No. ________

In The
Supreme Court of the United States

DAKAI CHAVIS,

Petitioner,

vs.

STATE OF DELAWARE,

Respondent.

On Petition For Writ Of Certiorari
To The Delaware Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Confrontation Clause permits DNA evidence obtained as the result of a multi-analyst testing process to be introduced against the defendant at trial through one of the testing analysts who has no personal knowledge of the basis for the out-of-court testimonial statements made by the other nontestifying analysts who participated in the testing.

PARTIES TO THE PROCEEDINGS

Petitioner, the defendant-appellant below, is Dakai Chavis. Respondent, the plaintiff-appellee below, is the State of Delaware.

STATEMENT OF RELATED CASES

Chavis v. State, 227 A.3d 1079 (Del. 2020). Judgement entered April 7, 2020.

State v. Chavis, I.D. #1701001697, Delaware Superior Court. Judgement entered April 13, 2018.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dakai Chavis respectfully petitions for a writ of certiorari to review the judgment of the Delaware Supreme Court.

OPINIONS BELOW

The opinion of the Delaware Supreme Court (App. 1-36) is reported at 227 A.3d 1079 (Del. 2020). The trial court's oral ruling (App. 37-39) is unpublished. There are no intermediary rulings.

JURISDICTION

On April 7, 2020, the Delaware Supreme Court issued an opinion affirming Petitioner's conviction. (App. 1-36). This Petition is timely filed under Supreme Court Rule 13 and this Court's order dated March 19, 2020, which extended the deadline for filing any petition for writ of certiorari due after the date of the order. This Court has jurisdiction under 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL PROVISION

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

STATEMENT OF THE CASE

In *Melendez-Diaz v. Massachusetts*, this Court held that the Confrontation Clause is violated where the prosecution introduces reports of forensic analysis into evidence without the defendant being given an opportunity to cross-examine the analysts who authored the reports. 557 U.S. 305 (2009). Then, in *Bullcoming v. New Mexico*, the Court underscored the principle that the accused's right to confrontation is only protected when he is given the opportunity to confront the actual analyst who performed the test that yielded the results contained in the report introduced against him at trial. 564 U.S. 647, 657 (2011). Finally, in *Williams v. Illinois*, the Court addressed the issue of whether an expert witness could relay to the jury the out-of-court statements of a nontestifying forensic analyst if those statements were not introduced into evidence. 567 U.S. 50, 67 (2012).

The result of the analysis in *Williams* was a splintered decision which created many questions with which lower courts now struggle. One particular question raised by Justice Breyer in his concurring opinion remains unanswered and is the one which Dakai Chavis seeks an answer today: Whether the introduction of DNA evidence, obtained as the result of a multi-analyst testing process, through one of the testing analysts who has no personal knowledge of the basis for the out-of-court testimonial statements made by the other nontestifying analysts who participated in the testing, complies with the principles of *Melendez* and *Bullcoming*.

1. Chavis was indicted on 11 trespass-related offenses. Between October 2016 and December 2016, police received multiple reports of criminal trespasses, burglaries and attempted burglaries occurring in the apartment complexes of Hunters Crossing and Harbor Club in New Castle County, Delaware. These two complexes are less than two miles apart and each of the units involved in the trespass-related events are located on the ground level. Only one of the three reported burglaries involved an allegation of property being removed. (App. 5).

Police obtained surveillance videos that showed a figure walking around the respective areas when some of the alleged crimes purportedly occurred. In a few instances, an individual peeked into a window of an apartment unit. After Chavis was developed as a suspect, police obtained a search warrant for his home. When police executed the warrant, they found clothes that they believed matched those worn by the unidentified individual in the footage. They also obtained evidence in the form of cell tower data that indicated he had been in the area at the time of some of the incidents. At the conclusion of trial, the jury was not convinced by any of this evidence. Accordingly, it acquitted him of 10 of the 11 charges against him. Notably, the 11th charge was not supported by any of this evidence. (App. 2, 5-7).

2. For the one charge of which Chavis was convicted, police relied solely on DNA evidence. Chavis was convicted of Burglary Second Degree in connection with an incident that purportedly occurred sometime

between November 11, 2016 and November 12, 2016. The State alleged that someone entered the first-floor apartment at 61 Fairway Road, Apartment 1C in Hunters Crossing ("61 Fairway Road"). Police believed the point of entry was a bedroom window which had its screen removed. While there was no theft, various items on the windowsill were knocked onto the ground outside and beneath the window.

The occupants of the apartment could not identify the possible trespasser; police obtained no fingerprints of any value from the window or any of the items that had been disturbed; and the State produced no witnesses identifying the possible trespasser. In fact, two witnesses testified that they actually saw someone in the area around the relevant time who did not match Chavis' description. Unlike the 10 charges of which Chavis was acquitted, there was no surveillance footage to help police identify the possible trespasser. There were also no cell phone records to establish that Chavis was in the area at the time.

Police processed the exterior of the bedroom window at 61 Fairway Road for DNA and obtained an evidentiary sample. Even though the State of Delaware has its own forensic lab that is capable of analyzing and comparing DNA samples, police sent the evidentiary sample to be analyzed at Bode Cellmark Forensics ("Bode"), an out-of-state private laboratory. When Chavis was later arrested, police collected a reference sample from him with a buccal swab. That sample was also sent to Bode for analysis. (App. 6-7).

3. DNA testing is typically a 6-step process involving examination, extraction, quantification, amplification, electrophoresis, and writing a report. *See Williams v. Illinois*, 567 U.S. 50, 100 (2012) (Breyer, J., concurring) (setting out chart and general description of the 6-step process). Like a growing number of forensic labs, Bode uses an "assembly line" approach to DNA testing, where each step in the process is performed by a different analyst. (App. 9-13, 42-46). It is not unusual, however, for one analyst to perform more than one of the steps in the process.

4. With respect to the evidentiary swab in our case (collected from 61 Fairway Road), the examination "step" was triggered when Alyssa Morris received the package containing the sample from New Castle County Police. While it is not clear whether she did so, it is at this point where the lab employee is required to examine the package to make sure it is properly sealed and to use proper procedures to unpackage the sample. *See Williams*, 567 U.S. at 100. It is clear, however, that the sample was delivered to Rachel Aponte, a lab technician, for "analysis." Aponte completed the examination stage when she looked for biological material on the cotton swabs, cut the swabs into long pieces, placed them in test tubes, then placed the test tubes in the secure evidence room. Sarah Siddons, the analyst who later testified at trial, did not participate in, observe or supervise either Morris or Aponte while they performed these functions. (App. 42).

Kelsey Powell (Dawson) purportedly extracted the DNA from the swabs containing the evidentiary

sample. The Delaware Supreme Court found this to be such a critical step that it recited the entirety of Siddons' understanding of Powell's actions:

> Powell retrieve[d] the sample from the secure evidence room and add[ed] chemicals to the test tubes which release the DNA from the swab. The tubes which now have chemicals in them are then incubated for one (1) hour, and next Powell place[d] a tray of tubes onto a centrifuge. The centrifuge separates the liquid, which now contains DNA if the original sample in fact contained DNA, from the cotton swab. The cotton swabs are discarded once the separation is complete. Now, the tubes only have liquid in them, the liquid consists of everything that was on the swab plus reagents. Finally, Powell place[d] the tubes into a refrigerator onside [sic] the lab.

(App. 10).

Douglas Ryan continued the extraction process by taking the tray of tubes out of the refrigerator, placing them in a robot to complete separation of DNA from everything else in the tube, sealing the tray and placing it back in the freezer. Siddons did not participate in, observe or supervise the actions of either Powell or Ryan. (App. 43).

It is only at this point that Siddons became involved in the testing of the evidentiary sample. When she went to the freezer and retrieved the tubes containing the extracted DNA, she retrieved evidence that had purportedly been converted from cotton swabs

with samples collected from 61 Fairway Road. However, she had to rely on the representation of prior analysts for purposes of identification of the samples as the samples were no longer in the form provided by law enforcement and examined by Morris or Aponte. Siddons then performed the last steps of the testing process. (App. 43).

Siddons conducted quantification by adding chemicals to the extracted DNA samples to measure the amount of DNA in each sample to ensure there is enough for testing. According to Siddons, only one of the two evidentiary samples provided by law enforcement had enough DNA for testing. She concentrated the sample which contained sufficient DNA by running it through a filter and moved on to amplification. During this stage, Siddons added more chemicals to facilitate a process that copies specific locations to raise them to a detectible level. (App. 43-44).

After amplifying the DNA, Siddons performed the step of "electrophoresis" when she placed the extracted DNA onto "a tray which was then placed onto the Genetic Analyzer, the machine which actually creates the DNA profiles." This mostly automated step generates a graph called on electropherogram. As the Delaware Supreme Court noted, Siddons had little to say about her reading of the electropherogram, other than that she "pulled up the profile and confirmed that the profile passed, or was satisfactorily readable." (App. 12). Finally, Siddons entered the DNA profile that was generated as a result of the process into a

local database. She did not, however, create a report at that time. (App. 44).

5. Testing of the reference swab (collected from Chavis) involved the same steps and Bode again used the multi-analyst approach. This time, however, Feng Chen retrieved the sample for "analysis," cut the cotton swab, placed the cut pieces into test tubes and returned the tubes to the evidence room. Also, Vanessa Sufrin conducted the entire extraction stage. This included extracting the DNA from the swabs, discarding the swabs and placing the tubes in the freezer. However, just as with the evidentiary sample, Siddons did not participate in, observe or supervise any of the work done at these stages of the process. She entered the process after the sample had been converted to liquid and she performed the remaining functions in the analysis. (App. 13, 45-46).

This time, after Siddons put the profile for the reference DNA sample in the local database, she obtained a "hit" or "match." According to Siddons, she reviewed the profiles for both the evidentiary and reference samples and "confirmed the computer's reported match." She then reviewed the case files to confirm that all Standard Operating Procedures were followed throughout the testing process. Finally, she authored the report containing the test results that were later introduced at trial along with her testimony. (App. 13-14, 46-47).

6. The lab report authored by Siddons contains the conclusions that Sample BHJ1701-383-R01 was

the reference sample obtained from the buccal swab of Chavis and that sample BHJ1611-8144-E01 was a swab obtained from the crime scene window. The report also contains the conclusion that the profile obtained from DNA sample BHJ1611-8144-E01 "matches the DNA profile obtained from sample BHJ1701-383-R01[.]" (App. 54-55). Finally, the report also asserts that the "[t]esting performed for this case is in compliance with accredited procedures[.]" (App. 56).

7. On February 12, 2018, the State filed a motion to admit the results of the DNA tests through Sarah Siddons without the appearance of any of the other analysts who participated in the testing of either of the samples. Over Chavis' objection, after further pleadings and a hearing, the trial court found that "the testimony of Siddons is the testimony that is testimonial in nature" and granted the State's motion. (App. 38).

8. At trial, the State presented Siddons' testimony about the testing process specifically employed in this case. (App. 48-52). Significantly, despite her absence through the early stages of testing each sample, Siddons testified that Bode is "a very ethical lab, if something were to have happened [during testing] where [another analyst] thought contamination could have occurred, they would have reported that event somewhere." (App. 52). Siddons testified that, at the end of the testing process, she reached a conclusion that there was a match between the two samples. (App. 49). She also testified as to the source of each of the samples. With respect to the evidentiary sample:

> A: We received two items and they were each individually packaged in their own envelope labeled with their specific case number and a unique identifier. And they each have their description on the outside as well.
>
> Q: Do you recall the description of the unknown sample in this case?
>
> A: We had one sample that was swab No.1, the handprint, window POE. And then we have swab No. 2, the handprint window POE.

(App. 48-49). And, as to the reference sample:

> Q: Do you recall the person that the reference sample with regard to your report came from?
>
> A: Yes. It was from a Dakai Chavis.

(App. 49).

Through Siddons' testimony, the State introduced her lab report into evidence. Therefore, her conclusions regarding the source of the samples as well as the match were offered for the truth of the matter asserted. (App. 50). Siddons' testimony and report containing her conclusions that Chavis' DNA was found on the outside of a window at 61 Fairway Road is the only evidence that linked him to the burglary for which he was convicted.

9. On appeal, Chavis argued, among other things, that the introduction of DNA evidence violated his Confrontation Clause rights because he was not given the opportunity to cross-examine the analysts beyond

Siddons who participated in the testing process. Siddons' assurance regarding actions of other analysts did not satisfy Chavis' right to confront and cross-examine those analysts. Further, Siddons' conclusion that she matched two DNA profiles had no value absent her reliance on the identification of the source of those profiles.

10. The Delaware Supreme Court affirmed Chavis' conviction. It noted that this was an issue of first impression in Delaware and that there was no case in the United States Supreme Court directly on point. Instead, it looked to other jurisdictions and held that the Confrontation Clause was not violated as the "nontestifying analysts' entries in the case files were not testimonial because those entries did not take the form of statements designed to serve as a substitute for in-court testimony against Chavis." (App. 30).

REASONS FOR GRANTING THE WRIT

I. This Case Presents An Important And Recurring Question Of Which Analysts The Prosecution Must Call To Testify When More Than One Analyst Was Involved In Testing The DNA Evidence That Is Introduced Against The Defendant At Trial.

The Confrontation Clause of the Sixth Amendment prohibits the introduction of testimonial hearsay statements against a defendant at trial "unless the

witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 54 (2004). A statement that a declarant "would reasonably expect to be used prosecutorially, . . . [or] made under circumstances which would lead an objective witness reasonably to believe that . . . [it] would be available for use at a later trial" is considered testimonial for purposes of the Confrontation Clause. *Id.* at 51-52.

In *Melendez-Diaz v. Massachusetts*, this Court held that forensic reports used to prove facts establishing a defendant's guilt constitute testimonial evidence and that the defendant must be given an opportunity to cross-examine the analyst who authored the report. 557 U.S. 305 (2009). The Court reaffirmed this decision in *Bullcoming v. New Mexico*, when it clarified that "the [Confrontation] Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." 564 U.S. 647, 652, 662 (2011). However, in *Williams v. Illinois*, in addressing the issue of whether an expert witness could discuss the out-of-court statements of a nontestifying forensic analyst if those statements were not introduced into evidence, 567 U.S. 50, 67 (2012), the Court issued a splintered decision that rendered a once clear rule no longer clear and sowed seeds of confusion among the lower courts. *See id.* at 141 (Kagan, J., dissenting);

Stuart v. Alabama, ___ U.S. ___, 139 S.Ct. 36, 37 (2018) (Gorsuch, J., dissenting from denial of writ of certiorari) (opining that the Court "owe[d] lower courts struggling to abide our holdings more clarity than we have afforded them in this area").

The 4-Justice plurality in *Williams* found no Confrontation Clause violation because the out-of-court statements were not offered for their truth. Instead, the statements were used, as is permissible under well-established evidentiary rules, only to "help the factfinder understand the expert's thought process and determine what weight to give to the expert's opinion." 567 U.S. at 78. The plurality alternatively concluded that, even if the statements had been offered for their truth, there still would have been no Confrontation Clause violation because the "primary purpose" of the report was not to accuse Williams of a crime but to assist in apprehending "a dangerous rapist who was still at large[.]" *Id.* at 83. Therefore, under the "primary purpose" test, the statements were not testimonial and, thus, did not fall within the protection of the Confrontation Clause. *Id.* at 82-83 (citing *Hammon v. Indiana*, 547 U.S. 813, 829-32 (2006)).

A 4-Justice dissent rejected both of the plurality's rationales and maintained that the expert in *Williams* was no different than the surrogate in *Bullcoming* in that neither witness had personal knowledge of the actual tests and processes used by the specific analyst in the case before the Court. *Williams*, 567 U.S. at 124 (Kagan, J., dissenting). Accordingly, just like the defendant in *Bullcoming*, the defendant in *Williams* was

unable to question the witness presented by the State about the testing analyst's "'proficiency, the care he took in performing his work, and his veracity.'" *Id.* (quoting *Bullcoming*, 564 U.S. at 661, n.7). Thus, the dissent concluded, Williams was denied his right to confrontation.

Justice Thomas "share[d] the dissent's view of the plurality's flawed analysis" but concurred in the judgment and expressed the lone opinion that the out-of-court "statements lacked the requisite 'formality and solemnity' to be considered 'testimonial' for purposes of the Confrontation Clause." *Williams*, 567 U.S. at 104 (Thomas, J., concurring).

Justice Breyer, who *did* join the plurality opinion, wrote separately to raise a question that he characterized as "difficult, important, and not squarely addressed" in *Williams* or in any of this Court's prior decisions:

> How does the Confrontation Clause apply to the panoply of crime laboratory reports and underlying technical statements written by (or otherwise made by) laboratory technicians? In this context, what, if any, are the outer limits of the "testimonial statements" rule set forth in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)?

Id. at 86 (Breyer, J., concurring).

To illustrate his concern, Justice Breyer appended the "typical[ ] laboratory procedures" to his opinion and

explained that multiple technicians can be involved in this process. *Id.* at 90. Those are the exact procedures used in our case and they were, in fact, followed by multiple analysts. Thus, Chavis asks the same unanswered question today as that raised by Justice Breyer: Which analysts must the prosecution call to testify when more than one analyst was involved in testing the DNA evidence that is introduced against the defendant at trial?

II. Lower Courts Need This Court's Guidance In Addressing The Question Presented.

Many state and federal courts have expressed the notion that the splintered *Williams* decision has cast doubt on the precedent related to which individual the defendant is entitled to confront when forensic evidence is introduced against him.[1] In fact, many courts have rejected *Williams* and, instead, "rely on Supreme Court precedent before *Williams*[.]"[2] Thus, while there

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[1] *See*, *e.g., Grim v. Fisher*, 816 F.3d 296, 310-11 (5th Cir. 2016); *United States v. Katso*, 74 M.J. 273, 282-83 (C.A.A.F. 2015); *United States v. Turner*, 709 F.3d 1187, 1189 (7th Cir. 2013); *United States v. James*, 712 F.3d 79, 95 (2d Cir. 2013); *Jenkins v. United States*, 75 A.3d 174, 184 (D.C. 2013); *State v. Ortiz-Zape*, 743 S.E.2d 156, 161 (2013); *Martin v. State*, 60 A.3d 1100, 1104 (Del. 2013); *State v. Kennedy*, 735 S.E.2d 905, 916 (2012).

[2] *James*, 712 F.3d at 95-96. *See State v. Dotson*, 450 S.W.3d 1, 68 (Tenn. 2014) ("The Supreme Court's fractured decision in *Williams* provides little guidance and is of uncertain precedential value[.]"); *State v. Michaels*, 95 A.3d 648, 666 (N.J. 2014) (finding force of *Williams* as precedence "at best unclear"); *United States v. Duron-Caldera*, 737 F.3d 988, 994 (5th Cir. 2013) (expressly refusing to follow Williams' plurality opinion); *Commonwealth v.*

has never been a clear answer to the question presented, reaching an answer has become even more difficult in the wake of *Williams*.

The factual scenario that garners the most consistency is that in which, like *Williams*, the DNA evidence is used by the prosecution's expert witness to "help the factfinder understand the expert's thought process and determine what weight to give to the expert's opinion." 567 U.S. at 78. That is because the plurality's decision rested, in part, on the distinction between this scenario and that in *Melendez-Diaz* and *Bullcoming* where the DNA evidence was introduced for its truth. *Id.* The Massachusetts Supreme Court made this distinction quite clear in *Commonwealth v. Greineder*, 984 N.E.2d 804, 807 (Mass. 2013).

In *Greineder*, a lab director testified regarding the DNA test results obtained by a nontestifying staff analyst and reviewed by another nontestifying scientist at the lab. The Massachusetts court found the nontestifying analyst's report was testimonial. *Id.* at 807. However, it also concluded that the lab director reviewed the nontestifying analyst's work and conducted an independent evaluation of the data. Thus, the director was permitted to offer his own expert opinion regarding the DNA data but was prohibited from presenting "on direct examination the specific information on which he or she relied" because expert

Yohe, 79 A.3d 520 (Pa. 2013) (finding *Williams* was "of little assistance").

testimony to the facts obtained by someone else that underlies the test results is hearsay. *Id.* at 815-16.

Courts tend to agree with Massachusetts as to both parts of the rationale. A significant majority allow experts to rely on out-of-court testimonial statements so long as those statements are not introduced for their truth.[3] This rationale does not tend to differ regardless

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[3] *See*, *e.g.*, *State v. Hall*, 419 P.3d 1042, 1076 (Idaho 2018) (holding expert's testimony did not violate defendant's confrontation right because it contained his own conclusions based on an independent interpretation of raw evidence obtained by physical processing of DNA samples by another); *United States v. Katso*, 74 M.J. 273, 275 (C.A.A.F. 2015) (holding expert witness need not have personally performed DNA test as admissibility of opinion hinges on the degree of independent analysis he undertook in arriving at opinion); *State v. Griep*, 863 N.W.2d 567, 583-84 (Wis. 2015) (holding testimony of chief of the toxicology lab did not violate defendant's right to confrontation because his expert opinion was based on independent review of test results obtained by another toxicologist at lab); *State v. Michaels*, 95 A.3d 648 (finding no violation in admission of forensic report containing supervisor's independent review and conclusions based on machine-generated data from gas chromatography/mass spectrometry testing in which 14 analysts participated); *United States v. Murray*, 540 F. App'x 918, 921 (11th Cir. 2013) (finding expert testimony of analyst who compared profiles obtained by non-testifying analysts in her lab was not offered for truth of the matter so defendant's right to confrontation was not violated); *Yohe*, 79 A.3d 520 (holding that testifying lab director's opinion, contained in toxicology report, was the result of independent analysis of three test results produced by two lab technicians he supervised, thus, his presence satisfied the State's confrontation obligation); *Marshall v. People*, 309 P.3d 943, 947-48 (Col. 2013) (concluding no Confrontation Clause violation when lab supervisor independently reviews scientific data, draws the conclusion that data indicates the positive presence of illegal substance in urine, signs report to that effect and is available for cross-examination); *State v. Roach*, 95

of the number of analysts involved in the testing. *See Paredes v. State*, 462 S.W.3d 510, 512-13 (Tex. Crim. App. 2015) (finding no confrontation clause violation in an "assembly-line" testing process of 3 analysts that produced the raw data upon which the testifying analyst relied to conduct a comparison of the DNA profiles and determine a match and the report was not introduced into evidence).

Nevada and Arkansas agree with Massachusetts with respect to excluding the DNA evidence from being considered by the jury substantively. However, these courts reached their result by finding that the fractured *Williams* decision casts doubt on the use of an expert witness in the place of in-court testimony of the analyst who participated in the critical stage of the test. *See Davidson v. State*, 2013 WL 1458654, at *2 (Nev. Apr. 9, 2013); *Alejandro-Alvarez v. State*, 587 S.W.3d 269, 273 (Ark. 2019) (finding introduction of lab report and out-of-court testimonial statements of testing analyst through testimony of expert who conducted data analysis, DNA comparison and reviewed the file, violated defendant's right to confrontation).

A.3d 683, 686-87, 697-98 (N.J. 2014) (holding that testimony of analyst who conducted an independent review and reached an independent judgment that she had obtained the defendant's DNA profile from a buccal swab, compared it with a profile generated by a non-testifying analyst and obtained a match did not violate defendant's right to confrontation where report not introduced into evidence); *State v. Med. Eagle*, 835 N.W.2d 886, 899 (S.D. 2013) (allowing testimony from an analyst because she participated in various steps in DNA testing, came to her own independent conclusions, and the test reports were not introduced at trial).

On the other hand, there are post-*Williams* courts that allow the introduction of DNA evidence for its truth based on the witness' degree of general involvement or general familiarity of the testing process. For example, some courts allow a supervising analyst to act as a surrogate witness if they find the supervisor "had a personal connection to the scientific testing and actively reviewed the results of the forensic analyst's testing and signed off on the report." *Williams v. Vannoy*, 669 Fed.Appx. 207 (Mem) (5th Cir. 2016). This assessment tends to involve a determination of whether the supervisor had an "intimate knowledge of the particular report" and was "actively involved in producing that report." *Phillips v. State*, 285 So. 3d 685, 690 (Miss. Ct. App.) (citing *Armstead v. State*, 196 So. 3d 913, 919 (Miss. 2016)). Similarly, some courts will allow a forensic analyst who is not a supervisor to testify as a surrogate even though that analyst did not participate in the testing process so long as he is familiar with each step in the process and he performed an independent analysis of the data.[4]

[4] *See*, *e.g.*, *Galloway v. State*, 122 So. 3d 614, 637-38 (Miss. 2013) (holding testimony of forensic analyst who did not perform underlying steps of DNA testing did not violate defendant's right to confrontation because she was familiar with each step of the process and she performed her own analysis of the data); *State v. Ortiz-Zape*, 743 S.E.2d 156, 161 (N.C. 2013) (holding testifying expert's opinion, from his independent analysis of testing performed by another analyst in her laboratory, that substance tested was cocaine did not violate *defendant's confrontation rights*).

When the DNA evidence tested by a team is introduced at trial, the issue as to which analyst(s) made the testimonial statement(s) becomes more complicated. Both Rhode Island and Washington have looked at the team-focused process and concluded that regardless of how many analysts participate, the "only witness against the defendant in the course of the DNA testing process is the final analyst who examines the machine-generated data, creates a DNA profile, and makes a determination that the defendant's profile matches some other profile." *State v. Lui*, 315 P.3d 493, 506, 510 (Wash. 2014). *See State v. Lopez*, 45 A.3d 1, 14 (R.I. 2012) (finding admission of supervising analyst's expert opinion, based on her independent analysis of DNA testing performed by others in 6-analyst team did not violate defendant's right to confrontation). According to this theory, the underlying data and processes would have been meaningless absent that analysts' independent review, analysis and conclusions. *Lui*, 315 P.3d at 506; *Lopez*, 45 A.3d at 14. The other analysts are not required to testify because they merely "facilitated" the testifying witness' "role as an expert[.]" *Lui*, 315 P.3d at 506.

The Circuit Court for the District of Columbia took a different approach in *Young v. United States*, 63 A.3d 1033 (D.C. Cir. 2013) when it held that the testimonial nature of the statement and not the amount of participation in the testing process is determinative of who must testify for purposes of satisfying a defendant's right to confrontation. In that case, the prosecution presented the scientist who conducted the comparison

and matched the DNA profiles. At trial she testified about the match she obtained from 2 profiles derived from a team of analysts. She "admittedly relied throughout her testimony not just on her general understanding of FBI laboratory procedures, but on the documentation, testing, and analysis written or produced by other employees of the FBI laboratory in connection with this particular case." *Id.* at 1045. Further, because she "was not personally involved in the process that generated the profiles, she had no personal knowledge of how or from what sources the profiles were produced." *Id.*

The *Young* Court noted that it was distinguishable from *Williams* because the DNA evidence was introduced substantively. *Id.* at 1046-47. The hearsay statements relayed to the jury were also testimonial under the " 'targeted accusation criterion set forth in Justice Alito's plurality opinion in *Williams*." *Id.* at 1048. So, the testifying analyst in *Young* "was relaying, for their truth, the substance of out-of-court assertions by absent lab technicians that, employing certain procedures, they derived the profiles from the evidence furnished by [the victim] or appellant. Those assertions were hearsay. Without them, what would have been left of [her] testimony—that she matched two DNA profiles she could not herself identify—would have been meaningless." *Young*, 63 A.3d at 1045.

The court noted that "it would 'require an impossible feat of mental gymnastics' to 'disaggregate' [the testifying analyst]'s own non-hearsay conclusions from the interwoven hearsay on which she relied,

relaying the results of the DNA testing and analysis performed by other FBI lab employees." *Id.* at 1048. While the court did not hold that every analyst and technician who performed any aspect of a multi-stage process must testify, the court did say those who were "personally and significantly involved in all the critical stages of the DNA testing process" are required. *Id.* at 1049. Not only did the District of Columbia Circuit Court reach this decision twice, the Connecticut Supreme Court and New York Court of Appeals concluded similarly. *See Jenkins*, 75 A.3d at 190 (finding introduction of lab report and out-of-court testimonial statements of other laboratory analysts through testimony of expert who conducted DNA comparison violated defendant's right to confrontation); *State v. Walker*, 212 A.3d 1244, 1256 (Conn. 2019) (finding introduction of lab report and out-of-court testimonial statements of the other laboratory analysts through testimony of an expert who conducted the DNA comparison violated defendant's right to confrontation even though testifying analyst participated in generating some but not all of the DNA profiles); *People v. John*, 52 N.E.3d 1114, 1128 (N.Y. Ct. App. 2016) (reversing, focusing on testifying analyst's failure to participate in portion of process contributing to testimonial nature of the evidence). *See also Holland v. Rivard*, 800 F.3d 224 (6th Cir. 2015) (assuming the introduction of out-of-court testimonial statements of an analyst who had obtained a DNA profile through testimony of expert who conducted DNA comparison violated the petitioner's right to confrontation).

III. The Delaware Supreme Court's Decision Is Incorrect And Is Inconsistent With The Guarantees Provided By The Confrontation Clause Of The Sixth Amendment.

The Delaware Supreme Court's decision erroneously permits the State, in a multi-analyst DNA testing process, to introduce testimonial statements of nontestifying forensic analysts through the in-court testimony and lab report of another forensic analyst who has no personal knowledge of the basis for those testimonial statements but who had participated at a later stage in the testing process. Yet, the court preceded its decision with the conclusion that:

> [t]he practice of testing forensic evidence at out-of-state laboratories whose analysts are, as a practical matter, beyond the reach of a Delaware subpoena implicates important constitutional and evidentiary considerations. In this case, for instance, the testifying analyst's report and testimony relied upon her conclusion—not based on personal knowledge, but on her review of the nontestifying analysts' recorded entries in the lab's case files—that the nontestifying analysts performed their work properly. But even though there was no showing that the nontestifying analysts were unavailable or that practical considerations precluded their appearance, the Superior Court excused their absence, and Chavis was unable to test the testifying analyst's conclusion regarding the quality of the other analysts' work.

(App. 3-4). The reason the court went on to reject Chavis' claim, however, was that it could not conclude "that the out-of-court statements by witnesses who did not appear at trial were 'testimonial' within the meaning of controlling United States Supreme Court precedent." (App. 4).

While the Delaware Supreme Court recognized that the plurality in *Williams* found no Confrontation Clause violation despite the expert witness' lack of personal knowledge because, in part, "the expert's references to the DNA profile were not offered to prove the truth of the matter asserted and were thus not testimonial[,]" it failed to consider that distinguishing factor when deciding Chavis' case. (App. 23). Here, the State introduced Siddons' testimony and her lab report into evidence for the truth of the matter at a jury trial. Further, there was no issue as to the accusatory nature of her report. Instead, the court erroneously found that nothing in the record supported the conclusion that other analysts made any testimonial statements. What the court ignored was that Siddons' testimony and report contained 3 testimonial statements upon which her comparisons relied and which were introduced into evidence for purposes of establishing the element of identification. Two of the testimonial statements were hearsay.

In her lab report, Siddons asserts that the reference sample from which the one profile was generated came from the buccal swab of Chavis. She also asserts that the evidentiary sample from which the other profile was generated came from the crime scene window.

Finally, she asserts that the two profiles matched. (App. 54-55). She testified similarly. (App. 48-49).

Siddons did not enter the testing process for either sample until after the "extraction" stage. Any DNA material that was on the swabs provided by police had already been extracted into a liquid by nontestifying analysts and the swabs had already been discarded by those nontestifying analysts. Extraction of the DNA from the evidentiary sample was conducted by Powell and Ryan and for the reference sample it was conducted by Sufrin.

Thus, when Siddons went to the freezer and retrieved the tubes containing the extracted DNA, she retrieved evidence that she could not identify as having been provided by law enforcement in this case. But for the representation of the nontestifying analysts, she did not know the identity of those samples which she later used to generate the profiles she compared in this case. In other words, while Siddons generated the profiles, she incorporated the out-of-court testimonial statements of Powell (and/or Ryan) and Sufrin as to the identification of each of the samples. Yet, she testified to the identification of the profiles as fact and certified to their truth in the lab report.

So, just as with the testifying analyst in *Young*, Siddons relayed, for their truth, the substance of out-of-court hearsay statements by absent lab technicians without which the remainder of her conclusions "—that she matched two DNA profiles she could not herself identify—would have been meaningless."

Young, 63 A.3d at 1045. This is not inconsistent with the theory that the underlying data and processes would have been meaningless absent Siddons' independent review, analysis and conclusions. *Lui*, 315 P.3d at 506; *Lopez*, 45 A.3d at 14. Both principles are true.

A straightforward application of *Bullcoming* would have required the court to conclude that, while the State was not required to produce every analyst in the testing process, it was required to produce each analyst responsible for each of the testimonial statements in the lab report. At a minimum, this would be Powell (and/or Ryan), Sufrin and Siddons.[5] However, because of the confusion created by *Williams*, the court's focus veered toward Siddons' independent judgement and participation in the process rather than on the testimonial nature of the hearsay statements contained in her report and testimony that was introduced into evidence, who made those statements and whether Chavis was able to confront those individuals.

IV. This Case Is An Excellent Vehicle For This Court To Answer The Question Presented.

This case presents an issue free from any waiver or collateral review complications. It comes to this Court on direct review. Petitioner clearly objected to

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[5] In addition to the explicit statements, all of the forensic analysts involved in the testing of the DNA in this case made implicit assertions that he or she followed proper protocols to generate accurate data. *See Bullcoming*, 564 U.S. at 660.

the State's Motion *in limine* to introduce the forensic report and testimony of the State's forensic witness. He argued that the introduction of the forensic report in this manner violated the Confrontation Clause. Petitioner also preserved this issue by raising it on direct appeal to Delaware's only appellate court, the Delaware Supreme Court. Finally, the Delaware Supreme Court resolved this issue on the merits.

This case clearly and cleanly presents the question of whether the prosecution may introduce testimonial statements of nontestifying forensic analysts through the in-court testimony and lab report of another forensic analyst who has no personal knowledge of the basis for those testimonial statements but who had participated at a later stage in the testing process. Here, the prosecution introduced the DNA evidence substantively and that evidence played a central role at trial. If this Court concludes that Petitioner's confrontation rights were violated, he would be entitled to a new trial.

V. This Issue Is Important To The Proper Administration Of Criminal Justice.

Upholding a defendant's right to confront all analysts responsible for making testimonial statements early in a multi-analyst process is necessary in order to "assure accurate forensic analysis." One analyst's assurances at trial regarding the actions of the other analysts is insufficient to satisfy a defendant's right to confront and cross-examine those analysts. In fact, it

provides an opportunity for fraudulent and incompetent analysts to eternally escape cross-examination and confrontation. *Williams*, 567 U.S. at 132-33 (Kagan, J., dissenting).

If multiple analysts in the testing process know their work will never be directly challenged in court, the goal of confrontation is stymied. *Melendez-Diaz*, 557 U.S. at 318. Allowing the prosecutor to question a witness who did not participate in each step of the procedure would be to allow him "to do through subterfuge and indirection what we previously have held the Confrontation Clause prohibits." *Williams*, 567 U.S. at 132-33 (Kagan, J., dissenting). On the other hand, "the prospect of confrontation will deter fraudulent analysis" and will help "weed out" the incompetent analyst. *Id.* at 319. Accordingly, the Confrontation Clause "does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." *Bullcoming*, 564 U.S. at 662.

Upholding the right to confront all the analysts responsible for making testimonial statements early in a multi-analyst testing process also prevents the State from unfairly and unreasonably shifting the burden to the defendant to secure the presence of an adverse witness at trial. Assuming, *arguendo*, this Court were to conclude that a testing analyst who made an out-of-court testimonial statement is not required to testify under the Confrontation Clause, the defendant would be required to subpoena that analyst if he sought to

question him at trial. Not only would this put the defendant in the unusual position of subpoenaing an adverse witness, it would allow the State to make strategic decisions to put the defendant at a significant disadvantage as the State has the option of where to have DNA evidence tested.

Here, for example, rather than employing Delaware's own forensic lab, which uses a one-analyst process, the State hired a private lab in Virginia. Presumably, many of the analysts working at that lab live in Virginia. Thus, if a defendant is required to subpoena a testing analyst in order to cross-examine her, he would be required to follow the procedures set forth in 11 Del.C. §§3522 & 3523 for subpoenaing a witness from out of state. As the court below recognized, these procedures are often "significantly more cumbersome and costly—oftentimes prohibitively so—than the issuance and service of a subpoena for an in-state witness." (App. 3-4 n.4). Thus, Delaware's approach "[c]onvert[s] the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause[.]" *Melendez-Diaz*, 557 U.S. at 324. This, in turn, "shifts the consequences of adverse-witness no-shows from the State to the accused." *Id*.

CONCLUSION

For the foregoing reasons, Petitioner, Dakai Chavis, respectfully prays that a writ of certiorari issue to review the judgment of the Delaware Supreme Court.

Respectfully submitted,

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