No. 13-504

IN THE

Supreme Court of the United States

JOHN EDWARD BREWINGTON

Petitioner,

v.

NORTH CAROLINA,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of North Carolina

REPLY BRIEF FOR PETITIONER

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The North Carolina Court of Appeals held in this case that "to allow a testifying expert to reiterate the conclusions of a nontestifying expert['s testimonial forensic report] would eviscerate the protection of the Confrontation Clause." Pet. App. 51a. That court then elaborated its holding by reference to the precise facts here:

> It is clear from the testimony of Special Agent Schell that she had no part in conducting any testing of the substance, nor did she conduct any independent analysis of *the substance.* She merely reviewed the reported findings of Agent Gregory, and testified that if Agent Gregory followed procedures, and if Agent Gregory did not make any mistakes, and if Agent Gregory did not deliberately falsify or alter the findings, then Special Agent Schell "would have come to the same conclusion that she did." As the Supreme Court clearly established in *Melendez-Diaz* [*v. Massachusetts*, 557 U.S. 296, 320 (2009)], it is precisely those "ifs" that need to be explored upon cross-examination to test the reliability of evidence.

Pet. App. 54a-55a (emphasis in original). At the State's urging, a bare majority of the North Carolina Supreme Court reversed that holding, ruling that expert testimony of this sort is acceptable because it can be characterized as an "independent opinion formed as a result of [the expert's] own analysis" of the original analyst's report and notes. Pet. App. 5a.

Having now obtained that legal ruling – and faced with a petition for certiorari demonstrating the ruling's stark incompatibility with precedent from this Court and other jurisdictions – the State attempts to recharacterize the ruling and obfuscate this case's procedural history. These attempts at elusion are ineffectual. This Court should grant certiorari and reverse.

1. Instead of defending the North Carolina Supreme Court's actual holding that the Confrontation Clause permits a testifying expert who had no role whatsoever in conducting the forensic examination at issue (or in preparing the report) to transmit the testing analyst's findings and conclusions to the jury when offered as a so-called "independent opinion," the State offers three alternative theories in support of the North Carolina Supreme Court's holding. None of these theories withstands scrutiny.

a. Perhaps trying to liken this case to *Turner v. United States*, pet'n for cert. pending (No. 13-127), the State asserts that the testifying expert here did nothing more than offer an opinion concerning a "machine-generated graph." BIO 14. But, as the Seventh Circuit itself recognized in *Turner*, there is a distinct difference between an expert testifying based on machine-generated data and allowing an expert "to testify about procedures [a non-testifying analyst] followed and as to what she concluded." *United States v. Turner*, 709 F.3d 1187, 1194 (7th Cir. 2013).

The latter is what happened here. The testifying expert stated that the non-testifying analyst conducted various forensic tests on the substance seized from petitioner. *See* BIO 2-7. The expert then

testified that "she would have come to the same conclusion that [the non-testifying analyst] did," namely, that the substance seized from petitioner "is the Schedule II controlled substance cocaine base." Pet. App. 4a, 12a (quoting trial testimony; alteration in opinions below).

The Seventh Circuit, in line with other courts, assumed that this kind of testimony, which goes well beyond referencing machine-generated data, violates the Confrontation Clause. *Turner*, 709 F.3d at 1189-90. The North Carolina Supreme Court held that it does not. Pet. App. 4a-5a. And that is the holding petitioner challenges here.

b. The State also contends that "[t]he evidence of the tests conducted by the nontestifying analyst was not offered for the truth of the matter asserted but instead for the non-hearsay purpose of showing the basis of Agent Schell's expert opinion." BIO 19. As with the State's "machine data" theory, no such rationale appears in the decision below. And for good reason: Five Justices of this Court have expressly rejected this argument. As Justice Thomas explained in *Williams v. Illinois*, 132 S. Ct. 2221 (2012), "[t]here is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth." *Id.* at 2257 (opinion concurring in the judgment); *see also id.* at 2268 (Kagan, J., dissenting) (agreeing with Justice Thomas that "when a witness, expert or otherwise, repeats an out-of-court statement as the basis for a conclusion . . . the statement's utility is then dependent on its truth").

If the State means to suggest it believes that uncertainty still exists as to whether this principle of confrontation law is settled, all the more reason exists for granting certiorari. Several state courts of last resort have relied on the vote in *Williams* to hold that "admitting testimonial hearsay for the limited, non-hearsay purpose of evaluating the basis of the expert's opinion does not cure the Confrontation Clause violation." *Carrington v. District of Columbia*, 77 A.3d 999, 1005 (D.C. 2013); *accord State v. McLeod*, 66 A.3d 1221, 1226 (N.H. 2013); *State v. Navarette*, 294 P.3d 435, 439-40 (N.M.), *cert. denied*, 134 S. Ct. 64 (2013); *Martin v. State*, 60 A.3d 1100, 1107 (Del. 2013); *State v. Kennedy*, 735 S.E.2d 905, 922 (W. Va. 2012). Prosecutors in North Carolina and elsewhere should have to abide by this rule as well.

c. Lastly, the State suggests this case tracks a hypothetical scenario that Justice Kagan described in *Williams* – namely, a scenario in which a testifying expert tells the jury that *if* certain forensic tests resulted from scientifically sound testing, then they would indicate that the defendant was guilty. BIO 13-14 (citing *Williams*, 132 S. Ct. at 2270 (dissenting opinion). Justice Kagan indicated that no confrontation problem would arise in such a hypothetical because none of the non-testifying analyst's forensic work would be introduced for its truth. *Williams*, 132 S. Ct. at 2270. Once again, the State misses the mark. As noted just above, Justice Kagan drew a sharp contrast between (i) expert testimony declining to transmit any factual information regarding the actual tests conducted and (ii) testimony telling the jury how those tests were done and what the analyst concluded. *See id.*; *supra*

at 3. This case plainly falls into the latter category. *See* BIO 2-8.

This is so even though the testifying expert here acknowledged on cross-examination that her opinion was correct "only if the non-testifying expert had conducted the tests properly." BIO 15. This acknowledgement simply made the confrontation violation inherent in repeating the non-testifying analyst's procedures and conclusions more vivid. To borrow Justice Kagan's words in *Williams*: "By testifying in that manner, [the testifying expert] became just like the surrogate witness in *Bullcoming* [*v. New Mexico*, 131 S. Ct. 2705, 2715 (2011)]—a person knowing nothing about 'the particular test and testing process,' but vouching for them regardless." 132 S. Ct. at 2270 (dissenting opinion) (quoting *Bullcoming*, 131 S. Ct. at 2715); *see also Williams*, 132 S. Ct. at 2256-59 (Thomas, J., concurring in the judgment) (same reasoning). Indeed, the testifying analyst's acknowledgments here are materially identical to those the testifying analysts made in *Bullcoming*. *See* Br. for Petitioner at 8 & Joint Appendix at 58-59, *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) (No. 09-10876).[*]

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[*] For example, the testifying analyst in *Bullcoming* conceded on cross-examination that he "didn't observe" the forensic testing at issue and that "you don't know unless you actually observe the analysis that someone else conducts, whether they followed the protocol in every instance." J.A. 58-59; *see also Bullcoming*, 131 S. Ct. at 2710 (noting that the testifying analyst "did not . . . perform or observe the test reported in the certification").

2. The State argues that the North Carolina Supreme Court's ruling does not conflict with those of numerous other state courts of last resort because "none of the cases [petitioner] cites from other jurisdictions involves an expert who testified to a straightforward application of expertise based upon machine-generated work product." BIO 21-22. But as petitioner has explained, this case does not involve such a scenario either. Accordingly, the conflict is manifest – and, whatever one may think of the merits of the North Carolina Supreme Court's opinion here, reason enough to warrant certiorari.

Indeed, the conflict has grown even deeper since the filing of the petition for certiorari. In *Carrington*, an expert witness "testified that he reviewed the results of a urine test [conducted by a different forensic analyst] before trial to make sure that all procedures were followed, and came to a conclusion that was similar to that of the report." 77 A.3d at 1002. The D.C. Court of Appeals held that such testimony violated the Confrontation Clause, adding one more to the tally of courts finding such violations when – as the Solicitor General has put it – the prosecution introduced "testimony from experts who not only offered their own expert opinions but also who testified about the procedures actually followed by, or the conclusions of, non-testifying analysts." Br. in Opp. at 17, *Turner v. United States*, cert. pending (No. 13-127).

3. The State contends, for a few reasons, that "[t]his case is not an appropriate vehicle to further consider Confrontation Clause jurisprudence." BIO 25. In fact, just the opposite is true.

a. The State asserts that petitioner "did not preserve a challenge" to the testifying expert's recitation of the non-testifying expert's findings and conclusions. BIO 16; *see also* BIO 25. But as the North Carolina Court of Appeals explained: "Defendant objected to the testimony of Special Agent Schell on Sixth Amendment grounds, and argued that the testimony should be excluded because Special Agent Schell was not the expert who actually conducted the testing." Pet. App. 39a. That objection obviously covered the totality of Agent Schell's testimony. That is why both the North Carolina Court of Appeals and the North Carolina Supreme Court treated petitioner's objection as challenging not only Agent Schell's so-called expert opinion but also her recitation of the non-testifying expert's conclusion – and why both ruled on the merits of that objection. Pet. App. 4a-5a, 51a-59a. The State's attempt to split hairs between those two elements of Agent Schell's testimony is baseless.

b. The State next suggests that it is problematic that the lab report is not part of the record. BIO 25-26. But that would be a problem only if there was a question concerning whether the report was testimonial. No such question exists. The facts set forth at Pet. 9 n.1 – none of which the State disputes – show beyond any doubt that the report was testimonial. That is why the North Carolina Court of Appeals held that "the law is clear that the report utilized by Special Agent Schell was testimonial in nature." Pet. App. 53a. The State never challenged that holding in the North Carolina Supreme Court, and the North Carolina Supreme Court never questioned it. Indeed, despite the dust the State now

attempts to kick up, it does not actually challenge the testimonial status of the report in this Court either.

c. Finally, the State suggests that there is no need to resolve the conflict the North Carolina Supreme Court has created because it involves nothing more than "pars[ing] semantic differences" in expert testimony. BIO 25. Nothing could be farther from the truth. There is a world of difference between (i) an expert testifying simply that *if* a non-testifying analyst followed certain forensic procedures, then a certain graph would indicate the presence of cocaine and (ii) an expert also telling the jury that the non-testifying analyst *in fact* followed certain procedures and concluded that the evidence at issue contained cocaine. The first kind of testimony is not even admissible unless "circumstantial evidence [lays] a sufficient foundation for its admission," *Turner* Br. in Opp. at 15 (something that was not done here). Even then, such testimony falls far short of telling the jury directly what the non-testifying analyst allegedly did and found. When an expert does the latter, she improperly "bolster[s]" her opinion, *United States v. Soto*, 720 F.3d 51, 60 (1st Cir. 2013), with directly incriminating hearsay evidence from someone whose "competence, evasiveness, or dishonesty" cannot be challenged, *Bullcoming*, 131 S. Ct. at 2715. That is precisely the evil the Confrontation Clause is designed to prohibit. *See id.* at 2715-16.

At bottom, therefore, the question here involves not "semantics" but rather the integrity of this Court's precedent – and of the Confrontation Clause itself. The North Carolina Supreme Court has ruled that the State may evade the clear dictates of *Melendez-Diaz* and *Bullcoming* simply by having a

testifying analyst assert that she would have come to the same conclusion as did the non-testifying analyst whose testimonial report she transmits to the jury. This Court should grant certiorari and make clear that such evasion will not be countenanced.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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