No. _____

In The

Supreme Court Of The United States

ANTONIO B. NASCIMENTO-DEPINA,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS
Respondent.

On Petition For Writ Of Certiorari
To The Massachusetts Supreme Judicial Court

PETITION FOR A WRIT OF CERTIORARI

Brad P. Bennion
Counsel of Record
P.O. Box 890118
East Weymouth, Massachusetts 02189
(617) 943-6164
bradpbennion@gmail.com

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Question Presented

Whether, after a state supreme court expressly acknowledging that admitting surrogate DNA-analyst testimony violated the Sixth Amendment Confrontation Clause and the Fourteenth Amendment's guarantee of due process, that court should not affirm a conviction on the rationale that the error was harmless because the case "turned entirely on the victim's credibility"—a method of review that (1) conflicts with this Court's requirement that harmless-error analysis ask whether a rational JURY, not an appellate court, could have reached a different verdict; and (2) is outcome-determinative in this and many similar prosecutions that rely on forensic certificates.

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OPINION BELOW

The memorandum and order of the Massachusetts Supreme Judicial Court (SJC) is reported at 496 Mass. 1, 256 N.E.3d 1286 (2025), and is reproduced in the Appendix.[1] [App. 3].

STATEMENT OF JURISDICTION

The order of the Massachusetts Supreme Judicial Court affirming the petitioner's conviction entered on May 8, 2025. The petitioner seeks review of a judgment by the highest State court in which a decision could be had and invokes this Court's jurisdiction under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

[1] Citations to the appendix will be referred to by "App." followed by the page number. Citations to the trial transcripts will be referred to by volume number, or date of a pretrial hearing, followed by the page number.

The Fourteenth Amendment to the United States Constitution, Section 1, provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. INTRODUCTION

The issues raised are paramount matters for this Court to resolve. The facts of this case are straightforward;

First, the Commonwealth itself treated the DNA evidence as central. It subpoenaed Ms. Hart, elicited the statistics that the sperm fraction was "one in 12.06 decillion," and argued that the profile belonged to the defendant. A juror hearing a near-zero random-match probability naturally regards the science as powerful corroboration. Stripping the jury of that testimony would thus have altered the evidentiary balance: without the expert's statistical anchor the Commonwealth could offer, at most, an un-contextualised reference to an unknown stain of unknown probative value. That is precisely why *Crawford v. Washington* and, now definitively, *Smith v. Arizona* forbid a surrogate from reading a non-testifying analyst's conclusions.

Second, the SJC's harmless-error calculus relies on its own assessment that the child's testimony "bore many indicia of reliability." But harmlessness is tested by asking whether *a rational jury* could have reached a different verdict *absent* the improperly admitted proof, not by appellate judge's re-credibility determinations. The report and Ms. Hart's narration were the only expert evidence of ejaculation—an element the prosecutor repeatedly referenced. Had the jury heard only that the child's DNA was missing from the blanket, yet been deprived of Ms. Hart's un-cross-examined claim that the male DNA proved the defendant ejaculated, reasonable doubt would have loomed substantially larger.

Third, contrary to the SJC's suggestion, the confrontation objection was effectively preserved. Trial counsel moved, before any witness testified, to preclude substitute-analyst testimony; the judge acknowledged awareness of the issue; counsel's further objection would have been futile under then-controlling precedent, satisfying *Commonwealth v. Vasquez***.** Even if viewed as unpreserved, the combination of constitutional magnitude, prosecutorial emphasis, and the small evidentiary record satisfies the "serious doubt" standard. The court's contrary conclusion understates both the gravity and the trial significance of the confrontation violation.

B. PROCEDURAL HISTORY

On November 29, 2018, a Bristol grand jury returned indictments charging the defendant, Antonio B. Nascimento-Depina, with two counts of aggravated rape of a child, with a 10-year age difference in violation of G.L. c. 265, § 23A; and three counts of indent assault and battery on a child under 14-years old, in violation of G.L. c. 265, § 13B. [App. 11, 14, 33-42]. The defendant pled *not guilty* to all charges on December 11, 2018. [App. 14].

On July 22, 2019, the Commonwealth filed a motion to compel the defendant to provide a DNA sample. [App. 17, 43]. The defense filed an opposition to the motion to compel on August 7, 2019. [App. 17, 47]. That same day (August 7th), the court (Donatelle, J.), allowed the Commonwealth's motion to compel. [App. 17]. Beginning in April of 2021, the parties began filing various pre-trial and *in limine* motions in preparation for trial. [App. 22]. On September 10, 2021, the Commonwealth filed a motion to exclude certain DNA evidence. [R. App. 24]. Pre-trial and *in limine* motions in preparation for trial were also filed in August 2022. [App. 28-29]. On August 5, 2022, the court (O'Shea, J.) denied the Commonwealth's motion to exclude certain DNA evidence. [App. 29].

Trial commenced before Judge O'Shea and a jury on August 1, 2022. [App. 13, 29]. On August 8, 2022, at the conclusion of the

Commonwealth's evidence the defense made a motion for a directed verdict, which the court denied. [App. 29, 52; Tr. **5**, 84]. This motion for a directed verdict was later renewed at the close of all the evidence, and again denied. [R. App. 29, 53].

On August 9, 2022, the jury found the defendant guilty on all counts. [App. 30, 54-58]. Judge O'Shea sentenced the defendant on Count 1 (aggravated rape of a child, 10-year age difference), to 10 to 12 years committed to the Souza Baranowski Correctional Center. As to Count 2 (aggravated rape of a child, 10-year age difference), the court sentenced the defendant to a 10 to 12-year prison term, concurrent with Count 1. As to Count 3 (indecent A&B on a child), the court sentenced the defendant to a 9½ to 10-year prison term, concurrent with Count 1. As to Count 4 (indecent A&B on a child), the court sentenced the defendant to a 9½ to 10-year prison term, concurrent with Count 1. As to Count 5 (indecent A&B on a child), the court sentenced the defendant to a 9½ to 10-year prison term, concurrent with Count 1. [App. 31]. The court also credited the defendant's sentence 391 days. [App. 31].

The defendant filed a timely notice of appeal on August 9, 2022. [App. 31, 59]. The case was entered on the docket of the Appeals Court on September 14, 2023 (2023-P-1061). On September 20, 2024, the SJC transferred the appeal from the Appeals Court *sua sponte* (SJC-13664).

The SJC issued its opinion in the case on May 8, 2025.

C. FACTS PRESENTED AT TRIAL

MD,[2] was born in early 2006, in Cape Verde to her mother Sophia (or Ileana) and father Dacu, and was 16 at the time of trial. [Tr. **4**, 75-76, 79]. MD's maternal grandfather is the defendant in this case. [Tr. **4**, 76]. MD's mother immigrated to the United States when MD was five years old, but they would communicate by phone. [Tr. **4**, 80]. The child immigrated to the U.S. when she was 11 years old, and she lived in Chelsea, with her mom, brother, grandpa (the defendant), and cousins. [Tr. **4**, 79, 82-83, 98]. Her first language is Creole, but she knew a "little bit" of English from school and watching TV. [Tr. **4**, 81, 83]. MD began sixth grade in Massachusetts. [Tr. **4**, 83]. She recalled living in Chelsea for a year and then the family moved to the Taunton area. [Tr. **4**, 83, 95]. In Taunton, she lived with her uncle, mom, brother, and her grandpa (the defendant). [Tr. **4**, 84, 95]. She attended the Taunton schools beginning in the seventh grade in the spring of 2018, when she was 12 years old. [Tr. **4**, 84, 95-96].

MD testified that when she was 11 years old and living with her grandfather in Chelsea, it was good but then the defendant "started playing touching private parts," meaning he "started playing, putting his hand around [her] chest and trying to touch" her "body parts such as her "belly," "breasts," and her "booty" (or ass). [Tr. **4**, 97-98]. MD testified

[2] A pseudonym

that when they would play, he would use his hand to touch her "private part" being her "breast," "belly," and "part of" her "ass too." [Tr. **4**, 98].

When the family moved from Chelsea to Taunton, this type of touching happened more. [Tr. **4**, 98]. In Taunton the defendant "also touched [her] breasts and started touching [her] vagina parts and with his hands," and would also touch her "ass." [Tr. **4**, 98]. She recalled that sometimes her mom would be at work so she would have to stay with the defendant. [Tr. **4**, 99]. She believed that sometimes when she was with the defendant her 7-year-old brother would be present. [Tr. **4**, 99-100].

Patricia Borja-Lima worked as a social worker for the Department of Children and Families (DCF). [Tr. **4**, 53]. [Tr. **4**,]. In May and early June of 2018, Ms. Borja became involved with the MD's family in Taunton, because of a report of physical abuse.[3] [Tr. **4**, 54-55]. One reason she was assigned was because she spoke Cape Verdean Creole, the family's primarily language. [Tr. **4**, 51-52,54-55]. Ms. Borja visited

[3] MD testified that she "wasn't listening to [her] mom," because she had thrown a can of under the sofa and her "mom was mad because [she] wasn't listening either and she hit [MD] with a belt." [Tr. **4**, 103, 125]. The court was leery to allow the defense to delve too much into the mother hitting MD, not wanting "to make this a trial within a trial." [Tr. **4**, 48]. Nonetheless, this event seems to have formed the basis for the defense namely that MD was not credible. As defense counsel stated in his closing argument, "I suggest it was a little more than not listening. [MD] was in trouble and when [MD]'s social worker, Patricia Borja-Lima asked [MD] is anyone touching, she responds Papa touches me." [Tr. **6**, 14].

with the family "to make an assessment," meaning to assess the child's living conditions, to make notes of who lives in the home, make contact with the school, make sure the child is up-to-date medically, and things of that nature; essentially to determine whether or not the child is safe. [Tr. **4**, 55]. In late May or early June of 2018, MD began to speak with Ms. Borja. [Tr. **4**, 84, 100]. All MD knew about Ms. Borja was that "she helps with problems," and spoke to MD in her native language. [Tr. **4**, 84-85]. Ms. Borja visited the house on more than one occasion. [Tr. **4**, 85].

MD recalled a specific instance in the summer of 2018, when she and her brother spent time alone with the defendant. She recalled her brother was playing in the living room and she was with the defendant in the kitchen cooking. She testified that "he just started doing things like touching me, my private parts, and then [she] told him to stop but he continued doing it." [Tr. **4**, 104].

The defendant also touched her in his bedroom. [Tr. **4**, 104]. MD testified that she believed her mom went out with some friends. She and her brother were again with the defendant. The two children were watching a cartoon. [Tr. **4**, 104]. She believed she was wearing two-piece pajamas, a shirt and pants. [Tr. **4**, 111]. The defendant then asked them to turn off the TV, and called the two children into his bedroom. [Tr. **4**, 104]. Then her brother started crying and the defendant told the boy "to

stop crying and that he would hit him." [Tr. **4**, 104]. He began touching her breasts or chest area. [Tr. **4**, 111]. He touched her breasts, and put his hands under her shirt while she still had it on. [Tr. **4**, 112]. She was standing next to the bed, and he told her to go to the bed. [Tr. **4**, 112-14]. The defendant then put MD on his bed, facing the window to the right. He pulled her pants and underwear down to her knees, and started putting his penis on her vagina and "he started rubbing it." [Tr. **4**, 104-05, 114]. She then testified that he "started spreading [her] ass cheeks and [her] vagina lips" and he put his fingers "through" her "vagina." [Tr. **4**, 105, 114-15]. MD recalled this hurt. She recalled that he used his thumbs to hold her "ass cheeks trying to put his penis on [her] vagina part and he started rubbing it." [Tr. **4**, 105, 115-16]. Then "he went into [her] butthole." [Tr. **4**, 105, 116]. She recalled that he "tried" to put his "penis inside" her but after an inch, she "started crying," and he told her to stop crying. [Tr. **4**, 105]. She then stood up and recalled "white things started coming out of his penis" and she saw it fall on the blanket and sheets. He then sent her to her mom's room. [Tr. **4**, 105, 109, 117]. MD had never seen "white stuff" come out of a penis before and didn't know what it was. [Tr. **4**, 109, 118]. She recalled the bedroom door was "semi-open," but mostly closed, and that the defendant had pushed the door closed. [Tr. **4**, 110-11]. This experience made MD feel "weird," because she never had experienced that and never thought her "only grandpa"

would do that to her. [Tr. **4**, 118]. That day, when he was "done," he told her "not to tell anybody" then he sent her to her room. [Tr. **4**, 119]. MD also testified that the defendant had a girlfriend. [Tr. **4**, 129-30].

Ms. Borja visited MD on August 1, 2018, as part of her assessment. [Tr. **4**, 57, 101]. On that day, MD, her brother, and mother were present. [Tr. **4**, 58]. Ms. Borja asked MD "if everything was all right." [Tr. **4**, 58-59, 101]. MD recalled that the first person she told about the experience with the defendant was Ms. Borja, telling her that her "grandpa was touching" her.[4] [Tr. **4**, 121-22]. Ms. Borja testified that MD's demeanor seemed nervous. MD responded and said in Cape Verdean Creole, "Papa," referring to her grandfather, "is touching me." [Tr. **4**, 59]. This statement was immediately reported to Ms. Borja's supervisor, who in turn contacted the Taunton Police. [Tr. **4**, 60]. Ms. Borja remained in the home until the police arrived and translated for the police. [Tr. **4**, 60-61]. Ms. Borja observed that as MD spoke with police, she "was rubbing her hands together," and "not making eye contact," and "looked very uncomfortable." [Tr. **4**, 61]. She also described MD as "very withdrawn." [Tr. **4**, 61]. Ms. Borja did meet with the defendant later in that day. [Tr. **4**, 58]. Ms. Borja continued working

[4] Ms. Borja testified as the first-complaint witness, and the jury was instructed on her testimony. [Tr. **4**, 49-51].

with the family for another month or two, and completed her assessment. [Tr. **4**, 62-63].

Taunton Police Detective Lynn Pina responded to a report that a child had been sexually assaulted by a family member on August 1, 2018. [Tr. **5**, 14-16, 18]. The detective had prior involvement with the family before, in late May or early June 2018. [Tr. **5**, 14, 17]. That situation involved the mother and the child in the home. [Tr. **5**, 15]. Detective Pina arrived first and then another police officer, Detective Mark Brady arrived. [Tr. **5**, 18]. The detective recalled that the mom, MD, her younger brother, and a DCF social worker were present at the home when he arrived. [Tr. **5**, 18]. He initially, spoke with Ms. Borja outside and she filled him in on what had happened prior. [Tr. **5**, 19]. Detective Pina then spoke with MD to find out what had happened to her, but she didn't speak English, so Ms. Borja translated. [Tr. **5**, 18-19]. The interview lasted "maybe 15-20 minutes." [Tr. **5**, 20]. The detective only obtained "minimal-facts" from the initial interview.[5] [Tr. **5**, 20]. Detective Pina described MD's demeanor during his interview as being "quite upset," and that "she was nervous," and "actually physically shaking," and "crying." [Tr. **5**, 21-22].

[5] A forensic interview was performed a few days later at the Children's Advocacy Center, where multiple people were able to listen to the interview. [Tr. **5**, 20-21].

As Detective Pina was at the home, and after his initial interview with MD, the defendant came home. [Tr. **5**, 22]. During the detective's investigation he obtained some basic biographical information about the defendant; that he was born September 2, 1960. [Tr. **5**, 24]. He also learned that MD was 12 years old on August 1, 2018. [Tr. **5**, 24]. Later, the detective, along with other officers conducted a lawful search of the home to obtain the sheets off of the defendant's bed. After seizing that bedding, it was transported to the crime lab. [Tr. **5**, 24]. The detective also transported to the crime lab, the clothes that MD identified as what she wore at the time of the assault, which consisted of shorts, a T-shirt, and underwear. [Tr. **5**, 25].

Jessica Hart worked for the of the Crime Lab, in the DNA Unit. [Tr. **5**, 48]. The only item that was found to contain biological materials was the blanket taken from the defendant's bed, which tested positive for blood and seminal fluid enzyme. [Tr. **5**, 59-60]. DNA testing in this case was conducted by Kira Snyder, who by the time of trial had left the DNA Unit. [Tr. **5**, 60]. Ms. Hart worked as her supervisor in the DNA Unit. [Tr. **5**, 60]. Ms. Snyder's, report tested two swabs and scraping items and two cutting items. [Tr. **5**, 65]. These were the items that tested positive for both blood and semen or sperm cells. [Tr. **5**, 65].

Ms. Snyder testified that the lab had a DNA profile for the defendant and one for MD. [Tr. **5**, 67]. A "swab scrapings of a light brown

stain on a blue blanket retrieved from" the defendant's bedroom contained the sperm fraction of a male whose DNA profile was consistent with that of the defendant. [Tr. **5**, 67-68]. The expected frequency of occurrence of the profile is approximately 1 in 12.06 decillion unrelated individuals. [Tr. **5**, 68]. That profile was also compared to MD's DNA profile and was not consistent with her DNA profile. [Tr. **5**, 68].

A cutting from the same light brown stain on the blue blanket obtained from the bedroom also generated a profile was a mixture that included male DNA, assuming three contributors, and that the DNA profile from the non-sperm fraction was one of those contributors, the DNA profile from that item was at least 120 nonillion times more likely if the profile originated from the DNA profile of the non-sperm fraction, the defendant, and a third unknown individual than originated from the DNA profile from the non-sperm fraction and two unknown individuals, unrelated to the defendant. That provides support for an inclusion of his profile on that questioned item. [Tr. **5**, 68].

No DNA from MD was found on the blanket, which defense counsel called to the jury's attention in his closing argument. [Tr. **6**, 14].

REASONS FOR GRANTING THE WRIT

After A State Supreme Court Expressly Acknowledging That Admitting Surrogate DNA-Analyst Testimony Violated The Sixth Amendment Confrontation Clause And The Fourteenth Amendment's Guarantee Of Due Process, That Court May Not Affirm A Conviction On The Rationale That The Error Was Harmless Because The Case "Turned Entirely On The Victim's Credibility"—A Method Of Review That (1) Conflicts With This Court's Requirement That Harmless-Error Analysis Ask Whether A Rational JURY, Not An Appellate Court, Could Have Reached A Different Verdict; And (2) Is Outcome-Determinative In This And Many Similar Prosecutions That Rely On Forensic Certificates

The SJC's opinion concedes that admitting Ms. Hart's hearsay narration of Ms. Snyder's report violated the Sixth Amendment, yet characterizes the misstep as harmless because "the case turned entirely on the jury's assessment of the victim's credibility." *Commonwealth v. Nascimento-Depina*, 496 Mass. 1, 7, 256 N.E.3d 1286 (2025). That framing is inconsistent with both logic and the evidentiary record.

First, the SJC wrote that the "argument was not preserved below" and right to confrontation may be waived, and, therefore, that court reviewed to determine whether there was error and, if so, whether it resulted in a substantial risk of a miscarriage of justice. *See Commonwealth v. Nascimento-Depina*, 496 Mass. at 6. However, the SJC disregarded the fact that this issue was preserved. As is demonstrated by this record, defense counsel along with the ADA and judge, discussed the crux of the issue and because the trial judge was aware of the issue, this Court should view this issue as preserved. *See*

Clifton v. Massachusetts Bay Transp. Authority, 445 Mass. 611, 621, 839 N.E.2d 314 (2005) (issue preserved when judge acknowledged awareness of issue and expressly noted objection). *See also U.S v. Torres-Meléndez*, 28 F.4th 339, 340 n.2 (1st Cir. 2022) (judge's comment adequately preserved the issue; to preserve a claim of error a defendant's objection need not be framed with exquisite precision); *U.S. v. Orlandella*, 96 F.4th 71, 96 (1st Cir. 2024) ("issues were properly preserved because 'the district judge addressed the issue at trial.'"). Therefore, the appellant deserves the standard of review for a preserved Confrontation Clause violation, that of *de novo* review. *See U.S. v. Malpica-Garcia,* 489 F.3d 393, 395 (1st Cir. 2007) (court of appeals reviews a properly preserved constitutional challenge *de novo*).

This issue is preserved. When it was clear that the Court was going to allow Ms. Hart to testify, defense counsel sought to introduce the DNA Testing Report, which caused the ADA to immediately object. [Tr. **5**, 76]. What occurred was an interesting back and forth between the parties and the court. The ADA correctly pointed out the report was hearsay. [Tr. **5**, 76-77]. Defense counsel countered that it was a business record. [Tr. **5**, 77-78]. The ADA countered saying that the document was prepared in anticipation of trial. [Tr. **5**, 78]. The ADA then correctly stated, "I'm not trying to be difficult about this point. If I could just put in a report, I wouldn't have called the witness." [Tr. **5**, 78]. Defense

counsel then stated, "She's the supervisor of the person that did the testing. This is a confusing topic and area and this summarized basically what her test results are. It's nothing more than a summary." [Tr. **5**, 79]. Defense counsel was stating essentially that Ms. Hart was testifying as an expert with no personal knowledge of the testing, and was only testifying based only on reviewed materials of the file of which the report was an important part. The trial court then picked up on the nuance of the distinction, commenting, "So what you're saying, the difference is because it's an expert's opinion as opposed to a layperson's opinion?" to which defense counsel affirmed. [Tr. **5**, 79]. The ADA then stated that Ms. Hart was not an expert witness because she had not been qualified and no expert instruction had been given. [Tr. **5**, 79-80]. However, even the ADA had to admitted that "she is testifying as to subject matter that's outside of the (indiscernible) experience (indiscernible) there's no question." [Tr. **5**, 80]. The court then allowed the report in over the objection of the ADA. [Tr. **5**, 80].

This issue was thoroughly discussed by the trial court and attorneys, and the issue is preserved. A constitutional error is harmless beyond a reasonable doubt when there is no "reasonable possibility that the evidence complained of might have contributed to the conviction." *U.S. v. Porter*, 764 F.2d 1, 7 (1st Cir. 1985), *quoting Fahy v. Connecticut*, 375 U.S. 85, 86–87 (1963). In practical terms, however, "courts have

found error to be harmless [beyond a reasonable doubt] when the untainted evidence, standing alone, provided 'overwhelming evidence' of the defendant's guilt." *Clark v. Moran*, 942 F.2d 24, 27 (1st Cir. 1991), *quoting Harrington v. California*, 395 U.S. 250, 254 (1969). To put it simply, "there must be 'no reasonable doubt' that the jury would have reached the same verdict without having received the tainted evidence." *U.S. v. Orlandella*, 96 F.4th at 103-04, *quoting Clark v. Moran*, 942 F.2d at 27. *See also U.S. v. Coker*, 433 F.3d 39, 47 (1st Cir. 2005) ("In other words, [in the context of an alleged Sixth Amendment violation,] the government would have to prove beyond a reasonable doubt that Coker would have been convicted even if his confession had not been admitted into evidence.").

In this case, the government provided no such overwhelming evidence of the defendant's guilt. The Commonwealth only had the testimony of the alleged victim. While that alone can suffice for a conviction, *see Commonwealth v. Santos*, 100 Mass. App. Ct. 1, 3, 173 N.E.3d 776 (2021) (in sexual assault case, victim's testimony was "sufficient, standing alone, to support a finding beyond a reasonable doubt"), such testimony from a young person is usually subject to heightened scrutiny by a jury who may believe that a young alleged victim may fabricate testimony. This weakness in the Commonwealth's evidence is why it was determined to put into evidence the DNA

findings. They government wanted to benefit from what is colloquially known as the *CSI effect*, which refers to the phenomenon where the popularity of crime television shows like *CSI: Crime Scene Investigation* influences public perceptions of forensic science, particularly in the context of criminal trials. It primarily affects jurors, but also sometimes lawyers, judges, and law enforcement. It creates a real impact on the defense because if forensic evidence *is* presented, jurors might give it undue weight, assuming that it's infallible—potentially harming the defense, even when such evidence may be flawed or misinterpreted. *See Commonwealth v. Perez*, 460 Mass. 683, 689-90, 954 N.E.2d 1 (2011) (discussing "CSI effect"); *U.S. v. Gentles*, 619 F.3d 75, 82-83 (1st Cir. 2010) (discussion of "CSI effect"). Here the government truly benefited from this allusion to scientific evidence to make a case that is entirely dependent on the veracity of the alleged victim in this case to one that seemingly had real scientific evidence showing the defendant was guilty.

Ms. Snyder testified that the lab had a DNA profile for the defendant and one for MD, the alleged victim. [Tr. **5**, 67]. A "swab scrapings of a light brown stain on a blue blanket retrieved from" the defendant's bedroom contained the sperm fraction of a male whose DNA profile was consistent with that of the defendant. [Tr. **5**, 67-68]. The expected frequency of occurrence of the profile is approximately 1 in 12.06 decillion unrelated individuals. [Tr. **5**, 68]. That profile was also

compared to MD's DNA profile and was not consistent with her DNA profile. [Tr. **5**, 68]. This evidence did not really show anything except that the defendant's sperm was found on a blanket from his own bedroom. There was no evidence when the alleged sexual assault occurred therefore no way to know if the semen stain was from the alleged encounter or from the defendant sleeping in his own bed. There was no DNA from the alleged victim on the blanket and it is really questionable whether this evidence is even relevant. *See Commonwealth v. Schuchardt*, 408 Mass. 347, 350, 557 N.E.2d 1380 (1990); Fed. R. Evid. 401; Mass. Evid. Guide, § 401 ("Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence and (b) the fact is of consequence in determining the action."). The real concern here is that jurors may have given that evidence that it was the defendant's semen on his own blanket undue weight, and potentially harming the defense, even though that evidence is clearly flawed and was an invitation to misinterpretation. Do not lighten the potential impact testimony from the Commonwealth by Mrs. Hart that it essentially was the defendant's DNA on the blanket. [Tr. **5**, 67-68]. She told the jury that the "expected frequency of occurrence of the [the defendant's] profile is approximately 1 in 12.06 decillion unrelated individuals," is powerful on the minds of a lay jury. [Tr. **5**, 68].

And, again, this testimony was deemed erroneous and contra the defendant's constitutional rights.

Again, it was the Commonwealth itself that treated the DNA evidence as central. It subpoenaed Ms. Hart, and elicited the statistics that the sperm fraction was "one in 12.06 decillion," and argued that the profile belonged to the defendant. A juror hearing a near-zero random-match probability naturally regards the science as powerful corroboration. Stripping the jury of that testimony would thus have altered the evidentiary balance: without the expert's statistical anchor the Commonwealth could offer, at most, an uncontextualised reference to an unknown stain of unknown probative value. That is precisely why *Crawford v. Washington* and, now definitively, *Smith v. Arizona* forbid a surrogate from reading a nontestifying analyst's conclusions. This is also why the SJC held Mrs. Hart's testimony on direct examination concerning contents of non-testifying analyst's report regarding DNA evidence obtained from bedding was hearsay and that the report was testimonial, and thus admission of its contents through reviewing analyst's hearsay testimony violated the Confrontation Clause. *See Commonwealth v. Nascimento-Depina*, 496 Mass. at 6-7 (reviewing analyst's testimony on direct examination concerning contents of non-testifying analyst's report regarding DNA evidence obtained from bedding was hearsay; report was testimonial, and thus admission of its

contents through reviewing analyst's hearsay testimony violated Confrontation Clause).

The fundamental problem with this case is that SJC essentially turned the Confrontation Clause violation into a dead letter, meaning a law, rule, or precedent still formally in effect but no longer valid or enforced, through standard of review. The SJC held that the Confrontation Clause violation (admitting the contents of non-testifying analyst's report regarding DNA evidence obtained from bedding), did not result in substantial risk of miscarriage of justice, in this prosecution for aggravated rape of a child and indecent assault and battery on a child under 14 years old. *See Commonwealth v. Nascimento-Depina*, 496 Mass. at 7. The SJC reasoned that the case turned entirely on jury's assessment of minor victim's credibility, and that the victim's testimony bore many *indicia* of reliability. *See Commonwealth v. Nascimento-Depina*, 496 Mass. at 7. But the SJC's harmless-error calculus relies on its own assessment that the child's testimony "bore many *indicia* of reliability." But harmlessness is tested by asking whether *a rational jury* could have reached a different verdict *absent* the improperly admitted proof, not by appellate judge's re-credibility determinations. *See U.S. v. Pizarro*, 772 F.3d 284, 296 (1st Cir. 2014) (reasonable jury determination); *U.S. v. Marshall*, 753 F.3d 341, 346 (1st Cir. 2014) (error was harmless; rational jury would have found guilt absent alleged

error). The report and Ms. Hart's narration were the only expert evidence of ejaculation—an element the prosecutor repeatedly referenced. Had the jury heard only that the child's DNA was missing from the blanket, yet been deprived of Ms. Hart's un-cross-examined claim that the male DNA proved the defendant ejaculated, reasonable doubt would have loomed substantially larger. This is not a case where the government can claim the error doesn't matter because the evidence was overwhelming. The evidence in this case was only one youth alleging abuse. Because the jury is there to determine veracity, given the young age of the alleged victim it is impossible to say with any reasonableness that the jury would have reached the same conclusion without the error in this case. The defendant is entailed to a new trial where the government will not be able to mislead the jury with the DNA evidence. *See Commonwealth v. Wilson*, 94 Mass. App. Ct. 416, 417, 113 N.E.3d 902 (2018) ("The required remedy for a confrontation clause violation is a new trial unless the error was harmless beyond a reasonable doubt."), *citing Commonwealth v. Vasquez*, 456 Mass. 350, 360, 923 N.E.2d 524 (2010). Again, the SJC's harmlessness review simply believed the alleged victim, but that is for a new jury to determine without the error.

The appellant has argued that this issue was fully preserved. Nonetheless, the SJC chose to review this case through the more

stringent standard of review, namely substantial risk of miscarriage of justice. *See Commonwealth v. Nascimento-Depina*, 496 Mass. at 7 (DNA evidence obtained from bedding did not result in substantial risk of miscarriage of justice). In Massachusetts a substantial risk of a miscarriage of justice, means reversal is warranted only "if the evidence and the case as a whole ... [leaves] [the reviewing court] with a serious doubt that the [defendant's] guilt [has] been fairly adjudicated [citations omitted]" *Commonwealth v. Vasquez,* 456 Mass. at 356 (quotation omitted). This standard of review is subjective since it relies on the court's assessment of witness credibility and not only viewing whether the error contributed to the jury's verdict. *See U.S. v. Pizarro*, 772 F.3d at 296; *U.S. v. Marshall*, 753 F.3d at 346. Again, it was the SJC itself that made the appellate determination that the victim's testimony carried the *indicia* of reliability, not whether the jury could have been swayed by the DNA evidence. This subjective review is should be considered a Due Process violation because such subjectivity lends itself to arbitrary and capricious legal determinations like this one.

The Due Process Clause and "substantive due process protects individuals against state actions which are "arbitrary and capricious," *Newman v. Commonwealth of Mass.,* 884 F.2d 19, 25 (1st Cir. 1989), or those which run counter to "the concept of ordered liberty," *Palko v. Connecticut,* 302 U.S. 319, 325 (1937), or those which, in context, appear

"shocking or violative of universal standards of decency," *Furtado v. Bishop,* 604 F.2d 80, 95 (1st Cir. 1979), *cert. denied,* 444 U.S. 1035 (1980). *See also Rios v. U.S.*, 364 U.S. 233, 239-40 (1960) (generally the Due Process Clause is a protection against arbitrary government action); *Lerner v. Casey*, 357 U.S. 399, 419 (1958) (Brennan, J., dissenting - reviewing court's duty to secure to the individual the safeguards, embodied in due process, against a State's arbitrary exercise of power); R. Barnett, *The Original Meaning of the 14th Amendment; Its letter & Spirit*, p. 289 (Harvard Univ. Press 2021) (the Due Process of Law Clause is a guarantee against all arbitrary government action). There really is nothing more arbitrary and capricious that an appellate court looking at a confrontation error and refusing to reverse and order a new trial because the reviewing court believed the alleged victim's testimony.

Nonetheless, trial counsel did not formally object to the substitute chemist's testimony nor discuss the Confrontation Clause issue. Even viewed under the more stringent standard of review for an unpreserved constitutional error, the defendant in this case still deserves a new trial. Where the proceedings violated the defendant's confrontation rights, this Court can review for plain error. *See U.S. v. Pena*, 24 F.4th 46, 67 (1st Cir. 2022) (review of unpreserved constitutional implications is for plain error). "Plain error" review is four-pronged process, pursuant to

which appellate court determines: (1st) whether there was error or defect, i.e., some sort of deviation from legal rule that was not intentionally relinquished or abandoned by defendant; (2nd) whether this legal error is clear or obvious, rather than in reasonable dispute; (3rd) whether error affects defendant's substantial rights, which in ordinary case means that defendant must demonstrate that it affected outcome of district court proceedings; if above three prongs are satisfied, then Court of Appeals has discretion to remedy error, discretion which ought to be exercised only if, (4th) and finally, the error seriously affects fairness, integrity or public reputation of judicial proceedings. *Puckett v. U.S.*, 556 U.S. 129, 135 (2009).

To prove its case the prosecution relied principally on the child's credibility, and to supplement that testimony, forensic corroboration through DNA analysis, which can have a very powerful effect on the juror. Specifically, the prosecution introduced evidence of the defendant's semen was on a blanket from his bedroom, which contained no DNA from MD. [Tr. **5**, 72].

The reason these types of cases are frustrating is for the defense is that the subjectivity of when a substitute analyst is testifying as to their own opinion versus the original analyst's test results. Again, "[a]n expert may give opinion testimony based on hearsay when the particular hearsay would be independently admissible if presented by the 'right

witness' or with a proper foundation, and if it is the type of evidence on which experts customarily rely as a basis for opinion testimony." *Commonwealth v. McGrail,* 80 Mass. App. Ct. 339, 343, 952 N.E.2d 969 (2011), *citing Commonwealth v. Barbosa,* 457 Mass. 773, 784–785, 933 N.E.2d 93 (2010). But this determination can venture into the subjectivity of what a judge thinks is opinion versus hearsay. *See Commonwealth v. Mattei*, 90 Mass. App. Ct. 577, 580, 62 N.E.3d 86 (2016) (expert DNA witness may testify to his or her independent opinion, even if based on a nontestifying analyst's test results, without violating a defendant's confrontation rights), *rev. den.* 476 Mass. 1112 (2017), *See also Commonwealth v. Sanchez*, 476 Mass. 725, 733, 73 N.E.3d 246 (2017) (testimony of DNA unit supervisor at State police crime laboratory did not violate murder defendant's right to confrontation); *Commonwealth v. Chappell*, 473 Mass. 191, 199-202, 40 N.E.3d 1031 (2015) (no confrontation clause violation where testifying expert independently reviewed raw data and reports produced by original analyst, made interpretations, and ensured that there was agreement between her findings and those of original analyst); *Commonwealth v. Greineder*, 464 Mass. 580, 595, 601-602, 984 N.E.2d 804 (2013) (no confrontation clause violation where substitute analyst reviewed nontestifying analyst's work, including six prepared reports, and then conducted independent evaluation of data); *Commonwealth v.*

Barbosa, 457 Mass. at 791 (no confrontation clause violation where substitute analyst conducted full technical review of other analyst's DNA reports regarding testing that was performed and results of testing). "[S]uch testimony is permissible provided that the testifying analyst 'reviewed the nontestifying analyst's work, ... conducted an independent evaluation of the data,' and 'then expressed her own opinion, and did not merely act as a conduit for the opinions of others.'" *Commonwealth v. Jones,* 472 Mass. 707, 715, 37 N.E.3d 589 (2015), *quoting Commonwealth v. Greineder,* 464 Mass. at 595.

The rule prohibits an expert from forming an opinion based on data where such data are not independently admissible in evidence. "[I]t is settled that an expert witness may not, under the guise of stating the reasons for his opinion, testify to matters of hearsay in the course of his direct examination unless such matters are admissible under some statutory or other recognized exception to the hearsay rule." *Commonwealth v. Nardi*, 452 Mass. 379, 392, 893 N.E.2d 1221 (2008), *quoting Grant v. Lewis/Boyle, Inc.*, 408 Mass. 269, 273, 557 N.E.2d 1136 (1990), *quoting Kelly Realty Co. v. Commonwealth*, 3 Mass. App. Ct. 54, 55–56, 323 N.E.2d 350 (1975). *See Commonwealth v. Barbosa*, 457 Mass. at 784 ("if a Commonwealth expert on direct examination were to testify to the conclusion or opinion of a second, nontestifying expert, that conclusion or opinion would be inadmissible hearsay."). In reality this

Court's opinion in *Williams v. Illinois*, 567 U.S. 50, 71-72 (2012) (plurality), was not a model of clarity, especially when compared to its earlier landmark opinion in *Crawford v. Washington*, 541 U.S. 36, 67 (2004). With hindsight, it is clear the minority or dissenters in *Williams* were correct in their legal analysis. Without this Courts clarifying opinion in *Smith v. Arizona*, 602 U.S. 779 (2024), there is little doubt this case would likely have been affirmed on appeal with an unpublished opinion. It is only because of *Smith* that the SJC took up this case from the Mass. Appeals Court docket to determine the outcome itself. In *Smith* this Court held that if a forensic-testing expert 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, as required for the admission of the statement to be barred by the Confrontation Clause; *abrogating Williams v. Illinois*, 567 U.S. 50 (2012). Again, *Smith* offers clarity as to when a statement by a substitute analyst is opinion versus improper hearsay.

Even looking at this case under the higher standard of review, the defendant still deserves a new trial. Most of the arguments in the Massachusetts appellate courts centered around whether there was even an error. The SJC settled this using *Smith* as its guide. It found that a confrontation error had occurred. *See Commonwealth v. Nascimento-Depina*, 496 Mass. at 6-7 (reviewing analyst's testimony on

direct examination concerning contents of non-testifying analyst's report regarding DNA evidence obtained from bedding was hearsay; report was testimonial, and thus admission of its contents through reviewing analyst's hearsay testimony violated Confrontation Clause). Under the analysis for an unpreserved constitutional error, the first prong of the test for a new trial is met. Here there was error or defect, that was not intentionally relinquished or abandoned by defendant.

The next prong is whether this legal error is clear or obvious, rather than in reasonable dispute. Again, the SJC settled this when it found the error. The issue was discussed at length at trial and objections were made, albeit by the ADA.

The next prong deals with the effects on a defendant's substantial rights, which means that defendant must demonstrate that the affected the outcome of trial court proceedings. This is the prong that differentiates the harmlessness inquiry under harmless beyond a reasonable doubt standard as discussed above versus the inquiry of the effect of the defendant's substantial rights. *See U.S. v. Andino-Rodríguez*, 79 F.4th 7, 21 n.20 (1st Cir. 2023). In other words, the defendant must demonstrate that it affected outcome of trial court proceedings. *See Puckett v. U.S.*, 556 U.S. at 135. *See also U.S. v. Olano*, 507 U.S. 725, 725 (1993) (the plain error must "affec[t] substantial rights," which normally means that the error must be prejudicial,

affecting the outcome of the district court proceedings.). The appellant feels this is easy to demonstrate. What this Court should look to is the un-rebuttable evidence Mrs. Hart put into evidence. Of course, the most damning evidence was the fact that she testified to the report's conclusions that the expected frequency of occurrence of the defendant's DNA profile is approximately 1 in 12.06 decillion unrelated individuals. [Tr. **5**, 68]. But look at what defense counsel was not allowed to cross examine Mrs. Hart on because she did not actually test the sample nor author the DNA Report. Ms. Hart really was not subject to cross-examination as to how the experiment was conducted. No substantive question could be put to her as she had no personal knowledge of anything except what the report outlined. Ms. Hart's sole knowledge was based on a review of the lab file and reports. Defense counsel could not ask if Ms. Snyder tampered with the findings or manipulated the data. Defense counsel could not ask Ms. Snyder if she had a dislike of people accused of child rape, or if she doctored the lab results for any reason or had a predisposition to help the Commonwealth's case believing people indicted on child rape charges should just be sent to prison. The logic behind Ms. Hart's testimony is that a DNA analyst can never doctor lab notes and test results. Massachusetts has sad history concerning overconfidence state employees who are supposed to be impartial and above reproach, namely cases dealing with Mrs. Annie

Dookhan and Mrs. Sonja Farak show that to place such implicit trust in the state analyst's ability to just do her job correctly and honestly is misguided.[6] Leaving aside any nefarious practice on the part of Ms. Snyder, most importantly to this case however is that defense counsel was not able to ask Ms. Hart if there was any possibility of cross contamination, because Ms. Hart didn't test the sample and was not there when the testing occurred. While Ms. Hart went through the

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[6] This is a reference to the gravest law enforcement and justice system scandals in recent history regarding the misconduct of two Mass. State chemists, Sonja Farak and Annie Dookhan. The magnitude of Dookhan and Farak's actions warranted around 44,000 drug convictions that had to be dismissed due to their misconduct. Mrs. Dookhan pled guilty to 27 charges arising out of the investigation, including one count of perjury, four counts of witness intimidation, and eight counts of evidence tampering. *See Commonwealth v. Scott,* 467 Mass. 336, 337 n.3, 5 N.E.3d 530, 535 n.3 (2014). *See also Commonwealth v. Dookhan* (Suffolk County Criminal Docket No. 2012-11155). Shortly after the Dookhan scandal, further misconduct of evidence tampering was revealed when officials learned that state chemist Sonja Farak stole drugs submitted to the lab for testing for her own use, consumed drug that were required for testing, and manipulated evidence and the lab's computer system to conceal her actions. *See Committee for Public Counsel Services v. Attorney General*, 480 Mass. 700, 726-27, 108 N.E.3d 966, 987 (2018). Her conduct has affected thousands of additional cases. There have also come to light other analysts, who have falsified credentials or have been caught in other fabrications.

In each of these cases there were charges of government misconduct at issue also which involved the deceptive withholding of exculpatory evidence by members of the state Attorney General's office, who were duty-bound to investigate and disclose the wrongdoing. Executive branch functionaries always seem loathed to admit such wide-ranging lapses, which is always a detriment to the rights of the criminal defendant. Such functionaries are flawed people, the same as analysts who work for the state, imperfect and subject to frailties of judgment and action. This is a main reason the Constitution requires confrontation.

system for keeping track of the samples with a lab number, [Tr. **5**, 52], we cannot know if an error was made through mislabeling or inattention to detail. Ms. Snyder was the accuser as to the DNA profile. Ms. Hart did little more that parrot Ms. Snyder's notes and lab test results.

The jury rendered their verdict without ever having a defense attorney put Mrs. Hart through the crucible of cross examination. *See Crawford v. Washington*, 541 U.S. at 67 ("the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined."). Again, there were not real questions the defense could probe Mrs. Hart as she did not test the DNA sample. For the jury, Mrs. Hart was a government witness who should have been completely believable. As stated above, there is real question that the DNA evidence was even relevant, nonetheless the jury was exposed to the fact that the defendant's seamen was on his blanket and he was on trial for sexual abuse. This would have had real impact on the lay jury petit. In sexual abuse of a minor case like this, jurors are often looking for reasons to find the defendant guilty as the sexual abuse of a child is an especially

heinous crime in our society and one for which severe penalties are in place. Here a government witness giving seemingly relevant and damning DNA evidence against the defendant would have had to play a role in the jury deliberations. Without Mrs. Hart's testimony, the jury was left with only the veracity of the alleged victim in this case. It is by no means certain that the jury would have found her testimony alone truthful and convincing beyond a reasonable doubt.

While the SJC credited MD's testimony, which is odd considering that the SJC was not at the trial and it is usually from visual contact with the witness that fact-finders make credibility determinations. *See Commonwealth v. Crayton,* 470 Mass. 228, 239, 21 N.E.3d 157 (2014) (a jury's collective valuation of the trustworthiness of a witness's in-court statements is premised on the ability of the jury to see "indications of witness certainty or hesitation" and such evaluation includes "facial expression, voice inflection, and body language," and to make "other observations pertinent to assessing the reliability of a person's statements."). The SJC omitted from its analysis that Ms. Borja became involved with MD's family in Taunton, because of a report of physical abuse. [Tr. **4**, 54-55]. MD testified that she "wasn't listening to [her] mom," because she had thrown a can of under the sofa and her "mom was mad because [she] wasn't listening either and she hit [MD] with a belt." [Tr. **4**, 103, 125]. The court was leery to allow the defense to delve

too much into the mother hitting MD, not wanting "to make this a trial within a trial." [Tr. **4**, 48]. Nonetheless, this event seems to have formed the basis for the defense, namely that MD was not credible. As defense counsel stated in his closing argument, "I suggest it was a little more than not listening. [MD] was in trouble and when [MD]'s social worker, Patricia Borja-Lima asked [MD] is anyone touching, she responds Papa touches me." [Tr., **6**, 14]. A youth like MD could make up a story of sexual abuse to deflect attention from herself as a wayward youth, or to deflect from the mother's possible abuse, maybe thinking that the state could take MD from her mother. While a child phycologist would have been a good witness for the defense to explore reasons children lie, nonetheless there was enough evidence to allow the defense to create a defense strategy, even if the judge was "leery" of the defense theory. [Tr. **4**, 48].

This case came down to the credibility of the only Commonwealth witness. That is why the government wanted to sway the jury to convict with questionably relevant DNA evidence. And it seems to have worked. The SJC believed MD's testimony, but the real standard is whether the jury would have reached the same conclusion without the constitutional error. Given that the defense did have a theory and that people lie even when under oath like Sonja Farak and Annie Dookhan, it is not inconceivable that a child could lie under oath also. Where the jury in this case was to make a pure credibility determination as to MD, Ms.

Hart's testimony must have played a part in the jury deliberations. Therefore, this Confrontation Clause violation did affected outcome of trial court proceedings. *See Puckett v. U.S.*, 556 U.S. at 135.

With all four plain-error prongs satisfied, this Court has discretion to remedy the error, discretion *which should* to be exercised where the 4th and final prong is shown, namely that the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *See Puckett v. U.S.*, 556 U.S. at 135. Either the Confrontation Clause is a fundamental right or it is not. In this case there was a constitutional error. If the standard of review creates vastly deterrent outcomes for a constitutional violation or if the reviewing court can simply credit the alleged victim's testimony without applying the objective standard as to whether the constitutional error affected the jury outcome then the Confrontation Clause and Due Process Clause are merely dead letters and justice depends on the subjective determinations of those government entities who can remain unaccountable or unreviewable.

Conclusion

The Massachusetts court's rejection of standards articulated by the Confrontation Clause and Due Process Clause affected the outcome of the petitioner's case and will no doubt continue to affect cases of other similarly situated defendants in state and federal courts. Where the

fundamental rights of countless criminal defendants are at stake and will continue to be compromised as a result of the confusion on this issue, the writ should be granted and the case briefed and set down for argument.

Respectfully submitted,

Antonio B. Nascimento-Depina,
By his attorney,

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Brad P. Bennion
P.O. Box 890118
East Weymouth, Massachusetts 02189
(617) 943-6164
bradpbennion@gmail.com

Counsel of Record for the Petitioner

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