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Case Number 520,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAKAI CHAVIS,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 520, 2018
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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DATED: September 20, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions:

Statutes:

Rules:

Other Sources:

NATURE AND STAGE OF THE PROCEEDINGS

Chavis incorporates by reference the Nature and Stage of the Proceedings as set forth in his Opening and Reply Briefs. After initial briefing, the matter was scheduled for submission on August 14, 2019 for consideration on the briefs. However, on August 5, 2018, this Court ordered oral argument *en banc* and supplemental briefing on six specific issues. This is Appellant's Supplemental Opening Brief addressing those issues. All arguments and facts contained herein shall be deemed supplemental to and not a waiver of any arguments and facts contained in Appellant's initial briefing.

SUMMARY OF THE ARGUMENT

1. *Crawford v. Washington*[1] and its progeny require this Court to hold that the Confrontation Clause entitled Chavis to be confronted with all the testing analysts whose implicit and explicit out-of-court testimonial statements were relied upon and relayed to the jury by Sarah Siddons.

2. No practical or policy concern overcomes Chavis' right to confront all of the testing analysts upon whose implicit and explicit out-of-court testimonial statements were relied upon and relayed to the jury by Sarah Siddons.

3. That the relevant samples were transferred to Rachel Aponte and Feng Chen, respectively for "analysis" confirms that these two analysts were active participants in the testing of the DNA sample in Chavis' case.

4. While the State did provide Chavis with portions of the requested discovery related to DNA testing, the production was incomplete.

5. The State's proposed framework of "producing data" versus "preparing samples" does not adequately encapsulate modern DNA testing, and even if it did, that distinction does not apply to this case.

6. The violation of Chavis' right to confront all of the testing analysts in his case was not harmless beyond reasonable doubt.

[1] 541 U.S. 36, 51 (2004).

STATEMENT OF FACTS

Chavis incorporates by reference the Statement of Facts as set forth in his initial briefing. Any additional facts relevant to Chavis' arguments contained herein will be incorporated into the Argument.

I. THE TRIAL COURT DENIED CHAVIS HIS RIGHT TO CONFRONT WITNESSES AGAINST HIM WHEN IT ALLOWED THE STATE TO INTRODUCE DNA TEST RESULTS, THE ONLY EVIDENCE LINKING HIM TO THE CRIME OF WHICH HE WAS CONVICTED, WITHOUT THE TESTIMONY OF ALL THE ANALYSTS WHO PARTICIPATED IN THE TESTING.

Question Presented

Whether the State was required, pursuant to Chavis' federal right to confrontation, to produce, at trial, the testimony of all the forensic analysts who were assigned to and did independently perform steps in the DNA analysis when the report that contained the results of that analysis and that relied on the implicit and explicit testimonial statements of those analysts was the only evidence linking Chavis to the crime of which he was convicted.[2]

Standard and Scope of Review

"Alleged constitutional violations relating to a trial court's evidentiary rulings are reviewed *de novo*."[3]

Argument

In its August 5, 2018 Order requesting supplemental briefing, this Court directed Counsel to answer six specific questions. The answers to each of these

[2] A18, 49, 70. The questions raised by the Court in its order are directed at Chavis' Confrontation Clause argument. Thus, Chavis' supplemental briefing addresses only his Confrontation Clause argument. He does not waive his arguments in his initial briefing regarding chain of custody or insufficiency of the evidence.
[3] *Milligan v. State*, 116 A.3d 1232, 1235 (Del. 2015).

questions further support the conclusions that the trial court violated Chavis' rights secured by the Confrontation Clause and that denying Chavis the ability to fully realize the "damaging potential of the cross-examination" of each of the testing analysts in his case was not harmless beyond a reasonable doubt.

1. *Crawford v. Washington*[4] And Its Progeny Require This Court To Hold That The Confrontation Clause Entitled Chavis To Be Confronted With All The Testing Analysts Whose Implicit And Explicit Out-Of-Court Testimonial Statements Were Relied Upon And Relayed To The Jury By Sarah Siddons.

a) Sarah Siddons relied upon out-of-court testimonial statements contained in the DNA report that was introduced into evidence.

A statement that a declarant "would reasonably expect to be used prosecutorially, . . . [or] made under circumstances which would lead an objective witness reasonably to believe that . . . [it] would be available for use at a later trial," is considered testimonial for purposes of the Confrontation Clause.[5] In *Crawford*, the United States Supreme Court held that the Confrontation Clause renders "testimonial statements against a defendant [] 'inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.'"[6] Thereafter, in *Melendez-Diaz v. Massachusetts*,[7]

[4] 541 U.S. 36, 51 (2004).
[5] *Id.* at 51-52.
[6] *Martin v. State*, 60 A.3d 1100, 1102 (Del. 2013) (*quoting Crawford*, 541 U.S. at 54). *See* U.S. Const. amend. VI.
[7] 557 U.S. 305 (2009).

Bullcoming v. New Mexico[8] and *Williams v. Illinois*,[9] the high Court applied this rule to evidence contained within forensic reports which the prosecution sought to present to the fact finder in one fashion or another.

Specifically, in *Melendez-Diaz*, a forensic lab tested a substance for the purpose of a criminal prosecution. The Court held that the "certificates of analysis" that attested to the fact that the substance was cocaine were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination' "[10] Thus, they were testimonial statements that, pursuant to the Sixth Amendment, could only be introduced into evidence through the certifying analysts.[11]

Then, in *Bullcoming*, a forensic analyst testified in a DUI case about the test of the defendant's blood alcohol concentration. However, while that analyst worked in the lab where the test was performed, he had not participated in, observed or certified the testing. The Court "held that the testifying analyst provided 'surrogate testimony' and the accused had the right to confront the analyst who made the certification." [12] This Court, in *Martin v. State*, later summarized the *Bullcoming* rationale as follows:

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[8]564 U.S. 647 (2011).
[9]567 U.S. 50 (2012).
[10] *Martin*, 60 A.3d at 1102–03 (*quoting Melendez-Diaz*, 557 U.S. at 311).
[11] *Id.*
[12] *Id.*

> the testifying analyst "could not convey what [the testing-certifying analyst] knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part."[13]

Finally, in *Williams*, the Court discussed a bench trial and condoned the State's end run around the Confrontation Clause in circumstances not applicable in our case. There, instead of introducing the DNA test results into evidence, the State presented an expert witness who opined, based on her comparison of profiles obtained by two other analysts, that it was the defendant's semen that was found on the vaginal swabs tested at the lab. The plurality in *Williams* concluded that there was no violation of the defendant's right to confrontation for two reasons: 1) the State did not offer the report for the truth of the matter asserted and an expert can rely on testimonial or otherwise inadmissible evidence when rendering an opinion;[14] and 2) the results were not testimonial because the primary purpose of the DNA report "was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time."[15] The 4-Justice dissent rejected this particular application of the primary

[13] *Id.* (*quoting Bullcoming* 564 U.S. at 661-662) (change in original)).
[14] *Williams*, 567 U.S. at 77-79.
[15] *Id.* at 83.

purpose approach and concluded that the test results were testimonial and that cloaking them in a witness' expert opinion could not change that conclusion.[16]

Here, like *Melendez-Diaz* and *Bullcoming*, the results contained in the DNA report were testimonial due to the evidentiary purpose of the creation of the report in the criminal proceedings.[17] As explained in Chavis' initial briefing, the testimonial nature of the results in our case is reflected by the facts that: the evidence to be analyzed was seized by police; police requested that the analysis be conducted; and the results of the analysis were reported to police.[18]

The *Williams* decision does not call for a different conclusion. First, unlike in *Williams*, the State in our case ***did*** introduce the report into evidence for the truth of the matter.[19] Therefore, the State cannot rely on the rationale reserved for expert witnesses that allows them to provide an opinion based on inadmissible evidence.[20] Rather, Siddons was required to rely on admissible evidence. Thus, the traditional "test" for determining the testimonial nature of the DNA results as explained in *Melendez-Diaz* and *Bullcoming* controls.

Second, the facts upon which the *Williams* plurality relied in finding the contents of the report were not testimonial simply do not exist in our case. As the

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[16] *Williams*, 567 U.S. at 135 (Kagan, J., dissenting).
[17] *Bullcoming*, 564 U.S. at 663-664.
[18] *Id. See* Appellant's Opening Brief at pages 9-13.
[19] A109.
[20] *See D.R.E.* 703.

dissent pointed out, the plurality stretched the Court's "'ongoing emergency'[21] test and the facts of th[e] case beyond all recognition[]"[22] when it concluded that the report was not testimonial because the primary purpose of the report "was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time."[23] Our facts simply do not lend themselves to disqualification of the report as testimonial through this contortion of an "ongoing emergency." Chavis was a suspect at the time the reference sample was tested.[24] He had been arrested by the time Siddons authored her report.[25] Thus, the testing was done for purposes of criminal prosecution. Therefore, this Court must conclude that the contents of the report were testimonial in nature and, thus, Chavis had an accompanying right to confrontation.

b) All analysts who participated in testing the DNA samples in this case made either implicit or explicit out-of-court testimonial statements that were relied upon and relayed to the jury by Sarah Siddons.

As this Court noted in *Martin v. State*, the United States Supreme Court has not yet addressed the breadth of *Crawford*'s application to a case, such as ours, where

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[21] In *Davis v. Washington*, 547 U.S. 813, 827 (2006), the Court concluded that statements to assist in resolving a present emergency rather than to learn what happened in the past were not testimonial.
[22] *Williams*, 567 U.S. 50, 136 (Kagan, J. dissenting).
[23] *Williams*, 567 U.S. at 83.
[24] The reference sample was labeled on an inventory sheet as belonging to "Chavis/Dakai." A65.
[25] State's Ans.Br. at p.27.

the forensic report contains the results from a multi-analyst DNA testing process. And, *Martin* is the closest this Court has come to addressing the issue. In *Martin*, the defendant was charged with driving under the influence of drugs and, through the certifying analyst, the State introduced test results that claimed the substance in the defendant's system was PCP.[26] However, that analyst "neither participated in nor observed the test on Martin's blood sample. She only reviewed the data and conclusions of the chemist who actually performed the test."[27]

The certifying analyst explained that a testing analyst conducted an initial and confirmatory screening of the blood sample. Then, an initial reviewer reviewed the results of the tests. She then received the batch packets including the results from both tests for final certification and review. She also testified that she "customarily" relied on the other analysts to follow the standard operating procedure that she develops and they would have performed a confirmatory screening.[28] "[A]fter reviewing the results in the batch packet, [she] prepared a written report certifying that Martin's blood tested positive for phencyclidine (PCP)."[29]

Ultimately, this Court reversed Martin's conviction. It held that "where the certifying and testing analyst are not the same person and the certifying analyst does

[26] *Martin*, 60 A.3d at 1101.
[27] *Id.* at 1106.
[28] *Id.* at 1101.
[29] *Id.*

not observe the testing process[,]" the defendant has "the right to confront the testing analyst as well."[30] Key to the holding was that the surrogate witness could not testify as to the testing analyst's proficiency, care, and veracity.[31] The defense attorney "could not probe whether the analyst had tested the wrong vial, inverted the labels on the samples, committed some more technical error, or simply made up the results."[32]

While there are generally multiple steps in the DNA testing process they do not have to be performed by multiple analysts.[33] Here, however, the State chose to employ a lab that takes a multi-analyst approach. The testing of the evidentiary swab (collected from 61 Fairway Road) involved the active participation of 4 forensic analysts in a 6-stage process. The two stages in which Siddons was not involved and did not observe were: Stage one: Evidence Examination where Rachel Aponte unsealed the package, cut the swab at a specific length and placed the pieces in the test tubes.[34] Stage two: Extraction where Kelsey Powell added chemicals to the test

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[30] *Id.* at 1109.
[31] *Id.*
[32] *Martin*, 60 A.3d at 1106 (*quoting Williams*, 567 U.S. at 124-125 (Kagan, J., dissenting)).
[33] "Having only one lab analyst work on a sample is the norm in many jurisdictions." Lucie Bernheim, *Getting Back to Our "Roots': Why the Use of Cutting Edge Forensic Technology in the Courtroom Should (and Can) Still Be Constrained by the Plain Language of the Confrontation Clause*, 10 Seattle J. for Soc. Just. 887, 924 (2012).
[34] A41.

tubes then, with the use of a centrifuge, extracted the liquid with DNA from the swab;[35] Douglas Ryan, with use of a robot, separated the DNA from everything else.[36] Siddons then performed the remaining stages.[37]

The lab used a similar process when testing the reference swab: Stage one: Evidence Examination where Feng Chen unsealed the package, cut the swab a specific length and placed the pieces in the test tubes.[38] Stage two: Extraction where Vanessa Sufrin added chemicals to the test tubes then, with the use of a centrifuge, extracted the liquid with DNA from the swab. She, apparently, also separated the DNA from everything else.[39] Again, Siddons conducted the remaining steps as she had with the evidentiary swab.[40]

The contents of the DNA report "do not stand on their own but, instead, have meaning because they amount to a communication by the scientists who produced them—the assertion, essentially, that the scientists generated these specific results by properly performing certain tests and procedures on particular, uncorrupted evidence and correctly recording the outcomes."[41] Each of the analysts made

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[35] A41-42.
[36] A42.
[37] A42-43.
[38] A43.
[39] A43.
[40] A21, 41-45, 110-111.
[41] *Young v. United States*, 63 A.3d 1033, 1046 (D.C. 2013) (*quoting Bullcoming*, 564 U.S. at 660)).

implicit assertions that he or she followed proper protocols to generate accurate data. Siddons relied on their work and "relay[ed], for their truth, the substance of out-of-court assertions by absent lab technicians that, employing certain procedures, they derived the profiles from the evidence furnished by [police]. Those assertions were hearsay. Without them, what would have been left of [Siddons]' testimony—that she matched two DNA profiles she could not herself identify—would have been meaningless."[42] Thus, "[r]eports memorializing the work performed by laboratory analysts when carrying out forensic duties are testimonial statements subject to the requirements of the Sixth Amendment, as interpreted by *Crawford*."[43]

c) Chavis has the right to confront each of the testing analysts upon whose out-of-court testimonial statements Siddons relied and that she relayed to the jury.

The Confrontation Clause required that Chavis be permitted to probe the proficiency, care and veracity of each of the analysts involved at each stage of the

[42] *Young*, 63 A.3d at 1045.

[43] *Holland v. Rivard*, 800 F.3d 224, 243 (6th Cir. 2015) (assuming analyst's testimony that she used a DNA profile obtained by her non testifying colleague from a buccal swab taken from the defendant to compare against the profile that was obtained from a swab on the victim's shirt violated the petitioner's right to confrontation since the colleague was not available for cross-examination). *See Veney v. United States*, 936 A.2d 809, 810 (D.C. 2007) (assuming confrontation clause violation where lab technician, in a 3-technician team, who performed extraction and amplification of DNA sample did not testify); *Jenkins v. United States*, 75 A.3d 174, 190 (D.C. 2013) (finding that by referring to the findings of other laboratory analysts who participated early in the testing process, the testifying analyst relayed hearsay).

testing process. When asked at trial how Bode could have safeguarded against a problem that the other analysts detected, Siddons responded that there were "controls at every step of the way to test the reagents . . . to make sure that they are clean."[44] Siddons described Bode as "a very ethical lab," and testified that had the other analysts believed that there was a problem with either the samples they received or the work they performed on them, "[t]here would be documentation somewhere."[45] This general response was speculation at best and did not satisfy Chavis' right to confront and cross-examine those analysts. The Confrontation Clause "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."[46]

Errors continue to occur at each stage of the DNA testing process and include sample contamination, sample switching, mislabeling and fraud, among other things.[47] All of the testing analysts in the process performed more than just administrative or ministerial duties. They were each assigned to independently perform a function in the analysis process. Further, Aponte and Chen observed the actual DNA sample inside the package they each unsealed. They identified each of

[44] A111.
[45] A111.
[46] *Bullcoming*, 564 U.S. at 662.
[47] *Williams*, 567 U.S. at 137 (Kagan, J., dissenting).

the samples. Only they could testify as to whether the DNA samples were intact when the packages were unsealed. They handled the sample that they each physically unsealed. They cut the swabs. They had to follow protocols such as wearing face masks and gloves.[48]

The other analysts also did more than just run machines and document results. Just as Siddons, they too were required to follow protocols and add chemicals as part of the process. There was room for error at every stage in the testing process and Siddons was not present at every stage. Thus, only the analyst who performed his/her particular phase of the test could testify as to whether he/she adhered to "precise protocols"[49] or whether there were "circumstances or conditions" that may have existed during that phase that may have " . . . affected the integrity of the sample or . . . the validity of the analysis[.]"[50] These topics were "meet for cross examination" because they "relat[ed] to past events and human actions not revealed in raw, machine-produced data[.]"[51] Because Siddons did not observe any of the steps in the process performed by the other analysts, Chavis had the right to confront those analysts on their proficiency, care in testing and veracity.

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[48] A111.
[49] *Bullcoming*, 564 U.S. at 659–61.
[50] *Id.* (citation omitted) (internal quotation marks and brackets omitted).
[51] *Id.*

2. No Practical Or Policy Concern Overcomes Chavis' Right To Confront The Testing Analyst Upon Whose Implicit And Explicit Out-Of-Court Testimonial Statements Were Relied Upon And Relayed To The Jury By Sarah Siddons.

"The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience."[52]

a) Confrontation of all analysts participating in multi-analyst DNA testing process promotes accurate forensic analysis.

Upholding a defendant's right to confront all testing analysts in a multi-analyst process is necessary in order to "assure accurate forensic analysis." Here, Siddons' assurances at trial regarding the actions of the other analysts insufficient to satisfy Chavis' right to confront and cross-examine those analysts. In fact, they provide an opportunity for fraudulent and incompetent analysts to eternally escape cross examination and confrontation. [53] If multiple analysts in the testing process know their work will never be directly challenged in court, the goal of confrontation is stymied. [54] On the other hand, "the prospect of confrontation will deter fraudulent

[52] *Melendez-Diaz*, 557 U.S. at 325.
[53] *Williams*, 567 U.S. at 132–33 (Kagan, J. dissenting).
[54] *Melendez-Diaz*, 557 U.S. at 318. Allowing the prosecutor to question a witness who did not participate in each step of the procedure would be to allow him "to do

analysis"[55] and will help "weed out" the incompetent analyst.[56] Accordingly, the Confrontation Clause "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."[57]

b) Upholding the right to confront all the testing analysts in a multi-analyst testing process prevents the State from unfairly and unreasonably shifting the burden to the defendant to secure the presence of an adverse witness at trial.

"Converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused."[58] Assuming, *arguendo*, this Court were to conclude that a testing analyst who made an out-of-court testimonial statement is not required to testify under the Confrontation Clause, the defendant would be required to subpoena that analyst if he sought to question him at trial. Not only would this put the defendant in the

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through subterfuge and indirection what we previously have held the Confrontation Clause prohibits." *Williams*, 567 U.S. at 132–33 (Kagan, J. dissenting).

[55] *Melendez-Diaz*, 557 U.S. 319.

[56] *Id.*

[57] *Bullcoming*, 564 U.S. at 662.

[58] *Melendez-Diaz*, 557 U.S. at 324.

unusual position of subpoenaing an adverse witness, it would allow the State to make strategic decisions to put the defendant at a significant disadvantage.

The State has the option of where to have DNA evidence tested. Here, for example, rather than employing Delaware's own forensic lab, it chose to hire a lab in Virginia. Presumably, many of that lab's analysts live in Virginia. Thus, if a defendant is required to subpoena a testing analyst in order to cross examine her, he would be required to follow the procedures set forth in 11 *Del.C.* §§3522 & 3523 for subpoenaing a witness from out of state. These procedures would require the defendant to first present an application to the trial court for an order and certificate for the analyst's presence. Assuming the trial court endorses the order and authorizes the issuance of the certificate, the defendant must then present the order and certificate to the Virginia court. This would likely require securing the assistance of a member of the Virginia bar.

Next, a hearing is conducted in Virginia for a court to determine whether the analyst is material and necessary and whether it will "cause undue hardship to the [analyst] to be compelled to attend and testify in the prosecution[.]" [59] If that court decides the analyst does not need to testify then the defendant does not get to confront her. Of course, if there are multiple analysts to be cross examined, the defendant would have to follow this process to secure the presence of each of them.

[59] *See* Va.Code Ann. §19.2-274.

On the other hand, if the State chooses to have the evidence tested at Delaware's lab, the defendant would need to follow the subpoena process set forth in the *Delaware Superior Court Criminal Rules*.[60] This may also be preferable as the testing process at that lab is typically conducted by only one analyst and the "'high-volume processing' practice is itself questionable. When multiple analysts are responsible for different parts of the data-collecting process, the process is at an even greater risk of being inaccurate: there may be too many cooks in the kitchen."[61]

3. That The Relevant Samples Were Transferred To Rachel Aponte And Feng Chen, Respectively For "Analysis" Confirms That These Two Analysts Were Active Participants In The Testing Of The DNA Sample In Chavis' Case.

The term "analysis" is commonly defined as "a detailed examination of anything complex in order to understand its nature or to determine its essential features."[62] The FBI has defined "forensic DNA analysis" as "the process of identification and evaluation of biological evidence in criminal matters using DNA technologies."[63] Thus, when each of the samples was signed out on the chain of

[60] *Del.Super.Ct.Crim.R.* 17.
[61] Bernheim, 10 Seattle J. for Soc. Just. 887, 924 ("Requiring that the author of a forensic report appear in court would place considerable pressure on jurisdictions using high-volume processing, which would reduce the number of analysts working on a sample and could increase accuracy in results.").
[62]https://www.merriam-webster.com/dictionary/analysis (last visited 9/19/19).
[63]https://www.fbi.gov/file-repository/quality-assurance-standards-for-forensic-dna-testing-laboratories.pdf/view (last visited 9/19/19).

custody sheets for "analysis," by Aponte and Chen,[64] they were signed out to begin the process of identification and evaluation. Accordingly, Aponte and Chen were the first individuals actively involved in the process of analysis. This is consistent with Siddons' representation of the work they purportedly performed. She identified both Aponte and Chen as performing the step of "Evidence Examination." This involves not only an examination of the sample for the presence of a biological sample and it involves cutting the swabs to a precise measurement for DNA extraction. Contamination and errors are a possibility at this stage.[65]

4. While The State Did Provide Chavis With Portions Of The Requested Discovery Related To DNA Testing, The Production Was Incomplete.

On August 1, 2017, Chavis requested from the State "specific information relating to DNA testing of evidence" in his case.[66] On September 27, 2017, because the State had not responded to his earlier request, Chavis filed a motion to compel.[67] It appears the materials were provided to defense counsel, in part, at some point after September 26, 2017.[68] Several requested items were not provided and no explanation

[64] A66-69.
[65] A111.
[66] C1.
[67] C5.
[68] *See* Label for Discovery CD, attached hereto as Ex.A. As this Court is aware, the docket does not reflect the production of the requested DNA discovery. Counsel does have a CD containing the discovery discussed above. However, Counsel has not located a cover letter indicating when the CD was produced. As Chavis' initial trial counsel is no longer employed at the Office of Defense Counsel, subsequent trial counsel and appellate counsel have relied on the date on the CD label,

was given for the failure to provide this material.[69] Of particular note, however, was the State's failure to provide a complete response to the following request for proficiency tests:

> 12. Any and all scientific data and accompanying material generated by the Laboratory and/or in the possession of the Laboratory that relates to any and all open and/or blind trial proficiency testing and undeclared trial (double-blind) proficiency testing in which the Laboratory participated in at any time. This information should include, but is not limited to:
> a. Any schedule of all proficiency testing, to include for each set of samples the following information:
> 1. Dates on which proficiency test samples were received by the Laboratory;
> 2. Agency or internal Laboratory group which administered the test;
> 3. Number of samples received;

September 26, 2017. Counsel has not provided the actual CD at this time as it is not part of the record. However, Counsel will provide it if the Court deems it appropriate.

[69] 6. Provide STR profile of all technicians handling the specimens.
7. Describe precautions and QC/QA procedures used to ensure that PR contamination does not occur.
8. Provide a diagram of the laboratory to clearly show work areas for DNA isolation, pre-and-post PCR areas.
9. Copies of any and all materials, documents and/or reports relied upon and/or consulted the by Laboratory in reaching its analysis and conclusions in this case.
10. Copies of any and all documents and/or publications which contain an analysis or description of the allelic variations used by the Laboratory to establish its conclusion in this case.
11. Copies of all scientific publications, product guides and package inserts relied upon by the Laboratory in its analysis of the STR typing in this case. C2-3.

4. The age, origin and description of the samples;
5. Whether the test was a blind trial or an undeclared trial, and
6. The names of all analysts involved in the testing.[70]

While the State provided proficiency information for Siddons, it failed to provide general proficiency tests for the laboratory itself or any of the other analysts involved in the DNA testing in our case.

In addition to the forensic report that was introduced into evidence at trial,[71] the only portions of the specific information relating to DNA testing of evidence that was requested and received that became part of the record include:

Evidence Sample Inventory Sheet	A63
Reference Sample Inventory Sheet	A65
Evidence Sample Chain of Custody Report	A67
Reference Sample Chain of Custody Report	A69
Sarah Siddons' Affidavit	A40

5. The State's Proposed Framework Of "Producing Data" Versus "Preparing Samples" Does Not Adequately Encapsulate Modern DNA Testing, And Even If It Did, That Distinction Does Not Apply To This Case.

When applying *Crawford* in a case involving multi-analyst DNA testing, any distinction between testing analysts who "prepare samples" and those who "produce data" is false. Rather, in modern-day DNA testing, all analysts who participate in the testing process contribute to the production of data. Even Justice Breyer, in concurring with the plurality in *Williams*, noted that in multi-analyst DNA testing,

[70] C3.
[71] A109, B1-3.

"[s]ome or all of the words spoken or written by each technician out of court might well have constituted relevant statements offered for their truth and reasonably relied on by a supervisor or analyst writing the laboratory report."[72] He also highlighted an example cited by the dissent that demonstrates how confrontation is effective in exposing error that can occur anywhere in the DNA testing process.

In the example cited by Justice Breyer and by the dissent, one analyst, relying on a lab report, testified at a rape trial that the sample taken at the crime scene matched the sample taken from the defendant.[73] Later, that analyst realized the report erroneously listed the sample taken from the victim as coming from the defendant, and vice versa.[74] Luckily, the error was caught in time, (*i.e.* before conviction). Both opinions noted, however, that the human error in that case, possibly misreading the original sample labeling, would "probably not have come to light if the prosecutor had merely admitted the report into evidence or asked a third party to present its findings."[75] In other words, unless the specific analyst who made the error is confronted, that error might never be exposed.

Hypothetically, in our case, anyone of the testing analysts could have mislabeled a sample or made some other type of error. By excusing the analysts

[72] *Williams*, 567 U.S. at 90 (Breyer, J., concurring).
[73] *Id.* at 89 –90 (Breyer, J., concurring), 118 –19 (Kagan, J., dissenting).
[74] *Id.* at 118 –19 (Kagan, J., dissenting).
[75] *Id.* at 89 (Breyer, J., concurring), 119 (Kagan, J., dissenting).

who participated early in the testing process from testifying merely because the State has labeled them "sample preparers," these errors would never come to light. Thus, the State's proposed description is an artificial distinction that stresses form over substance.

Moreover, even if the Court were to accept the State's false dichotomy, none of the analysts in our case can be considered "sample preparers." As previously discussed, they all played active roles.[76] They were not mere button-pushers or lever-pullers in the scientific process. Rather, the stated purpose of their work was "analysis."[77] They identified the presence of DNA biological material, took precise measurements, took sample cuttings and added chemicals. And, they were required to follow protocols to prevent contamination and errors. Their work was neither mechanical nor ministerial in such a manner as to render their presence at trial unnecessary, at least as this Court has found outside the DNA analysis context.[78]

[76] A111.
[77] A067, 069.
[78] *See, e.g.*, *McNally v. State*, 116 A.2d 1232, 1235 (Del. 2015) (ruling that a laboratory employee who placed gunshot residue samples in a machine and turned the machine on was not required to appear at trial); *Demby v. State*, 695 A.2d 1127, 1132 (Del. 1997) (ruling that a currier transporting a sealed envelope was not required to appear at trial); *State v. Scott*, 2019 WL 1130370, at *3 (Del. Super. Feb. 8, 2019) (ruling *in limine* that a DUI defendant's Sixth Amendment rights would not be violated by the absence of the phlebotomist at trial because of the observations of the arresting officer during the blood draw).

6. The Violation Of Chavis' Right To Confront All Of The Testing Analysts In His Case Was Not Harmless Beyond Reasonable Doubt.

When the trial court prohibited all inquiry into various analysts' proficiency, veracity and care with which they may or may not have performed their part of the analysis, it violated Chavis' rights secured by the Confrontation Clause.[79] The not-fully-impeached evidence affected the reliability of the factfinding process at Chavis' trial. In other words, denying Chavis the ability to fully realize the "damaging potential of the cross-examination" of each of the lab analysts was not harmless beyond a reasonable doubt.[80] This conclusion takes into account several factors, including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case."[81]

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[79] *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (finding that when the trial court prohibited all inquiry into an event that took place and was probative of the witness' bias, it violated the defendant's right to confrontation).

[80] *Van Arsdall*, 475 U.S. at 684.

[81] *Id.* (citations omitted).

a) The testimony of all of the testing analysts was crucial to the State's case as it was necessary for the introduction of the only piece of evidence linking Chavis to the scene of the crime of which the jury subsequently convicted him.

The State relied on the DNA test results in order to link Chavis to the scene of the burglary – the only one of 11 charges of which the jury convicted him. There was no other evidence linking him to that crime. Because the report and Siddons relied upon the implicit and explicit out-of-court testimonial statements, it was inadmissible without the testimony of the lab analysts involved in the testing. Accordingly, the testimony of those analysts was crucial to the State's case.

b) The testimony of the testing analysts would not have been cumulative.

Siddons' explanations and assurances do not render the other testing analysts' testimony cumulative, corroborative, or unnecessary. The absent forensic analysts had knowledge of evidentiary facts from their active participation in the testing process that Siddons did not have. Further, Siddons was unable to provide anything to the jury about the qualifications, credentials, or any certifications the other analysts may have had, and whether those certifications were up-to-date. And, the concurrent exodus of Aponte and Chen from Bode remained a mystery. [82] Thus, in addition to the quality of the technical work performed by each of the analysts in this case, the

[82] A110.

jury was left to speculate as to the professional competence of those performing that work.[83]

c) No other cross-examination on the proficiency, care and veracity of the absent lab analysts was available.

The United States Supreme Court has noted that "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials." [84] The U.S. Supreme Court has noted time and again that questioning the testing—certifying analyst under oath enables "counsel to raise before a jury questions concerning [the analyst's] proficiency, the care he took in performing his work, and his veracity."[85] Accordingly, the testimony of another witness, such as Siddons, regarding the actions of the other analysts cannot satisfy a defendant's right to confront and cross-examine the testing analysts. Therefore, Chavis was entitled to cross examine the testing analysts in this case.

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[83] As the dissent in *Williams* noted, "[s]cientific testing is "technical," to be sure, […] but it is only as reliable as the people who perform it. That is why a defendant may wish to ask the analyst a variety of questions: How much experience do you have? Have you ever made mistakes in the past? Did you test the right sample? Use the right procedures? Contaminate the sample in any way? Indeed, as scientific evidence plays a larger and larger role in criminal prosecutions, those inquiries will often be the most important in the case." *Williams*, 567 U.S. at 137 (Kagan, J. dissenting).

[84] *Melendez-Diaz*, 557 U.S. at 319.

[85] *Martin*, 60 A.3d at 1103 (*quoting Bullcoming* 564 U.S. at 661-662 n7)

d) The State's case relied solely on the DNA test results.

The *only* evidence that linked Chavis to the crime for which he was convicted was the DNA evidence at issue. He was convicted of only one out of eleven charges, six being alleged burglaries or attempted burglaries. The burglary for which Chavis was convicted was the only one that alleged the presence of DNA evidence. Several other forms of evidence were produced by the State in an attempt to link Chavis to other burglaries. That evidence, all of which the jury discredited, included surveillance footage, photographs, and cell phone data.[86] Chavis' sole conviction makes clear that the jury was convinced by only one piece of evidence: the DNA. Therefore, it cannot be concluded that any errors in the admission of this evidence was harmless beyond a reasonable doubt.

In any event, the violation of Chavis' "particular guarantee" of the right to confrontation under the Sixth Amendment could not be cured by the "substitute procedure" of simply calling Siddons to testify.[87] And, "[n]o additional showing of prejudice is required to make the violation 'complete.'"[88] Because the trial court denied him that right, his conviction must be reversed.

[86] A84–91.
[87] *Bullcoming*, 564 U.S. at 663.
[88] *Id.* (*quoting United States v. Gonzalez–Lopez*, 548 U.S. 140, 146 (2006)).

CONCLUSION

For the reasons and upon the authorities cited herein, Chavis' conviction must be reversed.

Respectfully submitted,

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