No. 22-899

In the Supreme Court of the United States

JASON SMITH,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition for a Writ of Certiorari to the
Court of Appeals of the State of Arizona, Division One

REPLY BRIEF FOR PETITIONER

Michael R. Huston
PERKINS COIE LLP
700 Thirteenth Street N.W.
Suite 800
Washington, D.C. 20005

Diane M. Johnsen
PERKINS COIE LLP
2901 North Central Ave
Suite 2000
Phoenix, AZ 85012

Robert Trebilcock
Deputy Public Defender
OFFICE OF YUMA COUNTY
PUBLIC DEFENDER
168 South 2nd Ave
Yuma, AZ 85364

Hari Santhanam
Counsel of Record
PERKINS COIE LLP
110 North Wacker Dr
Suite 3400
Chicago, IL 60606
(312) 324-8447
HSanthanam@perkinscoie.com

Counsel for Petitioner

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This Court should grant the petition for a writ of certiorari to resolve the acknowledged and growing divide among the lower courts in the wake of *Williams* v. *Illinois*, 567 U.S. 50 (2012), over a criminal defendant's constitutional right to confront a nontestifying forensic analyst. The petition showed that lower courts are divided over both whether a nontestifying analyst's statements can be admitted through a substitute expert on the ground that they are not offered for their truth, and whether the admission of those statements would be nonprejudicial to a defendant who did not independently subpoena the nontestifying analyst. The State does not dispute the lower courts' disagreement on those rationales, which were posited by the *Williams* plurality but rejected by five Justices. Instead, the State merely argues that many courts have adopted the not-for-the-truth rationale, without denying that others have roundly rejected it.

The State also offers no meaningful rebuttal to the petition's showing that this case is an ideal vehicle for ad-

dressing the question presented. The State does not dispute that Smith properly raised and preserved his Confrontation Clause argument. Nor does the State dispute that the statements introduced by the prosecution at Smith's trial are testimonial under the tests applied by both the plurality and the dissent in *Williams*. Thus, the core issue that divided this Court in *Williams* poses no problem here, and this case would enable the Court to finally resolve the not-for-the-truth and failure-to-subpoena rationales that have continuously divided lower courts. The State offers only a few afterthought reasons why this case would purportedly be a poor vehicle, but none has merit.

ARGUMENT

A. This Court's Intervention Is Needed to Resolve the Confusion and Divide Among Lower Courts.

1. The State offers no rebuttal to the fact that the not-for-the-truth rationale has firmly divided state high courts and federal courts of appeals. At most, the State tries to downplay the divide, arguing that petitioner "minimizes the number of jurisdictions that rely on [the] *Williams* [plurality] favorably and/or employ its reasoning." Opp. 16. But critically, the State does not dispute that many courts have expressly rejected the not-for-the-truth rationale, including the highest courts of California, Connecticut, Delaware, Maryland, Massachusetts, New Mexico, and the District of Columbia (Pet. 14–17).[1]

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[1] In addition to the courts noted in the petition, the Supreme Court of New Mexico also has rejected the not-for-the-truth rationale. *State* v. *Navarette*, 294 P.3d 435, 439 (¶13) (N.M. 2013) (distilling from the opinions of Justice Thomas and the four dissenting Justices in *Williams* the principle that "an out-of-court statement that is disclosed to the fact-finder as the basis for an expert's opinion is offered for the truth of the matter asserted").

Nor can the State dispute that a conflict exists in the face of clear statements of disagreement by lower courts:

- "We decline to accept [the not-for-the-truth rationale]. To the contrary, we agree with Justice Thomas [and the *Williams* dissent] that statements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose." *Leidig* v. *State*, 256 A.3d 870, 900–901 n.23 (Md. 2021) (internal citations and quotation marks omitted).

- "We agree with [Justice Thomas and the *Williams* dissent] that the [not-for-the-truth] rationale for admission does not work because the purportedly limited reason for such testimony—to aid the factfinder in evaluating the expert's opinion—necessarily entails an evaluation of whether the basis is true." *Young* v. *United States*, 63 A.3d 1033, 1047 n.53 (D.C. 2013) (internal citations and quotation marks omitted).

- "We find persuasive the reasoning of [Justice Thomas and the *Williams* dissent]. When an expert is not testifying in the form of a proper hypothetical question and no other evidence of the case-specific facts presented has or will be admitted, there is no denying that such facts are being considered by the expert, and offered to the jury, as true." *People* v. *Sanchez*, 374 P.3d 320, 333 (Cal. 2016) (internal citations and quotation marks omitted).

See also Pet. 16–17 (discussing *Martin* v. *State*, 60 A.3d 1100, 1106–1107 (Del. 2013); *State* v. *Walker*, 212 A.3d 1244, 1255–1256 (Conn. 2019); *Commonwealth* v. *Jones*, 37 N.E.3d 589, 596–597 (Mass. 2015)).

The State offers no persuasive justification for why this open and deep conflict over the meaning of a provision of the Bill of Rights should be allowed to persist. The State says that "Confrontation Clause cases in this arena are often fact-dependent." Opp. 19. But the conflict here does not turn on any factual issues. Rather, it reflects the undisputed and fundamental disagreement among lower courts over whether the not-for-the-truth rationale—rejected by five Justices in *Williams*—comports with the Confrontation Clause. And if anything, the fact that a sizable number of courts have adopted this rationale underscores that defendants' confrontation rights are being abridged across large swaths of the country and that this Court's intervention is direly needed.

2. The State also does not deny (nor could it deny) that the Arizona Court of Appeals and other lower courts have invoked the *Williams* plurality opinion to place the burden on defendants to subpoena the prosecution's absent analysts. And the State does not attempt to explain how that requirement can be reconciled with this Court's decisions in *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 324 (2009), and *Bullcoming* v. *New Mexico*, 564 U.S. 647, 666 (2011). Pet. 19–20. Here too, the State merely attempts unpersuasively to downplay the conflict. It argues that the failure-to-subpoena rationale "does not appear to have been a critical underpinning of the conclusions in th[e] cases" that have applied it (Opp. 22), while ignoring that the State itself successfully advocated for this rationale in the proceedings below.

The State's argument also misses the point: the fractured result in *Williams* has engendered so much confusion that prosecutors and lower court judges are disregarding even the clear holdings in this Court's prior decisions. Justice Kagan's dissent in *Williams* aptly pre-

dicted this result: "[*Melendez-Diaz* and *Bullcoming*] apparently no longer mean all that they say. Yet no one can tell in what way or to what extent they are altered because no proposed limitation commands the support of a majority." *Williams*, 567 U.S. at 141 (Kagan, J. dissenting). Six years after *Williams*, Justices Gorsuch and Sotomayor recognized the confusion and divide that *Williams* already had sown among lower courts. *Stuart* v. *Alabama*, 139 S. Ct. 36, 36–37 (2018) (Gorsuch & Sotomayor, JJ., dissenting). Now, more than twelve years after *Williams*, the situation has only worsened, and this Court should intervene.

B. The Decision Below Is Incorrect.

The State argues that the "Arizona Court of Appeals got it right," making several assertions that fail to address or rebut Smith's confrontation argument.[2]

1. The State asserts that the nontestifying analyst "Rast's report was not admitted, nor her conclusions." Opp. 14. But the State offers no rebuttal to Smith's argument that the testifying expert (Longoni) nonetheless conveyed to the jury Rast's statements from her notes and report that she performed particular tests on the specific evidence in Smith's case (Pet. 22). The State likewise offers no rebuttal to Smith's argument that Rast's statements were offered for their truth because Longoni's opinions necessarily depended on the statements being true (Pet. 22–23).

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[2] The State also applies the *Williams* plurality opinion as if it were the decision of "this Court." Opp. 9, 11–12. "Five Justices," however, "specifically reject[ed] every aspect of [the plurality opinion's] reasoning and every paragraph of its explication." 567 U.S. at 120 (Kagan, J. dissenting); see also, e.g., *United States* v. *James*, 712 F.3d 79, 95 (2d Cir. 2013) ("*Williams* does not, as far as we can determine … yield a single, useful holding relevant to the case before us.").

Notably, the State does not even attempt to address the excerpts of Longoni's testimony quoted in the petition that show unequivocally that Longoni repeatedly referenced Rast's notes and report to recount Rast's statements from those documents (Pet. 7–9). At most, the State downplays all of this in a passing comment, saying "Longoni merely refreshed his recollection." Opp. 14. But critically, Longoni had *no recollection* in the first instance to refresh because he admittedly and undisputedly had no personal knowledge of Rast's testing. Pet. App. 44a–45a.

2. Recognizing as much, the State places heavy emphasis on the fact that Longoni worked at the same lab as Rast and purportedly had "personal knowledge of the lab's procedures." Opp. 14. The problem, though, is that Longoni had no personal knowledge of the *specific* tests Rast performed in *Smith's case*. Indeed, in *Bullcoming*, this Court rejected a nearly identical argument. 564 U.S. at 651–652. There, the prosecution similarly presented testimony by a substitute expert who purportedly "was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test." *Id.* at 651. This Court, however, was not persuaded by the fact that the testifying expert had a connection to the lab but not the specific testing at issue, "hold[ing] that surrogate testimony of that order does not meet the constitutional requirement" of confrontation. *Id.* at 652.

3. The State finally tries to recast Smith's confrontation argument as an objection to whether Longoni had "adequate foundation to provide an admissible or credible expert opinion that the drugs were marijuana, cannabis, and methamphetamine." Opp. 15. That too is wrong. Smith's objection is not that the State failed to provide a foundation for Longoni's testimony but rather that the testimony the State presented to lay a foundation violated

his confrontation right. To be sure, the State could have had Longoni testify hypothetically that the certain test results he reviewed in the abstract reflected the presence of controlled substances. But recognizing that it needed to link those test results to *Smith*, the State went further: it had Longoni recount Rast's statements from her notes and report regarding the *specific* tests she performed in *Smith's case* and the results she reached—all without providing Smith any opportunity to cross-examine Rast. The introduction of those statements without any opportunity for Smith to cross-examine the critical witness against him violated his Sixth Amendment right. *Cf. Williams*, 567 U.S. at 129 (Kagan, J. dissenting).

C. The Question Presented Is Recurring and Important, and This Case Provides an Ideal Vehicle.

1. The State does not dispute that the question presented here is important and recurring. As underscored by the cases discussed in the petition (Pet. 14–19) and further reinforced by the cases cited by the State (Opp. 16–19), prosecutors in jurisdictions across the country rely on substitute experts to present the forensic analyses of nontestifying analysts. But it is in these cases that the Confrontation Clause's safeguards are especially vital, given the unwarranted air of infallibility that forensic evidence often carries and the numerous, confirmed instances of negligence, incompetence, bias, and even fraud on the part of forensic analysts. Pet. 24.

This case epitomizes these concerns. Even now, the State offers no explanation for why Rast—the analyst who tested the underlying evidence and whose statements the State relied on to secure Smith's convictions—ended her employment with the state-run crime lab. *Cf. Bullcoming*, 564 U.S. at 659, 662 (expressing concern where analyst had been "placed on unpaid leave for an

undisclosed reason"). In Rast's absence, Smith had no opportunity to confront her about any "lapses or lies" in her materials and could not "ask[] questions designed to reveal whether incompetence, evasiveness, or dishonesty [might have] accounted for" her employment at the lab ending. *Id.* at 661–662.

2. The State similarly offers no rebuttal to the key reasons why this case is an ideal vehicle for addressing the question presented. There is no dispute that Smith raised and preserved his Confrontation Clause argument in the proceedings below, nor any dispute that the Arizona Court of Appeals substantively applied the not-for-the-truth and failure-to-subpoena rationales. So there is no barrier to this Court addressing those rationales here. See *Hemphill* v. *New York*, 142 S. Ct. 681, 689 (2022); *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959).

The State also does not dispute that Rast's statements at issue here are testimonial, whether one views them under the *Williams* dissent's evidentiary-purpose test or the plurality's narrower targeted-individual test. That is because the State specifically requested the testing that Rast performed for the express purpose of generating evidence to use against Smith at trial (Pet. App. 127a–128a), and the State proceeded to coordinate with Rast on her testing in anticipation of Smith's trial (Pet. App. 99a). Because Rast's statements are undisputedly and indisputably testimonial, this case avoids the core issue that divided this Court in *Williams*, enabling the Court to resolve the not-for-the-truth and failure-to-subpoena rationales that have since divided lower courts.

3. Against this backdrop, the State's attempt to paint this case as a "poor vehicle" (Opp. 7) rings hollow.

a. The State's principal argument is that the Arizona Court of Appeals did not consider Rast's report, which the

State asserts is vital to Smith's argument, and that this Court should not review the report in the first instance. Opp. 7. That not only is wrong but also misses the point. It is wrong because, in connection with his briefing before the Arizona Court of Appeals, Smith submitted and cited an appendix containing Rast's notes (Pet. App. 88a–126a), which are more comprehensive and reflect the full substance of what appears in her report (Pet. App. 85a–87a). Resp. App. 5. Thus, the Arizona Court of Appeals had before it the full substance of all the materials Longoni considered. Later, in seeking discretionary review by the Arizona Supreme Court, and out of an abundance of caution, Smith requested to have the record formally supplemented to include Rast's notes and report. *Ibid.* The State did not oppose, and the Arizona Supreme Court granted Smith's request. Pet. App. 1a.

The State's argument also misses the point because Smith's confrontation argument is not predicated on Rast's report being part of the record. Rather, it is predicated on Longoni's testimony as reflected in the trial transcript, which the Arizona Court of Appeals undisputedly considered and leaves no doubt that Longoni repeatedly referred to, and recounted, Rast's statements from her notes and report regarding the tests she performed on the specific evidence in Smith's case and the results she reached. Pet. 7–9 (excerpting Longoni's testimony).

Nonetheless, the availability of Rast's notes and report in the record here offers a perspective into what Longoni considered in purportedly providing an "independent opinion," a perspective that was unavailable in prior cases that have come before this Court. If anything, that makes this case an ideal vehicle, not a poor one.

b. The State next argues that "this case presents a fundamentally different factual scenario" than *Williams*

because the State's expert was employed by the same lab as Rast and was familiar with the lab's procedures. Opp. 8. As noted, this ignores that Longoni had no personal knowledge or familiarity with the *specific* tests Rast performed on the evidence in *Smith's case*. And, indeed, this Court was not persuaded in *Bullcoming* by the fact that the prosecution's expert there was familiar with the testing lab's procedures because the expert had no familiarity with the specific testing at issue. 564 U.S. at 651–652.

c. The State additionally asserts, with no explanation or exposition, that "[t]he core issue at Smith's trial was whether Smith *knowingly* possessed the contraband, not whether the contraband was marijuana, cannabis, and methamphetamine." Opp. 8 (emphasis in original). Of course, if the identity of the alleged contraband were not in dispute (it was), it begs the question why the State presented Longoni's testimony at all, let alone why the State repeatedly relied on Longoni's testimony in closing arguments to try to prove its identity. See, e.g., App 64a ("We see a white crystalline substance in those bags, a substance that [Longoni] testified and told you was methamphetamine."); *id.* at 65a ("[Longoni] testified and told you that that was cannabis."); *id.* at 83a ("[W]hen we talk about the science in this case, [Longoni] told you an independent opinion about what those drugs are."). Indeed, in addressing Smith's confrontation argument, the trial court recognized precisely why the State called Longoni: the State sought to identify "what the nature of the substances was that w[ere] tested" by Rast. *Id.* at 62a.

d. Last, the State argues that Longoni's testimony "was not needed for [Smith's] possession of marijuana for sale conviction." Opp. 9. To be sure, having introduced and relied extensively on Longoni's testimony, the State is hard-pressed to argue now that this testimony "did not

contribute" to any of Smith's convictions, including his marijuana conviction. *United States* v. *Jackson*, 636 F.3d 687, 697 (5th Cir. 2011) (citation omitted).[3]

More fundamentally, by focusing on Smith's marijuana conviction, the State tacitly concedes that Longoni's testimony *was* needed for Smith's other convictions for possession of cannabis and methamphetamine. See Opp. 9. Indeed, Longoni's recounting of Rast's statements provided the *only* evidence at trial that any alleged contraband comprised cannabis or methamphetamine. And though the State tries to minimize Smith's cannabis and methamphetamine convictions, Smith assuredly takes them seriously as they reflect a stain on his record and resulted in him being sentenced to imprisonment (Pet. App. 18a–19a)—all without having had any opportunity to cross-examine the sole witness whose statements were used against him to secure those convictions.

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[3] To the extent that the State raises a belated harmless-error argument as to Smith's marijuana conviction, the State failed to raise this argument in any of the proceedings below. That failure does not impede this Court's ability to review the lower court's Confrontation Clause holding. See, e.g., *Hemphill*, 142 S. Ct. at 693 n.5 (addressing confrontation argument while declining to address harmless-error argument in first instance); *Melendez-Diaz*, 557 U.S. at 329 n.14 (2009) (same); *Bullcoming*, 564 U.S. at 668 n.11 (same).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Hari Santhanam
Counsel of Record
PERKINS COIE LLP
110 North Wacker Drive
Suite 3400
Chicago, IL 60606
(312) 324-8447
HSanthanam@perkinscoie.com

Michael R. Huston
PERKINS COIE LLP
700 Thirteenth Street N.W.
Suite 800
Washington, D.C. 20005

Diane M. Johnsen
PERKINS COIE LLP
2901 North Central Ave
Suite 2000
Phoenix, AZ 85012

Robert Trebilcock
Deputy Public Defender
OFFICE OF YUMA COUNTY
PUBLIC DEFENDER
168 South 2nd Ave
Yuma, AZ 85364

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