No. _____

In The
Supreme Court of the United States

MARIO GONZALEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Daniel J. Yadron, Jr.
Counsel of Record
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

QUESTION PRESENTED

Whether a drug value "expert" contravenes the Confrontation Clause and *Smith v. Arizona*, 602 U.S. 779 (2024), when her testimony about the value of drugs seized rests on the work of out-of-court analysts that she cannot explain.

RELATED PROCEEDINGS

United States v. Gonzalez, No. 23-1547, 2025 WL 66354 (9th Cir. Jan. 10, 2025)

United States v. Gonzalez, No. 3:21-cr-03308-JO-1 (S.D. Cal.)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

PETITION FOR A WRIT OF CERTIORARI

Petitioner Mario Gonzalez respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The panel decision of the court of appeals is available in the Westlaw database at 2025 WL 66354 and reprinted in the Appendix to the Petition ("Pet. App.") at 1a-7a. The Ninth Circuit's order denying en banc review is reprinted at Pet. App. 8a. The relevant proceedings in the district court are unpublished.

JURISDICTIONAL STATEMENT

The Court of Appeals first entered judgment on January 10, 2025. On April 17, 2025, following a timely petition, the panel denied rehearing and rehearing en banc. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Confrontation Clause of the Sixth Amendment provides that "the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

INTRODUCTION

In the thousands of drug-trafficking cases each year, the "bare fact of possessing" illegal drugs is insufficient to prove the accused's intent to distribute, *Turner v. United States*, 396 U.S. 398, 421 (1970), or even knowledge of possession, *see Diaz v. United States*, 602 U.S. 526, 529 (2024). So, to persuade the jury of such

knowledge or intent, the government often points to the drugs' value. *Id.* at 550 (Gorsuch, J., dissenting); *United States v. Pigrum*, 922 F.2d 249, 254 (5th Cir. 1991).

This case is about whether the Confrontation Clause permits the prosecution's expert to establish drug value by reading to the jury "modified average" prices created by out-of-court experts and multiplying those amounts by the undisputed drug quantity. In other words, can the prosecution get around *Smith v. Arizona*, 602 U.S. 779 (2024), by having its expert premise her analysis, in part, on out-of-court analysis by others?

By answering in the affirmative, the Ninth Circuit contravened *Smith*'s plain holding and diverged from the Fourth Circuit. That court recently recognized that post-*Smith*, the prosecution's expert can no longer offer testimonial hearsay merely as the basis for his own "independent" opinion, even if the independent opinion has "predominance." *United States v. Seward*, 135 F.4th 161, 169 (4th Cir. 2025) (quoting and recognizing the abrogation of *United States v. Summers*, 666 F.3d 192, 201 (4th Cir. 2011)). In failing to recognize the same, the Ninth Circuit created a circuit split on a critically important issue.

Mr. Gonzalez provides a suitable vehicle to resolve an important question that could affect thousands of cases each year. That is because drug value played a starring role in Mr. Gonzalez's case—indeed, the prosecutor told the jury that "this isn't about drugs. This is a case about money." Yet Mr. Gonzalez had no ability to cross-examine the governmental expert who created that monetary figure, apparently based on reports from still other out-of-court officers. Unless the Court

intervenes, there are thousands of criminal defendants who have faced or will face similar Confrontation Clause violations.

The Court should grant the Petition.

STATEMENT OF THE CASE

In Mr. Gonzalez's first trial for importing drugs into the United States, the jury hung 11–1 in favor of acquittal. But in closing argument at the second trial, the prosecutor offered a new theme for the case:

> [A]t its most core element . . ., this isn't about drugs. This is a case about money. This is a case about almost $250,000 worth of drugs. . . It's about packages of meth and fentanyl worth . . . as much as $246,000 and change. When you recognize that core truth, all of the evidence locks into place and makes perfect sense.

Pet. App. 14a.

The theory went that Mr. Gonzalez necessarily knew that drugs were in his car—the only element in dispute—because those drugs were so valuable that no drug trafficker would trust them with an unknowing courier. And the prosecutor was able to place such a high value on the drugs because of the testimony of Special Agent Johnson from the Department of Homeland Security, whom the district court qualified as an expert on drug prices.

Agent Johnson testified that unnamed analysts at a center for regional law enforcement created the drug prices. Those prices, according to the list, were a "modified average" of reported prices by various officers following other investigations. *Id.* at 33a. They included a high-end price and a low-end price. *See id.* at 20a.

So, on the stand, Agent Johnson simply multiplied the high and low per unit prices by the weight of the drugs in Mr. Gonzalez's car and came up with a low estimate and a high estimate for the drugs' value. *See id.* at 14a, 20a, 23a The high estimate was $246,000. *Id.* at 14a. The prosecutor repeatedly cited that figure in closing argument. *See, e.g.*, *id.*

Yet as the government did not dispute, Agent Johnson could not explain "the exact internal process" used to produce the price list, had not participated in a price survey, could not explain how the price list arrived at its "modified average," or if it matched information from undercover sources. *Id.* at 15a, 33a.

The Court was still considering *Smith* when Mr. Gonzalez filed his opening brief. But he alerted the Ninth Circuit that at least some Justices appeared concerned during oral argument that an expert repeating the findings of an out-of-court expert violated the Confrontation Clause. And after the Court decided *Smith*, Mr. Gonzalez's Reply Brief alerted the panel that the case controlled.

In *Smith*, the Court addressed whether the prosecution's expert witness violates the Confrontation Clause if she "restates an absent lab analyst's factual assertions to support his own opinion testimony." 602 U.S. at 783. There, the defendant was charged with possessing methamphetamine, cannabis, and marijuana for sale after authorities found him with substances that resembled those drugs. *Id.* at 789. The government then sent the substances to a lab, where an analyst prepared a report declaring that, of the eight samples tested, "four '[c]ontained a usable quantity of methamphetamine,' three '[c]ontained a usable

quantity of marijuana,' and one '[c]ontained a usable quantity of cannabis.'" *Id.* at 790 (citation omitted). The prosecution planned for that analyst to testify. *Id.*

But three weeks before trial, the prosecution announced that a different analyst would testify. *Id.* For unexplained reasons, the lab no longer employed the original analyst. *Id.* The new analyst was "expected to have the same conclusion" as the old analyst. *Id.* And, to no one's surprise, the new analyst did. *Id.*

He "prepared for trial by reviewing [the non-testifying analyst's] report and notes." *Id.* at 791. Then from the stand, "he referred to those materials and related what was in them, item by item by item." *Id.* "After thus telling the jury what [the non-testifying analyst's] records conveyed about her testing of the items, [the testifying analyst] offered an 'independent opinion' of their identity." *Id.*

This audible violated the Confrontation Clause because the non-testifying analyst's report was presented for the truth of the matter asserted. *Id.* at 803. "If an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts." *Id.* at 795.

Indeed, "'[t]here is no meaningful distinction between disclosing an out-of-court statement' to 'explain the basis of an expert's opinion' and 'disclosing that statement for its truth.'" *Id.* (quoting *Williams v. Illinois*, 567 U.S. 50, 106 (2012) (Thomas, J., concurring in the judgment)). Because, in practice, "the jury could credit [the testifying analyst's] opinions identifying the substances only because it too accepted the truth of what [the non-testifying analyst] reported about her lab

work (as conveyed by [the testifying analyst])." *Id.* at 798. The analyst in court thus became the unconstitutional "mouthpiece" for the analyst not in court. *Id.* at 800.

On appeal, Mr. Gonzalez argued that the government's drug-price expert similarly violated the Confrontation Clause. Like in *Smith*, "the jury could credit [Agent Johnson]'s opinions identifying the [drugs' value] because it too accepted the truth of what [non-testifying experts] reported . . . (as conveyed by [Agent Johnson])." *Id.* at 798. If whoever came up with the modified average price of the drugs lied, Agent Johnson's "expert opinion would have counted for nothing." *Id.*

The Ninth Circuit nevertheless affirmed. It did not acknowledge *Smith*, despite Mr. Gonzalez expressly raising the case. Rather, it held that the price expert's testimony "did not violate the Confrontation Clause because her testimony involved some independent judgment." Pet. App. 4a. (citing *United States v. Vera*, 770 F.3d 1232, 1237 (9th Cir. 2014); *United States v. Gomez*, 725 F.3d 1121, 1130 (9th Cir. 2013)). That independent judgment, according to the panel, was evidenced by the expert having

> considered the reasonableness of the price list in light of her 15 years of experience in undercover drug operations, conferred with other value experts and agents involved in similar operations, and deducted 10% of the total weight of methamphetamine to account for packaging, an amount she based on her experience and conversations with other drug investigators.

Id.

Mr. Gonzalez unsuccessfully sought rehearing and rehearing en banc. He now petitions the Court for review.

REASONS FOR GRANTING THE WRIT

Appellate courts already have begun to diverge on whether *Smith* and the Confrontation Clause permit the prosecution's expert to rely on an out-of-court analyst's conclusions so long as they form only part of the expert's opinion. That gives a rise to an issue core to the thousands of drug trafficking cases brought in the United States each year: How can the government constitutionally prove what the drugs are worth? Mr. Gonzalez presents a suitable vehicle to address that question because, by the government's own admission, drug value was the case's "core." Finally, the Ninth Circuit's disregard for *Smith*, in this and another case, is indefensibly wrong.

I. Federal courts already are divided about how to apply *Smith*.

1. The Fourth Circuit recently recognized that the Court meant what it said in *Smith*: the prosecution's testifying expert cannot rest her opinion on the out-of-court analysis of a non-testifying expert. It does not matter how much analysis the in-court expert provides.

In *Seward*, the defendant was convicted of murdering a mail carrier. 135 F.4th at 164. That conviction rested, in part, on DNA analysis showing that the defendant's "DNA profile could not be excluded from blood found inside [the victim]'s car door." *Id.* at 170. At trial, the prosecution's expert testified about "what DNA is, where it is found, and how it is tested." *Id.* at 168. She also "discussed the 'quality assurances' her lab follows to ensure it produces reliable results." *Id.* All sides agreed that posed no problem under the Confrontation Clause. *Id.*

But the expert also "admitted that she was not 'hands-on with the evidence samples' . . . and that a non-testifying analyst tested the samples." *Id.* at 168. Rather, the testifying expert merely "review[ed] the analyst's notes and work" and then "'independently review[ed] the [analyst's] conclusions' to ensure she agreed with the[m]." *Id.* (second alteration in original). She then "testified that her 'lab analyze[d]' each swab (seemingly according to the procedures she had explained earlier), and provided her conclusions—all without having tested the samples herself." *Id.* (alteration in original).

The Fourth Circuit recognized that this violated *Smith*. As in *Smith*, the testifying expert "'could opine' about the DNA profile produced by the other analyst 'only because [she] accepted the truth of what [the non-testifying analyst] had reported about her work.'" *Id.* (alterations in original) (quoting *Smith*, 602 U.S. at 798). The non-testifying analyst's conclusions were thus offered for the truth of the matter and, if testimonial, violated the Confrontation Clause.[1] *Id.* at 168–69.

It was no answer, the Fourth Circuit held, that the testifying witness did not "overtly" put the non-testifying analyst's comments as clearly "on the record" as the expert in *Smith*. *Id.* at 168. Nor was the Fourth Circuit bound by its prior holding that a testifying expert could rely on the conclusions of a non-testifying analyst so long as the testifying expert's "independent subjective opinion and judgment" had "predominance" over the "objective raw data generated by the [non-testifying]

[1] The Fourth Circuit held that, assuming the challenged testimony was "testimonial" under the Confrontation Clause, any error was harmless beyond a reasonable doubt. 135 F.4th at 169.

analyst." *Id.* at 169 (quoting *United States v. Summers*, 666 F.3d 192, 201–02 (4th Cir. 2011)). "[T]hat approach is no longer tenable after *Smith*." *Id.*

2. By contrast, the Ninth Circuit has twice held that *Smith* still permits the prosecution's testifying experts to pass on the conclusions of out-of-court analysts so long as they are nested within independent analysis. In other words, the Ninth Circuit has limited *Smith* to the narrow (and not particularly common) scenario where the prosecution's expert simply reads an out-of-court analyst's report and gets off the stand. *See Smith*, 602 U.S. at 797.

Take this case. As discussed above, the Ninth Circuit permitted the government's expert to serve as a conduit for out-of-court analysis that produced a "modified average" of various drug prices. *See* Pet. App. 33a. It held that the prosecution's expert got around *Smith* because her testimony "involved some independent judgment." Pet. App. 4a. But that independent judgement was limited to (1) considering whether the out-of-court analysis was "reasonable[] . . . in light of her 15 years of experience" and conversations with others; and (2) deducting 10% from the total weight of *one of the two* drugs tested to account for packaging. Pet. App. 4a.

But that is just *Smith* by another name. In *Smith*, the testifying expert also considered the out-of-court analysts conclusions in light of his "knowledge and experience." 602 U.S. at 797. Meanwhile, the observation that Agent Johnson knew to account for the weight of packaging says nothing about her analysis of the price of various drugs. It just means she knows about drug *weights*, not *prices*.

This case is no isolated incident. In *United States v. Earle*, the defendant appealed his bank robbery convictions. No. 24-48, 2025 WL 1540947, at *1 (9th Cir. May 30, 2025) (unpublished). Those convictions rested, in part, on DNA evidence tested by an out-of-court analyst. *See id.* at *2. That posed no problem under *Smith*, the Ninth Circuit concluded, because the testifying expert "supervised and directed the team of lab technicians who performed the tests and provided him with the results." *Id.* That expert then "interpreted the results, drew conclusions, and wrote those conclusions in a Report of Examination, which was the basis of his testimony at trial." *Id.*

That result directly contradicts the Fourth Circuit's recent holding in *Seward*. In other words, despite the Court's recent effort to clarify the Clause's scope in *Smith*, lower courts appear to be again divided.

II. The question presented is an important and recurring one, and Mr. Gonzalez presents a good case to resolve it because out-of-court analysis was "core" to his prosecution.

The question presented implicates a recurring issue of national significance to the proper administration of criminal trials. Thousands of people are charged with drug trafficking in American courts every year. Of those who go to trial, the key issue often is not whether they possessed drugs, but whether they possessed drugs with the intent to distribute. The former can be a misdemeanor. *E.g.*, 21 U.S.C. § 844(a). The latter is a felony that exposes the defendant to considerably more prison time. *See, e.g.*, 21 U.S.C. § 841(a)(1).

For better or worse, courts have long accepted that showing the monetary

value of drugs is a fair way to prove that intent. *See, e.g.*, *United States v. Hardin*, 710 F.2d 1231, 1237 (7th Cir. 1983); *Pigrum*, 922 F.2d at 254; *United States v. Rosario-Peralta*, 199 F.3d 552, 565 (1st Cir. 1999). Thus, this case implicates both the government's ability to prove one of the most common offenses in the United States and a defendant's ability to challenge that proof through the crucible of cross-examination.

This case presents the right vehicle to resolve the issue because the question is squarely presented, and the disputed evidence is central to Mr. Gonzalez's conviction. First, Mr. Gonzalez challenged Agent Johnson's basis for estimating drug values repeatedly before the trial court. *E.g.*, Pet. App. 33a. That made it crystal clear that Agent Johnson served as a conduit for the analysis of out-of-court analysts. She acknowledged that she did not know how the "modified averages" were created and played no part in creating them. *Id.*

Second, as discussed above, the out-of-court analysis was central to Mr. Gonzalez's conviction. That is because (1) the testimonial hearsay was the only evidence of drug value; (2) Mr. Gonzalez could not cross-examine the declarants of that testimonial hearsay; and (3) that drug value played a starring role in the prosecutor's closing argument.[2]

There is every reason to think that number mattered to the jury. The government's first prosecution of Mr. Gonzalez ended in a mistrial, with the jury

[2] Mr. Gonzalez demonstrated in his Opening Brief to the Ninth Circuit that the drug price analysis was testimonial. Appellant's Opening Brief at 37, *United States v. Gonzalez*, No. 23-1547, (9th Cir. March 2, 2024), ECF No. 12. The government did not dispute that showing on appeal.

voting 11-1 to acquit. In that case, a different expert testified about the value of the drugs in Mr. Gonzalez's car. That expert gave an estimate of half the amount, which featured less prominently in closing argument. Indeed, it is telling that the Ninth Circuit made no suggestion that the error did not affect Mr. Gonzalez's substantial rights. The question presented thus is one of substantial importance, and Mr. Gonzalez presents a good vehicle to resolve it.

III. The Ninth Circuit's interpretation of *Smith* and the Confrontation Clause is wrong.

The Ninth Circuit also is just wrong. The Confrontation Clause does not permit the prosecution's expert to smuggle in testimonial hearsay so long as it is laced with independent analysis. As the Fourth Circuit—in an opinion joined by Judge Wilkinson—recognized, "*Smith* makes clear that the government may not 'eva[de]' the Confrontation Clause by offering testimony that is based on a non-testifying analyst's work 'as long as [the testifying expert] bases an independent opinion on that material.'" *Seward*, 135 F.4th at 168 (alterations in original) (quoting *Smith*, 602 U.S. at 798–99). "'Approving that practice would make' *Smith* and several other post-*Crawford* decisions 'a dead letter, and allow for easy evasion of the Confrontation Clause.'" *Id.* (quoting *Smith*, 602 U.S. at 798).

But that is precisely what happened here. An out-of-court expert developed modified averages of drug prices that Agent Johnson relayed to the jury. Much like in *Smith*, "the jury could credit [Agent Johnson]'s opinions identifying the [drugs' value] because it too accepted the truth of what [non-testifying experts] reported . . . (as conveyed by [Agent Johnson])." *Id.* at 798. If whoever came up with the modified

average price of methamphetamine and fentanyl had lied, Agent Johnson's "expert opinion would have counted for nothing." *Id.*

The drug price averages thus "c[a]me into evidence for their truth—because only if true can they provide a reason to credit" Agent Johnson. *Id.* at 803. Mr. Gonzalez had "the right to cross-examine the person who," *id.*, created those averages. His inability to do so violated the Confrontation Clause.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Date: July 16, 2025

Daniel J. Yadron, Jr.
Counsel of Record
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467