No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DINA MARSHALL, PETITIONER,

vs.

STATE OF COLORADO, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Sixth Amendment's Confrontation Clause permit the prosecution to introduce a certified forensic laboratory report containing testing results, made in order to prove a fact at a criminal trial, through the in-court testimony of a laboratory analysts' supervisor who approved the results, but did not perform, participate in, or observe the testing reported in the certification?

PARTIES TO THE PROCEEDING

Petitioner is Dina Marshall, an individual. Respondent is the State of Colorado. All parties appear in the case caption on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dina Marshall respectfully seeks a writ of certiorari to review the judgment and published decision of the Colorado Supreme Court.

OPINION BELOW

Marshall v. People, 2013 CO 51, 309 P.3d 943 (Colo. 2013) is attached as Appendix A (the "Opinion" or "Opin.").

JURISDICTION

The Colorado Supreme Court ruled on Ms. Marshall's direct appeal on July 1, 2013, affirming the judgment of conviction in part and reversing it in part. It thereafter extended the time for filing a petition for rehearing. Marshall timely filed that petition on August 5, 2013. The Court denied it on September 9, 2013. A copy of that order is provided as Appendix B.

This Honorable Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Confrontation Clause of the Sixth Amendment provides that: "In all criminal prosecutions; the accused shall enjoy the right … to be confronted with the witnesses against him.

STATEMENT OF THE CASE

In the wake of *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), and *Williams v. Illinois*, 132 S. Ct. 2221 (2012), state supreme courts and federal courts have struggled and are now divided over whether the Confrontation Clause permits forensic laboratory supervisors who did not perform or observe the actual forensic testing to testify to and introduce the test results. State courts throughout the country are allowing this form of substitute testimony, even where the supervisor does not know who actually performed the tests. Most lower courts have remained faithful to *Melendez-Diaz* and *Bullcoming*. Others, like the Colorado Supreme Court, have not and have contravened the Sixth Amendment in order to reduce Confrontation Clause burdens on the prosecution when it comes to the admission of scientific evidence. This petition presents a superior opportunity and the perfect vehicle to address lingering questions, to eliminate widespread uncertainty and confusion by providing clear and authoritative guidance, and to resolve existing splits among lower courts.

I. Facts and Background

The facts relevant to the question presented are straightforward and undisputed. On March 4, 2008, Dina Marshall was driving her truck in Thornton, Colorado when she was involved in a minor traffic accident. Opin. at 944, ¶ 5.

Police arrived on the scene. *Id*. at ¶ 6. Suspecting that Marshall may have been under the influence of alcohol or drugs, a police officer administered roadside sobriety field tests, which Marshall failed. *Id.*; *see also id*. at 950, ¶ 29 (Bender, C.J., dissenting). The officer advised Marshall of her *Miranda* rights and arrested her. *Id*. After a breath test ruled out alcohol, Marshall consented to a urine test to screen for the presence of drugs and provided a sample, which the police sent to the Colorado Department of Health toxicology lab. *Id*. Subsequent testing by unidentified and unknown analysts detected the presence of methamphetamine. *Id.* at 945, ¶ 9.

The State charged Marshall with driving under the influence of drugs, careless driving, and possession of drug paraphernalia. The State notified the defense that it would seek to introduce the results of Marshall's urinalysis. Defense counsel then timely filed a motion demanding that the State make available the lab technician who performed the urinalysis to testify in person at Marshall's trial. *Id.* at ¶ 10; *see also id*. at 950, ¶ 30 (dissent). The State notified the defense that it intended to call Cynthia Burbach, director of the Colorado Department of Health toxicology lab. Burbach supervised the lab and signed off on all of its final reports, but she did not personally perform, participate in, or observe the actual testing. *Id*. at 945, ¶ 11; *see also id*. at 950, ¶¶ 30-31 (dissent).

When the State called Burbach to testify at the trial, "defense counsel objected on the ground that Marshall had a right to confront the lab technician who

actually performed the test." *Id*. at 945, ¶ 10; *see also id*. at 950, ¶ 31 (dissent). The trial court overruled the objection and "allowed Burbach to testify in lieu of the technician about the results of Marshall's urine sample." *Id*. at ¶¶ 8-10; *see also id*. at 950, ¶ 31. Defense counsel also objected when the State "sought to admit People's Exhibits 1 and 2 through the testimony of Burbach. Exhibit 1, which was signed by Officer Swisher and initialed by an unidentified lab employee, provided the chain of custody for the sample. Exhibit 2, which was signed by Burbach, provided the urinalysis results." *Id*. at 945, ¶ 11.[1] "No other person's name appears on the form." *Id*. at ¶ 9. The trial court admitted both exhibits under the business records exception to the hearsay rule. *Id*. at ¶ 11.

Burbach testified to all the standard operating procedures that each sample *should go* through before she reviews the reports:

> One technician receives the sample and performs an initial screening. A second technician then performs a more detailed test to determine more precisely what drug is in the sample and how much. The data is reviewed by two people before Burbach performs the final review. Reports for about a hundred different samples are compiled and sent to Burbach, who reviews them all in a batch as the final checkpoint before the reports are sent to the requesting police departments. This process takes her less than a day. She makes sure the tests match the calibrations and internal quality controls and checks to see whether either testing technician made any notes. If all appears to have gone according to procedure, then Burbach signs the reports before they are sent out. She does not observe the technicians while they perform the tests and does not perform any testing herself.

Id. at 950, ¶ 32 (dissent); *see also id*. at 945, ¶ 8 (describing the steps involved in Burbach's review).

[1] Exhibits 1 and 2 are provided as Appendices C & D, respectively.

Regarding Marshall's sample, Burbach testified that she had not tested it and had not supervised the technicians who did. *Id*. at 950, ¶ 33 (dissent); *see also id*. at 945, ¶ 9 ("… Burbach acknowledged that she did not perform any of the tests on the sample."). Nevertheless, her testimony nevertheless established the perfect process to test urine. "To determine whether Marshall's sample had been tested according to lab procedures, Burbach examined the printouts showing the results. These printouts did not show who had tested Marshall's sample or what had happened during the tests. Burbach did not know whether either of the technicians who tested Marshall's sample had run the sample more than once or had taken any other corrective measures." *Id*. at 950, ¶ 33 (dissent); *see also* 11/29/10 Tr. Trans. at 110 ("I can't tell you who did the testing.") She testified that she "expects" the technicians "to follow the standard operating procedure," *id*., but she could not even say for sure a test on Marshall's urine had been conducted.

The jury convicted Marshall of all three offenses. *Id*. at 945, ¶ 13. Marshall appealed her convictions to the district court of Adams County, Colorado, and the district court affirmed. *Id*. Marshall then petitioned the Colorado Supreme Court for certiorari, which was granted to consider, *inter alia*:

> Whether, in light of the United States Supreme Court's recent decision in *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), the appearance of a lab supervisor that reviewed and approved test results completed by another technician is sufficient to satisfy the Confrontation Clause of the United States Constitution.

Id. at 945, n.4.

The Colorado Supreme Court issued its published, split decision affirming in part and reversing in part the judgment of conviction.

II. The Majority Opinion

A five-justice majority held, *inter alia*, that the Sixth Amendment's Confrontation Clause is not violated by the admission of a lab report through testimony of a supervisor who neither performed the laboratory analysis nor supervised its performance. *Id*. at 946-48, ¶¶ 15-20. The majority found, and the State conceded, that, "the report in this case was testimonial in nature." *Id*. at 946, 15 (citing *Bullcoming,* 131 S. Ct. at 2717). It concluded, nevertheless, that Burbach's testimony satisfied the Confrontation Clause nevertheless because she "did not provide 'surrogate' testimony of the sort" that this Court found problematic in *Bullcoming*:

> Unlike in *Bullcoming*, where the testifying witness had no connection with the particular lab report at issue, here Burbach supervised the performance of the tests and certified the lab report. According to Burbach's testimony, she synthesized the tests performed by two different analysts to ensure that both had reached the same conclusion. Then, she reviewed the data generated by the scientific instruments to ensure that the controls show the instruments were working properly while they performed the tests in question. Finally, she reviewed the analysts' notes to conclude that they followed lab protocol throughout the testing process. Only after she performed all of these steps did she certify the test results and sign the form that was sent back to the Thornton Police Department. In other words, when Burbach testified at trial, she testified as to her own involvement in the process, not as a "surrogate" for someone else's.

Id. at 947, ¶ 18. Thus, the majority chose to "join" certain other courts "in

concluding that when a lab supervisor such as Burbach independently reviews scientific data, draws the conclusion that the data indicates the positive presence of methamphetamine, and signs a report to that effect that is admitted at trial, the Confrontation Clause is satisfied if she testifies and is available for cross-examination." *Id.* at ¶ 19. According to the majority, "once the lab report certified by Burbach was introduced as evidence against Marshall, she became the "witness [the defendant] had the right to confront." *Id.* ¶ 20 (citing *Bullcoming*, *supra* at 2716).

III. The Dissenting Opinion

Two justices, Chief Justice Bender joined by Justice Boatright, dissented. They insisted that even though "reliance upon forensic evidence has increased in criminal cases … the need to retain the traditional right of cross-examination must nonetheless be preserved." *Id.* at 949, ¶ 26. They reasoned:

> The supervisor's review in this case does not substitute for the testimony of a technician who received the defendant's sample, performed the testing, and observed the results. The supervisor here testified that she did not know which technicians performed the testing and could not tell from the form she reviewed who they were. She testified that she based her certification on her expectation that the technicians had followed laboratory procedures but had no way of knowing whether they actually did follow procedures. Her supervision thus consisted of reviewing machine-generated reports in large batches, assuming procedures had been followed if there were no notes on the reports and the data indicated the machines were working properly, and "rubber stamping" the reports. Although, unlike the analyst in *Bullcoming*, the supervisor's signature appeared on the reports as a certifier, she testified as to the contents of a lab report without actually screening or observing the screening of a blood sample. Her testimony raises the same constitutional

> concerns as the testimony of the *Bullcoming* analyst, who also testified about results without performing or observing the test that generated those results.

Id. at ¶ 27; *see also* ¶¶ 34-40.

In reaching their conclusions, the dissenting justices relied, in part, on a recent report by the Colorado Attorney General's office "detailing problems at the state toxicology lab," which describes, *inter alia*, "technicians testing samples after only three weeks of training, blood samples kept in an unlocked refrigerator, and an unidentified supervisor who was biased in favor of the prosecution, enjoyed testifying at trial, and bragged about making defense attorneys look like 'idiots.' " *Id*. at 951, ¶ 36; *see also* 6/7/13 Letter of Attorney General and Investigative Report attached as Appendix E. "News reports identified Burbach as the supervisor." *Id*. at 951, n.5; see also News Reports attach collectively as Appendix F. "The lab had to retest 1700 blood samples in 2012 after a blood sample was found to have higher blood-alcohol content than what the technician reported. Burbach was that technician's supervisor." *Id*. In the dissent's view, "the problems reported at toxicology labs in general and the Colorado Department of Health toxicology lab in particular highlight the need to adhere to the traditional guarantee of confrontation," rather than to allow Burbach simply to put "a 'rubber stamp' on the report." *Id*. at 952, ¶¶ 37-38.

The dissenting justices would have adhered to *Bullcoming* and held that supervisor testimony does not substitute for the testimony of the technician who

actually analyzed the evidence." *Id*. at 952-53, ¶ 39 (listing cases). Burbach's review, the dissent found, was an inadequate "substitute for the testimony of a technician who received Marshall's sample, performed the testing, and observed the results." *Id*. at 953, ¶ 40. Given that Burbach "testified as to the contents of a lab report without actually screening or observing the screening of a blood sample," *Bullcoming* was violated, notwithstanding the fact that "Burbach's signature appeared on the reports as a certifier," because the State had denied Marshall the "opportunity to confront the technician who actually performed the urinalysis." *Id*. at ¶¶ 40-41.

REASONS FOR GRANTING THE PETITION

A slim majority of Colorado's Supreme Court has created a forensic laboratory supervisor exception to *Bullcoming* that allows the prosecution to evade the Confrontation Clause. The majority Opinion conflicts with *Melendez-Diaz* and *Bullcoming* and with the decisions of many other state supreme courts and federal courts. It leads inescapably to a constitutionally repugnant third category of witnesses. It is imperative that this Honorable Court address, and reverse, the decision below before it finds further lodgment in published Sixth Amendment jurisprudence and leads other lower courts and states astray.

The error here may be so obvious that it warrants summary reversal, especially given that the underlying testimonial report itself was admitted into

evidence. This case alone has already caused a pandemic of Confrontation Clause violations throughout Colorado's criminal justice system. But it illustrates an even more widespread and growing problem – state crime labs and states themselves are seeking to evade the Confrontation Clause when it comes to forensic evidence. Similar problems have emerged in North Carolina, Maryland and other states.[2] Texas and Massachusetts, meanwhile, are embroiled in scandals involving fraud and false reporting from crime laboratories, resulting in thousands of convictions based on false scientific reports being generated and admitted as evidence in court. These scandals are timely to this petition because they demonstrate the absolute necessity for this Honorable Court to remain true to the constitutional requirements of *Bullcoming*. Similar problems of false and weak evidence were the main reason our founding fathers drafted the Confrontation Clause. The Confrontation Clause allows this evidence to be tested by a criminal defendant's thorough and sifting cross-examination.

This petition provides an opportunity and vehicle for this Court to resolve genuine and growing splits among lower courts by addressing what degree of involvement, *if any*, is required before a supervisor or reviewer may testify at trial to laboratory testing results contained in a report generated by another analyst(s)

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[2] Petitions seeking writs of certiorari in cases involving similar Confrontation Clause problems have recently been filed in *Brewington v. North Carolina*, No. 13-504 (Oct. 17, 2013), *Ortiz-Zape v. North Carolina*, No. 13-633 (November 21, 2013), *Derr v. Maryland*, No. 13-637 (November 20, 2013), *Cooper v. Maryland*, No. 13-644 (November 22, 2013) (No. 13-644); and *Turner v. United States*, No. 13-127 (July 29, 2013).

through extremely sensitive and technical work.

I. The Colorado Supreme Court's holding conflicts with *Melendez-Diaz* and *Bullcoming*.

In *Crawford v. Washington*, 541 U.S. 36, 59 (2004), this Court held that the Confrontation Clause permits admission of "[t]estimonial statements of witnesses absent from trial ... only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." This Court made clear that there are no "open-ended exceptions from the confrontation requirement to be developed by the courts." *Id.* at 54.

Subsequently, in *Melendez–Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531-32 (2009), it declined to create a "forensic evidence" exception to *Crawford*, holding that a defendant's right to confront adverse witnesses extended to laboratory scientists who analyzed criminal evidence in preparation for trial. The Court found a forensic laboratory report, created specifically to serve as evidence in a criminal proceeding and bearing three "certificates of analysis" showing the results of a forensic testing, was within the "core class of testimonial statements" for Confrontation Clause purposes. *Id.* at 3532 (citing *Crawford*, *supra* at 51-52). Absent stipulation, the prosecution may not introduce such a report without offering a live witness competent to testify to the truth of the statements contained therein. *Id.* Cross-examination of the actual analysts was essential because "neutral scientific testing" was not as "neutral or as reliable" as the State suggested.

Id. at 2536-37. The Sixth Amendment, this Court made clear, "contemplates two classes of witnesses – those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter ... There is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." *Id*. at 2534.

Later, in *Bullcoming*, this Court held that the Confrontation Clause does not permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification. *Id*. at 2710, 2713. One person's testimonial statement, this Court ruled, may not be "entere[d] into evidence through the in-court testimony of a second person." *Id*. at 2713. Rather, "[t]he analysts who write reports the prosecution introduces must be made available for confrontation even if they possess 'the scientific acumen of Mme. Curie and the veracity of Mother Teresa.' " *Bullcoming*, *supra* at 2715 (*quoting Melendez-Diaz*, *supra* at 2537, n.6).

The majority Opinion in *Marshall* contravenes *Melendez-Diaz* and *Bullcoming*. Here, as in those controlling precedents, the underlying forensic laboratory report, which resembles those in *Melendez-Diaz* and *Bullcoming*, was itself admitted into evidence. The report contains formal out-of-court statements that Marshall's urine first tested presumptively positive for amphetamines and

later tested positive for both amphetamines and methamphetamine. *See* Pet. App. D. These are not Burbach's statements, but rather those of the nontestifying forensic analysts who actually performed the tests. *See* 11/29/10 Tr. Trans. at 89 (describing the report as "a copy of results that would've been generated in the laboratory …"); *id*. at 91-94 ("The paper was given for me-not for-well for review but also for authorization to sign that the sample had been done correctly … I'm the final piece in the puzzle. … And then when it bears my signature, I believe that all the steps and processes had been followed, and that it was a good result that has been generated.")

These statements come within the "core class of testimonial statements" covered by the Confrontation Clause. First, they are "extrajudicial statements ... contained in formalized testimonial materials." *Melendez-Diaz*, *supra* at 2531-32 (citing *Crawford*, *supra* at 51-52). Second, the state's crime lab analysts generated these results and provided them to Burbach with the primary purpose to establish or prove facts relevant to Marshall's criminal prosecution. *Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006). Third, the statements are the functional equivalent of in-court testimony, meaning that, objectively, the analysts would have understood that their stated testing results would be used to establish Marshall's guilt at a later criminal trial. *Melendez-Diaz*, *supra* (citing *Crawford*, *supra*). The analysts made these statements with the understanding that they would be used as an essential component of "the coercive machinery of the State against the accused."

Michigan v. Bryant, 131 S. Ct. 1143, 1169 (2011) (Scalia, J., dissenting). Fourth, the requisite "solemnity … is well enough established by the severe consequences that can attend a deliberate falsehood." *Davis*, *supra* at 2276 (citing *Crawford*, *supra* at 51.[3] In sum, the statements are testimonial under any definition.

The prosecution made no showing that the nontestifying analyst(s) was unavailable, and Marshall had no prior opportunity for cross-examination. The trial court nevertheless permitted their testimonial statements to enter into evidence through the report and the in-court testimony of a second person, Burbach. As the dissenting Colorado justices correctly recognized, that should have been the end of the matter, Opin. at ¶¶ 27, 34-40, and under this Honorable Court's controlling precedents, it is. *Melendez-Diaz*, *supra*; *Bullcoming*, *supra*.

Unsatisfied with that result and its implications, the *Marshall* majority instead applied a loophole, which it perceived this Court to have created through its use of the disjunctive ["or"] in its holding in *Bullcoming* and by Justice Sotomayor's concurring opinion, in which she "emphasize[d] the limited reach of the Court's opinion" and described several factual scenarios that *Bullcoming* did "not present," among which was "a case in which the person testifying is a supervisor, reviewer, or

[3] In Colorado, a state crime lab analyst who deliberately or knowingly falsified forensic testing results would, at a minimum, face criminal liability for (a) false reporting to authorities, *see* § 18-8-111(1)(c), (d), C.R.S.; (b) tampering with physical evidence, *see* § 18-8-610(1)(b), C.R.S.; (c) first and/or second degree official misconduct, *see* § 18-8-404(1)(c), C.R.S., and § 18-8-405(1)(b), C.R.S.; and (d) attempting to influence a public servant. *See* § 18-8-306, C.R.S.

someone else with a personal, albeit limited, connection to the scientific test at issue." *Bullcoming*, *supra* at 2719-23 (Sotomayor, J., concurring).

What the majority Opinion disregarded, however, was Justice Sotomayor's clear statement that it was unnecessary to "address what degree of involvement is sufficient" in *Bullcoming* because "Razatos had no involvement whatsoever in the relevant test and report." *Id*. Here, it is uncontroverted that Burbach, like Razatos, "had no involvement whatsoever in the relevant test" – she did not perform, participate in, observe, or supervise any of the testing of Marshall's urine sample. Nor did she have any involvement in the "report" other than to stamp her signature of approval. *See* Pet. App. D. ("Approved by: Cynthia Burbach 3/12/08"); *see also* Opin. at 949-52, ¶¶ 27, 38 (dissent) ("a 'rubber stamp' "). Burbach was so removed from the testing that she could not even identify the analysts who performed the tests. *See* 11/29/10 Tr. Trans. at 110 ("I can't tell you who did the testing.")

The dissenting justices are correct that Burbach's "testimony raises the same constitutional concerns as the testimony of the *Bullcoming* analyst." Opin at 949, ¶ 27. By tendering a laboratory supervisor who reviews and approves the results of a test(s) performed by another analyst(s), the prosecution impermissibly shields and insulates the State's case from scrutiny and "testing in the crucible of cross-examination," *Crawford*, *supra* at 61, the "greatest legal engine ever invented for the discovery of truth," *California v. Green*, 399 U.S. 149, 158 (1970), and "the principal means by which the believability of a witness and the truth of his

testimony are tested." *Davis v. Alaska*, 94 S. Ct. 1105, 1111 (1974). The accused is prevented from cross-examining the analyst about:

- What the analyst knew or observed;
- Whether the analyst exercised proper judgment;
- Whether the analyst lied;
- Whether the analyst recalled the testing in this particular case;
- Whether there was any evidence of tampering with the biological sample before the analyst opened it;
- Whether the biological sample was compromised before testing;
- Whether the biological sample was "spoiled" or putrefied;
- Whether there were any particular problems with the testing of this particular sample;
- Whether the analyst could name and remember the specific protocols to properly test the urine in this case;
- Whether the analyst adhered to good and sound laboratory techniques;
- Whether the analyst was knowledgeable of the proper steps necessary to calibrate the instrument;
- Whether the analyst properly calibrated the instrument before and after the test, or whether there were problems with the instrument calibrations;
- Whether the machine ever had a computer glitch where it reported results to the wrong sample locations;
- Whether the analyst may have inadvertently mislabeled or incorrectly noted the particular position of a defendant's sample in a batch of tests run by the analyst – resulting in reporting another person's sample as the defendant's;

- Whether the analyst took adequate precautions to avoid these types of errors or statistical errors;
- Whether the analyst ever graduated from college;
- Whether the analyst passed or failed organic chemistry/biology in college;
- Whether the analyst had proper and adequate training;
- Previous errors made by the analyst while conducting tests and/or unexpected results in the analyst's laboratory work;
- The results of any proficiency testing of the analyst;
- Whether the analyst had problems at work;
- Previous reprimands of the analyst for poor work performance;
- Any documentation involving the analyst in a "Corrective Action" file related to errors occurring within the laboratory;
- Previous reprimands of the analyst for dishonest test reports due to laziness or bias;
- Pressure on the analyst to sacrifice appropriate methodology for the sake of expediency and/or to work faster to the point of sloppiness, thereby resulting inaccurate test results;
- Pressure or incentives on the analyst to report as she thinks her supervisor wants her to report (i.e. positive for narcotics) or to alter or fabricate evidence.

By allowing the State to present the surrogate testimony of lab supervisor Burbach, the majority Opinion deprives the accused of a "bedrock procedural guarantee" to confront "the analysts who write reports that the prosecution introduces" as substantive evidence. *Bullcoming*, *supra* at 2708. The Confrontation Clause

requires much more. *Bryant*, 131 S. Ct. at 1175 (Scalia, J., dissenting) ("The Confrontation Clause is not so forgiving. Business records prepared specifically for use at a criminal trial are testimonial and require confrontation.")

II. As in *Bullcoming*, the potential ramifications of the Colorado Supreme Court's reasoning raises red flags.

The majority Opinion tolerates a system that enables a prosecutor not only to evade the literal right of confrontation, but also "to choose the analyst-witness of his dreams …, offer her as an expert …, and have her provide testimony identical to the best the actual tester might have given." *See Williams*, 132 S. Ct. at 2272 (Kagan, J. dissenting). In this case, and hundreds of other Colorado cases, that witness was Burbach – the director and supervisor of the State's toxicology lab – who had testified over "thirteen-hundred (1300) times," and for more than twenty-six years had "worked in every aspect of" the field of forensic toxicology "from washing glassware, to on the bench, to work leader, to supervision. And writing standards operating procedures, validating instrumentation[,] validating procedures and training analyst." 11/29/10 Tr. Trans. at 84-85, 122. A more perfect witness for the prosecution would have been hard to find, given Burbach's hidden bias in its favor. Opin. at 952, ¶ 36 & n.4-5 (dissent).

The *Marshall* roadmap goes one substantial and decisive step further still because it effectively immunizes the actual tester(s) from *both* cross-examination and compulsory process by concealing his or her identity. *See* Opin. at 945, ¶ 9 ("No

other person's name appears on the form."); *see also id*. at ¶ 33 (dissent) ("These printouts did not show who had tested Marshall's sample or what had happened during the tests"); ¶ 40 ("Burbach testified that she did not know which technicians performed the testing and could not tell from the form she reviewed who they were."). The defense could not ascertain whom to subpoena because the information was never recorded. The resulting scheme enables prosecutors to "evade the formalized process," *see Davis*, 126 S. Ct. at 2283 (Thomas, J., concurring in part, dissenting in part), all the while adding critical weight to the State's case in a form not subject to cross-examination. *Cf. Douglas v. Alabama*, 380 U.S. 415, 419 (1965). This scheme renders the defense helpless – unable "to challenge any and all forensic evidence" because it *cannot* "call and examine the technician who performed a test." *Compare Bullcoming*, *supra* at 2724 (Kennedy, J., dissenting); *Williams*, *supra* at 2228 (emphasizing that the plurality's conclusion "will not prejudice any defendant who really wishes to probe the reliability of the DNA testing done in a particular case because those who participated in the testing may always be subpoenaed by the defense and questioned at trial.")

Thus, the majority Opinion, "with a wink and a nod," provides the State with "a ready method to bypass the Constitution," c*f. Williams*, *supra* at 2270 (Kagan, J., dissenting), one which places an impossible burden on the defendant and creates precisely the "third category of witnesses" that this Court declared to be constitutionally repugnant in *Melendez-Diaz*. "What a neat trick—but really, what

a way to run a criminal justice system." *Williams*, *supra* at 2272 (Kagan, J., dissenting).

Cross-examination is a critically important "means of assuring accurate forensic analysis," and, "of course, the prospect of confrontation will deter fraudulent analysis in the first place." *Melendez-Diaz*, *supra* at 2536-37. This Court need not look much further than the dissenting Opinion to understand that the crime labs in Colorado are not immune from unprofessionalism, inadequate training and supervision, and human error and bias. Opin. at 952, ¶¶ 36-37, & n.4-5; *see also* Appendices E & F. "The lab had to retest 1700 blood samples in 2012 after a blood sample was found to have higher blood-alcohol content than what the technician reported. Burbach was that technician's supervisor." *Id*. at 951, n.5. In April 2013, just before Burbach's resignation, the State revoked her toxicology lab's certification even to conduct urine testing after three consecutive *unsatisfactory* proficiency reviews. *See* 4/22/2013 Proficiency Testing Event Score Review attached as Appendix G.

Similar lapses have recently been exposed in North Carolina, Massachusetts, Texas, and other states. *See*, *e.g.*, Petition for Writ of Certiorari, *Brewington v. North Carolina*, No. 13-504, 2013 WL 5720392 (citing Marie Cusick, *Scandals Call Into Question Crime Labs' Oversight*, NPR, Nov. 20, 2012). Recent high profile scandals involving crime lab analysts Annie Dookhan in Massachusetts and Jonathan Salvador in Texas, whose lies and misconduct in faking and fabricating

forensic test results have tainted tens of thousands of convictions in both states, further demonstrate the critical need to cross-examine the testimony of testing analysts – not the surrogate testimony of their supervisors. *Id*. (citing Bridget Murphy, *Mass. Chemist's Colleagues Had Questioned Her Work*, Associated Press, Sept. 27, 2012); *see also* Matthew R. Segal, *Two Lab Scandals, One Good Response*, Massachusetts Lawyers Weekly, April 25, 2013) (attached as Appendix H); Deborah Becker, *Examining the 'Red Flags' In A Massachusetts Crime Lab Scandal*, NPR, November 23, 2013.[4]

All of these crime lab scandals make it obvious that there should never be a supervisor exception to the Confrontation Clause without significant involvement by the supervisor in the actual testing. As was demonstrated in a real case out of the same Colorado laboratory, Burbach certified results that she assumed were correct but, in reality, were done erroneously by analyst Mitchell Fox-Rivera. Opin, at 951, ¶ 36, n.4-5, *see also* App. F (Felisa Cardona, *Colorado Lab Tech Blames Boss For Mistakes on DUI Blood Sample Test*, Denver Post, May 1, 2012). The report goes on to explain that 600 samples were retested due to this problem. During this investigation, it was discovered that ten of those samples certified by Burbach were reported at incorrect levels. This presents an inescapable problem where Burbach could honestly testify that she certified the tests as accurate, but the test was wrong. Cross-examination of Fox-Rivera would have likely demonstrated that he

[4] Available at: www.npr.org/2013/11/23/246591027/examining-the-red-flags-in-a-massachusetts-crime-lab-scandal.

was dishonest or not proficient in his work, whereas the cross examination of Burbach would have been useless to discredit the test result.

The critical point, missed or ignored by the majority Opinion, is that a supervisor like Burbach, who might have the "scientific acumen of Mme. Curie and the veracity of Mother Teresa," *see Bullcoming*, *supra* at 2715 (*quoting Melendez-Diaz*, *supra* at 2537, n.6), could easily cover for an incompetent, unscrupulous and/or fraudulent analyst like Fox-Rivera, Dookhan or Salvador. Only through cross-examination of the actual analyst could an accused like Marshall discover that the analyst was sloppy or dishonest. Only confrontation in the crucible of cross-examination affords the jury, in whose hands rests the fate of the accused, the opportunity is hear the analyst's sworn testimony, to observe the analyst's demeanor, and to make its own informed assessments of each analyst's credibility, bias and competency.

This Honorable Court ruled correctly in *Bullcoming*, and the importance of that ruling is supported by the widespread news of scandals and erroneous reporting at crime labs throughout the nation. It is truly remarkable to consider the timeless nature of the protections of our constitution and its critical importance today as it pertains to forensic evidence. Reliability cannot and should not be assumed as Burbach assumed all the correct procedures were followed during the testing of Marshall's urine. The proof that Burbach signed off and certified the

erroneous work of Fox-Rivera further demonstrates that this Court's holding in *Bullcoming* was correct.

The majority Opinion is surely convenient and expedient, but it countenances a scheme that just as surely resembles the abuses targeted by the Confrontation Clause. The Confrontation Clause is not so "easily erasable." *Bullcoming*, *supra* at 2717-18. Its requirements cannot be disregarded at the convenience of the courts or by states seeking to evade the formalized process. *Id*. (citing *Davis, supra* (Thomas, J., concurring in the judgment in part and dissenting in part) and *Melendez-Diaz*, *supra* at 2540); *see also Williams*, *supra* at 2261 (Thomas, J., concurring in judgment)

The majority Opinion has quickly taken hold in Colorado's published jurisprudence. *See People v. Medrano-Bustamante*, 2013 COA139, ¶¶ 17-25, --- P.3d ----, *3-4 (Colo.App. October 24, 2013) (following *Marshall* and approving of Burbach's testimony regarding the defendant's blood alcohol concentration (BAC) tests even though she was not the analyst who performed the testing). Other states are following the *Marshall* bypass and will continue to do so unless or until this Court disapproves of it. *See generally, People v. Revill*, 2013 WL 6094307, *14 (Cal. App. 2 Dist November 20, 2013) (Not Officially Published) (approving of *Marshall* and observing that the *Marshall* majority was unimpressed with the reasoning of other courts).

This Honorable Court should disable the states' attempts to bypass the Confrontation Clause. Otherwise, the guarantees of confrontation and compulsory process will become no guarantees at all, as least with respect to forensic evidence. *Bullcoming*, *supra* at 2716; *Giles v. California*, 128 S. Ct. 2678, 2692 (2008) ("The guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider 'fair.")

III. The Colorado Supreme Court's decision genuinely conflicts with decisions of other state courts of last resort.

The majority Opinion briefly acknowledges several conflicting decisions, but dismisses them in a footnote by finding them "unpersuasive" or "simply disagree[ing]" with their reasoning. Opin. at 947, n.8 (citing, *inter alia*, *In United States v. Moore*, 651 F.3d 30, 71–72 (D.C. Cir. 2011) (remanding for further findings because testimony of supervisor who reviewed reports but had no personal knowledge of underlying testing potentially violated the Confrontation Clause), *cert. denied*, 132 S. Ct. 2772 (2012); *People v. Morrison*, 90 A.D.3d 1554 (N.Y. 2011) (Confrontation Clause violated where prosecution offered only surrogate testimony of the actual analyst's supervisor who did not perform her own independent review and analysis of the DNA data, had nothing to do with the analysis performed by the uncalled witness, and whose only involvement was reading the report after it was completed to ensure that the uncalled witness followed proper procedure); *Martin v. State*, 60 A.3d 1100 (Del. 2013) (concluding the defendant has a right to confront the

laboratory analyst who actually conducted the laboratory testing process). The dissenting Opinion concludes precisely the opposite. *Id.* at § 39 (finding these cases better reasoned).

This internal conflict alone highlights a genuine conflict among the states. For example, in *Burch v. State*, 401 S.W.3d 634 (Tex. Crim. App. 2013), the Texas Court of Criminal Appeals concluded that a reviewing supervisor's testimony failed to satisfy the Confrontation Clause. In *Burch*, much like here, the State offered a one-page laboratory test report stating the tested material contained cocaine into evidence at trial during the testimony of a supervisor who reviewed the testing completed by a technician. Both the analyst and the reviewer signed the report. *Id.* at 635. The supervisor testified that her job as the reviewer "was to ensure that the lab's policies and procedures were followed." *Id.* The supervisor –like Burbach – "basically double-checked" the documents purporting to show that standard procedures were followed, but there was no indication that the supervisor observed or participated in the testing process. *Id.* Thus, the Court concluded:

> Although [the testifying witness] was a supervisor who "reviewed" the original process, we cannot say, on this record, that she had personal knowledge that *the tests were done correctly or that the tester did not fabricate the results. She could only say that the original analyst wrote a report claiming to have conformed with the required safeguards.* Consequently, cross-examining her did not satisfy the appellant's constitutional rights. While we cannot say that anything would have come from a cross-examination of the original analyst, the law does not "tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination.

Id. at 637 (emphasis added) (quoting *Bullcoming*, *supra* at 2716). The Court further rejected the notion that the supervisor's signature on the report was sufficient to bypass the commands of the Confrontation Clause:

> Without having the testimony of the analyst who actually performed the tests, or at least one who observed their execution, the defendant has no way *to explore the types of corruption and missteps the Confrontation Clause was designed to protect against*. It would not, for instance, solve the problem if a laboratory had all of its analysts sign every report. *Rather, the witness being called needs to have personal knowledge of the facts in issue—the specific tests and their execution*.

Id. (emphasis added). "The State cannot avoid a straightforward application of *Bullcoming* by adding the signature of a reviewer with no personal knowledge and omitting more formalized language." *Id.* at 639.

Similarly, in *Young v. United States*, 63 A.3d 1033 (D.C. April 4, 2013), the District of Columbia Court of Appeals addressed a situation where, over Confrontation Clause objections, the government presented its DNA evidence at trial through a single expert witness – an FBI examiner (Craig) who had compared and matched the DNA profiles generated from the buccal sample and the crime scene evidence, but had not herself done the testing or produced those results. *Id.* at 1037. Unlike in *Marshall*, the government did not introduce the report that was prepared by other technicians, and Craig – who supervised those technicians – had arguably "couched her account of the testing and analysis in generalities and purported to describe her 'understanding' of what was done based, largely, on her familiarity with the FBI laboratory's standard practices." *Id.* at 1044. The Court

nevertheless categorically rejected the government's notion that there was no Confrontation Clause violation simply because "the written forensic analysis report was not formally entered into evidence," or because the expert did not read verbatim from any such report. *Id.* It was "plain," the Court ruled, that the expert had relayed hearsay, in that she – like Burbach – had "admittedly relied throughout her testimony not just on her general understanding of FBI laboratory procedures, but on the documentation, testing, and analysis written or produced by other employees of the FBI laboratory in connection with this particular case." *Id.* at 1045. Because Craig "was not personally involved in the process that generated the profiles, she had no personal knowledge of how or from what sources the profiles were produced. She was relaying, for their truth, the substance of out-of-court assertions by absent lab technicians." *Id.*

The Court, thereafter, had little trouble concluding that the conclusions of FBI laboratory scientists who conduct DNA profiling tests are testimonial in nature. *Id* at 1048. Citing Justice Sotomayor's concurrence in *Bullcoming*, however, the Court emphasized:

> This "would be a different case if, for example, [it had involved] a supervisor who [had] observed an analyst conducting a test [and who then] testified about the results or a report about such results." But without evidence that Craig performed or observed the generation of the DNA profiles (and, perhaps, the computer calculation of the RMP) herself, her supervisory role and independent evaluation of her subordinates' work product are not enough to satisfy the Confrontation Clause because they do not alter the fact that she relayed testimonial hearsay.

Id. It emphasized further that it was not holding "that every analyst and technician who performed any aspect of the multi-stage process used to isolate, amplify, identify, and analyze DNA evidence must testify at a defendant's trial absent a waiver." *Id.* at 1049. The Court ultimately suggested, as "a practical compromise that the "Confrontation Clause will be deemed satisfied so long as the testifying expert was personally and significantly involved in all the critical stages of the [ ] testing process, even if others 'played a supporting role.' " *Id.*

Several other states have rejected the notion that there exists a supervisor exception to the Confrontation Clause. *See State v. Navarette*, 294 P.3d 435 (N.M. 2013) (holding the testimony of a supervising medical investigator, who neither participated in nor observed the autopsy performed by another medical investigator, was insufficient to meet the commands of the Confrontation Clause despite the supervisor's testimony that the subordinate followed standard procedures); *State v. Frazier,* 735 S.E.2d 727 (W. Va. 2012) (supervising medical examiner's testimony based on a report of an autopsy conducted by a different examiner was surrogate witness testimony that conveyed testimonial hearsay in violation of Confrontation Clause, even though report itself was never offered into evidence)*; Davidson v. State,* No. 58459, 2013 WL1458654 (Nev. Apr. 9, 2013)(unpublished) (surrogate expert testimony violated the Confrontation Clause because the surrogate expert did not conduct the analyses at issue and based his opinion on his review of a "nontestifying analyst's certified report and the documentation generated by that

analyst."); *cf. State v. McLeod*, 66 A.3d 1221 (N.H. 2013) (holding that when a testifying expert who is not a supervisor offers an independent opinion, it violates the Confrontation Clause for the expert to disclose "testimonial statements of an unavailable witness on direct examination" that form the basis of the expert's opinion).

IV. Other state courts of last resort have reached conclusions similar to the majority Opinion, resulting in a fully evolved, genuine split of authority among lower courts.

On the opposite side of the spectrum, other state supreme courts and federal courts have formulated what amounts to a "supervisor exception" to the ban on surrogate testimony, similar to that crafted by the majority Opinion here. *See* Opin. at 947, ¶ 19 (citing, *inter alia*, *United States v. Summers*, 666 F.3d 192 (4th Cir. 2011) (finding the Confrontation Clause satisfied through the testimony of a supervisor who had prepared and signed a DNA test report based on data generated by another analyst but conclusions drawn by the supervisor); *Jenkins v. State*, 102 So.3d 1063, 1066-69 (Miss. 2012) (Confrontation Clause not violated when a supervisor did not perform the actual test but reviewed the data generated, reached his own conclusion, and signed the report as a supervisor); *State v. Lopez*, 45 A.3d 1 (R.I. 2012) (allowing a lab supervisor to introduce DNA results when he did not perform the tests but evaluated all the results, drew conclusions based on those results, and prepared the report).

Even though the dissent correctly distinguished some of these cases as "cases involving supervisors who took a much more active role than Burbach did here," Opin at 952, ¶ 39 & n.7, there is no denying the reality that a genuine split in authority has emerged and ripened. In *Disharoon v. State*, 727 S.E.2d 465 (2012), for example, the Georgia Supreme Court held that it was not error to allow a supervisor to testify where she participated in drafting the report and performed other steps in the analysis, because "the holding in *Bullcoming* might not be so broad as to make it applicable to 'a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue.'" *Id.* at 467 (quoting *Bullcoming*, *supra* at 2722) (Sotomayor, J., concurring).

The Pennsylvania Supreme Court recently reached a similar conclusion, finding that the Confrontation Clause permits the testimony of a lab supervisor who collaborated with two lab technicians, examined the "raw data" form three tests they provided, "formed his own independent expert opinion, and expressed this opinion in both the Toxicology Report and his live, in-court testimony. *See Com. v. Yohe*, --- A.3d ----, 2013 WL 5826045 (Pa. October 30, 2013).

The Supreme Courts of North Carolina and Maryland have also recently embraced similar conclusions. *See State v. Brewington*, 743 S.E.2d 626 (N.C. 2013) (holding that testimony of special agent that substance found on defendant's person was cocaine base, which testimony was based on analysis of substance performed by

agent's supervisor and supervisor's report, did not violate defendant's confrontation rights); *State v. Ortiz-Zape*, 743 S.E.2d 156 (2013) (admission of crime-lab analyst's expert opinion, based on her independent analysis of testing performed by another analyst in her laboratory, that substance tested was cocaine did not violate defendant's confrontation rights); *Derr v. State*, 73 A.3d 254 (Md. 2013) (finding the results of biological material extracted from victim were not sufficiently formalized to be "testimonial" for Confrontation Clause purposes); *Cooper v. State*, 73 A.3d 1108 (Md. 2013) (holding that testimony of laboratory supervisor as to details of report of another analyst's DNA report did not violate defendant's confrontation rights).[5]

These cases and others, though varying in their specific details, illustrate the emergence of a genuine split of authority among lower courts.

V. This petition provides an ideal vehicle to address and resolve the genuine split of authority and to eliminate uncertainty and confusion by providing clarity on the limits of surrogate supervisor expert testimony.

Undersigned counsel recognize that this Honorable Court is experiencing an onslaught of certiorari petitions in cases involving the Confrontation Clause's application to forensics evidence. *See*, *e.g.*, *Turner*, No. 13-127, *Brewington*, No. 13-504; *Ortiz-Zape*, No. 13-633; *Derr*, No. 13-637; *Cooper*, No. 13-644; *Turner*, No. 13-127. Some – perhaps all – of these cases present "issue[s] of great practical

[5] As noted, petitions for writ of certiorari have been filed in each of these cases.

importance that the Supreme Court left open in *Williams*," which are not "easy issue[s] under current Sixth Amendment doctrine." *Young*, 63 A.3d at 1049. Answering these difficult questions, "and doing so soon, is important." *Williams*, *supra* at 2245, 2248 (Breyer, J., concurring).

This case is perhaps most similar to *Brewington*, and raises many of the same concerns raised in that case. Unlike in *Brewington*, however, here the forensic report containing testimonial statements of the actual analysts was itself admitted as substantive evidence through a laboratory supervisor. Burbach did not purport to offer an "independent opinion" that Marshall's urine sample tested positive for methamphetamine, but rather rubber stamped the results contained in the report, which she herself did not generate. As egregious and damaging as the Sixth Amendment violation may have been in *Brewington*, it was all the more egregious here because the identities of the actual analysts who performed the actual testing were concealed from the defense, making compulsory process impossible.

Issuing a writ of certiorari here is unlikely to answer all of the difficult questions recently presented to the Court. This case, nevertheless, provides an important opportunity and ideal vehicle to address and resolve much of the current uncertainty, at least as it relates to limits of criminal laboratory analysts' supervisor testimony and what degree of involvement, *if any*, is required before the Confrontation Clause allows a supervisor to testify to results of chemical testing in lieu of the actual analysts who tested the sample. Reviewing this case would allow

this Court to define clearly the boundaries of such testimony. Review here could also assist the Court in answering the difficult questions identified by Justice Breyer in *Williams*, i.e. "How does the Confrontation Clause apply to the panoply of crime laboratory reports and underlying technical statements written by (or otherwise made by) laboratory technicians? In this context, what, if any, are the outer limits of the "testimonial statements" rule set forth in *Crawford*?" *Id*. at 2244-45.

The fact pattern in this case is simple and undisputed. Marshall was involved in a traffic accident and was investigated for driving under the influence. After police arrested her, she submitted to a urine test that tested positive for methamphetamine. The analysts that prepared and tested the urine samples did not testify. The forensic testing specifically targeted Marshall, and its sole purpose was to generate evidence against her for use in a criminal trial. The State's purpose of introducing the lab report through Burbach at trial was to introduce the results of the testing as substantive evidence of Marshall's guilt. There was no proof or argument from the State that the analysts themselves were unavailable, and Marshall never had a prior opportunity to cross-examine them. Burbach testified that she did not observe or participate in the testing. The testing involved chemical – not DNA – analysis, and the case was tried to a jury, not a judge.

CONCLUSION

The protections of the Sixth Amendment cannot vary by jurisdiction or geography, and the states are not free to define the Confrontation Clause at the expedience or convenience of courts or prosecutors.

For the foregoing reasons, Ms. Marshall respectfully asks this Honorable Court to grant her petition for a writ of certiorari, or in the alternative, to hold it pending disposition of *Turner*, *Brewington*, *Ortiz-Zape*, *Derr*, and *Cooper*, and then dispose of it accordingly.

Respectfully submitted this 9th day of December 2013.

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