No. 22-899

In the Supreme Court of the United States

JASON SMITH,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Confrontation Clause of the Sixth Amendment permits the prosecution in a criminal trial to present testimony by a substitute expert conveying the testimonial statements of a nontestifying forensic analyst, on the grounds that (a) the testifying expert offers some independent opinion and the analyst's statements are offered not for their truth but to explain the expert's opinion, and (b) the defendant did not independently seek to subpoena the analyst.

PARTIES TO THE PROCEEDING

Petitioner is Jason Smith. Respondent is the State of Arizona. No party is a corporation.

RELATED PROCEEDINGS

Superior Court of Arizona, Yuma County:

State v. *Smith*, No. S1400CR201901251 (Oct. 8, 2021) (entering judgment of conviction after jury trial)

Arizona Court of Appeals, Division One:

State v. *Smith*, No. 1 CA-CR 21-0451 (July 14, 2022) (affirming trial court judgment)

Supreme Court of Arizona:

State v. *Smith*, No. CR-22-0202-PR (Jan. 6, 2023) (denying discretionary review)

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OPINIONS BELOW

The opinion of the Arizona Court of Appeals affirming petitioner's conviction (Pet. App. 2a–16a) is unreported but available at 2022 WL 2734269. The decision of the Arizona Supreme Court denying discretionary review (Pet. App. 1a) is unreported. The Arizona Superior Court's oral rulings admitting trial testimony by the State's expert and rejecting petitioner's arguments that the testimony violated the Confrontation Clause of the Sixth Amendment (*id.* at 41a–45a, 55a–62a), and its order denying petitioner's motion for a new trial (*id.* at 24a), are unreported.

JURISDICTION

The judgment of the Arizona Court of Appeals affirming petitioner's conviction and sentence was issued on July 14, 2022. Pet. App. 2a–3a. The Arizona Supreme Court denied discretionary review on January 6, 2023. *Id.*

at 1a. The petition for a writ of certiorari was filed on March 14, 2023 and granted on September 29, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION AND RULE OF EVIDENCE

The Sixth Amendment to the Constitution of the United States provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him.

Arizona 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. But 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.

INTRODUCTION

The State of Arizona sought to prove its drug-related charges against Petitioner Jason Smith by having some of the most important evidence in his case—the alleged drug evidence—tested by a state crime-lab analyst named Elizabeth Rast. Rast performed her work specifically for the purpose of supporting the State's case against Smith. She memorialized the testing processes that she followed and the conclusions that she reached about the evidence against Smith in typewritten notes and a formal, signed report. By the time of Smith's trial, however, Rast was no

longer employed by the state-run crime lab. So the State instead called a "substitute" expert named Gregory Longoni to testify at Smith's trial about Rast's notes and signed report. Longoni had not conducted or observed any of the tests that Rast performed, nor had he conducted any quality assurance of those tests. And although he acknowledged that it would have taken him less than three hours to retest the evidence himself, the State did not have him do so before trial. Nonetheless, over Smith's objections, the trial court permitted Longoni to recount statements from Rast's notes and report describing the particular tests she had performed on the evidence and the conclusions she had reached.

The Arizona Court of Appeals held that the admission of that testimony did not violate the Confrontation Clause and affirmed Smith's conviction. The court reasoned that the State had not offered Rast's statements for their truth but rather only to explain the bases of Longoni's opinions. And the court faulted Smith for not himself subpoenaing Rast to testify at trial.

That decision was wrong. This Court has repeatedly held that forensic reporting like that here constitutes testimonial evidence against a criminal defendant. And the State in this case plainly made the original analyst Rast a witness against Smith: the State used Longoni to present to the jury Rast's written descriptions of *her* processes and *her* conclusions, and it then highlighted those conclusions as the key evidence to prove its criminal charges. The Sixth Amendment by its terms thus guaranteed Smith "the right … to be confronted with" Rast herself—not a substitute expert who afforded no opportunity to probe the potential flaws in Rast's analyses.

The Sixth Amendment's text admits of no exceptions for testimonial evidence against a criminal defendant,

regardless of whether that testimonial evidence is used as the basis for a testifying expert to offer a purportedly "independent" opinion. And this Court has already recognized that the Confrontation Clause puts the burden on the *prosecution*, not the defendant, to present the witnesses against the defendant for cross-examination.

The judgment of the Arizona Court of Appeals should be reversed.

STATEMENT

1. The State charged Smith with five drug-related offenses for possessing marijuana for sale and possessing methamphetamine, cannabis, and drug paraphernalia. Pet. App. 4a–5a ¶ 5. Smith pleaded not guilty. While Smith's case was pending, the prosecution sent alleged drug evidence that had been found in a shed at Smith's father's residence (occupied at the time by several individuals) to a crime lab operated by the Arizona Department of Public Safety ("DPS"), and it asked the lab to perform a "full scientific analysis" of the evidence. *Id.* at 127a–128a. The State's request specifically identified Smith and the charges against him, and it informed DPS that "trial ha[d] been set" in Smith's case. *Id.* at 127a.

Elizabeth Rast, then a DPS forensic scientist, conducted the testing. Pet. App. 5a ¶ 5. In the process, she coordinated with the State's attorney to build a case against Smith. *Id.* at 99a. To document her work, Rast prepared typewritten notes on DPS letterhead. *Id.* at 88a–107a. These notes are the only firsthand record of the specific tests that Rast conducted and how she conducted them. In her notes, Rast recorded the observations she made, the weights she measured, the test procedures she used, the results she obtained, and her comments and conclusions as to each evidence "item" that the State submit-

ted for testing, including Items 20A, 20B, 26, and 28, on which the State would ultimately rely at trial. *Ibid.*

As to Items 20A and 20B, Rast stated in her notes that she performed a chemical color test and a gas-chromatography and mass-spectrometry ("GC-MS") test, and she concluded that the items were methamphetamine. Pet. App. 89a–91a; see also *id.* at 38a, 46a–48a. Similarly, as to Item 28, Rast stated in her notes that she performed a chemical color test and a GC-MS test, and she concluded that the item was cannabis. *Id.* at 95a–96a; see also *id.* at 36a–38a, 48a–49a. The fact that Rast performed chemical color tests and the results of those tests are reflected only in Rast's written statements in her notes. *Id.* at 89a–91a (Rast's notes stating that she performed color tests and the results were "Orange-brown" and "Blue"). Rast also attached to her notes copies of the charts and graphs (chromatographs and mass spectra) from the GM-MS tests that she performed on Items 20A, 20B, and 28 (among others). *Id.* at 108a–126a.

As to Item 26, Rast stated in her notes that she performed a microscopic examination and chemical color test, and she concluded that it was marijuana. Pet. App. 94a; see also *id.* at 34a–36a, 41a–42a, 46a–47a. The fact that Rast performed those tests and the results of those tests are reflected only in Rast's written statements contained in her notes. *Id.* at 94a (Rast stating that she observed "Cystolith hairs" on microscopic examination and the result of the color test was "Purple"). Rast did not perform any GC-MS analysis on Item 26. *Ibid.*

Rast further prepared a typewritten report on DPS letterhead in which she named Smith and stated her conclusions and the measured weight of each evidence item. Pet. App. 85a–87a. Rast formally signed each page of the report above her title and employee number. *Ibid.*

2. In the lead-up to trial, the State initially identified Rast as its trial expert but then announced that it would introduce Rast's analyses through a "substitute" expert: DPS forensic scientist Gregory Longoni. Pet. App. 26a. The State did not offer any reason for the proposed substitution, though it was later revealed that Rast was no longer employed by DPS. *Id.* at 41a, 45a, 53a.

At trial, Longoni testified about his training and experience, "the general process" when "a law enforcement agency submits suspected drugs for testing," and the testing processes generally used by the DPS crime lab. Pet. App. 32a–39a. Because Longoni was not involved in any of the testing in Smith's case, Smith objected when Longoni was asked whether Rast, "[a]s a forensic scientist, would … have done the same things that [he] would have done." *Id.* at 41a. After a sidebar, the trial court allowed Smith to voir dire Longoni about whether he could "offer an opinion independently." *Id.* at 42a–45a. During that voir dire, Longoni testified that his opinions were based exclusively on Rast's report and "the notes that [Rast] took," along with "the scientific analysis and the analytical protocols" that DPS follows. *Id.* at 44a. He conceded that he "never tested anything in this case" and had performed no "quality assurance" of Rast's analyses; indeed, he had not even spoken to Rast about her analyses. *Id.* at 45a. Smith then renewed his objection to Longoni's testimony, which the trial court overruled. *Ibid.*

When his direct examination resumed, Longoni identified the specific tests that Rast had performed on each evidence item. Pet. App. 46a–49a. In response to the State's questions asking him for his "independent opinion," Longoni testified that the items Rast had tested were "a usable quantity of marijuana" (Item 26), "a usable quantity of methamphetamine" (Items 20A and 20B), and

a "usable quantity of cannabis" (Item 28). *Ibid.* But because Longoni lacked personal knowledge of Rast's testing, he based his testimony on Rast's notes and report, and he repeatedly referred to Rast's statements from those documents as he testified.

The prosecution's questions to Longoni began with the analysis that Rast had performed on what was suspected to be marijuana. In framing the questions, the prosecutor specifically acknowledged that Longoni's opinion necessarily would be based on Rast's written materials:

> Q *From your review of the lab notes in this case*, can you tell me what scientific method was used to analyze Item 26?
>
> A Yes.
>
> Q And what was used?
>
> A The microscopic examination and the chemical color test.
>
> * * *
>
> Q Let me be clear. You're not testifying as to her report, *you're testifying as to [your] review of lab notes*?
>
> A Correct.
>
> Q In reviewing what was done, your knowledge and training as a forensic scientist, your knowledge and experience with DPS's policies, practices, procedures, your knowledge of chemistry, *the lab notes, the intake records, the chemicals used, the tests done*, can you form an independent opinion on the identity of Item 26?
>
> A Yes.
>
> Q What is that opinion?
>
> A That is a usable quantity of marijuana.

Pet. App. 41a–42a, 46a (emphases added).

The prosecutor's questioning of Longoni and his responses about the color and GC-MS tests that Rast had performed on the other items of evidence were similar:

Q How is Item Number 20 tested?

THE WITNESS: *If I were to review the notes again real quick, Your Honor?*

THE COURT: You may.

THE WITNESS: So Item 20 was actually two items, 20A and 20B.

* * *

Q How -- *in reviewing the records, do you know what method was used to test Item Number 20A and 20B*?

A *Yes.*

Q What method was used?

A A chemical color test as well as a GC-MS.

* * *

Q Do you have an independent opinion on the result of what Item 20A is?

A Yes.

Q What is that opinion?

A That it is a usable quantity of methamphetamine.

Q And likewise for 20B?

A Yes.

Q And what is that?

A A usable quantity of methamphetamine.

* * *

Q Did you also look at what was done to Item 28?

THE WITNESS: *Again, can I refer to the report, Your Honor*?

THE COURT: You may.

THE WITNESS: Okay.

* * *

Q What kind of testing was done on Item 28?

A A chemical color test and a GC-MS.

Q And is that, again, consistent with the test you described for testing suspected cannabis?

A Yes.

Q Did you note whether or not the policies and practices of the lab and principles of chemistry were followed in this case?

A Yes.

Q Were they followed?

A Yes.

Q Can you form an independent opinion *based on your review of the records, the notes, the chemicals used, the graphs that were made* on what Item 28 is?

A Yes.

Q And what is Item 28?

A A usable quantity of cannabis.

Pet. App. at 46a–49a (emphases added).

On cross-examination, Longoni explained that he testifies in less than five percent of the cases in which he is involved. Pet. App. 53a. He further stated that, although he did not personally retest the evidence in Smith's case, it would have taken him less than three hours to do so. *Id.* at 53a–54a.

At the close of evidence, Smith moved for judgment of acquittal on the ground (among others) that Longoni's testimony was "really not independent." Pet. App. 55a. The trial court denied that motion, as well as Smith's subsequent renewed motion citing this Court's decision in

Bullcoming v. *New Mexico*, 564 U.S. 647 (2011), and arguing that Longoni's testimony violated his confrontation right. Pet. App. at 55a–62a. The trial court reasoned that "this case is distinguished from the *Bullcoming* case in that the expert [here], Mr. Longoni, testified of his own opinion as to what the nature of the substances was that w[ere] tested, and, therefore, [his testimony] d[id] not violate the [C]onfrontation [C]lause of the Constitution." *Id.* at 62a.

In its closing argument, the State relied exclusively on Longoni's recounting of Rast's conclusions to prove the identity of the alleged drug evidence. See, *e.g.*, Pet. 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."). The State further relied on Longoni's recounting of Rast's statements to establish that Rast had followed proper "policies and procedures" to test each evidence item:

> [Longoni] was able to see that the policies and procedures were followed, [and] he was able to tell how these were tested. He told you what he would have done and saw that that was done in this case too.

Id. at 83a–84a.

The jury found Smith guilty of possession of marijuana for sale and possession of methamphetamine, cannabis, and drug paraphernalia. Pet. App. 6a ¶ 7; see also *id.* at 4a–5a ¶ 5, 17a–20a. Smith moved for a new trial based on his confrontation objection (*id.* at 25a), and the trial court denied the motion (*id.* at 24a).

3. The Arizona Court of Appeals affirmed Smith's conviction and rejected his argument that the admission

of Longoni's testimony violated the Confrontation Clause. Pet. App. 2a–16a.

The court first reasoned that the State's presentation of Rast's statements to the jury was permissible because the State did not "introduce Rast's opinions or any of her work-product documents into evidence." Pet. App. 11a–12a ¶ 19. And in the court's view, "Longoni presented his independent expert opinions permissibly based on his review of Rast's work" while "subject to Smith's full cross-examination." *Ibid.* The court relied on its earlier decision in *State ex rel. Montgomery* v. *Karp*, 336 P.3d 753 (Ariz. Ct. App. 2014), which had applied Arizona Rule of Evidence 703 and the plurality opinion in *Williams* v. *Illinois*, 567 U.S. 50 (2012), to conclude that there is "no hearsay violation when an expert testifies 'to otherwise inadmissible evidence, including the substance of a non-testifying expert's analysis, if such evidence forms the basis of the expert's opinion.'" *Ibid.* (quoting *Karp*, 336 P.3d at 757 ¶ 13). Under this view, hearsay statements recounted by an expert are purportedly offered "only to show the basis of [the expert's] opinion and not to prove their truth." *Karp*, 336 P.3d at 757 ¶¶ 12–13 (citing *State* v. *Joseph*, 283 P.3d 27, 29 ¶ 8 (Ariz. 2012); *Williams*, 567 U.S. at 58 (plurality op.)).

Second, the court of appeals cited the *Williams* plurality opinion and reasoned that "[h]ad Smith sought to challenge Rast's analysis, he could have called her to the stand and questioned her, but he chose not to do so." Pet. App. 12a ¶ 19 (citing 567 U.S. at 58–59).

4. The Arizona Supreme Court denied Smith's timely filed petition for discretionary review. Pet. App. 1a.

SUMMARY OF THE ARGUMENT

A. The State violated Smith's rights under the Confrontation Clause of the Sixth Amendment when it presented testimony by a substitute expert, Gregory Longoni, conveying the absent analyst Elizabeth Rast's testimonial statements from her notes and report without affording an opportunity for Smith to cross-examine Rast.

1. Since *Crawford* v. *Washington*, 541 U.S. 36 (2004), this Court has applied the Confrontation Clause according to its text and historical purpose, which preclude the prosecution from introducing the testimonial statements of an absent witness unless the prosecution demonstrates that the witness is unavailable and that the defendant had a prior opportunity for cross-examination. *Id.* at 53–56. As this Court made clear in *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 310–311 (2009), and *Bullcoming* v. *New Mexico*, 564 U.S. 647, 651–652 (2011), *Crawford's* prohibition applies to evidence of forensic analyses.

2. Rast's statements in her notes and report are testimonial statements against Smith under any of the tests that this Court's members have articulated, including in the opinions in *Williams* v. *Illinois*, 567 U.S. 50 (2012). Rast prepared those documents at the State's request for the express purpose of generating evidence to use against Smith at trial, working hand-in-hand with the prosecution. The notes and report also bear sufficient indicia of formality and solemnity: Rast prepared these documents using official forms bearing the state agency seal; she detailed in these documents her analyses and conclusions; she formally signed each page of her report; and she coordinated with the State throughout the process in a manner akin to a formalized dialogue.

3. Because Longoni concededly lacked any personal knowledge of the evidence against Smith, he necessarily

conveyed to the jury *Rast's* testimonial statements from her notes and report when he testified about the tests that she performed and the results that she reached. That Longoni conveyed Rast's statements was underscored by the State's framing of its questions to reference Rast's notes and report, as well as Longoni's repeated requests to refer to those documents in answering questions about how each evidence item was tested. And because Rast's notes contain the only record of the procedures that Rast used, Longoni necessarily conveyed Rast's statements from her notes when he testified about what she did.

4. The State failed to afford Smith any opportunity to cross-examine Rast, and it failed to carry its burden to demonstrate that she was unavailable. If anything, by faulting Smith for failing to subpoena Rast, the State and the Arizona Court of Appeals apparently presumed that Rast *was* available and willing to testify.

B. In concluding that there was no confrontation violation here, the Arizona Court of Appeals reasoned that Arizona Rule of Evidence 703 permits an expert to testify regarding the basis of an opinion because such "basis evidence" is not offered for the truth of the matter asserted but instead to explain the expert's opinion. But there is no textual, historical, or logical support for creating an exception to the Confrontation Clause for an expert's basis evidence.

1. This Court in *Crawford* observed that the Framers of the Bill of Rights did not "mean[] to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" 541 U.S. at 61. That admonition is particularly relevant here because at common law, an expert could render an opinion based only on facts within his personal knowledge or else supplied to him in court through the testimony of

another witness or in the form of a hypothetical question. It was not until after 1975, when Federal Rule of Evidence 703 was adopted, that the universe of basis evidence on which an expert could rely was expanded to include materials presented to the expert outside of court and outside the expert's own perception. But whatever the utility of Rule 703 in some trial contexts, it cannot supplant the express constitutional guarantee of a defendant's right to confrontation in criminal trials.

2. Nor does this Court's precedent support the state court's decision here. In a footnote in *Crawford*, this Court observed that "[t]he Clause … does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U.S. at 59 n.9 (citation omitted). But that exception is limited and does not apply here. As five Justices in *Williams* recognized, an out-of-court statement introduced to explain the basis of an expert's opinion is useful only insofar as it is true, and thus it is necessarily offered for its truth. Legal scholars and preeminent evidence treatises have likewise acknowledged that it would be a legal fiction to suppose an expert's basis evidence is not admitted for its truth.

3. Significant practical concerns also demand rejecting a categorical exception to the Confrontation Clause for an expert's basis evidence. If prosecutors could introduce out-of-court forensic-analysis testimony through the strategy that was deployed in Smith's case, then they could easily end run the Confrontation Clause. But the need for confrontation is especially strong in cases involving forensic evidence, which often carries an air of infallibility despite numerous confirmed incidents of analysts' negligence, incompetence, bias, or fraud. Meanwhile, the burden on the prosecution through a requirement of confrontation is minimal: the prosecution can have its testify-

ing expert retest the evidence or seek a continuance until the absent analyst can be secured. Notably, Longoni acknowledged in this case that it would have taken him less than three hours to retest the evidence.

C. Finally, the Arizona Court of Appeals' attempt to fault Smith for failing to subpoena Rast cannot be squared with this Court's holdings in *Melendez-Diaz* that a defendant's "power [to subpoena witnesses]—whether pursuant to state law or the Compulsory Process Clause—is no substitute for the right of confrontation," and that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." 557 U.S. at 324–325. This Court should reaffirm that a defendant bears no burden to call the prosecution's absent analyst.

ARGUMENT

A. The State violated the Confrontation Clause by introducing the testimonial statements of a nontestifying forensic analyst through the testimony of a substitute expert.

The Sixth Amendment's Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. Const. amend. VI.[1] In *Crawford* v. *Washington*, 541 U.S. 36 (2004), this Court drew extensively on the Clause's text and historical purpose to hold that the Sixth Amendment precludes the prosecution from introducing the testimonial statements of an absent witness unless it demonstrates that the witness is unavailable and that the defendant had a prior opportunity for cross-examination. *Id.* at 53–56. In subsequent decisions,

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[1] The Sixth Amendment is made applicable against the States via the Fourteenth Amendment. *Pointer* v. *Texas*, 380 U.S. 400, 403 (1965).

this Court has made clear that *Crawford*'s rule reaches testimonial statements regarding forensic analyses, whether admitted without any sponsoring witness, *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 310–311 (2009), or through a sponsoring witness other than the analyst who made the underlying statements, *Bullcoming* v. *New Mexico*, 564 U.S. 647, 651–652 (2011).

This Case presents a straightforward application of that precedent: The State violated Smith's confrontation right when it used a substitute "expert" witness (Longoni) to convey to the jury the absent analyst Rast's testimonial statements against Smith from her notes and report, without attempting to demonstrate that Rast was unavailable and without affording Smith any opportunity to cross-examine her.

1. The text and original meaning of the Confrontation Clause prohibit the State from presenting out-of-court testimony against the accused without an opportunity for cross-examination.

a. As this Court recognized in *Crawford*, the purpose of the Confrontation Clause is to regulate "the manner in which" prosecution witnesses testify at trial against an accused. 541 U.S. at 43. This Court explained that "[t]he constitutional text, like the history underlying the common-law right of confrontation … reflects an especially acute concern with" out-of-court statements by "'witnesses' against the accused." *Id.* at 51. This Court thus held in *Crawford* that the Confrontation Clause prohibits the prosecution from presenting "[t]estimonial statements of witnesses absent from trial" unless "the declarant is unavailable" and the "defendant has had a prior opportunity to cross-examine." *Id.* at 59; see *id.* at 54.

This Court in *Crawford* applied the Confrontation Clause by conducting an in-depth review of the relevant

historical precedents dating from long before Colonial America. 541 U.S. at 43–50 (tracing development of precedents since "Roman times" to determine "[t]he founding generation's immediate source" for a right of confrontation). And the Court expressly rejected the approach of *Ohio* v. *Roberts*, 448 U.S. 56 (1980), and other late-twentieth-century cases that had relied on rules of evidence not "established at the time of the founding" to allow out-of-court testimony otherwise prohibited by the Clause. *Crawford*, 541 U.S. at 54–55, 60 (overruling *Roberts*); see also *Samia* v. *United States*, 599 U.S. 635, 655 (2023) (Barrett, J., concurring) (reasoning that the relevant historical evidence of the meaning of the Confrontation Clause is that from "the time of the founding" (citation omitted)).

Crawford thus refocused courts on the Confrontation Clause's original meaning, explaining that "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts"—exceptions that might "render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." 541 U.S. at 51, 54. Applying that original meaning, this Court found that the practice of admitting out-of-court testimony based on a judicial determination of reliability was "fundamentally at odds with the right of confrontation." *Id.* at 61. As the Court explained, "[t]he Clause … reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent)[,] but about how reliability can best be determined." *Ibid.* Reliability, this Court concluded, must "be assessed in a particular manner: by testing in the crucible of cross-examination." *Ibid.*

In two subsequent cases, *Melendez-Diaz* and *Bullcoming*, this Court made clear that *Crawford's* rule applies with equal force to testimony regarding forensic

evidence offered by the prosecution against an accused. Notably, in *Melendez-Diaz*, this Court emphatically rejected the contention that forensic evidence is inherently trustworthy because it purports to be neutral. 557 U.S. at 317–321. The Court instead held that the admission of certificates of analysis to prove the identity of drug evidence without allowing the defendant to cross-examine a live witness violated the Confrontation Clause. *Id.* at 310–311. As the Court explained, such certificates prepared for an evidentiary purpose were testimonial, and the analysts who prepared them were "witnesses" whom the prosecution needed to make available. *Id.* at 311.

The Court then carried that reasoning forward in *Bullcoming* when it held that an absent analyst's testimonial forensic report could not be admitted through a substitute expert who had not observed or participated in the testing. 564 U.S. at 661–662. It did not matter, the Court explained, that the substitute expert was familiar with the laboratory or its general testing procedures when the substitute expert did not observe or participate in the specific tests at issue. *Id.* at 652–653. 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." *Id.* at 662.

2. The nontestifying analyst's notes and report were testimony subject to the Confrontation Clause.

Throughout the proceedings below, the State never suggested that the statements in Rast's notes and report were anything but testimonial. And for good reason: they are testimonial under any of the tests that members of this Court have applied when evaluating out-of-court statements for purposes of the Confrontation Clause.

a. In *Melendez-Diaz*, this Court referred to *Crawford*'s description of "the [core] class of testimonial statements covered by the Confrontation Clause" as including:

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

557 U.S. at 309–310 (alteration in original, internal quotation marks omitted) (quoting *Crawford*, 541 U.S. at 51–52). Based on that description, this Court had "little doubt" that the sworn "certificates of analysis" at issue in *Melendez-Diaz*, which were akin to affidavits, were testimonial. *Id.* at 308, 310. Similarly in *Bullcoming*, this Court held that the forensic analyses on a state-laboratory form entitled "Report of Blood Alcohol Analysis," which contained an unsworn "certificate" signed by the testing analyst, were sufficiently testimonial to trigger the Confrontation Clause. 564 U.S. at 653, 663–664.

This Court most recently addressed forensic evidence in the context of the Confrontation Clause in *Williams* v. *Illinois*, 567 U.S. 50 (2012). At issue there was a DNA analysis report prepared by a private laboratory. *Id.* at 56. A four-Justice plurality concluded that the statements in the report describing the results were not testimonial because they were not "prepared for the primary purpose of accusing a targeted individual." *Id.* at 84. Justice Thomas

agreed that the statements were not testimonial, but only because they did not bear sufficient "formality" or "indicia of solemnity." *Id.* at 110–114 (Thomas, J., concurring) (internal quotation marks and citation omitted). A four-Justice dissent reasoned that the statements were testimonial because they had an "evidentiary purpose" and were "made under circumstances which would lead an objective witness reasonably to believe that [they] would be available for use at a later trial." *Id.* at 121 (Kagan, J., dissenting) (alteration in original, internal quotation marks and citations omitted).

b. Here, the statements in Rast's notes and report were testimonial under both the *Williams* dissent's evidentiary-purpose test and the plurality's narrower targeted-individual test. That is because Rast conducted the tests on the evidence and prepared her statements about those tests at the State's request, after Smith had been arrested, for the express purpose of generating evidence to use *against Smith* at trial. See, *e.g.*, Pet. App. 127a. The State's request for testing expressly noted that "trial ha[d] been set" in Smith's case. *Ibid.* And Rast's report identifies Smith by name on its first page. *Id.* at 85a; see also *United States* v. *Smith*, 640 F.3d 358, 363–364 (D.C. Cir. 2011) (Kavanaugh, J.) (reasoning that a court clerk's unsworn letter stating that court records show the defendant had a prior conviction was testimonial because it was created at the prosecution's request to prove a fact at trial); *United States* v. *Moore*, 651 F.3d 30, 72–73 & n.2 (D.C. Cir. 2011) (per curiam, joined in relevant part by Kavanaugh, J.) (reasoning that autopsy reports were testimonial because the participation of homicide detectives "would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" (citation omitted)).

c. The circumstances under which Rast prepared her notes and report demonstrate that those documents are also sufficiently formal and solemn to be testimonial under the standard articulated by Justice Thomas in *Williams*. See 567 U.S. at 110–114 (Thomas, J., concurring). In the request form that the State sent to the DPS lab, it requested a "full scientific analysis on all narcotics and drugs" and added that specific drug charges had been filed and that "[t]rial had been set." Pet. App. at 127a. The record also shows that the State's attorney worked hand-in-hand with Rast on the testing—including by providing input on which items to test—all to build a case against Smith. *Id.* at 99a (Rast's notes stating that, "[p]er phone conversation with Yuma County Attorney …, not all of the Items need to be tested. Discussed testing #26 and selecting a couple other plant material Items, and several crystal substance Items.").

The Rast testimony here is thus materially different from the laboratory report at issue in *Williams*, which nowhere reflected the identity of any law enforcement agency let alone any communication between the prosecution and the analyst. Report of Laboratory Examination, *Williams*, 567 U.S. 50 (2012) (No. 10-8505) (lodged). Rast's materials, by contrast, reflect a much more "formalized dialogue" in which she prepared statements at the State's prompting specifically to support Smith's prosecution. Cf. *Williams*, 567 U.S. at 111 (Thomas, J., concurring) (reasoning that "although the report [at issue] was produced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation"); *Ohio* v. *Clark*, 576 U.S. 237, 255 (2015) (Thomas, J., concurring).

It was through this exchange with the State that Rast prepared her notes and report, both of which she recorded

on forms bearing the official seal of the Arizona DPS. Pet. App. 85a, 88a. The top of the first page of Rast's report displays the form legend "Arizona Department of Public Safety Scientific Examination Report." *Id.* at 85a. Also on the first page is Rast's identification of the State agency that requested the test ("Yuma County Narcotics Task Force"), the name and number of the law enforcement officer who made the request, the date, and the name of defendant "Smith, Jason." *Ibid.* And Rast signed each page of the report above the legend "ELIZABETH RAST, # 6580, Forensic Scientist." *Id.* at 86a, 87a.

Rast also typed each of the nine pages of her notes on a form DPS "Laboratory Notes Worksheet," in which she identified the number and weight of each of the relevant items of evidence, described the tests she performed on each, and set forth her results. Pet. App. 88a–105a. As part of her notes, Rast additionally completed a form identifying the manufacturer and model number of the equipment that she used as well as the lot number of each reagent she used. *Id.* at 106a–107a. And she attached printouts reflecting her GC-MS testing. *Id.* at 108a–126a.

The detail and specificity of Rast's notes and report reflect the formal nature of the processes that she purported to undertake, and her signatures in her report above her employee number and title "Forensic Scientist" demonstrate the solemn manner in which she carried out her assignment. Rast plainly took ownership of these documents and acknowledged her responsibility to ensure that she correctly performed the tests and accurately reported the results.

This Court found the unsworn report in *Bullcoming* to be testimonial because (among other reasons) the analyst there had signed next to a legend stating, "I certify that I followed the procedures set out on the reverse of this

report, and the statements in this block [a hand-written number reflecting a blood-alcohol level and a statement that the sample had been received intact] are correct." Joint Appendix at 62, *Bullcoming*, 564 U.S. 647 (2011) (No. 09-10876), 2010 WL 4914918. Rast's work is just as clearly testimonial. She signed her report, and her carefully detailed notes of the tests she performed, which she plainly prepared for the sole purpose of assisting in Smith's prosecution, reflect a similar level of formality and solemnity even though they lack a "certification" label. Cf. *Clark*, 576 U.S. at 255 (Thomas, J., concurring) (explaining that testimonial statements need not always be contained in "'affidavits, depositions, prior testimony, or confessions'" (citation omitted)); *Williams*, 567 U.S. at 111 (Thomas, J., concurring) (noting that neither of the "reviewers" who signed the report at issue appeared to have even performed the tests at issue).

By any rationale, the statements in Rast's notes and report are testimonial.

3. The State used a substitute expert to relay the nontestifying analyst's testimonial statements to the jury.

a. Although the State's substitute expert, Longoni, stated that he would offer an "independent opinion" about the results of the testing that Rast did at the DPS lab, Pet. App. 46a, 47a, 49a, he performed no independent analysis of the evidence. Lacking personal knowledge of anything Rast did or the conclusions she reached, all Longoni knew about Rast's analyses and results was what he read in her notes and report. As a consequence, the only testing and test results that Longoni could relate to the jury were those of Rast, and he could testify to that testing and those results only insofar as they were reflected in Rast's notes and report. Longoni's "testimony" was nothing more than

Rast's own testimonial statements offered against Smith from her notes and report.

That Longoni conveyed Rast's statements from her notes and report is apparent from both the manner in which the State framed its questions with reference to those documents and Longoni's repeated requests to refer to those documents as he answered questions about how each evidence item was tested. See, *e.g.*, Pet. App. 41a ("Q From your review of the lab notes in this case, can you tell me what scientific method was used to analyze Item 26? A Yes."); *id.* at 46a ("Q How is Item Number 20 tested? [Longoni]: If I were to review the notes again real quick, Your Honor?"); *id.* at 48a ("Q Did you also look at what was done to Item 28? [Longoni]: Again, can I refer to the report, Your Honor?").

Moreover, because Rast's notes provide the only record of the tests she performed, Longoni necessarily conveyed Rast's statements from her notes when he testified about what she did. When Longoni testified regarding the tests performed on Item 26, for example, the only source of information from which he could have drawn his answer was Rast's statements in her notes that she performed a microscopic examination and chemical color test. Pet. App. 94a. Similarly, when testifying regarding the tests performed on Items 20A, 20B, and 28, the only source of information from which Longoni could have drawn his answer was Rast's statements in her notes that she performed a chemical color test and a GC-MS test on these items. *Id.* at 89a–91a (addressing Items 20A and 20B), 95a–96a (addressing Item 28).[2]

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[2] Although Rast attached graphs from her GC-MS analyses of Items 20A, 20B, and 28, those graphs do not, independent of the written statements in Rast's notes, show which items Rast tested or the particular procedures that she used.

b. In finding that there was no confrontation violation, the Arizona Court of Appeals reasoned that the State did not "introduce Rast's opinions or any of her work-product documents into evidence." Pet. App. 11a–12 ¶ 19. As an initial matter, however, the results of Rast's microscopic examination and color tests are reflected only in her written statements. *Id.* at 89a–90a (stating that results of color tests on Item 20A were "Orange-brown" and "Blue"); see also *id.* at 91a, 94a–95a (stating results of color tests on Items 20B, 26, and 28 and microscopic examination on Item 26). Thus, in referencing those tests, Longoni necessarily conveyed Rast's statements and conclusions about them.

More fundamentally, it is irrelevant whether Rast's notes and report were themselves admitted into evidence because Longoni conveyed to the jury the substance of Rast's testimonial statements from those documents. Courts have long recognized, both before and after *Williams*, that the prosecution "may not circumvent the Confrontation Clause by introducing the same substantive testimony in a different form." *Ryan* v. *Miller*, 303 F.3d 231, 248–249 (2d Cir. 2002); accord *United States* v. *Meises*, 645 F.3d 5, 21 (1st Cir. 2011); *United States* v. *Reyes*, 18 F.3d 65, 69 (2d Cir. 1994); *Ocampo* v. *Vail*, 649 F. 3d 1098, 1109 (9th Cir. 2011); *Hutchins* v. *Wainwright*, 715 F.2d 512, 516 (11th Cir. 1983); *Young* v. *United States*, 63 A.3d 1033, 1045 (D.C. 2013); *State* v. *Swaney*, 787 N.W.2d 541, 53–54 (Minn. 2010). "If the substance of the prohibited testimony is evident even though it was not introduced in the prohibited form, the testimony is still inadmissible." *Ryan*, 303 F.3d at 249. Thus, it matters not "whether the statement is quoted verbatim or conveyed only in substance; whether it is relayed explicitly or merely implied; [or] whether the declarant is identified or not." *Young*, 63 A.3d at 1044.

Longoni's testimony conveying to the jury the substance of Rast's testimonial statements against Smith thus triggered Smith's Sixth Amendment right to be confronted with *Rast*, who was among the most important witnesses against him.

4. The State failed to demonstrate that the nontestifying analyst was unavailable and that Smith had a prior opportunity to cross-examine her.

a. The Confrontation Clause permits the "admission of '[t]estimonial statements of witnesses absent from trial ... only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.'" *Bullcoming*, 564 U.S. at 658 (alterations in original) (quoting *Crawford*, 541 U.S. at 59). But Smith had no prior opportunity to cross-examine Rast, and the State has never suggested (let alone demonstrated) that Rast was unavailable.

In the lead-up to trial, the State sought to substitute Longoni as its expert in place of Rast. Pet. App. 26a. Later at trial, it was revealed that Rast was no longer employed by the state-run DPS crime lab. Pet. App. 41a, 45a, 53a. As with the absent analyst in *Bullcoming*, the State "never asserted" that Rast was unavailable to testify. 564 U.S. at 569. And the State made no effort to carry its burden to demonstrate its "good-faith effort to obtain [her] presence at trial." See *Barber* v. *Page*, 390 U.S. 719, 724–725 (1968). If anything, by faulting Smith for failing to subpoena Rast, the State apparently presumed that Rast *was* available and willing to testify. See Pet. App. 12a ¶ 19 (citing *Williams*, 567 U.S. at 58–59 (plurality op.)).

b. Rather than focusing on Smith's inability to cross-examine Rast, the Arizona Court of Appeals instead focused on Smith's ability to cross-examine Longoni, as if that were a fair substitute for Smith's confrontation right.

Pet. App. 11a–12a ¶ 19. But as this Court made clear in *Bullcoming*, "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. at 662. That would be no different from allowing "a note-taking policeman [to] *recite*" an unsworn out-of-court statement by another, an evasion of the Confrontation Clause that this Court has called not "conceivable." *Davis* v. *Washington*, 547 U.S. 813, 826 (2006) (emphasis in original); see also *Melendez-Diaz*, 557 U.S. at 334 (Kennedy, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second[.]"). Even in the infamous trial of Sir Walter Raleigh in 1603—which became a rallying call for the right of confrontation and is a paradigmatic example of a confrontation violation—Raleigh was "perfectly free to confront those who read [his alleged accomplice Lord] Cobham's confession in court." *Crawford*, 541 U.S. at 51.

By failing to make Rast available for cross-examination, the State denied Smith the "greatest legal engine ever invented for the discovery of truth." *Stuart* v. *Alabama*, 139 S. Ct. 36, 36 (2018) (Gorsuch, J., joined by Sotomayor, J., dissenting from the denial of certiorari) (quoting *California* v. *Green*, 399 U.S. 149, 158 (1970)). In Rast's absence, Smith could not cross-examine her about the tests that she performed or any "lapses or lies" in her materials; nor could he "ask[] [her] questions designed to reveal" why her employment with the DPS lab ended. *Bullcoming*, 564 U.S. at 661–662. And because the State did not call Rast at trial, she was spared the obligation to testify under oath, which would have impressed on her "the seriousness of the matter and [would have] guard[ed]

against [any] lie[s] by the possibility of a penalty for perjury." *Maryland* v. *Craig*, 497 U.S. 836, 845–846 (1990). At the same time, Smith was deprived of his right under the Confrontation Clause to "a face-to-face meeting with [Rast] appearing before the trier of fact." *Coy* v. *Iowa*, 487 U.S. 1012, 1016–1017 (1988). And the jury, in turn, was unable to observe Rast and "judge by h[er] demeanor upon the stand and the manner in which [s]he g[ave] h[er] testimony whether [s]he [wa]s worthy of belief." *Mattox* v. *United States*, 156 U.S. 237, 242–243 (1895). Smith's cross-examination of Longoni afforded him none of these safeguards that the Confrontation Clause demands.

In sum, under a straightforward application of this Court's precedent, Longoni's testimony recounting of the substance of Rast's testimonial notes and report without any opportunity to cross-examine Rast violated Smith's confrontation right.

B. The Confrontation Clause does not make an exception for out-of-court testimonial statements on which an expert bases an opinion.

As explained above, Longoni offered no independent opinion; he simply recounted to the jury what Rast's notes and report said about what she had done and the results she obtained. The Arizona Court of Appeals nonetheless justified the admission of Longoni's substitute expert testimony on the ground that he had "presented his independent expert opinions," reasoning that an expert may "testif[y] 'to otherwise inadmissible evidence, including the substance of a non-testifying expert's analysis, if such evidence forms the basis of the expert's opinion.'" Pet. App. 11a–12a ¶ 19 (quoting *State ex rel. Montgomery* v. *Karp*, 336 P.3d 753, 757 ¶ 13 (Ariz. Ct. App. 2014)).

Under this not-for-the-truth rationale, the hearsay statements recounted by an expert are purportedly of-

fered "only to show the basis of [the expert's] opinion and not to prove their truth." *Karp*, 336 P.3d at 757 ¶¶ 12–13 (citing *Joseph*, 283 P.3d at 29 ¶ 12; *Williams*, 567 U.S. at 58 (plurality op.)). *Crawford* observed that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted," 541 U.S. at 59 n.9 (citing *Tennessee* v. *Street*, 471 U.S. 409, 414 (1985)). The not-for-the-truth rationale attempts to fit into that narrow exception by pointing to Rule of Evidence 703 (in its federal and state forms), which generally permits an expert to base his opinion on facts about which he lacks personal knowledge and to disclose those facts to the trier of fact. See, *e.g.*, Fed. R. Evid. 703; Ariz. R. Evid. 703.

This Court should reject the Arizona Court of Appeals' categorical exception to the Confrontation Clause for an expert's basis evidence. That proposed exception lacks any textual, historical, or logical support, and it would enable the critical protections of the Confrontation Clause to be easily evaded.

1. There is no textual or historical support for a categorical exception to the Confrontation Clause for an expert's basis evidence.

For nearly a quarter century under *Roberts*, this Court had held that the admission of out-of-court statements was permissible under the Confrontation Clause if they fell within a "firmly rooted hearsay exception" or carried "particularized guarantees of trustworthiness." *Crawford*, 541 U.S. at 66 (quoting *Roberts*, 448 U.S. at 66). Under *Roberts*, courts had applied "countless factors bearing on whether a statement is reliable." *Id.* at 63. But in *Crawford*, this Court firmly rejected that approach in light of the Clause's text and history, explaining that "[w]here testimonial statements are involved, we do not

think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" *Id.* at 61.

Federal Rule of Evidence 703, on which state counterparts are generally based, is a relatively recent creation that provides no textual or historical support for making an exception to the Confrontation Clause for an expert's basis evidence. The prevailing common-law rule was that an expert could render an opinion based only on "(1) facts within the personal knowledge of the expert and (2) facts supplied to the expert in court," either through the testimony of other witnesses or in the form of a hypothetical question based on facts adduced at trial. D. Kaye et al., *The New Wigmore: A Treatise on Evidence: Expert Evidence* § 4.1, p. 165 (3d ed. 2022) ("*New Wigmore*"); see also Fed. R. Evid. 703 advisory committee note on proposed rules (explaining that under existing practice, an expert could base an opinion on "firsthand observation" or "presentation at trial"). When basis evidence was used in that limited manner, "there was little danger that the expert would rely on testimonial hearsay that was not subject to confrontation because the expert and the witnesses on whom he relied were present at trial." *Williams*, 567 U.S. at 107 (Thomas, J., concurring).

It was not until 1975, with the adoption of the Federal Rules of Evidence including Rule 703, that the universe of information on which an expert could base an opinion was significantly expanded to include materials presented to the expert "outside of court and other than by his own perception." Fed. R. Evid. 703 advisory committee note on proposed rules; see also *New Wigmore*, *supra*, § 4.6, pp. 194–195 ("Rule 703 marked a substantial expansion of the permitted basis for expert testimony" that "dramatically transformed expert evidence"); M. Graham, *Expert Wit-*

ness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness, 1986 U. ILL. L. REV. 43, 43 (1986) (explaining that adoption of federal rules "brought about a profound change in the common law approach to expert witness testimony").

In recognition of the dangers posed by Rule 703's expanded authorization for out-of-court basis evidence, the Rule was amended in 2000 to incorporate a balancing test: "[w]hen information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert's opinion," "[t]he information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect." Fed. R. Evid. 703 advisory committee note to 2000 amendment. Rule 703's balancing test implicitly recognizes that when otherwise inadmissible evidence, such as hearsay, is introduced to explain the basis for an expert's opinion, it is likely to be offered for its truth, and thus the rule allows for its admission only under circumstances where the resulting prejudice is minimized.

Like the *Roberts* test that this Court rejected in *Crawford*, however, Rule 703's balancing test is "no substitute for a constitutional provision that has already struck the balance in favor of the accused." *Williams*, 567 U.S. at 110 (Thomas, J., concurring) (citation omitted). The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. Whatever utility Rule 703 may have in various trial contexts, it cannot create an exception to the Confrontation Clause for an expert's basis evidence.

2. This Court's precedent does not support an exception to the Confrontation Clause for an expert's basis evidence.

a. In a footnote to its opinion in *Crawford*, this Court observed that "[t]he Clause … does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U.S. at 59 n.9 (citing *Street*, 471 U.S. at 414). But *Street*, the case that this Court identified as an example of this exception, shows that the exception is narrow and limited to instances (here) where there is a "*legitimate*, nonhearsay purpose." *Williams*, 567 U.S. at 105 (Thomas, J., concurring) (emphasis in original) (quoting *Street*, 471 U.S. at 417).

The defendant in *Street* asserted that the police had coerced him into giving a confession that was "derived from a written statement that [his accomplice] had previously given." 471 U.S. at 411. The prosecution thus introduced the accomplice's confession to show how it differed from that of the defendant, including the fact that the defendant's confession "contained factual details that were not found in [his accomplice's] confession." *Id.* at 412. In finding no confrontation violation, this Court reasoned that the accomplice's confession was introduced for the "legitimate, nonhearsay purpose" of rebutting the defendant's assertion that his confession was coerced. *Id.* at 416–417. Critically, it did not matter to the prosecution in *Street* whether the accomplice's confession was true; what mattered was that the two confessions were different. *Ibid.* And notably, this Court did not accept hearsay labels at face value but instead independently reviewed whether the out-of-court statements there were introduced for their truth. *Id.* at 413–416.

b. No such legitimate, nonhearsay purpose exists to admit an expert's basis evidence, let alone to introduce

out-of-court testimony against the accused without an opportunity for cross-examination. As five Justices recognized in *Williams*, an out-of-court statement introduced to explain the basis of an expert's opinion is useful only insofar as it is true, and thus it is necessarily offered for its truth. *Williams*, 567 U.S. at 104–110 (Thomas, J., concurring); *id.* at 125–129 (Kagan, J., dissenting). In a situation like the State's introduction of Rast's out-of-court testimony against Smith through Longoni, "[t]here is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the [testifying] expert's opinion and disclosing that statement for its truth." *Id.* at 106 (Thomas, J. concurring). "Unlike in *Street*, [the] admission of the out-of-court statement in this context has no purpose separate from its truth; the factfinder can do nothing with it *except* assess its truth and so [with it] the credibility of the conclusion it serves to buttress." *Id.* at 128 (Kagan, J., dissenting) (emphasis in original); accord *Stuart*, 139 S. Ct. at 37 (Gorsuch, J., dissenting from denial of certiorari); *Leidig* v. *State*, 256 A.3d 870, 900–901 & n.23 (Md. 2021); *People* v. *Sanchez*, 374 P.3d 320, 333 (Cal. 2016); *Martin* v. *State*, 60 A.3d 1100, 1106–1107 (Del. 2013); *Young*, 63 A.3d at 1047 n.53; *People* v. *Goldstein*, 843 N.E.2d 727, 732–733 (N.Y. 2005); *People* v. *John*, 52 N.E.3d 1114, 1121 (N.Y. 2016).

Legal scholars and preeminent modern treatises on evidence concur; they have similarly recognized that the not-for-the-truth rationale for admitting an expert's basis evidence is tantamount to legal fiction. See *New Wigmore*, *supra*, § 5.4, pp. 272–274 (describing the rationale as "fictional," "factually implausible," "nonsense," and "strain[ing] credibility"); V. Gold, 29 *Federal Practice & Procedure: Evidence* § 6275 (2d ed. 2023) (arguing the rationale "badly misreads the situation"); Hon. M. Bernstein, *Jury Evaluation of Expert Testimony Under the*

Federal Rules, 7 DREXEL L. REV. 239, 286–300 (2015) (criticizing the rationale as "fiction" and "absurd[]"); J. Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & Pol'y 791, 816 (2007) (the rationale "makes almost no sense").

As a leading treatise explains, to use otherwise inadmissible out-of-court statements in "evaluating [an] expert's testimony, the jury generally must make a preliminary judgment about whether this information is true." *New Wigmore*, *supra*, § 5.4.1, p. 271. "If the jury believes that the basis evidence is true, it will likely also believe that the expert's reliance is justified; inversely, if the jury doubts the accuracy or validity of the basis evidence, it will be skeptical of the expert's conclusions." *Ibid.* Thus, "to pretend that [the expert's basis evidence] is not being introduced for the truth of its contents strains credibility." *Ibid.*

c. Nor does it make any difference if the prosecution's substitute expert purports to offer an "independent" opinion. If the expert's opinion is valid only if the out-of-court statements on which the opinion is based are true—as is the case when the underlying statements are relied on to establish that specific evidence was tested in a particular manner—then the opinion is not truly independent in any meaningful sense. And even if the opinion could be characterized as independent, the alleged value added by the testifying expert does not negate the confrontation violation that arises from presenting the underlying out-of-court testimonial statements to the jury for their truth. *New Wigmore*, *supra*, § 5.4.6, p. 286 ("[W]hen experts do rely on testimonial statements, the addition of their own expertise does not negate the indirect transmission of the underlying testimonial basis."). As one court grappling with this issue aptly put it, "it would 'require an

impossible feat of mental gymnastics' to 'disaggregate' [the expert's] own non-hearsay conclusions from the interwoven hearsay on which [the expert] relied" and related to the trier of fact. *Young*, 63 A.3d at 1047 (citation omitted).

Smith's case powerfully demonstrates the point. Contrary to the prosecution's assertion that Longoni would provide an "independent" opinion, he simply recounted Rast's testimonial statements regarding the tests that *she* performed and the results that *she* reached. As Longoni admitted, he performed none of the relevant forensic tests. Pet. App. 45a. Nor did he do "any quality assurance with [Rast] to confirm or corroborate her report." *Ibid.* He did not even talk with Rast about the case. *Id.* at 44a. And his testimony under voir dire confirmed that his opinions were inextricably tied to Rast's statements:

> Q [O]ther than [Rast's] notes and reading a report that she prepared, how do you have an opinion?
>
> A *Based on the notes that she took* and the scientific analysis and the analytical protocols that we follow is how I feel like I have an opinion on what it could – what it is.

Ibid. (emphasis added). Put simply, if Rast's underlying statements about what she did and the results she reached were not true, then Longoni's opinions would have been neither valid nor helpful to the jury.

Longoni's testimony also was quite different from the accepted common-law practice of posing a hypothetical question to an expert. Cf. *Williams*, 567 U.S. at 129 n.2 (Kagan, J., dissenting). The State did not simply have Longoni testify in a vacuum that certain results he reviewed in the abstract reflected the presence of certain drugs. The State recognized, rather, that it needed to link those results *to Smith*, so it had Longoni recount from

Rast's notes and report that she had carried out specific tests on the evidence in Smith's case. And the fact that Smith's case was tried before a jury magnifies the confrontation problem, because it is implausible that the jury would have been capable of understanding Rast's testimony (introduced through Longoni) as being offered for some purpose other than the truth of Rast's statements and conclusions. See *id.* at 72 (plurality op.) (stating that "[t]he dissent's argument [in *Williams*] would have force if petitioner had elected to have a jury trial").

In sum, when the trial court allowed Longoni to testify, it "effectively denied [Smith] the chance to confront the witness [Rast] who supplied a foundational piece of evidence" against him, with the result that "[t]he engine of cross-examination was left unengaged, and the Sixth Amendment was violated." *Stuart*, 139 S. Ct. at 36 (Gorsuch, J., dissenting from denial of certiorari). There is no logical rationale for transforming *Crawford's* limited exception for certain nonhearsay statements into a general, categorical exception to the Confrontation Clause for an expert's basis evidence.

3. Significant practical considerations demand rejecting a categorical exception to the Confrontation Clause for an expert's basis evidence.

a. The not-for-the-truth rationale, taken to its logical conclusion, would permit the admission of the vast majority of testimonial statements by absent forensic analysts, including the laboratory reports in *Melendez-Diaz* and *Bullcoming* whose introduction this Court held to violate the Confrontation Clause. The rationale would thus establish an easy way for prosecutors everywhere to end run the confrontation requirement. All that a deft prosecutor would need to do is have the testifying expert "rely" on an

absent analyst's statements and then offer to have those statements admitted for the purpose of explaining the expert's opinion. And with "a wink and a nod," "the Confrontation Clause would not pose a bar." *Williams*, 567 U.S. at 128 (Kagan, J., dissenting).

The concern is not hypothetical. Arizona courts and many others already have countenanced the use of this approach to admit statements by absent analysts, including even their bottom-line opinions or their entire reports. See *Joseph*, 283 P.3d at 29 ¶ 8 (reasoning that "[b]ecause the facts underlying an expert's opinion are admissible only to show the basis of that opinion and not to prove their truth, an expert does not admit hearsay or violate the Confrontation Clause by revealing [even] the substance of a non-testifying expert's *opinion*" (alteration in original, emphasis added, and citation omitted)); *Grim v. State*, 102 So. 3d 1073, 1081 ¶¶ 20–23 (Miss. 2012), *as modified on denial of reh'g* (Dec. 20, 2012) (finding no confrontation violation in the admission of absent analyst's report through an expert who reviewed the report and "reached his own conclusion").

b. Circumventing the Confrontation Clause in cases like this, where forensic evidence is presented through an expert, is particularly troublesome because it is precisely in this context that the Clause's safeguards are especially needed. Forensic evidence often can be superficially impressive to juries, carrying an air of infallibility grounded on jurors' general confidence in the scientific method and propagated in part by popular media. See, *e.g.*, *State* v. *Bowman*, 337 S.W.3d 679, 694 n.3 (Mo. 2011) (taking judicial notice of the so-called "'CSI Effect,'" whereby "'television shows … may cause jurors to place undue weight'" on forensic evidence (citation omitted)). Yet concerns about the accuracy of forensic evidence have been repeat-

edly validated by confirmed incidents of negligence, incompetence, bias, and even fraud on the part of analysts, including "drylabbing" incidents where analysts have reported results of testing that they never even conducted. See *Melendez-Diaz*, 557 U.S. at 318; *Stuart*, 139 S. Ct. at 36 (Gorsuch, J., dissenting from denial of certiorari) (recognizing that "forensic evidence … is hardly 'immune from the risk of manipulation.'"). Even now, more than a decade after *Melendez-Diaz* acknowledged such incidents, "[m]alfeasance and mass error on the part of forensic science service providers" are not rare. *New Wigmore*, *supra*, § 1.4.1.a, pg. 25 n.15.

In light of those persistent and well-founded concerns about the integrity of forensic testing, questioning a substitute expert about the tests performed by a different, absent analyst is no substitute at all for confronting the testing analyst herself. Many of the most critical questions for cross-examination will necessarily lie outside the substitute expert's knowledge:

- The substitute expert would not know if the absent analyst failed to perform the stated tests and falsified the results, or otherwise was negligent or incompetent in carrying out the tests. See S. Gross et al., Nat'l Registry of Exonerations, *Government Misconduct and Convicting the Innocent, The Role of Prosecutors, Police and Other Law Enforcement* 67 (2020) ("Gross") (describing examiner who "filed reports on hundreds if not thousands of autopsies that he never conducted")[3]; J. Morgan, Nat'l Inst. of Just., *Forensic Testimony Archaeology: Analysis of Exoneration Cases and Its Implications for Forensic Science Testimony and Communications* 44–46 (2023) ("Mor-

[3] https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf

gan") (recounting hundreds of cases in which "an incompetent examiner may have contributed to many undiscovered errors prior to the discovery of a wrongful conviction")[4]; P. Morrison, *Barry Scheck on the O.J. Trial, DNA Evidence and the Innocence Project*, L.A. TIMES (June 17, 2014) (analyst revealed on cross-examination that he was unsure whether he had properly changed gloves)[5]; Brief of Amicus Curiae the National Innocence Network, *Melendez-Diaz*, 557 U.S. 305 (2009) (No. 07-591), 2008 WL 2550614, at *28 (analyst acknowledged on cross-examination that she had not performed a number of standard tests needed to ensure accuracy and did not understand the science); *City of Seattle* v. *Holifield*, 240 P.3d 1162, 1163 (Wash. 2010) (en banc) (analyst falsely certified solutions used to calibrate lab equipment); *Commonwealth* v. *Scott*, 5 N.E.3d 530, 536 (Mass. 2014) (recounting analyst's drylabbing and spiking of samples); *State* v. *Roche*, 59 P.3d 682, 690–691 (Ct. App. Wash. 2002), *as amended* (Dec. 4, 2002) (vacating conviction where analyst had diverted and ingested heroin and was suspected of drylabbing in other cases).

- The substitute expert would not know what steps the testing analyst actually took in performing the tests at issue, including whether the analyst followed the stated protocol. *E.g.*, *State* v. *Davis*, No. COA09-1552, 2010 WL 3001951, at *5–6 (N.C. Ct. App. Aug. 3, 2010) (unpublished) (excluding testimony by a substitute expert who lacked "independent or personal knowledge of what happened during the autopsy"); S. Ketterer, *Houston Crime Lab Fires Investigator After Alleged*

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[4] https://www.ojp.gov/pdffiles1/nij/grants/306259.pdf

[5] https://www.latimes.com/opinion/op-ed/la-oe-0618-morrison-scheck-oj-simpson-20140618-column.html

Testing Policy Violation, HOUSTON CHRON. (Oct. 26, 2018) (recounting Houston Forensic Science Center's firing of an investigator who used unapproved, substandard equipment rather than department-required device).[6]

- The substitute expert would not know whether the absent analyst was influenced by any biases, including cognitive biases, departmental incentives, or pressures to secure convictions at the expense of accuracy. See *Stuart*, 139 S. Ct. at 36 (Gorsuch, J., dissenting from denial of certiorari) ("A forensic analyst 'may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution.'" (citation omitted)); Morgan, *supra*, at 49 (recounting analysts who changed their reported analysis in view of "strong[] influence[s]" to do so); Gross, *supra*, at 155–156, 160 (recounting forensic chemists and serologists whose fraudulent results led to frequent convictions in "difficult" cases, and in turn led to their promotion and improved performance evaluations).
- The substitute expert also would be unlikely to know of any additional exculpatory data or testable material that the absent analyst chose not to analyze or include in her report. Gross, *supra*, at 66–67 (recounting multiple instances of analysts having lied that there was insufficient trace evidence for forensic testing), 91 (recounting analyst who concealed additional blood-type data showing innocence of the accused).

To be sure, not all instances of negligence, incompetence, or malfeasance will be exposed by cross-examination. Some analysts have lied on the stand. See Gross,

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[6] https://patch.com/texas/houston/houston-crime-lab-fires-csi-over-alleged-policy-violations

supra, at 96–97. But an oath is a serious thing, and most witnesses will respect it—or will at least think twice about lying in view of the penalty of perjury. See *Craig*, 497 U.S. at 845–846 (noting that an oath impresses upon the witness "the seriousness of the matter" to "guard[ ] against the lie"); see also *Ragland* v. *Commonwealth*, 191 S.W.3d 569, 580–581 (Ky. 2006) (noting statement by FBI analyst who had submitted a false affidavit that "[i]t was only after the cross-examination at trial that I knew I had to address the consequences of my action"). Increased scrutiny of forensic science and analysts also tends to deter misconduct. Gross, *supra*, at 178–179. And many forensic errors have been discovered through trial testimony. Morgan, *supra*, at 13–14; Brief of Amicus Curiae the National Innocence Network, *Melendez-Diaz*, 557 U.S. 305 (2009) (No. 07-591), 2008 WL 2550614, at *28–29 (providing examples); Brief of Amicus Curiae the Innocence Network, *Williams*, 567 U.S. 50 (2012) (No. 10-8505), 2011 WL 3973568, at *29–30 (providing additional example).

A lack of confrontation also has troubling consequences for the criminal justice system as a whole. A single analyst's misconduct can result in thousands of dismissed charges. See *Morgan*, *supra*, at 109. Without confrontation, serious problems might not be discovered until significant damage has been done, including when much of the evidence already has been destroyed or no longer is available for retesting. *E.g.*, Case Management Order, *In re Applications Seeking Relief Related to Kamalkant Shah* (N.J. Super. Ct. May 9, 2018) (Jerejian, J.) (noting that evidence pertaining to 1,169 defendants had already been destroyed by the time a crime lab analyst's drylabbing was discovered)[7]; S. Carter, *Dookhan Cases Give*

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[7] https://www.njcourts.gov/sites/default/files/public/notable-cases/labcase/littlefallsorder.pdf

21,000 Reasons Scalia Was Right, BLOOMBERG (Apr. 21, 2017) (noting 21,000 cases in Massachusetts vacated in wake of discovery of analyst's drylabbing).[8] Late discovery of negligence or misconduct also can create a flood of work for courts, which must handle ensuing petitions for post-conviction relief and requests to withdraw pleas. *E.g.*, *Scott*, 5 N.E.3d at 362.

c. What's more, there are reasonable and effective ways for the prosecution to present its case without violating a defendant's confrontation right. Smith's case illustrates the point. The State could have tried to secure Rast's presence, either voluntarily or via subpoena. And if needed, it could have sought a continuance to secure her presence.

Or the State could easily have had Longoni retest the evidence at issue—a task Longoni that acknowledged would have taken him less than three hours and that DPS procedures expressly contemplate. Pet. App. 53a–54a. The Arizona DPS specifically suggests retesting the relevant evidence when scheduling issues prevent the testing analyst from testifying. Ariz. Dep't of Pub. Safety, Scientific Analysis Bureau, *SAB General Procedures Manual* § 1.9.5, at 8 (2022) ("court/time off conflicts may be resolved by having the evidence reanalyzed").[9] Other states similarly suggest the retention of samples for "future testing." *E.g.*, Ark. State Crime Lab'y, Ark. Dep't of Pub. Safety, *Policies*.[10] And retesting is typically a viable option given that forensic analysts often testify only in a

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[8] https://www.bloomberg.com/view/articles/2017-04-21/dookhan-case-gives-21-000-reasons-scalia-was-right

[9] https://azdps.qualtraxcloud.com/showdocument.aspx?ID=2455

[10] https://www.dps.arkansas.gov/crime-info-support/arkansas-state-crime-lab/policies/

small fraction of their cases (for Longoni, it was about five percent). Pet. App. 53a.

Procedural mechanisms also can limit any burden on the prosecution in having to call the testing analyst. For example, some states require courts to (1) grant continuances to secure an analyst's presence, *e.g.*, Ga. Code Ann. § 35-3-154.1(e); N.D. R. Evid. 707(b); Va. Code Ann. § 19.2-187.1(C); (2) allow depositions to be taken in lieu of trial testimony, *e.g.*, Wa. Super. Ct. Crim. R. 6.13(a); R.I. Super. R. Crim. P. 15; Tenn. Code Ann. § 55-10-408; or (3) permit analysts to testify remotely by video, *e.g.*, Tenn. Code Ann. § 40-17-102; Tex. Code Crim. Proc. Ann. art. 38.076; La. Stat. Ann. § 15:502.[11] Many states also have implemented notice-and-demand statutes that require a defendant to "demand" that an analyst testify upon proper notice, or risk waiving confrontation. *E.g.*, 234 Pa. Code § 574; Mich. Ct. R. 6.202; N.C. Gen. Stat. § 8-58.20(d)–(f). As this Court explained in *Melendez-Diaz*, such statutes (so long as they do not shift the burden to the defendant to call prosecution witnesses) reflect a proper procedural limit on when a defendant must raise a Confrontation Clause objection. 557 U.S. at 326–327.

Finally, as further confirmation that prosecutors would not be left powerless to present their cases, many states (including some of the most populous) have already refused to create an exception to the Confrontation Clause for an expert's basis evidence using the not-for-the-truth rationale. The exception has not been permitted in New York for at least eighteen years, and in California for at least seven years. *Goldstein*, 843 N.E.2d at 732–733; *Sanchez*, 374 P.3d at 333. Yet "there is no evidence that

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[11] This Court has not resolved whether such remote testimony complies with the Confrontation Clause. See *Weigand* v. *United States*, 143 S. Ct. 2639 (2023) (denying certiorari in No. 22-844).

the criminal justice system has ground to a halt" in those states that have rejected the not-for-the-truth rationale. *Melendez-Diaz*, 557 U.S. at 326.

In sum, the not-for-the-truth rationale constitutes a sweeping and unwarranted end-run around the rigors of the Confrontation Clause for an expert's basis testimony, even while there are reasonable alternatives for the prosecution to present its case without violating a defendant's confrontation right. This Court should now hold that the not-for-the-truth rationale does not create a categorical exception to the Confrontation Clause for an expert's basis evidence.

C. The Arizona Court of Appeals erred in reasoning that the prosecution need not present the nontestifying analyst for cross-examination on the ground that the defendant might have been able to subpoena her.

a. Beyond applying the not-for-the-truth rationale, the Arizona Court of Appeals justified the admission of Longoni's substitute testimony on the ground that "[h]ad Smith sought to challenge Rast's analysis, he could have called her to the stand and questioned her, but he chose not to do so." Pet. App. 12a ¶ 19 (citing *Williams*, 567 U.S. at 58–59). By this reasoning, the court faulted Smith for failing to subpoena the State's absent witness. But this Court already held in *Melendez-Diaz* that a defendant's "power [to subpoena a witness]—whether pursuant to state law or the Compulsory Process Clause—is no substitute for the right of confrontation," and that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." 557 U.S. at 324–325.

The text of the Sixth Amendment confirms this distinction. On the one hand, the Confrontation Clause sets forth a defendant's *passive* right "to be confronted with

the witnesses *against him*," while on the other hand, the Compulsory Process Clause sets forth a defendant's *active* right "to have compulsory process for obtaining witnesses *in his favor*." U.S. Const. amend. VI. (emphasis added). As this Court recognized in *Melendez-Diaz*, the Sixth Amendment contemplates that these are two different rights that apply to the two different classes of witnesses. 557 U.S. at 313. "The prosecution *must* produce the former," while "the defendant *may* call the latter." *Id.* at 313–314 (emphasis in original).

b. The Arizona Court of Appeals' reasoning also distorts the practical realities. "Unlike the Confrontation Clause," the ability of a defendant to subpoena a witness is "of no use … when the witness is unavailable or simply refuses to appear." *Melendez-Diaz*, 557 U.S. at 324 (citing *Davis*, 547 U.S. at 820 (noting witness "was subpoenaed, but she did not appear at ... trial")). Thus, requiring a defendant to subpoena the prosecution's absent analyst improperly "shifts the consequences of adverse-witness no-shows from the State to the accused." *Ibid.* Worse, by faulting Smith for failing to subpoena Rast, the Court of Appeals apparently presumed that Rast was available and willing to testify, which, if true, raises the question why the State did not secure her presence in the first instance.

More generally, because the prosecution bears the burden to prove each element of its case beyond a reasonable doubt, *In re Winship*, 397 U.S. 358, 364 (1970), defendants in most cases are unlikely to subpoena adverse witnesses whose testimony forms the basis of the prosecution's case. But that is no reason to deprive defendants of the right to cross-examine such witnesses if the prosecution chooses to rely on their statements. Nor is it justification for the prosecution to avoid calling them—lest the right of confrontation be "replaced by a system in which

the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses." *Melendez-Diaz*, 557 U.S. at 324–325.

This Court should reaffirm its holding in *Melendez-Diaz* that a criminal defendant bears no burden under the Confrontation Clause to subpoena the prosecution's absent analysts.

CONCLUSION

The judgment of the Arizona Court of Appeals should be reversed, and the case remanded for further proceedings.

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