No. 22–899

In the
Supreme Court of the United States

JASON SMITH,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition for Writ of Certiorari to the Arizona Court of Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an expert witness's testimony violated the Confrontation Clause when he reasonably relied, in part, on a former colleague's notes and analysis from within the same crime lab to reach an independent opinion; the non-testifying expert's opinion and work-product were not admitted into evidence; and the testifying expert was subject to cross-examination.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

RULES

INTRODUCTION

In a plurality opinion, this Court held in *Williams v. Illinois*, 567 U.S. 50, 57–58 (2012), that the Confrontation Clause does not prohibit testifying experts from relying on the findings of non-testifying experts in reaching their conclusions. Justice Thomas concurred that there was no Confrontation Clause violation, finding that the statements at issue "lacked the requisite 'formality and solemnity' to be considered 'testimonial' for purposes of the Confrontation Clause." *Id.* at 103–04. Smith asks this Court to accept review and revisit *Williams* because, he claims, a deep split among jurisdictions has occurred in the wake of *Williams*. Pet. at 3.

Since *Williams* was decided, at least 13 other litigants have filed petitions for writs of certiorari raising similar arguments, and likewise encouraging this Court to revisit *Williams* in cases involving forensic analyst testimony. *See Chavis v. State*, 227 A.3d 1079 (Del. 2020), *cert. denied*, 141 S. Ct. 1528 (2021); *United States v. Baas*, 80 M.J. 114 (C.A.A.F. 2020), *cert. denied*, 141 S. Ct. 902 (2020); *Johnson v. State*, No. A-12744, 2019 WL 12044175 (Alaska Ct. App. 2019), *cert. denied*, 141 S. Ct. 112 (2020); *People v. Stahl*, 141 A.D.3d 962 (N.Y. App. Div. 2016), *cert. denied*, 138 S. Ct. 222 (2017); *United States v. Katso*, 74 M.J. 273 (C.A.A.F. 2015), *cert. denied*, 136 S. Ct. 1512 (2016); *State v. Stanfield*, 347 P.3d 175 (Idaho 2015), *cert. denied*, 136 S. Ct. 794 (2016); *State v. Griep*, 863 N.W.2d 567 (Wis. 2015), *cert. denied*, 136 S. Ct. 793 (2016); *Cooper v. State*, 73 A.3d 1108 (Md. 2013), *cert. denied*, 134 S. Ct. 2723 (2014); *State v. Walker*, 833 N.W.2d 872 (Table) (Wis. Ct. App. 2013), *cert. denied*, 134 S. Ct. 2663 (2014); *State v. Ortiz-Zape*, 743 S.E.2d 156 (N.C. 2013), *cert. denied*, 134

S. Ct. 2660 (2014); *United States v. Turner*, 709 F.3d 1187 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2660 (2014); *Commonwealth v. Dyarman*, 73 A.3d 565 (Pa. 2013), *cert. denied*, 134 S. Ct. 948 (2014); *Malaska v. State*, 88 A.3d 805 (Md. Ct. Spec. App. 2014), *cert. denied*, 135 S. Ct. 1162 (2015). In the face of arguments similar to the ones made here, this Court denied review each time.

This Court should similarly deny review here for at least three primary reasons. First, this case is a poor vehicle in which to revisit *Williams* because the concerns voiced by the dissent in *Williams* were not a factor in Smith's case, and the key issues at trial were not impacted by the analyst's testimony. Second, in an unpublished decision, the Arizona Court of Appeals correctly rejected Smith's confrontation challenge based on *Williams* and the facts presented at trial. Third, courts are not as divided as Smith claims—several federal circuits and many state courts permit expert testimony that relies on testing performed by non-testifying analysts.

This Court should deny certiorari.

STATEMENT OF THE CASE

1. *Factual background, trial, sentencing, and post-trial litigation.* In December 2019, police executed a search warrant at Smith's father's home. Pet. App. 3a. The property consisted of a double-wide trailer, two travel trailers, and a shed, which officers described as a "makeshift room." *Id.* at 3a–4a.

When officers arrived at the shed, they smelled an "overwhelming odor of fresh marijuana and burnt marijuana." *Id.* at 3a. Police knocked on the front door of the shed and announced their presence. *Id.* No one answered. *Id.* After the second knock, Smith answered the door. *Id.* at 4a. When Smith was subsequently detained, he refused to put his hands behind his back, yelling that the officers were "illegally trespassing" and "harassing" him. *Id.* Smith continued yelling at the officers until he was placed inside a police vehicle. *Id.*

Eleven individuals were detained at the property, two of whom were inside the shed with Smith. *Id.* The shed contained a bed, a couch, clothing, a work bench, a cabinet, and a small refrigerator. *Id.* During the search of the shed, there was marijuana strewn throughout, including nearly six pounds of marijuana on a drying rack hanging from the ceiling. *Id.* Officers also found a "joint," a "meth pipe," methamphetamine inside a jacket, cannabis wax, and two scales. *Id.* The total street value of all marijuana found was over $50,000. *Id.* at 14a.

Arizona Department of Public Safety ("DPS") Lab Manager Jonathan Noble and Forensic Scientist Elizabeth Rast performed the intake process for the seized items. *Id.* at 40a. Rast also tested the items. *Id.*

at 41a. At the time of trial, Rast no longer worked for DPS. *Id.* at 45a.

Before trial, DPS Forensic Scientist Greggory Longoni reviewed the testing request form, intake records, instruments and chemicals used, testing methods, and testing results. *Id.* at 39a. At trial, Longoni explained the testing processes followed by forensic scientists at the DPS Lab to identify marijuana, cannabis, and methamphetamine. *Id.* at 32a–38a. Before Longoni testified to his opinions, defense counsel requested a side-bar. *Id.* at 42a. Defense counsel said Longoni did not perform the testing and asked for "leeway on cross-examination." *Id.* The prosecutor responded that Longoni formed his own independent opinion and should be allowed to testify to it. *Id.* at 42a–43a. Defense counsel then requested to voir dire Longoni before he offered an opinion. *Id.* at 43a. The court granted defense counsel's request. *Id.*

During voir dire, Longoni said that he did not test any items in this case. *Id.* at 44a–45a. However, based on a review of Rast's notes, the scientific analysis conducted, including graph results from gas chromatograph mass spectrometer confirmatory testing, the analytical protocols, and the DPS policies and procedures used in all crime labs in Arizona, Longoni formed his own independent opinion as to what the seized substances were in this case. *Id.* at 35a, 37a–39a, 44a, 46a. Defense counsel objected to Longoni's opinion testimony, and that objection was overruled. *Id.* at 45a. When direct examination resumed, Longoni clarified he was not testifying as to Rast's report; he was testifying as to his own "independent opinion." *Id.* at 46a. Neither the report nor the lab notes were admitted at trial. *Id.* at 12a.

Longoni independently concluded, based on his "knowledge and training as a forensic scientist, [his] knowledge and experience with DPS's policies, practices, procedures, [his] knowledge of chemistry, the lab notes, the intake records, the chemicals used, the tests done," and the graphs used, that the seized substances were usable quantities of marijuana, methamphetamine, and cannabis. *Id.* at 42a, 46a–49a.

After Longoni's testimony, defense counsel moved for a directed verdict under Rule 20 of the Arizona Rules of Criminal Procedure. *Id.* at 55a–56a. Among other things, defense counsel argued that Longoni's opinion was not independent, which defense counsel acknowledged "probably goes to the weight of the evidence, and we have a lot to say about that to the jury." *Id.* at 55a. The trial court denied the motion. *Id.* at 56a–57a.

Defense counsel later renewed his Rule 20 motion, relying on *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), and arguing that Longoni's testimony (and the absence of Rast's testimony) violated Smith's confrontation rights. *Id.* at 57a–59a. The court denied the motion, reasoning that *Bullcoming* was distinguishable because Longoni testified to his own independent opinion. *Id.* at 62a.

The jury convicted Smith of possession of marijuana for sale and possession of dangerous drugs, narcotic drugs, and drug paraphernalia. *Id.* at 3a, 6a. The trial court subsequently denied a motion for a new trial (which raised many of the same arguments detailed above) and sentenced Smith to an aggregate, mitigated sentence of 4 years' imprisonment. *Id.* at 18a–20a, 24a–25a.

2. *The Arizona Court of Appeals rejects Smith's Confrontation Clause claim.* On direct appeal, Smith challenged Longoni's testimony and argued the trial court violated his right to confront the witnesses against him when it allowed Longoni to testify about his independent opinion based on data generated by Rast. Pet. App. 3a. In a unanimous unpublished decision, the Arizona Court of Appeals rejected Smith's claim. *Id.* at 10a–12a. The court first noted that it had rejected a similar argument in *State ex rel. Montgomery v. Karp*, 336 P.3d 753 (Ariz. Ct. App. 2014), where the testifying criminalist formed an independent opinion about the defendant's blood alcohol concentration based on her review of a non-testifying criminalist's notes and report. Pet. App. 10a–11a. In Smith's case, the court found Longoni did not act as a "mere conduit" because he "presented his independent expert opinions permissibly based on his review of Rast's work, and he was subject to Smith's full cross-examination." *Id.* at 11a (internal quotation and citation omitted). And "when an expert gives an independent opinion, the expert is the witness whom the defendant has the right to confront." *Id.* (citation omitted). Because Smith was able to confront Longoni, and the State did not admit Rast's opinions, no Confrontation Clause violation occurred. *Id.* at 11a–12a.

The Arizona Supreme Court denied review.[1] *Id.* at 1a. Smith now seeks a writ of certiorari.

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[1] Smith did not provide Rast's report to the Court of Appeals for its review. Instead, he later supplemented the record with the report when he petitioned for review in the Arizona Supreme Court. *See* Pet. App. 1a; Resp. App. 1–6.

REASONS FOR DENYING THE PETITION

I. This Case Is A Poor Vehicle To Revisit *Williams.*

Even if this Court were inclined to revisit *Williams*, this case is a poor vehicle to do so for several reasons.

First, Smith asks this Court to compare Longoni's testimony to Rast's report. Pet. at 26. But, as noted, this report was never admitted at trial; nor was it before the Arizona Court of Appeals. Rather, the first tribunal to ever receive Rast's report was the Arizona Supreme Court, which denied review of the case. *See* Pet. App. 1a; Resp. App. 1–6. Nonetheless, Smith's Confrontation Clause claim relies on this report. In arguing that the case is a *good* vehicle, for instance, Smith argues that the report and notes "are part of the record on appeal" and thus that this case is a good vehicle because "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." Pet. at 26. He ignores, however, that the report was not in front of the Arizona Court of Appeals. He thus encourages this Court to engage in review of that report—which he says is important—in the first instance. This Court should decline that invitation. *See Monks v. New Jersey*, 398 U.S. 71 (1970) (dismissing writ of certiorari as improvidently granted where the state courts had no opportunity to pass upon the petitioner's claim regarding the unconstitutional application of a state statute); *see also Smith v. Mississippi*, 373 U.S. 238 (1963) (dismissing writ as improvidently granted because "the record [was] not sufficient to permit decision of [the defendant's] constitutional claims").

Second, this case presents a fundamentally different factual scenario than was presented by *Williams*. In *Williams*, one reason the dissent declined to follow the plurality's rationale was its concern about the witness's ability to discuss the *outside* laboratory's testing procedures. 567 U.S. at 124–25 (noting that the testifying analyst "had no knowledge at all of [the outside lab]'s operations"). By contrast, in Smith's case, a forensic scientist from the same lab testified based on his personal knowledge and professional experience and explained the lab's testing process for marijuana, cannabis, and methamphetamine before offering his independent opinion. Pet. App. 32–38a, 42a, 46a–49a.

Third, Smith's case is not one where the scientific evidence and subsequent testimony squarely addressed the only contested issue at trial, such as impairment in a DUI case, *see Bullcoming*, 564 U.S. at 651, or the identity of an unknown rapist, *see Williams*, 567 U.S. at 84. The core issue at Smith's trial was whether Smith *knowingly* possessed the contraband, not whether the contraband was actually marijuana, cannabis, and methamphetamine. *See* Pet. App. 5a–6a, 15a; *see also United States v. Maxwell*, 724 F.3d 724, 728 (7th Cir. 2013) (noting in rejecting confrontation challenge that "[t]here was no question … about the *type* of drugs being distributed" and the defendant only cross-examined the expert "on the weight—not the composition—of the drugs because he was focused solely on showing his lack of intent to distribute") (emphasis in original).

Fourth, Smith cannot demonstrate prejudice from Longoni's testimony because it was not needed for his possession of marijuana for sale conviction, the felony for which he received the longest sentence of imprisonment. Pet. App. 17a–23a. At trial, the officers testified that they smelled an "overwhelming odor of fresh marijuana and burnt marijuana" upon approaching the shed. Pet. App. 3a. Once inside, the officers found, *inter alia*, several pounds of marijuana on a drying rack hanging from the ceiling. Pet. App. 4a; Resp. App. 7–10. Based on the officers' testimony, the photographs admitted at trial, and Smith's behavior at the scene, the jurors could have determined Smith possessed marijuana for sale without Longoni's testimony. *See* Pet. App. 14a–15a (the Arizona Court of Appeals reasoning that the strong odor of marijuana, Smith's behavior, and his trespassing accusations showed his knowledge of the contraband); *see also California v. Ciraolo*, 476 U.S. 207, 213 (1986) (stating that officers within public airspace "were able to observe plants readily discernible to the naked eye as marijuana").

Thus, Smith's case, in which the Arizona Supreme Court denied review of the Arizona Court of Appeals' unpublished decision, is not the "ideal vehicle" for granting review.

II. The Arizona Court of Appeals' Unpublished Decision Correctly Rejected Smith's Confrontation Clause Claim.

Setting aside the vehicle problems presented here, review is unwarranted because the Arizona Court of Appeals got it right. The Confrontation Clause is implicated by "testimonial" statements of non-testifying witnesses. *Crawford v. Washington*, 541

U.S. 36, 59 (2004). Since *Crawford*, this Court has several times addressed the Confrontation Clause implications of lab-generated evidence.

First, in *Melendez-Diaz*, where the State admitted three "certificates of analysis" to prove that a substance was cocaine, and where the State presented no live witnesses, this Court held that the Confrontation Clause was violated. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 308, 310–11, 329 (2009) (holding that certificates were testimonial and were "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination") (internal quotation marks and citation omitted).

Subsequently, in *Bullcoming*, this Court held that the Confrontation Clause did not permit "the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." 564 U.S. at 652.

Neither *Bullcoming* nor *Melendez-Diaz* were cases "in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence." *Bullcoming,* 564 U.S. at 673 (Sotomayor, J., concurring) (citing Fed. R. Evid. 703).

Thereafter, in *Williams*, this Court was tasked with deciding whether the defendant's confrontation rights were violated when an analyst testified that the defendant's DNA matched swabs from the victim's rape kit based on a DNA profile an outside laboratory created from those swabs. 567 U.S. at 59–62. Five justices concluded that this complied with the Confrontation Clause. *Id.* at 84–86, 93, 103–04. The plurality reasoned that "[o]ut-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which [their] opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause." *Id.* at 58. As the plurality highlighted, "[f]or more than 200 years, the law of evidence has permitted the sort of testimony that was given by the expert in this case."[2] *Id.* at 57.

In reaching its conclusion, this Court emphasized the distinction between whether a defendant's confrontation rights were violated and whether sufficient foundational evidence supported the expert's opinion. *Id.* at 75. In rejecting an argument that the State had "somehow introduced the substance of [the] report into evidence," the Court noted that the argument seemed to be rooted in "the (erroneous) view that unless the substance of the report was sneaked in, there would be insufficient evidence in the record" concerning the origin of the swabs and the reliability of the outside laboratory's procedures. *Id.* (internal quotation marks omitted). Not only was the concern "factually incorrect," this Court found it was "legally irrelevant" because the issue before the Court was whether a Confrontation

[2] Although less relevant here, the Court independently concluded that no Confrontation Clause violation had occurred because the underlying report was "very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach." *Id.* The outside laboratory's report was created before a suspect had been identified and was thus non-testimonial because it was not generated to be used as evidence against the defendant. *Id.*

Clause violation had occurred, and not whether sufficient foundational evidence had been presented to support the expert's opinion. *Id.*

Justice Thomas concurred with the plurality's conclusion—that there was no Confrontation Clause violation—albeit for a different reason. *Id.* at 103–04. He found that the statements at issue "lacked the requisite 'formality and solemnity' to be considered 'testimonial' for purposes of the Confrontation Clause." *Id.* As Justice Thomas reasoned, "the Confrontation Clause reaches formalized testimonial materials, such as depositions, affidavits, and prior testimony, or statements resulting from formalized dialogue such as custodial interrogation." *Id.* at 111 (cleaned up).

Justice Breyer wrote a separate concurring opinion, which also supports the State's position in this case. *Id.* at 86–99. In determining that there was no confrontation problem, he noted the "traditional rule" that allows experts to rely on an unadmitted forensic report authored by another to "indicate the underlying factual information upon which she based her independent expert opinion." *Id.* at 88. Justice Breyer reasoned that "[o]nce one abandons the traditional rule, there would seem often to be no logical stopping place between requiring the prosecution to call as a witness one of the laboratory experts who worked on the matter and requiring the prosecution to call *all* of the laboratory experts who did so." *Id.* at 89 (emphasis in original). Further, he noted that "[e]xperts–especially laboratory experts–regularly rely on the technical statements and results of other experts to form their own opinions." *Id.* Lower courts and treatise writers have thus long-recognized that a "substitute expert" may testify "if the original test was documented in a thorough way that permits the substitute expert to evaluate, assess, and interpret it." *Id.* at 91 (internal quotation marks and citation omitted).

Justice Breyer also noted that "[t]he defendant would remain free to call laboratory technicians as witnesses" and that "the need for cross-examination is considerably diminished when the out-of-court statement was made by an accredited laboratory employee operating at a remove from the investigation in the ordinary course of professional work." *Id.* at 93, 95.

Four justices dissented, arguing that the statements underlying the expert's opinion were necessarily offered for their truth and that the expert witness "'could not convey what the actual analyst knew or observed about the events …, *i.e.*, the particular test and testing process he employed.'" *Id.* at 120, 124, 126–29 (quoting *Bullcoming*, 564 U.S. at 661).

Here, the State's presentation of evidence at Smith's trial complied with the Confrontation Clause and this Court's jurisprudence. The State did not simply admit a report into evidence and call it quits. *Cf. Melendez-Diaz*, 557 U.S. at 308. Nor did the State call a surrogate expert who was unfamiliar with the underlying analysis for the sole purpose of admitting a certified report. *Cf. Bullcoming*, 564 U.S. at 653–56. Rather, the State offered testimony from another expert from the same lab who regularly conducts the same testing, and who reviewed all of the records in the case, analyzed them, and formed his own opinion. *See* Pet. App. 26a, 30a–31a, 39a, 42a, 46a–49a; *see also Bullcoming*, 564 U.S. at 673 (Sotomayor, J., concurring) (noting that a fact pattern like the one present here was *not* present in *Bullcoming*).

At trial, Longoni explained the lab's processes, the testing methods used by the lab for the respective contraband, and his independent opinions based, *inter alia*, on the testing methods he described. Pet. App. 32a–38a, 42a, 46a–49a. Longoni, who did not work at an outside laboratory, had personal knowledge of the lab's procedures and answered questions from Smith's counsel at trial regarding the same. Pet. App. 49a–53a; *cf. Williams*, 567 U.S. at 134 n.4 (Kagan, J., dissenting) (arguing that the "problem" present was "that *no* analyst came forward to testify") (emphasis in original).

Importantly, Rast's report was not admitted, nor were her conclusions. Pet. App. 12a. Consequently, the jury was not informed about Rast's opinion; rather, Longoni's opinion was the only opinion for the jury to consider. Accordingly, Longoni, not Rast, was the witness Smith was entitled to confront.

And contrary to what Smith suggests, Longoni did not merely serve as a conduit for Rast's conclusions. During voir dire, Longoni was asked if his conclusion was based on Rast's report and he explained that his conclusion was based on "the notes …, the scientific analysis and the analytical protocols[.]" Pet. App. 44a. After voir dire, Longoni affirmed that he was "not testifying as to [Rast's] report," but was merely "testifying as to [his] review of [Rast's] lab notes." Pet. App. 46a. Thereafter, Longoni merely refreshed his recollection with the report, the same as any other witness, when he was asked a question about a testing method. Pet. App. 46a, 48a.

In other words, the only forensic expert witness who provided evidence against Smith was Longoni. Smith was able to confront Longoni; indeed, Smith's counsel had the opportunity to question Longoni in voir dire and on cross-examination, including as to his lack of personal involvement in the testing. Pet. App. 43a–45a, 49a–54a. Neither Rast's report nor her conclusions were admitted at trial. Instead, Rast's analysis merely formed the basis of Longoni's independent opinions.

At bottom, Smith's objection is less about the right to confront a witness (since Smith was afforded that right) than it is about whether the witness he did confront had adequate foundation to provide an admissible or credible expert opinion that the drugs were marijuana, cannabis, and methamphetamine. *See Williams*, 567 U.S. at 75. This is evidenced by defense counsel's request to voir dire Longoni before he offered his expert opinion to explore "[h]ow he formed an opinion." Pet. App. 43a. But any such foundation objection is not only misplaced, but also "legally irrelevant" to a Confrontation Clause claim. *Williams*, 567 U.S. at 75. The Arizona Court of Appeals got it right in analyzing Smith's Confrontation Clause claim, and this Court should deny review.

III. Smith Overstates The Split Among Jurisdictions.

State and federal courts generally allow independent expert testimony that relies on data or analysis generated by other non-testifying analysts. Indeed, several federal circuits and many states have permitted such testimony in the wake of *Williams*. Moreover, several cases cited by Smith that have declined to follow *Williams* were decided on distinguishable facts.

A. Smith minimizes the number of jurisdictions that rely on *Williams* favorably and/or employ its reasoning.

Smith concedes that Arizona, Maine, Tennessee, Mississippi, Vermont, and the Eleventh Circuit have adopted the *Williams* plurality's rationale and that New Hampshire and North Carolina have "indirectly applied it." Pet. at 17–18 (citing *State v. Joseph*, 283 P.3d 27, 30 ¶ 12 (Ariz. 2012); *State v. Mercier*, 87 A.3d 700, 704 (Me. 2014); *State v. Hutchinson*, 482 S.W.3d 893, 914 (Tenn. 2016); *Hingle v. State*, 153 So.3d 659, 664–65 (Miss. 2014); *State v. Tribble*, 67 A.3d 210, 217–18 (Vt. 2012); *United States v. Murray*, 540 F. App'x 918, 921 (11th Cir. 2013); *State v. McLeod*, 66 A.3d 1221, 1230–32 (N.H. 2013); *State v. Brewington*, 743 S.E.2d 626, 628 (N.C. 2013)).

Other states, too, have likewise relied on *Williams* or adopted similar reasoning in rejecting Confrontation Clause challenges similar to the one here. *See State v. Jones*, 220 So.3d 128, 135–36 (La. Ct. App. 2017); *People v. Barajas*, 497 P.3d 1078, 1085–88 (Colo. Ct. App. 2021); *State v. Roach*, 95 A.3d 683, 695–97 (N.J. 2014); *Commonwealth v. Yohe, II,* 79 A.3d 520, 540–41 (Pa. 2013), *cert. denied*, 572 U.S. 1135 (2014); *State v. Lopez*, 45 A.3d 1, 13–14 (R.I. 2012); *State v. Medicine Eagle*, 835 N.W.2d 886, 895–99 (S.D. 2013); *State v. Griep*, 863 N.W.2d 567, 583–84 (Wis. 2015), *cert. denied*, 577 U.S. 1061 (2016). Additional states have reached similar conclusions in evaluating cases where a supervisor of the testing analyst testified at trial. *See Robbins v. State*, 449 P.3d 1111, 1115–16 (Alaska Ct. App. 2019); *Moss v.*

State, 879 S.E.2d 821, 828–29 (Ga. Ct. App. 2022); *State v. Hall*, 419 P.3d 1042, 1076 (Idaho 2018); *Ex parte v. Ware*, 181 So. 3d 409, 416–17 (Ala. 2014); *see also Roach*, 95 A.3d at 695–97 (detailing why the analysis for a testifying supervisor and a testifying colleague who conducted an independent review is no different). And still more states have approved of testimony like the testimony offered in this case in evaluating different, but similar, fact patterns. *See, e.g.*, *Ackerman v. State*, 51 N.E.3d 171, 189 (Ind. 2016) ("[E]ven if the autopsy report was inadmissible, Dr. Hawley could have still testified to his own independent opinion based upon his review of the autopsy report."), *cert. denied*, 137 S. Ct. 475 (2016); *State v. Sauerbry*, 447 S.W.3d 780, 785, 788–89 (Mo. Ct. App. 2014) (rejecting confrontation challenge "where a testifying examiner relates his or her *own* opinions based on another medical examiner's observations during an autopsy"); *State v. Maxwell*, 9 N.E.3d 930, 949 (Ohio 2014) (similarly allowing "independent opinion" testimony from medical examiner who did not perform autopsy).

In the federal system, while only the Eleventh Circuit has expressly adopted the *Williams* plurality's rationale, several circuits and the U.S. Court of Appeals for the Armed Forces have allowed forensic expert opinion testimony that relies upon data or analysis from other sources. *See United States v. Shanton*, 513 F. App'x 265, 266–67 (4th Cir. 2013) (concluding after post-*Williams* remand from this Court that DNA expert's testimony that relied, in part, on analysis from other experts did not violate the Confrontation Clause); *Maxwell*, 724 F.3d at 725–27 (rejecting on plain error review a confrontation challenge where the drug testing was conducted by a retired analyst from the same lab); *United States v. Richardson*, 537 F.3d 951, 959–60 (8th Cir. 2008) (finding no plain error where the testifying analyst's "testimony concerned her independent conclusions derived from another scientist's tests results"); *United States v. Pablo*, 696 F.3d 1280, 1283–95 (10th Cir. 2012) (concluding post-*Williams* that the expert's DNA testimony, which relied upon two other analysts' reports, did not amount to plain error); *United States v. Katso*, 74 M.J. 273, 282–84 (C.A.A.F. 2015) (finding a reviewing lab technician's testimony did not violate the Confrontation Clause because he "presented his own expert opinion at trial, which he formed as a result of his independent review"), *cert. denied*, 136 S. Ct. 1512 (2016); *see also United States v. Portillo*, 969 F.3d 144, 170 (5th Cir. 2020) (concluding on plain error review that law enforcement expert's testimony, which relied on hearsay statements to support conclusions, did not violate the Confrontation Clause); *United States v. Rios*, 830 F.3d 403, 417–19 (6th Cir. 2016) (rejecting confrontation challenge where "expert exercises independent judgment in assessing and using the hearsay (and other sources) to reach an expert opinion") (internal quotation marks and citation omitted); *United States v. Gomez*, 725 F.3d 1121, 1130 (9th Cir. 2013) (rejecting on plain error review a confrontation challenge where the testimony required "*some* level of independent judgment" from the officer) (emphasis in original).

Thus, a strong consensus exists that expert witnesses may rely on data, analysis, and statements from others that are not admitted in evidence in forming their own independent opinions without violating the Confrontation Clause. Moreover, as is discussed below, even the six jurisdictions cited by

Smith do not generate as clear of a split in authority as Smith suggests.

B. The cases Smith cites that rejected the *Williams* plurality's rationale were often presented with different facts.

Confrontation Clause cases in this arena are often fact-dependent. For example, some involve reports from a non-testifying expert that were admitted, while others (like Smith's case) do not. These and other factual idiosyncrasies can matter.

Some of the cases upon which Smith relies in arguing that there is a significant split in jurisdictions are factually distinguishable from his case. It is not clear that even the courts Smith points to would grant him relief. Smith relies on *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); *State v. Walker*, 212 A.3d 1244, 1260 (Conn. 2019); *Commonwealth v. Jones*, 37 N.E.3d 589, 597 (Mass. 2015); and *Leidig v. State*, 256 A.3d 870, 900 (Md. 2021). Pet. at 14–17. Several of those cases involved distinguishable facts.

In *Walker*, for example, the court emphasized that its holding was limited to the unique circumstances of that case. 212 A.3d at 1246, 1251, 1257. And those circumstances included that the testifying analyst swore to the accuracy of DNA profiles provided to her for testing, and that the testifying analyst's report—which was admitted—included out-of-court statements by non-testifying analysts. *Id.* at 1255.

In *Leidig*, a DNA report prepared by a non-testifying expert was admitted, and the DNA evidence was the only evidence linking the defendant to the crime. 256 A.3d at 872. Moreover, *Leidig* was decided on state constitutional grounds. *Id.* at 898–908. On multiple fronts, it thus fails to provide the clean split of authority that Smith alleges.

Smith's other cases also illustrate a more complicated picture than Smith suggests. *Sanchez*, for example, did not analyze scientific data, and the expert relayed pure hearsay to the jury. 374 P.3d at 324. *Sanchez* involved a gang expert who reviewed police reports and other police records concerning the defendant's prior police contacts to support his conclusions that the defendant was in a gang and the gang benefitted from his criminal activity. *Id.* at 325. The court in *Sanchez* found the defendant's confrontation rights were violated because the officer testified about information known only by reading another officer's police reports, which were entirely "hearsay information" and testimonial. *Id.* at 340–44.

In reaching that conclusion, however, the California Supreme Court noted that it had already applied *Williams* in the context of scientific testimony in two companion cases—*People v. Lopez*, 286 P.3d 469 (Cal. 2012), and *People v. Dungo*, 286 P.3d 442 (Cal. 2012). 374 P.3d at 338–39. Both cases found no Confrontation Clause violation. *See id.*

Lastly, the testimony at issue in *Jones* pertained to an entirely different type of evidence than was admitted at Smith's trial. In *Jones*, the issue "involved the circumstances under which the evidence that the testifying expert tested was collected in the first place." 37 N.E.3d at 598. At trial, the State failed to call the nurse who collected the "'rape kit'" as a witness nor alleged that she was unavailable. *Id.* at 595. Instead, the State presented an expert, who was not present during the examination and did not have any connection to the hospital where the swabs were taken, "to testify to her 'understanding' of how the three swabs had been collected." *Id.* In concluding the defendant's confrontation rights were violated, the Court reasoned that the expert had no personal knowledge about how the swabs were collected. *Id.* at 598. The Court analogized the situation to one where a chemist testifies as to how the police collected suspected cocaine from a defendant's pants pocket. *Id.* And the court emphasized that it was *not* confronted with a case "where a testifying analyst reviewed and then built on the findings of a nontestifying analyst in reaching his or her expert opinion." *Id.* at 598. Indeed, post-*Williams*, the same court has previously approved of testimony where "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.'" *Id.* at 597–98 (quoting *Commonwealth v. Greineder*, 984 N.E.2d 804 (Mass. 2013), *cert. denied*, 134 S. Ct. 166 (2013)).

This case thus differs critically from many relied upon by Smith, whose purported division in authority is at best overstated.

C. Smith's second purported division does not exist.

Smith also claims that courts are divided over the *Williams* plurality's "rationale" that a criminal defendant can subpoena a witness who participated in forensic testing. Pet. at 19. But this notation in *Williams* did not underpin its conclusion that there was no Confrontation Clause violation.

Rather, after announcing its "conclusion," the plurality simply noted that a defendant is not prejudiced when the State does not call all the witnesses involved in forensic testing "because those who participated in the testing may always be subpoenaed by the defense and questioned at trial." *Williams*, 567 U.S. at 58–59. Likewise, the three unpublished cases Smith cites for a purported division simply note that a defendant may seek to subpoena a witness who was involved in forensic testing if he believes such testimony will be helpful to his case. *See* Pet. at 20; Pet. App. 12a ("Had 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."); *see also State v. Garcia*, No. 33,756, 2014 WL 2933211, at *4 (N.M. June 26, 2014) (finding no Confrontation Clause violation, and then noting that if the defendant wanted to call as witnesses the two physicians who performed the autopsy, he was free to call them as witnesses for the defense); *Commonwealth v. LaLonde*, No. 3468 EDA 2012, 2014 WL 10965225, at *12–13 (Pa. Super. Ct. Apr. 28, 2014) (finding no Confrontation Clause violation, and then noting "[l]ast" that "nothing prevented Defendant from subpoenaing [lab] technicians as witnesses if he truly wanted to question them regarding their laboratory practices"). This fact does not appear to have been a critical underpinning of the conclusions in those cases.

CONCLUSION

The petition for writ of certiorari should be denied.

June 26, 2023

Respectfully submitted,

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APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX 1

SUPREME COURT OF ARIZONA

Supreme Court No. CR-22-0202-PR
Court of Appeals Division One
No. 1 CA CR 21-0451
Yuma County Superior Court
No. S1400CR201901251

[Filed September 19, 2022]

JASON SMITH,	)
Petitioner/Appellant,	)
	)
v.	)
	)
STATE OF ARIZONA,	)
Respondent/Appellee.	)
	)

Administrative Motion

UNOPPOSED MOTION TO SUPPLEMENT THE RECORD ON APPEAL

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Pursuant to Rules 31.8(a)(2)(C) and (g)(3), Arizona Rules of Criminal Procedure, Petitioner/Appellant Jason Smith respectfully moves to supplement the record to include the report and notes of the forensic analyst who tested the evidence items in Smith's case. These documents, which the State produced and identified on its trial exhibit list and which its expert referenced at trial, underlie the Confrontation Clause issue raised by Smith's Petition for Review ("Petition"). In connection with the Petition, Smith has filed an Appendix that includes the analyst's report (APP91-92) and notes (APP93-121), to which is appended the request by local law enforcement to have the evidence tested (APP122-123).[1] Out of an abundance of caution, Smith moves to formally include these documents in the record. Counsel for the State has stated that they do not oppose this Motion.

BACKGROUND

The factual background of this case is set forth in more detail in Smith's Petition and is addressed only briefly here as it is relevant to the present Motion. To prove the drug-related charges against Smith, the State had the alleged drug evidence tested by a crime lab operated by the Arizona Department of Public Safety ("DPS"). APP122. Elizabeth Rast, then a DPS forensic scientist, did the testing. APP93. Rast prepared and signed a report of her conclusions (APP91-92) and kept notes to which she attached charts of results from certain analyses and the State's testing request (APP93-121).

Before trial, the State produced Rast's report and notes, identifying them as State's Exhibits 97 and 98, and indicated that it would call Rast as an expert witness. APP124-125. By the time of trial, Rast was no longer employed with DPS, and the State disclosed it would instead call a "substitute" expert, DPS forensic scientist Gregory Longoni, to introduce the results of Rast's analyses. APP127. Smith objected that Longoni could offer no truly independent opinion and that his testimony therefore violated the Confrontation Clause,

[1] References to "APP" are to the Appendix filed with the Petition.

but the trial court overruled his objection. APP51:15-24, APP53:13-20, APP54:1-60:1. Smith then renewed his objection in an unsuccessful motion for a new trial. APP129, APP133.

Smith continued to maintain his Confrontation Clause objection on appeal and included Rast's notes in an appendix he submitted with his opening brief to the Court of Appeals. The Court of Appeals substantively decided the Confrontation Clause issue Smith raised and, in its analysis, referenced Rast's "work-product documents" on which Longoni relied. APP10, ¶ 19.

ARGUMENT

Under Rule 31.8(a)(1), the record on appeal includes the index prepared by the Superior Court clerk, all documents filed or introduced into evidence at the Superior Court, and certified transcripts of oral proceedings before the Superior Court. ARIZ. R. CRIM. P. 31.8(a)(1). Documents "other than those listed in [subsection] (a)(1)" "may be added to the record on appeal only by order of the appellate court," which the appellate court "may enter . . . at any time."ARIZ. R. CRIM. P. 31.8(a)(2)(C); *see also* ARIZ. R. CRIM. P. 31.8(g)(3) (permitting appellate court to address parties' requests as to form and content of the record). Under the circumstances here, this Court should order that Rast's report and notes (including the appended charts and the State's request for testing), reproduced in Smith's Appendix at APP91-92, APP93-121, and APP122-123, respectively, be included in the record.

The State produced and identified Rast's report and notes as Exhibits 97 and 98, respectively. Though they were not admitted at trial, the State's expert, Longoni, repeatedly referenced Rast's notes and report during his trial testimony. In ruling on Smith's Confrontation Clause objection, the Superior Court had Rast's report and her notes available to it. Similarly, the Court of Appeals had before it an appendix containing at least Rast's notes, which included the full substance of her report. And in its opinion, the Court of Appeals referenced Rast's "work-product documents" on which Longoni relied. APP10, ¶ 19.

Further, Smith's Petition asks this Court to address whether, and to what extent, a substitute expert may testify based solely on a nontestifying analyst's written materials. In considering this issue, this Court would benefit from a full record containing the notes and report that formed the basis of the State's expert testimony in this case.

CONCLUSION

For the foregoing reasons, this Court should supplement the record with Rast's report and notes and the request for testing, found in Smith's Appendix to his Petition at APP91-92, APP93-121, and APP122-123, respectively.

September 19, 2022

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APPENDIX 2

App. 8

App. 9