No. _____

In The

Supreme Court Of The United States

LAVAR EADY,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS
Respondent.

On Petition For Writ Of Certiorari
To The Massachusetts Appeals Court

PETITION FOR A WRIT OF CERTIORARI

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September 6, 2019

QUESTION PRESENTED

Whether the Confrontation Clause prohibits a substitute state analyst from testifying at trial as to the composition of a seized substance obtained as evidence where (1) the substitute analyst did not participate in the lab testing in any way and only reviewed the notes and data upon which the initial conclusion was based, and (2) the test was produced to prove the truth of the matter asserted, namely the chemical composition of the substance, which is an element of the offence.

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OPINION BELOW

The memorandum and order of the Massachusetts Appeals Court is reported at 95 Mass. App. Ct. 1116, 125 N.E.3d 802, and is reproduced in the Appendix.[1] [App. 3]. The order of the Massachusetts Supreme Judicial Court denying the petitioner's request for further appellate review is reported at 482 Mass. 1107, and is reproduced in the Appendix. [App. 5].

STATEMENT OF JURISDICTION

The order of the Massachusetts Supreme Judicial Court affirming the petitioner's conviction and the denial of his petition for further appellate review entered on July 31, 2019. The petitioner seeks review of a judgment by the highest State court in which a decision could be had and invokes this Court's jurisdiction under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...."

STATEMENT OF THE CASE

A. INTRODUCTION

The facts of this case are straightforward; the police accused the petitioner of selling narcotics based on observations and recovering a substance believed to be an illegal drug, namely fentanyl. The substance

[1] Citations to the appendix will be referred to by "App." followed by the page number.

was sent to the state lab to identify its chemical composition, which element the government had to prove at trial. The analyst certified that it was fentanyl, but before trial she became unavailable. A substitute analyst was then assigned to the case. The substitute analyst reviewed the notes and paperwork generated by the first analyst and testified at trial as to the chemical composition of the recovered substance. [Tr. **3**, 39]. The substitute chemist did not re-test the substance and could not testify as to personal knowledge of the chemical composition of the substance, she merely acted as a transmitter for testimonial hearsay.

This Court's opinion in *Williams v. Illinois*, 567 U.S. 50 71-72 (2012) (plurality opinion), allowed testimony of an expert witness that is based on a test the expert did not personally perform. But that holding required that the test not be produced to prove the truth of the matter asserted. In that case the expert testified as to a DNA test, which was confirmatory of the identity of the perpetrator. The Massachusetts Supreme Judicial Court, or SJC, used the holding in *Willaims* to hold that a defendant's right to confront witnesses was not violated when a substitute analyst testified regarding the identity of substance. *See Commonwealth v. Grady*, 474 Mass. 715, 724, 54 N.E.3d 22, 30 (2016). The problem is that unlike the DNA test in *Williams*, the test of the seized substance was produced to prove the truth of the matter asserted, namely the chemical composition of the substance, which is an element of the offence. Other circuit courts and state courts are similarly misreading *Williams*, which has produced a disunity of holdings and legal reasoning. *See Hollingsworth v. Mississippi*, 269 So.3d 456, 459

(2018) (trial court's admission of testimony from technical reviewers who did not personally conduct underlying drug testing did not violate Confrontation Clause); *Armstead v. Mississippi*, 196 So.3d 913, 918 (2016) (allowing a forensic scientist to testify that a substance that she did not personally test was cocaine did not violate the confrontation clause); *U.S. v. Hernandez*, 479 Fed.Appx. 636, 640 (5th Cir. 2012) (not published; testimony of drug laboratory supervisor, that government exhibit contained methamphetamine did not violate right of confrontation, even though witness had not personally performed the drug analysis, since witness testified from her own knowledge derived from underlying report and was available for cross-examination). *Contrast U.S. v. McGill*, 815 F.3d 846, 890 (DC Cir. 2016) (admission of drug analysis drug reports accompanied only by testimony from witnesses other than reports' authors violated Confrontation Clause).

B. PROCEDURAL HISTORY

On September 18, 2015, a Suffolk County grand jury returned an indictment against the defendant, Lavar Eady, for one count of distributing a Class B substance, subsequent offence, in violation of G.L. c. 94C, § 32A(b). (Indictment No. 15-11024). The defendant pled not guilty on September 29, 2015.

On November 19, 2015, the defendant filed a motion to suppress evidence, with an affidavit. A motion hearing was held on September 29, 2016. The court denied the suppression motion on the record that day.

Beginning in June 2017, the parties began filing various motions in preparation for trial. Trial commenced before Judge Wilkins and a

jury on June 6, 2017. On June 8, 2017, the defendant filed a motion for a required finding of not guilty and a directed verdict of a finding of not guilty, which were immediately denied.

On June 13, 2017, the jury returned a verdict, finding the defendant guilty. Judge Wilkins sentenced the defendant to two years to 2 years to 2 years and a day at MCI Cedar Junction, with three days jail credit. The defendant filed a notice of appeal on June 20, 2017.

On May 31, 2019, the Appeals Court affirmed the defendant's conviction in an unpublished opinion pursuant to Appeals Court Rule 1:28 (summary disposition). *See Commonwealth v. Lavar Eady*, 95 Mass. App. Ct. 1116, 125 N.E.3d 802 (2019). The defendant sought further appellate review of the decision rendered by the Appeals Court from the Massachusetts Supreme Judicial Court. That petition was denied on July 31, 2019. *See* 482 Mass. 1107 (2019).

C. FACTS PRESENTED AT TRIAL

A group of Boston Police Officers were working drug control in the downtown Boston area on July 21, 2015, around approximately 4:30 p.m.[2] [Tr. **2**, 86, 88, 151-52, 187-88; **3**, 8].

Officers Patrick Byrne and Latoya Gamble, noticed the petitioner, a bald black male wearing a white tank top and blue jeans, on Beach Street in the Chinatown section of downtown Boston at about 4:30 pm. [Tr. **2**, 89, 189]. The officers were in a vehicle with another policeman,

[2] Citations to the trial transcript will be referred to by volume number followed by the page number.

Officer Linehan. [Tr. **2**, 89]. Officer Byrne first observed the petitioner with an unknown white male and an unknown female. [Tr. **2**, 89-90, 190]. "They were huddled close together. Their arms appeared to be going back and forth towards each other." [Tr. **2**, 90-91, 190]. The officers did not see any exchange. [Tr. **2**, 190-91]. The gesturing lasted "ten to fifteen seconds," the unknown male and female immediately separated from Mr. Eady, walking back towards Officer Byrne's vehicle and across Beach Street towards Knapp Street, a small ally-way about a hundred to hundred fifty feet long. [Tr. **2**, 90-91, 191]. The pair then turned down Knapp Street Alley an even smaller alley on the left side of the street. [Tr. **2**, 91]. At that point, all the officers of the drug unit were in the general area. Officer Byrne was relaying to them his observations. [Tr. **2**, 92-93].

Officer Pinto, another officer in the area went to Knapp Street Alley. [Tr. **2**, 92, **3**, 9-10]. The officer went alone and observed two individuals, a male and a female, approach the corner of Knapp Alley. And once at the corner, the officer observed them place a glass tube up to their lips and light it and smoke whatever substance was in the pipe; passing it to one other one and it was gone. [Tr. **3**, 10].

Mr. Eady continued on Beach Street toward Washington Street. [Tr. **2**, 93]. Officers Byrne and Gamble drove around the area and next observed the petitioner about 45 minutes to an hour later on that day down by South Station on Atlantic Ave. and Beach Street. [Tr. **2**, 93, 95-96, 147-48, 192-93]. They observed him interacting and/or speaking with a white female wearing a navy-blue shirt that said Boston Sheriff or

Boston Sheriff's Office. [Tr. **2**, 96, 193]. The woman, Shannon Barao was "dirty," "disheveled," and "had a grayish tone to her skin." [Tr. **2**, 97]. They walked diagonal across Atlantic Ave. towards the corner of East and Atlantic Avenue. Officer Byrne was parked along Atlantic Ave. and observed the pair walk behind his vehicle to get to East Street. At that point Officer Byrne exited the vehicle to conduct foot surveillance of the pair. [Tr. **2**, 98]. Officer Gamble stayed in the vehicle. [Tr. **2**, 194]. Once Officer Byrne got to the corner of East and Atlantic Ave., he observed them walking down East Street, and as they reached the area of East Street Place and East Street, they turned towards each other or as they were walking they then stopped and turned toward each other. The officer observed their "arms begin moving back and forth toward each other very briefly." They then turned to walk back toward Atlantic Ave. As they turned, Ms. Barao had her hand face up with her palm cupped and appeared to be inspecting an item in her palm which she then placed up to her mouth. [Tr. **2**, 99, 107]. They walked together across Atlantic Ave. to where they had originally started over by the food court. [Tr. **2**, 106-07, 194]. Once they reached that point, Ms. Barao separated from Mr. Eady and began walking away on Atlantic Ave. on the side of South Station along the bus terminals towards Kneeland Street. [Tr. **2**, 106-07, 195].

Officer Robert Flynn, who was in South Station, was informed about Ms. Barao and Mr. Eady, and began to head back towards Atlantic Ave. [Tr. **2**, 152-53]. After Ms. Barao separated from Mr. Eady, maybe 20 to 40 feet down the street, Officers Byrne and Flynn saw her join a

white male later identified as Mr. Craig Smith, and they began walking together away from the area. [Tr. **2**, 108, 153-55]. By this time all the officers were in the area.

Mr. Eady remained in the area of South Station by the food court. [Tr. **2**, 109]. Officer Byrne observed Ms. Barao and Mr. Smith walk onto East Street Place to the end into the alley, and behind a vehicle. [Tr. **2**, 110, 156-57]. They went behind a vehicle that was parked on the left side out of the officer's view. [Tr. **2**, 112].

As Officer Flynn reached the entrance to the alleyway, Officer Cahill joined him and they proceeded down the alleyway. [Tr. **2**, 158]. The officers briefly lost sight of them when they turned left and onto the alleyway for "[m]aybe a minute, less than two at the most." [Tr. **2**, 158, 163]. When the officers got to the end of the alleyway they observed a parked motor vehicle. [Tr. **2**, 159]. The pair were sitting down in the dead-end alleyway behind the parked motor vehicle. [Tr. **2**, 112, 159]. Officer Flynn and Officer Cahill observed the two sitting, side-by-side on the ground. Mr. Smith was holding an item in his mouth, it appeared to be a small plastic bag that he was attempting to tear/rip open. The two officers informed them that they were Boston police and instructed Mr. Smith to put the item on the ground at which time he put placed it into his mouth. [Tr. **2**, 160-61]. Officer Flynn approached Mr. Smith and

grabbed his chin and told him to spit it out, at which point he did. [Tr. **2**, 161]. He spat out a plastic bag of a brown tan substance.[3] [Tr. **2**, 182].

Mr. Smith was also in possession of a small tin cap. [Tr. **2**, 161]. At no time observing the pair did Officer Flynn see Ms. Barao hand any items to Mr. Smith. [Tr. **2**, 161, 182]. Almost immediately after the two officers approached both parties, Officers Pinto, Linehan, and Byrne arrived at from East Street to assist.[4] [Tr. **2**, 163]. Mr. Smith was placed under arrest because of outstanding warrants, and she was summoned to Boston District Court.[5] [Tr. **2**, 112, 163; **3**, 13].

Officers Gamble and Pinto continued observing Mr. Eady. [Tr. **2**, 113, 164, 195]. The officers observed Mr. Eady waving a white T-shirt in the air as he was looking at oncoming traffic. He then entered a white taxi. The cab didn't move a few feet away, when it stopped at a red light at Atlantic Avenue and Essex Street. [Tr. **2**, 113, 196]. After receiving "some information" Officer Gamble moved to stop Mr. Eady. [Tr. **2**, 113, 195]. The officer removed Mr. Eady from the cab and placed him in handcuffs, whereupon she was joined by the other officers. Officer Gamble gave Mr. Eady his *Miranda* warnings. [Tr. **2**, 114-15, 196]. Mr.

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[3] The bag that was recovered from Mr. Smith was brought back to the police station, where it was placed into a sealed bag, labeled and the proper paperwork filled out so the item could be sent to the state lab for testing. [Tr. **2**, 167-68].

[4] Ms. Barao and Mr. Smith were both provided *Miranda* warnings and were interviewed. [Tr. **2**, 112].

[5] Officer Byrne testified that Ms. Barao was placed under arrest for outstanding warrants and also for possession of heroin, and Mr. Smith was informed he would be summoned into court and released. [Tr. **2**, 112].

Eady then asked her why he was being arrested. She responded that he was under arrest for distribution. [Tr. **2**, 198]. Mr. Eady was sweating to the point where he made a small puddle on the ground.[6] [Tr. **2**, 114, 198]. Detective Chu searched the defendant and seized $717 from the defendant. [Tr. **2**, 198-99]. After Mr. Eady was removed from the taxicab, Officer Flynn entered and searched he backseat and recovered a T-shirt, a cellular telephone, and a piece of mail in the name of Mr. Eady. [Tr. **2**, 165-66, 199]. The defendant was taken back to the police station for booking and again searched. [Tr. **2**, 115, 165, 199].

Christine Tyson who worked for the Mass. State Police Crime Lab as a forensic scientist testified that the plastic bag of tan powder, without the packaging, weighed 0.09 grams of acetaminophen and fentanyl.[7] [App. 10, 16-17; Tr. **3**, 32, 38-39]. No heroin was detected. [App. 19; Tr. **3**, 41]. However, Ms. Tyson did not actually test the substance. Another lab technician named Heather Moett (phonetic), tested the substance on August 10, 2015. [App. 13, 22, 24; Tr. **3**, 35, 44, 46]. Ms. Moett had left the lab by the time of trial. [App. 13; Tr. **3**, 35]. Ms. Tyson obtained Ms. Moett's reports associated with her tests of the substance. [App. 13; Tr. **3**, 35]. Ms. Tyson merely performed a review of all of the documents associated with Ms. Moett's analysis. [App. 14; Tr. **3**, 36]. In fact, prior to the day of trial Ms. Tyson had not seen that bag. [App. 21Tr. **3**, 43].

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[6] Officer Byrne testified that it wasn't particularly hot, it was a July day, it was warm, [Tr. **2**, 115].

[7] Christine Tyson's testimony is reproduced in the Appendix.

Officer Robert England was qualified as an expert and provided testimony based on his training and experience concerning individual hand-to-hand drug transactions. [Tr. **3**, 62-68].

REASONS FOR GRANTING THE WRIT

The Confrontation Clause Prohibits An Expert Prosecution Witness From Testifying At A Jury Trial As To The Composition Of A Seized Substance Obtained As Evidence Where (1) The Testifying Expert Did Not Participate In The Lab Testing In Any Way And Only Reviewed The Notes And Data Upon Which The Conclusion Was Based, and (2) The Test Was Produced To Prove The Truth Of The Matter Asserted, Namely The Chemical Composition Of The Substance, Which Is An Element Of The Offence

The first and paramount reason for granting this petition is that the Massachusetts court system has struck new legal ground by holding that a substitute expert who never observed or handled the seized drug, can testify as to its chemical composition by referring to the report and paperwork generated from another's testing of the substance. As discussed below this is a departure from this Court's Confrontation Clause jurisprudence.

In this case the Commonwealth was attempting to prove what was seized in the bag was a Class B controlled substance, namely fentanyl. Ms. Mowatt tested the substance by performing an "ultraviolet visible spectroscopy test" then a gas chromatography/mass spectrometry test. [App. 13, 16-17; Tr. **3**, 35, 38-39]. And it was that second test that revealed the presence of fentanyl. [App. 17; Tr. **3**, 39]. Ms. Mowatt created a Certificate of Analysis; which certificate was testimonial. [App. 24; Tr. **3**, 46]. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305,

310 (2009) (analysts' certificates of analysis were affidavits within core class of testimonial statements covered by Confrontation Clause).

By the time of trial, Ms. Mowatt had left the laboratory, [App. 13; Tr. **3**, 35], and a substitute chemist, Ms. Tyson reviewed Ms. Mowatt's "report," which contained "data [] in the form of charts and graphs," and "notes that are associated with the evidence when they open it and analyze it." [App. 11; Tr. **3**, 33]. Again Ms. Tyson reviewed all of "those notes" and "the data" "to ensure that the conclusions reached on the final report are supported by all the data in the documentation in the case file." [App. 11; Tr. **3**, 33]. The government affirmed that Ms. Mowatt was unavailable which the petitioner argues, triggered the Sixth Amendment's Confrontation Clause, which gives criminal defendants the right to confront witnesses through cross-examine, and which forbids experts to act merely as a well-credentialed conduit for testimonial hearsay. Confrontation extends not merely to the conclusions reached but the means in which they were produced and to expose biases, ineptitude, and mistakes that may have occurred. It is fundamentally the job of any criminal defense attorney to produce reasonable doubt principally through cross examination.

The Sixth Amendment to the Federal Constitution provides for confrontation and the Fourteenth Amendment renders the Confrontation Clause binding on the States. *See Michigan v. Bryant*, 562 U.S. 344, 352 (2011). The Massachusetts Constitution also contains such a privilege. *See* Mass. Const., Pt. 1st, Art, 12 ("And every subject shall have a right ... to meet the witnesses against him face to face ....").

In *Ohio v. Roberts*, this Court severely curtailed a defendant's confrontation right. *See* 448 U.S. 56 66, (1980) (Confrontation Clause does not bar admission of an unavailable witness's statement against a criminal defendant if the statement fit "within a firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness.") This Court then overruled *Roberts* in *Crawford v. Washington*, 541 U.S. 36, 68 (2004). "In *Crawford*, ... the Supreme Court established a new constitutional baseline: admitting testimonial statements of a witness not present at trial comports with the Sixth Amendment only where the declarant is unavailable, and the defendant has had a prior opportunity to cross-examine the declarant." *U.S. v. Ramos–Gonzàlez*, 664 F.3d 1, 4 (1st Cir. 2011) (quotations, footnote, ellipsis, and brackets omitted); *see Crawford*, 541 U.S. at 59. Although the Court did not define what constitutes a "testimonial" statement, it identified certain "formulations of [the] core class of 'testimonial' statements," such as;

> *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Crawford, 541 U.S. at 51–52 (quotations, ellipsis, and citations omitted).

Since *Crawford*, this Court has released three decisions addressing the application of the Confrontation Clause to forensic-testing evidence. They are *Melendez–Diaz v. Massachusetts*, 557 U.S. at

310 (state forensic analyst's lab report that is prepared for use in criminal prosecution is subject to the Confrontation Clause); *Bullcoming v. New Mexico*, 564 U.S. 647, 663 (2011) (Confrontation Clause does not permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification); and *Williams v. Illinois*, 567 U.S. at 71-72 (testimony of an expert witness that is based on a test the expert did not personally perform is admissible and does not violate the Confrontation Clause because the evidence of the third-party test was not produced to prove the truth of the matter asserted, but merely to provide a basis for the conclusions that the expert reached).

The Massachusetts Supreme Judicial Court, relying on *Williams v. Illinois*, decided the case of *Commonwealth v. Greineder*, 464 Mass. 580, 595, 984 N.E.2d 804, 815-16 (2013) (*Williams* did not require any change to Massachusetts rule allowing expert to testify to his or her independent opinion even if based on data not in evidence, and defendant's confrontation rights were not violated by admission of testimony of DNA expert despite expert's reliance on the DNA test results obtained by a nontestifying analyst).[8] *Greineder* presented facts

[8] This Court granted of defendant's petition for writ of *certiorari*, then vacated and remanded the case back to the Supreme Judicial Court for further consideration in light of *Williams v. Illinois*. *See Greineder v. Massachusetts*, 567 U.S. 948 (2012); *Commonwealth v. Greineder*, 464 Mass. 580, 581, 984 N.E.2d 804, 805 (2013).

similar to *Williams*, in that a government expert who did not perform DNA testing was allowed to testify that the defendant's DNA matched DNA found on items recovered from the crime scene using on the test results obtained by a nontestifying analyst to form the basis of that opinion. A few years after *Greineder* the SJC, relying on the holdings in *Willaims* and *Greineder,* decided *Commonwealth v. Grady*, which holds that a defendant's right to confront witnesses is not violated when a substitute analyst testifies regarding the identity of a seized substance. *See* 474 Mass. at 724, 54 N.E.3d at 30. The court reasoned that a substitute analyst may testify as to his own opinion regarding the composition of a tested substance, where the opinion was formed reviewing the nontestifying analyst tests, or paperwork generated. *Ibid*.

Williams v. Illinois stands for the proposition that the evidence of a third-party test is proper where it was not produced to prove the truth of the matter asserted, but merely to provide a basis for the conclusions that the expert reached. *See* 567 U.S. at 57-58 ("this form of expert testimony does not violate the Confrontation Clause because that provision has no application to out-of-court statements that are not offered to prove the truth of the matter asserted."). In *Williams* this Court said that the DNA test "plainly was not prepared for the primary purpose of accusing a targeted individual" but was merely used to identify the perpetrator of a rape. *See* 567 U.S. at 84. In this case the petitioner was charged with violating G.L. c. 94C, § 32A(b), distributing a Class B substance. The elements of the offense of distribution of a class

B substance, to wit, fentanyl,[9] are that (1) the substance in question was a class B substance, namely fentanyl; (2) the defendant distributed some perceptible amount of that substance to another person or persons; and (3) the defendant did so knowingly or intentionally. *See Commonwealth v. Terrelonge*, 42 Mass. App. Ct. 941, 942, 678 N.E.2d 1203, 1205 (1997). The sample in this case was sent to be tested specifically to assess whether it was illegal contraband.

In identifying the primary purpose of an out-of-court statement, for purposes of determining whether the statement violates the Confrontation Clause, a court is to apply an objective test. The court looks for the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances. *See Williams v. Illinois*, 567 U.S. at 84. Here, all surrounding facts indicate the test in this case was conducted in preparation for trial to prove an element of the crime. The analyst that tested the substance was required to testify, not a substitute analyst who was merely parroting the report. The SJC's opinion in *Grady* strikes new legal ground and seriously departs from this Court's opinion in *Williams*.

When the police seized the bag of what they believed was heroin, they did not know what the substance was. They did not do a field test, but instead sent it to the state lab to be analyzed. Ms. Mowatt tested the substance and through her training, experience and her *actions*, made a

[9] G.L. c. 94C, § 31, Class B (6), classifies Fentanyl, as a synthetic opioid.

determination as to the composition of the substance, i.e. – fentanyl. She then contacted the government officials, either police or the ADA, and made a statement, either orally or by sending the certificate of analysis stating that the substance contained fentanyl. This statement was crucial for the government moving forward with the prosecution. After all, had Ms. Mowatt reported that the substance contained only acetaminophen (Tylenol), then the government could not prove the indictment. Ms. Mowatt's statement to police was testimonial under the Court's definition in *Davis v. Washington*, 547 U.S. 813, 822 (2006) ("testimonial" is used in its colloquial, rather than any technical legal sense). And according to *Crawford* she had to testify as to the chemical make-up of the substance.

Ms. Mowatt had to testify and Ms. Tyson was not a suitable substitute to prove the element of chemical composition. Just as the *Melendez-Diaz* held that a certificate of analysis cannot be introduced into evidence to prove the matter asserted, Ms. Tyson who only read the paperwork could only repeat back what she read. No substantive question could be put to her as she had no personal knowledge of anything except what the report outlined. While Ms. Tyson was subject to cross-examination, defense counsel could not ask if Ms. Tyson tampered with the gas chromatography/mass spectrometry machines or if the machine was in working order. Defense counsel could not ask Ms. Tyson if she had a drug problem, or if she doctored the lab results for any reason or had a predisposition to help the Commonwealth's case because of a personal belief that people indicted on drug dealing charges

were likely guilty, or if she actually had the credentials claimed. The logic behind Ms. Tyson's testimony is that a chemist can never doctor lab notes and/or test results, never has biases, and never makes mistakes.

Ms. Tyson was insulated from every substantive question because while defense counsel could ask about testing and lab procedure generally, counsel was precluded from asking about the testing and lab procedure in this specific case. For example, defense counsel could not ask if the drugs tested were the same as were presented into evidence at trial. Again, confrontation must at least mean that the defense is able to not only probe the results of testing, but means of that testing and the tester.

Perhaps it is best that this case comes from Massachusetts, where our court system has had to learn the hard way that state drug analysts are not always honest. Annie Dookhan is a convicted felon who formerly worked as a chemist at Massachusetts crime lab who admitted to falsifying evidence, affecting up to 34,000 cases. The Supreme Judicial Court summed up the history regarding Mrs. Dookhan, writing:

> In June, 2011, allegations of misconduct at the William A. Hinton State Laboratory Institute in the Jamaica Plain section of Boston surfaced regarding work performed by Annie Dookhan, a chemist who had been employed in the forensic drug laboratory (Hinton drug lab) since November, 2003. Based on investigations conducted by the Department of Public Health and the State police, Dookhan was indicted on multiple counts of evidence tampering and obstruction of justice, as well as on at least one count of perjury and one count of falsely claiming to hold a graduate degree, all relating to her handling and testing of samples at the Hinton drug lab. See *Commonwealth v. Scott,* 467 Mass. 336, 337–342, ——

> N.E.3d —— (2014); *Commonwealth v. Charles,* 466 Mass. 63, 64, 992 N.E.2d 999 (2013). Dookhan resigned from her position, effective March 9, 2012, and the Hinton drug lab was closed on August 30, 2012.

Commonwealth v. Rodriguez, 467 Mass. 1002, 1003, 5 N.E.3d 519, 520 (2014). Mrs. Dookhan pled guilty to 27 charges arising out of the investigation, including one count of perjury, four counts of witness intimidation, and eight counts of evidence tampering. *See Commonwealth v. Scott,* 467 Mass. 336, 337 n.3, 5 N.E.3d 530, 535 n.3 (2014). *See also Commonwealth v. Dookhan* (Suffolk County Criminal Docket No. 2012-11155). In light of Mrs. Dookhan's guilty pleas and the information gathered in the course of the investigation into her misconduct, the SJC has held that "where Dookhan signed the certificate of drug analysis as either the primary or secondary chemist in [a] defendant's case, the defendant is entitled to a conclusive presumption that Dookhan's misconduct occurred in his case, that it was egregious, and that it is attributable to the Commonwealth." *See Commonwealth v. Scott,* 467 Mass. at 338, 5 N.E.3d at 535.

Shortly after the Dookhan scandal, further misconduct of evidence tampering was revealed when officials learned that state chemist Sonja Farak stole drugs submitted to the lab for testing for her own use, consumed drug that were required for testing, and manipulated evidence and the lab's computer system to conceal her actions. *See Committee for Public Counsel Services v. Attorney General*, 480 Mass. 700, 726-27, 108 N.E.3d 966, 987 (2018). Her conduct has affected thousands of additional cases. There have also come to light

other analysts, who have falsified credentials or have been caught in other fabrications.

In each of these cases there were charges of government misconduct at issue also which involved the deceptive withholding of exculpatory evidence by members of the state Attorney General's office, who were duty-bound to investigate and disclose the wrongdoing. Executive branch functionaries always seem loathed to admit such wide-ranging lapses, which is always a detriment to the rights of the criminal defendant. Such functionaries are flawed people, the same as analysts who work for the state, imperfect and subject to frailties of judgment and action. This is a main reason the Constitution requires confrontation.

A witness must have personal knowledge of the matter. *See* Mass. Evid. Rule 602; Fed. Evid. Rule 602. *See also Commonwealth v. Gibbons*, 378 Mass. 766, 770, 393 N.E.2d 400, 403 (1979) (witness is competent to testify if he or she is aware of a duty to tell the truth and has personal knowledge of relevant facts; competency also depends on capacity of a witness to perceive, remember, and recount his or her knowledge of the facts); *U.S. v. Flores-Rivera*, 787 F.3d 1, 28 (1st Cir. 2015) (personal knowledge of evidence can include inferences and opinions, so long as they are grounded in personal observations and experiences). Ms. Mowatt had personal knowledge of the chemical composition of the substance because she tested it.

Any substitute analyst testifying as to the chemical composition of a substance they did not analyze, is passed off as an expert giving an

opinion. "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (**b)** the testimony is based on sufficient facts or data; **(c)** the testimony is the product of reliable principles and methods; and **(d)** the expert has reliably applied the principles and methods to the facts of the case." Mass. Evid. Rule 702. *Compare* Fed. Evid. Rule 702. Focusing on the fourth foundation requirement that the expert apply the principles and methods to the facts of the case, must mean that the basis of the opinion should include the factors set forth in Section 703, namely: (a) facts observed by the witness or otherwise in the witness's direct personal knowledge; (b) evidence already in the record or which the parties represent will be presented during the course of the proceedings, which facts may be assumed to be true in questions put to the witness; and (c) facts or data not in evidence if the facts or data are independently admissible in evidence and are a permissible basis for an expert to consider in formulating an opinion. *See* Mass. Evid. Rule § 703, Bases of Opinion Testimony by Experts; *LaClair v. Silberline Mfg. Co.*, 379 Mass. 21, 32 (1979) (expert opinion must be based on either expert's direct personal knowledge, on evidence already in the record or that will be presented during trial, or a combination). This requirement means the expert witness "must have sufficient familiarity with the particular facts to reach a meaningful expert opinion. The relevant distinction is between an opinion based upon speculation and one

adequately grounded in facts." *See Fourth St. Pub, Inc. v. National Union Fire Ins. Co.*, 28 Mass. App. Ct. 157, 161, 547 N.E.2d 935, 938 (1989).

This case presents a good contrast between experts. Officer Robert England was qualified as an expert and provided testimony based on his training and experience concerning individual hand-to-hand drug transactions. [Tr. **3**, 62-68]. The prosecutor went through the officers' training and experience with drug culture, the price per quantity, and how the drug trade is set up. [Tr. **3**, 51-56]. The prosecutor then worked in generalized facts of this case to question the officer to provide an opinion as to why those facts would lead him to conclude the defendant distributed the fentanyl. [Tr. **3**, 56-61]. Here the officer, who had no personal knowledge as to the facts of this case, offered opinion testimony on the local drug trade using facts meaningful to that expert to help the lay jury understand evidence that may be outside of common experience.[10] There is a distinction that must be made between experts

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[10] "The role of an expert witness is to help jurors interpret evidence that lies outside of common experience." *Commonwealth v. Tanner,* 45 Mass. App. Ct. 576, 581, 700 N.E.2d 282 (1998). An element of the Commonwealth's case in proving a charge of drug possession with intent to distribute is whether the subject drugs, connected to a given defendant, were for personal use or for distribution. This is not a matter within the common experience of jurors. *See Commonwealth v. Wilson,* 441 Mass. 390, 401, 805 N.E.2d 968 (2004). However, such testimony may be admitted only if it is "limited to an opinion that the hypothetical facts were consistent with possession of [subject drugs] with the intent to distribute." *Ibid. See Commonwealth v. Johnson,* 410 Mass. 199, 202, 571 N.E.2d 623 (1991). Opinion evidence elicited from such a qualified expert properly informs the jury of the significance of evidence generally, and does not state an opinion as to the ultimate issue of intent, which must be resolved by the jury (or judge as a fact finder). *See Commonwealth v. Santiago,* 41 Mass. App. Ct. 916, 917, 670 N.E.2d 199

who help jurors interpret evidence like Officer England, and an expert who using tools of her trade fashions evidence by testing and formulating an opinion as to composition.

Compare the officer's testimony with that of Ms. Tyson. She too had specialized knowledge but there was no evidence already in the record or that would be presented, which could be assumed to be true in questions put to the witness. Ms. Tyson was there to testify as to the fact of chemical composition, not to presume the drug was fentanyl and offer an opinion as to how it was tested. In Massachusetts facts or data not in evidence, and which are not independently admissible are not a permissible basis for an expert to consider in formulating an opinion.[11] *See* Mass. Evid. Rule 703(c). Ms. Tyson's testimony should have been excluded.

The second reason to grant this petition is that the legal test that has grown out of confrontation clause jurisprudence, namely the *independent-opinion* or *independent judgment-test* appears erroneous. Here the government portrayed the substitute analysist as having formed an "independent opinion" based on her review of the "notes and the documents and the data…." [App. 14; Tr. **3**, 36]. As discussed further

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(1996); *Commonwealth v. Villanueva,* 47 Mass. App. Ct. 905, 907, 711 N.E.2d 608 (1999).

[11] Unlike under the Mass. Rules of Evidence where the basis of the opinion must be *independently admissible*, under the federal rule the expert may rely on facts or data that "need not be admissible for the opinion to be admitted" and even where the "facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." Fed. Evid. Rule 703.

below, this test, based on inadmissible evidence fails to protect a defendant from unscrupulous governmental actors. The Confrontation Clause is meant to allow the fact-finder to determine the truth (or as close to the truth as possible), through the adversarial process by applying the pressure of questioning to a witness under oath to judge the reaction. This is the *crucible of cross-examination*. But where a substitute expert can base their opinion of the work-product of some other expert, the petitioner is precluded from testing the underlying basis of that conclusion through cross-examination.

In the case of *U.S. v. Ramos–González,* the First Circuit held that the admission of an expert's testimony as to contents of a drug analysis report conducted by a non-testifying expert violated the Confrontation Clause, and that such error was not harmless. *See* 664 F.3d at 5–6. But in *Ramos–González*, it was only where the substitute expert failed "to forge an independent conclusion, albeit on the basis of inadmissible evidence" that the case was overturned based on the belief that under such circumstances "the likelihood of a Sixth Amendment infraction is minimal." *U.S. v. Ramos-González,* 664 F.3d at 5-6. *See also U.S. v. Johnson,* 587 F.3d 625, 635-36 (4th Cir.2009) (even if statements relied upon by experts were testimonial, there was no Confrontation Clause violation because the "expert witnesses present[ed] their own independent judgments, rather than merely transmitting testimonial hearsay, and [were] subject to cross-examination"); *U.S. v. Ayala*, 601 F.3d 256, 275 (4th Cir. 2010) (same); *U.S. v. Garcia*, 793 F.3d 1194, 1212 (10th Cir.2015) (same); *U.S. v. Williams,* 740 F.Supp.2d 4, 9-10

(D.D.C.2010) (an expert may testify as to independent judgment reached by application of expert's training and experience to testimonial evidence); *New Hampshire v. McLeod,* 165 N.H. 42, 66 A.3d 1221, 1230 (2013) (same); *New Mexico v. Gonzales,* 274 P.3d 151, 159 (N.M.Ct.App.2012) ("An expert's testimony may be based on inadmissible evidence, and until such expert testimony crosses the line from the formation of an independent opinion based on underlying raw data to a reliance on the conclusions and opinions of the author of the autopsy or a mere parroting of the report's findings, then that testimony is admissible subject to the rules of evidence."); *Washington v. Manion,* 173 Wn.App. 610, 295 P.3d 270, 278 (2013) (testifying expert may base his opinion on nontestifying expert's testimonial statement, so long as testifying expert exercised independent judgment). *Cf. Commonwealth v. Avila*, 454 Mass. 744, 761-763, 912 N.E.2d 1014 (2009) (substitute medical expert may rely on autopsy report, not to repeat its conclusions, but to apply expertise to "underlying 'facts or data' contained [therein]" [citation omitted]). As the Fourth Circuit reasoned: "As long as [an 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." *U.S. v. Johnson,* 587 F.3d at 635.

There is simply no discernable test to determine what is required to form and independent opinion. And how a court, or anyone for that matter, can tell when an expert has formed an independent opinion or

is parroting the paperwork read in preparation for trial is mere soothsaying. It may be, as Justice Thomas wrote in his concurrence in *Williams*, that "courts may be willing to conclude that an expert is not acting as a 'mere conduit[t]' for hearsay … as long as he simply provides some opinion based on that hearsay." 567 U.S. at 110. But where one envisions two substitute experts, both who read the notes and data of the initial analyst, and who both testify; it is entirely possible that one's testimony will be deemed admissible and the other inadmissible for no reason other than the whim of the court at that particular moment. Is the test the use of the magic question, *did you form an independent opinion?* or is it merely when the expert provided *some opinion*? And if so, how can a defense attorney or judge know when they are merely parroting the hearsay reports/data? Where there is no discernable test, there is no unanimity of process and therefore there must occur a violation of due process and equal protection of the law. *See* U.S. Const., Amend 14. *See generally Bank Markazi v. Peterson*, 136 S.Ct. 1310, 1327 (2016) (application of law that is arbitrary or inadequately justified may violate the Equal Protection Clause); *Wolff v. McDonnell,* 418 U.S. 539, 558 (1974) (purpose of the due process clause of the Fourteenth Amendment is to protect the individual against arbitrary governmental action).

As touched on above, this *substitute-analyst-independent-conclusion* test is in reality a mere house-of-cards which must fall because it is arbitrary, but worse the test or legal theory upon which it rests requires the supposition that the initial analysist did everything

correct, that that person followed procedural rules and were honest in their analysis, and honest in the preparation of work product materials. The government's case rests upon the Pollyanna-ish idea that a government analysts or government agent would never be anything but upright and honest in their dealings with the judicial system, and never prone to mistakes. This Court is familiar with James Madison's statement in *The Federalist*, No. 51 that "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." With a few edits it is also applicable here; *if all analysts were perfect angels, no cross-examination would be necessary. If such angels always provided honest and upright analysis of data, no such controls of the judicial process would be necessary*. State analysts/experts should not be deemed angels, they are people who err and make mistakes also.

The dissent in *Williams* is clearer that the plurality opinion, for it correctly spelled out how confrontation catches such errors of analysts. *See* 567 U.S. at 118-138 (Kagan, Scalia, Ginsburg and Sotomayor, JJ., Dissenting). The dissents' test for confrontation is clear and correct; the report in this case was made to establish *some fact in a criminal proceeding* and "when the State elected to introduce" the substance of the report into evidence, the analyst who generated that report "became a witness" whom this petitioner "had the right to confront." *Williams,* 567 U.S. at 123, 125 (Kagan, Scalia, Ginsburg and Sotomayor, JJ., Dissenting), *citing Bullcoming,* 564 U.S., at 664. *See also Crawford*, 541

U.S. at 51–52 (statement that declarants would reasonably expect to be used prosecutorially).

This Commonweal's sad history concerning Mrs. Dookhan and Mrs. Farak show that to place such implicit trust in the chemist's ability to just do his/her job correctly and honestly is misguided. *See Williams,* 567 U.S. at 119-20 (the dissent starts off recounting a mistake in another case where only after undergoing cross-examination, the analyst realized she had made a mortifying error). Leaving aside any nefarious practice on the part of Ms. Mowatt, most importantly to this case however is that defense counsel was not able to ask Ms. Tyson if the bag that was entered onto evidence was the same bag that was received from the police and tested, because Ms. Tyson didn't test it. While Ms. Tyson went through the system for keeping track of the samples, the lab number and barcode sticker, [App. 12, 17-18; Tr. **3**, 34, 39-40], we cannot know if an error was made through mislabeling or inattention to detail. Ms. Mowatt was the accuser as to the composition of the substance. Ms. Tyson did little more that parrot Ms. Mowatt's notes and lab test results. *See U.S. v. Ramos-González,* 664 F.3d at 6 (admission of expert witness's testimony as to contents of drug analysis report conducted by a non-testifying expert violated defendant's right of Confrontation; expert's testimony amounted to no more than the prohibited transmission of testimonial hearsay). *See also U.S. v. Ayala*, 601 F.3d at 275 (inquiry is whether "expert is, in essence, [giving an independent judgment or] merely acting as a transmitter for testimonial hearsay"); *U.S. v. Mejia*, 545 F.3d 179, 197 (2d Cir. 2008) (expert may

not simply "repeat[ ] hearsay evidence without applying any expertise whatsoever" [citation omitted]); Seaman, Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony, 96 Geo. L.J. 827, 880 (2008).

The defendant was clearly denied his right to meaningfully cross examine the witness against him. It should be of no import that the ADA or Ms. Tyson used the magic phrase "independent opinion." If the Appeals Court opinion stands, it will be an end-run around *Crawford* and a snubbing of *Williams*. Supposing a Dookhan or Farak-like chemist tested the substance in this case and doctored the sample(s) and/or results, and prepared false paperwork concerning the tests, the substitute chemist would only know what was in the report/papers reviewed. There is nothing of substance trial counsel could have asked the substitute analyst. As the Court wrote of the right of confrontation;

> the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Crawford v. Washington, 541 U.S. at 67. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Id.*, at 62.

The problem with the independent opinion test is that the analysis fails to understand that the substitute chemist, a state agent is taking over from another state agent chemist who will likely and

naturally adopt the findings of the original employee based on the work product because in most cases that is the easiest thing to do. The only way to form an independent opinion is to test, or in this case re-test the drugs. Ms. Tyson could have re-test the sample in relative short order, where the original sample test time was 13 days. [App. 22, 24; Tr. **3**, 44, 46]. Had Ms. Tyson performed such tests then her testimony would have been valid.

The plurality opinion in *Williams* is convoluted and is not providing adequate direction to lower courts. There are two new members of this Court who can assist in refining the legal analysis of the issue. Because this Court is going to have to continue to define its Confrontation Clause jurisprudence and classify what is and is not testimonial, this case provides a good vehicle to further hone the case law.

Please take up this case.

Conclusion

The Massachusetts court's rejection of standards articulated by this Court in *Williams* affected the outcome of the petitioner's case and will no doubt continue to affect cases of other similarly situated defendants in state and federal courts. Where the fundamental rights of countless criminal defendants are at stake and will continue to be compromised as a result of the confusion on this issue, the writ should be granted and the case briefed and set down for argument.

Respectfully submitted,

Lavar Eady,
By his attorney,

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Dated: September 6, 2019