No. 17-1676

In The

Supreme Court of the United States

VANESSA STUART,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Criminal Appeals Of Alabama

PETITIONER'S REPLY BRIEF

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The Petition showed that the admission into evidence of the formal blood alcohol reports was contrary to *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). In response, the State tries two arguments. First, it tries to analogize this case to *Williams v. Illinois*, 567 U.S. 50 (2012). Second, the State argues harmless error. Both arguments fail.[1]

1. The reports were admitted into evidence for their truth, in violation of the Confrontation Clause.

The State tries to squeeze this case into the mold of *Williams v. Illinois*, 567 U.S. 50 (2012), by (a) suggesting that the reports were not really introduced for their truth, in supposed analogy to the conclusion reached by the plurality opinion in *Williams*, and (b) suggesting that the report was not of sufficient solemnity to be testimonial under Justice Thomas's *Williams* concurrence.

The State's "not introduced for truth" theory is not candid given the record here. And as a matter of law it is also contrary even to *Williams* itself, in which five Justices rejected the "not introduced for truth" theory.

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[1] The State errs in saying that Petitioner has served twelve months of her sentence. She has served approximately five months so far. The State also errs in saying that Petitioner was charged with criminally negligent homicide. She was charged with a more serious offense, but was convicted of the lesser-included negligence charge.

See id., 567 U.S. at 104-09 (Thomas, J., concurring); *id.* at 125-33 (Kagan, J., dissenting).

The reports were admitted into evidence and published to the jury. (R-651). *Compare Williams*, 567 U.S. at 62, 79 (report not admitted into evidence). In Alabama, as in other jurisdictions, documents relied on by an expert are not admissible into evidence on that basis if they are otherwise inadmissible. See Ala. R. Evid. 703. When the prosecution offered the reports into evidence, it was plainly to have the jury see and believe what those reports said.

And here is Dr. Hudson's testimony under direct examination by the prosecutor, as he recited what was shown on these reports that had just been admitted into evidence:

> Q. Okay. So when we report this result, we're talking specifically about the amount of drinking alcohol in the blood?
>
> A. Yes.
>
> Q. And what was your result?
>
> A. The result for this analysis was 0.174 grams per 100 milliliters of blood.
>
> MR. BECK: And, again, Judge, I'll renew my objection on the prior ground stated.
>
> THE COURT: Overruled. And if you would like, you can have a running objection.
>
> MR. BECK: Thank you. Yes, sir, I do.
>
> . . .

Q. What does that mean?

A. That means that's the amount of alcohol in weight – grams per volume of blood which is 100 milliliters of blood.

. . .

Q. What is the legal limit in Alabama?

A. 0.08 grams per 100 milliliters of blood.

Q. Okay. And so this .174, that's a greater number than that, correct?

A. Correct.

Q. More than two times?

A. Correct.

. . .

Q. 34 minutes later, what did Ms. Stuart's blood show?

A. 0.158 grams per 100 milliliters of blood.

(R-654 to -56). This testimony shows the emptiness of the State's current suggestion that Dr. Hudson was agnostic in his testimony about whether the reports were accurate, and that he referred to them only insofar as they provided a hypothetical basis for some other calculations. The State used the reports as substantive evidence of an unlawfully high blood alcohol level. The "forensic reports were introduced into evidence, and there is no question that this was done for the purpose of proving the truth of what they asserted: . . . that the

defendant's blood alcohol level exceeded the legal limit. . . ." *Williams*, 567 U.S. at 79 (plurality).

Moreover, the trial court instructed the jury that the State could rely on a statutory presumption of impairment if there was a blood alcohol level over 0.08. (R-839). That instruction would have been nonsensical unless there was evidence of such a level. The reports – having been introduced into evidence for their truth – were the evidentiary premise for that instruction.

Perhaps the most striking refutation of the State's revisionist theory can be seen in closing argument. Although most of the arguments are not transcribed in the record, one relevant part (in a passage that was the subject of an objection, and so was transcribed) does appear. The prosecutor was arguing that the defense was trying to distract jurors from critical evidence. "It's look over here, look over here, don't pay attention to the blood they took from her that says she's .174. Don't pay attention to that." (R-824). Yet now the State asks this Court to believe that the report containing that supposed result of .174 was not offered for truth – when the State pointed to that very result, in closing argument, as particularly crucial evidence. The reports, inadmissible under the Confrontation Clause, were the source of that number. That .174 was not some expert extrapolation by Dr. Hudson from assumed facts; that .174 came from one place, the unlawfully admitted report. The reports were offered for truth, and the prosecutor relied on them for truth.

And even on appeal, the State continued to rely on the reports as evidence for the truth of the matters asserted therein:

> Beletia Sutton performed the blood alcohol analysis and the results showed that the ethanol present in Stuart's blood for sample 1A, item 6047, taken at 0259 hours was 0.174 grams per 100 milliliters of blood. (R. 654-55.) Another draw, taken at 0333 hours, approximately 34 minutes later, item 6046, showed 0.158 grams per 100 milliliters of blood. (R. 656-57.)

(State Brief to Court of Criminal Appeals, p. 6). And the Court of Criminal Appeals, too, took the reports directly as evidence for their truth. (3a).

The reports were introduced into evidence for their truth, in flat violation of *Bullcoming*. To suggest otherwise is not candid.

The reports were also squarely within the range of "testimonial" under this Court's precedents. They were formal documents, on official State letterhead, framed on their face as reports to law enforcement about the "suspect" Ms. Stuart. They tout the accredited status of the laboratory making the report. They declare the supposed blood alcohol level result, even bolstering that with the assertion that the margin of possible error is very small. And of course it was the State itself that created these forms, giving them the level of solemnity and impressiveness that the State chose. By their official format they inherently carry great

weight. No wonder the State emphasized in closing argument that jurors should keep their minds on the reports' results.

2. The error was not harmless.

Second, the State asks this Court to deny review on the basis that the violation of the Confrontation Clause was harmless error.

In *Bullcoming*, this Court left any harmless-error issue for the state courts to address on remand. *Bullcoming*, 564 U.S. at 668 n.11. That could be done here.

But the State is wrong; the error was not harmless. The State is confusing the harmless-error standard with a sufficiency-of-the-evidence standard. The question here is not whether the evidence was sufficient if these reports are excluded from the calculus. The question is whether the State can show beyond a reasonable doubt that the error did not contribute to the verdict. *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988).

Had there been no evidence of blood-alcohol levels admitted in this case, the chance of acquittal would have been real. That would have been a striking gap in the evidence, which many jurors in this modern time would have taken seriously. And there was ample evidence that Ms. Stuart was not substantially intoxicated. (The nurse who drew her blood, for instance, testified that Ms. Stuart did not seem drunk and that she had no odor of alcohol. (R-403)). No wonder, then, that the prosecutor (as quoted above) returned

forcefully to that supposedly scientific and precise number – ".174" – in closing argument, as the evidence that jurors should keep their eyes on. All other sorts of evidence – from police officers claiming that they could subjectively sense various clues of intoxication, to Ms. Stuart's statement that she had consumed some alcohol – could well be consistent with reasonable doubt that she was impaired. The jury might well have understood the possibility that what law enforcement witnesses were portraying as evidence of severe alcohol impairment was instead the result of the trauma of having just been in a terrible and tragic accident, and the result of nervousness about being taken into custody. The blood alcohol reports were, quite likely, what made the difference in whether the jury saw reasonable doubt about that. It was the "science" that was the cornerstone of this prosecution and so many others of this sort. The problem here is that the "science" was admitted in violation of the Constitution.

CONCLUSION

This Court should summarily reverse.

Respectfully submitted,

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