No. 19-1065

In the
Supreme Court of the United States

TERESA ANN JOHNSON,
Petitioner,

v.

STATE OF ALASKA,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Alaska

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the testimony of a scientific analyst who provided an independent opinion based on her review of instrument-generated, raw data comports with the Confrontation Clause.

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INTRODUCTION

Courts generally agree that an expert witness may testify about her independent opinion based on raw data generated by others without violating the Confrontation Clause. Johnson fails to identify a genuine conflict warranting this Court's intervention. The alleged division Johnson cites is primarily a manifestation of case-specific, factual differences.

Moreover, this case is a poor vehicle to address any broad Confrontation Clause issues. First, although Johnson now argues that a lab report was erroneously admitted, she waived this argument by not raising it in the Alaska Court of Appeals. Second, review would be significantly hindered because the record does not contain the case file on which the testifying witness based her opinion. Third, even assuming that aspects of the expert witness's testimony were erroneously admitted, any error was harmless beyond a reasonable doubt because of the other substantial evidence of Johnson's guilt.

Finally, the Alaska Court of Appeals correctly rejected the sole argument Johnson raised, holding that the expert witness's testimony complied with the Confrontation Clause. The witness testified to her opinion based on her own independent analysis of the instrument-generated, raw data, and Johnson cross-examined her. This satisfied Johnson's confrontation right.

Further review is unwarranted.

STATEMENT OF THE CASE

In the early morning hours, a gas station attendant called 911 to report that Teresa Johnson was obviously intoxicated and driving. Tr. 47-51. Officer Michael Lopez responded and stopped Johnson after observing several clues of impaired driving. Tr. 109, 113-14.

During their contact, Officer Lopez noticed that Johnson had slurred, thick speech, bloodshot, watery eyes, was confused, and had difficulty complying with his requests. Tr. 117. Johnson admitted that she had taken many medications, including Methadone, and she exhibited numerous signs of impairment during the field sobriety tests. Tr. 123-38; audio recording of trial, Volume I, 9/20/16, 12:28:16-12:29:38 (audio recording of contact not transcribed). Johnson was arrested for felony driving under the influence (DUI). Tr. 137. Johnson's breath sample did not contain any alcohol, and a blood sample was taken. Tr. 137-39. One sample was sent to the Washington State Patrol Toxicology Laboratory, where forensic scientists determined that her blood contained numerous controlled substances. Tr. 139; Pet. App. 44a-53a.

Before trial, the State notified the trial court that Amanda Chandler, the analyst who tested for most of the substances in Johnson's blood, could not travel to Alaska for trial because of childcare issues but the reviewing analyst, Lisa Noble, could testify. Pet. App. 24a-25a. Johnson objected. Pet. App. 25a. The trial court ruled that Noble could testify, provided that the prosecution could "show that . . . Noble independently reviewed the test results and drew conclusions from the underlying data." Pet. App. 10a.

Noble testified at trial, explaining in detail the testing process, as described in Section III.A. Pet. App. 28a-72a. In short, an analyst extracts from the blood sample the substances being tested. Pet. App. 59a. The extract is then placed into instruments, which break it down and represent the fragments through graphs. Pet. App. 33a-36a. The analyst reviews the graphs to determine the type and quantity of substance extracted. Pet. App. 33a-36a. Noble explained that she reviewed the raw data the instruments generated. Pet. App. 37a-53a. After independently concluding that the test results were correct, she signed the lab report. Pet. App. 37a-53a.

A jury convicted Johnson of felony DUI. Tr. 254-55; Pet. App. 12a.

Johnson appealed her conviction to the Alaska Court of Appeals, arguing solely that the trial court erred in permitting Noble to testify. Resp. App. 3a, 6a-8a. The court of appeals unanimously affirmed Johnson's conviction in a brief, unpublished summary disposition. Pet. App. 3a-6a. Relying on its recent decision in *Robbins v. Alaska*, 449 P.3d 1111 (Alaska App. 2019), which dealt with similar facts and issues, the court of appeals reasoned that Noble testified about her independent conclusion based on her evaluation of the testing data. Pet. App. 5a. Johnson filed a petition for hearing in the Alaska Supreme Court; it summarily denied her petition. Pet. App. 1a.

Johnson petitioned for a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. THE COURTS GENERALLY AGREE THAT AN EXPERT WITNESS MAY TESTIFY ABOUT HER OPINIONS BASED ON RAW DATA PROVIDED BY OTHERS

The courts are generally unified in permitting expert witnesses to testify about their own independent opinions based on raw data generated by others. Johnson's claim that the courts are intractably divided on this issue is incorrect, and this Court has repeatedly denied petitions presenting similar questions.[1] The same result is warranted here.

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[1] *E.g.*, *United States v. Katso*, 74 M.J. 273 (C.A.A.F. 2015), *cert. denied*, 136 S. Ct. 1512 (2016); *Stanfield v. Idaho*, 347 P.3d 175 (Idaho 2015), *cert. denied*, 136 S. Ct. 794 (2016); *Griep v. Wisconsin*, 863 N.W.2d 567 (Wis. 2015), *cert. denied*, 136 S. Ct. 793 (2016); *Hardin v. Ohio*, 15 N.E.3d 878 (Ohio 2014), *cert. denied*, 135 S. Ct. 2379 (2015); *Paredes* v. *Texas*, 462 S.W.3d 510 (Tex. Crim. App. 2015), *cert. denied*, 136 S. Ct. 483 (2015); *Hingle v. Mississippi*, 153 So. 3d 659 (Miss. 2015), *cert. denied*, 135 S. Ct. 2388 (2015); *Maxwell v. Ohio*, 9 N.E.3d 930 (Ohio 2014), *cert. denied*, 135 S. Ct. 1400 (2015); *New Jersey v. Michaels*, 95 A.3d 648 (N.J. 2014), *cert. denied*, 574 U.S. 1051 (2014); *In re Ware v. Alabama*, 181 So. 3d 409 (Ala. 2014), *cert. denied*, 573 U.S. 935 (2014); *Lui v. Washington*, 315 P.3d 493 (Wash. 2014), *cert. denied*, 573 U.S. 933 (2014); *United States v. Maxwell*, 724 F.3d 724 (7th Cir. 2013), *cert. denied*, 572 U.S. 1136 (2014); *Marshall v. Colorado*, 309 P.3d 943 (Colo. 2013), *cert. denied*, 572 U.S. 1136 (2014); *Yohe v. Pennsylvania*, 79 A.3d 520 (Pa. 2013), *cert. denied*, 572 U.S. 1135 (2014); *United States v. James*, 712 F.3d 79 (2d Cir. 2013), *cert. denied*, 572 U.S. 1134 (2014); *United States v. Turner*, 709 F.3d 1187 (7th Cir. 2013), *cert. denied*, 572 U.S. 1134 (2014); *Galloway v. Mississippi*, 122 So. 3d 614, 638 (Miss. 2013), *cert. denied*, 572 U.S. 1134 (2014); *North Carolina v. Brewington*, 743 S.E.2d 626 (N.C. 2013), *cert. denied*, 572 U.S. 1134 (2014); *Ortiz-*

This Court has found no Confrontation Clause violation when an expert witness testified about her opinion based on facts that the expert did not observe personally. Likewise, lower federal courts and state courts have found no violation when experts testified about their independent opinions based on raw data provided by others or by instruments. The cases Johnson cites finding a Confrontation Clause violation also follow this principle, explaining that an expert witness may not be a conduit for a non-testifying expert. The differing outcomes within jurisdictions that Johnson discusses are explained by factual differences between the cases. Last, different rationales by some courts for reaching the same conclusion as the one here do not warrant review.

A. Lower courts have correctly applied this Court's precedent to permit expert witnesses to testify about their independent opinions based on raw data generated by others

1. In *Crawford v. Washington*, this Court held that the Confrontation Clause bars the admission of "testimonial statements of a witness who did not appear at trial," unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. 541 U.S. 36, 50-51, 53-54, 68 (2004). Since *Crawford*, this Court has issued three decisions applying the Confrontation Clause to forensic evidence.

Zape v. North Carolina, 743 S.E.2d 156 (N.C. 2013), *cert. denied*, 572 U.S. 1134 (2014).

First, in *Melendez-Diaz v. Massachusetts*, this Court held that affidavits reporting the results of forensic drug testing that had been created "sole[ly]" as evidence for criminal proceedings were "testimonial" and could not be admitted as substantive evidence, unless the prosecution produced a witness competent to testify to the truth of the statements in the affidavits. 557 U.S. 305, 311 (2009).

Second, in *Bullcoming v. New Mexico*, this Court applied *Melendez-Diaz* to hold that the Confrontation Clause did not allow admission of an analyst's forensic report certifying the results of a blood-alcohol test when offered through the testimony of another analyst who "did not sign the certification," had no "independent opinion" about the test result, and had "no involvement whatsoever in the . . . report." 564 U.S. 647, 652, 662 (2011); *id.* at 673 (Sotomayor, J., concurring). *Bullcoming* did not hold that the only witness who may testify about the result is the testing analyst.

In a concurring opinion, Justice Sotomayor "emphasize[d] the limited reach of the Court's opinion." *Bullcoming*, 564 U.S. at 668 (Sotomayor, J., concurring). Justice Sotomayor explained, "this is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports[.]" *Id.* at 673 (citing Fed. R. Evid. 703). Nor was *Bullcoming* "a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue." *Id.* at 672.

Third, in *Williams v. Illinois*, this Court concluded that admitting an expert's opinion testimony that DNA profiles from two samples matched did not violate the Confrontation Clause, even though the witness did not test either sample. 567 U.S. 50, 57-61 (2012). Relying in part on Federal Rule of Evidence 703—and its state equivalent—which permits an expert to testify to an opinion based on evidence that would otherwise be inadmissible, the plurality opinion stated that an expert may voice an opinion based on relevant facts even if he lacks first-hand knowledge of those facts. *Id.* at 57, 67, 69, 72, 78; *see also id.* at 88 (Breyer, J., concurring). The dissent agreed that an expert could apply her knowledge to raw data supplied by others and testify to her opinion. *Id.* at 129 (Kagan, J., dissenting). In his concurrence, Justice Breyer made a particularly apt statement: "Experts . . . regularly rely on the technical statements and results of other experts to form their own opinions. . . . [T]he introduction of a laboratory report involves layer upon layer of technical statements . . . made by one expert and relied upon by another." *Id.* at 89 (Breyer, J., concurring).

2. Like the Alaska Court of Appeals, numerous federal circuit courts permit expert witnesses to testify about their independent opinions based on information from others. *E.g.*, *United States v. Ramos-Gonzalez*, 664 F.3d 1, 5 (1st Cir. 2011) (concluding that "the assessment is one of degree. Where an expert witness employs her training and experience to forge an independent conclusion, albeit on the basis of inadmissible evidence, the likelihood of a Sixth Amendment infraction is minimal."); *United States v. Mejia*, 545 F.3d 179, 197 (2d Cir. 2008) (stating that for

the expert's testimony to be admissible, the expert must form his own opinions by applying his experience and a reliable methodology to the data); *Langbord v. United States Dep't of Treasury*, 832 F.3d 170, 195 (3d Cir. 2016) (explaining that there was no error in permitting the expert to testify because he synthesized voluminous data and provided his own opinion to the jury); *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009) ("As long as [the expert] is applying his training and experience to the sources before him and reaching an independent judgment, there will typically be no *Crawford* problem. The expert's opinion will be an original product that can be tested through cross-examination."); *United States v. Maxwell*, 724 F.3d 724, 726 (7th Cir. 2013) (finding no Confrontation Clause violation when the expert witness, who did not test the substance, testified about her "independent conclusion" that the substance was cocaine after reviewing the data generated by the testing analyst); *United States v. Richardson*, 537 F.3d 951, 960 (8th Cir. 2008) (stating that the DNA expert's testimony regarding her conclusions upon reviewing DNA tests conducted by another scientist did not violate the Confrontation Clause); *United States v. Gomez*, 725 F.3d 1121, 1129 (9th Cir. 2013) ("The question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay."); *United States v. Kamahele*, 748 F.3d 984, 1000 (10th Cir. 2014) ("Introduction of opinion testimony does not violate the Confrontation Clause when the experts rely on their independent judgment—even when this independent judgment is based on inadmissible evidence.").

Likewise, in addition to the decisions Johnson acknowledges, Pet. 13, numerous other state courts have found no Confrontation Clause violation precisely because the expert witnesses testified about their own opinions, even though the opinions were based on data supplied by others. *E.g.*, *In re Ware v. Alabama*, 181 So. 3d 409, 412, 416 (Ala. 2014) (finding no Confrontation Clause violation when a DNA-profile report was admitted at trial because the testifying witness, who did not conduct the tests, supervised and reviewed the testing and signed the report), *cert. denied*, 573 U.S. 935 (2014); *Arizona v. Joseph*, 283 P.3d 27, 30 (Ariz. 2012) (en banc) (holding that there was no confrontation violation when a medical expert testified to his own conclusions based on the autopsy reports prepared by another); *Marshall v. Colorado*, 309 P.3d 943, 947 (Colo. 2013) (finding no Confrontation Clause violation when a lab report showing the presence of methamphetamine in the defendant's urine was admitted at trial through the testimony of a supervisor who independently reviewed the data, drew the conclusion that the data indicated the presence of methamphetamine, and signed the report), *cert. denied*, 572 U.S. 1136 (2014); *Clark v. Georgia*, 769 S.E.2d 376, 381 (Ga. 2015) (stating that an expert may base her opinions on data gathered by others and holding that there was no error in permitting a medical examiner who did not perform the autopsy to testify about the cause of death after reviewing various documents because she reached her own opinion); *Grim v. Mississippi*, 102 So. 3d 1073, 1081 (Miss. 2012) (holding that "a supervisor, reviewer, or other analyst involved [in drug testing] may testify in place of the primary analyst where that person was

'actively involved in the production of the report and had intimate knowledge of analyses even though [he or] she did not perform the tests first hand'") (quoting *McGowen v. Mississippi*, 859 So. 2d 320, 340 (Miss. 2003)); *New Jersey v. Michaels*, 95 A.3d 648, 676-76 (N.J. 2014) ("a truly independent reviewer or supervisor of testing results can testify to those results and to his or her conclusions about those results, without violating a defendant's confrontation rights, if the testifying witness is knowledgeable about the testing process, has independently verified the correctness of the machine-tested processes and results, and has formed an independent conclusion about the results"), *cert. denied*, 574 U.S. 1051 (2014).

Johnson argues that this Court's decision in *Williams* has caused confusion, citing *Turner v. United States*, 709 F.3d 1187, 1189 (7th Cir. 2013), *cert. denied*, 572 U.S. 1134 (2014), and *Connecticut v. Walker*, 212 A.3d 1244, 1260 (Conn. 2019). Pet. 9. Johnson is incorrect. Lower courts have successfully dealt with expert witness testimony by applying Rule 703, or its state equivalent, and this Court's precedent interpreting the Confrontation Clause. The courts in *Turner* and *Walker* appropriately applied *Williams*. In *Turner*, the court pointed out that the plurality opinion "expressly endorses the notion that an appropriately credentialed individual may give expert testimony as to the significance of data produced by another analyst." *Turner*, 709 F.3d at 1190-91 & n.2 (citing *Williams*, 567 U.S. at 66-71). And neither Justice Thomas's concurrence nor Justice Kagan's dissent takes issue with this principle. *Id.* at 1191. Similarly, the court in *Walker* relied on *Williams* and other cases and stated

that a witness could testify about her own conclusion based on raw data provided by others. *Walker*, 212 A.3d at 1253, 1254-55, 1267.

B. The cases Johnson cites that found a Confrontation Clause violation also generally permit an expert to express an independent opinion based on raw data generated by others

Johnson contends that federal courts of appeal and state courts of last resort are deeply divided on the issue of expert witness testimony. Pet. 11. Johnson is incorrect, as neither the federal nor the state cases are genuinely in conflict. The cases finding a Confrontation Clause violation are consistent with the decision here. Like the Alaska Court of Appeals, the courts in those jurisdictions generally hold that expert witnesses may express independent opinions but may not parrot non-testifying analysts' opinions.

First, Johnson fails to cite a single federal court of appeals decision in conflict with this case, let alone substantiate her claim of a conflict within the federal courts of appeal. *See* Pet. 11-12 (failing to cite authority indicating a conflict).

United States v. Moore, the sole federal court of appeals decision Johnson discusses with regard to this issue, is consistent with this case. 651 F.3d 30 (D.C. Cir. 2011), *aff'd in part sub nom. Smith v. United States*, 568 U.S. 106 (2013). In *Moore*, a medical examiner testified about the contents of approximately 30 autopsy reports authored by others, which were admitted into evidence. *Id.* at 71. But there is no

indication that he formed an independent conclusion based on raw data generated by others, nor did he sign the reports. *Id.* Additionally, a forensic chemist testified about 20 reports authored by others, which were admitted into evidence. *Id.* Again, there is no indication that he independently analyzed the raw data that was the basis for those reports, nor did he sign them. *Id.* at 72. Thus, the independent analysis and conclusions critical to admitting Noble's testimony were not present in *Moore*. Therefore, there is nothing inconsistent between *Moore* and this case because *Moore* does not prohibit an expert's testimony about her independent opinion. *See also United States v. Williams*, 740 F. Supp. 2d 4, 9-10 (D.D.C. 2010) (stating that under Rule 703, a medical examiner could testify about his "independent judgment" based on another's autopsy report); *cf. DL v. District of Columbia*, 109 F. Supp. 3d 12, 30 (D.D.C. 2015) (stating that the expert "must form his [or her] own opinions by applying his [or her] extensive experience and a reliable methodology to the inadmissible materials, rather than simply transmit the hearsay to the jury") (internal quotation marks omitted).

Second, Johnson's claim that the high courts of Arkansas, Connecticut, Massachusetts, Nevada, New Mexico, and New York have held inadmissible the testimony of an expert who did not personally test the items is misplaced because the cases Johnson cites are factually distinguishable from this case. *See* Pet. 12. For example, in *Walker*, the Connecticut Supreme Court affirmed the general principle that expert witnesses may base their testimony on data provided by other sources. 212 A.3d at 1252-53. The court

concluded that when there was no basis to conclude that the witness "was provided with the raw data . . . and came to her own conclusion," the witness's testimony was inadmissible. *Id.* at 1267. Subsequently, applying the same principle, the Connecticut Supreme Court permitted the opinion testimony of a firearms examiner who, relying on another's report, presented his independent judgment. *Connecticut v. Lebrick*, 223 A.3d 333, 356-57 (Conn. 2020).

Following the same approach, the Massachusetts Supreme Court stated that a "medical examiner who did not perform the autopsy may offer an opinion on the cause of death, based on his review of an autopsy report . . . and . . . of the autopsy photographs, as these are documents upon which experts are accustomed to rely[.]" *Massachusetts v. Reavis*, 992 N.E.2d 304, 311-12 (Mass. 2013); *see also Massachusetts v. Grady*, 54 N.E.3d 22, 30 (Mass. 2016) (holding that there was no confrontation violation when the analyst who testified formed his own opinion about the substances based on tests conducted by another); *Massachusetts v. Greineder*, 984 N.E.2d 804, 816 (Mass. 2013) (permitting a DNA analyst to testify about her own opinion based on her independent evaluation of the non-testifying analyst's data).

Johnson's reliance on the Nevada case of *Davidson v. Nevada* is also inapt. *Davidson* is a brief, unpublished opinion with little analysis and no discussion of whether the witness who testified proffered his own independent opinion. 129 Nev. 1109, 2013 WL 1458654, at *1-2 (Nev. Apr. 9, 2013) (unpublished). Moreover, more recently the Nevada

Supreme Court held that an expert witness *is* permitted to testify about his independent opinion based on data generated by others. *E.g.*, *Brock v. Nevada*, 451 P.3d 897, 2019 WL 6119117, at *2 (Nev. Nov. 15, 2019) (unpublished) (holding that permitting a medical examiner who did not perform the autopsy to testify about her "independent opinion based on the autopsy reports and photographs" did not violate the Confrontation Clause); *Kiles v. Nevada*, 433 P.3d 1257, 2019 WL 442397, at *2 (Nev. Jan 31, 2019) (unpublished) (holding that a fingerprint analyst could testify about his own independent analysis of the prints even though he did not take the prints or input them into the database).

Similarly, the New Mexico Supreme Court stated that "an expert witness may express an independent opinion regarding his or her interpretation of raw data without offending the Confrontation Clause." *New Mexico v. Navarette*, 294 P.3d 435, 443 (N.M. 2013), *cert. denied*, 571 U.S. 939 (2013); *see also New Mexico v. Sisneros*, 314 P.3d 665, 672 (N.M. 2013) ("[A]n expert witness may offer an expert opinion based on raw data . . . taken by others."); *New Mexico v. Garcia*, No. 33,756, 2014 WL 2933211, at *2-3 (N.M. June 26, 2014) (unpublished) (permitting a medical examiner to testify about his opinion based on photographs taken by others).

Likewise, the highest court in New York has held that an expert witness who independently analyzed raw data generated by another may testify about his opinion; but a witness may not "parrot" the subjective conclusions of others. *New York v. John*, 52 N.E.3d

1114, 1124-25, 1127-28 (N.Y. 2016); *see also New York v. Hao Lin*, 71 N.E.3d 941, 944 (N.Y. 2017) (contrasting *John* with a situation when the witness personally interpreted the data); *New York v. Rodriguez*, 59 N.Y.S.3d 337, 346-47 (N.Y. App. Div. 2017) (holding that a DNA analyst who conducted an independent review of the data could testify about her conclusions), *aff'd*, 101 N.E.3d 977 (N.Y. 2018).

Johnson cites *Alejandro-Alvarez v. Arkansas* in support of the claim that Arkansas's highest court takes a position conflicting with that of the Alaska Court of Appeals. 587 S.W.3d 269, 273 (Ark. App. 2019). But the Arkansas Court of Appeals, not the Arkansas Supreme Court, decided *Alejandro-Alvarez*. And the Arkansas Supreme Court has held that under Rule 703 an expert witness may render an opinion based on inadmissible facts and data, so long as they are of a type reasonably relied upon by experts. *Sauerwin v. Arkansas*, 214 S.W.3d 266, 269 (Ark. 2005). Accordingly, the Arkansas Supreme Court has permitted an expert witness to testify about his opinion based on data or reports generated by another. *Id.* at 269-70 (permitting a medical examiner to testify about his opinion based on the autopsy report prepared by another); *Sera v. Arkansas*, 17 S.W.3d 61, 80 (Ark. 2000) (permitting an expert witness who independently reviewed the urine sample results and signed off on the report to testify about the test results).

Nor does *Martin v. Delaware* support Johnson's argument that the courts are divided on this issue. 60 A.3d 1100 (Del. 2013). The court acknowledged Justice Sotomayor's statement in *Bullcoming* recognizing the

limits of this Court's holding and the admissibility of independent expert opinion. *Martin*, 60 A.3d at 1109. But in *Martin*, the witness relied on the testing analyst's "conclusions," unlike in this case. *Id.* at 1107.

The decision in *Young v. United States* is also factually distinguishable from this case. 63 A.3d 1033 (D.C. 2013). The court pointed out that the witness did not personally perform the DNA testing or the computer analysis that generated the DNA profiles. *Id.* at 1038. Nor did the witness personally run the program to determine the probability of a match. *Id.* at 1038, 1045. Notably, the court held that not every analyst involved in the process of obtaining DNA evidence must testify. *Id.* at 1049. It also recognized that under certain circumstances a non-testing analyst could testify if he can "'understand, interpret, and evaluate the results.'" *Id.* (quoting David H. Kaye, David E. Bernstein, & Jennifer L. Mnookin, *The New Wigmore: Expert Evidence* § 4.10.2 at 204-05 (2d ed. 2011)). And *Carrington v. District of Columbia* is similarly distinguishable on the facts. 77 A.3d 999 (D.C. 2013). While here Noble stated her independent opinion, in *Carrington* the witness conversely testified that he "cannot form an opinion" regarding the testing. *Id.* at 1002 n.1.

C. Factual differences between the cases explain the different results within jurisdictions

Johnson's contention that courts within three jurisdictions have reached different outcomes in several cases does not warrant this Court's review. This Court need not resolve intra-jurisdiction differences.

Cf. Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) (dismissing a certificate from a federal court of appeals because differences in outcomes within a circuit are primarily the task of that circuit to resolve).

Moreover, the differing outcomes merely reflect the factual differences between the cases. There is no conflict on the law between the decision here and in *McCord v. Alaska*, 390 P.3d 1184 (Alaska App. 2017). As the court of appeals stated in *Robbins*—where it concluded that there was no confrontation violation when a reviewer testified about test results—"the same legal principle underlies our decisions in *McCord* and in the present case." 449 P.3d at 1115. The *Robbins* court explained that Noble was not certified to test for clonazepam when she testified about its presence in *McCord* and she knew of it only because she read another analyst's test result. *Robbins*, 449 P.3d at 1115; *see also McCord*, 390 P.3d at 1186. Thus, it was "unclear to what extent Noble was able to independently analyze a test that she herself was not certified to perform[.]" *Robbins*, 449 P.3d at 1115. But by the time Johnson's blood sample was tested several years later, Noble was a supervisor and qualified to test for the substances found in Johnson's blood, a crucial distinction between *McCord* and this case. Pet. App. 28a-29a. The court in this case said nothing about a conflict with its precedent or between jurisdictions—because there is no genuine conflict.

Johnson's argument that the North Carolina and Texas courts issued conflicting rulings similarly does not withstand scrutiny. *See* Pet. 14 & n.3, 19. The

outcomes in the cases Johnson discusses were fact specific and consistent with the decision in this case.

When the expert witnesses testified about their independent opinions, the courts held that there was no Confrontation Clause violation. *E.g.*, *North Carolina v. Brewington*, 743 S.E.2d 626, 627-28 (N.C. 2013) (finding no violation because the expert "presented an independent opinion formed as a result of her own analysis, not mere surrogate testimony") (citing *North Carolina v. Ortiz-Zape*, 743 S.E.2d 156, 163, 165, 172 (N.C. 2013), *cert. denied*, 572 U.S. 1134 (2014)); *Ortiz-Zape*, 743 S.E.2d at 159, 164 (permitting an expert witness to testify about her independent opinion based on her review of testing performed by another analyst); *North Carolina v. Brent*, 743 S.E.2d 152, 155 (N.C. 2013) (holding that an expert could testify about her "independent opinion based on her analysis of data" collected by a non-testifying analyst); *North Carolina v. Romano*, 836 S.E.2d 760, 771-72 (N.C. App. 2019) (determining that the defendant's confrontation rights were not violated when an expert who did not conduct the test testified about the level of alcohol in the defendant's blood because he reviewed the records and formed "an independent opinion through his own analysis"); *Paredes v. Texas*, 462 S.W.3d 510, 512-14, 518 (Tex. Crim. App. 2015) (finding no confrontation violation because the expert testified about her own conclusions); *Garrett v. Texas*, 518 S.W.3d 546, 551, 554 (Tex. App. 2017) (distinguishing the facts from *Burch v. Texas*, 401 S.W.3d 634 (Tex. Crim. App. 2013), and comparing them to *Paredes* and admitting the DNA analyst's testimony because it was based on his own analysis of

the machine-generated, raw DNA data prepared by others); *Gaddis v. Texas*, No. 13-16-00190-CR, 2017 WL 2979802, at *1, *4, *6 (Tex. App. July 13, 2017) (unpublished) (distinguishing the facts from *Burch* and *Bullcoming* and comparing them to *Paredes* and finding no Confrontation Clause violation in admitting an analyst's testimony and report about the presence of drugs in the defendant's blood because she "independently analyzed the raw data" from the blood tested by another); *Molina v. Texas*, 450 S.W.3d 540, 550-51 (Tex. App. 2014) (holding that a witness could testify about the lack of gunshot residue on the victims because he "independently analyzed" the "raw data" and "offered his own opinion").

When the expert witnesses were simply conduits for non-testifying experts' opinions, the courts concluded there was a confrontation violation. *E.g.*, *North Carolina v. Craven*, 744 S.E.2d 458, 459-60, 461 (N.C. 2013) (holding that the expert's testimony was inadmissible because the expert "did not give her own independent opinion," but rather "parroted" others' conclusions); *Burch*, 401 S.W.3d at 637 (finding a violation when there was no indication that the expert witness formed her own opinion). Thus, the North Carolina and Texas decisions are consistent with this case.

D. Different rationales for reaching the same conclusion do not warrant review

Johnson also contends that certain courts, relying on some of the different rationales in *Williams*, have concluded that no Confrontation Clause violation

occurred. Pet. 15. This is not a reason for this Court to grant Johnson's petition. This Court "reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam); *see also McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 603 (1821) ("The question before an appellate Court is, was the judgment correct, not the ground on which the judgment professes to proceed."). Because the courts in the decisions to which Johnson refers affirmed admitting the expert witness evidence, there is no conflict in judgments for this Court to review.

Additionally, in deciding to permit such evidence, a number of these courts found relevant that the witnesses testified about their independent opinions. *E.g.*, *California v. Lopez*, 286 P.3d 469, 478 (Cal. 2012) (considering relevant that the witness "gave his independent opinion"); *id.* at 481 (Werdegar, J., concurring) (stating that the Confrontation Clause was satisfied by calling an expert witness who could interpret the instrument-generated data for the jury, "giving his own, independent opinion as to the level of alcohol in defendant's blood sample"); *New Hampshire v. Stillwell*, No. 2017-0361, __ A.3d __, 2019 WL 4455041, at *4 (N.H. Sept. 18, 2019) (explaining that the "Confrontation Clause does not prohibit experts, applying their own knowledge to the facts before them, from testifying regarding their opinions"); *Washington v. Lui*, 315 P.3d 493, 505 (Wash. 2014) ("our test allows expert witnesses to rely on technical data prepared by others when reaching their own conclusions"), *cert. denied*, 573 U.S. 933 (2014); *Wisconsin v. Deadwiller*, 834 N.W.2d 362, 376 (Wis. 2013) (permitting an analyst who did not obtain

the DNA profile to testify because the availability for cross-examination of an expert witness who "'renders her own expert opinion is sufficient to protect a defendant's right to confrontation, despite the fact that the expert was not the person who performed the mechanics of the original test'") (quoting *Wisconsin v. Williams*, 644 N.W.2d 919, 926 (Wis. 2002)).

In conclusion, no conflict of authority warranting this Court's review exists.

II. THIS CASE IS A POOR VEHICLE FOR THIS COURT TO ADDRESS CONFRONTATION CLAUSE ISSUES SURROUNDING EXPERT WITNESS TESTIMONY

This Court's review is unwarranted because this case is the wrong vehicle, for three reasons, to address the Confrontation Clause arguments Johnson presents. First, Johnson waived her argument about the admissibility of the lab report. Second, the record does not contain the analysts' file. Third, any error was harmless.

First, when Johnson appealed her conviction to the Alaska Court of Appeals, she raised no argument about the report, appealing only the admission of Noble's testimony. *See* Resp. App. 3a, 6a-8a.[2] Thus, Johnson has waived her argument about the lab report's

[2] Johnson's single sentence reference about the lab report in her reply brief failed to preserve this issue. *See Barnett v. Barnett*, 238 P.3d 594, 598, 603 (Alaska 2010) (deeming waived (1) arguments raised for the first time in a reply brief and (2) arguments cursorily briefed).

admissibility. *See, e.g.*, *United States v. Ortiz*, 422 U.S. 891, 898 (1975) (declining to consider an issue "raised for the first time in the petition for certiorari"); *cf. Melendez-Diaz*, 557 U.S. at 327 ("The defendant *always* has the burden of raising his Confrontation Clause objection[.]"). Contrary to Johnson's assertion, Pet. 2, the court of appeals stated nothing about the lab report because Johnson never raised this issue.

Second, the record does not include the lab case file, which contains the raw data upon which Noble formed her opinion. Thus, this Court would be limited in analyzing the independence of Noble's opinion and in determining whether any of the materials in the case file were testimonial. *See Williams*, 567 U.S. at 86-94 (Breyer, J., concurring) (discussing complications in Confrontation Clause analysis when addressing "crime laboratory reports and underlying technical statements made by laboratory technicians").

Third, even if the court had erred in admitting Noble's testimony or the lab report, any error was harmless beyond a reasonable doubt. *Bullcoming*, 564 U.S. at 668 n.11 (stating that the harmless error analysis applies to Confrontation Clause violations); *cf. Schiro v. Farley*, 510 U.S. 222, 228-29 (1994) (stating that the respondent may "rely on any legal argument in support of the judgment below"). This case satisfies the harmless error standard because the jury would have found Johnson guilty based on "the remaining evidence." *Coy v. Iowa*, 487 U.S. 1012, 1022 (1988).

Johnson was convicted of a DUI based on the "under the influence" subsection of the statute, not based on the 0.08 subsection. R. 20-21; *see* AS 28.35.030. Thus, the prosecution did not need to prove any particular level of alcohol or drugs in Johnson's body, as was the case in *Bullcoming*, where the lab report provided a specific alcohol concentration that met the threshold for the aggravated DUI with which Bullcoming was charged. 564 U.S. at 654-55. Rather, to prove that Johnson was "under the influence," the prosecution had to show only that, as a result of using controlled substances, her capabilities were impaired to the extent that she no longer had the ability to drive a vehicle with the caution of a person not under the influence. R. 86. The prosecution provided ample evidence of this.

Specifically, the gas station attendant testified that Johnson was confused and stumbled backed to her car. Tr. 48, 50. The attendant was so concerned about Johnson driving impaired that he called 911 twice. Tr. 50-51.

Officer Lopez testified that he observed clues of intoxication in Johnson's driving. Tr. 109, 113-14. After Officer Lopez stopped Johnson, she tried to hand him cash. Tr. 115-16. Johnson had slurred, thick speech and bloodshot, watery eyes. Tr. 117; R. 27-28. She also had poor manual dexterity, was confused, and had difficulty finding the documents the officer requested. Tr. 118; R. 28. When Officer Lopez asked Johnson to unlock the door, Johnson pressed numerous buttons, including the buttons for the windows. Tr. 119-20.

Crucially, Johnson confessed to Officer Lopez, telling him that she had taken both prescription and over-the-counter medications, including methadone and sleep aids; the jury heard the audio recording of this admission. Audio recording of trial, Volume I, 9/20/16, 12:28:16-12:29:38, Tr. 123 (audio recording of contact not transcribed).

Officer Lopez also testified that Johnson exhibited numerous signs of intoxication during all of the standardized field sobriety tests, a video recording of which the jury watched. Tr. 124-38; R. 28. Johnson's breath sample did not indicate any alcohol. Tr. 138-39; R. 28. Officer Lopez, who is a certified drug recognition expert, testified that be believed that Johnson was impaired by drugs. Tr. 190.

Additionally, Noble explained that the quantities of drugs found in Johnson's blood did not mean much by themselves, unlike an alcohol concentration. Pet. App. 46a. To determine the drugs' effects, Noble testified the jury had to consider the attendant's and the officer's observations. Pet. App. 46a, 52a, 71a. This, too, means that Noble's testimony about the drugs in Johnson's blood and the lab report had limited significance. And the prosecutor referred to the lab report only once during his closing argument. Tr. 252. To prove intoxication, the prosecutor relied on the testimony of not only Noble but also Officer Lopez and the attendant. Tr. 226-32. Nor did Johnson focus her closing argument on the testing or Noble's conclusions; instead, she primarily argued she was not under the influence. Tr. 238-47.

The gas station attendant's and the officer's observations, combined with Johnson's admission, proved beyond a reasonable doubt that Johnson drove under the influence. Thus, any error from introducing Noble's testimony and the lab report had "little, if any, likelihood of having changed the result of the trial." *Chapman v. California*, 386 U.S. 18, 22 (1967).

III. THE ALASKA COURT OF APPEALS CORRECTLY HELD THAT ADMITTING NOBLE'S TESTIMONY DID NOT VIOLATE THE CONFRONTATION CLAUSE

The court of appeals concluded that, because Noble testified about her independent opinion based on the testing data, her testimony did not violate the Confrontation Clause. Pet. App. 5a. This holding is consistent with this Court's precedent.

A. Noble testified that she reached her own conclusion about the substances in Johnson's blood

Noble testified about her qualifications, including her certification to perform the tests and interpret the results at issue in this case. Pet. App. 29a-31a, 38a-41a. She explained the three tests conducted to ascertain first the type and then the quantity of drugs found in the blood. Pet. App. 32a-36a. She then explained how she independently assessed the raw data and concluded that the analysts' conclusions were consistent with the data. Pet. App. 36a-40a, 60a.

First, the drug screen test gives an idea of what classes of compounds can be found in the blood. Pet. App. 32a.

The second test detects specific compounds. Pet. App. 33a. For this test, solvents are added to the blood to extract the substances being tested. Pet. App. 59a. A small extract from the blood in a solvent is placed into the gas chromatograph-mass spectrometer, and the rest of the process is automated. Pet. App. 33a-34a, 40a. The spectrometer separates the different compounds and bombards them with electrons. Pet. App. 33a-34a. The compounds' molecules are broken into small pieces, "[a]nd every drug predictability breaks up into the same size fragments every time." Pet. App. 33a-34a. The fragments are collected, and the pattern of their masses is analyzed; the pattern is compared to a library of known standards to determine the drug. Pet. App. 33a-34a.

Third, other methodologies are used to determine the quantity of the detected drugs. Pet. App. 35a-36a. Instruments break down the molecules into smaller pieces to obtain an even more detailed graphical representation of them. Pet. App. 35a. The data is collected electronically, and software analyzes it. Pet. App. 36a. The software measures the graphs' peaks, and from this the compound's quantity can be determined. Pet. App. 36a.

Noble explained that the laboratory uses both positive controls (i.e., with a known amount of the drug being tested for) and negative controls (i.e., with no amount of the drug being tested for). Pet. App. 37a-38a. The use of the controls would reveal any errors, which the reviewer would see in the graphs. Pet. App. 39a-41a, 61a.

Noble explained that after the analyst has completed the report, the supervisor independently reviews the same data as did the testing analyst. Pet. App. 37a-40a, 60a. Noble testified that only if the supervisor finds that the analyst's conclusions accurately reflect the data, does she sign the report. Pet. App. 37a. Noble repeatedly testified that she formed her own conclusion regarding the data initially reviewed by the testing analysts. Pet. App. 38a-40a, 45a.

Noble explained to the jury her role in the testing of Johnson's blood, where she approved the report. Pet. App. 38a. She stated that Chandler prepared the report, which included all of the data printed from the instruments. Pet. App. 38a-39a. Noble examined the entire file to make sure that everything met the criteria, including comparing the graphs of the tested substances to the graphs of the controls. Pet. App. 36a-41a, 60a. Once Noble determined that she accepted all the data in the file, she signed it as the reviewer. Pet. App. 22a, 38a-39a. Noble then testified about the types and quantities of substances found in Johnson's blood sample, including methadone. Pet. App. 44a-53a.

B. Noble's testimony comported with the Confrontation Clause because she provided her independent opinion

Noble expressed her independent opinion; thus, Johnson could cross-examine Noble and challenge her analysis of the data. No binding legal authority required Noble to have personally observed Chandler's testing. Nor did the Confrontation Clause require

Noble to have been the evidence custodian of Johnson's blood sample.

Noble reviewed all the data and graphs, which were computer-generated from the tests conducted by the analysts, and, using her own judgment, formed independent conclusions about what they meant. Pet. App. 36a-40a, 42a, 45a, 60a. Thus, unlike in *Bullcoming*, here "an expert witness was asked for [her] independent opinion" and "the person testifying [was] a supervisor [and a] reviewer[.]" 564 U.S. at 672-73 (Sotomayor, J., concurring). Noble's role was unlike that of the testifying witness in *Bullcoming*, who did not "review[] [the testing analyst's] analysis," let alone the raw data, had no "independent opinion" about the result, "did not sign the certification," and had "no involvement whatsoever" in the test and report. 564 U.S. at 655, 662; *id.* at 673 (Sotomayor, J., concurring). Noble reviewed the raw data and Chandler's analysis, formed an independent opinion, signed the report, and played an essential role in creating it. Pet. App. 38a, 45a, 72a.

Williams supports the court of appeals' conclusion that Noble's testimony complied with the Confrontation Clause. As Justice Breyer stated, "Under well-established principles of evidence, experts may rely on otherwise inadmissible out-of-court statements as a basis for forming an expert opinion if they are of a kind that experts in the field normally rely upon." *Williams*, 567 U.S. at 88-89 (Breyer, J., concurring) (citing Fed. R. Evid. 703). Likewise, the plurality and dissent agreed that there is "'nothing wrong'" with an expert "'testifying that two DNA profiles'" that she did not

personally compile "'matched each other'" because that is "'a straightforward application of [her] expertise.'" *Williams*, 567 U.S. at 72 (plurality opinion) (quoting *id.* at 129 (Kagan, J., dissenting)).

Here, Noble applied her expertise and independently examined the raw, machine-generated data. She testified that she concluded that the data showed the types and quantities of substances in Johnson's blood sample. Her testimony was not hearsay because she was not repeating an out-of-court statement; the opinion Noble expressed was her own. And because Johnson could, indeed did, cross-examine Noble, this satisfied the Confrontation Clause.

The concerns of the *Williams* dissent regarding the testifying witness's lack of knowledge about testing procedures are not present in this case. In *Williams*, Cellmark, a private laboratory, tested one of the two samples, and a state employee testified about the DNA match between the sample tested at Cellmark and the sample tested at the state laboratory. 567 U.S. at 56, 59. The witness in *Williams* "had no knowledge at all of Cellmark's operations," could not convey the particular test and testing process Cellmark employed, and "had no idea how [the results of Cellmark's] testing were generated." 567 U.S. at 124-25 (Kagan, J., dissenting). Noble, on the other hand, knew exactly how the results at the Washington laboratory were generated. She knew the standard operating procedures at her laboratory, supervised Chandler, and knew what tests had been conducted and how those tests operated. Pet. App. 29a, 36a-52a, 60a.

The laboratory report was admissible because it simply recited Noble's conclusions about Johnson's blood sample, conclusions about which Noble testified. In addition, Noble—along with Chandler—signed the report, satisfying *Bullcoming*. Moreover, as discussed above, Johnson waived any argument pertaining to the report for not raising it in the court of appeals.

Johnson raises various confrontation arguments concerning a supervisor testifying about a subordinate's testing. Pet. 16-17. These arguments are misplaced. The court of appeals held that Noble's testimony comported with the Confrontation Clause because Noble independently reviewed Chandler's work, not because Noble supervised Chandler. Pet. App. 4a-5a.

Johnson contends that determining whether an opinion is independent is "artificial and subjective" and results in inconsistent decisions. Pet. 14, 18. Not so. Rule 703, or its state equivalent, and the accompanying case law provide guidance in evaluating whether an expert witness's opinion is independent. The courts must then decide each case based on the facts, and courts regularly make such fact specific evaluations. *See, e.g.*, *Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014) (stating that evaluating searches and seizures under the Fourth Amendment requires analyzing the totality of the circumstances); *Fare v. Michael C.*, 442 U.S. 707, 725 (1979) (same for determining a *Miranda* waiver).

Johnson cites no authority in support of her argument that the witness at trial must have personal knowledge of the tests, for example by conducting or observing the test or reviewing videos of it. *See* Pet. 20.

Melendez-Diaz does not require it. Nor does *Bullcoming*; in fact, Justice Sotomayor's concurrence suggest the contrary. And *Williams* as well as Rule 703 directly contradict Johnson's claim. *See supra* Section I.A (explaining that *Williams* and Rule 703 permit an expert to testify to her opinion based on information of which she lacks first-hand knowledge).

Johnson incorrectly contends that Noble conveyed testimonial hearsay by testifying about the particular sample tested and claims that Noble could not explain why the lab records allegedly indicated that the laboratory received the sample in an unsealed, opened condition. *See* Pet. 2, 7, 20, 22. First, Johnson's contention is factually inaccurate. Noble testified that when evidence arrives at the lab, various notes annotate its state. Pet. App. 56a. Here, next to the "evidence sealed" question, the "no" box was checked. Pet. App. 56a. Noble explained that this was an error because the boxes for "bag sealed" and "tube sealed" were checked. Pet. App. 56a. Additionally, Noble testified that the notes also stated that the items were sealed with evidence tape. Pet. App. 56a.

Second, any dispute about the seal's condition pertains to the chain of custody, not to a confrontation right. Neither Noble nor any other analyst could personally attest to the chain of custody; that was the evidence custodian's duty. *See Williams*, 567 U.S. at 74 (stating that the DNA analyst was not competent to testify to the chain of custody); *Melendez-Diaz*, 557 U.S. at 311 n.1 ("[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the

sample, or accuracy of the testing device, must appear in person as part of the prosecution's case."); Pet. App. 31a-32a, 55a. Moreover, "'gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.'" *Melendez-Diaz*, 557 U.S. at 311 n.1 (quoting *id.* at 336 (Kennedy, J., dissenting)). Johnson could cross-examine Noble on whether she had personally witnessed any other analyst handle the evidence or watched the analyst conduct the tests, and she did so. Pet. App. 60a.

Noble formed her own, independent conclusions regarding the substances in Johnson's blood based on the raw data the instruments generated. Therefore, the court of appeals correctly concluded that her testimony comported with the Confrontation Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

Appeal No. A-12744

Trial Court No. 3PA-16-01291cr

[Filed February 21, 2018]

TERESA ANN JOHNSON, Appellant,	)
v.	)
STATE OF ALASKA Appellee.	)

VRA AND TYPEFACE CERTIFICATION

I certify that this document and any attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61,140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify that the font used herein is Times New Roman 13.

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT PALMER
HONORABLE GREGORY L. HEATH, JUDGE

BRIEF OF APPELLANT

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Filed in the Court of Appeals
for the State of Alaska
this __ day of February, 2018.

_____
Deputy Clerk of Court

[*Tables of Contents and Authorities Omitted in this Appendix*]

AUTHORITIES PRINCIPALLY RELIED UPON

U.S. Constitution, Amendment VI.

The Sixth Amendment to the U.S. Constitution provides:

> Right to Speedy Trial
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the

> crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him'; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF JURISDICTION

This court has jurisdiction over this appeal from the conviction of Teresa Ann Johnson pursuant to AS 22.07.020(a) and (b). The superior court's judgment is dated October 24, 2016. The notice of appeal was filed on November 17, 2016.

ISSUE PRESENTED FOR REVIEW

I. WHETHER THE COURT ERRED WHEN IT ALLOWED THE STATE'S WITNESS TO TESTIFY ABOUT THE RESULTS OF THE CHEMICAL TESTS OF JOHNSON'S BLOOD PERFORMED BY OTHERS.

STATEMENT OF THE CASE

Appellant Teresa Ann Johnson "Johnson" was convicted by a jury in 2016 of felony Driving Under the Influence "DUI" in violation of AS 28.35.030(n). [R. 2] She was found not guilty of the crime of Misconduct Involving Weapons in the Fourth Degree. [Tr. 255] She was sentenced to 16 months with 14 months suspended. [R. 2]

Johnson was charged with driving under the influence of controlled substances. [R. 27-29] Prior to

trial, on September 14, 2016, the State gave notice that its expert from the Washington State Patrol Laboratory, Amanda Chandler "Chandler," had childcare problems precluding her from testifying at trial about Johnson's toxicology report which was generated from that lab. [Tr. 5] Johnson objected to anyone testifying who had not conducted the testing herself because it denied her the right to confront her witnesses. [Tr. 5] The court continued the hearing until September 16, 2016, so that Johnson would be present for it. She was telephonic on September 14, 2016.

The State gave notice on September 16th that another analyst, Lisa Noble, would testify in Chandler's place. [Tr. 12] The court ordered the parties to submit briefing on the issue. [Tr. 13] The State filed its Motion Regarding Expert Testimony. [R. 123-125] Johnson filed her Defendant's Brief Regarding Admissibility of Lisa Noble's Testimony About the Lab Results re-iterating that Noble's testimony violated her confrontation rights guaranteed by the U.S. and Alaska Constitutions. [R. 107-116] The court issued a written decision allowing the State to call Noble provided it lay the appropriate foundation for her testimony. [R. 119-122] It found no violation of Johnson's confrontation rights. *Id.*

Johnson renewed her objection to Noble testifying when the State called her as a witness. [Tr. 54]

Noble testified that she is a forensics toxicology supervisor at Washington State Patrol Toxicology Lab. [Tr. 55] Alaska sends certain blood samples to Washington because the Alaska Crime Lab was unable to perform the tests to determine if a defendant's blood

contained controlled substances. [Tr. 58] After the Washington lab receives the blood sample, it is given to an analyst or analysts to determine what class of drugs it contains. [Tr. 60] Once the class or classes are identified, further drug screening is conducted with a gas chromatography mass spectrometer. [Tr. 61] These results are given to the primary analyst, who authors a lab report. [Tr. 66] This report is then reviewed by a supervisor. [Tr. 66]

In Johnson's case the primary analyst of the controlled substances in her blood was Chandler. [Tr. 70] Chandler identified 7-aminoclonazepam, Alprazolam, Clonazepam, Diazapam and Nordiazapam. [Tr. 77] [R. 154] The other analysts who tested Johnson's blood were Christie Mitchell-Mata "Mitchell-Mata" and Justin Cray "Cray." [Tr. 70] Mitchell-Mata conducted two tests and identified Methadone and Oxycodone. [Tr. 74] [R.153-154]. Cray did one test and identified Dipenhydramine. All these substances are controlled, with the exception of Dipenhydramine. [Tr. 82] [R. 87] Tapentadol was also identified. [Tr. 80]

Noble was the lab report reviewer. [Tr. 70] She did not do any of the tests, nor did she watch any of the other analysts test Johnson's blood. [Tr. 93]

The jury returned a guilty verdict on the DUI. Johnson filed this appeal.

STANDARDS OF REVIEW

When a defendant has been denied his right to confront a witness, the court must reverse the conviction unless the error was harmless beyond a

reasonable doubt. *Blue v. State*, 558 P.2d 636,645 (Alaska 1977).

ARGUMENT

II. THE COURT ERRED WHEN IT ALLOWED THE STATE'S WITNESS TO TESTIFY ABOUT THE RESULTS OF THE CHEMICAL TESTS OF JOHNSON'S BLOOD PERFORMED BY OTHERS.

The Sixth Amendment to the U.S. Constitution provides:

> Right to Speedy Trial
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him'; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

This court, in a recent case directly on point and involving the same witness who testified about the presence of controlled substances in Johnson's blood, has ruled that a defendant is denied the right to confrontation when she is not afforded the right to cross-examine the analyst who tested her blood for controlled substances. In *McCord v. State,* 390 P.3d 1184 (Alaska App. 2017) this court reversed McCord's conviction for driving under the influence of clonazepam, a controlled substance. In that case

McCord's blood sample, taken when she was arrested for DUI, was sent to the Washington State Patrol Laboratory for testing for controlled substances. Although Sarah Swenson was the analyst who tested the sample and identified the clonazepam, Lisa Noble, who was the primary analyst and did the initial testing of the blood, testified regarding the results at trial. *Id.*, at 1185. McCord objected to Noble's testimony asserting her right to cross-examine Swenson since she had done the actual testing. *Id.*

The *McCord* court relied upon *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 310-11, 129 S.Ct. 2527, 2532, 174 L.Ed 2nd 3114 (2009) in reaching its decision. *Id.*, at 1185. Melendez-Diaz had been convicted of trafficking cocaine. On appeal the Supreme Court ruled that under the confrontation clause of the Sixth Amendment the government was required to present live testimony from the laboratory technician who tested the sample at issue and concluded it was cocaine. *Id.*, at 1185.

The *McCord* court noted that the State was required to prove that McCord' s driving had been impaired by a controlled substance. *Id.*, at 1186. It was Swenson who performed the testing that detected clonazepam in McCord's blood. Noble was aware of the clonazepam only because Swenson's lab report described her test results. Under *Melendez-Diaz* McCord was entitled to cross-examine Swenson regarding the presence and concentration of clonazepam in her blood. *Id.* The district court committed reversible error when it allowed the state to introduce this evidence through Noble. *Id.*

In the present case the trial court denied Johnson her constitutional right to cross-examine the analysts who identified the various controlled substances in her blood when it allowed Noble to testify. Noble was only aware of these substances because the lab report described the various test results of analysts Chandler and Mitchell-Mata confirming the presence of Alprazolam, Diazapam, Nordiazapam, Methadone, Oxycodone and Trapentadol. Under the Sixth Amendment to the U.S. Constitution and *Melendez-Diaz* the State was required to present live testimony from the laboratory technicians who tested the sample. *McCord v. State, supra.* Johnson's conviction must be reversed because this was not harmless error; i.e., the State could not prove its DUI case against her without testimony from a toxicologist establishing the presence and concentrations of controlled substances in her blood. *McCord v. State, supra.*

CONCLUSION

The Sixth Amendment guarantees to a criminal defendant the right to confront his accusers. In a DUI trial where the defendant is charged with driving under the influence of controlled substances, the State must present live testimony of the analysts who tested the defendant's blood for these substances so that the defendant may cross-examine them. In the present case the court erred when it allowed the State to present the testimony of the analysts' supervisor, Lisa Noble, who only knew of the substances through the lab report.

Johnson respectfully requests that this court reverse her conviction.

Dated this 19th day of February, 2018, at Anchorage, Alaska.

MARILYN J. KAMM
ATTORNEY AT LAW

By:_____

Marilyn J. Kamm #7911105
Contract Attorney for the Office of Public Advocacy

I certify that this document(s)
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