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 Arizona, Division One

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether an expert witness's testimony violated the Confrontation Clause when he reasonably relied, in part, on the notes of a former colleague from within the same crime lab to reach an independent opinion; the non-testifying expert's opinion and work-product were not admitted into evidence; and the testifying expert was subject to cross-examination.

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INTRODUCTION

Although this Court's decision in *Crawford* transformed Confrontation Clause jurisprudence, it left at least one fundamental principle untouched—the Confrontation Clause does not apply to statements admitted for purposes other than proving the truth of the matter asserted.

Arizona Rule of Evidence 703, like its federal counterpart, permits an expert to (1) base an independent opinion on out-of-court facts; and (2) disclose those facts to the jury for the limited purpose of explaining the basis for the expert's opinion. When disclosed, any such statements are not admitted for the truth of the matter asserted, and jury instructions to that effect are given upon request.

In this case, forensic scientist Greggory Longoni provided testimony that required him to apply his expertise. He provided independent opinions about whether certain substances were illicit drugs, and in doing so disclosed some of the facts underlying his opinions. Those opinions were based on facts from two sources: (1) lab notes of Elizabeth Rast, a former colleague who tested the substances; and (2) graphs reflecting machine-generated raw data that resulted from Rast's testing.

Contrary to Smith's assertions, no statement from Rast's lab notes was used to prove the truth of the matter asserted. And the only opinion offered as substantive evidence was Longoni's. On these facts, no Confrontation Clause violation occurred.

What is more, Rast's notes were not testimonial. They contain accounts of the tests she performed and

the phenomena she observed (e.g. that the result of a chemical color test was "purple" and that she saw "cystolith hairs" and "clothing hairs" during a microscopic examination). Nothing indicates that these technical notes—which are full of shorthand and jargon—were intended to substitute for live testimony. Nor do they bear any indicia of solemnity.

The bottom line is that Longoni was not a mere conduit for Rast's opinion. In arguing otherwise, Smith conflates Rast's report with her notes, and similarly conflates test results (e.g. "purple" or a graph) with ultimate opinions (e.g. "the substance contains marijuana"). The Confrontation Clause does not prohibit an expert from relying on out-of-court facts or revealing them for a limited purpose. Smith's new rule would reimagine and vastly expand the reach of the Confrontation Clause, requiring testimony from a parade of analysts in countless individual cases.

The Confrontation Clause does not require that result. This Court should affirm.

STATEMENT

A jury convicted Petitioner Jason Smith of possessing marijuana for sale and possessing a dangerous drug (methamphetamine), a narcotic drug (cannabis wax), and drug paraphernalia. Pet. App. 3a-6a. He was sentenced to four years' imprisonment, the Arizona Court of Appeals affirmed his convictions and sentences, and the Arizona Supreme Court denied review. *Id.* at 1a, 16a, 18a-20a.

1. *The offenses*. In December 2019, police executed a search warrant at Smith's father's property. *Id.* at

3a. As officers approached a shed, they smelled an "overwhelming odor of fresh marijuana and burnt marijuana." *Id.* After officers knocked twice, Smith answered the door, but then failed to comply with officers' commands and had to be forcibly removed from the shed. *Id.* at 3a-4a.

Officers found evidence that Smith was living in the shed. *Id.* They also "found six pounds of marijuana on a 'drying shelf' in the ceiling, ten grams of marijuana in a dish, marijuana in various jars, marijuana and a meth pipe on the couch, marijuana in a baggie near a stereo, a marijuana flower, marijuana on a bench, marijuana and a joint located on a plate, two scales and cannabis wax near the bed, methamphetamine inside a jacket on the couch, and cannabis wax inside the refrigerator." *Id.* at 4a.

Officers assigned each item of contraband an evidence number, photographed and weighed each item, and bagged each item separately. J.A. 72. After the bags were sealed, they were marked with the relevant item number, case number, sealing date, and who sealed them. *Id.* at 47-48, 73. All items were then stored securely until they were submitted for laboratory testing. *Id.* at 77.

2. *Forensic science evidence.* Arizona Department of Public Safety ("DPS") lab forensic scientist Elizabeth Rast tested the drugs. Pet. App. 41a. During her testing, Rast generated ten pages of notes and, ultimately, a signed two-page report. *See id.* at 85a-107a. The unsigned notes were typed on a "Worksheet" and are filled with shorthand and technical jargon. *See, e.g.*, *id.* at 88a ("hs/marked cpb ctg plant material repack - LB"), 106a-107a

(information about reagents like "2% Na2CO3" and "FastBlue B"). Rast's gas chromatograph mass spectrometer (GC-MS) testing of items also generated graphs. *See id.* at 108a-126a.

Before trial, Rast left DPS. *Id.* at 45a. Accordingly, three weeks before trial, the State disclosed that forensic scientist Greggory Longoni would testify as an expert instead of Rast. *Id.* at 26a. The State also disclosed that Longoni would "provide an independent opinion on the drug testing performed by Elizabeth Rast," that "Rast [would] not be called," and that Longoni was "expected to have the same conclusion."[1] *Id.*

Smith raised no concern about Rast's absence or Longoni's potential testimony before trial or at the outset of Longoni's testimony. Longoni testified about his own qualifications in forensic science, including his education and his employment with the DPS lab since 2012. *Id.* at 29a. He testified that the DPS lab is an accredited laboratory and that all forensic scientists receive the "same type of training," which he then described. *Id.* at 29a-31a, 41a.

Longoni further testified that in his role as a forensic scientist, he works on "10 to 15 different types of analyses a day." *Id.* at 31a. He described the standard procedures for the intake of suspected drugs at the lab. *Id.* at 32a. He described the processes for weighing, presumptive tests, and confirmatory tests, which are "standard across the crime labs in Arizona."

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[1] Although Longoni worked at a different location of the DPS lab, he testified that the relevant policies and procedures were consistent across all DPS lab locations. Pet. App. 29a, 33a, 35a, 38a, 51a.

Id. at 33a-34a. He also detailed how the specific tests performed on particular suspected drugs are "consistent across all Arizona crime labs." *Id.* at 34a-38a.

As for the testing done in Smith's case, Longoni testified that he had reviewed the testing request form and Rast's notes, which contained intake information, instruments and chemicals used, testing methods, and test results.[2] *Id.* at 39a. Longoni then testified about the testing of four items, numbered 20A (methamphetamine), 20B (methamphetamine), 26 (marijuana), and 28 (cannabis wax). All four items were admitted as physical exhibits at trial—numbered as Exhibits 1-3, with items 20A and 20B combined in one exhibit. *See* Resp. Br. in Opp. App. 7-10 (photographs of Item 26); J.A. 18-24 (photographs of Items 20, 26, and 28), 73-76 (admitting exhibits); Pet App. 46a ("Item 20 was actually two items, 20A and 20B").

Without objection, Longoni testified that his review of the records indicated that (1) the lab followed standard intake processes for each item; (2) Rast performed a microscopic examination and chemical color test—which he had already testified were standard for suspected marijuana—on Item 26; and (3) consistent with standard practice, Rast ran a "blank" to confirm there has been no contamination. Pet. App. 36a, 40a, 42a.

When the prosecutor asked Longoni his opinion about the identity of the first item, Smith's counsel

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[2] This brief uses the term "results" to refer to GC-MS graphs and the color that resulted from chemical color testing, not any conclusions or opinions reached based on those results.

requested a sidebar, where he asked for (1) "leeway on cross-examination" to explore Longoni's lack of participation in the testing, and (2) permission to voir dire Longoni to determine whether he could truly offer an independent opinion. *Id.* at 42-43a ("If he knows he can't offer an opinion independently, he should say so. If [] I'm wrong, he'll tell me I'm wrong.").

During the subsequent voir dire, Smith's counsel elicited from Longoni that he formed an opinion "[b]ased on the notes that [Rast] took and the scientific analysis and the analytical protocols that we follow[.]" *Id.* at 44a. Longoni made clear that he did not test any of the items or discuss the testing with Rast. *Id.* at 44a-45a. At the conclusion of voir dire, the trial court overruled Smith's objection to Longoni's testimony. *Id.* at 45a.

When direct examination resumed, Longoni reiterated that he was "not testifying as to [Rast's] report," but rather based on his review of her notes. *Id.* at 46a. He then testified to his "independent opinion" that Item 26 contained a "usable quantity of marijuana." *Id.* That opinion was based not on Rast's conclusion, but rather on "what was done, [his] knowledge and training as a forensic scientist, [his] knowledge and experience with DPS's policies, practices, procedures, [his] knowledge of chemistry, the lab notes, the intake records, the chemicals used, [and] the tests done." *Id.*

Longoni's testimony about Items 20 and 28 was similar. As to the testing of all three items, his review of the records indicated that standard DPS policy and procedures were followed. *Id.* at 40a, 46a-48a. He testified that "the records" indicated that Rast

performed chemical color tests and GC-MS tests on Items 20 and 28 and ran blanks for each item. *Id.* at 46a-49a. Longoni further testified that he reviewed the resulting GC-MS graphs and that based on his review of those graphs and other materials, his independent opinion was that the items contained usable quantities of methamphetamine and cannabis, respectively. *Id.* at 47a-49a.

As to each of the drugs, Longoni said nothing about what result Rast had observed or what she had concluded. Instead, he testified to his own opinion based on the observations reflected in her notes and resulting graphs. *Id.* at 46a-49a. Although Longoni consulted Rast's notes while testifying, neither Rast's report nor her notes were admitted into evidence.

On cross-examination, Smith's counsel elicited that the DPS lab had received the items on February 1, 2021. *Id.* at 49a-50a. He also elicited that Longoni testifies approximately 8-12 times each year and that retesting of the items would have taken between two and three hours. *Id.* at 53a-54a. Other cross-examination questions were related to Smith's mere-presence defense. *See id.* at 50a-52a.

After Longoni's testimony, the State rested and Smith moved for judgment of acquittal, arguing in part that "with regard to the lab expert, it's really not independent if it's not independent," but conceding that "it probably goes to the weight of the evidence, and we have a lot to say about that to the jury." *Id.* at 55a. The court denied Smith's motion, which Smith subsequently renewed after a lunch break. *Id.* at 57a-59a. In this renewed motion, he cited this Court's decision in *Bullcoming* and—for the first time—

mentioned the Confrontation Clause. *Id.* The court again denied the motion, finding that Longoni "testified of his own opinion as to what the nature of the substances was[.]" *Id.* at 62a. The defense rested without calling any witnesses. J.A. 86.

3. *Conviction, sentencing, and appeal.* The jury convicted Smith of possessing marijuana for sale and possessing a dangerous drug, a narcotic drug, and drug paraphernalia. Pet. App. 4a-6a. Smith's subsequent motion for new trial, which again objected to Longoni's testimony, was denied. R.O.A. 72, 77. The court sentenced Smith to concurrent, mitigated sentences, the longest of which was four years' imprisonment. Pet. App. 17a-20a.

On direct appeal, Smith argued that Longoni's testimony violated the Confrontation Clause. *Id.* at 3a. The Arizona Court of Appeals disagreed, noting that the case was largely resolved by its prior decision in *State ex rel. Montgomery v. Karp*, 336 P.3d 753 (Ariz. Ct. App. 2014). Pet. App. 10a.

Karp "concluded that an expert may offer an independent opinion 'when the basis of the independent opinion [is] forensic reports prepared by a non-testifying expert, if the testifying expert reasonably relied on these facts and data to reach the conclusions,' and the testifying expert does not serve as a 'mere conduit' for the non-testifying expert's opinions." Pet. App. 11a (quoting *Karp*, 336 P.3d at 755, 757-58 ¶¶ 1, 12-13, 17-18). Citing the Arizona Supreme Court's decision in *State v. Joseph*, 283 P.3d 27 (Ariz. 2012), *Karp* noted that under Arizona law, "the underlying facts are used only to show the basis of that opinion and not to prove their truth." 336 P.3d

at 757 ¶ 12. "[B]ecause the notes and reports are used for the sole purpose of explaining the basis on which [the testifying expert's] opinion rests, they fall outside the scope of the Confrontation Clause." *Id.* ¶ 15.

In Smith's case, the court found that Longoni did not act as a "mere conduit" because he "presented his independent expert opinions permissibly based on his review of Rast's work, and he was subject to Smith's full cross-examination." Pet. App. 11a.

The Arizona Supreme Court denied review. *Id.* at 1a.

SUMMARY OF ARGUMENT

I. The Confrontation Clause is not violated when an expert like Longoni provides an independent opinion based on out-of-court facts that are disclosed to the jury for the limited purpose of explaining the basis for the expert's opinion.

A. Three times since *Crawford*, this Court has considered Confrontation Clause challenges to forensic science evidence. Those cases make clear that the Confrontation Clause is violated when an out-of-court opinion is admitted as substantive evidence and the expert offering that opinion is not made available for cross-examination. That problem, however, is not present here.

Instead, Longoni testified to his own independent opinion and was available for cross-examination. Permitting independent opinion testimony like Longoni's is consistent with historical practice—courts have long recognized the unique nature of expert testimony. Since the 18th century, courts have permitted experts to proffer opinions rooted in their

expertise and based on out-of-court facts. Although the form in which such evidence is presented has changed some over the years, one fundamental thing has not changed—no otherwise inadmissible out-of-court fact is admitted as substantive evidence. And this Court has been clear—before *Crawford* and in *Crawford* itself—that the Confrontation Clause does not apply unless statements are admitted substantively.

B. Longoni's testimony here was rooted in his expertise. Although he disclosed facts from Rast's notes, he disclosed none of Rast's test results or conclusions. And under Arizona law, those underlying facts could not be admitted as substantive evidence. The limited purpose of the evidence could have been made clearer at Smith's trial, but Smith never asked for a limiting instruction.

C. Looking beyond the facts of this case, Smith's proposed new rule would have profound and wide-ranging implications. It would seemingly prohibit experts from basing their testimony on any testimonial statement beyond their personal knowledge. That would deepen laboratory backlogs and result in windfalls to defendants when analysts become unavailable before trial and critical evidence cannot be retested (as is often the case).

II. Even if this Court were to find—contrary to state law—that Rast's statements were admitted as substantive evidence, the Confrontation Clause was not violated because the statements are nontestimonial.

A. Statements are testimonial if their primary purpose was to create "an out-of-court substitute for

trial testimony." That is the test this Court now applies, not other iterations of the "primary purpose" test that either preceded the current formulation or were not holdings of this Court. The statements here—Rast's shorthand- and jargon-filled notes (not her report)—were not designed to substitute for trial testimony.

B. The statements in Rast's notes are likewise nontestimonial under the view long-expressed by Justice Thomas, which requires sufficient "indicia of solemnity." Rast's notes—recorded on a "Worksheet" and not sworn, certified, signed, or even initialed—do not come close to meeting that test.

ARGUMENT

I. The Confrontation Clause does not prohibit experts like Longoni from relying on out-of-court facts and revealing the facts on which they relied.

The Confrontation Clause provides 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. The Clause generally bars the admission of "testimonial statements of a witness" who does not appear at trial, unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine. *See Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). Statements are testimonial if they are "procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Michigan v. Bryant*, 562 U.S. 344, 359 (2011).

Since *Crawford*, this Court has thrice considered how the Confrontation Clause applies to forensic expert testimony, and the Court has prohibited expert opinion evidence only when the opining expert does not testify. *Compare Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 307 (2009) (no live testimony), *and Bullcoming v. New Mexico*, 564 U.S. 647, 662 (2011) (surrogate witness with no independent opinion), *with Williams v. Illinois*, 567 U.S. 50, 70 (2012) (plurality opinion) (testifying expert based independent opinion in part on work done by an outside laboratory).[3]

Here, the only opinion admitted was Longoni's. In providing an independent opinion, he disclosed some of the facts on which he relied—e.g., which tests Rast conducted. But Arizona law allows these statements to be admitted only for the limited purpose of helping the jury evaluate Longoni's opinion. And Rast's opinions were not introduced at all.

Longoni's testimony—which was consistent with historical and modern practices governing expert testimony—complied with the Confrontation Clause. To conclude otherwise would unjustifiably widen the Confrontation Clause's reach.

A. This Court has not departed—and should not now depart—from the longstanding practice of allowing expert opinion testimony that relies on out-of-court facts.

Expert testimony is unique. While fact-witness testimony is rooted in what the witness saw, heard, or otherwise directly experienced, expert-witness

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[3] All citations to *Williams* herein are to the plurality opinion, unless otherwise noted.

testimony is rooted in specialized knowledge from which the witness forms opinions. Those opinions are often inextricably linked to out-of-court facts or data on which experts in a particular field rely, whether in the form of studies, medical records, or foundational work done by colleagues (or any number of other forms). Thus, consistent with longstanding practice, modern rules permit such reliance and provide safeguards to (among other things) ensure otherwise inadmissible facts are not admitted as substantive evidence.

1. This Court has barred expert opinion evidence under the Confrontation Clause only when the defendant is unable to confront the opining expert.

In the immediate aftermath of *Crawford*, this Court held that a defendant must be allowed to confront a forensic science expert who offers opinion evidence against the defendant. But the Court has been careful not to stray beyond that basic rule.

In *Melendez-Diaz*, the trial court admitted into evidence "certificates of analysis"—sworn before a notary public and created for the "sole purpose" of being admitted at trial—to prove that relevant substances contained cocaine. 557 U.S. at 308-11. The Court held that the Confrontation Clause was violated by admitting those certificates with no accompanying witness testimony. *Id.*

In *Bullcoming*, the trial court again admitted a document created for admission at trial and containing a certified expert opinion. 564 U.S. at 665. This Court again found a Confrontation Clause violation, holding that testimony from a forensic

scientist who had no "independent opinion" about the test results did not solve the Confrontation Clause problem. *Id.* at 662. *Bullcoming* thus was "not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence." *Id.* at 673 (Sotomayor, J., concurring in part).

The following year, this Court confronted whether "*Crawford* bar[s] an expert from expressing an opinion based on facts about a case that have been made known to the expert but about which the expert is not competent to testify." *Williams*, 567 U.S. at 56. Five justices found no constitutional violation, albeit for differing reasons.

A four-justice plurality held that this form of expert testimony did not violate the Confrontation Clause because no out-of-court statement was admitted to prove the truth of the matter asserted. *Id.* at 57-58. Under Illinois law, the plurality noted, it was clear that any out-of-court statements were "not admissible for the purpose of proving the truth of the matter asserted," but rather "solely for the purpose of explaining the assumptions on which [the testifying expert's] opinion rests." *Id.* at 58, 72.

The plurality also concluded that any out-of-court statements were nontestimonial, in large part because those statements were not "prepared for the primary purpose of accusing a targeted individual." *Id.* at 84.

Justice Thomas concurred in the judgment, finding that the out-of-court statements were nontestimonial

because they lacked sufficient "indicia of solemnity." *Id.* at 111-13.

The end result is that this Court has never held that the Confrontation Clause prohibits independent opinion testimony based in part on out-of-court statements.

2. Expert opinion testimony naturally relies on out-of-court facts and data.

Expert witnesses as we conceive of them today emerged as "a distinct legal entity" in the 18th century. *See* Tal Golan, *Revisiting the History of Scientific Expert Testimony*, 73 Brook. L. Rev. 879, 885-87 (2008) (detailing early uses of expert testimony by parties in "the new adversarial courtroom" of the 18th century). Since then, courts have recognized the unique nature of expert testimony—including the need for experts to rely on out-of-court facts in forming their opinions. *See* United States Br. 13-16.

"Early common law implicitly recognized that expert testimony—by its very nature—often would be based on information made known to the expert by others." *Id.* at 13-14 (citing King's Bench cases from 1782, 1790, and 1807). American courts, too, have long "allowed experts to opine based on otherwise inadmissible hearsay of the sort normally relied on by experts in that field, reasoning that objections to the testimony went to weight, rather than admissibility." *Id.* at 15-16 (collecting nineteenth-century cases); *see also Town of Rochester v. Town of Chester*, 3 N.H. 349, 365 (1826) (permitting expert opinion testimony "[o]n questions of science and trade, or others of the same kind").

Of course, an expert's lack of personal knowledge about particular facts in a case may be probed on cross-examination. And absent independent proof of the underlying facts, the "opinion might not go for much; but still it [i]s admissible evidence." *Beckwith v. Sydebotham*, (1807) 170 Eng. Rep. 897 (K.B.).

For many years, this type of testimony relied heavily on the use of hypothetical questions. *Williams*, 567 U.S. at 68-69. The use of hypothetical questions, however, was "nearly universally recognized as a practical disaster." D. Kaye et al., *The New Wigmore: A Treatise on Evidence: Expert Evidence* § 4.4, at 189 (3d ed. 2022) ("*New Wigmore*") (adding that "Learned Hand called it 'the most horrific and grotesque wen upon the fair face of justice'"). Thus, "[m]odern rules of evidence continue to permit experts to express opinions based on facts about which they lack personal knowledge, but these rules dispense with the need for hypothetical questions." *Williams*, 567 U.S. at 69.

Consistent with this history, current rules permit experts to rely on facts outside their personal knowledge only when "experts in the particular field would reasonably rely on those kinds of facts or data." Fed. R. Evid. 703.[4] "[A] physician," for instance, might rely on "statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays." Fed. R. Evid. 703 Advisory Committee's Note (1972 Proposed Rules).

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[4] Arizona Rules of Evidence 702-705 are materially identical to the federal rules. Accordingly, this brief will cite the federal rules except when explicitly discussing Arizona law.

Some materials on which experts rely will rarely be shown or otherwise relayed to the jurors, who would not even understand materials like the GC-MS graphs in this case. *See* United States Br. 22 (similarly noting that a physician may rely on MRI results that the jury would not understand). Reference to out-of-court statements is sometimes permitted, however, because "[i]rrespective of the truth of the reports, a consideration of the reports can assist the trier to assess the caliber of the expert's reasoning." 1 Kenneth S. Broun et al., *McCormick on Evidence* § 14 (8th ed. 2020). The modern rule "bring[s] the judicial practice into line with the practice of the experts themselves when not in court." Fed. R. Evid. 703 Advisory Committee's Note (1972 Proposed Rules).

Expert reliance on out-of-court facts or data "does not constitute admissible evidence of this underlying information." *Williams*, 567 U.S. at 69.

3. The Confrontation Clause does not bar admission of statements not admitted for the truth of the matter asserted.

As the history above demonstrates, while modern rules dispense with the need for hypothetical questions and permit testifying experts to more directly disclose the basis for their opinions, the rules remain identical to historical practice in a critical way—no otherwise inadmissible out-of-court statement may be admitted as substantive evidence.

1. Before *Crawford*, in *Tennessee v. Street*, 471 U.S. 409 (1985), this Court confronted the limited use of an accomplice's out-of-court confession—powerful evidence with great potential to prejudice the

defendant if accepted by the jury as substantive evidence. *Id.* at 413. This Court nonetheless affirmed that the Confrontation Clause does not apply to statements admitted for purposes other than the truth of the matter asserted. *Id.*; *accord United States v. Inadi*, 475 U.S. 387, 398 n.11 (1986) (reaffirming the same principle); *United States v. Bostick*, 791 F.3d 127, 147 (D.C. Cir. 2015) (Kavanaugh, J.) (holding that admission of statements from confidential informant to provide context for another person's statements did not violate Confrontation Clause because the statements were not offered for the truth of the matter asserted).

In reaching that result, *Street* held "that the trial judge's instructions were the appropriate way to limit the jury's use of that evidence in a manner consistent with the Confrontation Clause." 471 U.S. at 417. And while *Crawford* "depart[ed] from prior Confrontation Clause precedent in other respects," it "took pains to reaffirm the proposition that the Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'" *Williams*, 567 U.S. at 70 (quoting *Crawford*, 541 U.S. at 59-60 n.9).

2. The Confrontation Clause thus has no application to the facts underlying an expert opinion because those facts are not admissible for substantive purposes. *See* Fed. R. Evid. 703. The underlying facts are "admissible only for the purpose of assisting the jury in evaluating [the] expert's opinion." Fed. R. Evid. 703 Advisory Committee's Note (2000 Amendments).

Modern rules provide other safeguards, too. In Arizona, as in the federal courts, expert testimony is subject to the gatekeeping required by *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993). *State v. Bernstein*, 349 P.3d 200, 227 ¶ 1 (Ariz. 2015) ("Arizona Rule of Evidence 702 requires a trial court to act as a gatekeeper[.]").

A testifying expert may rely on (and disclose) only facts of a type that "experts in the particular field would reasonably rely on." Fed. R. Evid. 703. The expert "may state an opinion—and give the reasons for it—without first testifying to the underlying facts." Fed. R. Evid. 705. And the underlying facts may be disclosed to the jury "only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." Fed. R. Evid. 703.

That final balancing test does not, as Smith suggests, "implicitly recognize[]" that any statement disclosed to the jury is "likely to be offered for its truth." Pet. Br. 31. In explaining why the balancing test was added to the federal rule, the Advisory Committee Notes to the 2000 Amendments reiterated that "the underlying information must not be used for substantive purposes." Thus, "the trial judge must give a limiting instruction upon request." *Id.*

B. Longoni's independent opinion testimony reasonably relied on Rast's statements.

Longoni's testimony in this case was entirely consistent with these background principles. He testified only to his own independent opinion and, under Arizona law, no statement of Rast's was admitted as substantive evidence. Although a

limiting instruction could have made that clearer, Smith never asked for one.

1. Under Arizona law, no out-of-court statement was introduced for the truth of the matter asserted.

Arizona law—consistent with the Federal regime cited above—makes clear that out-of-court facts or data underlying an expert's opinion "are not admitted as substantive evidence, but only for purposes of showing the basis of the expert's opinion." *State v. Lundstrom*, 776 P.2d 1067, 1072 (Ariz. 1989); *see also* Ariz. R. Evid. 703.

1. Of course, a testifying expert "may not act as a conduit for another non-testifying expert's opinion." *State v. Smith*, 159 P.3d 531, 538 ¶ 23 (Ariz. 2007) (cleaned up). And if facts relied on by the expert "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." Ariz. R. Evid. 703.

In testifying about his own independent opinions here, Longoni disclosed some of the out-of-court facts on which he relied. These included Rast's statements about which tests she performed and that she followed DPS lab policies and procedures, including by running "blanks" before tests. *See* Pet. App. 40a-42a, 46a-48a. The results of the tests—such as the resulting color of the chemical color tests and the graphs produced by GC-MS testing—were not disclosed to the jury. Nor were Rast's conclusions.

As the Arizona Court of Appeals concluded, any out-of-court statements that were disclosed were used only to show the basis of Longoni's expert testimony. *See id.* at 10a-12a. Indeed, under Arizona law—just as under Illinois law in *Williams*—that was the only basis on which they could be disclosed. *See* Ariz. R. Evid. 703; *Williams*, 567 U.S. at 72 ("[U]nder Illinois law (like federal law) it is clear that the putatively offending phrase in Lambatos' testimony was not admissible for the purpose of proving the truth of the matter asserted[.]").

2. To be sure, the *Williams* plurality suggested that "if such evidence is disclosed, the trial judges may and, under most circumstances, must, instruct the jury that out-of-court statements cannot be accepted for their truth." 567 U.S. at 81. But Smith never requested any such instruction in this case.

If Smith had requested a limiting instruction, the court should have given one. And when limiting instructions are given, this Court presumes that jurors will follow them. *Samia v. United States*, 599 U.S. 635, 646 (2023). That presumption applies even when the evidence at issue carries far greater risk of prejudice than the out-of-court statements at issue here, including when that evidence is a codefendant's confession. *Id.* at 646-47 (noting also that the presumption applies to the admission of a defendant's prior conviction for a limited purpose and to the impeachment use of "statements elicited from a defendant in violation of *Miranda*").

But even in the unique context of codefendants' confessions, many courts have held that the failure to give a limiting instruction is not error absent a

request. *See, e.g.*, *United States v. Sherrill*, 972 F.3d 752, 763 n.1 (6th Cir. 2020) (concluding that "a district court's failure to give a limiting instruction is not problematic if the defendant did not request such an instruction" (cleaned up)); *United States v. Clark*, 989 F.2d 1490, 1500 (7th Cir. 1993) ("[N]othing in [*Richardson v. Marsh*, 481 U.S. 200 (1987)] suggests that the trial judge must give a limiting instruction when the defendant does not ask for it."); *Barth v. Commonwealth*, 80 S.W.3d 390, 396-97 (Ky. 2001) (same).

More generally, in Arizona and elsewhere, the burden is on the parties to request limiting instructions. *See* Ariz. R. Evid. 105 (providing for limiting instructions "on timely request"); *accord* Fed. R. Evid. 105 (same). Thus, it has "long been the rule" in Arizona that "if a defendant wants an instruction limiting the effect of certain evidence he must request it, and the failure of the trial court to so instruct is not error in the absence of a request therefor." *State v. Taylor*, 622 P.2d 474, 477 (Ariz. 1980); *accord State v. Allen*, 513 P.3d 282, 305 ¶ 33 (Ariz. 2022) (citing *Taylor* and holding same).

Even though the trial court "might properly have given a limiting instruction regarding the use of [Longoni]'s testimony, [Smith] did not request one and the failure to give it was not fundamental error" under Arizona law. *Joseph*, 283 P.3d at 29 ¶ 13; *see also* Fed. R. Evid. 703 Advisory Committee's Note (2000 Amendments) ("When 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 . . . the trial judge must give a limiting instruction *upon request*[.]") (emphasis added).

2. Longoni testified to no opinion other than his own.

Everyone agrees that an expert like Longoni cannot serve as a "mere conduit" for the conclusions of a testing analyst like Rast. *See* Pet. App. 11a (citing *Karp*, 336 P.3d at 757 ¶ 12). This was the focus of Smith's objections below. *See* Pet. App. 42a-43a ("If he knows he can't offer an opinion independently, he should say so. If [] I'm wrong, he'll tell me I'm wrong."), 55a ("[I]t's really not independent if it's not independent[.]"). But Longoni did not serve as a "mere conduit" here.

Longoni is a trained forensic scientist who was employed for more than a decade by the same crime lab as Rast. *Id.* at 29a-40a; *compare Williams*, 567 U.S. at 124-25 (Kagan, J., dissenting) (noting that the testifying analyst "had no knowledge at all of [the outside lab]'s operations"). His testimony was grounded in his experience at the DPS lab and his familiarity with its policies and procedures. *See* Pet. App. 29a-49a.

Perhaps most importantly, Longoni explicitly testified that his opinion was not based on Rast's report or ultimate conclusions, *id.* at 46a, and nothing in the record refutes that testimony. The pretrial notice of his testimony made clear that he would "provide an independent opinion on the drug testing performed by Elizabeth Rast." *Id.* at 26a. During his testimony, he was asked if he could "form an independent opinion" and responded affirmatively. *Id.* at 46a, 49a. And after hearing the testimony, the trial court concluded that Longoni "testified of his own opinion as to what the nature of the substances was[.]" *Id.* at 62a. That opinion was based on the testing

performed (as reflected in the lab notes and resulting graphs) and his training and experience. *Id.* at 46a, 49a. Nowhere did he indicate that he relied on Rast's conclusions in forming his own.

In forming his conclusions, Longoni of course relied on Rast's statements about which tests she performed and the results of those tests. But the test results are distinct from the conclusions Longoni reached about the nature of the substances tested. *See supra* at 5 n.2. And Longoni's need to refer to Rast's notes to refresh his recollection on the details of the tests (as often happens when the testing expert testifies, given that few individual tests are memorable) does not somehow transform Longoni into a "mere conduit" for Rast's conclusions.

For items 20A, 20B, and 28, for example, the GC-MS tests resulted in graphs that Longoni relied on in concluding that the items tested contained methamphetamine and cannabis, respectively. Pet. App. 46a-49a. As for Item 26, Rast performed a "microscopic examination and the chemical color test," per standard procedure at the DPS lab. *Id.* at 34a-35a, 42a. Her notes indicate that she observed the presence of "[c]ystolith hairs" and "[c]lothing hairs" during the microscopic examination. *Id.* at 94a. For the chemical color test, her notes say that the result was "[p]urple." *Id.* at 94a. Without revealing those test results to the jury, Longoni used them to conclude that the item was marijuana. *Id.* at 46a.

Rast's statements that (1) she observed the presence of cystolith hairs and clothing hairs, and (2) the result of the chemical color test was purple, are meaningful (or, perhaps, decipherable) only to those

with relevant expertise. Longoni's expertise was thus a necessary underpinning of his testimony and there is no evidence that he simply parroted Rast's ultimate opinions. To the contrary, Longoni's testimony here mirrored what one would expect to hear from a supervisor or formal reviewer of Rast's work. *See State v. Roach*, 95 A.3d 683, 695 (N.J. 2014) (holding that a supervisor who does not observe testing, but independently reviews the analyst's work, may testify to his own independent opinion, where that opinion relies on "the supervisor's knowledge of the laboratory's testing procedures and protocols generally and his training and knowledge of the particular testing involved").

Meanwhile, Rast's observations were not "conclusions" in the sense of being interpretations or opinions, as Smith suggests. Pet. Br. 25. Nor does it matter that they were "reflected only in her written statements." *Id.* Whether Longoni could "reasonably rely on" the test results does not turn on whether he saw the word "purple" in Rast's notes or the color purple in a photograph of the sample, as Smith seems to suggest. Ariz. R. Evid. 703.[5]

Longoni's testimony thus helps illustrate how far off Smith is in suggesting that "[t]he not-for-the-truth rationale, taken to its logical conclusion, would permit the admission of . . . the laboratory reports in

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[5] Regarding any reference in closing argument to Rast's out-of-court statements, *see* Pet. Br. 10 (citing Pet. App. 83a-84a), this Court has rejected the notion that statements are necessarily admitted for their truth and thus in violation of the Confrontation Clause merely because those statements are "referenced by . . . witnesses and mentioned in closing argument." *Woods v. Etherton*, 578 U.S. 113, 117-18 (2016).

Melendez-Diaz and *Bullcoming*." Pet. Br. 36. An expert may rely on out-of-court statements only "[i]f experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject[.]" Ariz. R. Evid. 703. And the State is not suggesting that a supposedly independent expert could reasonably rely on a "bare-bones statement that 'the substance was found to contain: Cocaine.'" *Melendez-Diaz*, 557 U.S. at 320 (noting that petitioner did not even know what tests had been performed at the time of trial). Smith seems to ignore critical differences between a witness who parrots another's opinions and a witness who uses another analyst's testing and data to form his own opinions. This Court should not make the same mistake.

3. Any alleged lack of foundation or relevance plays no role in the Confrontation Clause analysis.

To establish the relevance of expert opinion testimony like Longoni's, the State must introduce direct or circumstantial evidence linking the facts relied on by the expert to the evidence in the case. But here—as in *Williams*—the question before this Court "is whether petitioner's Sixth Amendment confrontation right was violated, not whether the State offered sufficient foundational evidence to support the admission of [the testifying expert's] opinion[.]" *Williams*, 567 U.S. at 75.

1. Smith argues that basis testimony like Longoni's is "necessarily offered for its truth" because the underlying basis evidence is "useful only insofar as it is true." Pet. Br. 14. The usefulness of testimony, however, is an evidentiary question, not a constitutional one. *See* Fed. R. Evid. 401. Put

differently, the Confrontation Clause was directed at a particular "principal evil"—the "use of *ex parte* examinations as evidence against the accused"—not the admission of irrelevant evidence. *Crawford*, 541 U.S. at 50.

Of course, absent direct or circumstantial evidence linking the opinion to the underlying facts, the "opinion might not go for much; but still it [i]s admissible evidence." *Beckwith*, 170 Eng. Rep. at 897. Those questions of relevance and proof are questions of state law. *Williams*, 567 U.S. at 75. "Thus, even if the record did not contain any evidence that could rationally support a finding that [Rast tested the drugs in this case], that would not establish a Confrontation Clause violation." *Id.* at 76.

2. But here—as in *Williams*—the State presented "independent circumstantial evidence" from which the jury could conclude that the lab tested the relevant samples. *Id.* at 79. That included "conventional chain-of-custody evidence," *id.* at 76, including testimony about the collection and storage of each item, J.A. 47-48, 72-73; crime-scene photographs of each item (with the associated item number) where it was found, Exhs. 4-92, J.A. 10-17 (exhibit list); and testimony that the items were sent to the lab for testing, J.A. 77. Longoni testified that the materials he reviewed were associated with case number 2019TF000383, the same case number testified to by the case agent and written on the physical exhibits in the courtroom at trial. Pet. App. 49a; J.A. 74-76; Exhs. 1-3.[6] Those physical exhibits—

[6] To provide the Court a convenient method of reviewing the physical exhibits, the State has filed a letter pursuant to Rule

Items 20(A and B), 26, and 28—likewise bore the initials "ER" with a date that was just a few days after the date the items were received by the lab.[7]

Thus, although it is of no significance to the Confrontation Clause question, the State presented ample evidence from which the jury could fairly conclude that the drugs in this case were the ones tested by the lab.

3. Of course, the State's case may be strongest if it presents direct evidence of the underlying facts through the testimony of an analyst who participated in the testing. But it can likewise choose to present circumstantial evidence on this front. *Williams*, 567 U.S. at 75; *accord Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (noting that this Court has "never questioned the sufficiency of circumstantial evidence in support of a criminal conviction"). "[G]aps in the chain of custody normally go to the weight of the evidence rather than its admissibility." *Melendez-Diaz*, 557 U.S. at 311 n.1 (cleaned up).

No doubt, when the State does not present direct testimony from a testing analyst, skilled defense counsel may have an easier time casting doubt on the evidence's persuasiveness. Defense counsel in this case elicited testimony that Longoni never tested anything in the case, never spoke with Rast about the case, and never did "any quality assurance with Ms.

32.3 seeking to lodge photographs of the physical exhibits as non-record material.

[7] The date the lab received the items—February 1, 2021—was elicited by Smith on cross-examination. Pet. App. 50a.

Rast to confirm or corroborate her report." Pet. App. 45a.

He could have gone much further. He could have elicited testimony that there was no video, photographic, or other corroboration of some of Rast's observations. He could have even walked Longoni through a parade of potential malfeasance and incompetence that theoretically could have occurred without Longoni knowing about it, including manufacturing of results, working on multiple items at one time and thus risking contamination, failing to wear gloves, failing to follow any number of other procedures and best practices, and even the possibility that Rast could have outright lied in her notes.

As to each possibility, defense counsel could have made clear that Longoni would have been completely unaware if any of these unlikely possibilities had occurred. He likewise could have made clear that each possibility, if true, would cast significant doubt on the results upon which Longoni relied. All of this and more was fair game on cross-examination, but the Confrontation Clause does not prevent the State from taking that risk.

C. Smith urges an unwarranted sea change in Confrontation Clause jurisprudence.

At this point, it is helpful to take a step back. The problem here is not just that Smith mischaracterizes Longoni's testimony, that he conflates evidentiary and constitutional principles, or that he strains the text of the Confrontation Clause. More broadly, Smith urges this Court to dramatically expand the reach of the Confrontation Clause in not only the drug-testing context, but also many other contexts.

This Court has undoubtedly "interpreted the Confrontation Clause as prohibiting modern-day practices that are tantamount to the abuses that gave rise to the recognition of the confrontation right." *Williams*, 567 U.S. at 82. But "any further expansion would strain the constitutional text." *Id.* Smith's arguments here not only strain the text—they would create practical chaos and legal absurdity if adopted by this Court.

1. As the United States notes in its brief, Smith's new rule would unquestionably impact more than "substitute experts" and apply in contexts far beyond forensic testing of drug evidence. *See* United States Br. 25 (noting, for example, that "the radiologist who reads the X-ray shortly after it is taken is relying just as much on the X-ray technician as the radiologist who later reads the same X-ray to form an independent opinion and testify at trial"). "Once one abandons the traditional rule [that experts may rely on otherwise inadmissible out-of-court statements], there would seem often to be no logical stopping place between requiring the prosecution to call as a witness one of the laboratory experts who worked on the matter and requiring the prosecution to call all of the laboratory experts who did so." *Williams*, 567 U.S. at 89 (Breyer, J., concurring).

That may seem like little cause for concern here, where Rast performed the lion's share of the work at the lab. But even in the context of relatively straightforward drug testing, the analyst may not be "the same person who operated the GC-MS machine." United States Br. 26. Nor is it likely that the same person calibrated the machine.

More concerning are other contexts that would surely be affected by Smith's proposed outcome, including DNA testing where "twelve or more technicians could have been involved." *Williams*, 567 U.S. at 90 (Breyer, J., concurring); *see also id.* at 85 (citing labs that use 10-12 analysts in one case); United States Br. 29-30 (noting that different biologists at the FBI lab often perform each of five separate steps); *Williams*, 567 U.S. 50 (No. 10-8505), Amicus Br. of New York County District Attorney's Office and New York City Office of the Chief Medical Examiner ("NYC-DAO/NYC-OCME Br."), 2011 WL 5125054, at *8 (providing real-world example where 25 technicians were involved in the testing of four samples in one homicide case).

Were this Court to require the testimony of all (or many) of these analysts, the consequences would be dire. That new rule would slow productivity at labs that often are already backlogged. *See* Pet. App. 54a-55a (Longoni's testimony that the DPS lab had a "very large backlog," that he was "overworked," and that the lab changed its policies in 2019 to limit the number of analyses to reduce the lab's backlog). And the unavailability of any one testing analyst could result in a windfall to a defendant who committed a serious violent crime.

To adjust to that new world, labs might adjust their practices to involve fewer people in each test, potentially reducing reliability and efficiency. *See Commonwealth v. Yohe*, 79 A.3d 520, 542 (Pa. 2013) (observing that involving fewer individuals in each test "would likely have the undesired consequence of making errors more likely"). So too might prosecutors choose "to forgo DNA testing and rely instead on older

forms of evidence, such as eyewitness identification, that are less reliable." *Williams*, 567 U.S. at 58.

Of course, this Court has already made clear that "it is not the case [] that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." *Melendez-Diaz*, 557 U.S. at 311 n.1. But in urging this Court to adopt a new rule that would seemingly prohibit experts from revealing any basis for their opinion that is beyond their personal knowledge, Smith provides no limiting principle to accomplish the circumscribed result that *Melendez-Diaz* requires.

2. In urging this Court to believe that the practical effects of creating a new rule would be minimal, Smith makes much of the fact that Longoni could have retested the items here in less than three hours. Pet. Br. 3, 9, 15, 42. But this bare fact, when not viewed in context, is quite misleading.

To begin, any retesting that requires work from multiple analysts will multiply the loss in efficiency at the lab. And Smith's new rule would require analysts to retest evidence in more than just the cases in which they ultimately testify. Retesting would often be done, for example, in cases that eventually are resolved on the eve of trial or continued to a date on which the retesting analyst is unavailable (thus requiring yet more retesting). *See* RT 9/1/21 at 4-11 (colloquy on the morning of trial about accepting plea offer).

More importantly, retesting simply won't be an option in many contexts, including in cold cases.

"What is to happen if the medical examiner dies before trial? Is the Confrontation Clause effectively to function as a statute of limitations for murder?" *Williams*, 567 U.S. at 98 (Breyer, J., concurring) (cleaned up) (noting that "repetition of the autopsy may not be possible"). As prior amici in this Court have noted, "[t]his is not just a hypothetical matter." *Williams*, 567 U.S. 50 (No. 10-8505), Amicus Br. of National District Attorneys Association, et al., 2011 WL 5125056, at *31-32 (citing homicide cases in which the pathologist who performed the autopsy died or retired before trial).

Other examples abound. Critical DNA evidence often must be consumed during the original testing. *See* United States Br. 32. Fingerprints cannot be re-extracted. *Id.* The alcohol concentration in blood samples not only "degrades over time," *id.* at 31, it also changes when the sample is exposed to air by opening the vial in which it is contained. *See* Xiaoquin Shan, et al., *A Study of Blood Alcohol Stability in Forensic Antemortem Blood Samples*, 211 Forensic Sci. Int'l 47, 50 (2011).[8] And beyond the forensic science context, a radiologist cannot order a new x-ray well after healing has occurred.

Smith says his rule is applied already in some jurisdictions without incident, citing California and New York. *See* Pet. Br. 43-44. But as the United States notes, the picture in California and New York is more complicated than Smith suggests. *See* United States Br. 30 (citing cases from both jurisdictions in

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[8] https://www.sciencedirect.com/science/article/pii/S0379073811001940?casa_token=PNo2-mwccccAAAAA:uc_r85uMU9879n6MhjR10M-ya_sAi7xG-wpvJRZQRZ65B1Mi8ApiUEE4UBYRJSlsXfhQjzIPUQ

which experts testified "based on lab work completed by others"). New York, for example, has placed limits on its rule that are inconsistent with what Smith urges. *See People v. John*, 52 N.E.3d 1114, 1127 (N.Y. 2016) (holding (1) that a single analyst can testify without personal knowledge of each critical step, and (2) that "when the testing analysts are unavailable, a fully qualified OCME expert" could testify "after analyzing the necessary data").

Finally, this Court has previously speculated that the practical consequences of requiring more live testimony from experts will be modest because "[i]t is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis." *Melendez Diaz*, 557 U.S. at 328; *see also* National Association of Criminal Defense Lawyers, et al. Amicus Br. 13-14 (similarly arguing in this case that defendants will frequently stipulate because "forensic testing is neither regularly challenged nor a frequent focal point for the defense"). Even if that were true in *Melendez-Diaz*, Smith's new rule would reach much further, as detailed above, and be much less flexible, requiring the production not just of a qualified expert witness but of particular witnesses.

Especially if the testimony of multiple analysts is required, competent defense counsel will want to be sure all such analysts are available, even if counsel might stipulate to the admission of evidence in that eventuality. "The result would be that technicians would be paraded to court only to be sent back to the laboratory after defense counsel had counted heads." *Williams*, 567 U.S. 50 (No. 10-8505), NYC-DAO/NYC-OCME Br., 2011 WL 5125054, at *12. That is no small

burden in a state like Arizona—Longoni traveled approximately six hours round-trip to testify in this case. *See* Pet. App. 29a (testimony that Longoni works in Phoenix, which is approximately three hours from Yuma). And even under a notice-and-demand regime that required a defendant to assert his confrontation right before trial, surely a defendant could assert that right and then decide to stipulate once the analysts showed up at trial.

3. Any speculation that defense counsel would typically stipulate to the admission of evidence and obviate the need for analyst testimony is also in obvious tension with an argument that Smith advances at length—that defense counsel view cross-examination as essential to ferret out purportedly widespread problems in the field of forensic science. *See* Pet. Br. 36-42. On that front, Smith argues that the Confrontation Clause's "safeguards are especially needed" in the context of forensic evidence, citing instances in which malfeasance or mistakes have occurred at labs. *Id.*

To be sure, scientific evidence is not immune to error. But error in the most commonly used scientific disciplines is "vanishingly rare." *United States v. Herrera*, 704 F.3d 480, 485 (7th Cir. 2013) (noting rarity of error in DNA evidence, and similarly observing that "errors in fingerprint matching by expert examiners appear to be very rare"). And "the need for cross-examination is considerably diminished when the out-of-court statement was made by an accredited laboratory employee operating at a remove from the investigation in the ordinary course of professional work." *Williams*, 567 U.S. at 95 (Breyer, J., concurring).

Of course, problems sometimes occur at accredited labs, "[b]ut if accreditation did not prevent admission of faulty evidence in some of those cases, neither did cross-examination." *Id.* at 96 (Breyer, J., concurring). Most technicians "perform thousands of tests each year and have no memory of any one test." *Williams*, 567 U.S. 50 (No. 10-8505), NYC-DAO/NYC-OCME Br., 2011 WL 5125054, at *11. Often, "[i]f called to testify, a technician would be able to say 'this is what I routinely do on those weeks in which I am assigned this task,' and little more," mirroring Longoni's testimony about standard DPS lab practices. *Id.* Accordingly, cross-examination may not be nearly as useful in this context as it is in probing the veracity of conventional witness testimony.

The Massachusetts scandal involving analyst Annie Dookhan, one of the most frequently cited, provides a useful illustration. *See* Pet. Br. 39 (citing *Commonwealth v. Scott*, 5 N.E.3d 530, 536 (Mass. 2014)). "Unfortunately, the 'crucible of cross-examination' failed to stop Annie Dookhan," who testified "*approximately 150 times* in the three years before her arrest." Sean K. Driscoll, *I Messed Up Bad: Lessons on the Confrontation Clause From the Annie Dookhan Scandal*, 56 Ariz. L. Rev. 707, 709, 719 (2014). Dookhan's malfeasance was discovered internally by her lab. *Id.* at 717.

Indeed, most cases of forensic misconduct cited by Smith were not revealed through cross-examination. The misconduct of Marie Gordon was investigated by police after an anonymous tip. *See* Pet. Br. 39 (citing *City of Seattle v. Holifield*, 240 P.3d 1162, 1163 (Wash. 2010)); *see also* T. Johnson & D. Lathrop, *Allegations may cast cloud over DUI cases*, SEATTLE POST-

INTELLIGENCER (July 30, 2007).[9] Meanwhile, Michael Hoover's misconduct was discovered after a police investigation initiated at the request of Hoover's supervisor because co-workers reported concerns. *See* Pet. Br. 39 (citing *State v. Roche*, 59 P.3d 682, 690-91 (Wash. Ct. App. 2002), *as amended* (Dec. 4, 2002)); *Roche*, 59 P.3d at 686-87 (detailing how Hoover's misconduct was discovered). And Tammy Barette's misconduct was first discovered by a supervisor "during a routine technical review for quality control." S. Ketterer, *Houston crime lab fires investigator after alleged testing policy violation*, HOUSTON CHRON. (Oct. 26, 2018)[10] (cited at Pet. Br. 39-40). Kalmalkant Shah, too, was caught after internal observations indicated irregularities. Justin Zaremba, *Lab tech allegedly faked result in drug case; 7,827 criminal cases now in question*, NJ.com (Mar. 2, 2016)[11]; *see also* Pet. Br. 41 (citing Shah case).

Many cases cited by amici suffer from the same flaw. Sonja Farak was caught internally. *See* S. Musgrave, *The Chemists and the Cover-Up*, REASON (March 2019)[12]; *see also* National College for DUI Defense Amicus Br. 7-8 (citing Farak's case). So too was Joseph Graves, who stole drug evidence. *See* Innocence Network, et al. Amicus Br. 11 n.15 (citation

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[9] https://www.seattlepi.com/seattlenews/article/allegations-may-cast-cloud-over-dui-cases-1245161.php

[10] https://www.chron.com/news/houston-texas/houston/article/Houston-forensic-lab-fires-investigator-after-13338820.php

[11] https://www.nj.com/passaic-county/2016/03/state_police_lab_tech_allegedly_faked_results_in_p.html

[12] https://reason.com/2019/02/09/the-chemists-and-the-cover-up/

omitted). And Diana Morales, whose incompetence amici say "came to light **only** after [she] provided inconsistent in-court testimony," National College for DUI Defense Amicus Br. 7-8 (emphasis in original), actually provided those inconsistent statements *out-of-court*, to prosecutors who reported their concerns, and who were questioning her only because an internal audit had identified irregularities. *See* A. Ball & T. Plohetski, *Austin DNA lab leader's work triggered alarm in sex assault case*, AUSTIN AMERICAN-STATESMAN (Sep. 25, 2018)[13]; *see also* National College for DUI Defense Amicus Br. 20 (noting that problems in Illinois were identified by Illinois State Police lab audits, not cross-examination).

Thus, while these cases undoubtedly illustrate that forensic science evidence is not immune to manipulation and error, they simultaneously demonstrate that cross-examination's impact may be significantly more attenuated for forensic science witnesses than it is for the lay witnesses whose testimony lies at the heart of the Confrontation Clause. And "the remote potentiality of misconduct should not serve as a basis to permit every defendant in every case to engage in a proverbial fishing expedition, when it is not constitutionally mandated." *Yohe*, 79 A.3d at 542. "The Confrontation Clause is not designed, and does not serve, to detect error in scientific tests." *Melendez-Diaz*, 557 U.S. at 338 (Kennedy, J. dissenting).

That conclusion is supported by the fact that defendants rarely subpoena and call a testing analyst

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[13] https://www.statesman.com/story/news/2017/01/10/austin-dna-lab-leaders-work-triggered-alarm-in-sex-assault-case/10123558007/

like Rast. If defendants truly thought that cross-examination was likely to ferret out errors by forensic scientists, such subpoenas would be much more common. Their absence indicates that defendants like Smith are using the Confrontation Clause not like Sir Walter Raleigh would have—to confront an accuser who he believed might recant (or whose testimony might otherwise be materially undermined)—but to avoid conviction for reasons unrelated to the veracity of the charges against them.

II. The out-of-court statements that Longoni disclosed to the jury are not testimonial.[14]

Even if this Court were to find—contrary to state law—that Rast's statements were admitted for the truth of the matter asserted, the judgment below should be affirmed because those statements are not

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[14] Although Smith's formulation of the question presented simply assumes that the statements at issue are testimonial, he must demonstrate that the statements are testimonial to show a violation of the Confrontation Clause, as he impliedly acknowledges by arguing the issue in his merits brief. *See* Pet. Br. 18-23. Whether the statements here are testimonial was not a subject of focus in the state courts, where it was well-settled that there was no constitutional violation regardless. *See* Pet. App. 10a-12a. Smith exaggerates, though, in saying that the State "never suggested that the statements in Rast's notes and report were anything but testimonial." Pet. Br. 18. In its response to Smith's petition for review in the Arizona Supreme Court, for example, the State argued: "*Williams* supports the trial court's decision to admit Longoni's testimony because five of the nine justices ultimately concluded the defendant's confrontation rights were not violated when the testifying analyst relied on data by a third-party because the statement at issue was not testimonial." *State v. Smith*, No. 1 CA-CR 21-051 (Ariz. Ct. App. 2022), *review denied* Jan. 6, 2023 (No. CR-22-0202-PR), Response to Petition for Review at 14.

testimonial. The statements in Rast's notes—which were the only statements discussed by Longoni—are not testimonial under the primary purpose test articulated by this Court and also lack indicia of formality and solemnity.

A. The primary purpose of Rast's notes was not to serve as an "out-of-court substitute for trial testimony."

"[A] statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial." *Ohio v. Clark*, 576 U.S. 237, 245 (2015). To determine whether a statement is testimonial, the key question is whether the statement was "procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, 562 U.S. at 359; *accord Clark*, 576 U.S. at 245.

"Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Bryant*, 562 U.S. at 358.

1. After *Crawford*, this Court "labored to flesh out what it means for a statement to be 'testimonial.'" *Clark*, 576 U.S. at 244. "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Crawford*, 541 U.S. at 68. So too does the term cover a "battery affidavit," completed by a victim of domestic violence at the request of police after any emergency has dissipated. *Hammon v. Indiana*, 547 U.S. 813, 830 (2006). Consistent with the standard later articulated in *Bryant* and *Clark*, the *Hammon* Court reasoned that the statements in the affidavit there were "an

obvious substitute for live testimony" because they did "precisely what a witness does on direct examination." *Id.*

In *Melendez-Diaz*, this Court held that a "certificate"—"quite plainly" an affidavit, sworn before a notary public, and created for the "sole purpose" of being admitted at trial—is testimonial. 557 U.S. at 310. And in *Bullcoming*, this Court held that a forensic report "certifying" key facts and created to be admitted at trial is likewise testimonial. 564 U.S. at 664-65. In both *Melendez-Diaz* and *Bullcoming*, particular characteristics of the documents led to the conclusion that those documents had a "primary purpose of creating an out-of-court substitute for trial testimony." *Bullcoming*, 564 U.S. at 670 (Sotomayor, J., concurring in part) (quoting *Bryant*, 562 U.S. at 358).

Ignoring that test, Smith argues that statements are necessarily testimonial if they "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." Pet. Br. 19 (quoting *Melendez-Diaz*, 557 U.S. at 309-10).

The Court should reject Smith's attempt to replace the primary purpose test with this language from *Melendez-Diaz*. The language originated in an amicus brief in *Crawford*, and the Court in *Crawford* merely cited it as one of several "various formulations of the core class of 'testimonial' statements," not as a definitive test. 541 U.S. at 51-52 (cleaned up). Those "various formulations" varied widely and were not consistent with each other. *See id.* at 52 (noting that while different, the formulations "share a common

nucleus," and that "[r]egardless of the precise articulation, some statements qualify under any definition"). For example, they included Justice Thomas's much narrower list of "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *Id.* (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment)).

The formulation cited by Smith does not seem to have been applied broadly by this Court, if at all—the dying victim in *Bryant* surely would have expected that his statements "would be available for use at a later trial," *Crawford*, 541 U.S. at 51-52, even if they were not given for the "primary purpose of creating an out-of-court substitute for trial testimony," *Bryant*, 562 U.S. at 358. Recognizing the obvious tension, one treatise has observed that the formulation Smith cites here "no longer seems tenable in light of the 'primary purpose' inquiry, as it does not require the statement to have been elicited or made with any evidentiary *purpose*." *New Wigmore* § 5.3.2, at 257 n.32 (emphasis in original).

As for the primary purpose test, the Court articulated an early version of the test in *Davis v. Washington*, 547 U.S. 813, 822 (2006), stating that statements "are testimonial when the circumstances objectively indicate that there is no [] ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." As this Court explained a decade later in *Clark*, however,

that test has been further refined in the years since.[15] 576 U.S. at 244-45. After detailing the history of the test, *Clark* concluded that, "[i]n the end, the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to create an out-of-court substitute for trial testimony." *Id.* at 245 (cleaned up).

2. To apply that test here, it is first necessary to identify the out-of-court facts and data referenced in Longoni's testimony. They include:

- the identities of the employees responsible for the intake process (Pet. App. 40a);
- the types of tests performed on each item (*id.* at 41a-42a, 46a-48a); and
- that blanks were run before tests (*id.* at 42a, 47a).

All of this information was contained only in Rast's notes, not her report. *See id.* at 85a-105a. Longoni also testified that the notes indicated that Rast had followed the DPS lab's policies and procedures. *Id.* at 40a, 47a, 48a. Finally, Longoni testified that he reviewed the GC-MS graphs generated by the testing of Items 20A, 20B, and 28, and relied on them in coming to his independent conclusions.[16] *Id.* at 48a-

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[15] Indeed, *Davis*'s prior iteration of the primary purpose test failed to garner five votes in *Bullcoming*. *See* 564 U.S. at 658-59 n.6 (Ginsburg, J., opinion of the Court with respect to all but Part IV and footnote 6).

[16] The graphs were not shown to the jury and could not be testimonial in any event, as they are generated by a machine, which is "not a 'witness against' anyone." *United States v. Moon*,

49a. None of this information can be found in Rast's report. *See id.* at 85a-87a.[17]

Smith invites this Court to lump the notes and report together, often using the phrase "notes and report" as if the two are inseparable, *see, e.g.*, Pet. Br. 3, 7, 12, 13, 16, 24, 28, 36, except when he revealingly characterizes the notes as "typewritten" and the report as "formal" and "signed," *see id.* at 2. As that last characterization indicates, though, key differences exist between the documents.

More importantly, Smith is simply incorrect in suggesting that the report was the source of the out-of-court statements in Longoni's testimony. *See, e.g.*, *id.* at 35-36 (arguing that the State "had Longoni recount from Rast's notes and report that she had carried out specific tests," even though the specific tests appear nowhere in the report).

Longoni explicitly testified that he was "not testifying as to [Rast's] report" and was instead "testifying as to [his] review of lab notes." *Id.* at 46a. Moreover, although Longoni sometimes used the word "report" during his testimony, a close look at the record makes clear that he used the terms "notes" and "report" interchangeably to refer to the notes. Immediately before the first time Longoni asked to refer to the "report," the prosecutor handed Longoni

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512 F.3d 359, 361-62 (7th Cir. 2008); *accord United States v. Lamons*, 532 F.3d 1251, 1262-64 (11th Cir. 2008); *United States v. Washington*, 498 F.3d 225, 231-32 (4th Cir. 2007).

[17] Smith does not appear to identify any other purportedly testimonial statement that was revealed to the jury, other than his incorrect suggestion that Longoni necessarily revealed Rast's opinions during his testimony. *See, e.g.*, Pet. Br. 3.

"State's Exhibit 98," *id*. at 39a, marked on the Exhibit List as "Laboratory Notes," J.A. 17.

The information Longoni then provided after referring to what he sometimes called the "report" was contained only in the notes. *See* Pet. App. 39a (how Item 26 was tested), 40a (who was responsible for intake), 48a (how Item 28 was tested). This case thus differs materially from those that have analyzed the admission of or reference to final reports containing the testing analyst's opinions. *See, e.g.*, *United States v. Moore*, 651 F.3d 30, 71, 74 (D.C. Cir. 2011) (per curiam, joined in relevant part by Kavanaugh, J.) (finding Confrontation Clause violation where "approximately 30 autopsy reports" and 20 DEA lab reports from non-testifying analysts were admitted).

3. Rast's laboratory notes were not recorded for the "primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, 562 U.S. 358. They did not do "precisely what a witness does on direct examination." *Hammon*, 547 U.S. at 830. Nor were they "functionally identical to live, in-court testimony." *Melendez-Diaz*, 557 U.S. at 310.

Rather, the notes were created pursuant to a "standard practice" at the DPS lab of recording "what test was done, what items were used, [and] what instruments were used." Pet. App. 38a. That standard practice is codified in procedures. *See generally* Ariz. DPS Scientific Analysis Bureau, *SAB Quality Assurance Manual* (2022).[18] And there is no reason to believe that the practice is any different when, for example, the DPS lab tests items for a defendant requesting post-conviction results in an

[18] https://azdps.qualtraxcloud.com/showdocument.aspx?ID=2430

effort to be exonerated. *See generally State v. Gutierrez*, 278 P.3d 1276 (Ariz. 2012) (interpreting Ariz. Rev. Stat. § 13-4240, which permits defendants to seek post-conviction DNA testing); *id.*, Petition for Review, 2011 WL 6808195, at *7 (noting that the DPS lab performed the defendant-requested (and court-ordered) testing in *Gutierrez*); *see also* A.R.S. § 13-4241 (similarly permitting post-conviction, defendant-requested forensic testing, and requiring that it be done "by the department of public safety crime laboratory" in most cases).

Far from being a potential "out-of-court substitute for trial testimony," much of Rast's notes would be indecipherable to those who do not work in the field of forensic science. Two of the ten pages provide the samples' chain of custody within the lab, containing notes like "P&E Intake" and "3A – CS to be worked." Pet. App. 100a-105a. One page, titled "Laboratory Reagent and Balance List," lists some of the machinery used, as well as "prepared reagents" like "2% Na2CO3" and "purchased reagents" like "FastBlue B," along with the manufacturer of each purchased reagent and the lot number associated with each reagent. *Id.* at 106a-107a.

Regarding the tests that Rast performed, Item 20A provides a representative example of what is contained in the notes. Under "Examination," the notes contain two notations for "Marquis": "Blank run – ok" and "Orange-brown." *Id.* at 89a. Under "Sodium Nitroprusside" appear the notations "Blank run – ok" and "Blue." *Id.* at 90a. And under "GC-MS" appear the notations "Blank run – ok," "Ethyl Stearate," "CTS," "B/H ext:," "RRT = 0.344," and "+meth." *Id.*

Rast's lab notes thus reflect detailed and technical preparatory and foundational work. For good reason, courts often conclude that notes of this kind are nontestimonial. *See, e.g.*, *United States v. Katso*, 74 M.J. 273, 279-80 (C.A.A.F. 2015) (holding that the case file—including analyst's notes and computer-generated data—was nontestimonial even if report was testimonial); *Derr v. State*, 73 A.3d 254, 272 (Md. 2013) (concluding that serological exam results, which were contained in "notes from the bench work of the serological examiner," were nontestimonial); *People v. Dungo*, 286 P.3d 442, 449 (Cal. 2012) (concluding that a "pathologist's anatomical and physiological observations about the condition of the body" are "not testimonial in nature" because they "merely record objective facts [and] are less formal than statements setting forth a pathologist's expert conclusions").

The notes differ substantially from affidavits and certifications explicitly designed to be admitted at trial. *See Melendez-Diaz*, 557 U.S. at 310; *Bullcoming*, 564 U.S. at 664-65. Although the notes contain Rast's conclusion that certain controlled substances were present in each item, the details of the tests she performed—on which Longoni relied in reaching an independent conclusion—would mean nothing to a jury absent explanatory testimony from an expert. *Compare Melendez-Diaz*, 557 U.S. at 320 (noting that the affidavits at issue "contained only the bare-bones statement that 'the substance was found to contain: Cocaine,'" and that petitioner did not even know what tests were performed at the time of trial). Only someone with expertise in the field, like Longoni, could read these notes and form an *independent* opinion as to whether the substances were illicit.

B. Rast's notes lack indicia of formality and solemnity.

Under the Confrontation Clause, a defendant is entitled to confront those "who bear testimony," and "testimony" is "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Clark*, 576 U.S. at 243 (quoting *Crawford*, 541 U.S. at 50). Writing separately in prior cases, Justice Thomas has articulated a test that looks to whether statements "bear sufficient indicia of solemnity to qualify as testimonial." *Id.* at 254-55 (Thomas, J., concurring in the judgment) (citations omitted).

"[S]ufficient indicia of solemnity," *id.*, are not present here.[19] Rast's notes—completed on a "Worksheet" and full of abbreviations and technical jargon—were not sworn, certified, signed, or even initialed.

Again, the analysis should focus on Rast's notes, not her report. But even her report is missing many of the indicia of formality and solemnity present in *Melendez-Diaz* and *Bullcoming*. The notarized "certificates" in *Melendez-Diaz* were described by this Court as "quite plainly affidavits" because they were sworn. 557 U.S. at 310, 320. And "under Massachusetts law the *sole purpose* of the affidavits was to provide prima facie evidence of the composition, quality, and the net weight of the analyzed substance." *Id.* at 311 (cleaned up). Indeed, the "evidentiary purpose" of the affidavits was

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[19] In analyzing this question, it is the formality and solemnity of Rast's statements that ultimately matter, not any alleged "formal nature of the processes she purported to undertake." Pet. Br. 22.

"reprinted on the affidavits themselves." *Id.* While unsworn, the *Bullcoming* report similarly contained "certifications" of certain key facts and was created to be admitted as evidence at trial; the document itself cited the provisions of state law under which it could be admitted. 564 U.S. at 665.

By contrast here, as in *Williams*, Rast's report "certifies nothing." *Williams*, 567 U.S. at 112 (Thomas, J., concurring in the judgment); *see also Bullcoming*, 564 U.S. at 671 (Sotomayor, J., concurring in part) ("The formality derives from the fact that the analyst is asked to sign his name and 'certify' to both the result and the statements on the form."). Although Rast signed the report, which Smith heavily emphasizes (Pet. Br. 2, 5, 12, 22–23), her report was "neither a sworn nor a certified declaration of fact." *Williams*, 567 U.S. at 111 (Thomas, J., concurring in the judgment).

More importantly given that Rast's notes were the source of any out-of-court statements, the notes were not sworn, certified, or otherwise formalized in any way. Nor were they generated to replace live testimony in an attempt to evade confrontation. *Clark*, 576 U.S. at 255 (Thomas, J., concurring in the judgment). Indeed, the State initially listed Rast as a witness and called Longoni to testify only after Rast left DPS. Pet. App. 26a, 45a.

In his attempt to conjure solemnity, Smith emphasizes that Rast's notes were "typewritten" and "on DPS letterhead." Pet. Br. 4, 5. But the choice to use a computer and identifying letterhead do not make a document solemn. The "Worksheet" on which the notes were typed contains no signature or even

initials from Rast, let alone any certification. Pet. App. 88a-106a.

Smith also points out that Rast spoke to the prosecutor, Pet. Br. 21, but a single conversation to discuss which items to test (because not all of them needed to be tested and the lab's resources are limited) does not rise to the level of "formalized dialogue resembling custodial interrogation." *Williams*, 567 U.S. at 111 (Thomas, J., concurring in the judgment); *see* Pet. App. 99a (noting, for example, that Rast and the prosecutor discussed testing Item 28 because Item 27 had leaked).

Thus, contrary to Smith's assertions, Rast's notes (and report) lack the "indicia of solemnity" necessary to qualify as testimonial under Justice Thomas's test.

III. Any error was harmless.

Even if this Court finds error, it should remand for the state courts to consider whether any error was harmless beyond a reasonable doubt. *See Bullcoming*, 564 U.S. at 668 n.11 (expressing no view on harmlessness and remanding for state court consideration); *Melendez-Diaz*, 557 U.S. at 329 n.14 (same).

Even without Longoni's testimony, substantial evidence proved Smith possessed marijuana for sale. *See* Resp. Br. in Opp. at 9 (listing additional evidence, including the smell of fresh and burnt marijuana, the presence of marijuana and paraphernalia throughout the shed, and Smith's behavior); *see also Melendez-Diaz*, 557 U.S. at 329 n.14 (declining to adopt a rule that only an analyst's testimony suffices to prove whether a substance is as alleged).

As for the convictions for possessing methamphetamine and cannabis wax, any error there was likewise harmless so long as Longoni's ultimate opinions were properly admitted (even if this Court concludes that his reference to out-of-court facts and data on which he formed those opinions was error). And the possession of paraphernalia conviction was not directly predicated on forensic testing.

In any event, consistent with this Court's "general custom of allowing state courts initially to assess the effect of erroneously admitted evidence in light of substantive state criminal law," this Court should remand for harmless error analysis if it finds error. *Hemphill v. New York*, 595 U.S. 140, 155-56 n.5 (2022) (cleaned up).

CONCLUSION

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

December 13, 2023 Respectfully submitted,

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