No. 19-1065

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

PETITIONER'S REPLY BRIEF

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I. THE CONFLICT AND CONFUSION AMONG LOWER COURTS IS REAL AND REQUIRES THIS COURT'S INTERVENTION.

Ignoring reality, the State denies the existence of a conflict and strains to present an alternative narrative that courts are "generally unified in permitting expert witnesses to testify about their own independent opinions based on raw data generated by others." Opp. 4. Any perceived conflict, the State says, is merely a byproduct of "case-specific, factual differences" regarding whether the expert testimony in a given case presented an "independent opinion." *Id*. at 1. Yet, many courts have expressly declined to uphold the admission of surrogate expert testimony purporting to offer an independent opinion. And even those courts applying the independent-opinion test have acknowledged the conflict and confusion that exists under this Court's Confrontation Clause jurisprudence. Indeed, as two Justices have recognized, this Court's last foray into this field eight years ago in *Williams v. Illinois*, 567 U.S. 50 (2012), "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 from denial of certiorari). The time is ripe for this Court to intervene and provide much-needed guidance.

A. Courts Are Divided and Struggling with the Lack of Guidance.

1. A clear conflict exists among lower courts regarding whether the Confrontation Clause permits a surrogate expert to testify regarding tests conducted by other analysts, including the particular samples

tested, procedures followed, and results reached. As Johnson acknowledges, a number of courts, if not a majority, distinguish between permissible surrogate expert testimony that provides a so-called "independent opinion," and impermissible testimony that does not. Pet. 1, 13-14. Other courts, however, have held that surrogate expert testimony conveying testimonial statements of absent analysts violates the Confrontation Clause—even when the expert purports to offer an independent opinion.

The D.C. Court of Appeals' decision in *Young*, for example, epitomizes this conflict. There, the prosecution presented DNA evidence at trial through a surrogate expert—a lab supervisor who did not conduct or have personal knowledge of the underlying tests. *Young v. United States*, 63 A.3d 1033, 1037 (D.C. 2013). As in Johnson's case, the trial court permitted the surrogate expert to testify regarding the underlying tests, reasoning that she "independently analyzed the data produced by the scientists under her supervision and reached her own conclusions." *Id.* at 1048.

But, unlike here, the D.C. Court of Appeals reversed and held that the surrogate expert's testimony violated the Confrontation Clause, because it relayed information about what the absent analysts did and observed—information gleaned only from reviewing their testimonial work product. *Id.* Significantly, the court explained the surrogate expert's "supervisory role and independent evaluation of her subordinates' work product are not enough to satisfy the Confrontation Clause because they do not

alter the fact that she relayed testimonial hearsay."[1] *Id.*; *see Carrington v. District of Columbia*, 77 A.3d 999, 1004 (D.C. 2013) (applying *Young* to DUI case).

As another example, the Delaware Supreme Court held in *Martin*, a DUI case, that a surrogate expert's testimony violated the Confrontation Clause. *Martin v State*, 60 A.3d 1100, 1108-09 (Del. 2013). There too, the trial court had permitted a lab supervisor to testify regarding blood analyses conducted by another analyst, even though she did not conduct or have personal knowledge of the tests. *Id.* at 1101. On appeal, the Delaware Supreme Court noted that the case presented one of the circumstances Justice Sotomayor had identified in her *Bullcoming* concurrence, "in which an expert witness [i]s asked for h[er] independent opinion." *Id.* at 1108-09 (citing *Bullcoming v. New Mexico*, 564 U.S. 647, 673 (2011) (Sotomayor, J. concurring)). Nonetheless, the court found a confrontation violation, explaining that the supervisor improperly conveyed the absent analyst's testimonial statements regarding her testing and observations. *Id.* at 1107-09.

In its opposition, the State attempts to distinguish *Martin* on the grounds that the testifying lab supervisor there "relied on the testing analyst's 'conclusions,' unlike in this case," but offers little explanation. Opp. 16 (citing *Martin*, 60 A.3d at 1107.) If anything, on the very page the State cites, the *Martin* court identified the "conclusions" on which the supervisor relied, explaining that the testing analyst's

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[1] The State mentions *Young* in its opposition, but fails to address its core reasoning and its rejection of the independent-opinion test as a basis to admit underlying testimonial statements that form the basis of an expert's opinion. Opp. 16.

"representations and test results comprise the underlying conclusions supporting [the supervisor's] report." *Martin*, 60 A.3d at 1107. That is precisely what Noble relied on in Johnson's case, yet the Alaska Court of Appeals found Noble's testimony permissible.

2. Courts also have widely acknowledged the existence of a conflict, with many courts that have adopted the independent-opinion test recognizing a conflict with *Martin*. For example, in *Marshall*, the Colorado Supreme Court applied the independent-opinion test to find a surrogate expert's testimony permissible, declaring that "we simply disagree with the [Delaware Supreme Court's] reasoning in *Martin*." *Marshall v. People*, 309 P.3d 943, 947 n.8 (Colo. 2013) (citation omitted); *see also id.* at 953 (Bender & Boatright, JJ., concurring and dissenting in part) (identifying "separate line of cases" from the D.C. Circuit, Delaware, New York, and Texas).

As another example, in *Katso*, the Court of Appeals for the Armed Forces upheld the admission of a surrogate expert's testimony, reasoning the expert "presented his own expert opinion at trial, which he formed as a result of his independent review." *United States v. Katso*, 74 M.J. 273, 283-84 (C.A.A.F. 2015). But the court cited *Martin* (among other cases) to acknowledge that some courts have "eschew[ed]" the independent-opinion test to "find a Confrontation Clause violation even [when] the expert had a high degree of involvement in the testing process or thoughtfully formulated her own conclusions." *Id.* at 283 n.1 (citations omitted).

Similarly, in *Michaels*, the New Jersey Supreme Court applied the independent-opinion test, while citing *Martin* (and a D.C. Court of Appeals decision)

to acknowledge that, under similar circumstances, "a few state high courts have found that a defendant's confrontation rights are violated." *State v. Michaels*, 95 A.3d 648, 677 (N.J. 2014) (citations omitted).

3. Further, on a more general level, the State does not, and cannot, deny that lower courts are almost universally struggling to identify the permissible boundaries of surrogate expert testimony in light of the factual scenarios this Court has left unaddressed and its various conflicting approaches in *Williams*. As Justices Gorsuch and Sotomayor recently observed, this struggle "affect[s] courts across the country in cases that regularly recur." *Stuart*, 139 S. Ct. at 36-37 (Gorsuch & Sotomayor, JJ., dissenting from denial of certiorari) (citing *Michaels*, 95 A.3d at 666; *State v. Dotson*, 450 S.W.3d 1, 68 (Tenn. 2014); *United States v. Turner*, 709 F.3d 1187, 1189 (7th Cir. 2013); *United States v. James*, 712 F.3d 79, 95 (2d Cir. 2013)). Therefore, this Court should intervene to resolve the conflict and confusion confronting lower courts.

B. Courts Applying the Independent-Opinion Test Have Reached Conflicting Decisions Under Similar Circumstances.

Even those courts that have adopted the independent-opinion test have struggled to apply it consistently. For example, in its opposition, the State dismisses the North Carolina Supreme Court's conflicting decisions in *Brewington* and *Craven*, asserting that the conflict can be explained by the fact that the expert in *Brewington* purportedly provided an independent opinion, whereas the expert in *Craven* did not. Opp. 17-19 (citing *State v. Brewington*, 743 S.E.2d 626, 627-28 (N.C. 2013); *State v. Craven*, 744

S.E.2d 458, 461 (N.C. 2013)). But the State fails to acknowledge, much less address, that these cases involved essentially identical testimony by the same expert. In both cases, the expert followed the "exact same procedure" and provided the same substantive testimony that "she did not perform the tests [at issue], but reviewed the reports of the testing analyst and agreed with the [analyst's] conclusions." *Brewington*, 743 S.E.2d at 638 (Beasley, J. dissenting). The only difference that led the court to find the expert's opinion in *Craven* to lack independence was that the prosecution asked, "'What was [the testing analyst's] conclusion?'" *Id.* As the dissent aptly noted, "[t]his is mere semantics." *Id.*

Johnson's case, which conflicts with the Alaska Court of Appeals' earlier decision in *McCord*, provides yet another example. In both cases, Noble testified to the underlying blood analyses, without personal knowledge and based solely on her review of the testing analysts' work product, yet the court found a confrontation violation in *McCord* but not Johnson's case. *Compare McCord v. State*, 390 P.3d 1184, 1185-86 (Alaska Ct. App. 2017), *with* Pet. App. 5a-6a.

To reconcile these cases, the State reiterates the same post-hac distinction that the Alaska Court of Appeals offered in *Robbins v. State*, 449 P.3d 1111, 1115 (Alaska Ct. App. 2019), namely that Noble lacked the certification to run the clonazepam test at issue in *McCord* and, thus, purportedly could not provide an independent opinion. Opp. 17. By the time Noble testified in Johnson's case, the State says, Noble had become certified to run this test. *Id.* (citing

Pet. App. 28a-29a).[2] The court in *McCord*, however, was clear that it based its decision on Noble's lack of personal knowledge, not her lack of certification. *McCord*, 390 P.3d at 1186. Indeed, under the heading, "*Why the district court's ruling violated McCord's right of confrontation*," the court explained:

> Noble was aware of the clonazepam only because [the testing analyst's] lab report described her test results. For this reason, *Melendez-Diaz* [*v. Massachusetts*, 557 U.S. 305 (2009)] controls, and McCord's attorney was entitled to cross-examine [the testing analyst] regarding the presence and concentration of clonazepam in McCord's blood.

Id. (emphasis added).

In short, courts applying the independent-opinion test have reached conflicting decisions under nearly identical circumstances, underscoring the test is unworkable and warrants this Court's intervention.

II. THE INDEPENDENT-OPINION TEST DOES NOT COMPORT WITH THE CONFRONTATION CLAUSE.

The State asserts that the Alaska Court of Appeals correctly upheld the admission of Noble's testimony because Noble purportedly provided her independent opinion. Opp. 21-32. The State, however, essentially presupposes that the independent-opinion test comports with the Confrontation Clause and misses the crux of Johnson's petition: the test is prone to inconsistent application and is constitutionally

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[2] The cited portions of the record do not indicate that Noble is certified to test for clonazepam, or any other substance.

suspect given its tendency to admit core testimonial statements.

Indeed, the State's sole response to the arbitrary and subjective nature of the independent-opinion test is that "Rule 703, or its state equivalent, and the accompanying case law provide guidance in evaluating whether an expert witness's opinion is independent" and that "courts regularly make . . . fact specific evaluations." Opp. 30. This Court, however, rejected a similar line of reasoning in *Crawford* when it overruled the "indicia of reliability" test of *Ohio v. Roberts*, 448 U.S. 56 (1980), under which courts had evaluated the reliability of challenged evidence based on numerous factors, often reaching conflicting results. *Crawford v. Washington,* 541 U.S. 36, 62-63 (2004). As this Court explained, "[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence." *Id.* at 61.

Ultimately, as with the *Roberts* test, the "unpardonable vice" of the independent-opinion test "is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." *Id.* at 63. Johnson's case embodies this concern. Even assuming Noble applied her scientific knowledge and training to provide an independent opinion, she did not simply provide an opinion in a vacuum or in the form of a hypothetical. Rather, she testified affirmatively that the absent analysts tested Johnson's particular blood sample, followed proper protocol, and reached specific results—information she could have gleaned only from reviewing their testimonial statements and certifications and without

which her opinion would have lacked any relevance.[3] Not to mention, Noble was permitted to introduce the primary analyst's certified report. Put simply, Noble's "supervisory role and [purported] independent evaluation of her subordinates' work product are not enough to satisfy the Confrontation Clause because they do not alter the fact that she relayed testimonial hearsay." *Young*, 63 A.3d at 1048.

III. THIS CASE IS AN IDEAL VEHICLE.

The State does not dispute that the lab report and statements introduced through Noble's testimony qualify as testimonial under any of the tests articulated in *Williams*, thereby providing this Court an opportunity to reach a consensus that it has thus far been unable to reach. Pet. 21-22. Instead, the State advances three attacks on the suitability of this case, none of which has merit.

1. The State first asserts that Johnson's briefing before the Alaska Court Appeals somehow waived her challenge to the *lab report*. Opp. 21-22. Notably, the State does *not* dispute that Johnson's briefing properly preserved her challenge to Noble's *testimony*, or that Johnson had timely objected to both Noble's testimony and the lab report at the trial court. It was, of course, through Noble's testimony that the State introduced the lab report, and Johnson's challenge to the report was part and parcel to her challenge to

[3] As noted in the petition, there have been numerous incidents of "drylabbing" where analysts have fabricated results, which may not be apparent from reviewing the results. Pet. 23. Moreover, despite reviewing the lab records in Johnson's case, Noble failed to note they indicated that the blood sample at issue had arrived in an unsealed, opened condition—a fact she could not explain, but "guess[ed]" was a mistake. Pet. App. 56a-57a.

Noble's testimony.[4] Indeed, the primary, if not sole, reason the State called Noble to testify was that it knew it could not introduce the substantive contents of the report into evidence without also offering Johnson some witness to cross-examine. *See Melendez-Diaz*, 557 U.S. at 329. Thus, the State's suggestion that Johnson challenged Noble's testimony but not the report makes little sense.

2. Next, the State complains that the record here does not include the lab file containing the raw data that the testing analysts generated. But the State fails to explain how having the raw data, including gas chromatographs and the like, would assist this Court, above and beyond what the record evidence already shows. Notably, the issues here do not turn on the substance of any materials in the lab file but rather their nature and the circumstances under which they were produced, which Noble's testimony and the lab report fully establish. Among other things, there is no dispute that the State requested the testing of Johnson's blood after she was in custody. Pet. App. 8a, 18a. By statute, the lab analysts carried out the testing, certified their results, and prepared a certified report for the primary purpose of generating evidence to secure Johnson's conviction. *See* WASH. REV. CODE § 43.43.670. Even as to the raw data on which the State focuses, Noble explained that the lab's procedures required the analysts, upon completing a test, to initial each page of data to certify that they

[4] Johnson's briefing, in fact, discussed the lab report in addressing Noble's testimony. Resp. App. 5a. Likewise, the State's briefing addressed the testimony and report together, repeatedly emphasizing that Noble signed off on the report. Br. of Appellee at 9-11, 20, 23-24, *Johnson v. Alaska*, No. A-12744 (Oct. 23, 2018), 2018 WL 7223756.

followed proper protocol and met the relevant criteria for the results to be acceptable and reportable. Pet. App. 36a-37a. It was these testimonial statements and certifications that Noble conveyed to the jury when she testified regarding what the absent analysts did and observed.

3. Further, the State asserts that any error in admitting Noble's testimony and the lab report was harmless. As an initial matter, because the State did not raise this argument below, the Alaska Court of Appeals did not undertake any harmlessness analysis. *Id.* at 3a-6a. Thus, as this Court has consistently done in past cases, it may address the merits of the Confrontation Clause issues presented and leave harmlessness to be addressed in the first instance on remand. *See Bullcoming*, 564 U.S. at 668 n.11; *Melendez-Diaz,* 557 U.S. at 329 n.14.

Even if this Court were to consider the State's harmlessness argument, it runs contrary to this Court's guidance that "[a]n error admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless." *Chapman v. California*, 386 U.S. 18, 23 (1967). Indeed, there is little denying that Noble's testimony and the lab report at least *possibly*, if not with certainty, influenced the jury adversely to Johnson. Under ALASKA STAT. § 28.35.030(a)(1), the State needed to prove not merely that Johnson's driving was impaired and that she had ingested a controlled substance, but that the impairment was *proximately caused* by a controlled substance. *Adams v. State*, 359 P.3d 990, 991 (Alaska Ct. App. 2015); *McCord*, 390 P.3d at 1185. Noble's testimony and the

lab report comprised the only evidence[5] the State introduced to show proximate cause. The State, in fact, acknowledged the significance of this evidence in closing, explaining that it was "one-half of the equation" and "how we show [Johnson's] impairment [by] a controlled substance." Pet. App. 78a, 81a. Having relied in closing on the "'very evidence' that offends the Confrontation Clause," the State can hardly contend it "'did not contribute to the conviction.'" *United States v. Jackson*, 636 F.3d 687, 697 (5th Cir. 2011) (citation omitted).

CONCLUSION

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

Respectfully submitted,
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[5] The State now points to the testimony of Officer Lopez and the gas-station attendant describing Johnson's demeanor, and alleges that Johnson admitted that she had taken methadone, a controlled substance for which she had a prescription. Opp. 23-24. But none of this shows any impairment that was *proximately caused* by a controlled substance, which is why the State introduced Noble's testimony and the lab report.