No. 20-317

IN THE

Supreme Court of the United States

DAKAI CHAVIS,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DELAWARE SUPREME COURT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This case meets all the criteria for certiorari, and the Brief in Opposition effectively shows why. There can be no doubt that the fractured decision in *Williams v. Illinois*, 567 U.S. 50 (2012), left uncertainty in its wake. State high courts and federal appellate courts have struggled even to discern the holding of *Williams* and have taken radically different approaches when applying it to unresolved questions. The most the State can offer in response is to quibble that any disagreement is "not severe." BIO 1, 23. But the cases set forth in the Petition and below demonstrate that this is incorrect—which is why two Members of the Court already have said that this fundamental disagreement merits further review. Pet. 12-13.

There also is no doubt that the issue is sufficiently important to merit review. As the unyielding disagreements in state and federal courts confirm, the question presented arises frequently, in myriad contexts. And the confusion will not dissipate. DNA evidence is a mainstay of criminal prosecutions, and the State does not deny that courts, prosecutors, and defendants require clarity on what constitutional protections apply when labs choose to use multiple analysts to test DNA and then produce a report.

Instead, the State's principal argument is that this case is an inapt vehicle to resolve this important and recurring question, merely because the analysts' underlying notes are not themselves in the record. That is beside the point. The constitutional defect here arises precisely because the State laundered

those testimonial statements of nontestifying witnesses through the testimony and report of a single witness, Siddons. And *her* testimony and report conveying those testimonial statements are in the record. Pet. 8-9; *see* Pet. App. 48-53 (testimony), 54-56 (report). Meanwhile, the State does not contest the crucial point that the challenged evidence secured Chavis's conviction.

The decision below embraces a rule divorced from the text and history of the Confrontation Clause, and from common sense. If the State wants to introduce an out-of-court statement for its truth, then the defendant has a constitutional right to confront the declarant. Chavis was denied that opportunity here.

For all of these reasons, the Petition should be granted.

I. State And Federal Courts Have Splintered Over This Important Question.

Williams explicitly left open a "difficult" and "important" question: "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?" *Williams*, 567 U.S. at 86 (Breyer, J., concurring). State and federal courts have reached conflicting conclusions. This disagreement is widespread and severe, which is why Justices have recognized that the "various opinions" in *Williams* "have sown confusion in courts across the country." *Stuart v. Alabama*, 139 S. Ct. 36, 36 (2018) (Gorsuch J., joined by Sotomayor, J., dissenting from denial of cert.); *see* Pet. 15-16 & nn.1-

2 (chronicling courts' confusion). This Court's intervention is urgently needed to resolve this uncertainty.

A. Federal courts of appeals and state high courts are split.

State and federal courts disagree about who must be subject to cross-examination when, as here, multiple individuals make distinct contributions to a single DNA report. Pet. 20-22. On one side of the divide, some courts hold that, under the Confrontation Clause, the analyst "who tested for the presence of biological material" or "who extracted" DNA must testify about the work they performed. *Jenkins v. United States*, 75 A.3d 174, 190 (D.C. 2013). A witness lacking firsthand knowledge about such testing cannot testify to it, particularly given its importance to the case against the defendant: "Without [the assertions of absent analysts], what would have been left of [the expert's] testimony—that she matched two DNA profiles she could not herself identify—would have been meaningless." *Young v. United States*, 63 A.3d 1033, 1045 (D.C. 2013).

Thus, applying the Confrontation Clause, multiple courts have rejected testimony by one analyst averring that *other* analysts followed proper testing protocols. *E.g., United States v. Turner*, 709 F.3d 1187, 1190, 1191 (7th Cir. 2013) (supervisor's testimony that analyst "followed standard procedures in testing the substances" was "necessarily … relying on out-of-court statements contained in [the testing analyst's] notes and report"); *United States v. Moore*, 651 F.3d 30, 74 (D.C. Cir. 2011) (per curiam; Sentelle, C.J., Rogers, Kavanaugh, JJ.) (statements that other

analysts "followed certain procedures regarding the marking of containers and the inspection of seals, and that the chemical reagents and/or analytic instruments used were free from contamination and operating properly" were testimonial); *see also Davidson v. State*, No. 58458, 2013 WL 1458654, at *1-2 (Nev. Apr. 9, 2013) (Confrontation Clause violated where expert testified that testing analyst "followed the procedures that would prevent anything like [a mix-up] from happening" (alteration in original)); *cf. Bullcoming v. New Mexico*, 564 U.S. 647, 660 (2011) (representations that a sample is "intact" and that an analyst "performed on [defendant's] sample a particular test, adhering to a precise protocol" are "meet for cross-examination").

Other courts, like the decision below, have adopted the opposite rule. They hold that the Confrontation Clause is simply inapplicable under these circumstances because analytical work such as DNA extraction can *never* yield testimonial statements. Pet. App. 30-31; *e.g., State v. Lui*, 315 P.3d 493, 507-08 (Wash. 2014) (en banc); *Speers v. State*, 999 N.E.2d 850, 852-55 (Ind. 2013) (technician who transferred blood sample from glass to swab not subject to Confrontation Clause); *State v. Ortiz*, 360 P.3d 125, 137-38 (Ariz. Ct. App. 2015) (collecting cases reasoning that "the state's failure to call a technician from the preliminary steps of preparing a DNA or blood sample does not violate the Confrontation Clause"). And some courts have permitted analysts involved in testing the DNA to evade cross-examination on the basis of the particular record. *E.g., People v. John*, 52 N.E.3d 1114, 1126-27 (N.Y. 2016) ("[N]ot every person who

comes into contact with the evidence … must be produced. … [N]othing in this record supports the conclusion that the analysts involved in … extraction … are necessary witnesses."); *State v. Walker*, 212 A.3d 1244, 1267 (Conn. 2019) (same). The State does not deny that state and federal courts have split, and admits that even courts on the same side of the split "have differed in their reasoning." BIO 23, 26.

The State responds (at 23) that the split is not "severe" because some courts allow a designated expert[1] or a supervisor[2] to testify about the work of other testing analysts that they themselves did not perform. But this confirms rather than minimizes the conflict, as other courts disagree. *See Alejandro-Alvarez v. Arkansas*, 587 S.W.3d 269, 273 (Ark. Ct. App. 2019) ("[T]he testimony must be by an analyst who performed the analysis at issue, not [an expert] who merely reviewed the data."). The State's cases are flatly at odds with those requiring the underlying analyst to testify. And, as a majority of this Court held

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[1] *See, e.g.*, *United States v. Murray*, 540 F. App'x 918, 921 (11th Cir. 2013); *State v. Griep*, 863 N.W.2d 567, 581-84 (Wis. 2015); *Commonwealth v. Greineder*, 984 N.E.2d 804, 807-08 (Mass. 2013). The State disputes whether Massachusetts falls into this camp, BIO 25-26, but it does not dispute that, unlike Delaware, Massachusetts would not have allowed Siddons to testify to "the specific information" from nontestifying analysts "on which … she relied," BIO 25 (quoting *Greineder*, 984 N.E.2d at 807).

[2] *See, e.g.*, *Williams v. Vannoy*, 669 F. App'x 207, 208 (5th Cir. 2016); *Marshall v. People*, 309 P.3d 943, 947 (Col. 2013); *State v. Lopez*, 45 A.3d 1, 13 (R.I. 2012); *but see Marshall*, 309 P.3d at 952-53 (Bender, J., concurring in part, dissenting in part) (supervisor cannot act as surrogate).

in *Williams*, experts are no panacea for the Confrontation Clause. Pet. 13-14.

B. This Court's guidance is urgently needed.

"Answering the underlying … question … and doing so soon, is important." *Williams*, 567 U.S. at 92 (Breyer, J., concurring); *see Young*, 63 A.3d at 1049 (whether all analysts in a "multi-stage" DNA testing process must testify is an "issue of great practical importance"). It arises "across the country in cases that regularly recur." *Stuart*, 139 S. Ct. at 37 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of cert.). And as the disarray set forth above makes plain, courts, prosecutors, and defendants need this Court to settle the scope of forensic analysis that is properly subject to the Confrontation Clause. *See* Pet. 15-22. "[F]ederal and state cases are all over the map." *Griep*, 863 N.W.2d at 585 (Abrahamson, C.J., concurring). In the meantime, uncertainty about the meaning of *Williams* "sow[s] confusion as to precisely what limitations the Confrontation Clause may impose when an expert witness testifies about the results of testing performed by another analyst." *Turner*, 709 F.3d at 1189.

This issue is of surpassing importance for *individual* litigants in addition to the criminal justice system as a whole. There is significant "subjectivity involved in DNA testing," which is one reason "why DNA profiling should never be considered infallible." Erin E. Murphy, *Inside the Cell: The Dark Side of Forensic DNA* 27 (2015). Experts emphasize the "difficulty of uncovering" errors "after the fact," and explain that

extraction is "probably the moment where the DNA sample is [most] susceptible to contamination." *Id.* at 9 (quotation marks omitted). And the "Constitution guarantees one way" to "challenge or verify the results of a forensic test": "confrontation." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 317-18 (2009). There is no "'forensic evidence' exception to this rule." *Bullcoming*, 564 U.S. at 658. Review is essential to provide clarity about the scope of this foundational constitutional protection.

II. This Case Is An Ideal Vehicle.

This case is uniquely suited for review. *See* Pet. 26-27. Unlike many Confrontation Clause cases, there is no question of harmless error: The State's case rises or falls on DNA evidence. No witnesses, fingerprints, or videos tie Petitioner to the offense. Pet. 3-4. Indeed, the State offered such evidence for *other* offenses, but not this one—and even as to those other charges, the jury found the evidence so lacking that it acquitted on all of them. Pet. 3. Chavis has also vigorously and consistently asserted his Confrontation Clause rights, both in the trial court, *see* Pet. 26-27, then in the Delaware Supreme Court, which explicitly resolved the question in a lengthy, published decision, Pet. App. 1.

The State does not dispute that the DNA evidence is central here. Instead, it argues that the nontestifying analysts' notes are not themselves in the record. BIO 12-14. But far from a barrier to review, that is exactly the problem: When Siddons, relying on those notes, represented to the jury and in her report that other analysts conducted certain tests and that they

did so properly, she impermissibly conveyed other analysts' testimonial, hearsay assertions. *See* Pet. 24-26. After all, it is undisputed that Siddons did not participate in, observe, or supervise those tests and procedures. As the Delaware Supreme Court recognized, "[b]ecause Siddons had not performed or witnessed" the foundational steps of the DNA analysis, she had to review "the case files for both the evidence sample and the reference sample" to explain them to the jury and represent "that Standard Operating Procedures were followed." Pet. App. 14 (quoting Pet. App. 46, Siddons Affidavit); *see* BIO 5-8 (repeatedly conceding that Siddons had to rely on other analysts' representations). The Delaware Supreme Court had all the information it needed to assess whether the notes contained testimonial statements: It knew that Siddons considered the notes sufficient to testify to where the samples came from and whether they were properly processed. *See, e.g.*, Pet. App. 27-28.

What is critical is that Siddons relayed the testimonial statements within the other analysts' notes to the jury. As the Seventh Circuit explained in a similar scenario, the testifying witness "effectively repeat[ed] the out-of-court statements … in these written materials" by asserting "standard [operating] procedures [were followed] in testing the substances. … [She] had no firsthand knowledge … [and] was relying on what [absent analysts] had written about [their] analysis." *Turner*, 709 F.3d at 1191; *see* David H. Kaye et al., *The New Wigmore: Expert Evidence* § 5.4.6 (2d ed. 2020) ("If the information contained in a testimonial report is disclosed to the factfinder without the defendant having an opportunity to cross-examine its

author, the Confrontation Clause violation is equivalent whether what is disclosed is the actual report itself or merely its contents transmitted by another expert."). The information that matters therefore *is* in the record—Siddons's testimony and report about underlying testimonial materials concerning the process and propriety of examining evidence and extracting DNA. Pet. App. 48-53, 56.

Nor does it help the State that it introduced evidence from police who handled the DNA samples *before* they arrived at the private lab. BIO 14. The question here is how those samples were processed and tested by the nontestifying analysts *after* the lab began its work.

Lastly, the State argues that this case is an unsuitable vehicle because it does not involve "an analyst who simply reviews the results generated entirely by others." BIO 14. Such a case, it concedes, would "generate a rule that assists jurisdictions." *Id.* But this case would provide such guidance. For while Siddons testified about *some* steps that she completed herself, that is not the focus of the Petition. Instead, the question presented is whether Siddons may convey to the jury *other* analysts' representations about what testing *they* did, and how well they did it, in establishing the foundation of the DNA analysis on which Chavis's conviction rests. In that regard, Siddons "simply review[ed]" the work "generated entirely by others," BIO 14, and did not personally observe it. Even on the State's logic, therefore, resolving this case would "assist[] jurisdictions."

III. The Decision Below Is Wrong.

Finally, review is warranted because the decision below is incorrect. The Delaware Supreme Court erred when it blessed the trial court's decision to allow an expert to introduce the testimonial statements of other witnesses without providing Chavis an opportunity to confront those witnesses. Pet. 23-26. This Court has twice recognized that forensic lab reports prepared to serve as evidence at trial are testimonial. *Bullcoming*, 564 U.S. at 665; *Melendez-Diaz*, 557 U.S. at 310-11. And, "[a]s a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness." *Bullcoming*, 564 U.S. at 657. That rule was violated here.

As the Petition explains, the State introduced through Siddons several testimonial statements of other analysts. Pet. 25. Siddons, for instance, had no idea whether the samples she compared in fact came from Chavis and from the window at the crime scene, even though her report said as much. Pet. 24-25. All she knew was that the DNA in two tubes she pulled from a refrigerator matched. *Id.* Had the report merely indicated that "Tube A matches Tube B," a jury would not have found that as relevant and as damning as her testimony that Chavis's DNA matched the DNA collected from the crime scene. *See, e.g.*, *Young*, 63 A.3d at 1045. Yet to provide that critical testimony, Siddons relayed the testimonial statements of other analysts whom Chavis never had the opportunity to confront. Pet. 24-26.

The State responds that a statement is not testimonial unless "the purpose of the statement" is to "prov[e] an essential element of the crime." BIO 19 (quoting Pet. App. 25). But whether the defendant was the one who perpetrated the crime is always an "essential element of the crime." What the State seems to argue is that a testimonial statement triggers the Confrontation Clause only when the statement, on its own, proves an element of the offense.[3] On the contrary, "the defendant has the opportunity to cross-examine the expert about *any* statements that are offered for their truth." *Williams*, 567 U.S. at 58 (plurality) (emphasis added). The State's proposed rule would neuter the Confrontation Clause. Nearly *all* evidence in a criminal trial is aimed at proving the elements of the crime. And as to DNA testing specifically, no one step is conclusive of the final result; arguing otherwise is like climbing a ladder and giving credit to just the top rung. The State's rule also would be utterly unworkable—the State doesn't even attempt to explain how to assess which evidence is intended to "prov[e] an essential element." Ultimately, the State's proposed rule runs afoul of this Court's command that "the text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." *Crawford v. Washington*, 541 U.S. 36, 54 (2004). It

[3] Indeed, the State seems to favor an even more restrictive rule, under which the Confrontation Clause would apply only to *ultimate facts* that on their own prove elements. *See* BIO 19 (arguing that, because "the non-testifying employees would [not] have opined about *the final test result*," Chavis had no right to confront them) (emphasis added).

has no basis in this Court's precedent or in the original meaning of the Constitution.

Finally, the State argues that "[t]his case is … factually dissimilar to *Bullcoming*" and "distinguishable" from *Williams*. BIO 19-22. Of course it is—this case presents the question that *Williams* left open. *Supra* 2. The State then contends there is no conflict between those decisions and its position because Siddons "had personal knowledge about the testing process for each sample." BIO 22. But Chavis is not challenging the statements about which Siddons had personal knowledge. He is challenging the statements of fact in Siddons's report and testimony about which only *other* witnesses had personal knowledge. The Constitution guarantees Chavis's right to confront those witnesses. This Court should grant review and reverse so that he has that opportunity.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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