged victim's videotaped statement in lieu of live testimony where defense could have called her as a witness). In other words, the certification rule threatens not only to undo the importance of the *Crawford* and *Davis* decisions, which reaffirmed importance of live

testimony, in court, subject to cross-examination, but also to "dramatic[ally] change . . . the way we conduct criminal trials." Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L. J. 1011, 1038 (1998). With such basic principles at stake, the Court's corrective intervention is urgently needed.

II. WHETHER STATE FORENSIC EXAMINER EVIDENCE IS TESTIMONIAL AND SUBJECT TO TRADITIONAL CONFRONTATION GUARANTEES IMPLICATES THE INTEGRITY OF OUR CRIMINAL JUSTICE SYSTEM.

We need only look back to recent history for proof that the integrity of our criminal justice system is at stake. During the *Roberts* era, a defendant's right to confrontation and cross-examination of a prosecution witness was downgraded from a categorical constitutional guarantee to a highly arbitrary judicial determination of evidentiary reliability. At the same time, some states (erroneously) concluded that the mechanism for fulfilling the confrontation obligation, in the more limited instances that obligation was recognized under *Roberts,* could be altered in such a way as to further constrict the scope of the right. In particular, some states endorsed the use of purportedly reliable forensic examiner reports in lieu of live testimony so long as a defendant had an opportunity to subpoena the examiner to testify. From the vantage of hindsight, the result was predictable; the *Roberts* era coincided with widespread crime laboratory failures around the country.

Lest history repeat itself, this Court should use Petitioner's case as a vehicle to expressly reject the permissive admission of unconfronted forensic

evidence and affirm that the traditional strictures of the confrontation right regulate the admission of such evidence. The Court's constitutional holding in *Crawford* means little in practice if States can avoid that holding by simply categorizing vital prosecution evidence used to prove elements as "non-testimonial." Now that the *Roberts* regime has been rejected, reliance on a forensic certification in lieu of live testimony will be the most attractive option for bypassing the rigors of its traditional confrontation obligations. Moreover, state legislatures have the incentives of increased conviction rates and decreased costs to create systems like the one used in Massachusetts, that employ certification as proof of prima facie evidence of an element of a crime.

The ability to confront and probe scientific evidence is critical because it is often the most powerful evidence in the prosecution's arsenal, and is considered to be extremely reliable and persuasive by juries. In a survey of potential jurors in the District of Columbia, respondents said that, on a scale of one to ten, fingerprint and DNA evidence rated 8.3 and 9 respectively for general persuasiveness, and 8.6 and 9 for general reliability; likewise 94% of those polled deemed "important" laboratory and scientific tests performed by the government that provided favorable evidence to the defense, and 91% of those polled said that they would be concerned if the prosecution withheld this information from the defense. See Survey of D.C. Jurors conducted by the Public Defender Service in December 2003, questions 3, 6, 17, 20, 57, & 71.[6]

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[6] *Available at* http://www.pdsdc.org/Special Litigation/SLD SystemResources/Brady%20Poll%20Results,%20December%202003.pdf.

This reliance is potentially dangerous because this sort of evidence is no more immune to human error or bias than any other type of evidence. Thus, in the review of the first 74 DNA exoneration cases analyzed by the Innocence Project, *one third* involved "tainted or fraudulent science." Barry Scheck et al., *Actual Innocence: When Justice Goes Wrong and How to Make It Right*, 365 (2003); see also Maurice Possley, *Crime Lab Disorganized, Report Says Consultant Alleges Meager Supervision, Inadequate Training*, CHI. TRIB., Jan. 15, 2001 (examination of first 200 exoneration cases since 1986 revealed than "more than a quarter involved faulty crime lab work or testimony"). Indeed, our *Roberts*-era history suggests that forensic evidence, just like any other type of evidence, is more susceptible to human error and misrepresentation when it is shielded from confrontation.

During the *Roberts* era, the confrontation guarantee turned on judicial estimations of evidentiary reliability and in-court confrontation was generally devalued. See *Roberts*, 448 U.S. 56. At the same time, the practice of allowing the prosecution to introduce a state forensic examiner's report against the accused as a substitute for the forensic examiner's live testimony gained currency and proliferated rapidly. Conclusory declarations about the results of a "wide range" of forensic tests—including drug tests, "DNA tests, microscopic hair analyses, fingerprint identifications, coroners' reports, [and] ballistics tests," were exempted from the strictures of the Confrontation Clause. Metzger, 59 Vand. L. Rev. at 479; *id.* at 479 n.12. Demonstrating the influence of *Roberts*, the oft-cited justification for the permissive use of these

unconfronted forensic laboratory reports was their inherent reliability. *Id.* at 480 n.15.

Ironically, the *Roberts*-era attitude that confrontation was discretionary and dispensable for "reliable" evidence can only have created an atmosphere which facilitated the creation and admission of unreliable evidence at trial precisely because the work of state forensic examiners was largely insulated from meaningful scrutiny. It would be an overstatement to say that confrontation is the cure-all for faulty forensic evidence; there will always be some people who are willing to take the stand and affirmatively lie or withhold information that might expose their testimony to be falsely premised or unreliable. But in-court confrontation works in concrete ways to deter the creation and use in court of sloppy, inaccurate, or falsified forensic work. See Point I *supra*; see also *Crawford*, 541 U.S. at 61 (confrontation identified as the procedural mechanism through which "reliability *can best be* determined") (emphasis added).

And, in fact, the practice of insulating the work of state forensic examiners from the crucible of adversarial testing coincided with a disconcerting number of systemic laboratory errors and failures around the country. Flaws with the administration and operation of state forensic laboratories and the evidence they generated during this time have been uncovered in virtually every state or locality in the country, as well as in the federal system, and are well-documented in Baltimore, Boston, Chicago, Cleveland, Los Angeles, Montana, Oklahoma City, Texas (Houston, Fort Worth, and West Texas), Virginia, Washington, and West Virginia. See generally Appendix of Sample Crime Laboratory Failures from Around the Country During the

Roberts Era ("App. of Crime Lab Failures"). In these jurisdictions, the same types of human error that can undermine the reliability of any other type of evidence—overwork, inattention, bias, lack of training, outright dishonesty— compromised the reliability and probity of laboratory tests and the reports of those test results. *Id.*

The Houston Police Department Crime Laboratory is perhaps the paradigmatic example of a failed forensic agency. According to one state senator, "the validity of almost any case that has relied upon evidence produced by the lab is questionable." Rodney Ellis, Editorial, *Want Tough on Crime? Start by Fixing HPD Lab*, HOUSTON CHRONICLE, Sept. 5, 2004. Specifically, a state audit revealed a dysfunctional organization with serious contamination issues and an untrained staff using shoddy science, including poor calibration and maintenance of equipment, improper record keeping, a lack of safeguards against contamination, and a leaky roof which flooded boxes of biological evidence.[7] Other problems were discovered with the toxicology, serology, and ballistics units of the lab.[8] In addition, several instances of "drylabbing"—that is, the

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[7] *See Quality Assurance Audit of Houston Police Dep't Crime Laboratory—DNA/Serology Section* (Dec. 12-13, 2002), http://www.pdsdc.org/resources/dna/QA_Audit_for_DNA_databasing_labs.pdf.

[8] *See* Ralph Blumental, *Double Blow, One Fatal, Strikes Police in Houston*, N.Y. TIMES, Oct. 30, 2003, at A23 ("The Houston police chief announced on Wednesday that he had shut down the Police Department's toxicology section after its manager failed a competency test."); *Fourth Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room,* 3-4 (Jan. 4, 2006), http://www.hpdlabinvestigation.org/reports/060104report.pdf.

fabrication of scientific results—were documented in the controlled substances division.[9] Further investigation revealed widespread problems, including inadequate documentation and a failure to follow generally accepted forensic science practices and laboratory procedures.[10]

West Virginia too provides a cautionary tale about the systemic problems that can render forensic evidence wholly unreliable. After the DNA exoneration of Glen Dale Woodall, the prosecuting attorney for Kanawha County requested a judicial investigation into the work of the serology department at the West Virginia Department of Public Safety; a separate investigation was also conducted by the American Society of Crime Laboratory Directors (ASCLD). See *In Re Investigation of West Virginia State Police Crime Lab, Serology Division*, 438 S.E.2d 501, 503 (W.Va. 1993).

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9 *See Third Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room* at 31-36 (June 30, 2005), http://www.hpdlabinvestigation.org/reports/050630report.pdf.13. *See Fifth Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room*, 66-67 (May 11, 2006), http://www.hpdlabinvestigation.org/reports/060511report.pdf. (documenting "pervasive and serious problems with the quality of scientific work performed by the serologists, as well as with the presentation of the results obtained"); Possley, *Scandal Touches Even Elite Labs*, (firearms examiner misreported caliber of bullet in order to connect gun to defendant); *see also* Roma Khanna & Steve McVicker, *Fingers Pointed at HPD Crime Lab in Death Row Cas*e, HOUSTON CHRONICLE, April 24, 2003.

10 *See Third Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room* 31-36 (June 30, 2005), http://www.hpdlabinvestigation.org/reports/050630report.pdf.

Both the Court and ASCLD found that the serologist involved in the Woodall case routinely overstated results, provided misleading statements about his results, failed to report exculpatory results, failed to follow-up on conflicting results, and reported scientifically impossible or improbable results. They also found evidence that the serologist's supervisors ignored or concealed complaints about his work. Both concluded that laboratory operating procedures—which, among other things, did not require written documentation of methodology, lacked auditing requirements, lacked written protocols, and failed to follow accepted scientific protocols—"undoubtedly contributed to an environment within which [the serologist's] misconduct escaped detection." *Id.* at 504 (internal quotation omitted).

A guarantee of routine in-court confrontation might have averted problems like these. Confrontation might have prompted the crime laboratories in these jurisdictions to act with greater care from the outset. Part of the problem is that many of the lab failures documented above would not be discernable from state forensic examiner reports used by the prosecution. As noted above, and as was the case below, see Point 1 *supra*, these reports often incorporate only the examiner's bare conclusions without providing any information about the tests performed, the manner in which tests were conducted, laboratory protocols, departure from these protocols and the reasons therefore, or error rates. Thus the act of writing the report does not require self-scrutiny by the examiner, and hence provides little incentive either to conduct tests properly and carefully or to report results accurately. The expectation of in-court confrontation provides these

incentives, however, and thus can reduce the susceptibility of this evidence to error.

If it did not preempt them, a guarantee of routine confrontation could have also prompted or hastened the in-court exposure of these systemic problems. The types of errors and problems that have been discovered—disregard for protocols in conducting lab tests, lack of meaningful protocols, falsification of credentials by forensic examiners, fabrication of test results, utilization of junk science techniques or other flawed forensic methodology, pro-government bias, misreporting of actual test results, see App. of Crime Lab Failures—are the very types of mistakes and misconduct that the crucible of adversarial testing is generally designed to deter and reveal. A forensic examiner may think twice about making unsupported, inaccurate or false statements when testifying in open court. In addition, defense counsel has the opportunity with the examiner on the stand to contrast inadequate protocols and methodologies with best practices, expose error rates and bias, question training, and reveal all the inconsistencies and implausibilities inherent in testimony that lacks adequate foundation or contains actual falsehoods. See*, e.g., Kyles* v. *Whitley*, 514 U.S. 419, 447 (1995) (through cross-examination defense counsel could have "laid the foundation for a vigorous argument that the police had been guilty of negligence");[11]

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[11] The prosecution is obliged to turn over Brady information to defense counsel for this precise purpose. *Id*. at 446 n.15 (When "the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it."); *Smith* v. *Secretary of New Mexico Dep't of Corrections*, 50 F.3d 801, 830 (10th Cir. 1995) (*Brady* obligation encompasses

Delaware v. *Van Arsdall*, 475 U.S. 673, 678-79 (1986) (right to confrontation encompasses right to cross-examine prosecution witnesses for bias); *United States* v. *Davis*, 14 M.J. 847, 848 n.3 (A.C.M.R. 1982) (cross-examination of a "chemist may reveal the possibility of laboratory error due to the carelessness").

Without in-court confrontation, there is little assurance that defense counsel will be able to probe any of these matters effectively, if at all. Indeed, it is telling that, although the crime laboratory errors and problems documented above occurred almost exclusively in criminal prosecutions, they were uncovered largely outside of the criminal trial process. Often long after the fact, the unreliability of laboratory test results and reports relied on in criminal trials was brought to light by media exposés, civil suits and post-conviction proceedings that afforded meaningful discovery, whistleblowers, and innocence commissions examining the causes of wrongful convictions. See App. of Crime Lab Failures.

Even in the smaller subset of cases under *Roberts* where it was deemed necessary, in-court confrontation revealed laboratory errors and problems, thus demonstrating the very efficacy of adversarial testing to "beat[] and bolt[] out the Truth." *Crawford*, 541 U.S. at 62 (internal citation and quotation omitted). The cross-examination of a police chemist about her testing of blood evidence in a Baltimore County, Maryland case is illustrative. The chemist acknowledged that "she did not understand

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information "would also have been useful in discredit[ing] the caliber of the investigation") (internal citation and quotation omitted) (alteration in original).

the science behind many of the tests that she performed," and "she did not perform a number of standard tests on the blood samples in the case." Stephanie Hanes, *Chemist Quit Crime Lab Job After Hearing, Papers Show; She Acknowledged Report Was 'Worthless' In 1987,* BALT. SUN, Mar. 19, 2003, at B1. She also "agreed that other tests she had completed were useless" and "acknowledged that she had failed to record the results of some testing steps needed to ensure accuracy in blood typing." *Id.* Finally, she acknowledged at the conclusion of cross that, "as a result of all this" "there [wa]s not one finding, one result in this report that [wa]s usable" and that her "entire report . . . [her] entire analysis [wa]s absolutely worthless." *Id.*[12] Cross-examination had similarly beneficial results in *Ragland* v. *Kentucky*, 191 S.W.3d 569, 581 (Ky. 2006), where an FBI bullet lead composition analyst was caught in a lie by defense counsel on cross-examination, confronted with her earlier statements, and eventually forced to admit that her prior statements were false. Later, the analyst admitted, "[i]t was *only after the cross-examination at trial* that I knew I had to address the consequences of my actions." *Id.* (emphasis added).

The errors and failures of forensic evidence detailed above expose the bankruptcy of the argument that confrontation is unnecessary in the area of forensic science because of its inherent reliability. They also demonstrate how concerns about the "cost" of

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[12] This chemist also tested blood evidence in DNA-exoneree Bernard Webster's case, but the prosecutor opted not to call her as a witness because he "didn't want to complicate" the case by allowing the defense to conduct what he anticipated would have been "a nasty cross-examination." Hanes, *Chemist Quit Crime Lab, supra.*

presenting live-witness testimony by forensic examiners are, at best, penny-wise and poundfoolish. Time away from the laboratory and transportation to the courthouse are not the only costs implicated. There are also real costs to a suspension of confrontation: wrongful convictions, attendant civil suits, loss of public trust, and, in some cases, the failure to apprehend the true perpetrator. See *In Re Investigation of West Virginia State Police Crime Lab, Serology Division*, 438 S.E.2d at 508 (systemic forensic failures "stain our judicial system and mock the ideal of justice under [the] law"). The recent and extensive history of laboratory errors and failures demonstrates why it is critical for this Court to determine post-*Crawford*, whether state forensic examiner evidence is testimonial and thus subject to the traditional strictures of the confrontation clause, a question this Court should expressly answer in the affirmative.

CONCLUSION

For all the reasons set forth above, the Petition should be granted.

Respectfully submitted,

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APPENDIX OF SAMPLE CRIME LABORATORY FAILURES FROM AROUND THE COUNTRY DURING THE ROBERTS ERA

Baltimore, Maryland: In Baltimore County, a county-employed forensic chemist resigned after acknowledging at a preliminary hearing in a murder case that she did not understand the science involved in her serology work, that she failed to perform standard tests in the case, and that she had failed to properly record her test results. See Stephanie Hanes, *Chemist Quit Crime Lab Job After Hearing, Papers Show; She Acknowledged Report Was 'Worthless' In 1987*, BALT. SUN, March 19, 2003, at B1. Police acknowledged an independent audit of her work was warranted after her testimony in the case of Bernard Webster came to light and was characterized as "within the definition of material perjury." *Id.* Webster spent twenty years in prison for rape before being exonerated by DNA evidence. *Id.*

Boston, Massachusetts: The reexamination of a previously identified fingerprint revealed that Stephan Cowans was wrongfully convicted of shooting a police officer and was imprisoned for six and a half years based on faulty fingerprint analysis. Police Commissioner blamed the error on "low standards and a lack of professionalism." Ralph Ranalli, *Reilly Won't Charge Two Police Anaylsts*, BOSTON GLOBE, June 25, 2004, at B8. The botched match "wasn't even close" and was described as "no simple mistake." *Id.* Shortly after the error was discovered, the

Massachusetts's State Police (one of only sixteen state agencies nationwide that at the time remained uncertified) took over Boston's fingerprinting lab in an effort to upgrade the quality of work. Suzanne Smalley, *State Police to Process Boston Prints Scathing Reivew Prompts Shift,* BOSTON GLOBE, Oct. 16, 2004, at B3. Mr. Cowans reached a $3.2 million settlement with the city and received another $500,000 for his wrongful imprisonment. David Abel, *Man Wrongfully Convicted in Boston Police Shooting Found Dead*, BOSTON GLOBE, Oct. 26, 2007.

Chicago, Illinois: Prompted by DNA exonerations, journalists have now uncovered many instances in which forensic examiners in the Illinois State Police crime laboratory in Chicago stretched lab reports so as to inculpate defendants who turned out to be innocent, in part because analysts in Illinois are funded by police agencies and state law mandates they serve the prosecution. See Steven Mills, et.al., *When Labs Falter, Defendants Pay*, CHI. TRIB., Oct. 20, 2004, at 1. An independent review in connection with a civil case has uncovered many additional problems with the Chicago Police crime laboratory, including poor supervision, lack of protocols and inadequately trained staff. Maurice Possley, *Crime Lab Disorganized, Report Says Consultant Alleges Meager Supervision, Inadequate Training*, CHI. TRIB., Jan. 15, 2001, at 1.

Cleveland, Ohio: In Cleveland, a state forensic examiner vastly overstated the importance of largely irrelevant serological test results, resulting in the wrongful conviction of Michael

Green. The city agreed to settle Green's civil case for $1.6 million and a commitment to look into the 100 cases that included the same forensic laboratory worker who testified falsely at Green's rape trial. See Connie Schultz, *City to Pay $1.6 Million for Man's Prison Time*, PLAIN DEALER, June 8, 2004, at A1.

Fort Worth, Texas: The Fort Worth Police Department's crime laboratory was forced to review almost 100 cases— three years' worth of DNA evidence—when a proficiency test revealed a senior forensic examiner did not follow proper procedures and protocols. Deanna Boyd, *Crime Lab Subject of Criminal Inquiry*, FT. WORTH STAR-TELEGRAM, April 13, 2003 at 1. The laboratory's work had been questioned but remained unaddressed for three years, despite additional issues of case backlogs, staff shortages and an "inadequate facility." *Id.*

Houston, Texas: The Houston Police Department Crime Laboratory was exposed in a series of investigative news reports that aired on KHOU–Channel 11, a local Houston television station. The story led to an audit, which revealed a dysfunctional organization with serious contamination issues and an untrained staff using shoddy science, including poor calibration and maintenance of equipment, improper record keeping, a lack of safeguards against contamination, and a leaky roof which flooded boxes of biological evidence. *Quality Assurance Audit of Houston Police Dep't Crime Laboratory – DNA/Serology Section* (Dec. 12- 13, 2002), http://www.pdsdc.org/resources/dna/QA_Audit_for_DNA_databasing_labs.pdf. Five reports were issued by the Independent

Investigator of the Houston Police Department and Property Room between May 31, 2005 and May 11, 2006 documenting extensive problems in nearly every division of the laboratory. See*, e.g., Third Report of the Independent Investigator for the Houston Police Dep't Crime Laboratory and Property Room* 1 (June 30, 2005)*,* http://www.hpdlabinvestigation.org/reports/050630report.pdf; *Fifth Report of the Independent Investigator for the Houst Police Dep't Crime Laboratory and Property Room*, 66-67 (May 11, 2006), http://www.hpdlabinvestigation.org/reports/060511report.pdf.

Western Texas: A contract medical examiner, Dr. Ralph Erdmann, who worked in more than 40 rural counties in Texas beginning in the early 1980s, and may have performed up to 400 autopsies a year, was convicted of seven felony counts (spanning three counties) of falsifying autopsies. Roberto Suro, *Ripples of a Pathologist's Misconduct in Graves and Courts of West Texas*, N.Y. TIMES, Nov. 22, 1992 at 22. Suspicion arose about Erdmann when he listed in an autopsy report the weight of a decedent's spleen—where relatives were aware the decedent's spleen had been removed years prior to his death. *Id.* A special prosecutor appointed to investigate the misconduct said even a narrow examination of Erdmann's conduct reveled around 100 faked autopsies in a single county. *Id.* The special prosecutor noted, "[i]f the prosecution theory was that the death was caused by a Martian death ray, then that was what Dr. Erdmann reported." Richard L. Fricker, *Pathologist's Plea Adds to Turmoil: Discover of Possibly Hundreds of Faked Autopsies Helps*

Defense Challenges, 79 A.B.A.J. 24 (March 1993). In spite of this bias, Erdmann on several occasions determined individuals had died of natural causes when in fact they had been killed. See*, e.g.,* Geoffrey A. Campbell, *Erdmann Faces New Legal Woes: Pathologist Indicted for Perjury in Texas Murder Trial*, 81 A.B.A.J. 32 (November 1995); *Couple Indicted on Murder Charges*, DALLAS MORNING NEWS, March 24, 1993, at 14D. In addition, he also exaggerated his credentials, claiming to be a ballistics expert. Suro, *Ripples,* N.Y. TIMES, Nov. 22, 1992 at 22.

Los Angeles, California: In Los Angeles, a police chemist failed to follow basic protocols for drug tests: he did not weigh drugs separately from the containers in which they were seized. See Anna Gorman, *LAPD Narcotics Analyst Erred: Botched Evidence Raises Question on Credibility. Public Defender's Office Demands an Accounting*, L.A. TIMES, Sept. 2, 2004, at B1. After the error was ultimately discovered in one case, a preliminary review of the analyst's prior work was conducted and revealed problems in 47 additional cases, and subsequently lead to a review of all 972 drug cases in which he was involved. *Id.* The chemist had started at the crime lab analyzing blood and urine evidence before moving to narcotics. *Id.*

Mississippi: A forensic dentist represented that he could "match" bite marks, tool marks, shoe prints, fingernail imprints, and knife wounds using a method he dubbed, after himself, the "West Phenomenon." Marcia Coyle, *"Expert" Science under Fire in Capital Cases; Daubert vs. Frye*, Nat. L.J., July 11, 1994, at A1. The "West Phenomenon" involved using an alternate light

source to analyze the wounds; his methodology could neither be reproduced nor photographed. *Id.* The forensic dentist's misconduct was acknowledged two years after a defense attorney complained to the American Academy of Forensic Sciences, which found West misrepresented data to bolster the acceptance of his technique and that his testimony was misleading in its certainty as well as its methodology. *Id.* Other review boards thereafter criticized his testimony and his methodology. *Id.*

Montana: An exoneration revealed the faulty and invented statistical analysis for hair evidence by the founder and director of the Montana state police crime laboratory had resulted in at least two additional wrongful convictions. An independent review board reviewed the examiner's testimony and concluded he had demonstrated a "fundamental lack of understanding" of hair comparisons. See Innocence Project, Peer Review Report: *Montana* v. *Jimmy Ray Bromgard*, *available at* http://www.innocenceproject.org/docs/bromgard_print_version1.html; Adam Liptak, *States to Review Lab Work of Expert Who Erred On ID*, N.Y. TIMES, Dec. 19, 2002, at A24. After his shoddy work was exposed in Montana, the Montana crime laboratory director moved to Washington to conduct drug analysis work. Ruth Teichroeb, *Counties to Be Told of Crime Lab Flaws,* SEATTLE POST-INTELLIGENCER, March 17, 2004, *available a*t http://seattlepi.nwsource.com/local/165129_crimelab17.html. When his past became known, an internal review of his drug analysis work revealed additional methodology problems. The reviewer described the forensic

work as "sloppy" and "built around speed and shortcuts." *Id.*

Oklahoma City, Oklahoma: In Oklahoma, in multiple criminal cases over the course of a decade, a forensic chemist failed to follow basic scientific method, misrepresented qualifications, contaminated evidence, misreported test results, withheld evidence from the defense, and drew conclusions beyond bounds of accepted science. See *McCarty* v. *State*, 765 P.2d 1215, 1218-19 (Ok. Ct. Crim. App. 1988); *McCarty* v. *State*, 114 P.3d 1089, 1093 n.19 (Ok. Ct. Crim. App. 2005); See also, Special Agent Douglas Deedrick, *Summary of Case reviews Of Forensic Chemist, Oklahoma City Police Department Crime Laboratory* (April 4, 2001), http://www.pdsdc.org/resources/dna/Summary_of_case_reviews_for_Joyce_Gilchrist.pdf

Virginia: After an exoneration in Virginia, the governor directed the state laboratory to allow an audit by the American Society of Crime Laboratory Directors ("ASCLD"). The audit found that crime laboratory examiners interpreted DNA tests erroneously, deviated from standard protocols, and were subject to pressure to reach results consistent with the prosecution case, rather than conducting neutral scientific analysis. See *American Society of Crime Laboratory Directors, Limited Scope of Interim Inspection Report of the Virginia Division of Forensice Science Central Laboratory* (Apr. 9, 2005), http://www.innocenceproject.org/docs/VA_ASCLD_Audit_Report.pdf; Steve Mills, *Top Lab Repeatedly Botched DNA Tests*, CHI. TRIB., May 8, 2005, at 8. (describing American Society of Crime Laboratory Directors Report).

Washington: A review by journalists of various Washington state crime laboratories found multiple instances of contamination, sloppy reporting techniques, the use of "junk science," bias in favor of law enforcement, influence of law enforcement over laboratory workers, and concealment of botched tests at various Washington state patrol laboratories. See Ruth Teichroeb, *Rare Look Inside State Crime Labs Reveals Recurring DNA Test Problems*, SEATTLE POST-INTELLIGENCER, July 22, 2004, *available at* http://seattlepi.nwsource.com/local/183007_crime lab22.html; Ruth Teich roeb, *Oversight of Crime-Lab Staff Has Often Been Lax*, SEATTLE POST-INTELLIGENCER, July 23, 2004, *available at* http://seattlepi.nwsource.com/local/183203_crime lab23.html; Ruth Teichroeb, *Crime Labs Too Beholden to Prosecutors, Critics Say*, SEATTLE POST-INTELLIGENCER, July 23, 2004, *available at* http://seattlepi.nwsource.com/local/ 183227_lab solutions23.html.

West Virginia: After the DNA exoneration of Glen Dale Woodall, and the insurance investigation which resulted in a settlement of $1 million in Woodall's civil suit for false imprisonment, the Prosecuting Attorney for Kanawha County requested a judicial investigation into the work of the serology department at the West Virginia Department of Public Safety; a separate investigation was conducted by the ASCLD. See *In Re Investigation of West Virginia State Police Crime Lab, Serology Division*, 438 S.E.2d 501, 503 (W.Va. 1993). The judge found misconduct on a massive scale: the serologist, Fred Zain, routinely overstated results, provided misleading statements about

his results, failed to perform tests he claimed to have performed, failed to report exculpatory results, failed to follow-up on conflicting results, reported scientifically impossible or improbable results, and altered laboratory reports. *Id.* at 503. And his misconduct always favored the prosecution: the ASCLD team found, "when in doubt, Zain's findings would always inculpate the suspect." *Id.* at 512 n. 9. Contributing to the misconduct was the fact that Zain's supervisors ignored or concealed complaints about his work. *Id.* at 503-4. The ASCLD also concluded that laboratory operating procedures—which, among other things, did not require written documentation of methodology, lacked auditing requirements, lacked written protocols, and failed to follow accepted scientific protocols—"undoubtedly contributed to an environment within which [the serologist's] misconduct escaped detection." *Id.* at 504. After citing "shocking and . . . egregious violations" and the "corruption of our legal system," the judicial inquiry concluded, "as a matter of law, any testimonial or documentary evidence offered by Zain at any time in any criminal prosecution should be deemed invalid, unreliable, and inadmissible." *Id.* at 506, 508, 520.

Federal Bureau of Investigations Crime Laboratory: Allegations of wrongdoing and improper practices within the FBI by Supervisory Special Agent Frederic Whitehurst involving some of the most significant prosecutions of the 1990s prompted the Office of Inspector General to investigate the nation's most respected crime laboratory. See, *Office of Inspector General, U.S. Dep't of Justice, The FBI*

Laboratory: *An Investigation Into Laboratory Practices and Alleged Msiconduct in Explosives-Related and Other Cases* (April 1997), *available at* http://www. usdoj.gov/oig/special/9704a/index. htm ("1997 I.G. Report"). "FBI examiners had given scientifically flawed, inaccurate, and overstated testimony under oath in court; had altered the lab reports of examiners to give them a pro-prosecutorial slant, and had failed to document tests and examinations from which they drew incriminating conclusions, thus ensuring that their work could never be properly checked." John F. Kelly & Phillip K. Wearne, *Tainting Evidence* 2 (1998); See *also,* 1997 I.G. Report, Executive Summary, part I, section A. The FBI laboratory and analysts have been criticized in divisions ranging from fingerprint analysis (for example, the FBI misidentification of Brandon Mayfield, a Portland, Oregon, lawyer as a perpetrator of the Madrid terrorist attack of March 11, 2004, Flynn McRoberts & Maurice Possley, *Report Blasts FBI Lab: Peer Pressure Led to False ID of Madrid Fingerprint,* CHI. TRIB., Nov. 14, 2004, *available at* 2004 WLNR 19808891), to comparative analysis of bullet lead (William A. Tobin & Wayne Duerfeldt, *How Probative is Comparative Bullet Lead Analysis?*, 17 CRIM. JUSTICE 26 (Fall 2002) (retired FBI examiner began questioning the scientific technique of bullet lead composition analysis)). A 2004 Report by the Office of Inspector General focused on Jacqueline Blake, who worked in the DNA unit for two years after having worked in the serology division for the ten previous years. *Office of Inspector General, U.S. Dep't of Justice, The FBI Laboratory: A Review of Protocal and Practice Vulnerbilities* (May 2004), *available at*

http://www.usdoj.gov/oig/special/0405/final.pdf ("2004 I.G. Report"). In May 2004, she pleaded guilty to a misdemeanor charge of providing false information in her lab reports. Maurice Possley, *Scandal Touches Elite Labs*, CHI. TRIB., October 21, 2004 at 1. Significantly, although the FBI lab was accredited and subject to audits, it was not an audit that discovered Blake's malfeasance—rather, a colleague who was working late one night accidentally discovered Blake's inconsistent and improper documentation. 2004 I.G. Report, Executive Summary at ii.

Federal Bureau of Investigation: CBS's *60 Minutes* and *The Washington Post* recently uncovered hundreds of defendants convicted with the now discredited tool of bullet lead analysis. More startling, when the FBI discovered that this analysis was faulty, it never notified the defendants, their lawyers or the courts. Bullet lead analysis has been used for over forty years in thousands of cases. This analysis was often used when standard ballistics analysis was impossible due to deformed bullets. In 2002, the FBI asked the National Academy of Science to independently review this type of analysis. After the National Research Council report called into question this analysis, the FBI waited nearly a year before stopping bullet lead analysis. It sent form letters which suggested that the method should no longer be employed, but did not state that prior testimony was invalid. Only after CBS and The Washington Post investigation did the FBI acknowledge its mistakes and agree to review all cases. See *Evidence of Injustice*, CBS NEWS (Nov. 18, 2007), http://www.cbsnews.

.com/stories/2007/11/16/60minutes/main3512453.shtml.

Drug Enforcement Agency: Veteran chemist Anne Castillo of the Dallas, Texas, Drug Enforcement Agency Laboratory, which analyzes evidence for state and federal agencies in Texas, Alabama, Arizona, Louisiana, Mississippi, New Mexico and Oklahoma, admitted in 1996 to fabricating results and providing testimony for tests never performed. Peter Schoenburg & Steve McCue, *Controlled Substances*, 20 CHAMPION 34 (Dec. 1996). While DEA director Howard Schlesinger confirmed Castillo had fabricated test results for at least several months – affecting hundreds of cases – he admitted there was no way to determine for how long she had been doing so, as she had been with the laboratory for many years, and worked on a full range of controlled substance cases. *Hundreds of Drug Cases May Be in Jeopardy*, DALLAS MORNING NEWS, July 19, 1996, at 34.