No. _____

IN THE
Supreme Court of the United States

TERESA ANN JOHNSON,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALASKA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Bullcoming v. New Mexico*, 564 U.S. 647, 663 (2011), this Court held that the Confrontation Clause of the Sixth Amendment prohibits the prosecution in a criminal case from introducing into evidence an absent analyst's report through a surrogate expert. *Bullcoming*, however, did not address a number of scenarios, including where "the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue" or "an expert witness [i]s asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence." *Id.* at 672–73 (Sotomayor, J., concurring). This Court sought to address some of these issues in *Williams v. Illinois*, 567 U.S. 50 (2012). But as two Justices of this Court have recognized, *Williams* "yielded no majority and its various opinions have sown confusion in courts across the country." *Stuart v. Alabama*, 139 S. Ct. 36, 37 (2018) (Gorsuch & Sotomayor, JJ., dissenting). Indeed, since *Williams*, lower courts have widely diverged on whether, and to what extent, surrogate expert testimony is permissible. This case raises the following questions:

1. Whether the Confrontation Clause prohibits the prosecution from introducing into evidence at trial a certified lab report reflecting statements of nontestifying analysts through a surrogate expert who, although a supervisor at the lab, merely reviewed the report and results and did not conduct or observe any of the underlying tests; and

2. Whether the Confrontation Clause prohibits the surrogate expert from testifying at trial about the underlying tests, including the particular samples tested, procedures followed, and results reached.

PARTIES TO THE PROCEEDING

Petitioner is Teresa Ann Johnson. Respondent is the State of Alaska. No party is a corporation.

RELATED PROCEEDINGS

This case arises from the following proceedings in Alaska state courts:

State v. Johnson, No. 3PA-16-01291CR (Alaska Sup. Ct. Nov. 15, 2016) (entering judgment of conviction following jury trial);

Johnson v. State, No. A-12744 (Alaska Ct. App. Oct. 23, 2019) (affirming trial court judgment); and

Johnson v. State, No. S-17563 (Alaska Jan. 29, 2020) (denying discretionary review).

There are no other proceedings in state or federal trial or appellate courts or in this Court that are directly related to this case.

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INTRODUCTION

This Petition presents an ideal vehicle for this Court to provide much-needed guidance to lower courts regarding whether, and to what extent, the Sixth Amendment's Confrontation Clause permits the prosecution in a criminal case to introduce into evidence a forensic lab report and related testimony through a surrogate expert. Between the factual scenarios this Court's earlier cases have left unaddressed and this Court's fractured 4-1-4 decision in *Williams v. Illinois*, 567 U.S. 50 (2012), state courts of last resort and federal courts of appeal are in disarray and deeply divided.

Lacking direction, a sizable number of courts, which the Alaska Court of Appeals now joins, have fashioned unwarranted loopholes to permit surrogate expert testimony when the prosecution's expert happens to be a lab supervisor or the expert's testimony can be loosely characterized as providing an "independent opinion," even if the expert did not conduct or observe any of the tests at issue. These loopholes, however, effectively gut the Confrontation Clause's safeguards in cases involving forensic evidence, where those safeguards are perhaps most needed. Moreover, different courts might apply the "independent opinion" rationale in different ways to reach different outcomes, given the arbitrary and subjective nature of what is "independent."

Johnson's case epitomizes these concerns. The prosecution's expert (Lisa Noble) was a lab supervisor but did not conduct or observe any of the tests at issue, which were carried out by three nontestifying analysts. App. 62a. Although Noble reviewed the analysts' work product, including a certified report that one of the analysts had prepared, she lacked the

personal knowledge to address critical facts regarding the particular sample the analysts tested, the precise procedures they followed, and what specifically they observed in Johnson's case. App. 62a–63a. Nor could she explain why the lab records indicated that the lab received the blood evidence at issue in an unsealed, opened condition. App. 56a–57a. Nonetheless, the Alaska Court of Appeals held that the admission of the certified report and Noble's testimony regarding the underlying tests did not violate Johnson's confrontation right because Noble was a supervisor and purportedly "reached her own independent conclusion," despite holding just two years earlier that similar testimony by Noble was impermissible. *Compare* App. 5a–6a, *with McCord v. State*, 390 P.3d 1184, 1185–86 (Alaska Ct. App. 2017).

This Court should grant review to clarify the boundaries of such surrogate expert testimony.

OPINIONS BELOW

On September 19, 2016, the Superior Court for the State of Alaska ("trial court") issued an unpublished order, reprinted at App. 7a–11a, ruling that the State may present testimony by its surrogate expert regarding blood analyses performed by nontestifying analysts. The trial court made further evidentiary rulings during trial to allow the State to introduce into evidence and show to the jury a certified lab report prepared by one of the nontestifying analysts, as reflected in the trial transcript reprinted at App. 43a and 52a. On October 11, 2016, the trial court issued an unpublished judgment, reprinted at App. 12a–17a. The Alaska Court of Appeals affirmed the trial court's judgment on October 23, 2019, in an unpublished opinion, reprinted at App. 3a–6a. On January 29,

2020, the Alaska Supreme Court denied Johnson's petition for hearing seeking discretionary review in an unpublished order, reprinted at App. 1a–2a.

JURISDICTION

The Alaska Supreme Court denied discretionary review on January 29, 2020. App. 1a–2a. This Petition invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI.

STATEMENT OF THE CASE

Petitioner Teresa Johnson was charged with, and pleaded not guilty to, a felony count of driving while under the influence of controlled substances ("DUI") in violation of ALASKA STAT. § 28.35.030(n). App. 12a. To make its case, the State sought to use forensic analyses to prove that Johnson's blood contained controlled substances at levels consistent with impaired driving. App. 4a, 7a–8a, 18a–22a. After arresting Johnson, the police obtained a sample of her blood pursuant to a warrant and requested that it be tested by the Washington State Patrol Toxicology Laboratory ("Washington Lab"), a contract crime lab for the State of Alaska. App. 8a, 18a, 29a, 31a.

As blood samples come into the Washington Lab,[1] they are given case numbers and assigned in batches of 40 to particular lab analysts. App. 31a–32a. Under the lab's assignment procedures, analysts may run multiple tests on a given blood sample, but the tests are often divided up such that the same analyst may not conduct or observe all of the tests on that sample. App. 38a–39a, 42a. After completing a test, the testing analyst initials each page of data he or she generates to certify that the standard operating procedures were followed in conducting the test and that the results meet the relevant criteria to be considered acceptable and reportable. App. 36a–37a. A supervisor similarly reviews and initials the data. App. 37a. Each case is also assigned to a primary analyst who, after all the testing is completed, prepares a formal report and certifies its contents, including the particular sample tested, procedures followed, and results obtained. App. 37a, 18a–22a. A supervisor then reviews the report for identifiable errors before signing and releasing it. App. 39a, 22a.

Amanda Chandler was the primary analyst assigned to Johnson's case. App. 22a, 42a. A copy of her certified report is reprinted at App. 18a–22a. In her report, Chandler specifically identified Johnson's name as the "Subject Name" and noted that the State of Alaska had submitted the blood sample at issue for testing. App. 18a. Chandler attested in her report that she conducted an initial drug screen on the blood sample using an enzyme multiplied immunoassay. App. 19a. According to Chandler, she then conducted

[1] By statute, the Washington Lab is charged with assisting law enforcement and prosecuting attorneys by providing analyses in connection with criminal investigations and prosecutions. WASH. REV. CODE § 43.43.670.

a more specific gas chromatography/mass spectrometry (GC/MS) test on the blood sample and found it "positive" for certain drugs, including diphenhydramine, which is not a controlled substance and is often sold over-the-counter as BENADRYL, as well as various prescription drugs such as methadone, oxycodone, and certain benzodiazepines, which are controlled substances. App. 19a. Chandler also attested that other tests, including GC/MS, liquid chromatography/mass spectrometry (LC/MS), and liquid chromatography/tandem mass spectrometry (LC/MS-MS) were performed on the blood sample to determine the specific levels at which certain substances were present. App. 20a–21a. Chandler stated that she conducted some of these tests while other analysts, Christie Mitchell-Mata and Justin Knoy, conducted the remaining tests. *Id.*

At the end of her report, Chandler "certifie[d] under penalty of perjury" (among other things) that (a) the statements in her report were "true and correct," (b) she "technically reviewed all relevant pages of testing documentation in the case record," and (c) "the tests were administered according to testing methods approved by the state toxicologist pursuant to [WASH. ADMIN. CODE §] 448-14-010, -020, -030 and/or [WASH. REV. CODE §] 46.61.506(3)." App. 22a. Lisa Noble, Chandler's supervisor, reviewed, and signed off on the report. App. 22a.

Leading up to trial, the State initially notified Johnson that it would call Chandler to testify as an expert witness regarding the blood analyses. App. 24a–26a. The State, however, later indicated that Chandler would not testify due to childcare obligations and that it would instead call Noble, Chandler's supervisor, in her place. *Id.* Johnson

timely objected on Confrontation Clause grounds to the admission of forensic evidence and related expert testimony through Noble. App. 7a, 24a–26a. At the trial court's request, the State submitted a motion to allow Noble to testify, which Johnson opposed. App. 7a, 27a. The trial court then issued an order overruling Johnson's Confrontation Clause objection and granting the State's motion. App. 7a–11a.

At trial, Johnson maintained her Confrontation Clause objection, but the trial court allowed the State to call Noble to testify regarding the blood analyses. App. 28a. Over Johnson's continuing objection, the trial court also permitted the State to introduce into evidence, and show to the jury, Chandler's certified lab report. App. 43a, 52a, 18a–22a. Noble testified not only about the standard operating procedures of the Washington Lab, App. 32a–38a, but also specifically that Chandler, Mitchell-Mata, and Knoy ran particular tests on Johnson's particular blood sample and reached particular results, App. 38a–53a.

When asked in a leading manner whether she reviewed the test results and reached her own "independent conclusion," Noble testified that she did but clarified at one point that she merely "accepted" the results. App. 38a, 45a. Noble, however, admitted that she did not conduct or observe "any of the analysts perform any of the tests," and that she did not know whether the analysts followed particular testing procedures. App. 62a–63a. Noble also acknowledged that the tests did not simply involve placing the blood in machines, but rather involved specialized protocols that required the nontestifying analysts to exercise judgment. App. 59a–61a.

Further, despite testifying that she reviewed the lab records, Noble was surprised to learn on cross-examination that the records indicated that the lab received the blood evidence at issue in an unsealed, opened condition, which she lacked the personal knowledge to explain. App. 56a–57a. Noble also testified that there is an electronic chain-of-custody record for Johnson's blood sample, which the State never requested and did not present at trial. App. 58a–59a. Johnson, thus, moved for a judgment of acquittal on the grounds that the State failed to establish that it was her blood that was tested, which the trial court denied. App. 73a–75a.

In its closing arguments to the jury, the State relied heavily on the certified lab report and Noble's related testimony to establish that Chandler, Mitchell-Mata, and Knoy ran particular tests on Johnson's particular blood sample and identified particular controlled substances that the State characterized as being present at levels that contributed to Johnson's impaired state. App. 75a–79a, 81a. The State, in fact, acknowledged that the report (Exhibit 4) and testimony were its primary, if not only, evidence that Johnson was under the influence of controlled substances:

> [W]hat we have is Officer Lopez, he went, he applied for a search warrant and got the search warrant for the blood in this case. And that is the evidence in this case. That's how we show impairment of a controlled substance. We get the blood and we have the blood tested. That is the evidence. And that is [S]tate's Exhibit 4 . . . .

App. 81a. Ultimately, the jury returned a verdict finding Johnson guilty of felony DUI. App. 12a.

Johnson timely appealed her conviction and maintained that the admission of evidence related to the blood analyses through Noble violated her rights under the Confrontation Clause. App. 4a. On October 23, 2019, the Alaska Court of Appeals issued a summary disposition affirming the trial court's judgment. App 3a–6a. The Court of Appeals reasoned that Noble was the "supervising analyst" who reviewed and signed off on the other analysts' test results and that she purportedly "reached her own independent conclusion that the test results were accurate." App. 5a. Based on these circumstances and its then-recent decision in *Robbins v. State*, 449 P.3d 1111 (Alaska Ct. App. 2019), the Court of Appeals held that "Noble's testimony did not violate Johnson's right of confrontation." App. 6a.

On November 22, 2019, Johnson timely filed a petition for hearing with the Alaska Supreme Court seeking discretionary review, which was denied on January 29, 2020. App. 1a–2a. This petition follows.

REASONS FOR GRANTING THE WRIT

I. Lower Courts Are Intractably Divided and Need this Court's Guidance Regarding Whether, and to What Extent, the Confrontation Clause Permits Surrogate Expert Testimony.

In *Bullcoming*, this Court held that when the prosecution in a criminal case elects to introduce a forensic analyst's certifications, the analyst becomes a witness whom the defendant has a right to confront—a right that is not satisfied by cross-examining a surrogate expert. *Bullcoming*, 564 U.S. at 663. As this Court explained, "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." *Id.* at 662. Despite this seemingly straightforward proclamation, the practical guidance *Bullcoming* offers to lower courts is limited. Among other things, as Justice Sotomayor outlined in her concurrence, *Bullcoming* did not address various scenarios in which (1) "the person testifying [wa]s a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue"; (2) "an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence"; or (3) "the [prosecution] introduced only machine-generated results." *Id.* at 672–74 (Sotomayor, J., concurring).

Shortly after *Bullcoming*, this Court granted review in *Williams*, seeking to address some of these issues and provide more guidance, but its fractured 4-1-4 decision has created a muddled state of law. *See, e.g., United States v. Turner*, 709 F.3d 1187, 1189 (7th Cir. 2013) ("[T]he divergent analyses and conclusions of the plurality and dissent [in *Williams*] sow confusion as to precisely what limitations the Confrontation Clause may impose when an expert witness testifies about the results of testing performed by another analyst, who herself is not called to testify."); *State v. Walker*, 212 A.3d 1244, 1260 (Conn. 2019) ("Due to the fractured nature of the *Williams* decision, courts have struggled to determine the effect of *Williams*, if any, on the legal principles governing [C]onfrontation [C]lause claims.").

A four-Justice plurality in *Williams* took the view that statements qualify as testimonial only when they are "prepared for the primary purpose of accusing a targeted individual." *Williams*, 567 U.S. at 84. The plurality also reasoned that when an expert's opinion relies on underlying testimonial statements, those statements are "not offered to prove the truth of the matter asserted," but rather merely to explain the expert's assumptions. *Id.* at 57–58. A four-Justice dissent took the broader view that statements can be testimonial, even without a targeted individual in mind, if they are "made under circumstances which would lead an objective witness reasonably to believe [it] would be available for use at a later trial." *Id.* at 121 (Kagan, J., dissenting) (internal quotation marks and citations omitted). The dissent also rejected the plurality's not-for-the-truth rationale, reasoning that the usefulness of the statements at issue depended on their truth. *Id.* at 127–29 (Kagan, J., dissenting).

Justice Thomas, in turn, wrote a separate opinion taking the view that statements are testimonial only if they bear certain "formality" or "indicia of solemnity," which he applied to concur in the plurality's result, while rejecting the plurality's "targeted individual" test and not-for-the-truth rationale. *Id.* at 105–09, 113–14, 118 (Thomas, J., concurring) (internal quotation marks and citation omitted). Justice Breyer also separately concurred to emphasize that none of this Court's Confrontation Clause cases have squarely addressed what to do when the forensic report sought to be admitted or relied on by the prosecution's expert reflects statements made by multiple nontestifying analysts. *Id.* at 86–93 (Breyer, J., concurring).

Between the divergent opinions in *Williams* and the factual scenarios that this Court's Confrontation Clause cases have left unaddressed, state courts of last resort and federal courts of appeals are deeply divided over whether, and to what extent, surrogate expert testimony is permissible. On the one hand, in direct conflict with the Alaska Court of Appeals' decision here, a number of courts have held that a defendant's Confrontation Clause right is violated when a nontestifying analyst's report is admitted through a surrogate expert, or even if the report is not admitted, when a surrogate expert testifies regarding the tests underlying the report without having any personal knowledge of the tests.

For example, in *Martin*, the Delaware Supreme Court addressed a DUI case and held that the admission of a toxicology lab report and testimony by a lab supervisor, who signed off on the report, regarding the underlying blood analyses conducted by a nontestifying analyst, violated the Confrontation Clause. *Martin v State*, 60 A.3d 1100, 1108–09 (Del. 2013). In particular, the court emphasized that the supervisor "merely reviewed [the nontestifying analyst's] data and representations about the test, while having knowledge of the laboratory's standard operating procedures, [but] without observing or performing the test herself." *Id.* at 1109. Notably, the data on which the supervisor relied included gas chromatography results like those here. *Id*. at 1107.

Similarly, in *Young*, the D.C. Court of Appeals held that a lab supervisor's testimony regarding DNA analyses the supervisor did not observe or perform violated the Confrontation Clause. *Young v. United States*, 63 A.3d 1033, 1047–48 (D.C. 2013). As the court explained, "without evidence that the

[supervisor] performed or observed the generation of the DNA profiles" at issue, "her supervisory role and independent evaluation of her subordinates' work are not enough to satisfy the Confrontation Clause because they do not alter the fact that she relayed testimonial hearsay." *Id.* at 1048; *see also Carrington v. District of Columbia*, 77 A.3d 999, 1003–04 (D.C. 2013) (applying *Young* to hold that admission of lab supervisor's testimony in DUI case was error, reasoning the supervisor "did not personally perform or observe the testing of appellant's" sample).

Since *Williams*, the highest courts of Arkansas, Connecticut, Massachusetts, Nevada, New Mexico, and New York have also held that the introduction of a lab report or testimony by a surrogate expert regarding the tests performed by nontestifying analysts violates the Confrontation Clause.[2] *See Alejandro-Alvarez v. State*, 587 S.W.3d 269, 273 (Ark. 2019) (finding Confrontation Clause violation in admission of report and testimony by surrogate expert reflecting DNA analyses performed by nontestifying analysts); *Walker*, 212 A.3d at 696–97 (same); *People v. John*, 52 N.E.3d 1114, 1117–18, 1125 (N.Y. 2016) (same); *Davidson v. State*, No. 58459, 2013 WL 1458654, at *1–2 (Nev. Apr. 9, 2013) (same); *Commonwealth v. Reavis*, 992 N.E.2d 304, 311–12

[2] Even before *Williams*, the D.C. Circuit suggested that a surrogate expert's testimony that is based solely on a review of work product generated by nontestifying analysts is insufficient under the Confrontation Clause. *See United States v. Moore*, 651 F.3d 30, 71–72 (D.C. Cir. 2011) (per curiam opinion by panel including then-Judge Kavanaugh) (remanding for further findings because testimony of surrogate expert who reviewed reports but had no personal knowledge of underlying tests potentially violated the Confrontation Clause).

(Mass. 2013) (finding Confrontation Clause violation where surrogate expert testified to facts gleaned from reports of nontestifying medical examiner); *State v. Navarette*, 294 P.3d 435, 436–37 (N.M. 2013) (same).

On the other hand, a number of courts, which the Alaska Court of Appeals now joins, have reached the opposite conclusion, reasoning that a surrogate expert may testify to opinions based on analyses carried out by nontestifying analysts without violating the Confrontation Clause, so long as the expert happens to be a supervisor or the expert's testimony can be loosely characterized as providing an "independent opinion" based on a review of the nontestifying analysts' work product. *See Turner*, 709 F.3d at 1191; *United States v. Katso*, 74 M.J. 273, 282–83 (C.A.A.F. 2015) (noting conflict with *Martin*, *supra*); *Marshall v. People*, 309 P.3d 943, 947–48 (Colo. 2013) (noting conflict with *Moore* and *Martin*, *supra*); *Disharoon v. State*, 727 S.E.2d 465, 467 (Ga. 2012); *State v. Hall*, 419 P.3d 1042, 1076 (Idaho 2018); *Galloway v. State*, 122 So.3d 614, 637–38 (Miss. 2013); *State v. Brewington*, 743 S.E.2d 626, 628 (N.C. 2013); *State v. McLeod*, 66 A.3d 1221, 1230–32 (N.H. 2013); *State v. Michaels*, 95 A.3d 648, 675–78 (N.J. 2014) (noting conflict with *Martin*, *supra*); *Commonwealth v. Yohe*, 79 A.3d 520, 541 (Pa. 2013); *State v. Griep*, 863 N.W.2d 567, 583–84 (Wis. 2015).

Illustrative of this rationale, the Pennsylvania Supreme Court held in *Yohe* that the admission of a toxicology report in a DUI case and related testimony by a lab supervisor did not violate the Confrontation Clause. *Yohe*, 79 A.3d at 541. Although the supervisor did not personally conduct or observe the tests at issue, the court reasoned that the supervisor nonetheless conducted an "independent analysis" by

reviewing the results generated by nontestifying analysts and signing off on the report. *Id.* at 540–41. Similarly, in *Griep*, the Wisconsin Supreme Court held that a lab supervisor's testimony in a DUI case was proper because the supervisor conducted an informal "peer review" of the nontestifying analysts' work product and reached an "independent opinion," even though the supervisor did not personally conduct or observe the underlying tests. *Griep*, 863 N.W.2d at 569, 583–84.

At the same time, because determining what is, or is not, an "independent opinion" is rather artificial and subjective, courts applying this distinction are often themselves internally conflicted. For example, despite holding that Noble's testimony in Johnson's case was permissible, the Alaska Court of Appeals previously held in *McCord* that similar testimony by Noble violated the Confrontation Clause. *Compare* App. 5a–6a (no confrontation violation), *with McCord*, 390 P.3d at 1185–86 (Alaska Ct. App. 2017) (confrontation violation). As another example, the North Carolina Supreme Court issued conflicting rulings on the same day in cases involving nearly identical testimony by the same expert. *Compare Brewington*, 743 S.E.2d at 627–28 (no confrontation violation), *with State v. Craven*, 744 S.E.2d 458, 461–62 (N.C. 2013) (confrontation violation).[3]

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[3] Texas courts have also reached conflicting results. *Compare Paredes v. State*, 462 S.W.3d 510, 512–13, 518–19 (Tex. Crim. App. 2015) (finding no confrontation violation where supervisor performed "independent analysis" of DNA profiles, even though supervisor did not conduct or observe tests at issue), *with Burch v. State*, 401 S.W.3d 634, 637 (Tex. Crim. App. 2013) (finding confrontation violation in admission of report and supervisor testimony as supervisor lacked personal knowledge of tests).

Still further, some courts have found ways to excuse surrogate expert testimony by relying on one or more of the divergent rationales in *Williams* that failed to garner support from a majority of this Court. *See, e.g.*, *United States v. Shanton*, 513 F. App'x. 265, 267 (4th Cir. 2013) (reasoning that statements regarding DNA analyses, if considered by this Court, would not meet tests articulated by *Williams* plurality or Justice Thomas); *United States v. Murray*, 540 F. App'x 918, 921 (11th Cir. 2013) (applying *Williams* plurality's not-for-the-truth rationale); *People v. Lopez*, 286 P.3d 469, 477–78 (Cal. 2012) (reasoning that report at issue lacked "requisite degree of formality or solemnity to be considered testimonial" under Justice Thomas' test); *Derr v. State*, 73 A.3d 254, 271–73 (Md. 2013) (reasoning that results of serological and DNA analyses were not "sufficiently formalized to be testimonial" under Justice Thomas' test); *State v. Stillwell*, No. 2017-0361, 2019 WL 4455041, at *7 (N.H. Sept. 18, 2019) (reasoning that record was not clear whether underlying statements attributing DNA analysis to defendant were made with sufficient "formality or solemnity" to be considered testimonial under Justice Thomas' test); *State v. Lui*, 315 P.3d 493, 506, 510 (Wash. 2014) (reasoning that nontestifying analysts were not witnesses "against" defendant because DNA analyses and temperature readings at issue were not "inculpatory" under *Williams* plurality's test); *State v. Deadwiller*, 834 N.W.2d 362, 375 (Wis. 2013) (reasoning that statements by nontestifying analysts did not have a "primary purpose of accusing a targeted individual" under *Williams* plurality's test and lacked sufficient "solemnity" under Justice Thomas' test).

In short, lower courts are divided over whether, and to what extent, surrogate expert testimony is permissible, and require this Court's intervention.

II. Unless this Court Intervenes, the Loopholes Lower Courts Have Created for Supervisor Testimony and So-Called "Independent Opinions" Threaten to Swallow the Confrontation Clause.

Leveraging the unaddressed factual scenarios that Justice Sotomayor outlined in her *Bullcoming* concurrence, the Alaska Court of Appeals and other lower courts have permitted surrogate expert testimony when the prosecution's expert happens to be a lab supervisor or the expert's opinions can be loosely characterized as "independent." These rationales, however, fail to withstand constitutional scrutiny and create unwarranted loopholes that effectively gut the right of confrontation in cases involving forensic evidence.

As an initial matter, the fact that the prosecution's expert happens to have a supervisory role does not render the expert's testimony permissible. To be sure, as Justice Sotomayor noted, *Bullcoming* was "not a case in which the person testifying [wa]s a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue." *Bullcoming*, 564 U.S. at 672 (Sotomayor, J., concurring). But Justice Sotomayor explained the type of circumstances she had in mind, namely "a supervisor who observed an analyst conducting a test [and] testified about the results or a report about such results." *Id.* at 673 (emphasis added). Critically, unless the supervisor has personal knowledge of the testing, the supervisor lacks the capacity to testify

regarding the particular samples tested, procedures followed, or results reached in a given case.

As a leading treatise explains,

> Permitting a supervisor [to testify] is a superficially attractive approach, but it is not supported by careful scrutiny unless as [Justice] Sotomayor puts forward in her hypothetical, the supervisor observed the analyst conducting the test. If not, the supervisor has no greater connection to *this specific test* than does any other qualified laboratory employee. . . . The mere fact of a supervisory relationship does not make the witness better able to assess the accuracy of the testimonial statements than any other qualified expert at the laboratory.

THE NEW WIGMORE: A TREATISE ON EVIDENCE: EXPERT EVIDENCE § 4.12.4 (2d Cum. Supp. 2020) (underlining added, italics in original).

Johnson's case bears out these concerns. As Noble admitted, she did not observe or perform any of the tests at issue. App. 62a–63a. Rather, like the surrogate expert in *Bullcoming*, Noble merely reviewed the results and report generated by the nontestifying analysts, the only difference being that Noble's supervisory role required her to do so. Significantly, Noble could not convey "what [the nontestifying analysts] knew or observed about the events [their] certifications concerned, *i.e.*, the particular test and testing process [they] employed." *Bullcoming*, 564 U.S. at 661–62. "Nor could [her] surrogate testimony expose any lapse[s] or lies on the certifying analyst[s'] part." *Id.*

The "independent opinion" rationale, which the Alaska Court of Appeals and other lower courts have

adopted, fares no better and creates yet another end run around the Confrontation Clause. Indeed, unless narrowly applied to circumstances where an expert has personal knowledge of the underlying tests, the "independent opinion" rationale devolves into a subjective assessment by the trial court of whether an expert's testimony has crossed some unwritten and indescribable line, harkening back to the pre-*Crawford* "indicia of reliability" test that this Court soundly rejected. *Crawford v. Washington*, 541 U.S. 36, 60–61 (2004) (overruling *Ohio v. Roberts*, 448 U.S. 56 (1980)). Many courts, in fact, have described the so-called "independence" of an expert's opinion as a matter of degree. *See, e.g.*, *McLeod*, 66 A.3d at 1229–30; *Griep*, 863 N.W.2d at 587. Thus, different courts may apply the "independent opinion" rationale in different ways to reach different outcomes.

Empirically, courts applying the "independent opinion" rationale have struggled to maintain consistency and rationalize their decisions. As noted, although the Alaska Court of Appeals held in Johnson's case that Noble's testimony was permissible, the court previously held in *McCord* that similar testimony by Noble violated the Confrontation Clause.[4] *Compare* App. 5a–6a, *with McCord*, 390 P.3d

[4] The Alaska Court of Appeals later attempted to rationalize its decision in *McCord* on the grounds that Noble was not certified to run the clonazepam test at issue in that case, and thus, purportedly was unable to provide an independent opinion. *Robbins,* 449 P.3d at 1115. To be sure, the clonazepam test is one of the tests at issue in Johnson's case, and thus the court's reasoning would appear to support reversal here. App. 20a. The court, however, was clear in *McCord* that it based its decision on Noble's lack of personal knowledge of the test, not her lack of certification to run it. *McCord*, 390 P.3d at 1186.

at 1185–86. Texas courts also have struggled with consistency. *Compare Paredes*, 462 S.W.3d at 512–13, 518–19 (no confrontation violation), *with Burch*, 401 S.W.3d at 637 (confrontation violation). Perhaps epitomizing the problem, the North Carolina Supreme Court issued conflicting decisions on the same day in *Brewington* and *Craven* regarding nearly identical testimony by the same expert. *Compare Brewington*, 743 S.E.2d at 627–28, *with Craven*, 744 S.E.2d at 461–62. As the dissent in *Brewington* aptly observed:

> That the majority in *Craven* holds a Confrontation Clause violation occurred under the precedent of *Bullcoming*, but fails to do so here, is a remarkable demonstration of the semantics embodied in the term "independent opinion." In *Craven* the State asked the substitute analyst, who coincidentally was also Agent Schell, whether she reviewed the reports of the testing analyst and whether she agreed with the results of the report. She answered both questions affirmatively. That exact same procedure was followed here: Agent Schell stated that she did not perform the tests, but reviewed the reports of the testing analyst and agreed with the conclusions. In both *Craven* and the case *sub judice* the information at issue goes to a critical element of the offense charged. Yet, in *Craven* the fatal error to achieving the classification of "independent opinion" as observed by the majority was that the State then asked, "What was [the testing analyst's] conclusion?" Here the State asked for Agent Schell's opinion. This is mere semantics.

Brewington, 743 S.E.2d at 638 (internal citation omitted, brackets in original) (Beasley, J. dissenting).

More fundamentally, the "independent opinion" rationale ignores that unless the prosecution's expert truly has personal knowledge of the underlying tests, for example by conducting or observing the tests or reviewing videos of the tests, the expert's testimony will necessarily convey testimonial statements gleaned from the expert's review of the nontestifying analysts' work product. Here, because Noble lacked personal knowledge of the underlying tests, her testimony necessarily conveyed testimonial hearsay when she testified regarding the particular sample that the nontestifying analysts tested, the particular procedures they followed, and particular results they reached in Johnson's case. Thus, even if Noble applied her scientific knowledge and training in reviewing and analyzing the test results, she was not equipped to address critical facts regarding the tests performed. Indeed, despite testifying that she reviewed the lab records, Noble was surprised to learn on cross-examination that the lab records indicated that the lab received the blood evidence at issue in an unsealed, opened condition, which she lacked the personal knowledge to explain. App. 56a–57a.

In short, this Court should intervene to close the loopholes that the Alaska Court of Appeals and other lower courts have created for supervisor testimony and so-called "independent opinions," which undermine the Confrontation Clause.

III. This Petition Presents an Ideal Vehicle for Addressing the Boundaries of Surrogate Expert Testimony.

This petition presents an ideal vehicle for this Court to provide much-needed guidance to lower courts regarding whether, and to what extent,

surrogate expert testimony is permissible. As an initial matter, Johnson's case comes to this Court on direct appeal under the broadest standard of review and free of any procedural constraints. Johnson timely and unambiguously objected to Noble's surrogate expert testimony, App. 7a, 24a–28a, 43a, and preserved this issue on appeal, App. 1a, 4a.

Johnson's case also avoids the pitfalls *Williams* posed in that the statements at issue here are testimonial under any of the various rationales posited in *Williams*. "However you slice it, a routine postarrest forensic report like the one here must qualify as testimonial." *Stuart v. Alabama*, 139 S. Ct. 36, 37 (2018) (Gorsuch & Sotomayor, JJ., dissenting). And so do the nontestifying analysts' underlying statements and certifications regarding the particular sample they tested, the procedures they followed, and the results they reached. Indeed, even under the *Williams* plurality's more restrictive "targeted individual" test, there is no dispute here that the State collected Johnson's blood and requested the testing at issue only after she was in custody. Per their statutory duty, analysts at the Washington Lab carried out the tests at issue, certified their results, and prepared a formal report for the primary purpose of generating evidence to secure Johnson's conviction. *See* WASH. REV. CODE § 43.43.670.

The statements at issue here also meet Justice Thomas' requirement of formality and solemnity. In fact, the Washington Lab's procedures require analysts, upon completing a test, to initial each page of results to certify that they followed the standard procedures and that the relevant criteria were met for the results to be acceptable and reportable. App 36a–37a. As the primary analyst, Chandler also prepared

a formal written report with certifications much like the report in *Bullcoming* that Justice Thomas found testimonial. *Compare* App 18a–22a, *with Bullcoming*, 564 U.S. at 664–65. Because Noble lacked personal knowledge of the underlying tests, it was these testimonial statements and certifications that she conveyed to the jury when she testified regarding the particular sample tested, procedures followed, and results reached.

Further, Johnson's inability to cross-examine the nontestifying analysts presents a compelling case of prejudice. As this Court explained in *Melendez-Diaz*, confrontation through cross-examination is designed to weed out both the fraudulent analyst and the incompetent analyst. *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 319 (2009). This Court further explained that the very type of "gas chromatography/mass spectrometry analys[e]s" at issue here "require[] the exercise of judgment and presents a risk of error" that should properly be explored on cross-examination. *Id.* at 320 (citing Paul Giannelli & Edward Imwinkelried, 2 SCIENTIFIC EVIDENCE § 23.03[c] (4th ed. 2007)). Here, as the prosecution acknowledged in summation, Noble's testimony and the certified lab report were essential to proving that Johnson was under the influence of controlled substances. App. 81a. Noble, however, lacked the personal knowledge to confirm critical facts regarding the underlying tests such as the particular sample the nontestifying analysts tested, the precise procedures they followed in their testing, and what specifically they observed. App. 62a–63a. Nor could she explain why the lab records indicated that the lab received the blood evidence at issue in an unsealed, opened condition. App. 56a–57a.

Moreover, it is in cases such as Johnson's that the Confrontation Clause's safeguards are perhaps most important, because forensic evidence can be superficially impressive to juries, carrying with it an air of infallibility propagated by popular media. *See, e.g.*, *State v. Bowman*, 337 S.W.3d 679. 694 n.3 (Mo. 2011) (taking judicial notice of the "CSI Effect"). At the same time, concerns about forensic evidence have been repeatedly validated and reinforced by incidents of negligence, incompetence, bias, and even fraud on the part of forensic analysts, including "drylabbing" incidents where analysts have reported results of testing that they never even conducted.[5] *See generally* Brief of Amicus Curiae The Innocence Network, Bullcoming v. New Mexico, 564 U.S. 647 (2011) (No. 09-10876), 2010 WL 5043100; Brief of Amicus Curiae National Association of Criminal Defense Lawyers *et al.*, Bullcoming v. New Mexico, 564 U.S. 647 (2011) (No. 09-10876), 2010 WL 5043101.

The Washington Lab is no exception. For example, in 2007, it was discovered that a lab manager had made false certifications that she had tested solutions used to calibrate and evaluate breath alcohol machines, when in truth she had not, and other individuals at the lab acted to cover up the fraud. *See generally State v. Ahmach*, No. C00627921 (King County Dist. Ct., Wash. Jan. 30, 2008); *see also City of Seattle v. Holifield,* 240 P.3d 1162, 1163 (Wash. 2010); Jennifer Sullivan, *State crime-lab chief to resign*, SEATTLE TIMES (Feb. 15, 2008), *available at*

[5] Such incidents underscore the limitations of Noble's testimony. Even if she reviewed the the nontestifying analysts' results and compared them against controls, she lacked the personal knowledge to confirm that the analysts tested the correct sample using the appropriate procedures to generate bona fide results.

https://www.seattletimes.com/nation-world/state-crime-lab-chief-to-resign/ (last accessed Feb. 24, 2020). After an investigation, a three-judge panel found more far-reaching problems at the Washington Lab that stemmed from a "culture of compromise," including "ethical lapses, systemic inaccuracy, negligence and violations of scientific principles." *Ahmach*, No. C00627921, slip op. at 20–25.

In short, Johnson's case provides an ideal and compelling vehicle for this Court to address the boundaries of surrogate expert testimony and provide lower courts with much-needed guidance.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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