

No. 13-735

Supreme Court, U.S.
FILED

JAN 17 2014

OFFICE OF THE CLERK

In The
Supreme Court of the United States

EFREN MEDINA,

Petitioner,

v.

ARIZONA,

Respondent.

**On Petition For Writ Of Certiorari
To The Supreme Court Of Arizona**

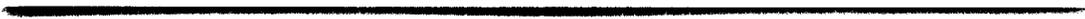
**BRIEF OF THE INNOCENCE NETWORK AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

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CAPITAL CASE
QUESTION PRESENTED

Amicus Curiae adopts and incorporates the question presented by Petitioner.

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INTEREST OF AMICUS CURIAE¹

The Innocence Network is an affiliation of organizations dedicated to providing pro bono legal and investigative services to prisoners for whom evidence discovered after conviction can provide conclusive proof of innocence. The 63 current member organizations of the Innocence Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Canada, New Zealand, the United Kingdom, and Australia.²

¹ Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *Amicus Curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *Amicus Curiae* certifies that counsel of record for both parties received at least 10-days' notice of *Amicus Curiae*'s intent to file this brief and have consented to its filing. A consent letter from the Respondent is attached hereto. A blanket consent letter from the Petitioner is on file with the Clerk of Court.

² The member organizations include the Alaska Innocence Project, Association in the Defense of the Wrongly Convicted, California Innocence Project, Center on Wrongful Convictions, Committee for Public Counsel Services Innocence Program, Connecticut Innocence Project, Delaware Office of the Public Defender, Downstate Illinois Innocence Project, Duke Center for Criminal Justice and Professional Responsibility, Exoneration Initiative, Georgia Innocence Project, Griffith University Innocence Project, Hawaii Innocence Project, Idaho Innocence Project, Indiana University School of Law Wrongful Convictions Clinic, Innocence Institute of Point Park University, Innocence Network UK, Innocence Project, Innocence Project Arkansas, Innocence Project at UVA School of Law, Innocence Project New

(Continued on following page)

The Innocence Network has helped to exonerate hundreds of individuals over the past two decades. Through these experiences, it has become clear that problems involving the forensic sciences and their application are pervasive. The interests of justice are undermined by forensic error and false information. Indeed, examination of post-conviction DNA-based exonerations demonstrates that flawed or inaccurate forensic science testimony has contributed to approximately fifty percent of those wrongful

Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Irish Innocence Project at Griffith College, Justice Brandeis Innocence Project, Justice Project, Kentucky Innocence Project, Life After Innocence Project, Maryland Innocence Project, Medill Innocence Project, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwestern Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Ohio Innocence Project, Office of the Ohio Public Defender Wrongful Conviction Project, Osgoode Hall Innocence Project, Pace Post-Conviction Project, Palmetto Innocence Project, Pennsylvania Innocence Project, Reinvestigation Project, Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project, Texas Center for Actual Innocence, Texas Innocence Network, Thomas M. Cooley Law School Innocence Project, Thurgood Marshall School of Law Innocence Project, University of British Columbia Law Innocence Project, University of Leeds Innocence Project, Wake Forest University Law School Innocence and Justice Clinic, and the Wisconsin Innocence Project.

convictions.³ The Innocence Network advocates for reforms to prevent wrongful convictions and has a strong interest in ensuring that criminal convictions are premised on valid and reliable scientific evidence – an interest directly implicated by Petitioner Efren Medina’s case.

Forensic autopsy reports often play a critical evidentiary role in criminal prosecutions. Like other forensic sciences, forensic pathology is susceptible to cognitive bias, human error, and incompetence. Moreover, forensic pathology is particularly susceptible to cognitive bias due to the subjectivity of autopsies and the way they are generally conducted. Several recent exoneration cases and scandals involving forensic pathologists illustrate the need to subject the authors of forensic autopsy reports – and not their surrogates – to the rigors demanded by the Confrontation Clause.

◆

SUMMARY OF ARGUMENT

Authors of autopsy reports should be subject to the constitutionally prescribed method of testing accuracy: Confrontation. Forensic pathologists and coroners are particularly susceptible to cognitive bias and suggestion by law enforcement officers when

³ See The Innocence Project, *Unreliable or Improper Forensic Science*, available at <http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php>.

drafting autopsy reports. Indeed, law enforcement officials are often present when the autopsy is conducted, and many states require law enforcement officials to report the results of any investigation to the person conducting the autopsy. Further, like all forensic sciences, forensic pathology is subject to human error, incompetence, and even fraud. Testimony from surrogates hides these issues at trial and frustrates the truth-seeking function of the criminal justice system.

Several recent exonerations and scandals illustrate how this cognitive bias, human error, and fraud can wrongfully deprive innocent people of their liberty. This result is unsurprising given the central role that the observations and conclusions contained in autopsy reports often play in homicide trials. Nevertheless, as happened in Petitioner's case, some state courts admit autopsy reports into evidence without providing the defendant an opportunity to cross-examine the author of those reports. As a result, the accuracy of one of the most critical pieces of prosecution evidence goes untested.

The time is now for this Court to clarify this critical area of law, which has deeply divided state courts of last resort. Delay serves only to produce more wrongful convictions in courts allowing testimonial statements in autopsy reports to be introduced into evidence without confrontation of the report's author. Recognizing that autopsy reports are testimonial and that criminal defendants have a constitutional right to confront the authors of those

reports will help to avoid wrongful convictions and strengthen the integrity of the criminal justice system.

◆

ARGUMENT

I. THE CURRENT SYSTEM IMPORTS FLAWED, TESTIMONIAL STATEMENTS INTO AUTOPSY REPORTS.

A. The contents of autopsy reports are inherently testimonial.

An autopsy is the systematic examination of a body to determine the time, manner, and cause of death.⁴ During the autopsy, the death investigator (either a medical examiner or a coroner) inspects the external condition of the body, examines the internal body cavity and organs, and tests tissue and fluid samples. The death examiner combines the results of this examination with contextual information – often provided by law enforcement – regarding the circumstances surrounding the person’s death. Using this information, the death investigator comes to a subjective conclusion regarding the time, manner, and

⁴ See generally National Research Council, Committee on Identifying the Needs of the Forensic Sciences Community, *Strengthening Forensic Sciences in the United States: A Path Forward* 248 (2009) (describing the autopsy process) (hereinafter, the “NAS Report”).

cause of death. The death investigator formalizes these findings and conclusions in an autopsy report.

Time, manner, and cause of death are often the ultimate questions in homicide trials.⁵ And importantly, autopsies are conducted primarily when a person dies under suspicious circumstances, *e.g.*, a suspected homicide. Consequently, medical examiners are aware that any statements they make in their autopsy report will be key evidence in a subsequent criminal trial – possibly a capital murder case. Given the autopsy report’s central role in homicide cases and the high stakes of murder trials, testing the accuracy of the statements and conclusions contained in these reports through cross-examination is paramount.

B. The current death investigation system undermines the veracity of autopsy reports.

The deep, systematic flaws that pervade the current death investigation system increase the likelihood that autopsy reports will contain inaccurate subjective judgments. Few investigators work under ideal conditions. Few institute best practices, and many are overwhelmed with unmanageable caseloads. For example, the National Academy of Sciences estimates that this country has less than half the number of pathologists needed to investigate

⁵ See Pet. at 14.

suspicious deaths properly.⁶ The NAS has also found that *all* coroner *and* medical examiner systems share the following deficiencies:

- imperfect legal structure/code controlling death investigations;
- inadequate expertise to investigate and medically assess decedents;
- inadequate resources to perform competent death investigations;
- inadequate facilities and equipment for carrying out body views and conducting autopsies;
- inadequate technical infrastructure (laboratory support);
- inadequate training of personnel in the forensic science disciplines;
- lack of best practices and information standards;
- lack of quality measures and controls;
- lack of information systems; and
- lack of translational research and associations with university research.⁷

Furthermore, eighty-two percent of supervising coroners and medical examiners are popularly elected,

⁶ NAS Report at 257.

⁷ NAS Report at 250-51.

often with minimum requirements for service that do not include advanced medical or scientific training. This results in a patchwork system of coroners and medical examiners with widely varying levels of expertise and quality of service. The NAS Report highlighted this reality by noting that an eighteen-year-old high school senior became a deputy coroner in Indiana after taking an exam.⁸

These systemic problems foster an environment ripe for forensic fraud and tolerance for gross incompetence, two primary causes of wrongful convictions. One of the few protections defendants have against such fraud and incompetence is their Sixth Amendment right to confront the autopsy report's author at trial. The few examples discussed below illustrate the importance of confrontation in exposing misconduct in autopsy reports, intentional or otherwise:

(1) Dr. Thomas Gill

Over a span of three decades, Dr. Thomas Gill served as an expert witness and conducted thousands of autopsies in multiple states. Dr. Gill was fired for inaccurate findings and alcohol abuse while working as a coroner in Indianapolis.⁹ Nevertheless, he was

⁸ *Teen Becomes Indiana's Youngest Death Investigator*, THV 11 News, May 11, 2007, available at <http://www.thv11.com/news/article/45762/0/Teen-Becomes-Indianas-Youngest-Death-Investigator> - .

⁹ Ryan Gabrielson, *Second Chances Underscore Flaws in Death Investigations*, ProPublica, January 31, 2011, available at <http://>
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hired by the Los Angeles County Coroner, where he was demoted and had his pay cut in half. He next moved to a private company with a contract to handle death investigations for over a dozen Northern California cities, including Sonoma County, where he was ultimately barred from conducting autopsies because of his incompetence. A California State Bar investigation concluded “Dr. Gill was not a competent pathologist and committed several serious errors.”¹⁰ Despite this track record, Dr. Gill was next hired by the Jackson County Medical Examiner’s Office, which conducts death investigations in Kansas City, Missouri. Dr. Gill remained in Kansas City until local prosecutors objected to his work, after which he returned to California and was rehired by the same private company he had left after the State Bar investigation concluded he was incompetent.¹¹

(2) Dr. Stephen Hayne

For nearly three decades, forensic pathologist Dr. Stephen Hayne performed eighty percent of

www.propublica.org/article/second-chances-underscore-flaws-in-death-investigations.

¹⁰ State Bar of California Hearing Department, *In the Matter of Brooke P. Halsey, Jr.*, August 1, 2006, available at <http://s3.documentcloud.org/documents/31419/02-o-10195.txt>.

¹¹ Mihir Zaveri, *Prosecutors Failed to Disclose Coroner’s ‘Unreasonable’ Findings*, *The Bay Citizen*, May 4, 2012, available at <https://www.baycitizen.org/news/crime/defendants-murder-case-didnt-see-report/>.

Mississippi death investigations and carried out nearly seven times the maximum number of autopsies recommended by the National Association of Medical Examiners.¹² Amid major concerns about the quality of his work and the plausibility of his testimony in hundreds of cases, the Mississippi Supreme Court acknowledged it “should not qualify Dr. Hayne as an expert in forensic pathology.”¹³ For example, in one case Dr. Hayne examined the body of a three-year-old child who was exhumed many weeks after burial. Dr. Hayne claimed he was able to determine not only that the child suffocated, but that he was smothered by a large male hand – consistent with the police’s theory of the case that the boyfriend of the boy’s mother committed the murder.¹⁴ Despite Dr. Hayne’s claim, Andrew M. Baker, the president of the medical examiners’ association, has stated that it is unheard of to speculate on hand size and gender when making such a determination.¹⁵

¹² Campbell Robertson, *Questions Left for Mississippi Over Doctor’s Autopsies*, The New York Times, January 7, 2013, available at http://www.nytimes.com/2013/01/08/us/questions-for-mississippi-doctor-after-thousands-of-autopsies.html?page-wanted=all&_r=1&.

¹³ *Edmonds v. State*, 955 So. 2d 787, 799 (Miss. 2007) (Diaz, J., concurring).

¹⁴ Jacob Sollum, *Canned Forensic Pathologist Steven Hayne Stands by His Work*, Reason, January 8, 2013, available at <http://reason.com/blog/2013/01/08/canned-forensic-pathologist-steven-hayne>.

¹⁵ Campbell Robertson, *Questions Left for Mississippi Over Doctor’s Autopsies*, The New York Times, January 7, 2013, available at <http://www.nytimes.com/2013/01/08/us/questions-for->

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(3) Ralph Erdmann

Texas forensic pathologist Ralph Erdmann surrendered his medical license and pleaded no contest to seven felony counts after he falsified numerous autopsies. When Erdmann's work was evaluated, seven bodies he supposedly autopsied showed no incisions at all, contrary to his reports; the weight of the spleen and gallbladder of a man who had both organs surgically removed had been measured and included in the autopsy report, and a victim's head containing the fatal bullet was misplaced and never located.¹⁶

C. Forensic pathology is particularly susceptible to cognitive bias and suggestion by law enforcement.

By the time an autopsy commences, detectives often have identified a suspect or have formulated a theory of the case that requires corroboration by the autopsy report. As in the Petitioner's case, detectives typically communicate their case theory to the death investigator personally, in the autopsy room, during the autopsy itself. Inevitably, as this Court has acknowledged, there is a great deal of subtle pressure or – as in the wrongful convictions discussed below – overt pressure on the examiner to reach a particular

mississippi-doctor-after-thousands-of-autopsies.html?pagewanted=1&_r=0.

¹⁶ Barry Scheck et al., *Actual Innocence*, 151-52 (2003).

conclusion. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009) (“A forensic analyst responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution.”). Exacerbating the problem, *elected* coroners perform medicolegal death investigations throughout 14 states; because elected officials must be sensitive and responsive to public opinion, “this may lead to difficulty in making unpopular determinations of the cause and manner of death.”¹⁷

The effect of these cognitive biases is well documented. Human decision-making is “influenced by cognitive limitations, personal preferences, and psychological and emotional factors that influence the way in which [people] choose between the available alternatives.”¹⁸ It is a fundamental principle of modern psychology that “context and expectations influence an individual’s perceptions and interpretations of what he observes.”¹⁹ Known as “observer effects,” the potential for such biasing information to influence subjective opinions is so well recognized that blind

¹⁷ NAS Report at 245 (as of 2004, another 13 states have a mixed coroner/medical examiner system).

¹⁸ Alessandra Gorini & Gabriella Pravettoni, *An overview on cognitive aspects implicated in medical decisions*, 22 EUROPEAN JOURNAL OF INTERNAL MEDICINE 547-53 (2011) (defining at least 17 established biases in medicine).

¹⁹ D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CAL. L. REV. 1-56 (2002).

evaluations are employed in everything from soft drink “taste tests” to exam grading. Put simply, human beings often see what they expect or desire to see. “Such cognitive biases are not the result of character flaws; instead, they are common features of decision making, and they cannot be willed away.”²⁰

Forensic science is not immune from this phenomenon. A robust body of scientific research demonstrates the significant potential for bias and human error to affect the findings of forensic science experts.²¹ Research demonstrates that experts can be biased in favor of the side that retains them to perform an evaluation,²² or by “domain irrelevant”

²⁰ NAS Report at 122.

²¹ See, e.g., Saul M. Kassin et al., *The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions*, 2 JOURNAL OF APPLIED RESEARCH IN MEMORY & COGNITION 42 (2013); M. J. Saks et al., *Context effects in forensic science: A review and application of the science of science to crime laboratory practice in the United States*, 43 SCIENCE & JUSTICE 77-90 (2003).

²² Daniel C. Murrie et al., *Are Forensic Experts Biased by the Side That Retained Them?*, PSYCHOLOGICAL SCIENCE, August 22, 2013 (From the abstract: “In this experiment, we paid 108 forensic psychologists and psychiatrists to review the same offender case files, but deceived some to believe that they were consulting for the defense and some to believe that they were consulting for the prosecution. Participants scored each offender on two commonly used, well-researched risk-assessment instruments. Those who believed they were working for the prosecution tended to assign higher risk scores to offenders, whereas those who believed they were working for the defense tended to assign lower risk scores to the same offenders; the effect sizes (d) ranged up to 0.85. The results provide strong

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information that points to a particular conclusion. For example, studies have shown that experienced latent fingerprint examiners will change their identification decisions when supplied with biasing information, such as, “the suspect in this case confessed.”²³

The subjective findings and conclusions of forensic pathologists are likewise vulnerable to the influence of biasing contextual information when attempting to determine the time, manner and cause of death. *See, e.g., United States v. Ignasiak*, 667 F.3d 1217, 1233-34 (11th Cir. 2012) (“the ultimate conclusions and supporting finding in the autopsy reports are the product of the examiner’s skill and judgment, not an infallible machine that requires no human intervention.”); *People v. Freycinet*, 11 N.Y.3d 38, 42 (N.Y. 2008) (recognizing that “a report of a doctor’s findings at an autopsy may reflect more exercise of judgment than the report of a DNA technician.”).

evidence of an allegiance effect among some forensic experts in adversarial legal proceedings.”).

²³ *See, e.g.,* I.E. Dror, D. Charlton and A.E. Péron, *Contextual information renders experts vulnerable to making erroneous identifications*, 156 FORENSIC SCIENCE INTERNATIONAL 74, 77 (2006) (“Our study shows that it is possible to alter identification decisions on the same fingerprint, solely by presenting it in a different context.”); I.E. Dror and D. Charlton, *Why experts make errors*, 56(4) JOURNAL OF FORENSIC IDENTIFICATION 600 (2006) (Experienced fingerprint examiners were asked to analyze fingerprints that, unknown to them, they had analyzed previously. Two-thirds of the experts made inconsistent decisions to those they had made in the past on the same pair of prints.).

Indeed, unlike other forensic assays such as toxicology or latent-fingerprint analysis, forensic pathology often *requires* some contextual information to assist the pathologist in arriving at an opinion concerning the potential time, manner, or cause of death. For example, an individual's clinical history and the circumstances surrounding the discovery of the body may be necessary for a death investigator to differentiate between a suicide and an accidental overdose of prescribed medication. Because this contextual information is often necessary for proper evaluation of a case, forensic pathologists are uniquely susceptible to the problem of external information improperly influencing their findings.

Thus, these experts must navigate a fine line between relevant, necessary information and improper, biasing information – a homicide detective's theory of the case, for example. The National Association of Medical Examiners (NAME) recognized this tension in a resolution endorsing the findings of the National Academy of Sciences 2009 report on the state of forensic science in this country:

NAME endorses the recommendation that research programs on human observer bias and sources of human error in forensic examinations including studies to determine contextual bias in forensic practice should be encouraged. However, NAME urges caution in the arena of contextual information and forensic pathology. Medical examiners are physicians who operate in the medical paradigm of using a clinical history and

information about the circumstances surrounding a death to generate hypotheses about potential causative diseases and injuries. The autopsy and laboratory examination allows a forensic pathologist to confirm or refute these hypotheses and reach medical conclusions. Autopsy is the practice of medicine. The history and circumstances provide the context for the autopsy and laboratory findings. In addition to determining cause of death, medical examiners are directed to determine the manner of death, which is largely based on the circumstances surrounding death.²⁴

In a suspicious death investigation a police detective nearly always provides the “circumstances surrounding death” to a medical examiner or a coroner, who might not be a physician or have had any medical training.²⁵ Indeed, Arizona law *requires* law enforcement to share all of their preliminary findings with coroners during preparation of autopsy reports, and at least six states share the same requirement. Eleven others require law enforcement to provide

²⁴ Resolution of National Association of Medical Examiners, Executive Committee, July 2, 2009, *available at* <https://netforum.avectra.com/temp/ClientImages/NAME/b21b1126-3124-42f1-b73f-0a689113084f.pdf>.

²⁵ NAS Report at 247.

such information upon request, which, for reasons discussed above, occurs frequently.²⁶

The inherent subjectivity of the autopsy process – combined with the myriad sources of biasing information *invited* into that process – make cross-examination of the medical examiner who conducted the autopsy essential to vindicating a defendant’s Sixth Amendment right of confrontation. *See Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2715 (2011) (“[S]urrogate testimony . . . could not convey what [the forensic examiner] knew or observed about the events his certification concerned. . . . Nor could such surrogate testimony expose any lapses or lies on [the examiner’s] part.”).

²⁶ *See* Ariz. Rev. Stat. § 593(B) (“The peace officer shall promptly notify the county medical examiner or alternate medical examiner and . . . shall promptly make or cause to be made an investigation of the facts and circumstances surrounding the death and report the results to the medical examiner or alternate medical examiner.”); *see also* Fla. Stat. Ann. § 406.14; Ga. Code Ann. § 45-16-24(a); Idaho Code Ann. § 19-4301(2); Ind. Code Ann. § 36-2-14-6; Me. Rev. Stat. tit. 22, § 3028(2)-(3); Md. Code Ann., Health-Gen. § 5-309(b); Mass. Gen. Laws Ann. ch. 38, § 4; Minn. Stat. Ann. § 390.11; N.J. Stat. Ann. § 52:17B-87; N.M. Stat. Ann. § 24-11-5; N.C. Gen. Stat. Ann. § 130A-383(a); Ohio Rev. Code Ann. § 313.12(A); Okla. Stat. Ann. tit. 63, § 940(A); Or. Rev. Stat. Ann. § 146.100(6); Tenn. Code Ann. § 38-7-108(a); Tex. Crim. Proc. Code Ann. art. 49.25 § 7(a); Utah Code Ann. § 26-4-8(1)-(2); Va. Code Ann. § 32.1-283(A); W. Va. Code Ann. § 61-12-8(a); Wis. Stat. Ann. § 979.01(1g); Wyo. Stat. Ann. § 7-4-201(a).

**II. CONFRONTATION OF THE AUTHORS OF
FLAWED TESTIMONIAL STATEMENTS
IN AUTOPSY REPORTS SERVES THE IN-
TERESTS OF JUSTICE.**

**A. Surrogate testimony allows law en-
forcement officials to cover up cog-
nitive bias and forensic fraud.**

The insulated testimony of a surrogate creates unacceptable risk of covering up inaccurate forensic science or fraud. Rather, vigorous cross-examination of the medical examiner who actually conducted the autopsy is essential to present a proper defense. See *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974) (“Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. . . . A more particular attack on the witness’ credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate *directly to issues or personalities in the case at hand.*”) (emphasis added).

Surrogate testimony cannot expose the role cognitive bias may have played in a death investigator’s conclusions. Such insulated testimony cannot expose the lack of adequate investigator training and resources that may have undermined the accuracy of the autopsy report. Nor can surrogate testimony expose the pressure put on the report’s author by a detective standing over his or her shoulder in the

autopsy room to corroborate a detective or a prosecutor's case theory.²⁷

Additionally, surrogate testimony frustrates the discovery of the forensic fraud, error, and incompetence described above. Until this Court reversed the Massachusetts Supreme Judicial Court in *Melendez-Diaz*, for example, Massachusetts law permitted prosecutors to introduce toxicology reports without requiring testimony from the analyst who actually performed the test. As a result, a long-running fraud by a lab analyst, Annie Dookhan, went undetected for years, affecting tens of thousands of criminal cases in Massachusetts.²⁸ The *Melendez-Diaz* decision now precludes prosecutors from requiring the defense to accept a lab analyst's purportedly objective findings concerning controlled substances at face value.

²⁷ Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 296-99 (2013) ("We have also witnessed notable tension between forensic science and prosecution interests, with forensic labs tailoring results for law enforcement interests and the Department resisting changes to its use of forensics even in the face of serious evidence that existing protocols come up short.").

²⁸ Sally Jacobs, *Annie Dookhan pursued renown along a path of lies*, The Boston Globe, February 3, 2013, available at <http://www.bostonglobe.com/metro/2013/02/03/chasing-renown-path-paved-with-lies/Axw3AxwmD33lRwXatSvMCL/story.html>. In one instance, a man released from a Massachusetts prison because his case involved Dookhan was arrested months later for allegedly killing a man in a drug dispute. Bridget Murphy et al., *For Mass. Lab Chemist an unlikely road to scandal*, The Associated Press, October 13, 2012.

The Annie Dookhan scandal confirms the importance of promoting the truth-seeking function of the criminal justice system through confrontation. This principle should apply with equal force to the medical examiner who performed the autopsy and authored the autopsy report.

B. Errors concerning the time, manner, and cause of death are major factors in wrongful convictions.

Several innocent people have been wrongly convicted based on erroneous or distorted autopsy reports. For example, the cases of Michael Morton, Alan Gell, and Jeffrey Deskovic demonstrate not only the pervasive cognitive bias and error in the death investigation system, but also how persuasive the results of an autopsy report can be to a jury.

(1) Michael Morton

Michael Morton was wrongly convicted of the 1986 murder of his wife, Christine. At Mr. Morton's 1987 trial, the time of his wife's death was critical to the prosecution's theory of guilt. To implicate Mr. Morton in his wife's death, Mrs. Morton must have been murdered between 9:30 PM and 5:00 AM, because she was seen alive at around 9:00 PM, and Mr. Morton arrived at work at 6:00 AM the next day. Initially, the medical examiner who autopsied Mrs. Morton, Dr. Robert Bayardo, placed the time of

death between 1:00 AM and 6:00 AM, which failed to undermine Mr. Morton's alibi.²⁹

Information from law enforcement officials influenced Dr. Bayardo to change his initial time of death estimate. Prosecutors told Dr. Bayardo that a receipt from the restaurant where Mrs. Morton ate her last meal indicated that she finished dinner at around 9:15 PM. At trial, contrary to his initial conclusion, Dr. Bayardo placed the time of death at *no later than* 1:15 AM, based on three ounces of partially digested food in Mrs. Morton's stomach and his belief that "the typical stomach empties in about four hours."³⁰ It was later revealed that Mrs. Morton was murdered sometime after 5:00 AM, after Mr. Morton had left for work.

Dr. Bayardo's flawed testimony was one of the critical pillars of the prosecution's case, which ultimately persuaded a jury to convict Mr. Morton. Immediately after the trial, the jury foreman told the Austin-American Statesman that the medical examiner's conclusions were the "crucial testimony" in the case.³¹ Mr. Morton spent nearly 25 years in prison before he was exonerated in 2012 by DNA evidence that matched the real killer, Mark Norwood.

²⁹ Trial Transcript at 696.

³⁰ *Morton v. State*, 761 S.W.2d 876, 880 (Tex. App. 1988); Chuck Lindell, *Circumstantial case convicting Morton of Murder now under attack*, Austin American Statesman, October 1, 2011, available at <http://www.statesman.com/news/news/state-regional-govt-politics/circumstantial-case-convicting-morton-of-murder--1/nRfz9/>.

³¹ *Ibid.*

(2) Alan Gell

Alan Gell was convicted and sentenced to death for a 1995 murder he did not commit. The date of the victim's death was especially critical at Mr. Gell's trial because he was in jail on unrelated charges during most of the time period surrounding the victim's death. On the eve of trial, North Carolina forensic pathologist M.G.F. Gilliland had not settled on a date of the victim's death.³² In a meeting with prosecutors, Dr. Gilliland asked the prosecution team about a note made by her colleague in the initial Narrative Description in the Report of Autopsy, indicating that the victim 'was last seen on April 8, 1995 by his neighbor.'³³ This note was consistent with statements from seventeen other eyewitnesses who saw the victim alive after Mr. Gell was jailed.³⁴ However, prosecutors told Dr. Gilliland that the victim's neighbor had recanted her statement and did not reveal the existence of the other, corroborating witnesses. Dr. Gilliland subsequently determined the date of death to be April 3, 1995, the day before Mr. Gell had been jailed.³⁵ A 2004 retrial resulted in Mr.

³² Complaint and Jury Demand, *Gell v. Town of Aulander, et al.*, No. 2:05-CV-21-FL(1), 2005 WL 1476477 (E.D.N.C. May 2, 2005).

³³ *Ibid.*

³⁴ Joseph Neff, *State pays \$3.9 million for wrongful conviction*, *The News & Observer*, October 2, 2009, available at <http://www.newsobserver.com/2009/10/02/122030/state-pays-39-million-for-wrongful.html>.

³⁵ *State v. Gell*, 351 N.C. 192, 199 (2000).

Gell's acquittal, based on the testimony of multiple witnesses who saw the victim alive after April 3 and testimony from another doctor who explained that the victim's body would have decomposed quickly due to the high temperature in his house.³⁶

(3) Jeffrey Deskovic

On November 17, 1989, fifteen-year-old Angela Correa was found raped and murdered in a Peekskill, New York forest. Investigators quickly identified sixteen-year-old Jeffrey Deskovic as the primary suspect. After police interrogated Mr. Deskovic for eight hours and promised him that he could go home if he admitted to killing Ms. Correa, Mr. Deskovic gave a false confession.³⁷ After securing the "confession," however, a "Negroid-type" hair was discovered on the victim's body and DNA testing of semen from the crime scene excluded Mr. Deskovic.³⁸ Nevertheless, forensic pathologist Dr. Louis Roh, made aware by prosecutors that Mr. Deskovic had implicated himself, claimed that he had observed scarring on Ms. Correa's hymen, indicating she had been sexually active prior to her rape and murder. Relying on Dr. Roh's theory to explain the exculpatory semen

³⁶ Alexandra Gross, National Registry of Exonerations, Alan Gell, available at <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3236>.

³⁷ *Deskovic v. City of Peekskill*, 673 F. Supp. 2d 154, 157 (S.D.N.Y. 2009).

³⁸ *Deskovic*, 673 F. Supp. 2d at 157.

evidence, prosecutors argued at trial that the hairs found on the victim belonged to Dr. Roh's African-American assistant, despite failing to conduct a test to determine if this was in fact true.³⁹ Deskovic was exonerated in 2006 when DNA from the crime scene was matched to the real killer, who subsequently confessed to the murder of Ms. Correa.

* * *

The Morton, Gell, and Deskovic cases demonstrate how persuasive death-investigation evidence is to juries and how easily biasing information – information *not* contained in autopsy reports – influences the subjective opinions of medical examiners. Therefore, it is critical that the opinions offered by the examiner who conducted the autopsy be subject to cross-examination.

CONCLUSION

Accordingly, *Amicus Curiae* urges this Court to grant the petition and to recognize that the contents of autopsy reports – especially those asserting that the victim's cause of death was homicide – are testimonial and that the authors of such reports must be subject to confrontation. Doing so is necessary to expose fraud and bias and to ensure that erroneous

³⁹ Leslie Crocker Snyder et al., *Report on the Conviction of Jeffrey Deskovic*, June 2007, available at <http://www.westchesterda.net/Jeffrey%20Deskovic%20Comm%20Rpt.pdf>.

autopsy reports do not continue to serve as the basis for wrongful convictions. Further “percolation” only consigns more innocent people to prison.

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January 17, 2014

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