No. 20-317

IN THE
SUPREME COURT OF THE UNITED STATES

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DAKAI CHAVIS,

Petitioner

v.

STATE OF DELAWARE,

Respondent

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On Petition for Writ of Certiorari
to the Delaware Supreme Court

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BRIEF IN OPPOSITION

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October 28, 2020

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QUESTION PRESENTED

Whether the Confrontation Clause under the Sixth Amendment is satisfied where a forensic analyst testifies regarding her conclusion that a reference sample DNA profile matches an evidentiary sample DNA profile when that forensic analyst participated in developing both of the DNA profiles used for comparison, independently certified the match, and authored the final laboratory report with the final test results.

INTRODUCTION

Respondent, the State of Delaware, respectfully asks this Court to deny Chavis's petition seeking review of the April 7, 2020 judgment of the Delaware Supreme Court for several reasons. The factual record is inadequate because the complete case files for the samples are not part of the record, and the Delaware Supreme Court had to "conjure up" the potential testimonial statements made by the non-testifying lab employees. Pet. App. 25. The incomplete record does not support Chavis's assertions about Siddons's reliance on testimonial statements. Nor will Chavis's case generate a rule that assists jurisdictions because the Delaware Supreme Court did not decide whether an analyst who simply reviews the results generated by others can testify about the results. The Delaware Supreme Court's decision was correct under this Court's precedent applying the Confrontation Clause to forensic testing. The split among jurisdictions is not severe because courts have generally agreed that experts may rely upon work not performed or data generated

by others and may testify about their independent conclusions without violating the Confrontation Clause.

OPINIONS BELOW

The opinion of the Delaware Supreme Court is reported at *Chavis v. State*, 227 A.3d 1079 (Del. 2020), but the oral decision of the Delaware Superior Court is unpublished (Pet. App. 37-39).

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a) and this Court's order from March 19, 2020, which extended the deadline to file a petition for a writ of certiorari.

COUNTER-STATEMENT OF THE CASE

1. The Crimes and Procedural History

In the fall of 2016, a number of night-time burglary and peeping-tom complaints from the residents of two apartment complexes—Hunter's Crossing and Harbor Club—prompted the New Castle County Police Department ("NCCPD") to install motion-sensitive surveillance cameras in the affected areas. Pet. App. 5. When the cameras detected motion, they took one photograph per second for the next ten seconds. Pet. App. 5. This generated approximately 40,000 images, which NCCPD Detective Mackie reviewed. In the images, Detective Mackie noticed a black male with facial hair, wearing camouflage pants, and a "pilot-style" jacket. Pet. App. 5. The frequent appearance of this individual in surveillance photos taken at or near the times when police had received the residents' complaints, "always late at night ...

[and] never ... during the daytime hours," piqued the detective's suspicion that this bearded man was the culprit. Pet. App. 5.

One of the burglaries, which occurred during the evening of November 11-12, 2016, involved a ground-floor apartment at 61 Fairway Road in the Hunter's Crossing apartment complex. Pet. App. 5. During the investigation, police concluded that the burglar entered through one of the bedroom windows. Pet. App. 5-6. The NCCPD's evidence-detection specialist, Officer Sweeney-Jones, swabbed the exterior of the window for DNA evidence, wrote where the evidence had been collected on an envelope, and logged the evidence with NCCPD. Pet. App. 6; Resp. App. B-15-16. NCCPD Sergeant Orzechowski then mailed the swabs (the crime-scene or evidence sample) to Bode Cellmark Forensics ("Bode"), a private lab in Virginia, for forensic DNA testing and entered the information from the envelope into Bode's database. Pet. App. 6; Resp. App B-17-18.

Based on a chance encounter on November 20, 2016 between two NCCPD officers and Chavis in the vicinity of the Harbor Club apartment complex, Chavis was developed as a suspect in these crimes. Pet. App. 6. Detective Mackie obtained search warrants for Chavis's residence and automobile, and for his DNA. Pet. App. 7. Upon executing the search warrants, Detective Mackie located numerous pieces of clothing, including a "pilot-style" jacket, camouflage pants, and Nike sneakers, all of which were similar to what the suspect wore in many of the surveillance-camera photographs. Pet. App. 7. The detective obtained the DNA sample from Chavis, using a collection method known as buccal swabbing, by scraping the inside of Chavis's

cheeks with a Q-tip-like swab to collect skin cells. Pet. App. 7. Sergeant Orzechowski mailed the swabs (the reference or known person sample) to Bode and entered the information into Bode's database in a similar manner as he did with the crime-scene sample. *See* Resp. App. B-18. Bode determined that Chavis's DNA sample matched the profile it had already developed from the bedroom window. Pet. App. 8.

On January 4, 2017, police arrested Chavis for the burglary at 61 Fairway Road, and a grand jury subsequently indicted him for trespassing with intent to peer or peep into a window or door of another (four counts), attempted burglary second degree (three counts), burglary second degree (three counts), and theft of a firearm. Pet. App. 2; Resp. App. B-1-2. Prior to Chavis's trial, the State filed a motion *in limine* to admit the DNA test results solely through the testimony of a Bode analyst named Sarah Siddons ("Siddons"). Pet. App. 14; Resp. App. B-7. In support of the motion, the State attached an affidavit from Siddons describing the stages of DNA testing in Chavis's case. Pet. App. 11. Chavis opposed the State's motion, arguing that his rights under the Confrontation Clause and Delaware's chain of custody laws would be violated if only Siddons testified. Pet. App. 15. On April 13, 2018, the Delaware Superior Court granted the State's motion after a hearing. Pet. App. 16; Resp. App. B-8.

Chavis's case proceeded to a jury trial in the Superior Court on June 19, 2018. Resp. App. B-9. Siddons testified as an expert witness regarding the DNA testing in Chavis's case. Pet. App. 16-17. On June 22, 2018, the jury found Chavis guilty of one count of burglary second degree (related to the apartment at 61 Fairway Road) and

acquitted him of the remaining charges. Pet. App. 2. Chavis appealed, and the Delaware Supreme Court affirmed his convictions and sentence on April 7, 2020. *Chavis*, 227 A.3d at 1095.

2. The DNA Testing

a. The Crime-Scene or Evidence Sample

In her affidavit, Siddons described the following having taken place with the DNA swabs from the crime-scene or evidence sample. On November 22, 2016, a Bode employee, Alyssa Morris, received the swabs collected at 61 Fairway Road from Federal Express. Pet. App. 9. The swabs were subsequently delivered to Rachel Aponte ("Aponte"), a Bode technician, for the purpose of "analysis" on December 6, 2016. Pet. App. 9. Aponte returned the swabs to Joseph Hufnagel, who was responsible for storage, one week later but not before conducting a step that Bode's testifying witness, Siddons, described as "evidence examination." Pet. App. 9. During this examination, after retrieving the sample from Bode's evidence room, Aponte examined the evidence for biological materials, "cut [ ] the swabs lengthwise ... then place[d] the swab pieces into tubes and place[d] the tubes into a secure evidence room inside the lab." Pet. App. 9. Siddons did not participate in or witness Aponte's examination and cutting of the swabs. Pet. App. 9-10.

The next step in the process, extraction, was completed by Kelsey Powell ("Powell"), a Bode analyst, to release any DNA from the swab. Pet. App. 10. Siddons did not observe or supervise Powell but averred that:

> 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 the lab.

Pet. App. 10. Another technician, Douglas Ryan ("Ryan"), retrieved the samples from the refrigerator and placed the tubes in a robot that added chemical reagents to the samples, "separat[ing] the DNA from everything else that was in the tube." Pet. App. 10-11. Ryan completed the extraction step by sealing the tray and placing it into a freezer. Pet. App. 11. Siddons neither participated in nor witnessed the foregoing activity. Pet. App. 11. Instead, she would have learned about it from reviewing the case files produced by the other analysts. Pet. App. 11.

Siddons performed the quantification, amplification, and electrophoresis steps. Pet. App. 11. During quantification, Siddons added chemicals to the DNA samples that Powell and Ryan had extracted and placed the tray holding the sample onto a machine that measured the amount of DNA in each sample. Pet. App. 11. Only one of the two crime-scene samples contained enough DNA to allow for testing, and it required "concentration," which was accomplished by running it through a filter. Pet. App. 11.

Siddons next completed the amplification step, where the technician adds another chemical mix that facilitates a process called a polymerase chain reaction ("PCR")—a largely automated process during which the DNA sample is placed into a high-precision oven that repeatedly cycles through a series of temperatures. Pet.

App. 12. The chemicals react to the temperature cycle and produce exponentially rising copies of what are called "short tandem repeats" ("STRs") in the DNA so that there is a readable signal from even a tiny amount of DNA. Pet. App. 12.[1]

After amplification, Siddons "placed [the DNA] into a tray which was then placed onto the Genetic Analyzer, the machine which actually creates the DNA profiles." Pet. App. 12. This mostly automated step involves a process known as electrophoresis, which generates a graph called on electropherogram.[2] Pet. App. 12. Siddons "pulled up the profile and confirmed that the profile passed, or was satisfactorily readable." Pet. App. 12. Siddons then entered the profile into a local database but did not generate a report with her final conclusions. Pet. App. 13.

b. The Reference or Known Person Sample

On January 16, 2017, Federal Express delivered the buccal swabs from Chavis's mouth to Bode. Pet. App. 13. Technicians completed similar steps to analyze this reference or known person sample, with some exceptions. Pet. App. 13. Feng Chen ("Chen"), a Bode technician, performed the evidence examination step (done by Aponte in the prior sample), and Vanessa Sufrin ("Sufrin") completed the extraction step (done by Ryan in the prior sample). Pet. App. 13, 45. Siddons neither participated in nor witnessed Chen's or Sufrin's work. Pet. App. 13. Siddons

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[1] STRs are repetitive sequences in DNA that have a variable number of repetitions from person to person. By evaluating enough STRs and finding sufficient matches, a forensic investigator can conclude that two DNA samples are statistically highly likely to be from the same person. Pet. App. 12.

[2] The electropherogram "is a visual depiction of the genetic material resembling a line graph with peaks showing the lengths of DNA strands at specified loci." Pet. App. 12.

completed the quantification and amplification steps and, in the electrophoresis step, placed the sample into the Genetic Analyzer so it could produce a DNA profile. Pet. App. 13. Siddons then confirmed that the profile was satisfactorily readable and entered it into a local database. Pet. App. 13. This time "[t]he database reported a 'hit' or 'match.' " Pet. App. 13.

c. Siddons's Report

Upon learning that the database reported a "hit," Siddons reviewed both profiles and "confirmed the computer's reported match." Pet. App. 13. Siddons also confirmed that "[t]he evidence profile and reference profile ... matched at all fifteen (15) loci analyzed at Bode." Pet. App. 13. Before writing her report, and because Siddons had not performed or witnessed the first two steps in the analysis, she "reviewed the case files for both the evidence sample and the reference sample ... and confirmed that Standard Operating Procedures were followed." Pet. App. 13. Satisfied that Aponte, Powell, Ryan, Chen, and Sufrin had performed the earlier steps competently and in accordance with Bode's standard operating procedures, Siddons authored the report, dated July 31, 2017, which contained the expert opinion that was offered at Chavis's trial. Pet. App. 13, 54-57.

3. The State's Motion *in Limine*

In its motion *in limine*, the State moved the Superior Court to allow the introduction into evidence of Bode's DNA testing results through Siddons's testimony and without requiring the State to produce the other Bode analysts for cross-examination by Chavis. Pet. App. 14. The State asserted:

> Siddons [was] the only person at Bode who performed testing and analysis on the samples. Other Bode employees (also referred to as 'analysts') only prepared the samples for Siddons' eventual testing by cutting swabs, adding reagents to test tubes, and placing samples onto machines. The actions taken by the other Bode analysts were preparatory in nature and did not yield any data or result, and no report was generated.

Pet. App. 14-15. The State also argued that Siddons was a qualified expert and that, under Delaware Rule of Evidence 703,[3] she could rely on facts and data provided by the other analysts in rendering her opinion. Pet. App. 15.

Chavis responded in opposition to the motion and argued, among other reasons, that Siddons's assurances about the competency of Aponte, Chen, "and anyone else who might have performed similar 'analysis' " were inadequate under the Confrontation Clause. Pet. App. 15. However, Chavis did not claim that Siddons was not qualified as an expert or that her report and testimony had incorporated factual assertions that were beyond her personal knowledge. Pet. App. 15.

The Superior Court held a hearing on the State's motion and considered Siddons's affidavit, her final report, and chain of custody and inventory documents

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[3] Delaware Rule of Evidence 703 provides:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. Upon objection, if 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.

The rule generally tracks the federal one in effect on December 31, 2000. *See* Comment to D.R.E. 703.

from Bode that Chavis had attached to his response. Pet. App. 15-16. No witnesses from Bode testified. Pet. App. 16. After oral argument from counsel, the Superior Court granted the State's motion and held that the only testimonial statements in Bode's DNA testing results were those made by Siddons and that, therefore, her appearance at trial would satisfy the Confrontation Clause. Pet. App. 16. Accordingly, Siddons was the only witness at Chavis's trial to testify in support of the DNA testing results and conclusions. Pet. App. 16.

4. Siddons's Trial Testimony

At trial, Siddons described her training as a DNA analyst, her employment at Bode, and her experience in DNA-typing technology, and the State proffered her as an expert in DNA analysis. Pet. App. 16. Chavis's counsel stated for the record that he had "no objection" to Siddons's expert-witness status. Pet. App. 16. Siddons then described the DNA testing process similarly as she did in the affidavit she submitted in support of the State's motion *in limine*. Pet. App. 16. As she testified in detail about the testing steps conducted by Aponte, Chen, Ryan, Powell, and Sufrin, Chavis did not object on hearsay or other evidentiary grounds, but limited his challenge to the Confrontation Clause and chain of custody. Pet. App. 16-17. On direct examination, Siddons did not recount any statement made or conclusions reached by any of the non-testifying analysts. Pet. App. 17. Rather, she explained that she was able to generate one DNA profile from the two evidence samples and a profile from the reference sample. Pet. App. 17. According to Siddons, "the male profile obtained from the evidence sample was a match to the male profile from [Chavis's] reference

sample," matching at all 15 loci. Pet. App. 17. Her written report, which was admitted into evidence without objection, noted that "[t]he probability of randomly selecting an unrelated individual with this DNA profile at 15 of 15 loci tested is approximately ... 1 in 26 quintillion in the U.S. African American population." Pet. App. 17; Resp. App. B-23.

REASONS FOR DECLINING REVIEW

I. This case is not a good vehicle for the question presented.

A. The factual record is inadequate and does not otherwise support Chavis.

In his petition seeking certiorari, Chavis contends that the Confrontation Clause under the Sixth Amendment was violated because Siddons's testimony and report "contained [three explicit] testimonial statements upon which her comparisons relied and which were introduced into evidence for purposes of establishing the elements of identification." Pet. at 24. First, Chavis contends that "Siddons assert[ed] that the reference sample from which the profile was generated came from the buccal swab of Chavis." Pet. at 24. Second, "the evidentiary sample from which the other profile was generated came from the crime scene window." Pet. at 24. Third, "the two profiles matched." Pet. at 25. Chavis elaborates that "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" and that she relied on the non-testifying employees' representations about where the evidence came from. Pet. at 25. Chavis argues that Siddons "incorporated the out-of-court testimonial statements of Powell (and/or

Ryan) and Sufrin as to the identification of each of the samples" in generating the DNA profiles. Pet. at 25. Moreover, Chavis claims that "all of the forensic analysts involved in the testing of the DNA in the case made implicit assertions that he or she followed proper protocols to generate accurate data." Pet. at 26. Chavis contends that "[t]his case clearly and cleanly presents the question of whether the prosecution may introduce "testimonial" statements of non-testifying forensic analysts through the in-court testimony and lab report of another forensic analyst." Pet. at 27. Chavis is mistaken.

In order for this Court to decide a constitutional question, the record must be "sufficiently clear and specific." *Commonwealth of Massachusetts v. Painten*, 389 U.S. 560, 561 (1968). An insufficient record to reach a constitutional question will result in dismissal of a writ of certiorari as improvidently granted. *Smith v. State of Mississippi*, 373 U.S. 238, 238 (1963).

As an initial matter, Chavis's question presented presupposes the conclusion he seeks, *i.e.*, that the non-testifying lab employees' statements in the case files are testimonial. But the real question is whether any statements from these non-testifying employees are testimonial. The factual record is incomplete and inadequate to resolve this question.

The Delaware Supreme Court noted on direct appeal, *Chavis v. State*, 227 A.3d 1079 (Del. 2020), that Chavis had not demonstrated a violation of the Confrontation Clause based on the record before it and lamented the absence of case files "produced by the non-testifying analysts, which Siddons relied upon and which Chavis seems to

claim contain the non-testifying analysts' out-of-court statements." Pet. App. 4, 25. The court mentioned the few documents in the record from Bode's DNA testing, including Siddons's report with the final test results, her affidavit, two one-page inventory sheets for the samples, and two one-page chain of custody reports for the samples. Pet. App. 9, 17. The court determined "that Chavis does not identify any particular statement in [these] documents … as an out-of-court statement that gives rise to his confrontation right," and it had to "conjure up" the potential out-of-court statements. Pet. App. 25. The court concluded that Chavis "only posit[ed] that the non-testifying analysts' statements relate to their adherence to testing protocols and the absence of irregularities (following standard operating procedures and not seeing any evidence of taint or contamination)." Pet. App. 25.

Nothing has changed here. Chavis's petition does not identify any actual statements from Powell, Ryan, or Sufrin that are part of the record. Siddons also testified about her education and training to become an analyst with Bode and about the overall training and proficiency testing required of Bode's employees. *See* Resp. App. B-19-20. However, as the Delaware Supreme Court determined, Siddons did not testify about the qualifications of the non-testifying lab employees. *See* Pet. App. 16. Moreover, as explained later, the court correctly rejected Chavis's argument about the non-testifying lab employees having made implicit testimonial statements when it concluded that the fact that a non-testifying analyst made a statement relevant to a fact at issue did not automatically result in the analyst becoming a "witness[ ] against" Chavis under the Sixth Amendment. Pet. App. 31 (citing U.S.

Const. amend VI). Without a complete record, this Court cannot announce a broad rule, and Chavis has not offered what the rule should be. Taken to their logical conclusions, Chavis's arguments would effectively require every lab employee in the sample's chain of custody to testify. As will be further explained, this Court has not imposed such a requirement.

In any event, the incomplete factual record does not support Chavis's assertions. In describing the evidence samples in her report, Siddons testified that she relied on the descriptions from the submitting police agency. *See* Resp. App. B-22, B-25. The State presented detailed testimony about the police's collection and handling of the DNA samples in this case, including from NCCPD Sergeant Orzechowski, who testified that he provided information to Bode about the samples based on information on the envelopes containing the swabs. *See* Resp App. B-18. Accordingly, this case lacks a sufficient factual record for this Court to reach the constitutional question presented.

B. Chavis's case will not help to generate a rule that assists jurisdictions.

Chavis's case will not generate a rule that assists jurisdictions where multiple technicians or analysts are involved in DNA testing because the Delaware Supreme Court never reached the issue of whether an analyst who simply reviews the results generated entirely by others can testify as to the results. *See* Pet. App. 29. Siddons was directly involved in creating the DNA profiles for the samples from the quantification step onward. Pet. App. 10-14. She placed the prepared samples into the Genetic Analyzer, inputted the profiles obtained from the machine and software

into the local database, and wrote the final report with her conclusions. Pet. App. 11-14. The court also noted that "Chavis might have challenged Siddons's opinion or testimony on the grounds that they lacked an adequate foundation because of her lack of personal involvement in the early stages of the testing process or that Siddons's reliance on information by the non-testifying analysts was improper under [Delaware Rule of Evidence] 703." Pet. App. 31. Because Chavis did not object to Siddons's report or testimony on these grounds, the Delaware Supreme Court did not determine the effects of the Confrontation Clause on Rule 703. Pet. App. 31-32.

Siddons's extensive involvement in the testing starkly contrasts with other jurisdictions that employ outside laboratories or use multiple lab employees for testing. In some cases, the testifying analyst only compared the results and was not involved in creating any of the profiles; was only involved in creating some of the profiles and comparing them with a known sample; or wrote the report from comparing the DNA profiles, but had otherwise only participated in the early stages of the testing. *See, e.g., Campbell v. People*, 464 P.3d 759, 762, 764-67 (Colo. 2020) (no plain error from expert testifying about comparing DNA profiles where a different lab developed one of the profiles); *State v. Walker*, 212 A.3d 1244, 1251-56 (Conn. 2019) (Confrontation Clause violated where expert had not personally generated the defendant's DNA profile, although she had compared it with a profile she had developed and wrote a report with her final conclusions); *Derr v. State*, 73 A.3d 254, 261, 273 (Md. 2013) (Confrontation Clause was not violated where expert testified about comparing DNA samples and writing the report with her conclusions based on

reviewing lab work performed by others), *cert. denied*, 573 U.S. 903 (2014); *People v. John*, 52 N.E.3d 1114, 1117-19, 1122-28 (N.Y. 2016) (Confrontation Clause violated where analyst wrote a report with her conclusions but was only involved in the early stages of processing the evidence sample). But here, Siddons's significant involvement in developing the DNA profiles makes this case not a good vehicle to address the constitutional question presented.

II. The Delaware Supreme Court's decision was correct.

Chavis contends that "[t]he Delaware Supreme Court's decision erroneously permits the State, in a multi-analyst DNA testing process to introduce "testimonial" statements of non-testifying 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." Pet. at 23. According to Chavis, "[a] straightforward application of *Bullcoming* [*v. New Mexico*, 564 U.S. 647 (2011),] 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." Pet. at 26. Chavis is incorrect.

The Confrontation Clause under the Sixth Amendment provides a defendant with the right "to be confronted with the witnesses against him." U.S. Const. amend VI. In *Crawford v. Washington*, this Court found that the Confrontation Clause is violated when the prosecution introduces evidence of a prior out-of-court testimonial statement of a witness unless the witness is unavailable and the defendant has had

a previous opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 38, 50-51, 68-69 (2004). However, *Crawford* also concluded that "not all hearsay implicates the Sixth Amendment's core concerns." *Id.* at 51. The Delaware Supreme Court reached a similar conclusion in Chavis's case. While acknowledging that "the other analysts' adherence to standard operating procedures and their entries in the case files to that effect were essential to [Siddons's] conclusion," the court also found that "just because a declarant makes an out-of-court statement that may have some relevance to a fact at issue in a criminal trial does not make that declarant 'a witness[ ] against' the defendant within the meaning of the Sixth Amendment." Pet. App. 31. (quoting U.S. Const. amend VI).

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), *Bullcoming*, and *Williams v Illinois*, 567 U.S. 50 (2012), this Court applied the Confrontation Clause to scientific reports. In *Melendez-Diaz*, this Court determined that the Confrontation Clause was violated when the prosecution admitted three notarized "certificates of analysis" from the state's forensic laboratory at trial, which attested that the substances in the petitioner's possession were cocaine. *Melendez-Diaz*, 557 U.S. at 308, 329. The affidavits were testimonial statements because, in lieu of the analyst's testimony, the "'certificates' [we]re functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" *Id.* at 310-11 (quoting *Davis v. Washington*, 547 U.S. 813, 830 (2006)). This Court noted that "petitioner did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use

of skills that the analyst may not have possessed." *Id.* at 320. However, this Court was careful to "not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." *Melendez-Diaz*, 557 U.S. at 311, n.1. In other words, "this does not mean that everyone who laid hands on the evidence must be called." *Id.*

In *Bullcoming*, this Court found that a defendant charged with driving while intoxicated had the right to have confronted the analyst who had completed and signed the report with his blood alcohol concentration ("BAC") level from testing his blood sample in a gas chromatograph machine. *Bullcoming*, 564 U.S. at 651-54. Because this analyst was not available to testify, another analyst who "was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample" testified instead. *Id.* at 651-52, 655. In finding the report testimonial, the Court concluded that "the formalities attending the 'report of blood alcohol analysis' are more than adequate to qualify [the non-testifying analyst's] assertions as testimonial." *Id.* at 665.

In Justice Sotomayor's concurrence, she explained that the BAC report had "'a primary purpose of creating an out-of-court substitute for trial testimony.'" *Id.* at 669. Justice Sotomayor also identified the "factual circumstances that [*Bullcoming*] does *not* present," including asking the expert witness under Federal Rule of Evidence 703 "for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence." *Id.* at 672-73 (emphasis in original).

This Court did not "address what degree of involvement is sufficient because here [the testifying analyst] had no involvement whatsoever in the relevant test and report." *Id.* Nor did this Court "decide whether ... a State could introduce (assuming an adequate chain of custody foundation) raw data generated by a machine in conjunction with the testimony of an expert witness." *Id.* at 674.

Based on *Melendez-Diaz* and *Bullcoming*, the Delaware Supreme Court correctly discerned the following "indicator for when a statement is testimonial: the purpose of the statement in proving an essential element of the crime." Pet. App. 25. The court noted that the affidavits and certificates in this precedent were testimonial because they concerned the results from forensic testing, which were used to prove an element of a criminal offense. Pet. App. 21-22.

As the Delaware Supreme Court also properly concluded, Chavis's case is factually inapposite to *Melendez-Diaz* and *Bullcoming*. Pet. App. 25. Only Siddons's statements were accusatory because they linked Chavis to the DNA left on the apartment's bedroom window and identified him as having entered or remained unlawfully in the apartment, an element of his burglary charge. *See* 11 *Del. C.* § 825(a). Unlike *Melendez-Diaz*, where no witnesses testified about the affidavits, Siddons testified in detail about her work related to the DNA testing, and Chavis had the opportunity to cross-examine her. The record does not suggest that the non-testifying employees would have opined about the final test result, or the match between the DNA profiles developed during the testing.

This case is also factually dissimilar to *Bullcoming* based on the circumstances

not present. It does not involve surrogate testimony. *See Bullcoming*, 564 U.S. at 672-73. Instead, this case encompasses "a testifying analyst who was also involved in the testing of *both* DNA samples and who certified the results." Pet. App. 27 (emphasis in original). Contrary to Chavis's claim, a "straightforward application of *Bullcoming*" would not have required Powell, Ryan, or Sufrin to have testified at trial. *See* Pet. 26. Justice Sotomayor's concurrence in *Bullcoming* cited *Melendez-Diaz's* footnote, which, in turn, noted that not every person who can establish the sample's authenticity is required to testify. *Id.* at 670, n.2 (citing *Melendez-Diaz*, 557 U.S. at 311, n.1).

Bullcoming also did not concern "an expert witness [who] was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence" under Federal Rule of Evidence 703. *Id.* at 673. Although the Delaware Supreme Court did not address this issue under Delaware's version of the federal rule, it noted that "an expert, Siddons, testified to the results of a forensic analysis, but in doing so, relied upon information that experts in her field typically rely upon—case files by other testing analysts who manipulate the DNA samples in order to prepare them for the expert, but who do not themselves analyze the result." Pet. App. 24. Siddons was also entitled to depend on her knowledge of standard operating procedures in providing her expert opinion.

Unlike *Bullcoming*, this case also involved the introduction of raw, machine-generated data "in conjunction with the testimony of an expert witness." *Bullcoming*, 564 U.S. at 674. Although Siddons obtained the DNA profiles during the

electrophoresis step by running the samples through the Genetic Analyzer, software measured the DNA fragments' lengths and determined the allele values. Pet. App. 12; Resp. App. B-13. The DNA profiles were not statements, nor were the machine and software declarants. *See United States v. Summers*, 666 F.3d 192, 202 (4th Cir. 2011) (concluding that "[t]he numerical identifiers of the DNA allele here, insofar as they are nothing more than raw data produced by a machine," are nontestimonial), *cert. denied*, 568 U.S. 851 (2012). The technicians who operate this machine and software cannot independently affirm or deny that samples will yield complete DNA profiles. *See State v. Stillwell*, 232 A.3d 363, 372 (N.H. 2019).

In *Williams*, this Court concluded that the prosecution had not violated the Confrontation Clause based on expert testimony about DNA testing where an expert witness from the police's laboratory had testified that the defendant could not be excluded as the source of the DNA on the victim's vaginal swabs, although a private laboratory, Cellmark, had generated the DNA profile from the swabs and issued a report. *Williams*, 567 U.S. at 57, 59-62. A four-justice plurality concluded that the expert's testimony did not violate the Confrontation Clause because Cellmark's report was not offered to prove the assertion for its truth "that the matching DNA profile was found in semen from the vaginal swabs," but was a premise the analyst could rely on to provide her expert opinion. *Id.* at 72. Even if Cellmark's report had been admitted into evidence, the plurality concluded that "there would have been no Confrontation Clause violation" because the report's primary purpose was to "find[ ] a rapist who was on the loose." *Id.* at 58. Justice Thomas constituted the majority's

fifth vote, but he concurred only in the judgment. *Id.* at 103. In his concurrence, Justice Breyer would have set the case for re-argument but considered Cellmark's report to "fall outside the category of 'testimonial' statements that the Confrontation Clause makes inadmissible." *Id.* at 86, 92-93.

The four-justice dissent in *Williams* viewed Cellmark's report as testimonial and the analyst who had generated the report "became a witness whom Williams had the right to confront" when the prosecution introduced its substance into evidence. *Id.* at 125. The dissent also contended that the expert's testimony did not involve a "straightforward application of … expertise." *Id.* at 129. According to the dissent, the expert should not have testified that "the Cellmark report *was* produced in this way by saying that [the victim's] vaginal swab contained DNA matching Williams's" because the expert knew "nothing about 'the particular test and testing process.' " *Id.* at 130 (quoting *Bullcoming*, 564 U.S. at 661).

As the Delaware Supreme Court determined, Siddons's testimony is distinguishable from the expert in *Williams* because Siddons was involved in developing both samples used for comparison. *See* Pet. App. 27. Siddons therefore had personal knowledge about the testing process for each sample. *See* Pet. App. 27. Chavis's case is a straightforward application of Siddons's expertise that does not implicate the concerns raised by *Williams's* dissent. Based on the foregoing, the Delaware Supreme Court's decision was correct.

III. The split among jurisdictions is not severe.

Chavis argues that lower courts need this Court's guidance to determine "which individual the defendant is entitled to confront when forensic evidence is introduced against him" and that "reaching an answer has become even more difficult in the wake of *Williams*." Pet. App. 15-16. Chavis claims that "[a] significant majority [of courts] allow experts to rely on out-of-court testimonial statements so long as those statements are not introduced for their truth," other courts "allow the introduction of DNA evidence for its truth based on the witness'[s] degree of general involvement or general familiarity," and the District of Columbia has taken a different approach. Pet. App. 17-22. As previously stated, under *Bullcoming*, the question is answered here, and, in any case, Chavis's arguments are unavailing.

Here, Chavis did not object to Siddons testifying as an expert or to the admission of her report, which essentially precludes any review of the "statements" at issue. *See* Resp. App. B-20, B-23. To the extent Chavis argues that uncertainty about *Williams's* holding has created a significant split among jurisdictions, his claim overlooks important similarities. Although courts have differed in their reasoning and in the degree that experts may recite the underlying bases for their opinions, courts have generally agreed that experts may rely upon work not performed or data not generated by them, and they may testify about their independent conclusions without violating the Confrontation Clause. A rational inference from their decisions is that testimony from other lab employees who had physically performed the lab work was not necessary because they had not made testimonial statements. *See, e.g.,*

Summers, 666 F.3d at 197-203 (finding no Confrontation Clause violation and citing the expert's independent opinion and Federal Rule of Evidence 703); *Williams v. Vannoy*, 669 F. Appx. 207, 208 (5th Cir. 2016) (supervisor at laboratory could testify about DNA test results without violating the Confrontation Clause), *cert. denied*, 137 S. Ct. 1440 (2017); *Benjamin v. Gipson*, 640 F. Appx. 656, 659 (9th Cir. 2016) (no violation of the Confrontation Clause based on expert testimony where the expert had not conducted the DNA testing); *United States v. Katso*, 74 M.J. 273, 282 (U.S.A.F. 2015) (concluding that an expert may "review and rely upon the work of others, including laboratory testing conducted by others, so long as they reach their own opinions in conformance with evidentiary rules regarding expert opinions") (internal quotation and citation omitted), *cert. denied*, 136 S. Ct. 1512 (2016); *Ex Parte Ware*, 181 So.3d 409, 416-17 (Ala 2014) (Confrontation Clause not violated where the expert witness signed the DNA report, initialed the case file, and reviewed the analyses), *cert. denied*, 573 U.S. 935 (2014); *Marshall v. People*, 309 P.3d 943, 946-48 (Colo. 2013) (Confrontation Clause not violated where the laboratory supervisor who had independently reviewed the data testified), *cert. denied*, 572 U.S. 1136 (2014); *State v. Hall*, 419 P.3d 1042, 1076 (Idaho 2018) (expert who had supervised the employee processing DNA samples and independently reviewed the data could testify without violating the Confrontation Clause), *cert. denied*, 139 S. Ct. 1618 (2019); *Derr*, 73 A.3d at 271-73 (Confrontation Clause not violated where examiner testified based upon reviewing bench work performed by others); *State v. Roach*, 95 A.3d 683, 684 (N.J. 2014) (testimony from witness who independently reviewed the testing and

processes did not violate Confrontation Clause), *cert. denied*, 135 S. Ct. 2348 (2015); *State v. Lopez*, 927 N.E.2d 1147, 1155-56, 1160 (Ohio Ct. App. 2010) (Confrontation Clause not violated from technical reviewer testifying), *cert. denied*, 568 U.S. 1217 (2013); *Commonwealth v. Yohe*, 79 A.3d 520, 543-64 (Pa. 2013) (same), *cert. denied*, 572 U.S. 1135 (2014); *Galloway v. State*, 122 So.3d 614, 637-38 (Miss. 2013) (same), *cert. denied*, 572 U.S. 1134 (2014); *State v. Lopez*, 45 A.3d 1, 10-11, 13 (R.I. 2012) (supervisor who never physically touched the evidence could testify about DNA test results without violating Confrontation Clause); *State v. Lui*, 315 P.3d 493, 508-10 (Wash. 2014) (supervisor who did not physically conduct the DNA testing could testify about the results without violating the Confrontation Clause), *cert. denied*, 573 U.S. 933 (2014).

Chavis's reliance on Massachusetts is misplaced. Massachusetts allows an expert to testify substantively about DNA testing by providing his or her conclusions, but it prohibits the expert from "present[ing] on direct examination the specific information on which he or she relied." *See Commonwealth v. Greineder*, 984 N.E.2d 804, 807, 818-21 (Mass. 2013), *cert. denied*, 571 U.S. 865 (2013). Massachusetts has also concluded that an "[e]xpert opinion, even that which relies for its basis on the DNA test results of a non-testifying analyst not admitted in evidence, does not violate a criminal defendant's right to confront witnesses against him under … the Sixth Amendment." *Id.* at 821. Because Massachusetts' evidentiary rule regarding expert testimony is more restrictive than the federal one, it affords more protections than

this Court requires. *See id.* at 813-14; *Commonwealth v. Jones*, 37 N.E.3d 589, 596 (Mass. 2015) (discussing *Greineder*).

Even jurisdictions employing more stringent requirements that do not permit expert testimony from those who only independently review test results have cited possible exceptions. New York has held that "it is the generated numerical identifiers and the calling of the alleles at the final stage of the DNA typing that effectively accuses defendant of his role in the crime charged," but it has also concluded that "an analyst who witnessed, performed or supervised the generation of defendant's DNA profile, or *who used his or her independent analysis on the raw data*, as opposed to a testifying analyst functioning as a conduit for the conclusions of others, must be available to testify." *John*, 52 N.E.3d at 1127-28 (emphasis added). The District of Columbia has determined that the Confrontation Clause was violated when analysts who had performed the extraction and amplification steps of DNA testing did not testify. *See Jenkins v. United States*, 75 A.3d 174, 190-91 (D.C. 2013). However, this jurisdiction has acknowledged the practical problem of an expert witness's unavailability and has considered possibly allowing the prosecution "to call a substitute expert to testify when the original expert who performed the testing is no longer available (through no fault of the government), retesting is not an option, and the original test was documented with sufficient detail for another expert to understand, interpret, and evaluate the results." *Young v. United States*, 63 A.3d 1033, 1049 (D.C. 2013) (internal quotation and citation omitted). The agreement of many jurisdictions on certain basic points demonstrates that this Court's review is

not needed to reconcile any divide. Accordingly, there is no basis for this Court to grant the petition for certiorari. This Court should deny such review in this case as it has done in many of the foregoing decisions, including those decided after *Williams*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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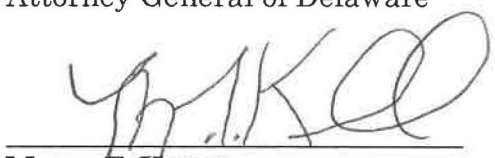

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October 27, 2020