IN THE
THE SUPREME COURT OF THE UNITED STATES

STATE OF SETONIA,

Petitioner,

v.

MR. JACK BAUER,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SETONIA

BRIEF FOR RESPONDENT

Counsel for Respondent
QUESTIONS PRESENTED

This case presents two issues that strike at the heart of American criminal procedure.

Specifically:

1. Whether law enforcement must expressly advise a suspect of the right to have an attorney present during custodial interrogation and, if not, whether the Supreme Court of Setonia correctly decided that informing a suspect of the right “to talk to a lawyer before answering any of our questions” and of the right “to use any of these rights at any time you want during this interview” is not a fully effective equivalent to Miranda because such warnings misleadingly suggest that an attorney may be consulted only before interrogation.

2. Whether the Supreme Court of Setonia correctly decided that when a state introduces a forensic report but fails to present the live testimony of the forensic in its case-in-chief, the state still violates the Confrontation Clause even if the defendant has the opportunity to subpoena the analyst.
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The decision of the Supreme Court of Setonia No. 009-0024 is unreported and can be found at pages one through fourteen of the record.

STATEMENT OF JURISDICTION

Under 28 U.S.C. § 1257(a) (2006), this Court has jurisdiction to review final judgments rendered by the highest court of a state when the state court decides issues of federal constitutional law.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: “No person . . . shall be compelled in any criminal case to be a witness against himself . . . .”

The Sixth Amendment to the United States Constitution provides in relevant part: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him [and] to have compulsory process for obtaining witnesses in his favor.”

The Fourteenth Amendment to the United States Constitution provides in relevant part: “[No] State [shall] deprive any person of life, liberty, or property, without due process of law.”

Setonia Code § 19.2-187 (2008) provides in relevant part that “In any hearing or trial of any criminal offense . . . a certificate of analysis of a person performing an analysis or examination, duly attested by such person, shall be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination rendered to therein, provided (i) the certificate of analysis is filed with the clerk of the court hearing the case at least seven days prior to the proceeding if the attorney for the State intends to offer it into evidence. . . .”

Setonia Code § 19.2-187.1 (2008) provides in relevant part that “The accused in any hearing or trial in which a certificate of analysis is admitted into evidence pursuant to § 19.2-187
shall have the right to call the person performing such analysis or examination or involved in the
chain of custody as a witness therein, and examine him in the same manner as if he had been
called as an adverse witness. Such witness shall be summoned and appear at the cost of the
State.”
STATEMENT OF THE CASE

Mr. Jack Bauer, a twenty-five year resident of Brick City, Setonia, was arrested on December 1, 2008, after the police executed a search warrant for Mr. Bauer’s Brick City apartment. (R. at 2-3.) During the search, the police seized two scales, a razorblade, a 100-gram weight, a box of plastic sandwich bags, a plate, and a white, powdery substance. (R. at 3.) Police immediately arrested Mr. Bauer, transported him to police headquarters, and sequestered him in a cramped interrogation room. (R. at 3.) Mr. Bauer then received Miranda warnings read from the Setonia Standard Police Department Form 311 (“Setonia Form”) which states:

You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

(R. at 3.) After being asked if he understood these rights as read to him and responding affirmatively, Mr. Bauer signed a release form which reprinted verbatim the rights read to him from the Setonia Form. (R. at 3.) Mr. Bauer then made incriminating statements. (R. at 3.)

Based on the evidence gathered and statements extracted from Mr. Bauer, he was indicted on felony charges of possession of cocaine with the intent to distribute and conspiracy to distribute cocaine, and a misdemeanor charge of possession of a controlled substance. (R. at 4.) At trial, the government introduced Mr. Bauer’s incriminating statements and, pursuant to section 19.2-187 of the Setonia Code,¹ two certificates of analysis identifying the seized

¹ Setonia Code § 19.2-187 provides in pertinent part that “In any hearing or trial of any criminal offense… a certificate of analysis of a person performing an analysis or examination, duly attested by such person, shall be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination rendered to therein, provided (i) the certificate of analysis is filed with the clerk of the court hearing the case at least seven days prior to the proceeding if the attorney for the State intends to offer it into evidence. . . .” Setonia Code § 19.2-187 (2008). Setonia Code § 19.2-187.1 provides in pertinent part that “[t]he accused in any hearing or trial in which a certificate of analysis is admitted into evidence pursuant to § 19.2-187

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substance as cocaine. (R. at 4.) The certificates bore the signature and attestation of a forensic
analyst confirming that the forensic performed the tests and that the certificates were accurate.
(R. at 4.)

Defense counsel made a timely objection to the introduction of the statements, arguing
that the Setonia Form violated Mr. Bauer’s Fifth Amendment rights under Miranda v. Arizona,
384 U.S. 436 (1966). (R. at 4-5.) Defense counsel also objected to the introduction of the
certificates, arguing that they were testimonial in nature and that the prosecution’s introduction
of them at trial violated Mr. Bauer’s Sixth Amendment right to confrontation under Melendez-
Diaz v. Massachusetts, 129 S. Ct. 2527 (2009). (R. at 4-5.) Judge Allison Taylor overruled both
objections. (R. at 4-5.)

Based on the certificates and incriminating statements introduced at trial, Mr. Bauer was
convicted on charges of possession with the intent to distribute and possession of a controlled
substance. (R. at 5.) Mr. Bauer received concurrent sentences of ten years in prison for the
intent to distribute conviction and one year in prison for the possession of a controlled substance
conviction. (R. at 5.) Under Setonia law, Mr. Bauer appealed directly to the Supreme Court of
Setonia (R. at 5) which vacated Mr. Bauer’s conviction and remanded (R. at 10). The Supreme
Court held that Mr. Bauer was not clearly informed of his Miranda right to have an attorney
present during questioning (R. at 8) and that submitting certificates of analysis without
presenting the live testimony of the forensic in the government’s case-in-chief violated the
filed for a writ of certiorari to this Court which was granted on January 22, 2010.
SUMMARY OF THE ARGUMENT

1. The decision of the Supreme Court of Setonia to vacate Mr. Bauer’s conviction and suppress his incriminating statements should be affirmed because Mr. Bauer was not expressly advised of his right to have an attorney present during questioning. *Miranda v. Arizona*, 384 U.S. 436 (1966), announced a bright-line rule that a suspect must be clearly advised of the right to have an attorney present during custodial interrogation. This Court should resolve the current circuit split over whether *Miranda* requires that law enforcement expressly advise a suspect of the right to have counsel present during questioning in favor of an express warning. Express warning circuits recognize that the right to have counsel present during interrogation is a core requirement of *Miranda*, an express warning is crucial to its protection, and an express warning poses no burden to law enforcement.

   An express warning is critical to protecting the core values underlying the *Miranda* right to counsel. Without an express warning, a suspect is not fully informed of the scope of the *Miranda* right to counsel and thus cannot make a knowing and intelligent waiver. Furthermore, in order for a suspect to clearly and unambiguously assert the *Miranda* right to counsel as required under *Davis v. United States*, 512 U.S. 452 (1994), the initial warning must be equally precise. Finally, the clarity that an express warning provides law enforcement and courts is consistent with the bright-line character of *Miranda* and is essential to its substantive protections.

   An express warning poses no burden to law enforcement. Over ninety-six percent of law enforcement agencies already use express warnings, and express warnings ensure that more uncoerced confessions reach the trier-of-fact. Moreover, losing confessions secured by failing to inform fully a suspect of the right to have counsel present during questioning cannot be a constitutionally relevant cost. Such confessions are precisely those that *Miranda* presumes are coerced and must be suppressed. Finally, an express warning does not burden law enforcement
by requiring the use of “magic words” because an express warning can be articulated using many different verbal formulations.

Even if this Court finds that *Miranda* does not require an express warning, the decision of the Supreme Court of Setonia should be affirmed because the Setonia Form is not a fully effective equivalent to *Miranda*. Any warning that temporally restricts the right to an attorney, as does the most natural reading of the Setonia Form, violates *Miranda*. To approve of the Setonia Form would blur a once clear line for law enforcement, destroy the bright-line quality of *Miranda*, and encourage law enforcement to dilute further *Miranda*’s core protection, a result this court cannot countenance.

2. As to the Confrontation Clause issue, the decision of the Supreme Court of Setonia to vacate Mr. Bauer’s conviction should be affirmed because prosecution by affidavit violates the Confrontation Clause. Under Setonia’s regime, the prosecution may submit forensic reports in lieu of the live testimony of the forensic during the state’s case-in-chief, as long as the state allows the defendant to subpoena the forensic. This Court rejected this procedure just last term in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), and this Court should affirm *Melendez*.

Depriving defendants of confrontation rights during the prosecution’s case-in-chief clashes with the longstanding constitutional principle that the state has the burden of establishing guilt beyond a reasonable doubt. A defendant cannot demonstrate that the state has failed to meet its burden unless the defendant can, during the state’s case-in-chief, utilize the two fundamental protections that the Confrontation Clause guarantees: face-to-face confrontation and cross-examination.

Additionally, prosecution by affidavit deprives defendants of the right to meaningful, effective confrontation. Setonia’s regime dilutes the value of face-to-face confrontation by diminishing a lying witness’ experience of guilt. Witnesses are not required to state openly their
accusations, but instead need only repeat lies already submitted to the jury via their affidavits. Moreover, it is easier for a dishonest witness to lie when answering “yes” or “no” to leading questions as an adverse witness than it is to lie when fully stating an accusation to the jury as a witness for the prosecution. Lastly, prosecution by affidavit transforms cross-examination into adverse witness questioning, which, for many reasons, dilutes the effectiveness of a defendant’s cross-examination. The result of this restructuring of the criminal trial is that defendants will experience a real impact on their ability to fight for their freedom.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE DECISION OF THE SUPREME COURT OF SETONIA BECAUSE MIRANDA REQUIRES THAT A SUSPECT BE EXPRESSLY ADVISED OF THE RIGHT TO HAVE AN ATTORNEY PRESENT DURING INTERROGATION, A WARNING DENIED TO MR. BAUER.

Miranda v. Arizona, 384 U.S. 436 (1966), announced that law enforcement must clearly advise a suspect of the right to have counsel present during custodial interrogation. Federal circuit courts faithful to Miranda require an express warning, as have the vast majority of law enforcement agencies across the country. Expressly articulating the right to have counsel present during questioning is crucial to protecting the Miranda right to counsel and poses absolutely no burden to law enforcement. Because Mr. Bauer was not expressly advised of his right to have counsel present during questioning, this Court should affirm the decision below.

A. Miranda Announced That a Suspect Must Be Clearly Advised of the Right to Have Counsel Present During Custodial Interrogation, a Requirement That This Court Has Repeatedly Affirmed.

Forty-four years ago, recognizing the inherently coercive and compelling pressures of incommunicado interrogation in a police dominated environment, this Court declared that the presence of counsel during questioning is indispensible to the protection of the Fifth Amendment privilege against self-incrimination. Miranda v. Arizona, 384 U.S. 436, 469 (1966). For the presence of counsel during questioning not only protects against police coercion, but also ensures
that any incriminating statements made are accurate. Id. at 470. Consistent with these principles, *Miranda* announced a constitutional rule that “the Fifth Amendment privilege comprehends not merely a right to counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.” Id.; accord *Edwards v. Arizona*, 451 U.S. 477, 485-86 (1981) (“The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation.”). In fact, just last term, this Court reiterated that *Miranda* protects the right to have an attorney present during custodial interrogation. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2090 (2009).

In order to protect vigorously the right to have an attorney present during questioning, *Miranda* demands that an individual “must be clearly informed [of] the right to consult with a lawyer and to have the lawyer [present] during interrogation.” 384 U.S. at 471 (emphasis added). Without providing this warning to a suspect prior to interrogation, “no amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.” Id. at 472-73. And in the four decades since *Miranda*, this Court has never retreated from this principle. To the contrary, it has repeatedly rearticulated the requirement that law enforcement must clearly advise a suspect of the right to have an attorney present during custodial interrogation. *See, e.g., Davis v. United States*, 512 U.S. 452, 457 (1994) (“[W]e held in *Miranda v. Arizona* . . . that a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and that police must explain this right [] before questioning begins.”); *see also Duckworth v. Eagan*, 492 U.S. 195, 204 (1989) (*Miranda* requires “that the suspect be informed, as here, [of] the right to an attorney before and during questioning . . . .”); *Fare v. Michael C.*, 442 U.S. 707, 717 (1979) (“The rule the Court established in *Miranda* is clear. In order to be able to use statements obtained during
custodial interrogation of the accused, the State must warn the accused prior to questioning . . . of [the] right to have counsel, retained or appointed, present during interrogation.”).

B. Circuit Courts Requiring an Express Warning Recognize That an Express Warning Is Critical to Protecting the Right to Have Counsel Present During Questioning, a Core Requirement of Miranda, and Poses No Burden to Police.

This Court should resolve the current circuit split in favor of an express warning because circuit courts requiring an express warning recognize that an express warning is crucial to protecting the core Miranda right of having counsel present during questioning, and properly balance Fifth Amendment rights against the legitimate needs of law enforcement. The Fifth, Sixth, Ninth, and Tenth Circuits have explicitly held that warnings that do not expressly articulate the right to have an attorney present during questioning are constitutionally defective under Miranda. See, e.g., Atwell v. United States, 398 F.2d 507, 510 (5th Cir. 1968); United States v. Tillman, 963 F.2d 137, 140-42 (6th Cir. 1992); United States v. Noti, 731 F.2d 610, 615 (9th Cir. 1984); United States v. Anthon, 648 F.2d 669, 672-74 (10th Cir. 1981). The Ninth Circuit, in United States v. Noti, 731 F.2d 610, 615 (9th Cir. 1984), rested its analysis on the fact that having counsel present during questioning is a core requirement of Miranda, advisement of that right is vital to its protection, and administering express warnings does not burden law enforcement.

both involved challenges to warnings that expressly articulated the right to have counsel present during interrogation, and thus only serve to reinforce that express warnings are required under *Miranda*. Worse still, circuits that do not require express warnings also rely on the unsubstantiated presumption that general warnings are sufficiently clear to inform the average suspect of the specific right to have counsel present during questioning, *see, e.g.*, Frankson, 83 F.3d at 81-82, presumptions that ignore social science data, *see* Adam S. Bazelon, Comment, *Adding (or Reaffirming) a Temporal Element to the Miranda Warning “You Have the Right to An Attorney,”* 90 Marq. L. Rev. 1009, 1032–33 (2007). The constitutional right to have an attorney present during questioning cannot be eroded by unpersuasive reasoning that strays from *Miranda*’s definitive mandate that suspects be *clearly advised* of the right to have counsel present during questioning. *Miranda*, 384 U.S. at 471. Ultimately, what non-express warning circuits ignore is that an express warning is critical to protecting the *Miranda* right to counsel and poses absolutely no burden to police. *See Noti*, 731 F.2d at 615.

C. **An Express Warning Is Essential to Protecting the *Miranda* Right to Counsel and Poses No Burden to Law Enforcement.**

*Miranda* struck a careful balance between Fifth Amendment liberties and the legitimate needs of law enforcement. *Moran v. Burbine*, 475 U.S. 412, 427 (1986). Thus, when this Court considers the boundaries of the constitutionally required *Miranda* warnings, it balances the benefits of protecting core *Miranda* rights against any possible costs to law enforcement. *See Montejo*, 129 S. Ct. at 2089; *Davis*, 512 U.S. at 461-62. This Court has declined to extend the boundaries of *Miranda* when the incidental benefits are insufficient to justify the exclusion of confessions from trial. *See Montejo*, 129 S. Ct. at 2090-91 (refusing to attach *Edwards* protection to the Sixth Amendment right to counsel when the justifying policy already is adequately served and imposes significant costs on obtaining voluntary confessions); *Moran*, 475 U.S. at 427 (1986) (finding police need not advise suspect of counsel’s attempts at contact
because the minimal benefits protecting the Fifth Amendment right to counsel come at
substantial costs to securing confessions). But unlike the substantial costs and peripheral
benefits of the proposed protections rejected in *Louisiana v. Montejo*, 129 S. Ct. 2079 (2009) and
*Moran v. Burbine*, 475 U.S. 412 (1986), expressly advising a suspect of the right to have counsel
present during interrogation is necessary for a suspect to waive or invoke the *Miranda* right to
counsel, serves the bright-line character of *Miranda*, and poses no burden to law enforcement.
See *Noti*, 731 F.2d at 615.

1. **An express warning is necessary for a suspect to effectuate a knowing and
   intelligent waiver of the *Miranda* right to counsel.**

Expressly advising a suspect of the right to have counsel present during questioning
ensures that a suspect comprehends the full scope of the *Miranda* right to counsel so that any
subsequent waiver is valid. Waiver of the Fifth Amendment right to counsel requires not only
that the waiver be voluntary, but also that the suspect have “knowledge essential to [the] ability
to understand the nature of [the] right and the consequences of abandoning them.” See *Moran*,
475 U.S. at 423. Furthermore, the Fifth Amendment right to counsel under *Miranda* is of an
importance so paramount that this Court requires “special protection of the knowing and
intelligent standard.” *Davis*, 512 U.S. at 458; *cf. Edwards*, 451 U.S. at 483 (establishing a
bright-line prohibition on police-initiated interrogation after suspect invokes the *Miranda* right to
counsel).

Because *Miranda* explicitly established an individual right to have counsel present during
questioning, 384 U.S. at 470, failing to articulate expressly that right deprives criminal suspects
of information essential to understanding the full scope of the *Miranda* right to counsel. Even
the general warning that a suspect has “the right to the presence of counsel” does not clearly
inform a suspect of the right to have counsel present during interrogation. Most criminal
suspects do not possess the ability to infer from a general warning the specific right to counsel
during custodial interrogation. See Tillman, 963 F.2d at 141 (“Although we as judges and lawyers may be aware of the link between these elements we cannot be so presumptuous as to think that it would be common knowledge to laymen.”); Bazelon, supra, at 1032–33. Thus, a suspect who is not expressly advised of the right to have counsel present during questioning does not have knowledge essential to understand fully the scope of the *Miranda* right to counsel and cannot effectuate a valid waiver under the precedent of this Court. See Moran, 475 U.S. at 423.

2. **An express warning provides the clarity necessary for a suspect to invoke effectively the *Miranda* right to counsel.**

Requiring an express warning also protects a suspect’s ability to invoke effectively the right to counsel. Under *Davis v. United States*, 512 U.S. 452, 459-61 (1994), a suspect must affirmatively and unambiguously invoke the right to counsel in order for questioning to cease. *Davis*’s demand for clarity when invoking the right to counsel makes the need for an express warning all the more compelling. It is unreasonable to require suspects to make a clear request for counsel when the warning articulating that right is itself ambiguous. Such inequity in the *Miranda* right to counsel invocation and warning articulation requirements is particularly troublesome because many criminal suspects are indigent and lack sophisticated or even basic linguistic skills. See Bazelon, supra, at 1029–32. Thus, in order to ensure that even the least sophisticated suspect can clearly and unambiguously assert the *Miranda* right to counsel, the initial warning should be equally precise.

3. **An express warning reinforces the bright-line character of *Miranda* and sets clear constitutional boundaries for law enforcement and courts.**

*Miranda* imposed a carefully crafted bright-line rule in order to reign in overzealous police practices and dispel the inherently compelling pressures of custodial interrogation. 384 U.S. at 444, 466. Not only is the bright-line character of *Miranda* easier for police to follow than the pre-*Miranda* totality of the circumstances test, but it is also easier for courts to apply
consistently. *Dickerson v. United States*, 530 U.S. 428, 444 (2000). Requiring express warnings will serve the bright-line character of *Miranda*. Express warnings will resolve any ambiguity concerning the substantive requirements of the right to counsel warning and serve as a clear guide for law enforcement officers. Further, express warnings will conserve judicial resources by reducing *Miranda* challenges in the courts and expediting judicial review of those that remain.

4. **An express warning poses no burden to police, has been adopted by almost every law enforcement agency in the United States, and would reduce the number of voluntary confessions that must be suppressed.**

Setonia has not identified any relevant costs, let alone substantial ones, associated with express warnings—nor can it. An express articulation of the right to have counsel present during questioning requires only that law enforcement officials add one simple phrase to the general warning when Mirandizing criminal suspects: “during interrogation.” In fact, in a recent study, social scientists found that nearly all of the *Miranda* warning forms from federal, state, and local law agencies in over 600 jurisdictions contained an explicit reference to the right to have an attorney present *during interrogation*. See Richard Rodgers et al., *The Language of Miranda Warnings in American Jurisprudence: A Replication and Vocabulary Analysis*, 32 Law & Hum. Behav. 124 (2008) (finding 96.6 percent of warnings surveyed include a warning of the right to have counsel present either “during questioning” or “before and during questioning”). Standard police practices thus confirm that express warnings do not burden law enforcement.

Petitioners may argue that requiring express warnings would prevent the police from obtaining uncoerced confessions and keep otherwise voluntary confessions from the trier-of-fact. Nothing could be further from the truth. Express warnings can only serve to reduce the number of voluntary confessions that courts must suppress. Confessions obtained after administering *Miranda* warnings that explicitly inform a suspect of the right to have counsel present during
questioning are less susceptible to a *Miranda* challenge. *Cf. Noti*, 731 F.2d at 615 (noting that reading precise warnings from prepared cards reduces the chance of constitutionally defective *Miranda* warnings). For the suspect who receives express warnings cannot credibly claim that any subsequent waiver was not knowing and intelligent. Thus, more confessions will reach the trier-of-fact, not less, and those that do will be all the more credible and reliable.

But even if fewer confessions reached the trier-of-fact, confessions obtained by failing to inform fully a suspect of the Fifth Amendment right to counsel are precisely those that *Miranda* presumes are coerced and must be suppressed. 384 U.S. at 469-72. To the point, cases where the loss of otherwise uncoerced confessions trump Fifth Amendment protective rules rest their analysis on the fact that law enforcement fully advised the accused of the right to have counsel present during custodial interrogation. *See, e.g., Oregon v. Elstad*, 470 U.S. 298, 311 (1985) (finding initial *Miranda* defective statement did not require exclusion of subsequent *Miranda* compliant statement because suspect received all relevant information necessary to waive the right to counsel before second interrogation); *see also Moran*, 475 U.S. at 423 (finding failure to inform suspect of counsel attempts at contact did not violate *Miranda* because suspect was not deprived of knowledge essential to understand the *Miranda* right to counsel). Thus, if any confessions are lost, they are coerced confessions, not constitutionally voluntary confessions.

5. **An express warning does not burden police by requiring the use of “magic words.”**

Requiring that police expressly advise a criminal suspect of the right to have an attorney present during questioning does not result in the kind of linguistic rigidity that *Miranda* rejected. Although this Court has been clear that there is no precise verbal formulation required to satisfy the strictures of *Miranda*, *see Duckworth*, 492 U.S. at 203, law enforcement officials can deliver an express warning using many different verbal formulations including: “You have the right to have an attorney present while we question you,” “You have a right to consult with an attorney
prior to and at any time during interrogation,” and “You have the right to an attorney that begins now and continues throughout any questioning.” Because law enforcement can formulate many different warnings that expressly advise a suspect of the substantive right to have an attorney present during questioning—as Miranda demands—expressly articulating this right does not burden police by requiring the kind of “talismanic incantation” that this Court has repudiated. See Prysock, 453 U.S. at 359-60.

D. The Police Failed to Advise Expressly Mr. Bauer of His Right to Have an Attorney Present During Custodial Interrogation.

Instead of expressly informing Mr. Bauer of his right to have counsel present during questioning, police told Mr. Bauer: “. . . You have the right to a lawyer before answering any of our questions . . . You have the right to use any of these rights at any time you want during this interview.” (R. at 3.) This warning, which suggests that the right to a lawyer is temporally limited to the period before questioning, is ambiguous at best. Having failed to advise expressly Mr. Bauer of his right to have counsel present during custodial interrogation, Setonia violated Mr. Bauer’s constitutional rights under Miranda. 384 U.S. at 471. Thus, the decision of the Supreme Court of Setonia reversing Mr. Bauer’s conviction and suppressing his unconstitutionally obtained confession should be affirmed.

II. THIS COURT SHOULD AFFIRM THE DECISION BELOW BECAUSE THE SETONIA FORM IS NOT A FULLY EFFECTIVE EQUIVALENT TO THE SUBSTANTANCE OF MIRANDA.

Even if this Court finds that Miranda does not require that a suspect be expressly advised of the right to have counsel present during custodial interrogation, this Court should affirm the decision below. The language of the Setonia Form suggests that the right to an attorney is limited to the period before questioning. Because any temporal restriction on a suspect’s right to counsel is not a fully effective equivalent to the substance of Miranda, the use of the Setonia Form violates Miranda.
A. Any Deviation from the Warnings Expressly Articulated in Miranda Is Constitutionally Defective Unless the Warning Is a Fully Effective Equivalent.

The Court in *Miranda v. Arizona*, 384 U.S. 436, 479 (1966), announced that law enforcement officials must clearly advise a suspect as follows:

“[You] ha[ve] the right to remain silent, [.] anything [you] say[.] can be used against [you] in a court of law, [.] [you] ha[ve] the right to the presence of an attorney, [.] if [you] cannot afford an attorney one will be appointed for [you] prior to any questioning . . . .”


B. The Setonia Form, Which Temporally Restricts the Right to Counsel to the Period Before Questioning, Is Not a Fully Effective Equivalent to Miranda.

The Setonia Form does not serve as a full and effective equivalent to *Miranda* because it misleads a suspect into thinking that the right to counsel is limited to the period before questioning. Warnings do not fully and effectively convey the core protections of *Miranda* if
they impose a temporal restriction on the right to counsel. See Prysock, 453 U.S. at 360 (upholding warnings that fully articulate the right to counsel prior to and during questioning and distinguishing those linking the right to some point after interrogation).

Although the circuit courts are divided on whether law enforcement must expressly advise a suspect of the right to have counsel present during questioning, compare Atwell v. United States, 398 F.2d 507, 510 (5th Cir. 1968) (requiring express warning), with United States v. Burns, 684 F.2d 1066, 1074-75 (2d Cir. 1982) (express warning not constitutionally required), they uniformly agree that warnings suggesting a temporal restriction on the right to counsel do not fully and effectively articulate the core requirements of Miranda. Circuits that require express warnings reject “before questioning” warnings as omitting a material element of Miranda. See, e.g., United States v. Noti, 731 F.2d 610, 615 (9th Cir. 1984). Circuits that allow general warnings do so because the right to counsel is neither temporally limited nor misleading. See, e.g., United States v. Caldwell, 954 F.2d 496, 503 (8th Cir. 1992) (“[T]he general warning . . . could not have misled Caldwell into believing that an attorney could not be present during questioning.”). In these circuits, the general warning clearly articulates that “the right to an attorney beg[ins] immediately and continue[s] forward in time without qualification.” United States v. Frankson, 83 F.3d 79, 82 (4th Cir. 1996).

The Setonia Form employs the precise temporal limitation that has been rejected by this Court and every federal circuit. Instead of receiving a general warning or an express warning, the police advised Mr. Bauer that he has “the right to talk to a lawyer before answering any of [their] questions.” (R. at 3.) Read alone, this warning in no uncertain terms restricts the right to counsel to the period prior to interrogation. The catchall provision in the final sentence of the Setonia Form, “[y]ou have the right to use any of these rights at any time during this interview” (R. at 3), does not cure this constitutional defect. The only right to counsel that the catchall
provision could have conveyed to Mr. Bauer was the previously articulated right to consult with an attorney prior to questioning. The best that can be said of these warnings is that when read together they advise a suspect of the right to go and talk to a lawyer between questions, which is decidedly deficient under *Miranda*. 384 U.S. at 471.

C. **Condoning the Setonia Form Warnings Would Undermine the Bright-Line Character of *Miranda* and Encourage Police to Dilute Further *Miranda*’s Substantive Protections.**

To countenance the Setonia Form, which requires a suspect to read two sentences together and extrapolate from their conjunction a right that is not clearly articulated in either, would erode *Miranda*’s bright-line character which is critical to its substantive protections. *Miranda* imposed a rigid constitutional framework during custodial interrogation because, in practice, the line between voluntary and coerced confessions obtained during questioning is ambiguous at best. *Seibert*, 542 U.S. at 608 (plurality opinion) (quoting *Dickerson*, 530 U.S. at 443). In short, *Miranda* drew a bright-line that cannot be crossed in order to prevent police from overreaching where boundaries are vague and coercion is likely. Thus, the ease and clarity of *Miranda*’s application is essential to ensure its efficacy. *See Moran v. Burbine*, 475 U.S. 412, 425-26 (1986) (noting that the benefits of *Miranda* depend on the “ease and clarity of its application”).

Sanctioning Setonia’s misleading warnings would blur a line that has been clear for virtually every law enforcement agency across the country. *See* discussion, *supra* I(C)(4). These law enforcement agencies would no longer have any incentive to articulate clearly the right to have counsel present during interrogation, but would have every incentive to adopt Setonia’s ambiguous and misleading warnings. Even worse, rejecting the ease and clarity that are the hallmark of *Miranda* would encourage police to develop warnings even more equivocal than those at issue here. The history of *Miranda* shows that some law enforcement agencies attempt
to dilute and even avoid entirely the rigid protections of *Miranda*. See, e.g., *Seibert*, 542 U.S. at 662 (Kennedy, J., concurring) (striking down two-step interrogation procedure specifically calculated to undermine *Miranda*); see also Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators’ Strategies for Dealing with the Obstacles Posed by Miranda*, 84 Minn. L. Rev. 397, 431-451 (1999) (discussing strategies carefully tailored to minimize the importance of *Miranda* and induce waiver). Given the propensity of the police to push the limits of *Miranda*, muddying the once clear waters of the *Miranda* right to counsel would encourage law enforcement to blur *Miranda*’s other well-defined boundaries, like “the right to remain silent.”

*Miranda* was decided in response to police tactics that were so coercive that “[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces . . . cannot be otherwise than under compulsion to speak.” 384 U.S. at 461. The police have abandoned physical violence to force confessions, but the compelling and coercive conditions of questioning continue today in the form of carefully crafted and refined interrogation techniques that exert severe psychological pressure and often illicit false confessions. *See generally* Richard A. Leo, *Police Interrogation and American Justice* (Harvard Univ. Press 2008). Although *Miranda* does not require the use of any particular formulation to satisfy its strictures, *Duckworth*, 492 U.S. at 202-03, this Court should not allow the police to use patently misleading warnings. To do so would tear down the only wall of protection available to an individual who is confined, confused, and facing the intimidating presence of police power in the isolation of the interrogation room. Accordingly, this Court should affirm the decision of the Supreme Court of Setonia.
III. THIS COURT SHOULD AFFIRM WITH RESPECT TO THE CONFRONTATION CLAUSE ISSUE BECAUSE MELENDEZ’S REJECTION OF PROSECUTION BY AFFIDAVIT IS CONTROLLING.

Just last term, Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2540 (2009), held that prosecution by affidavit violates the Confrontation Clause:

Respondent asserts that we should find no Confrontation Clause violation in this case because petitioner had the ability to subpoena the analysts. But that power - whether pursuant to state law or the Compulsory Process Clause - is no substitute for the right of confrontation. Unlike the Confrontation Clause, those provisions are of no use to the defendant when the witness is unavailable or simply refuses to appear. 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. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via ex parte affidavits and waits for the defendant to subpoena the affiants if he chooses.

(emphasis added). Ignoring Melendez’s explicit holding, Petitioner asks this Court to reopen the issue, advancing the same argument rejected in Melendez: a state can introduce a forensic lab report without presenting the forensic’s live testimony if the defendant has the opportunity to subpoena the forensic. Id. In so arguing, Setonia claims that Melendez’s rejection of the prosecution by affidavit procedure was mere dicta. The history of the Melendez proceedings undermines this argument. First, both parties briefed the issue. Brief of Respondent at 57, Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009) (No. 07-591); Reply Brief of Petitioner at 20-23, Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009) (No. 07-591). Then, a majority of this Court explicitly rejected the prosecution by affidavit scheme, Melendez, 129 S. Ct. at 2540, and the dissent addressed the issue on its merits, id. at 2556-57 (Kennedy, J., dissenting). Finally, the prosecution by affidavit procedure was essential to Melendez’s holding because if this procedure were constitutional, this Court would have affirmed, not reversed, Melendez-Diaz’s conviction. See Stein v. New York, 346 U.S. 156, 189 (1953) (dicta is the
discussion of an issue that is not essential to the outcome of the case), overruled in part on other grounds by Jackson v. Denno, 378 U.S. 368 (1964).

In sum, Melendez held just last term that the prosecution cannot “present[] its evidence via ex parte affidavits.” Stare decisis discourages overturning a decision before it reaches its first birthday. Arizona v. Gant, 129 S. Ct. 1710, 1722 (2009). And, as will be established below, this Court should affirm Melendez in order to avert a threat to Confrontation Clause rights.

IV. THIS COURT SHOULD AFFIRM THE DECISION BELOW BECAUSE DEPRIVING DEFENDANTS OF CONFRONTATION RIGHTS DURING THE STATE’S CASE-IN-CHIEF CLASHES WITH THE LONG-STANDING CONSTITUTIONAL PRINCIPLE THAT THE STATE BEARS THE BURDEN OF ESTABLISHING GUILT BEYOND A REASONABLE DOUBT.

Even if this Court were willing to entertain a challenge to Melendez, this Court should affirm Melendez because prosecution by affidavit denies defendants confrontation rights during the state’s case-in-chief. Depriving defendants of their right to cross-examine and confront face-to-face during the prosecution’s case-in-chief clashes with the longstanding principle that the state bears the burden to prove the defendant’s guilt beyond a reasonable doubt, a position supported by Melendez, Taylor v. Illinois, 484 U.S. 400 (1988), and the Sixth Amendment’s text. Moreover, there is no basis to distinguish between forensic reports and other forms of testimony. If this Court adopts Setonia’s prosecution by affidavit regime, prosecutors throughout the nation will accept the invitation to prosecute via documents instead of live testimony, a result that will undermine the burden of proof and presumption of innocence principles.

A. The Confrontation Clause Guarantees the Right to Challenge the State’s Evidence Through Cross-Examination and Face-to-Face Confrontation.

The Confrontation Clause guarantees criminal defendants the right “to be confronted with [] witnesses.” U.S. Const. amend. VI; see Pointer v. Texas, 380 U.S 400, 403 (1965) (incorporating the Confrontation Clause through the Fourteenth Amendment). At its heart, the Confrontation Clause grants defendants the right to challenge the state’s evidence via cross-

Cross-examination is indispensable to an innocent defendant because it allows the defendant to challenge forcefully the state’s evidence. Indeed, *Crawford* required that the state’s evidence “be tested in the crucible of cross-examination,” 541 U.S. at 61, because cross-examination is the “greatest legal engine ever invented for the discovery of the truth.” *California v. Green*, 399 U.S. 149, 158 (1970) (citation and internal quotations omitted).

On the other hand, the face-to-face requirement flows from the principle that it is easier to tell a lie behind a person’s back than to his face. As this Court held in *Coy v. Iowa*, 487 U.S. 1012, 1019-20 (1988), “[a] witness may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is. It is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back.’” *Accord Melendez*, 129 S. Ct. at 2527 (Kennedy, J., dissenting) (“One purpose of confrontation is to impress upon witnesses the gravity of their conduct.”); *Mattox v. United States*, 156 U.S. 237, 244 (1895) (“The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of. . . .”).

**B. Without the Right to Cross-Examine and Confront Witnesses Face-to-Face During the Prosecution’s Case-In-Chief, a Defendant Cannot Demonstrate That the State Has Failed to Meet Its Burden of Establishing Guilt Beyond a Reasonable Doubt.**

By depriving defendants of the right of cross-examination and face-to-face confrontation during the prosecution’s case-in-chief, Setonia’s regime clashes with the long-standing principle that a “defendant is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt.” *Herrera v. Collins*, 506 U.S. 390, 399 (1993); see
Taylor v. Kentucky, 436 U.S. 478, 483 (1978) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.") (citation and quotations omitted). A defendant’s right to a presumption of innocence, and the state’s correlated burden of proof, both presuppose the right to challenge the state’s ability to meet its burden during its case-in-chief. For instance, cross-examination may expose that a prosecution witness is incredible as a matter of law. Face-to-face confrontation may show that a prosecution witness is unwilling to testify openly to material evidence. A defendant cannot, however, effectively establish the state’s failure to meet its burden if the state deprives him of the right of cross-examination and face-to-face confrontation—the constitutionally recognized procedures for “beat[ing] and bolt[ing] out the truth,” Crawford, 541 U.S. at 61 (citation omitted); see Thomas v. United States, 914 A.2d 1, 17 (D.C. 2006) (holding prosecution by affidavit unconstitutional on the grounds that “[u]ltimately the effect could be to blur the presumption of innocence and the principle that the burden of proof on the prosecution never shifts throughout the trial.”) (quotations omitted); Hoover v. Beto, 439 F.2d 913, 924 (5th Cir. 1971) (prosecution by affidavit “would severely alter the presumption of innocence and the burdens of proof”).

Prosecution by affidavit also nullifies the right “not to put on a defense,” Virginia v. Black, 538 U.S. 343, 345 (2003), an essential element of the presumption of innocence, Kentucky, 436 U.S. at 484 n.12. As Justice Black once explained:

The defendant, under our Constitution, need not do anything at all to defend himself, and certainly he cannot be required to help convict himself. Rather he has an absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources. Throughout the process the defendant has a fundamental right to remain silent, in effect challenging the State at every point to: “Prove it!”
Williams v. Florida, 399 U.S. 78, 112 (1970) (Black, J., dissenting). A defendant cannot require the state to “prove it,” and then decline to present a defense, if the state can bypass the adversarial process during its case-in-chief. *Id.*

*Melendez*’s rejection of prosecution by affidavit was rooted in the interplay between the Confrontation Clause and the burden of proof/presumption of innocence requirements. *Melendez* held: “[m]ore fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via ex parte affidavits. . . .” 129 S. Ct. at 2540. The “value” that *Melendez* spoke of is the right to challenge the state’s proof through confrontation during *the state’s case-in-chief*. Indeed, this is precisely how the dissent interpreted *Melendez*. Justice Kennedy criticized this Court’s majority for making the presentation of live testimony “a new prosecutorial duty linked with proving the State’s case beyond a reasonable doubt.” *Id.* at 2556 (Kennedy, J., dissenting). This duty, however, is not “new”; it is a longstanding duty flowing from a defendant’s basic right to argue that the state has failed to meet its burden of proof. *Id.* at 2534 (majority opinion) (“[Massachusetts] fails to cite a single case in which such testimony was admitted absent a defendant's opportunity to cross-examine. Unsurprisingly, since such a holding would be contrary to longstanding case law.”) (footnote omitted); see François Quintard-Morenas, *The Presumption of Innocence In The French and Anglo-American Legal Traditions*, 58 Am. J. Comp. L. 107, 126-27 (2010) (tracing the presumption of innocence principle to the common-law); *Kentucky*, 436 U.S. at 483 (same).

C. **Requiring Confrontation During the State’s Case-in-Chief Is Consistent with This Court’s Analysis in Taylor v. Illinois and the Text of the Sixth Amendment.**

Protecting the constitutional right to confront witnesses during the prosecution's case is consistent with this Court’s constitutional analysis in *Taylor v. Illinois*, 484 U.S. 400 (1988).
There, this Court stated that the right to confrontation “arise[s] automatically on the invitation of the adversary process and no action by the defendant is necessary to make [it] active in his or her case.” *Taylor v. Illinois*, 484 U.S. 400, 410 (1988). As *Taylor* noted, the confrontation right is “designed to restrain the prosecution by regulating the procedures by which it presents its case against the accused. [It applies] in every case, whether or not the defendant seeks to rebut the case against him or to present a case of his own.” *Id.* at 410 n.14.

The Confrontation Clause’s text also establishes that a defendant has the right to challenge the state’s evidence during the prosecution’s case-in-chief. The framers did not provide a general “right to confront witnesses,” they guaranteed the “right to be confronted with [] witnesses.” U.S. Const. amend. VI (emphasis added). The passive voice of the text demonstrates an intent to require the prosecution to present its witnesses, and to subject those witnesses to the rigor of the adversarial process. *See Thomas*, 914 A.2d at 16 (“This language, employing the passive voice, imposes a burden of production on the prosecution, not on the defense.”). The founders may have guaranteed this right because they understood that cross-examination was more effective than calling adverse witnesses to the stand. *See* discussion, *infra* V(B). The more likely conclusion, however, is that the founders breathed life into the burden of proof principle by requiring the state to present its witnesses for confrontation during the prosecution’s case-in-chief. *See* Quintard-Morenas, *supra*, at 126-27; *Kentucky*, 436 U.S. at 483; *Coffin v. United States*, 156 U.S. 432, 455 (1895).

This reading of the Sixth Amendment is also compatible with the framers’ placement of the Compulsory Process Clause alongside the Confrontation Clause. The Compulsory Process Clause of the Sixth Amendment already guarantees a defendant the right to subpoena witnesses. *See* U.S. Const. amend. VI (establishing the right to “have compulsory process for obtaining witnesses in his favor. . . .”). The Confrontation Clause would be superfluous if it merely
provided the right to subpoena witnesses; thus violating the principle that “every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.” *Wright v. United States*, 302 U.S. 583, 588 (1938). Indeed, *Melendez* agreed that the Compulsory Process and Confrontation Clauses must be read distinctly: “[t]he text of the Amendment 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.” 129 S. Ct. at 2534 (footnote omitted) (emphasis added).

**D. There Is No Rational Basis to Distinguish Between a Forensic’s Written Report and All Other Forms of Testimony.**

There is no limiting principle to the application of Setonia’s prosecution by affidavit regime. Setonia’s argument does not hinge on the nature of the witness’ testimony, it hinges on a reading of the Confrontation Clause which deprives defendants of the power to cross-examine and confront during the state’s case. Therefore, under Setonia’s theory, there is no reason to distinguish between forensics and other witnesses. Within Setonia’s prosecution by affidavit system, there is also no basis to distinguish between videotapes, recordings, and affidavits; testimony can be submitted in any physical form.

Permitting states to employ prosecution by affidavit whenever they see fit would transform the presumption of innocence underlying our constitutional framework into a de facto presumption of guilt. Defendants will have no chance to confront witnesses to establish the state’s failure to meet its burden of proof. And once the defendant is forced to present a case and challenge the affidavits, it is unlikely that the defendant will be successful, given that prosecutors can make even the most innocent defendant look guilty when allowed to selectively craft affidavits for all witnesses in any form. *Crawford*, 541 U.S. at 56 n.7 (“Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with
which the Framers were keenly familiar.”). If this Court ratifies Setonia’s regime the burden of proof and presumption of innocence principles will lose their value within our constitutional system.

V. THIS COURT SHOULD AFFIRM BECAUSE PROSECUTION BY AFFIDAVIT DEPRIVES DEFENDANTS OF EFFECTIVE CONFRONTATION.

Depriving a defendant of the right to effective confrontation is a “constitutional error of the first magnitude.” *Davis v. Alaska*, 415 U.S. 308, 318 (1974). Thus, alterations to trial procedures that render cross-examination or face-to-face confrontation ineffective violate the Confrontation Clause. *See Delaware v. Van Arsdall*, 475 U.S. 673, 677-79 (1986) (holding denial of right to cross-examine on witness’ bias cross constitutionally defective); *Smith v. Illinois*, 390 U.S. 129, 131 (1956) (same as to denial of cross-examination regarding witness’ home address and telephone number); *United States v. Yates*, 438 F.3d 1307, 1318 (11th Cir. 2006) (en banc) (finding face-to-face confrontation ineffective where witness testified *via* two-way video conference). Setonia’s prosecution by affidavit regime substantially undermines the efficacy of face-to-face confrontation and the force of cross-examination, and thus violates the Confrontation Clause.

A. Prosecution by Affidavit Undermines the Effectiveness of Face-to-Face Confrontation.

Under Setonia’s prosecution by affidavit regime, witnesses are required to testify face-to-face with the defendant only *after* prosecutors have submitted their affidavits to the jury. This diminishes a dishonest witness’ experience of guilt. *Coy*, 487 U.S. at 1019. The witness will think, “the harm has already been done by my affidavit, so what is wrong with simply repeating the lie, especially when it may get me in trouble with the prosecutor?” The end result is that Setonia’s system diminishes a lying witness’ sense of personal responsibility for the defendant’s fate, thus diluting the value of the face-to-face confrontation. *Id.*
Consider a forensic analyst. A forensic does not have to face the defendant whom his work may incarcerate for years, and in some instances, life. See, e.g., 21 U.S.C. § 842(b)(1)(a) (2006) (mandatory life imprisonment upon conviction for possession with intent to distribute cocaine where defendant has two prior felony drug convictions). The forensic is an agent of the state, and to him, the defendant is just another name, another test. Forensic analysts conduct millions of tests every year, and some technicians will necessarily become lax in their analysis or intentionally manipulate results. See Melendez, 129 S. Ct. at 2536 (“A forensic analyst responding to a state request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution.”); id. at 2536-2537 (collecting sources indicating that forensic fraud is prevalent). A fraudulent analysts’ face-to-face encounter with the defendant will force the analyst to recognize the gravity of false testimony and will deter perjury or reckless testimony. Melendez, 129 S. Ct. at 2527 (Kennedy, J., dissenting). But if the prosecution introduces the lie passively via affidavit, and the face-to-face confrontation occurs during the defendant’s case, the forensic, fearful of disrupting the prosecution’s case and unable to experience fully the guilt of dishonesty, will confirm the lie.

Moreover, prosecution by affidavit substantially undermines the value of face-to-face confrontation because a witness will not be forced to accuse the defendant openly in court. Instead, the witness will be asked leading questions that only require a “yes” or a “no” answer. Defense counsel could test the witness’ ability to accuse the defendant openly, but only an inexperienced attorney would sacrifice the power of leading questions for the minefield of open-ended ones, especially when the open-ended question is “please restate your accusation against my client.” Cf. Stouffer v. Reynolds, 214 F.3d 1231, 1234 (10th. Cir. 2000) (finding ineffective assistance of counsel when defense counsel “exhibited ineptness at direct questioning without use of leading questions,” later asking the state court “how to phrase a question in a non-leading
manner”). It is much easier for a witness to lie when answering “yes” instead of openly testifying that “the results of the forensic analysis that I conducted were . . . .” See Fed. R. Evid. 611(c) (prohibiting leading questions on direct examination); United States v. Rouse, 111 F.3d 561, 577 (8th. Cir. 1997) (noting that leading questions increase the likelihood of dishonest answers).

B. Prosecution by Affidavit Substantially Undermines the Force of Cross-Examination.

The prosecution by affidavit scheme also diminishes the efficacy of confrontation by transforming cross-examination into adverse-witness questioning. As the D.C. Circuit once noted, “[o]nly a lawyer without trial experience would suggest that the limited right to impeach one’s own witness is the equivalent of [the] right to immediate cross-examination which has always been regarded as the greatest safeguard of American trial procedure.” N.Y. Life Ins. Co. v. Taylor, 147 F.2d 297, 305 (D.C. Cir. 1945); see Crawford, 541 U.S. at 61.

During adverse-witness questioning, the defendant cannot immediately challenge the reliability and veracity of the witness’ affidavit. Instead, the defense must wait to cross-examine the witness long after the presentation of the affidavit. As the time gap between the introduction of the affidavit and confrontation grows wider, the longer the lie lingers and the more difficult it becomes to discredit the lie. See State v. Saporen, 285 N.W. 898, 901 (Minn. 1939) (“The chief merit of cross-examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot.”).

Additionally, defense counsel must ask an adverse-witness to repeat the damaging testimony so that the jury can understand the examination. Note, Right of Confrontation: Admission of Declaration by Co-Conspirator, 85 Harv. L. Rev. 188, 195 (1971) (“[E]ven a direct examination successful from the defendant’s perspective is less effective than cross-examination
because . . . the damaging hearsay will have to be repeated during the examination, thereby increasing its impact.”). The prosecutor will then have the opportunity to elicit more harmful testimony from the state's witness during the defendant’s case. Cross-examination is ineffective if harming one’s case is a prerequisite to its exercise.

Setonia may argue that even if prosecution by affidavit does decrease the effectiveness of confrontation, that decrease is not constitutionally significant. This argument ignores constitutional history and the precedent of this Court. At common-law, the prosecution presented its witnesses and then the defendant cross-examined. Geoffrey Gilbert, The Law Of Evidence 105 (1754) (“The Witness produced must first be examined on the part of the Producer, and then the other Side may examine him; and this is a Regulation that naturally follows the true Order of Things, for it is proper first to enquire what a Witness can prove before you are to examine what hath not fallen under his Knowledge.”). If the framers’ conception of adequate cross-examination is the touchstone, then prosecution by affidavit fails.

But more fundamentally, this argument disregards Crawford’s recognition of the indispensable value of cross-examination. 541 U.S. at 42, 61. Crawford does not merely stand for the proposition that the Constitution guarantees the right to effective cross-examination, it stands for the principle that confrontation is essential to a criminal justice system that vigilantly guards against the incarceration of innocent people. Id. Because effective confrontation rights are indispensable to our system of justice, they should be vigorously defended, not watered down. Prosecution by affidavit ignores this principle, the result being that innocent defendants will experience an indelible effect on their ability to fight for their freedom. This Court cannot countenance such a result.
CONCLUSION

For the reasons enumerated above, this Court should affirm the decision of the Supreme Court of Setonia.