NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GREGORY TAYLOR,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Confrontation Clause of the Sixth Amendment is satisfied when an expert witness provides opinion testimony that is based on data from laboratory tests performed by someone who is not testifying.[1]

[1] A very similar question is presented in Smith v. Arizona (S. Ct. No. 22-899), cert. granted, Sept. 29, 2023, argued Jan. 10, 2024.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Gregory Taylor, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The Sixth Circuit opinion is available electronically at United States v. Taylor, No. 23-5473, 2024 WL 278476 (6th Cir. Jan. 25, 2024). It is also submitted herewith in Appendix A.

JURISDICTION

On January 25, 2024, a three-judge panel in the Sixth Circuit Court of Appeals entered its opinion in United States v. Taylor, No. 23-5743, 2024 WL 278476 (6th Cir. Jan . 25, 2024). This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

STATUTES, ORDINANCES AND REGULATIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides, in relevant part, that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const., amend. VI.

STATEMENT OF THE CASE

This case is about whether an analyst uninvolved in the laboratory testing process has adequate information to form an independent opinion regarding laboratory test results, where the only basis for the opinion is a review of the paperwork prepared by the evidentiary analyst or generated by the laboratory's software system.

Petitioner was charged federally with distributing heroin and fentanyl after a college student died from an overdose. Prior to these charges, as part of the State's investigation, the medical examiner sent blood, vitreous fluid, urine, and liver tissue samples to National Medical Services Laboratory ("NMS Labs") for toxicology analysis. There, presumably following its chain of custody procedures as described by toxicologist, Doctor Michael Lamb, at trial, the samples were received in the receiving department.[2] According to Lamb, the samples would have been assigned an eight-digit work number, and a bar code would be affixed to them. Dr. Lamb explained what generally happens next at NMS Labs is an initial screening test to identify any controlled substances. Once a substance is presumptively identified, then more specific, confirmation testing is performed, which identifies the drug of interest and its quantity. This more specific testing is done through liquid chromatography mass spectrometry. This test allows the analyst to look at various analytes of interest, identify them on a molecular level, and provide the quantity present in the specimen.

Dr. Lamb has worked for NMS Labs for over a decade. He testified that his primary duties involve reviewing all of the analytical data, case history, and case work for an individual case, ensuring proper chain of custody is followed, and that standard operating procedures are

[2] To the extent that it may aid the Court in determining whether to grant certiorari review, Dr. Lamb's testimony is submitted herewith in Appendix B.

maintained throughout the analysis. Once the review of all of the data for a case is satisfied, he issues a report with the findings and signs it.

Dr. Lamb testified that in this case, he did not personally handle or test the specimens. Instead, he reviewed all the data to complete the results for his own final review of the case. That is, Dr. Lamb reviewed all the information handled by the lab's qualified analysts and then he generated a report.

Dr. Lamb testified that he had the knowledge and training to perform the tests done in the lab. But his job was to provide a high-level review to ensure that the testing of the samples was independently performed and conformed to NMS Labs' operating procedures.

The day before trial, the government submitted a motion in limine seeking to introduce Dr. Lamb's NMS Labs report. This motion was addressed on the first day of trial, where the defense objected to introduction of the report. Relying upon Bullcoming v. New Mexico, 564 U.S. 647 (2011), the defense argued that it would be a violation of Petitioner's right to confront the witnesses against him if Dr. Lamb were permitted to testify about the report in lieu of the analysts who actually performed the tests on the substances. The defense acknowledged that Dr. Lamb could testify as to the procedures and protocols at NMS Labs, but argued he did not have first-hand knowledge of the actual testing done.

The court granted the government's motion in limine, ruling that the lab report was non-testimonial as it was performed in a private lab at the behest of the county medical examiner before the federal government made any decision to prosecute Mr. Taylor. All the analytical data and Dr. Lambs' report were submitted in evidence at trial. Dr. Lamb then gave his opinion that the heroin, morphine, and fentanyl found in the college student's blood were at lethal levels. Petitioner was found guilty of distributing heroin and fentanyl.

Petitioner appealed to the Sixth Circuit Court of Appeals, arguing that the NMS Labs report was testimonial in nature because it was ordered by the county medical examiner as part of an investigation of a suspicious death. Petitioner explained that under Tennessee's post-mortem examination act, county medical examiners may perform or order an autopsy on the body of any person in a case involving an unnatural or suspicious death. Indeed, any law enforcement officer having knowledge of the death of any person in any suspicious/unusual/unnatural manner must immediately notify the county medical examiner or the district attorney general in the county in which the death occurs. When a death is reported, it is the duty of the county medical examiner in the county in which the death occurred to immediately make an investigation of the circumstances of the death. The medical examiner is authorized to remove from the body of the deceased a specimen of blood or other body fluids, and to retain such for testing and/or evidence if in the medical examiner's judgment these procedures are justified in order to complete the investigation or autopsy. The medical examiner's records and the reports of the toxicology laboratory examinations performed by the testing laboratory are received as competent evidence in any court of the state. Petitioner averred that these governing statutes demonstrated that the toxicology report, as an essential part of the autopsy, was testimonial in nature.

Petitioner relied upon this Court's decisions in Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310-11 (2009), and Bullcoming. In Melendez–Diaz, the Court held that the admission of affidavits from forensic analysts who had performed drug analysis on evidence seized from a suspect, who did not themselves testify, violated the Confrontation Clause. 557 U.S. at 329. Relying heavily on Melendez–Diaz, the Bullcoming Court held that the Confrontation Clause barred the admission of a blood alcohol level test where the certifying analyst did not testify, and the government instead relied on the testimony of another analyst familiar with the forensic

procedures. Bullcoming held that the surrogate testimony of another analyst who, familiar with testing procedures, but "had neither participated in nor observed the test on [defendant's] blood sample, does not meet the constitutional requirement of the Confrontation Clause." 564 U.S. at 651-52. Instead, the accused had the right "to be confronted with the analyst who made the certification." Id. at 652.

Petitioner argued that the NMS Labs analysts who performed the actual toxicology tests were analogous to the analyst who certified the forensic test in Bullcoming. Petitioner averred that Dr. Lamb's role was analogous to the surrogate witness in Bullcoming who, though familiar with the lab's gas chromatograph machine and lab procedures, was insufficient for Sixth Amendment purposes. Petitioner concluded that providing a substitute analyst who did not perform the tests to testify about a laboratory report based on those tests was simply insufficient to ameliorate Confrontation Clause concerns.

The Sixth Circuit rejected these arguments without addressing whether the NMS Labs report was testimonial because the defense had an opportunity to cross-examine Dr. Lamb at trial. See Taylor, 2024 WL 278476, at *2. The Court reasoned that Dr. Lamb reviewed all of the data collected by the analysts, compared their test results, and came to his own conclusions about the information ultimately included in the NMS Labs report. Id. At trial, Dr. Lamb introduced the report, and the defense had the opportunity to cross-examine him. Id. Thus, the court concluded that Petitioner had an opportunity to confront the witness who compiled the report, signed the report, and certified that its findings were valid. Id.

As for Petitioner's argument that he should be able to confront the analysts who performed the tests, the court found that the Confrontation Clause does not give anyone a right to cross-examine "anyone whose testimony may be relevant" in establishing the accuracy of the tests. Id.

(quoting Melendez-Dias, 557 U.S. at 311 n.1). Moreover, the court observed, the Clause does not create a best-witness rule requiring the most knowledgeable or reliable analyst to appear. Id.

The court found that the NMS Labs report was Dr. Lamb's testimony, not the analysts' testimony. Id. The court noted that none of the analysts compiled the report, nor were they identified in the report.[3] Id. Also, they did not certify that the test results complied with NMS Labs standards. Id. Thus, the court found that it was Dr. Lamb who was bearing testimony against Mr. Taylor. Id.

The court noted that it would be different under Bullcoming if Dr. Lamb simply parroted the analysts' testimony. Id. at *3. But the court distinguished the NMS Labs report because it contained Dr. Lamb's own conclusions that he formed after his own independent review of the data. Id. Because the report contained Dr. Lamb's own conclusions, he was the one who compiled the report, he signed it, he certified the findings, and Petitioner had an opportunity to confront him, the court found no Sixth Amendment violation. Id.

[3] This is a mistake. The analysts' names are in the report. Neither party submitted the report to the court, however, because it is over 800 pages long.

REASONS FOR GRANTING THE PETITION

Petitioner respectfully requests this Court to grant review because lower courts are "confused as to precisely what limitations the Confrontation Clause may impose when an expert witness testifies about the results of testing performed by another analyst, who herself is not called to testify." United States v. Turner, 709 F.3d 1187, 1189 (7th Cir. 2013) (referencing the divergent opinions in Williams v. Illinois, 567 U.S. 50 (2012)). This confusion, and the many splits of authority amongst lower federal and states courts, was aptly explained in the Petition for Certiorari filed in Smith v. Arizona, No. 22-899, so Petitioner will simply summarize it here.

The Williams Court addressed a question left open by Bullcoming—whether the Confrontation Clause is violated when a testifying expert witness is asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence. A majority of the Court, however, was unable to agree on the appropriate test for determining whether the statements at issue were testimonial. The four-Justice plurality opinion said, "Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause." 567 U.S. at 58. Though the lower court in this case did not express its rationale as such, this is essentially what occurred in this case.

Justice Thomas agreed that the statements were not testimonial, but his view was that the statements did not have sufficient "formality" or "indicia of solemnity." Id. at 110–113 (Thomas, J., concurring) (internal quotation marks and citation omitted). Four other Justices dissented, reasoning that the statements were testimonial because they were "made under circumstances which would lead an objective witness reasonably to believe [they] would be available for use at a later trial." Id. at 121 (Kagan, J., dissenting) (internal quotation marks and citations omitted).

Since Williams, federal and state courts of appeal have struggles to apply the split decision in Williams. A number of courts have rejected the Williams plurality's rationale as a basis for permitting a substitute expert to convey the testimonial statements of others. See Smith v. Arizona, No. 22-899, Pet. Cert., 2023 WL 2571950, at *14-18 (Mar. 14, 2023) (collecting cases). Other courts have adopted the Williams plurality's rationale. Id. at *17-18 (collecting cases). Still others, while not directly addressing the Williams plurality's rationale, have indirectly applied it by justifying the admission of substitute expert testimony based upon the tests by absent analysts because the testifying expert offered some independent opinion. Id. at *18 (collecting cases). This is what the lower court did in this case.

Many courts have been unable to discern any guiding principles from Williams, even as to the plurality's rationale, and have instead limited Williams to its particular facts. Id. (collecting cases). And despite their inability to discern a holding from Williams, these courts have often rationalized the admission of substitute expert testimony reasoning that, if the testimony at issue were presented to the same Justices in Williams, five Justices would uphold its admission, including the plurality for the reason that the expert's basis testimony was not offered for its truth. Id. at *18-19 (collecting cases).

Given this confusion, Petitioner avers that this Court's intervention is necessary to clarify the limits of a testifying expert's opinion when that opinion relies upon non-testifying experts' testimonial out-of-court statements.

A. The Confrontation Clause requires statements "to be subject to the crucible of cross-examination."[4]

The Confrontation Clause of the Sixth Amendment affords the accused in criminal prosecutions the right "to be confronted with the witnesses against" them. U.S. Const. amend. VI. It prohibits the admission of testimonial statements of a witness who did not appear at trial unless the witness is unavailable, and the defendant previously had the opportunity for cross-examination. See Crawford v. Washington, 541 U.S. 36, 53-54 (2004). Indeed, cross-examination has been recognized as "the greatest legal engine ever invented for the discovery of truth." California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 Wigmore § 1367). Consequently, this Court has insisted upon cross-examination and rejected the notion of a judicial determination of reliability for absent witnesses. See Crawford , 541 U.S. at 54 (2004).

A statement is testimonial if its primary purpose is to "create an out-of-court substitute for trial testimony." Ohio v. Clark, 576 U.S. 237, 245 (2015) (quoting Bryant, 562 U.S. at 358). This general rule likewise prohibits the prosecution from introducing certain testimonial forensic or scientific reports through the in-court testimony of a witness who did not perform or observe the test or examination detailed in the report. See Bullcoming, 564 U.S. at 652; Melendez-Diaz, 557 U.S. at 310-11 (2009).

There is no forensic evidence exception to this rule. See Bullcoming, 564 U.S. at 658 (citing Melendez-Diaz, 557 U.S. 305, at 317–21). The Bullcoming Court was unequivocal—when the prosecution in a criminal trial introduces a forensic analyst's certifications, the analyst becomes a witness whom the defendant has a Sixth Amendment right to confront—a right that is not satisfied by cross-examining a substitute expert. Id. at 663.

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[4] Michigan v. Bryant, 562 U.S. 344, 361 (2011).

Confrontation of the forensic analyst can expose or deter an inaccurate or fraudulent analysis, weed out an incompetent examiner, reveal the analyst's lack of proper training, or any deficiency in judgment. See Melendez-Diaz, 557 U.S. at 318–320. As the National College for DUI Defense ("NCDD") warned in its amicus curiae brief in the Smith case, eliminating the right of confrontation of the evidentiary analyst: (1) creates a safe harbor for fraudulent and incompetent scientists to produce erroneous results with impunity and estranges honest analysts who would otherwise expose laboratory malpractices; (2) ignores the reality of the testing process and perpetuates poor scientific practices by permitting pre- and post-analytical errors to remain unchallenged and therefore unexposed; and (3) does not conform to the prevailing notions of fundamental fairness and due process guaranteed by the Constitution. See Smith v. Arizona, No. 22-899, NCDD Amicus Brief, 2023 WL 8114325 at *2-27 (Nov. 17, 2023). To ensure exposure of such deficits if they exist, "the Constitution promises every person accused of a crime the right to confront his accusers." Stuart v. Alabama, 139 S. Ct. 36, 36 (2018) (Gorsuch, J., dissenting from the denial of certiorari). This constitutional guarantee was declared in Bullcoming.

The guarantee is eroded, however, when a surrogate analyst is allowed to testify in place of the original testing analyst. While cross-examination of the original analyst can expose bias, mistakes, and even outright fraud in the analysis, the same is not true of a surrogate analyst whose lack of personal knowledge of the actual testing process may insulate the opinion from challenge. The criminal legal system depends on adversarial testing and cross-examination to guard against "mischief and mistake and the risk of false convictions they invite." Id.

B. The rationale applied by the lower court does not comport with the Confrontation Clause.

The lower court, without ruling on whether the testing analysts' data and reports were testimonial, justified the admission of Dr. Lamb's substitute expert testimony on the grounds that

he had reviewed the substance of all the non-testifying analysts' data and then wrote the NMS Labs report himself. Yet, in this situation, he still repeated the testing analysts' out-of-court statements as the basis for his conclusion, which means the statements' utility are dependent on their truth. As explained by Justice Kagan, "[T]o determine the validity of [an expert's] conclusion, the factfinder must assess the truth of the out-of-court statement on which it relies" such that the statement's "utility is then dependent on its truth." Williams, 567 U.S. at 126 (2012) (Kagan, J., dissenting). "If the statement is true, then the conclusion based on it is probably true; if not, not." Id. Justice Thomas agreed: "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. 'To use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true.' " Id. at 106 (Thomas, J., concurring) (quoting D. Kaye, D. Bernstein, & J. Mnookin, The New Wigmore: A Treatise on Evidence: Expert Evidence § 4.10.1, p. 196 (2d ed.2011) (hereinafter Kaye).

Moreover, it is irrelevant whether the underlying documents or data prepared by the absent analysts are themselves admitted or whether the expert offers some independent opinion based upon them because a confrontation violation occurs when the expert relates testimonial statements from those documents and data. Put simply, it does not matter "whether the statement is quoted verbatim or conveyed only in substance; whether it is relayed explicitly or merely implied; whether the declarant is identified or not." Young v. United States, 63 A.3d 1033, 1044 (D.C. 2013). And even if an expert provides some independent opinion, that does not justify or cure the confrontation violation, because "it would 'require an impossible feat of mental gymnastics' to

'disaggregate'[the expert's] own non-hearsay conclusions from the interwoven hearsay on which [the expert] relied" and related to the trier of fact. Id. at 1047 (citation omitted).

These flaws are evident in Petitioner's case. Dr. Lamb did not simply testify hypothetically or in a vacuum that the test results he reviewed reflected the presence of controlled substances. Rather, he affirmatively testified that NMS Labs analysts performed particular tests on the specific evidence in the case to reach those results—all information that he related from the data generated from those analysts' testing because he lacked personal knowledge of those analyses. These are the same types of statements that this Court found problematic in Bullcoming. See 550 U.S. at 660 (noting that the nontestifying analyst there made representations that "he performed on Bullcoming's sample a particular test, adhering to a precise protocol").

The underlying statements, in turn, were offered for their truth, because to the extent that Dr. Lamb provided any independent opinions, those opinions depended on the analysts' statements and data being true. It is true that a substitute expert could offer an independent opinion without violating the Confrontation Clause, for example, if that expert observed the original testing or retested the evidence. But Dr. Lamb testified he did neither, so he had no personal knowledge of the testing at issue.

Yet, Dr. Lamb was permitted to testify about how a liquid gas chromatograph machine analyzes substances and then he explained NMS labs' general procedures. He then discussed the results of the testing that he did not perform. Finally, he opined that the heroin, morphine, and fentanyl levels found in the deceased college student's blood were at lethal levels based on the lab report he wrote from the data generated from those procedures.

Unless this Court intervenes, these practices will persist and ensure that defendants in jurisdictions across the country are deprived of a meaningful opportunity to confront some of the

most important witnesses against them. Now, more than ever, lower courts, prosecutors, and defense lawyers need this Court's guidance on whether, and to what extent, the Confrontation Clause permits substitute expert testimony.

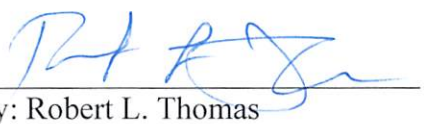
CONCLUSION

For all of the foregoing reasons, Petitioner respectfully prays that this Court will grant certiorari to review the judgment of the Sixth Circuit in his case.

DATED: 15th day of February, 2024.

Respectfully submitted,

DORIS RANDLE HOLT
FEDERAL DEFENDER



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PROOF OF SERVICE

I, Robert L. Thomas, Assistant Federal Defender for the Western District of Tennessee, do swear or declare that on this date, February 15, 2024, as required by Supreme Court Rule 29, I have filed electronically via this Court's electronic filing system and also served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Elizabeth B. Prelogar, Solicitor General of the United States
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With a courtesy copy also e-mailed this same date to the Solicitor General, at: SUPREMECTBRIEFS@USDOJ.GOV.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 15th day of February, 2024.

DORIS RANDLE HOLT
FEDERAL DEFENDER

By: Robert L. Thomas
Court-Appointed Counsel for Petitioner