No. ____

In the Supreme Court of the United States

JASON SMITH,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition for a Writ of Certiorari to the
Court of Appeals of the State of Arizona, Division One

PETITION FOR A WRIT OF CERTIORARI

Diane M. Johnsen
PERKINS COIE LLP
2901 North Central Ave
Suite 2000
Phoenix, AZ 85012

Robert Trebilcock
Deputy Public Defender
OFFICE OF YUMA COUNTY
PUBLIC DEFENDER
168 South 2nd Ave
Yuma, AZ 85364

Hari Santhanam
Counsel of Record
PERKINS COIE LLP
110 North Wacker Dr
Suite 3400
Chicago, IL 60606
(312) 324-8447
HSanthanam@perkinscoie.com

Counsel for Petitioner

QUESTION PRESENTED

Whether the Confrontation Clause of the Sixth Amendment permits the prosecution in a criminal trial to present testimony by a substitute expert conveying the testimonial statements of a nontestifying forensic analyst, on the grounds that (a) the testifying expert offers some independent opinion and the analyst's statements are offered not for their truth but to explain the expert's opinion, and (b) the defendant did not independently seek to subpoena the analyst.

PARTIES TO THE PROCEEDING

Petitioner is Jason Smith. Respondent is the State of Arizona. No party is a corporation.

RELATED PROCEEDINGS

Superior Court of Arizona, Yuma County:

State v. *Smith*, No. S1400CR201901251 (Oct. 8, 2021) (entering judgment of conviction after jury trial)

Arizona Court of Appeals, Division One:

State v. *Smith*, No. 1 CA-CR 21-0451 (July 14, 2022) (affirming trial court judgment)

Supreme Court of Arizona:

State v. *Smith*, No. CR-22-0202-PR (Jan. 6, 2023) (denying discretionary review)

TABLE OF CONTENTS

APPENDIX CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

RULES

OTHER AUTHORITIES

In the Supreme Court of the United States

JASON SMITH,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition for a Writ of Certiorari to the
Court of Appeals of the State of Arizona, Division One

PETITION FOR A WRIT OF CERTIORARI

Jason Smith respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of Arizona, Division One.

OPINIONS BELOW

The opinion of the Arizona Court of Appeals affirming petitioner's conviction (App., *infra*, 2a–16a) is unreported but is available at 2022 WL 2734269. The decision of the Arizona Supreme Court denying discretionary review (App., *infra*, 1a) is unreported. The Superior Court's oral rulings admitting trial testimony by the State's expert and rejecting petitioner's arguments that the testimony violated his rights under the Confrontation Clause (App., *infra*, 41a–45a, 55a–62a), and its order denying petitioner's motion for a new trial (App., *infra*, 24a), are unreported.

JURISDICTION

The Arizona Court of Appeals issued a final judgment affirming petitioner's conviction on July 14, 2022. App., *infra*, 2a–16a. The Arizona Supreme Court denied

discretionary review on January 6, 2023. App., *infra*, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION AND RULE OF EVIDENCE

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."

Arizona Rule of Evidence 703 provides that:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

INTRODUCTION

This Court held in *Bullcoming* v. *New Mexico*, 564 U.S. 647 (2011), that 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. Shortly after *Bullcoming*, this Court granted review in *Williams* v. *Illinois*, 567 U.S. 50 (2012), to address a factual scenario left open by *Bullcoming*: where "an expert witness [i]s asked for his independent opinion about underlying testimonial reports that were not them-

selves admitted into evidence." *Id.* at 67 (quoting *Bullcoming*, 564 U.S. at 673 (Sotomayor, J., concurring)). But the result in *Williams*—a fractured 4-1-4 decision—"yielded no majority and … ha[s] sown confusion in courts across the country." *Stuart* v. *Alabama*, 139 S. Ct. 36, 37 (2018) (Gorsuch & Sotomayor, JJ., dissenting) (collecting cases). Now, more than a decade after *Williams*, state high courts and federal courts of appeals are firmly divided. This petition asks this Court to resolve two aspects of this divide, each a direct result of *Williams*.

First, courts are divided over the viability of the rationale posited by the *Williams* plurality—though rejected by five Justices—that under Evidence Rule 703 (in its federal and various state forms), a nontestifying analyst's "[o]ut-of-court statements that are related by [a testifying] expert solely for the purpose of explaining the assumptions on which [the expert's] opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause." *Williams*, 567 U.S. at 57–58; but see *id.* at 104–110 (Thomas, J., concurring) (rejecting the not-for-the-truth rationale); *id.* at 125–129 (Kagan, J., dissenting) (same).

Second, courts are divided over the *Williams* plurality's rationale that the admission of substitute expert testimony would "not prejudice any defendant who really wishes to probe the reliability of the … testing done in a particular case because those who participated in the testing may always be subpoenaed by the defense and questioned at trial," 567 U.S. at 58–59—a position that a majority of this Court rejected in *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305 (2009). See *id.* at 324 (holding that a defendant's "ability to subpoena the analysts … is no substitute for the right of confrontation").

This case embodies both of these issues and underscores the need for this Court's intervention. To prove the drug-related charges against petitioner Jason Smith, the State had the alleged drug evidence tested by a crime lab analyst, Elizabeth Rast. App., *infra*, 5a ¶ 5; see App., *infra*, 127a. But by the time of trial, Rast was no longer employed by the crime lab—for reasons the State has never explained. App., *infra*, 41a, 45a, 53a. The State thus called a substitute expert, Gregory Longoni, who reviewed only Rast's report and notes, and had not conducted or observed any of the tests at issue, nor conducted any quality assurance of those tests. *Id.* at 43a–45a. And though Longoni acknowledged it would have taken him less than three hours to retest the evidence, the State did not have him do so prior to trial. *Id.* at 53a–54a. Nonetheless, over Smith's objections, the trial court permitted Longoni to use Rast's notes and report, and recount from these documents the particular tests Rast performed on the evidence in Smith's case and the results she reached, reasoning that Longoni could testify to his "independent opinion" based on Rast's work without violating the Confrontation Clause. *Id.* at 46a–49a; see also *id.* at 55a–62a.

The Arizona Court of Appeals affirmed and held that Longoni's testimony did not violate the Confrontation Clause, even though Smith had no opportunity to cross-examine Rast. App., *infra*, 3a ¶ 1. Citing one of its earlier decisions applying Arizona Rule of Evidence 703 and the *Williams* plurality's not-for-the-truth rationale, the court reasoned that "Longoni presented his independent expert opinions permissibly based on his review of Rast's work" and that an expert may "testif[y] 'to otherwise inadmissible evidence, including the substance of a non-testifying expert's analysis, if such evidence forms the basis of the expert's opinion.'" *Id.* at 11a–12a ¶ 19 (quoting *State ex rel. Montgomery* v. *Karp*, 336 P.3d 753, 757 ¶ 13 (Ariz. Ct.

App. 2014)). The court also invoked the *Williams* plurality opinion to conclude that "[h]ad Smith sought to challenge Rast's analysis, he could have called her to the stand and questioned her, but he chose not to do so." *Id.* at 12a ¶ 19 (citing *Williams*, 567 U.S. at 58–59).

This Court should grant review to address the confusion and divide among lower courts over the viability of the not-for-the-truth rationale for admitting substitute expert testimony and reaffirm that a defendant bears no burden to subpoena the prosecution's absent analysts under the Confrontation Clause.

STATEMENT

1. Petitioner Jason Smith was charged with, and pleaded not guilty to, five drug-related offenses. App., *infra*, 4a–5a ¶ 5. While Smith's case was pending, the State sent alleged drug evidence to a crime lab operated by the Arizona Department of Public Safety ("DPS") and requested that it be tested. App., *infra*, 127a–128a. In its request, the State specifically identified Smith and the charges against him, and it informed DPS that "trial ha[d] been set" in Smith's case. *Id.* at 127a.

Elizabeth Rast, then a DPS forensic scientist, conducted the testing. App., *infra*, 5a ¶ 5. To document her work, Rast prepared typewritten notes on DPS letterhead. App., *infra*, 88a–107a. These notes provide the only firsthand record of the specific analyses Rast conducted. In her notes, Rast recorded the observations she made, the weights she measured, the test procedures she used, and the results she obtained, as well as her comments and conclusions as to each evidence "item" the State submitted for testing, including Items 20A, 20B, 26, and 28 on which the State would ultimately rely at trial. *Ibid.*

As to Items 20A and 20B, Rast stated in her notes that she performed a chemical color test and a gas-chromatography and mass-spectrometry ("GC-MS") test, and concluded that the items were methamphetamine. App., *infra*, 89a–91a; see also App., *infra*, 38a, 46a–48a. Similarly, as to Item 28, Rast stated in her notes that she performed a chemical color test and a GC-MS test, and concluded it was cannabis. App., *infra*, 95a–96a; see also App., *infra*, 36a–38a, 48a–49a. Rast also attached to her notes copies of the charts and graphs (chromatographs and mass spectra) from the GM-MS tests that she performed on Items 20A, 20B, and 28 (among others). App., *infra*, 108a–126a.

As to Item 26, Rast stated in her notes that she performed a microscopic examination and chemical color test, and concluded that it was marijuana. App., *infra*, 94a; see also App., *infra*, 34a–36a, 41a–42a, 46a. Rast did not perform any GC-MS analysis on Item 26. See App., *infra*, 94a.

Rast further prepared a typewritten report on DPS letterhead in which she stated her conclusions and the measured weight of each item, and she signed each page of the report. App., *infra*, 85a–87a.

2. The State initially identified Rast as its trial expert. App., *infra*, 26a. But by the time of trial, Rast was no longer employed by DPS, for reasons that the State has not explained. App., *infra*, 41a, 45a, 53a. The State then announced that it would introduce the results of Rast's analyses through a "substitute" expert, DPS forensic scientist Gregory Longoni. App., *infra*, 26a.

At trial, Longoni testified about his training and experience, "the general process" when "a law enforcement agency submits suspected drugs for testing," and the testing processes used by the DPS crime lab. App., *infra*,

32a–39a. Because Longoni was not involved in the specific testing in Smith's case, Smith objected when Longoni was asked whether Rast, "[a]s a forensic scientist, would … have done the same things that [he] would have done," and Smith subsequently requested a sidebar. *Id.* at 41a–43a. After the sidebar, the trial court allowed Smith to voir dire Longoni about whether he could "offer an opinion independently." *Id.* at 43a–45a. During that questioning, Longoni testified that his opinions were based on Rast's report, "the notes that [Rast] took and the scientific analysis and the analytical protocols" DPS follows. *Id.* at 44a. He conceded that he "never tested anything in this case" and performed no "quality assurance" of Rast's analyses; indeed, he had not even spoken to Rast. *Id.* at 45a. Smith then renewed his objection to Longoni's testimony, which the trial court overruled. *Ibid.*

When direct examination resumed, Longoni identified the specific tests that Rast had performed on each evidence item, and in response to the State's questions asking him for his "independent opinion," Longoni testified that the items Rast tested were "a usable quantity of marijuana" (Item 26), "a usable quantity of methamphetamine" (Items 20A and 20B), and a "usable quantity of cannabis" (Item 28). App., *infra*, 46a–49a. But because he lacked personal knowledge of Rast's testing, Longoni repeatedly referred to Rast's notes and report, and made clear that he was recounting Rast's statements from those materials. For example:

> Q How is Item Number 20 tested?
>
> THE WITNESS: If I were to review the notes again real quick, Your Honor?
>
> THE COURT: You may.
>
> THE WITNESS: So Item 20 was actually two items, 20A and 20B.

* * *

Q How -- in reviewing the records, do you know what method was used to test Item Number 20A and 20B?

A Yes.

Q What method was used?

A A chemical color test as well as a GC-MS.

* * *

Q Was a blank run?

A Yes.

* * *

Q Did you also look at what was done to Item 28?

THE WITNESS: Again, can I refer to the report, Your Honor?

THE COURT: You may.

THE WITNESS: Okay.

* * *

Q What kind of testing was done on Item 28?

A A chemical color test and a GC-MS.

Q And is that, again, consistent with the test you described for testing suspected cannabis?

A Yes.

Q Did you note whether or not the policies and practices of the lab and principles of chemistry were followed in this case?

A Yes.

Q Were they followed?

A Yes.

Id. at 46a–48a.[1]

Even the manner in which the State framed its questions made clear that Longoni was drawing straight from Rast's notes and report:

- "From your review of the lab notes in this case, can you tell me what scientific method was used to analyze Item 26?" App., *infra*, 41a.
- "In reviewing these notes, in reviewing what was done to the sample, the intake records, the instruments used, the chemicals used, can you form an independent opinion about what the identity of Item 26 is?" *Id.* at 42a.
- "[I]n reviewing the records, do you know what method was used to test Item Number 20A and 20B?" *Id.* at 46a.
- "Can you form an independent opinion based on your review of the records, the notes, the chemicals used, the graphs that were made[,] on what Item 28 is?" *Id.* at 49a.

On cross-examination, Longoni explained that he testifies in less than five percent of the cases in which he is involved and that although he did not personally retest the evidence in Smith's case, it would have taken him less than three hours to do so. App., *infra*, 53a–54a.

At the close of evidence, Smith moved for acquittal, arguing (among other things) that Longoni's testimony was "really not independent." App., *infra*, 55a. The trial court denied that motion and Smith's subsequent renewed motion, in which he cited this Court's decision in *Bullcoming*

---

[1] Longoni similarly recounted from his "review of [Rast's] lab notes in this case" that Rast conducted "[a] microscopic examination and [a] chemical color test" on Item 26. App., *infra*, 41a–42a.

in arguing that Longoni's testimony violated his confrontation right. *Id.* at 55a–62a. The trial court reasoned that "this case is distinguished from the *Bullcoming* case in that the expert … , Mr. Longoni, testified of his own opinion as to what the nature of the substances was that w[ere] tested, and, therefore, [his testimony] d[id] not violate the [C]onfrontation [C]lause of the Constitution." *Id.* at 62a.

In its summation, the State relied exclusively on Longoni's testimony to prove the identity of the alleged drug evidence. See, e.g., App., *infra*, 64a ("We see a white crystalline substance in those bags, a substance that [Longoni] testified and told you was methamphetamine."); *id.* at 65a ("[Longoni] testified and told you that that was cannabis."); *id.* at 83a ("[W]hen we talk about the science in this case, [Longoni] told you an independent opinion about what those drugs are."). The State further relied on Longoni's recounting of Rast's statements to establish that Rast had followed proper "policies and procedures" to test each evidence item:

> [Longoni] was able to see that the policies and procedures were followed, he was able to tell how these were tested. He told you what he would have done and saw that that was done in this case too.

Id. at 83a.

The jury found Smith guilty of possession of marijuana for sale and possession of methamphetamine, cannabis, and drug paraphernalia. App., *infra*, 6a ¶ 7; see also App. 17a–21a. Smith moved for a new trial based on his confrontation objection (App., *infra*, 25a), and the trial court denied the motion (App., *infra*, 24a).

3. The Arizona Court of Appeals affirmed Smith's conviction and rejected his argument that the admission of Longoni's testimony violated the Confrontation Clause. App., *infra*, 2a–16a.

First, the Arizona Court of Appeals reasoned that the State did not "introduce Rast's opinions or any of her work-product documents into evidence," and that "Longoni presented his independent expert opinions permissibly based on his review of Rast's work" while "subject to Smith's full cross-examination." App., *infra*, 11a–12 ¶ 19. As support for that rationale, the court relied on its earlier decision in *Karp*, which applied Arizona Rule of Evidence 703 and the *Williams* plurality's not-for-the-truth rationale, to explain that, in the court's view, there is "no hearsay violation when an expert testifies 'to otherwise inadmissible evidence, including the substance of a non-testifying expert's analysis, if such evidence forms the basis of the expert's opinion.'" *Ibid.* (quoting *Karp*, 336 P.3d at 757 ¶ 13). Under this view, the hearsay statements recounted by an expert are purportedly offered "only to show the basis of [the expert's] opinion and not to prove their truth." *Karp*, 336 P.3d at 757 ¶¶ 12–13 (citing *State* v. *Joseph*, 283 P.3d 27, 29 ¶ 12 (Ariz. 2012); *Williams*, 567 U.S. at 58 (plurality op.)).

Second, the Arizona Court of Appeals cited the *Williams* plurality opinion and reasoned that "[h]ad Smith sought to challenge Rast's analysis, he could have called her to the stand and questioned her, but he chose not to do so." App., *infra*, 12a ¶ 19 (citing *Williams*, 567 U.S. at 58–59).

Smith timely filed a petition seeking discretionary review by the Arizona Supreme Court, which was denied on January 6, 2023. App., *infra*, 1a.

REASONS FOR GRANTING THE PETITION

A. Lower Courts Are Deeply Divided Over the Viability of the Not-for-the-Truth Rationale for Admitting Substitute Expert Testimony and Whether a Defendant Has a Burden to Subpoena Nontestifying Analysts Under the Confrontation Clause.

As two Justices have aptly described it, *Williams* "yielded no majority and its various opinions have sown confusion in courts across the country." *Stuart*, 139 S. Ct. at 37 (Gorsuch & Sotomayor, JJ., dissenting) (collecting cases). Lower court judges agree. See, e.g., *United States* v. *Turner*, 709 F.3d 1187, 1189 (7th Cir. 2013) ("[T]he divergent analyses and conclusions of the plurality and dissent [in *Williams*] sow confusion 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."); *State* v. *Walker*, 212 A.3d 1244, 1260 (Conn. 2019) ("Due to the fractured nature of the *Williams* decision, courts have struggled to determine the effect of *Williams*, if any, on the legal principles governing [C]onfrontation [C]lause claims."). This Court should grant review to provide further guidance and resolve two aspects of *Williams* that have deeply divided lower courts.

1. The principal reason for the fractured result in *Williams* was that a majority of this Court was unable to agree on the appropriate test for determining whether the statements at issue were testimonial. A four-Justice plurality found that the statements there were not testimonial, reasoning that they were not "prepared for the primary purpose of accusing a targeted individual." *Williams*, 567 U.S. at 84. Justice Thomas agreed that the statements were not testimonial based on the view, endorsed by no other Justice, that the statements did not

bear 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).

Relevant here, the *Williams* plurality also reasoned that regardless of whether the statements were testimonial, no confrontation violation occurred there because, under Evidence Rule 703 (in its federal and various state forms), a nontestifying analyst's "[o]ut-of-court statements that are related by [a testifying] expert solely for the purpose of explaining the assumptions on which [the expert's] opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause." 567 U.S. at 57–58. The plurality further justified the admission of such out-of-court statements through a substitute expert on the grounds that it would "not prejudice any defendant who really wishes to probe the reliability of the … testing done in a particular case because those who participated in the testing may always be subpoenaed by the defense and questioned at trial." *Id.* at 58–59.

On these points, however, a majority of the Court was able to reach consensus: Justice Thomas and the four dissenting Justices roundly rejected the plurality's not-for-the-truth rationale, explaining that out-of-court statements that form the basis of an expert's opinion are necessarily offered for their truth because they are useful only insofar as they are true. 567 U.S. at 104–110 (Thomas, J., concurring); *id.* at 125–129 (Kagan, J., dissenting). And as Justice Thomas noted, the Court in

Melendez-Diaz had already rejected the position that a defendant's ability to subpoena those who made the out-of-court statements is a "substitute for the right of confrontation." *Id.* at 117 n.6 (Thomas, J., concurring) (quoting *Melendez-Diaz*, 557 U.S. at 324); see also *Bullcoming*, 564 U.S. at 666 (citing same).

2. Since then, state high courts and federal courts of appeals have struggled to apply the split decision in *Williams*. Lower courts are now firmly divided over the viability of the *Williams* plurality's not-for-the-truth rationale.

a. A number of courts have rejected the *Williams* plurality's not-for-the-truth rationale as a basis for permitting a substitute expert to convey the testimonial statements of others, including the highest courts of California, Connecticut, Delaware, Maryland, Massachusetts, and the District of Columbia. See *People* v. *Sanchez*, 374 P.3d 320, 333 (Cal. 2016); *Martin* v. *State*, 60 A.3d 1100, 1107 (Del. 2013); *Young* v. *United States*, 63 A.3d 1033, 1045 (D.C. 2013); *Walke*r, 212 A.3d at 1253; *Commonwealth* v. *Jones*, 37 N.E.3d 589, 597 (Mass. 2015); *Leidig* v. *State*, 256 A.3d 870, 900 (Md. 2021).

In *Sanchez*, the Supreme Court of California specifically addressed the question "whether [the] facts an expert relates as the basis for his opinion are properly considered to be admitted for their truth." 374 P.3d at 326. The court was especially concerned with expert testimony conveying "[c]ase-specific facts … relating to the particular events and participants alleged to have been involved in the case being tried," such as facts concerning the particular evidence tested in a given case and the manner in which it was tested. *Id.* at 327; see also *id.* at 331 (noting that the expert in *Williams* related the fact that the DNA profile at issue "was in fact derived

from [the victim's] swabs, rather than from some other source" (citation omitted, brackets in original)). After examining the applicable state evidentiary rules and the various opinions in *Williams*, the court rejected the not-for-the-truth rationale, explaining that "[w]hen an expert relies on hearsay to provide case-specific facts, considers the statements as true, and relates them to the jury as a reliable basis for the expert's opinion, it cannot logically be asserted that the hearsay content is not offered for its truth." *Id.* at 332.

In *Young*, the Court of Appeals for the District of Columbia addressed a factual scenario similar to *Williams* in which a substitute expert testified regarding DNA analyses performed by nontestifying analysts even though she herself "was not personally involved in the process that generated the [DNA] profiles [at issue]" and "had no personal knowledge of how or from what sources the profiles were produced." 63 A.3d at 1045. Although the underlying documents were not admitted into evidence, the court concluded that the expert necessarily "was relaying, for their truth, the substance of out-of-court assertions by absent [analysts] that, employing certain procedures, they derived the profiles from the evidence furnished" from specific sources. *Ibid.* In reaching that conclusion, the court rejected the not-for-the-truth rationale and agreed with the *Williams* dissent and Justice Thomas that the rationale "does not work because 'the purportedly 'limited reason' for such testimony—to aid the factfinder in evaluating the expert's opinion—necessarily entails an evaluation of whether the

basis is true.'" *Id.* at 1047 n.53 (quoting *Williams*, 567 U.S. at 107 (Thomas, J., concurring)).[2]

Similarly, in *Martin*, the Supreme Court of Delaware considered whether a substitute expert permissibly testified regarding blood analyses performed by a nontestifying analyst based solely on her review of the analyst's reports. 60 A.3d at 1101. Although the reports were not admitted, the court rejected the not-for-the-truth rationale and relied on the opinions of Justice Thomas and the four dissenting Justices in *Williams* to conclude that the expert had conveyed the absent analyst's representations and that those representations were offered for their truth. *Ibid.* (citations omitted).

The highest courts of Maryland, Connecticut, and Massachusetts have reached the same conclusion. In *Leidig*, the Court of Appeals of Maryland "decline[d] to accept" the not-for-the-truth rationale, noting that "[t]his view failed to garner the support of five Justices in *Williams*." 256 A.3d at 900 n.23.[3] Instead, the court "agree[d] with Justice Thomas that 'statements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose.'" *Ibid.* (citation omitted). In *Walker*, the Supreme Court of Connecticut held that "where [a] testifying expert explicitly refers to, relies on, or vouches for the accuracy

---

[2] The court in *Young* also found it immaterial that the expert "independently analyzed" the underlying data and "reached her own conclusions," explaining that "it would 'require an impossible feat of mental gymnastics' to 'disaggregate' [the expert's] own non-hearsay conclusions from the interwoven hearsay on which she relied, relaying the results of the DNA testing and analysis performed" by the absent analysts. 63 A.3d at 1048 (citation omitted).

[3] In 2022, the Court of Appeals of Maryland was renamed the Supreme Court of Maryland.

of [an] other expert's findings, the testifying expert has introduced out-of-court statements that, if offered for their truth and are testimonial in nature, are subject to the [C]onfrontation [C]lause." 212 A.3d at 1253. Though it was uncontested that the nontestifying analysts' statements there were offered for their truth, the court found this concession "unavoidable" and further recognized that "five [J]ustices in *Williams* rejected the plurality's" not-for-the-truth rationale. *Id.* at 1256–1257 (citations omitted). In *Jones*, the Supreme Judicial Court of Massachusetts applied its common-law evidentiary rules to conclude that statements related by a substitute expert regarding procedures used by nontestifying nurses to collect the DNA samples at issue had been offered for their truth. 37 N.E.3d at 597.

b. By contrast, a number of courts have adopted the *Williams* plurality's not-for-the-truth rationale, including the highest courts of Arizona, Maine, Mississippi, Tennessee, and Vermont, as well as the Eleventh Circuit. The Arizona Supreme Court's decision in *Joseph*, which the decision below indirectly applied, is illustrative.[4] The court there approvingly cited the *Williams* plurality's not-for-the-truth rationale and held that "[b]ecause the facts underlying an expert's opinion are admissible only to show the basis of that opinion and not to prove their truth, an expert does not admit hearsay or violate the Confrontation Clause by revealing the substance of a nontestifying expert's opinion." *Joseph*, 283 P.3d at 29-30

---

[4] The Arizona Court of Appeals in this case relied on its earlier decision in *Karp*, which in turn relied on *Joseph* and the *Williams* plurality opinion for the proposition that hearsay statements recounted by an expert are offered "only to show the basis of [the expert's] opinion and not to prove their truth." *Karp*, 336 P.3d at 757 ¶ 12 (citing *Joseph*, 283 P.3d at 29 ¶ 12); *see also id.* ¶ 13 (citing *Williams*, 567 U.S. at 58 (plurality op.)).

¶¶ 8, 12 (citing *Williams*, 567 U.S. at 58 (plurality op.)); *accord State* v. *Mercier*, 87 A.3d 700, 704 (Me. 2014); *Hingle* v. *State*, 153 So.3d 659, 664 (Miss. 2014); *State* v. *Hutchison*, 482 S.W.3d 893, 914 (Tenn. 2016); *State* v. *Tribble*, 67 A.3d 210, 218 (Vt. 2012); *United States* v. *Murray*, 540 F. App'x 918, 921 (11th Cir. 2013).

Other courts, while not directly addressing the not-for-the-truth rationale, have indirectly applied it by justifying the admission of substitute expert testimony revealing statements by absent analysts regarding analyses performed on particular evidence on the grounds that the testifying expert offered some "independent opinion." See, e.g., *State* v. *Brewington*, 743 S.E.2d 626, 628–629 (N.C. 2013); *State* v. *McLeod*, 66 A.3d 1221, 1230–1232 (N.H. 2013).

c. Further still, many courts have been unable to discern any guiding principles from *Williams*, even as to the plurality's not-for-the-truth rationale, and have instead limited *Williams* to its particular facts. In *State* v. *Griep*, 863 N.W.2d 567 (Wis. 2015), for example, the Supreme Court of Wisconsin unsuccessfully attempted a *Marks* analysis to distill a holding from *Williams*. *Id.* at 579 n.16 (citing *Marks* v. *United States*, 430 U.S. 188, 193 (1977)); see also *United States* v. *James*, 712 F.3d 79, 95 (2d Cir. 2013) ("*Williams* does not, as far as we can determine, using the *Marks* analytic approach, yield a single, useful holding relevant to the case before us. It is therefore for our purposes confined to the particular set of facts presented in that case.").

Despite their inability to discern a holding from *Williams*, these courts often have rationalized the admission of substitute expert testimony on the grounds 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. See, e.g., *United States* v. *Shanton*, 513 F. App'x 265, 267 (4th Cir. 2013) ("If this case were to go before the Supreme Court again, we believe five [J]ustices would affirm" including the plurality "on the ground[s] that the statements were not admitted for the truth of the matter asserted."); *United States* v. *Pablo*, 696 F.3d 1280, 1291 (10th Cir. 2012) ("The four-Justice plurality in *Williams* likely would determine that [the expert's basis] testimony was not offered for the truth of the matter asserted."); *State* v. *Lui*, 315 P.3d 493, 503 (Wash. 2014) ("[O]ur decision is consistent with the five [J]ustices in *Williams*.").

3. In addition to the not-for-the-truth rationale, lower courts are divided over whether a defendant bears any burden to independently subpoena the prosecution's absent analysts and secure their testimony at trial. Many courts addressing this issue have faithfully applied this Court's holding in *Melendez-Diaz* that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." 557 U.S. at 324; *accord United States* v. *Walker*, 673 F.3d 649, 656 (7th Cir. 2012); *United States* v. *Macias*, 789 F.3d 1011, 1018 (9th Cir. 2015); *State* v. *Sykes*, 204 A.3d 1282, 1290 (Me. 2019); *People* v. *Fackelman*, 802 N.W.2d 552, 559 (Mich. 2011).

But given the *Williams* plurality's treatment of this issue, some courts have disregarded the holding of *Melendez-Diaz* and placed the burden on the defendant to subpoena nontestifying analysts. For example, in the decision below, the Arizona Court of Appeals cited the *Williams* plurality decision to rationalize the admission of Longoni's substitute testimony on the grounds that "[h]ad Smith sought to challenge Rast's analysis, he could have

called her to the stand and questioned her, but he chose not to do so." App., *infra*, 12a ¶ 19 (citing *Williams*, 567 U.S. at 58–59). And Arizona courts are not alone. See, e.g., *State* v. *Garcia*, No. 33,756, 2014 WL 2933211, at *4 (N.M. June 26, 2014); *Commonwealth* v. *LaLonde*, No. 3468 EDA 2012, 2014 WL 10965225, at *13 (Pa. Super. Ct. Apr. 28, 2014).

This Court's intervention is needed to resolve the confusion and divide among lower courts regarding the propriety of the not-for-the-truth rationale and to reaffirm that a defendant bears no burden to subpoena the prosecution's absent analysts under the Confrontation Clause.

B. The Rationales Applied by the Arizona Court of Appeals and Similarly Applied by Other Lower Courts Do Not Comport with, and Threaten to Swallow, the Confrontation Clause.

The Arizona Court of Appeals justified the admission of Longoni's substitute expert testimony on the grounds that he had "presented his independent expert opinions" and that an expert may "testif[y] 'to otherwise inadmissible evidence, including the substance of a non-testifying expert's analysis, if such evidence forms the basis of the expert's opinion.'" App., *infra*, 11a–12a ¶ 19 (quoting *Karp*, 336 P.3d at 757 ¶13). Under that rationale, the hearsay statements recounted by an expert are purportedly offered "only to show the basis of [the expert's] opinion and not to prove their truth." *Karp*, 336 P.3d at 757 ¶ 12. The Arizona Court of Appeals further reasoned that "[h]ad Smith sought to challenge Rast's analysis, he could have called her to the stand and questioned her, but he chose not to do so." App., *infra*, 12a ¶ 19 (citations omitted). Those rationales, which other courts have similarly applied, do not withstand scrutiny, and if allowed to per-

sist, would provide deft prosecutors with an unwarranted end-run around the Confrontation Clause in most cases.

1. Five Justices in *Williams* rejected the not-for-the-truth rationale that was applied in this case by the Arizona Court Appeals, and for good reason—it is not consistent with the Confrontation Clause. See *Williams*, 567 U.S. at 104–110 (Thomas, J., concurring) (rejecting plurality's not-for-the-truth rationale); *id.* at 125–129 (Kagan, J., dissenting) (same). As Justice Kagan aptly explained, "to 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." *Id.* at 126 (Kagan, J., dissenting). Thus, as the principal modern treatise on evidence explains, "[o]ne can sympathize … with a court's desire to permit the disclosure of basis evidence that is quite probably reliable, such as a routine analysis of a drug, but to pretend that it is not being introduced for the truth of its contents strains credibility." *Id.* at 127 (quoting D. Kaye et al., THE NEW WIGMORE: EXPERT EVIDENCE § 4.10.1, at 198 (2d ed. 2011)).

Similarly, it is irrelevant whether the underlying documents prepared by the absent analyst are themselves admitted or whether the expert offers some "independent opinion," because a confrontation violation occurs when the expert relates testimonial statements from those documents. 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*, 63 A.3d at 1044. 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).

Smith's case epitomizes these flaws in the not-for-the-truth rationale. Significantly, Longoni did not simply testify hypothetically or in a vacuum that the certain test results he reviewed reflected the presence of controlled substances. Rather, he affirmatively testified that Rast performed *particular* tests on the *specific* evidence in *Smith's case* to reach those results—all information that he necessarily related from Rast's statements in her notes and report because he lacked personal knowledge of Rast's analyses. App., *infra*, 44a–45a. Notably, these are the very 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").

Rast's underlying statements, in turn, were offered for their truth, because to the extent that Longoni provided any "independent opinions," those opinions depended on Rast's statements being true.[5] Longoni's opinions, therefore, cannot be properly described as "independent." That characterization, in fact, derives from the suggestive manner in which the prosecution framed its questioning to ask Longoni for his "independent opinion." See App., *infra*, 46a ("[C]an you form an independent opinion on the identity of Item 26?"); *id.* at 47a ("Do you have an independent opinion on the result of what Item 20A is? … And

---

[5] To be sure, it is possible 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 as Longoni admitted, he did neither and had no personal knowledge of the testing at issue. App., *infra*, 44a–45a.

likewise for 20B?"); *id.* at 49a ("Can you form an independent opinion … on what Item 28 is?"). If that is all that were required, then any skilled prosecutor could frame the questioning to elicit an "independent opinion" from a substitute expert that bypasses the Confrontation Clause.

2. The Arizona Court of Appeals' other rationale—that Smith did not independently subpoena and seek to secure Rast's testimony—fares no better and was squarely rejected by this Court in *Melendez-Diaz*. 557 U.S. at 324. Fundamentally, as this Court explained, "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." *Ibid.* The Arizona Court of Appeals' reasoning also makes little practical sense because "[u]nlike the Confrontation Clause," the ability of a defendant to subpoena a witness is "of no use … when the witness is unavailable or simply refuses to appear." *Ibid.* (citation omitted). Indeed, this reasoning assumes that Rast was available and willing to testify, which if true begs the question why the State did not secure her presence at trial. It is all the more troubling given that the State never explained why Rast was no longer employed by the DPS crime lab. And given that the prosecution bears the burden to prove its case beyond a reasonable doubt, defendants in most cases are unlikely to subpoena adverse witnesses who form the basis of the prosecution's case, thus providing skilled prosecutors yet another mechanism to bypass the Confrontation Clause.

In short, the rationales applied here by the Arizona Court of Appeals and similarly applied by other courts do not comport with the Confrontation Clause. Unless this Court intervenes, these rationales 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.

C. The Question Presented Is an Important and Recurring One, and This Case Presents the Ideal Vehicle for Addressing It.

1. The question presented implicates recurring issues of national significance to the proper administration of criminal trials in which forensic analyses play an increasingly central evidentiary role. As reflected by the sheer number of cases grappling with the question presented (see Section A, *supra*), prosecutors in many jurisdictions across the country rely on substitute experts to present the forensic analyses of nontestifying analysts. And it is in these cases that the Confrontation Clause's safeguards are perhaps most needed. Indeed, forensic evidence often can be superficially impressive to juries, carrying with it an air of infallibility propagated by popular media. See, e.g., *State* v. *Bowman*, 337 S.W.3d 679, 694 n.3 (Mo. 2011) (taking judicial notice of the so-called "CSI Effect"). Concerns about forensic evidence also have been repeatedly validated and reinforced by incidents of negligence, incompetence, bias, and even fraud on the part of forensic analysts, including "drylabbing" incidents where analysts have reported results of testing that they never even conducted. See generally Brief of Amicus Curiae The Innocence Network, Bullcoming v. New Mexico, 564 U.S. 647 (2011) (No. 09-10876), 2010 WL 5043100. Now, more than ever, lower courts, prosecutors, and defense lawyers need this Court's guidance on whether, and the extent to which, the Confrontation Clause permits substitute expert testimony.

2. This case presents the ideal vehicle for this Court to address the question presented and resolve the confusion and divide among lower courts. As an initial

matter, this case comes to this Court on direct appeal under the broadest standard of review and free of any procedural constraints. Smith timely objected and argued that Longoni's testimony violated the Confrontation Clause (App., *infra*, 41a–45a, 55a–62a) and preserved the issue on appeal (App., *infra*, 3a ¶ 1). The Arizona Court of Appeals, in turn, substantively addressed and decided Smith's confrontation argument (App., *infra*, 10a–12a ¶¶ 16–20), and it is properly presented for this Court's review. See *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959).

This case also squarely raises the question presented. In finding that Longoni's testimony did not violate the Confrontation Clause, the Arizona Court of Appeals invoked the *Williams* plurality's not-for-the-truth rationale to hold that an expert may "testif[y] 'to otherwise inadmissible evidence, including the substance of a non-testifying expert's analysis, if such evidence forms the basis of the expert's opinion.'" App., *infra*, 11a–12a ¶ 19 (citation omitted). And the court further cited the *Williams* plurality opinion for the proposition that "[h]ad Smith sought to challenge Rast's analysis, he could have called her to the stand and questioned her, but he chose not to do so." *Ibid.* (citing 567 U.S. at 58–59).

Moreover, this case avoids the pitfalls that *Williams* posed and will enable this Court to get past the testimonial nature of the underlying statements and decide the question presented. Indeed, Rast's statements that Longoni related to the jury are testimonial under either the *Williams* dissent's broader evidentiary-purpose test or the plurality's narrower targeted-individual test, because Rast tested the evidence and prepared the statements at issue at the direct request of the State and for the express purpose of generating evidence to use against Smith at trial. See, e.g., App., *infra*, 127a (reflecting that

State specifically identified Smith in its request for testing and noted that "trial ha[d] been set" in Smith's case);[6] see also App., *infra*, 99a (reflecting that State's attorney coordinated with Rast regarding testing to build case against Smith).

Further, Rast's report and notes, including the results of the GC-MS tests she performed, are part of the record on appeal. App., *infra*, 85a–126a. Thus, this Court may review precisely the same materials that Longoni reviewed and determine for itself whether Longoni's testimony impermissibly related Rast's testimonial statements to the jury.

Finally, Smith's inability to cross-examine Rast presents a compelling case of prejudice. Significantly, the forensic analyses that Rast performed "require[d] specialized knowledge and training" in which "human error can occur at each step." *Bullcoming*, 564 U.S. at 654. In Rast's absence, Smith could not interrogate her about "lapses or lies" in her materials and could not "ask[] questions designed to reveal whether incompetence, evasiveness, or dishonesty [might have] accounted for" her employment at the DPS crime lab ending. *Id.* at 661–662. And as the State acknowledged in its summation, Longoni's testimony recounting Rast's statements was essential to establishing the identity of the alleged drug evidence. App., *infra*, 64a–65a, 83a (arguing that "[Longoni] told you … what those drugs are" and that "[Longoni] was able to see that the policies and procedures were followed, [and] he was able to tell how these were tested"). At the

---

[6] Rast's report and notes also likely meet Justice Thomas' formality criterion because they were prepared at the behest of the State under formalized procedures and printed on DPS letterhead. App., *infra*, 85a–87a; App., *infra*, 88a–107a. Rast also signed each page of her report. App., *infra*, 85a–87a.

same time, as Longoni acknowledged, it would have taken him less than three hours to retest the evidence in Smith's case. *Id.* at 51a. The State thus had available a simple, alternative means for presenting its case without violating Smith's confrontation right—it just chose not to pursue it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Hari Santhanam
Counsel of Record
PERKINS COIE LLP
110 North Wacker Drive
Suite 3400
Chicago, IL 60606
(312) 324-8447
HSanthanam@perkinscoie.com

Diane M. Johnsen
PERKINS COIE LLP
2901 North Central Ave
Suite 2000
Phoenix, AZ 85012

Robert Trebilcock
Deputy Public Defender
OFFICE OF YUMA COUNTY
PUBLIC DEFENDER
168 South 2nd Avenue
Yuma, Arizona 85364

MARCH 14, 2023