NO. 22-899

In the Supreme Court of the United States

JASON SMITH,

Petitioner,

v.

ARIZONA,

Respondent.

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

BRIEF OF AMICUS CURIAE RICHARD D. FRIEDMAN IN SUPPORT OF PETITIONER

Richard D. Friedman
Counsel of Record and Amicus Curiae
625 South State Street
Ann Arbor, MI 48109-1215
(734) 647-1078
rdfrdman@umich.edu

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TABLE OF CONTENTS

Table of Authorities. iii

Interest of *Amicus Curiae*. 1

Summary of Argument. 2

Argument.. 6

I. If a statement supports an expert's opinion only if the statement is true, then presenting the statement to the trier of fact is presenting it for the truth of the statement.. 6

II. Longoni's opinions were not independent in any meaningful sense.. 9

III. It does not matter that Rast's written statements were not formally introduced into evidence.. 12

IV. Federal Rule of Evidence 703 and its State counterparts do not trump the Constitution.. . . 15

V. The statements in this case were clearly testimonial.. 18

VI. Here, in contrast to *Williams v. Illinois*, a "cold hit" case, the value of the statements at issue depended critically on the credibility of their maker.. 21

VII. Applying the confrontation right in cases like this will not create a significant burden on prosecution. 24

VIII. The defense does not bear the burden of producing prosecution witnesses.. 26

TABLE OF AUTHORITIES

Cases

Briscoe v. Virginia,
559 U.S. 32 (2010). 1

Crawford v. Washington,
541 U.S. 36 (2004). 1, 18

Davis v. Washington,
546 U.S. 813 (2006). 12-13

Douglas v. Alabama,
380 U.S. 415 (1965). 12

Hammon v. Indiana (decided together with
Davis v. Washington,
547 U.S. 813 (2006)). 1

Idaho v. Wright,
497 U.S. 805 (1990). 13

Melendez-Diaz v. Massachusetts,
557 U.S. 305 (2009). 5, 18, 19, 25, 26

New York Life Ins. Co. v. Taylor,
147 F.2d 297 (D.C. Cir. 1944). 26-27

Ocampo v. Vail,
649 F.3d 1098 (9th Cir. 2011). 13

Ohio v. Clark,
576 U.S. 237 (2015). 20

People v. Goldstein,
843 N.E.2d 727 (N.Y. 2005). 9

People v. Sanchez,
374 P.3d 320 (Cal. 2016). 9

State v. Sweeney,
787 N.W.2d 541 (Minn. 2010). 13

Stuart v. Alabama,
139 S.Ct. 36 (2018).. 9

United States v. Katso, 74 M.J. 273
(USCAAF 2015), *cert. denied*,
578 U.S. 905 (2016). 25

United States v. Meises,
645 F.3d 5 (1st Cir. 2011). 14-15

United States v. Reyes,
18 F.3d 65 (2d Cir. 1994). 15

Williams v. Illinois,
567 U.S. 50 (2012). 2, 7-9, 18-23

Young v. United States,
63 A.3d 1033 (D.C. 2013). 15

Rules

Fed. Evid. 703. . . . . 4, 7, 15-17

Fed. R. Evid. 705. 7

Other

SUZANNE BELL, OXFORD DICTIONARY OF FORENSIC SCIENCE (2013). 11

Brief of Petitioners in *Briscoe v. Virginia*, No. 07-11191 (U.S.S.C.). 27

Richard D. Friedman, *Confrontation and Forensic Laboratory Reports, Round Four*, 45 TEXAS TECH L. REV. 51 (2012). 23

Richard D. Friedman, *Grappling with the Meaning of "Testimonial"*, 71 BROOK. L. REV. 241 (2005). 18, 20-21

Richard D. Friedman, *Is there a multi-witness problem with respect to forensic lab tests?*, Confrontation Blog, https://tinyurl.com/5avv3zzf. 24

Richard D. Friedman, *Route Analysis of Credibility and Hearsay*, 96 YALE L.J. 667 (1987). 23

RICHARD D. FRIEDMAN & JOSHUA DEAHL, FEDERAL RULES OF EVIDENCE: TEXT AND HISTORY (2015).. . . . . 7, 17

Houston Forensic Science Center, *Seized Drugs: Training Guide for Marihuana* (2018), https://tinyurl.com/2cnhfzmf. 11

Alexander D. Jacob & Robertg Steiner, *Detection of the Duquenois-Levine chromophore in a marijuana sample*, 239 FORENSIC SCI. INT'L 1 (2014). 11

DAVID H. KAYE ET AL., THE NEW WIGMORE, A TREATISE ON EVIDENCE: EXPERT EVIDENCE (3d ed. 2021).. 9

MCCORMICK ON EVIDENCE (Robert P. Mosteller, gen. ed, 8th ed. 2020). 7

James W. McElhaney, *Expert Witnesses and the Federal Rules of Evidence*, 28 MERCER L. 463 REV. (1977).. 6

JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW (Chadbourn Rev. 1979). 6-7

INTEREST OF *AMICUS CURIAE*[1]

I am a legal academic, and since 1982 I have taught Evidence law; in January 2023 I received the John Henry Wigmore Award for Lifetime Achievement in the Law of Evidence and the Process of Proof from the Evidence Section of the Association of American Law Schools. Much of my academic work has dealt with the confrontation right, and since 2004 I have maintained The Confrontation Blog, http://confrontationright.blogspot.com, to report and comment on developments related to that right. In *Crawford v. Washington*, 541 U.S. 36 (2004), I was author of a law professors' *amicus* brief, which was discussed in oral argument. In 2005-06, I successfully represented the petitioner in *Hammon v. Indiana* (decided together with *Davis v. Washington*, 547 U.S. 813 (2006)), and in 2009-10 I successfully represented the petitioners in *Briscoe v. Virginia*, 559 U.S. 32 (2010). I have submitted numerous *amicus* briefs to this Court on behalf of myself in prior Confrontation Clause cases, both on the prosecution side and on the defense side, often making some points favoring one side and some favoring the other. In accordance with my usual practice, I am submitting this brief on behalf of myself only; I have not asked any other person or entity to join in it. I am doing this so that I can express

[1] Part of the cost of preparing and submitting this brief was paid for by research funds provided by the University of Michigan Law School to *amicus* and under his control. The brief does not necessarily reflect the views of that Law School or of any of its faculty other than *amicus*. Except as just noted, no persons or entities other than the *amicus* made any monetary contribution to the preparation or submission of this brief, which was not authored in any part by counsel for either party.

my own thoughts, entirely in my own voice. I am entirely neutral in this case, in the sense that my interest is not to promote an outcome good for one party or the other, or for prosecutors or defendants as a class. Rather, my interest, in accordance with my academic work, is to promote a sound understanding of the confrontation right, one that recognizes the importance of the right in our system of criminal justice and at the same time is practical in administration and does not unduly hamper prosecution of crime.

In this brief, I support the petitioner, because I believe the decision of the Arizona Court of Appeals misunderstands some fundamentals of the confrontation right and could, if the premises on which it was based became the law of the land, severely undermine the right.

SUMMARY OF ARGUMENT

This case gives the Court an opportunity to clear up much of the uncertainty that was created by its splintered decision in *Williams v. Illinois*, 567 U.S. 50 (2012). The Court should confirm what five justices asserted in *Williams*: If the substance of a testimonial statement is presented to the trier of fact in support of an expert's opinion, and it supports that opinion only if it is true, then it is presented for the truth of what it asserts. Thus, if the accused has not had an opportunity to be confronted with the maker of the statement, and there is no issue of forfeiture or a dying declaration, such presentation violates his

rights under the Confrontation Clause of the Sixth Amendment to the Constitution.

That violation cannot be obscured by labeling the opinion of the expert who testified at trial as an "independent" one. Even if that expert develops his opinion independently of any *opinion* of the person who made the supporting testimonial statement, the expert's opinion cannot be deemed independent in any constitutionally significant sense given that it is based on the *facts* presented in the supporting statement. And this case is a vivid illustration of that principle, because the supposed independent opinion of the expert was effectively a charade: The lab technician reported asserted test results that left no real room for interpretation by the expert. The expert was a conduit for the transmission of those results – and essentially nothing more.

Similar reasons make clear that it is immaterial that the report was not formally introduced into evidence. The essential question, rather, is whether the substance of the testimonial statement has been communicated to the trier of fact. If an in-court witness could do that without raising a Confrontation Clause issue, even though the trier of fact could rely on that substance in reaching a verdict, the Clause would have little effect; the prosecution could avoid formal introduction of an out-of-court testimonial statement and yet it could be used to secure a conviction.

This case is very different from *Williams*. That was a "cold hit" DNA case, and the evidence at issue, a lab report containing a DNA profile that matched that of the accused, had substantial probative value without relying on the truth-telling ability of the

author; as the plurality emphasized repeatedly, it was "beyond fanciful" to suppose that the match could have occurred by coincidence. Here, by contrast, the report would be of no substantial value unless the author was treated as a truth-teller. This is not to suggest that the category of testimonial statements is limited to those that are directed at a "targeted individual"; there is no warrant for such a test (and in fact, the key statements in *Williams* was directed at a precisely targeted individual, the one who had the stated DNA profile). But there is some basis for holding that admitting the fact of a cold-hit match does not violate the Confrontation Clause so long as it is clear that no reliance can be placed on the truth-telling ability of the reporter.

Rules such as Fed. R. Evid. 703 provide no path to admissibility in contravention of the Confrontation Clause. When the right is not at stake, such rules can be very useful, operating in effect as a hearsay exception for a category of probative evidence. But obviously, the rules of evidence do not trump the Constitution. And Rule 703 does not reflect a long-established principle that might shed light on the historical meaning of the confrontation right. On the contrary, Rule 703 is an innovation of the 20th century, and it was recognized at the time of its creation to be a departure from traditional principles.

For several reasons, the Court need not be concerned that recognizing a Confrontation Clause violation in this case would impose a significant burden on prosecutions. Defendants are often satisfied that a lab report be presented rather than a live witness. It is not true that anyone who participated in a lab test is deemed a witness for

purposes of the Clause; rather, it is only one who makes a statement the substance of which is communicated to the trier of fact for the truth of what it asserts. In most cases, only one lab analyst performs a test. Even with respect to a more complex test, like DNA, a laboratory can be vertically integrated, and even if not most often it is only one lab witness who testifies live and hardly ever more than two.

The lab notes and report in this case were clearly testimonial; they were prepared with the anticipation that they would assist in a prosecution (and for the purpose of doing so). In determining whether a statement is testimonial, it is potentially confusing to ask whether the statement was made with sufficient formality. Adherence to prescribed formalities, such as the oath, is required for testimony to be *acceptable*, but it is not in itself a measure of whether the statement is testimonial in nature. A statement does not lose its testimonial quality if it is given informally. The better question to ask is whether the question was given with sufficient solemnity – that is, with an appreciation of the potential consequences. In a case such as this, the answer is clearly in the affirmative.

Finally, it is of no consequence that the accused could have chosen to attempt to put the absent analyst on the stand. This is a point that was made clear in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). It was the prosecution that sought to make use of the absent analyst's testimonial statement. She was therefore a prosecution witness for purposes of the Confrontation Clause. It was the prosecution that bore the burden of securing her presence in court and the risk of inability to do so. Nor did the defense have

to bear the substantial risk entailed in calling a prosecution witness as its own.

ARGUMENT

I. IF A STATEMENT SUPPORTS AN EXPERT'S OPINION ONLY IF THE STATEMENT IS TRUE, THEN PRESENTING THE STATEMENT TO THE TRIER OF FACT IS PRESENTING IT FOR THE TRUTH OF THE STATEMENT.

Longoni's testimony in this case followed a common pattern of expert evidence: "Given the truth of predicate **F**, in my opinion conclusion **C** follows." Here, **F** was the factual assertions made by Rast in her notes, and **C** was the set of conclusions that the tested items contained certain illicit substances.

Obviously, if there is no proof of **F** (and the court cannot take judicial notice of it), then the opinion is worthless: In that setting, however valid may be the expert's opinion that **C** follows from **F**, the proponent has not shown that it has anything to do with the case; the effect is much like that of one hand clapping.

How then may predicate **F** be proven? It may be that the expert witness can testify to **F** from personal observation; this is not unusual in the case of a physician testifying to a diagnosis. If not, then **F** must be proven by other admissible evidence. And if the proponent cannot prove **F**, then the traditional, long-established law is clear: The expert's opinion as to **C** is not admissible. *E.g.*, James W. McElhaney, *Expert Witnesses and the Federal Rules of Evidence*, 28 MERCER L. REV. 463, 481 (1977) (noting that under the common law "any opinion based on inadmissible hearsay was also fatally tainted"); 2 JOHN HENRY

WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 941 (Chadbourn rev. 1979) (“**If the premises fail, the conclusion must be disregarded.**”).[2] There is a long-standing practice of allowing an expert witness to testify by answering a hypothetical question (essentially, “*If* **F** is true, then what conclusion follows?”), *Williams*, 567 U.S. at 67-69 (opinion of Alito, J.). But it was equally clear that if the factual predicate was not proven the opinion had no value. *E.g.*, 1 ROBERT P. MOSTELLER, gen. ed., MCCORMICK ON EVIDENCE 134 (8th ed. 2020) (traditional doctrine that “if the opinion is premised on a fact which the jury, for lack of evidence, cannot find to be true, the jurors may not use the opinion as the basis for a finding”).

In terms of ordinary evidence law, **C** is conditionally relevant on proof of **F**, and therefore “proof must be introduced sufficient to support a finding” of **F**. Fed. R. Evid. 104(b).

[2] Under Fed. R. Evid. 705, “[u]nless the court orders otherwise, an expert may state an opinion – and give the reasons for it – without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.” This Rule reflects 20th-century developments, *see* Advisory Committee Note, RICHARD D. FRIEDMAN & JOSHUA DEAHL, FEDERAL RULES OF EVIDENCE: TEXT AND HISTORY 305 (2015), and so presumably has little bearing on the meaning of the Confrontation Clause. But in any event, it is of no consequence here, because Longoni *did* make clear that he was relying on assertions by Rast. Fed. R. Evid. 703 also altered the common law; that provision is discussed below in Part IV of this brief.

Thus, given that Longoni's opinions were explicitly predicated on the truth of Rast's statements, the prosecution needed to present admissible evidence of the truth of those statements. To say that the prosecution presented those statements in support of Longoni's opinions therefore does not diminish the fact that they were presented for the truth of what they asserted.

It would be different if an expert testifying in court formed an opinion on the basis of out-of-court statements but without relying on the truth of them. Suppose, for example, that an expert testifying in a fraud case expresses an opinion that assertions made by the defendant were misleading, and bases the opinion in substantial part on statements reflecting confusion made to her by potential targets of those assertions. In that case, presenting the statements in support of the opinion would not be presenting them for the truth of what they asserted.

But in the current case, Longoni relied critically on the truth of Rast's statements, and his opinion would have no use at all if those statements were not true. Accordingly, presenting the statements in support of Longoni's opinions was presenting them in support of the truth of what they asserted.

These principles should be clear. They were adopted by a majority of the members of this Court in *Williams*, 567 U.S. at 106 (Thomas, J., concurring in the judgment) ("There is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and

disclosing that statement for its truth."); *id.*at 126 (Kagan, J., dissenting) (" when a witness . . . repeats an out-of-court statement as the basis for a conclusion, . . . the statement's utility is then dependent on its truth"); *see also, e.g., Stuart v. Alabama*, 139 S.Ct. 36, 37 (2018) (Gorsuch, J., dissenting from denial of *certiorari*) (endorsing the argument of Justice Kagan quoted above); *People v. Sanchez*, 374 P.3d 320, 333 (Cal. 2016) ("there is no denying that such facts are being considered by the expert, and offered to the jury, as true"); *People v. Goldstein*, 843 N.E.2d 727, 732-33 (N.Y. 2005) ("The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context."); DAVID H. KAYE et al., THE NEW WIGMORE, A TREATISE ON EVIDENCE: EXPERT EVIDENCE (3d ed. 2021), at 271 ("The factually implausible, formal claim that experts' basis testimony is being introduced only to help in the evaluation of the expert's conclusions, but not for its truth, ought not permit an end-run around a constitutional prohibition."). But because a differently constituted majority held against the invocation of the Confrontation Clause in *Williams*, the matter has been left in confusion. The Court should clarify the matter now.

II. LONGONI'S OPINIONS WERE NOT INDEPENDENT IN ANY CONSTITUTIONALLY MEANINGFUL SENSE.

The prosecutor was careful to ask repeatedly for Longoni's "independent opinion" as to the composition

of the substances at issue, Pet. App. 42a, 46a, 47a, 49a, and the Colorado Court of Appeals emphasized this factor. Pet. App. At 5a, 11a**.** But the term was meaningless in this context.

The structure of the problem is as follows: An out-of-court analyst (such as Rast) asserts factual predicate **F** and draws from that conclusion **C**. An in-court expert (such as Longoni) assumes predicate **F** on the basis of the analyst's assertion and from that predicate also draws conclusion **C**. If one is really confident that the in-court expert has given no weight to the reasoning that led the out-of-court analyst to infer **C** from **F**, then one might perhaps say that the expert's opinion is independent of the analyst's *opinion*. But that is not significant: It is clear that the expert's opinion is critically *dependent* on the analyst's *factual* statement of predicate **F**. And that is the situation here: Longoni repeatedly testified that he was relying on statements by Rast. Pet. App. at 39a, 40a, 41a, 42a, 46a, 48a, 49a.

The point is particularly salient here, because the principal input leading to Longoni's conclusion that the tested items contained illicit substances was Rast's factual statements, not Longoni's assessment of those statements. That is, *if* one accepted those statements as true, then little analysis would be necessary to conclude that the items contained the substances identified by both Rast and Longoni.

Consider, for example, Item #26. Rast's notes, on which Longoni relied, report it contained a little more than 2 kg. of plant material in a brown paper bag and

that she performed two tests, microscopic examination and the Duquenois-Levine test. As to the microscopic examination, she reports "Cystolithic hairs" and "Clothing hairs." *Amicus* – who has no expertise in forensic science – has been able to confirm after a few minutes of rudimentary online research that each of these indicate, even if not to a certainty, the presence of marijuana. SUZANNE BELL, OXFORD DICTIONARY OF FORENSIC SCIENCE, *cystolithic hair*, https://tinyurl.com/35jj8uu3 (2013); Houston Forensic Science Center, *Seized Drugs: Training Guide for Marihuana* 14 (2018), https://tinyurl.com/2cnhfzmf ("conical hairs . . . more commonly referred to as clothing hairs"). Not surprisingly, after noting these results, Rast added "+MJ."

As to the Duquenois-Levine test, Rast's notes read in their entirety:

Blank run – ok Purple

Notes: +MJ resin

The notation on the blank run indicates a control. Pet. App. at 42a. Similarly brief internet research has indicated that, while the test can yield false postives, purple indicates the presence of tetrahydrocannabinol (THC), the critical ingredient in marijuana. *E.g.*, Alexander D. Jacob & Robert Steiner, *Detection of the Duquenois-Levine chromophore in a marijuana sample*, 239 FORENSIC SCI. INT'L 1, 1 (2014).

In short, the talk of Longoni offering an "independent opinion" was a charade. Rast's factual assertions provided the essential basis for Longoni's conclusions. Indeed, though this is not necessary to

recognize a Confrontation Clause violation, those conclusions followed rather simply from Rast's assertions. She could not have made those assertions accurately without considerable training and expertise. Virtually none was necessary for Longoni to draw his conclusions.

III. IT DOES NOT MATTER THAT RAST'S WRITTEN STATEMENTS WERE NOT FORMALLY INTRODUCED INTO EVIDENCE.

Rast's statements were not formally introduced into evidence, but this fact does not preclude application of the Confrontation Clause. The question is whether the substance of her statements was communicated to the jury, and in this case that was unquestionably true: Longoni, by making explicit his reliance on Rast's notes, communicated that she performed certain tests, identified by Longoni, and that the results were such as to support his conclusion as to the composition of the items in question.

As *Douglas v. Alabama*, 380 U.S. 415 (1965), makes clear, formal admission is not necessary for the Confrontation Clause to be invoked. In *Douglas*, the prosecutor, purportedly to refresh the memory of an alleged confederate of the accused, questioned him on the basis of a document that was assertedly his confession. The document was never offered into evidence, but that did not matter. This Court, in holding that the procedure had "plainly" violated the accused's confrontation right, noted that under the circumstances "the jury might improperly infer both that the statement had been made and that it was true." *Id.* at 419. And more recently, in *Davis v.*

Washington, 547 U.S. 813, 826 (2006), the Court asserted, "[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition."

That applicability of the Confrontation Clause does not depend on formal introduction of a tangible manifestation of the statement in question is made obvious by considering oral statements that have not been recorded. By definition, no tangible manifestation of such a statement exists. Accordingly, the prosecution must present an in-court witness to testify to the substance of the statement. But if the witness who does so is not the person who made the statement, there is a potential Confrontation Clause problem.

It is well established that a verbatim repetition of the statement, or even an attempt to quote it, is not necessary for the Confrontation Clause to come into play. In *Idaho v. Wright*, 497 U.S. 805 (1990), for example, the in-court witness reported conversation from notes that were "not detailed," 497 U.S. at 811. *See, e.g., Ocampo v. Vail*, 649 F.3d 1098, 1108 (9th Cir. 2011) (even before *Crawford*, Supreme Court case law clearly established that out-of-court statements "trigger[] the protections of the Confrontation Clause, even if the in-court testimony described rather than quoted the out-of-court statements"; citing *Wright*); *State v. Swaney*, 787 N.W.2d 541, 554 (Minn. 2010) (holding that trial court "violates the Confrontation Clause when it admits testimony that inescapably implies a nontestifying witness's testimonial hearsay statement," even though the in-court witness does not

"expressly state" the out-of-court testimonial statement).

Indeed, a rule that made the Clause inapplicable unless the exact statement were formally presented to the trier of fact would make no sense and would render the Clause a virtual nullity: A prosecutor could avoid the Clause simply by having the in-court witness offer a paraphrase or summary of the statement, or for that matter any other testimony from which the substance of the statement might be inferred. (And with respect to oral statements, in most situations, a paraphrase or summary is all that would be possible, because the in-court witness is not able to quote an earlier testimonial statement exactly.)

In *United States v. Meises*, 645 F.3d 5 (1st Cir. 2011), for example, the prosecutor, recognizing that statements made by a cooperating arrestee to law enforcement agents were testimonial, did not ask a testifying agent what the arrestee said; instead, he secured the agent's testimony that after the interview "the targets of [the] investigation change[d]" and that the accused was taken into federal detention. The Court of Appeals for the First Circuit saw through this blatant ruse:

> "It makes no difference that the government took care not to introduce [the out-of-court witness's] 'actual statements.' . . . [A]ny other conclusion would permit the government to evade the limitations of the Sixth Amendment . . . by weaving an unavailable declarant's statements into another witness's testimony by implication."

Id. at 12-13; *accord*, *e.g.*, *United States v. Reyes*, 18 F.3d 65, 69 (2d Cir. 1994) ("although the jury was not told exactly what words [the out-of-court declarants] had spoken, [the in-court witness's] testimony clearly conveyed the substance of what they had said"); *Young v. United States*, 63 A.3d 1033, 1044 (D.C. 2013) (holding it immaterial "whether the statement is quoted verbatim or conveyed only in substance [or] whether it is relayed explicitly or merely implied").

The substance of Rast's statements – that they provided the basis on which Longoni offered his conclusions as to the substance of the items in question – was clearly conveyed to the jury. That was sufficient (assuming, of course, that they were presented for the truth of what they asserted and that they were testimonial in nature) to make them subject to the Confrontation Clause.

IV. FEDERAL RULE OF EVIDENCE 703 AND ITS STATE COUNTERPARTS DO NOT TRUMP THE CONSTITUTION.

Federal Rule of Evidence 703, which has been copied by most of the states, was a useful innovation in evidence law. Suppose, for example, that in a medical malpractice case a physician is prepared to offer an opinion about the plaintiff's condition. That opinion may be based on lab tests, of a type on which the physician relies in making life-or-death diagnoses in her ordinary practice. Accordingly, the rulemakers, focusing on reliability considerations, concluded that evidentiary rules should not be more restrictive. Rule 703, as amended, provides that if the expert's opinion

is based on the type of facts or data on which "experts in the particular field would reasonably rely . . . in forming an opinion on the subject," then the opinion may be admitted even though the facts or data would otherwise be inadmissible. Moreover, in some circumstances the Rule allows the proponent of the expert's opinion to introduce those otherwise inadmissible facts or data themselves, in support of the opinion; the Rule was amended in 2000 to limit the circumstances in which the proponent may do that, but it is still permissible "if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect."[3]

Thus, Rule 703 amounts in essence to a hearsay exception, allowing some out-of-court statements to be admitted in effect for the truth of what they assert. And so, *if the Confrontation Clause did not exist*, Rule 703 and its state counterparts (including Arizona Rule of Evidence 703, which is identical to the Federal Rule) would offer a path for testimony like Longoni's to be presented to the jury. *If* the prosecution satisfied the court that experts like Longoni reasonably rely on statements like Rast's in forming opinions, and *if* the court determined that the probative value of those

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[3] The 2000 amendment was plainly prompted by unease with some uses of Rule 703 to secure admission of out-of-court statements. *Amicus* believes that this unease arose from an inchoate sense that some such uses effectively allowed witnesses to testify out of court. But the amendment was not tailored to this confrontation concern; instead, it was based on the type of balancing of probative value and prejudice that has traditionally been thought to underlie most hearsay exceptions.

statements in helping the jury evaluate Longoni's opinion substantially outweighed their prejudicial effect, then the substance of the statements could be presented to the jury.

But the Confrontation Clause does exist, and obviously Rule 703 cannot trump it. Petitioner and *amicus* argue that Rast's statements were testimonial and effectively presented to the jury for the truth of what they asserted.[4] Given these propositions, the Confrontation Clause was violated, and Rule 703 cannot change that.

Of course, Rule 703 could be significant in determining the bounds of the Confrontation Clause if it reflected deep and longstanding practices or understandings. But it does not. On the contrary, it is an innovation of the late 20th century, and its creators recognized at the time of its creation that it was a departure from traditional principles. *See* FRIEDMAN & DEAHL, FEDERAL RULES OF EVIDENCE, *supra*, at 703 (Reporter's Comment on first draft: "a substantial departure from existing practice in most jurisdictions"); Pet. Br. at 29-31.

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[4] *Amicus* believes that there would be a Confrontation Clause violation in this case even if Longoni made no mention of Rast and simply stated an opinion as to the content of the questioned materials; he would still be acting as a conduit for Rast's assertions, effectively repackaging them into his own opinion. But there is no need to reach that issue, because Longoni did make clear that his conclusions were based on Rast's findings.

V. THE STATEMENTS IN THIS CASE WERE CLEARLY TESTIMONIAL.

The Arizona Court of Appeals did not doubt that the statements at issue in this case were testimonial, but it is important to recognize why. Like the certificates in *Melendez-Diaz v. Massachusetts*, the statements here were "made under circumstances which would lead an objective observer to realize that the statement would be available for use at a later trial." 557 U.S. at 311, quoting *Crawford*, 541 U.S. at 52.[5] If Rast's notes and reports were acceptable as evidence, then we have created a system in which a person can knowingly create evidence that will be used in a prosecution – that is, testify against an accused – without ever taking an oath, confronting the accused, or submitting to cross-examination.

The *Williams* plurality suggested that only a statement directed at a "targeted individual" could be testimonial. 567 U.S. at 84 (opinion of Alito, J.), but five justices rejected that proposition. *Id.* at 114-15 (Thomas, J., concurring in the judgment), 135-36 (Kagan, J., dissenting). But because a different majority held that the Confrontation Clause did not apply in *Williams*, it would be useful –

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[5] *Amicus* believes that the reasonable *expectation* of a person in the position of the maker of the statement, rather than any perception of the primary purpose for which the statement was made, should be the determining factor. *See* Richard D. Friedman, *Grappling with the Meaning of "Testimonial"*, 71 BROOK. L. REV. 241, 253-59 (2005), but the Court need not address that issue here.

notwithstanding that Rast's statements indisputably were targeted against the Petitioner – to make clear that the Confrontation Clause does not incorporate a "targeted individual" test.[6]

Melendez-Diaz was explicit that to be testimonial a statement need not be accusatory; a statement does not fall out of the protection of the Confrontation Clause because it is "inculpatory only when taken together with other evidence linking [the accused to the crime charged." 557 U.S. at 313. If a statement is testimonial, the maker becomes a witness against the accused within the meaning of the Clause when the statement is used against him, "proving one fact necessary for his conviction." *Id.*

To place any statement not directed at a targeted individual outside the Confrontation Clause would open enormous gaps in it. For example, a statement describing a crime scene, or even one describing the crime itself but failing to provide specific information concerning the identity of the perpetrator, would fall outside the scope of the Clause. And that would mean that, so far as the Constitution is concerned, a prosecutor could provide second- or third-hand

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[6] Ironically, the lab report at issue in *Williams* itself *was* directed at a targeted individual. There are multiple ways of identifying an individual. One can, for example, name him, or point to him, or pick him out of a photo array. In *Williams*, the lab report identified the person with a given DNA profile, which presumably no other person in the history of the world has shared, as the source of the crime-scene sample. *See Williams*, 567 U.S. at 58 ("a DNA profile is evidence that tends to exculpate all but one of the more than 7 billion people in the world today").

accounts of such matters. That cannot be the law, and it never has been.

Some opinions have spoken of "formality" as a component in determining whether a statement should be deemed testimonial. *E.g., Williams*, 567 U.S. at 114 (Thomas, J., concurring in the judgment). *Amicus* believes that such a locution is potentially misleading, and that it is better to speak of "solemnity," as the Court has also done. *Ohio v. Clark*, 576 U.S.237, 252 (2015); *see id.* at 255 (Thomas, J., concurring) (arguing that the test should be whether the statements in question " bear sufficient indicia of solemnity to qualify as testimonial"); *Williams*, 567 U.S. at 118 (Thomas, J., concurring in the judgment) Confrontation Clause should be limited to "a narrow class of statements bearing indicia of solemnity"). Solemnity connotes that the maker of the statement understands the potential gravity of its consequences – that is, that it might be used in a prosecution. If a statement meets that criterion, it should be deemed testimonial even if its nature and the manner in which it was given might lead to its being deemed informal.

Thus, no matter how informal Rast's notes might be considered, they were written in anticipation of prosecutorial use, and so are testimonial. Certain formalities – the oath, subjection to adverse examination, presence at trial or another formal proceeding – are measures of what makes testimony *acceptable*. They are not measures of what makes the statement testimonial in the first place. Friedman, *Grappling with the Meaning of "Testimonial"*, *supra*,

71 BROOK. L. REV. at 266-69 (arguing that "the absence of formalities does not render a statement non-testimonial; rather, the absence of the most important formalities may make unacceptable as evidence a statement that is testimonial in nature" and that "[t]he presence of formalities can reinforce" a determination that a statement is testimonial "but they are not necessary to it," *id.* at 269).

VI. HERE, IN CONTRAST TO *WILLIAMS V. ILLINOIS*, A "COLD HIT" CASE, THE VALUE OF THE STATEMENTS AT ISSUE DEPENDED CRITICALLY ON THE CREDIBILITY OF THEIR MAKER.

This case is very different from *Williams v. Illinois*. Here, the lab was presented with materials and asked to determine whether they were illicit substances. It was apparent from the start what answer would assist the prosecution. If Rast was dishonest, it would have been perfectly feasible for her, as numerous other lab analysts have done before, to create a statement that would achieve that end. (It is notable that Rast's departure from the laboratory has not been explained, and the prosecution made no apparent attempt to secure her presence at trial.) Moreover, the key questions addressed, whether illicit substances were present, were binary, yes or no, and so it is easy to imagine how unintentional errors might have led to affirmative results. Thus, the lab report here has significant probative value only if one puts weight on

Rast's ability to perceive the facts and inclination to report them.

Williams stands in stark contrast. There, the lab was presented with a sample taken from the crime scene and asked to determine the DNA profile of the semen found in it. No particular individual was suspected. And yet, the lab turned out a profile that matched that of Williams, who lived in proximity to the crime and whom other evidence, developed after investigation, linked to the crime. *Williams*, 567 U.S. at 59-60 (opinion of Alito, J.) (identifications made by complainant). The possibility of this result having been reached accidentally was, as the plurality emphasized repeatedly, "beyond fanciful." *Williams,* 567 U.S. at 86 (opinion of Alito, J.); *see also id.* at 74 ("there is simply no plausible explanation for how Cellmark could have produced a DNA profile that matched Williams' if Cellmark had tested any sample other than the one taken from the victim"), 75 ("the fact that the Cellmark profile matched Williams—the very man whom the victim identified in a lineup and at trial as her attacker—was itself striking confirmation that the sample that Cellmark tested was the sample taken from the victim's vaginal swabs"), 76 (similar), 76-77 (asking "how could shoddy or dishonest work in the Cellmark lab[9] have resulted in the production of a DNA profile that just so happened to match petitioner's?" and concluding that the trier of fact could "infer that the odds of any of this were exceedingly low"). Even a dishonest lab analyst, eager to frame *somebody* and with access to the data base, would not have known what profile to assert if

he or she wanted to point to a suspect plausibly linked to the crime.

Accordingly, the lab report in *Williams* had significant probative value even without putting any weight on the credibility of the analyst who prepared it.[7] *Amici* believes that if lab reports in *Williams*-like situations are to be admitted, the jury should be instructed not to rely on the credibility of the lab or its absent analyst, and only on what would be a remarkable coincidence if the accused was not the source of the DNA sample in question. But such

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[7] An analogy might help to make the point. Suppose the prosecution wants to prove that a child was in the accused's home on a particular occasion, it being clear that the child was not there at any other time. Suppose further that the child described a place that closely matched the accused's home but that was so unusual in its conjunction of features that it appears virtually certain that no other home in the vicinity that is like it. This evidence might have significant probative value even without relying on the child's truth-telling ability. Indeed, it might be that the child made no assertion at all, merely uttering the description; a trier of fact might conclude that it is extremely unlikely that she would have made such an utterance without having been in the room. The argument made here is stated more fully in Richard D. Friedman, *Confrontation and Forensic Laboratory Reports, Round Four*, 45 TEXAS TECH L. REV. 51, 74-77 (2012); *see also* Richard D. Friedman, *Route Analysis of Credibility and Hearsay*, 96 YALE L.J. 667, 681-85 (1987).

reasoning would be completely unavailing to the prosecution in a case like the present one.

VII. APPLYING THE CONFRONTATION RIGHT IN CASES LIKE THIS WILL NOT CREATE A SIGNIFICANT BURDEN ON PROSECUTION.

If the Confrontation Clause applies, then the witness must testify live at trial, whatever the cost, or the prosecution must forgo use of evidence from her. But the Court need not be concerned that confirming that the confrontation right applies to lab analysts in the position of Rast will result in a significant burden for prosecutorial authorities. The fact is that, even if we restrict attention to the small percentage of criminal cases that go to trial, and to the smaller subset in which lab results are presented, there is no parade of live lab witnesses. In many such cases, no lab witnesses testify live, and more than one witness for any given lab test is rather rare. A study supporting these conclusions is reported at Richard D. Friedman, *Is there a multi-witness problem with respect to forensic lab tests?*, Confrontation Blog, https://tinyurl.com/5avv3zzf (Dec. 7, 2010).

Some basic factors explain this phenomenon. First, defendants very often have no interest in having a lab witness testify live, and so they are happy to consent to presentation of a lab report. That was true in almost exactly half of the drug cases involving lab evidence in the study cited above.

Second, not every lab employee who has anything to do with a test is a witness subject to the Confrontation Clause; it is only those who make testimonial statements that the prosecution chooses

to present at trial who are. *See Melendez-Diaz*, 557 U.S. at 311 n.1 ("It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live.").

Third, most lab tests, like the ones involved in this case, are performed by only one analyst. Even DNA tests, which are far less frequently needed than drug or blood-alcohol tests, can be performed by a single analyst. *See United States v. Katso*, 74 M.J. 273, 276 (USCAAF 2015), *cert. denied*, 578 U.S. 905 (2016) (describing procedures of United States Army Criminal Investigation Laboratory, in which one case examiner performs all steps of DNA test, from breaking seal on evidence to writing report). (And even if the lab is not integrated, there is not a parade of lab witnesses; in the rape cases involving DNA evidence in the study cited above, there was an average of 1.24 live lab witnesses per trial, usually one and hardly ever more than two.)

In view of the life-altering consequences that their evidence can have for an accused, it is not asking too much that occasionally a lab analyst leave her desk to present that evidence face to face with the accused, under oath and subject to cross-examination. (And it bears note than in this case, the prosecution chose to present the testimony of an active lab analyst rather than of one who was no longer with the lab.) As the Petitioner notes, Brief at 42-43, governmental authorities have numerous ways of reducing whatever burden the Confrontation Clause imposes on them – including retesting by another analyst (which would have been very easy in this case; simple notice-and-demand statutes, which were explicitly approved by

Melendez-Diaz, 557 U.S. at 326-27; requests for continuance; and depositions.

VIII. THE DEFENSE DOES NOT BEAR THE BURDEN OF PRODUCING PROSECUTION WITNESSES.

The Arizona Court of Appeals suggested that Petitioner could have called Rast as a witness. Even if that is true, it is constitutionally immaterial.

Melendez-Diaz made clear that the State may not present an out-of-court testimonial statement and leave it to the accused to bring the witness to court. 557 U.S. at 324-25. The confrontation right is a passive one, "to *be confronted with*" adverse witnesses; an accused has no burden to produce prosecution witnesses. It is the prosecution, which wants to use evidence from the witness, rather than the accused, that bears the risk that the witness's live testimony cannot be secured.

Even if the witness is readily available, and even assuming state law provided that the accused could treat her as hostile and so ask leading questions, the difference is crucial. After direct examination of a prosecution witness, cross-examination is the norm; it follows immediately, does not raise high expectations, and can be conducted carefully so as to pose little risk. But if the prosecution is able to introduce an out-of-court statement, by calling the declarant to the stand the accused would give greater emphasis to the statement and raise expectations that the examination would be dramatically effective. And so it hardly ever happens. *See, e.g., New York Life Ins.*

Co. v. Taylor, 147 F.2d 297, 305 (D.C. Cir. 1944) (Thurman Arnold, A.J.) ("Only a lawyer without trial experience would suggest that the limited right to impeach one's own witness is the equivalent of that right to immediate cross-examination which has always been regarded as the greatest safeguard of American trial procedure."). The matter is discussed more fully in the brief filed by *amicus* as counsel for Petitioners in *Briscoe v. Virginia*, No. 07-11191, especially at pp. 13-31.

CONCLUSION

For the foregoing reasons, the judgement of the Arizona Court of Appeals should be reversed.

Respectfully submitted,

RICHARD D. FRIEDMAN
Counsel of Record
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 647-1078
rdfrdman@umich.edu

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