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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Confrontation Clause of the Sixth Amendment was violated when a forensic analyst, who did not conduct or observe the forensic testing at issue, testified to her expert opinion based upon another analyst's report and notes.

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STATEMENT

1. On the evening of January 18, 2008, a Goldsboro, North Carolina, police officer conducted a consent search of petitioner. During the pat-down, the officer felt something like a rock on the inside of petitioner's left pants leg. When the officer pulled down petitioner's sock, a napkin fell out. The officer opened the napkin and saw "an offwhite rock-like substance" he believed to be cocaine. Pet. App. 2a.

2. The rock-like substance was sent to the North Carolina State Bureau of Investigation ("SBI") laboratory and was analyzed by Assistant Supervisor in Charge Nancy Gregory. Pet. App. 2a.

3. A grand jury subsequently indicted petitioner for possession of a controlled substance. Petitioner pled not guilty and trial commenced. Pet. App. 38a.

4. Special Agent Kathleen Schell, also of the SBI laboratory, was tendered at trial as an expert witness in forensic chemistry. Prior to her testimony concerning the chemical analysis of the rock-like substance, petitioner objected on the ground that "her opinion is going to be based solely on what some other person did and wrote down in a report." Pet. App. 3a. After an extensive *voir dire*, the trial court overruled petitioner's objection. Pet. App. 2a-3a.

5. Agent Schell then testified in the presence of the jury. During her direct examination, she first testified concerning how evidence is received at the

lab. Tr. 107-09.[1] She then testified as to the tests conducted to determine the identity of suspected controlled substances and the reports that are produced as a result of the tests. Tr. 110-14. After testifying to the chain of custody of the substance analyzed in this case and to the fact that it was tested by Nancy Gregory, Tr. 114-17, she testified concerning the test results:

> Q. . . . What types of tests were performed on this sample?
>
> A. There were two preliminary color tests, a preliminary crystal test and a more specific instrumental analysis test that was conducted on this piece of evidence.
>
> Q. And from your training and experience, can you explain why there are more tests done?
>
> A. Typically, when we receive evidence we will look at it, and we almost always start with general color tests. They just allow us to give a – they give us like a focus of where we need to go. So based upon what colors are produced, we can say: Okay. Well, we can eliminate these drugs; it could be one of these. So then we tailor and do more specific color tests

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[1] Reference is to the trial transcript, which is part of the record below.

followed by more specific instrumental tests, kind of like a funnel. We start with a lot that you could possibly have and then just narrow it down to just one specific thing.

Q. And concerning this particular sample, can you just explain first the first color test, what kind of test that was and how it was performed?

A. It's called a Marquis color test. What the analyst will do will place a little bit of the liquid, the Marquis liquid, into a little spot plate like you'd use in Biology or Chemistry class. They will then add a little bit of the sample or that piece of evidence into there and look for any type of color change that may or may not occur. Based upon what color is produced, then that kind of gives you an idea of what type of chemical you're looking at. If no color is produced, then it rules out chemicals, so you just look at basically what you've got in front of you and kind of make more specific determinations of where you need to go.

Q. And from the notes that you retrieved were you able to determine what the result was of this particular color test?

A. In this particular test it did not turn any color.

Q. And based on your training and experience, what does that indicate?

A. That indicates that such drugs like heroin, which would turn purple for this test; or methamphetamine, which would turn orange, are not present. We're looking for something that doesn't turn this particular color test a color.

Q. And was the second type of color test then performed?

A. It was.

Q. What type of test is that?

A. That test is called a cobalt thiocyanate test. It's just a pink solution that is again added to that spot plate well, a new one, and little bit more of the sample is put into that liquid, and if a blue color forms, then that just indicates that there's certain groups on that chemical molecule itself that are present. It just helps you to determine whether or not those groups are present or not.

Q. And when you reviewed this particular case, did you see the results of this test?

A. I did.

Q. And what was the result of that test?

A. It turned blue.

Q. And based on your training and experience, what does that mean?

A. It means that those specific chemical groups are present.

Q. What was the next test that was performed?

A. The next test was a crystal test.

Q. And if you'll describe that test.

A. In that test we take a microscope slide and we put a little bit of the sample onto that microscope slide. We then add a liquid that will either react or not react specifically with cocaine. If it reacts and certain cross shaped crystals are formed, we can look for those using a microscope, whether or not the crosses are there. If they're there, that indicates that cocaine is more than likely present in your sample. If they're not there, then you do not have cocaine.

Q. And based on your review of the lab reports, were you able to determine what the result was of this particular test?

A. Yes, crosses were obtained. Those specific crosses were obtained.

Q. And what does that result mean to you as a chemical analyst?

A. It indicates that cocaine is present.

Q. And was any other test performed then?

A. A more specific instrumental test was performed.

Q. Can you describe how that test was performed?

A. Another little bit of the sample is placed onto the instrument, a beam of light is shined onto that sample. Based upon the amount of light that is reflected off that sample, a graph is produced, and that graph is specific to what that chemical or what that piece of evidence is on a chemical level. That graph can then be compared to standards of controlled substances and matched up to determine what you have.

Q. And in this particular case did you review the results of that particular test?

A. I did.

Q. And what were the results?

A. In this case the graph produced, there was a mixture of cocaine base and bicarbonate, which is just baking soda. So further tests had to be conducted.

Q. Could you explain that?

A. Since it was a mixture of two different things we have to separate those two things in order to basically release our data, so what we do is like a cleaning up process, and that will just allow us to remove the baking soda from that cocaine base that is present and generate a graph of cocaine base specifically.

Q. And what happened when that was done?

A. A graph was produced using that same instrument and it was a clean graph of just cocaine base.

. . . .

Q. Now have you reviewed the testing procedures that you've described and the results of the examinations of the test yourself?

A. I have.

Q. And have you also reviewed Agent Gregory's conclusion?

A. I have.

Q. Have you formed an opinion as to the item that was submitted inside the plastic bag that's been marked State's Exhibit 1B?

A. I have.

Q. And what is your opinion based on?

A. Based upon all the data that she obtained from the analysis of that particular item, State's Exhibit 1B, I would have come to the same conclusion that she did.

Q. And what is your opinion as to the identity of the substance that was submitted as State's Exhibit 1B?

MR. GURLEY: Just objection for the record, Judge.

THE COURT: I'll overrule the objection. You can answer the question.

> A. State's Exhibit 1B is the Schedule II controlled substance cocaine base. It had a weight of 0.1 gram.

Tr. 118-24.

6. None of the documents relied upon by Agent Schell was admitted into evidence. Pet. App. 3a.

7. Petitioner cross-examined Agent Schell concerning the fact that she did not personally perform or observe any of the tests she relied upon in forming her opinion. Pet. App. 3a-4a.

8. Petitioner then testified that he had not possessed the substance. He did not testify that the substance was not cocaine. Tr. 132-45.

9. The jury found petitioner guilty of possession of cocaine, and he appealed to the North Carolina Court of Appeals. Pet. App. 43a.

10. The North Carolina Court of Appeals granted petitioner a new trial, holding that his Sixth Amendment right to confront witnesses against him was violated by "allow[ing] Agent Schell to testify concerning the composition of the confiscated substance." Pet. App. 59a.

11. The North Carolina Supreme Court granted the State's petition for discretionary review and reversed the decision of the North Carolina Court of

Appeals. Relying upon its contemporaneous decision in *State v. Ortiz-Zape*, 743 S.E.2d 156 (N.C. 2013), *pet'n for cert. filed*, (U.S. Nov. 21, 2013) (No. 13-633), the North Carolina Supreme Court concluded that: Agent Schell gave her own independent opinion as to the identity of the substance; petitioner's right to confrontation was protected by his opportunity to cross-examine Agent Schell concerning the basis of and weaknesses in her opinion; and Agent Schell's expert opinion could be based on otherwise inadmissible facts or data.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner contends the admission of Agent Schell's expert testimony, based upon the work product of a non-testifying forensic analyst, violated his Sixth Amendment confrontation rights. He further contends the decision of the North Carolina Supreme Court in this case directly contravenes this Court's decision in *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011).

Contrary to petitioner's contentions, admission of Agent Schell's expert opinion did not violate his confrontation rights and the North Carolina Supreme Court's opinion does not contravene *Bullcoming* because: Agent Schell's expert opinion was a straightforward application of her expertise; she did not vouch for the accuracy of the non-testifying expert's tests; to the extent that she relied upon the preliminary test results, that evidence was not

admitted for the truth of the matter asserted; and her ultimate opinion was based upon non-testimonial machine-generated data. Petitioner has failed to show a compelling reason for this Court to review this case.

I. THE DECISION OF THE NORTH CAROLINA SUPREME COURT DOES NOT CONTRAVENE *BULLCOMING* AND IS IN ACCORDANCE WITH OTHER DECISIONS OF THIS COURT.

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Confrontation Clause generally prohibits the introduction at a criminal trial of out-of-court testimonial statements unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 59 (2004). However, the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 59 n.9.

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009), this Court held that affidavits reporting the results of forensic drug testing could not be admitted as substantive evidence under the Confrontation Clause without the live testimony of a witness competent to testify to the truth of the statements in the affidavits because those affidavits

were created "sole[ly]" as evidence for a criminal trial and were "testimonial."

In *Bullcoming*, this Court held there was a Confrontation Clause violation where the signed and certified report of a non-testifying expert concerning the petitioner's blood alcohol concentration was admitted during the testimony of another expert witness who did not "ha[ve] any 'independent opinion' concerning Bullcoming's BAC." *Bullcoming*, 131 S. Ct. at 2716.

More recently, this Court in *Williams v. Illinois*, 132 S. Ct. 2221 (2012), affirmed the judgment of the Illinois Supreme Court and concluded there was no Confrontation Clause violation in the admission of an expert's opinion even though that opinion was based in part on data from the report of a non-testifying DNA analyst. However, there is no clear holding in *Williams* because no rationale garnered the assent of at least five justices and because four justices concurring in the judgment did so on one ground while a fifth justice concurred on an entirely different – not a narrower – ground. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the results enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (citations omitted)); *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) ("*Marks* is workable – one opinion can be meaningfully

regarded as 'narrower' than another – only when one opinion is a logical subset of other, broader opinions."), *cert. denied*, 503 U.S. 918 (1992).

A. Agent Schell's Expert Opinion Was A Straightforward Application of Her Expertise That Did Not Contain Any Testimonial Hearsay Statement.

Unlike the witness in *Bullcoming*, the witness in this case was asked for and gave her own expert opinion as to the identity of the substance.[2] Although this case is more similar to *Williams* than to *Bullcoming*, it is even more apparent here than in *Williams* that the witness's expert opinion did not contain testimonial hearsay.

Although no clear holding can be identified in *Williams*, what can be discerned from that decision is that even the dissenting justices agreed there would be no Confrontation Clause violation if the expert witness testified based upon her own expertise and revealed her assumptions:

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[2] To the extent that Agent Schell testified to the weight of the substance, that testimony was largely irrelevant inasmuch as possession of *any* amount of cocaine is at least a Class I felony under North Carolina law. *See* N.C. Gen. Stat. § 90-95(a)(2), (c) (2013); *State v. Jones*, 598 S.E.2d 125, 128 (N.C. 2004).

> There was nothing wrong with [the witness] testifying that two DNA profiles – the one shown in the Cellmark report and the one derived from Williams's blood – matched each other; that was a straightforward application of [her] expertise. Similarly, [she] could have added that *if* the Cellmark report resulted from scientifically sound testing of [the victim's] vaginal swab, *then* it would link Williams to the assault. What [she] could not do was what she did: indicate that the Cellmark report *was* produced in this way by saying [the victim's] vaginal swab contained DNA matching Williams's.

Williams, 132 S. Ct. at 2270 (Kagan, J., dissenting).

In this case, Agent Schell testified that she matched a machine-generated graph to known standards to reach her expert opinion that the substance was cocaine. In other words, she utilized a straightforward application of her expertise that was approved by eight members of this Court in *Williams*.

To the extent that petitioner contends Agent Schell did not actually apply her own expertise to match the graph to the standards, this may raise a foundation issue. However, such an issue is a matter to be resolved, if at all, under state law and not under Confrontation Clause jurisprudence inasmuch as the statement of Agent Schell's ultimate opinion itself contained no out-of-court statement made by anyone

else. *See Williams*, 132 S. Ct. at 2238 (plurality opinion) (stating that this Court could not review the state court's interpretation and application of Illinois law in finding the evidence presented "was sufficient to satisfy state-law requirements regarding proof of foundational facts").

In any event, Agent Schell made it clear to the jury that she was basing her expert opinion on tests conducted by another expert. She never testified that she knew the tests were conducted properly – instead testifying only as to how the tests *generally* are conducted. And petitioner exercised his confrontation rights by vigorously conducting cross-examination of Agent Schell that made it even more clear that her expert opinion was correct only if the non-testifying expert had conducted the tests properly.[3]

This case is not *Bullcoming* or even *Williams*. Instead, this case is one in which the expert's testimony was based upon a straightforward application of her expertise and in which the finder of

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[3] Much like the model for admissibility put forward by the dissent in *Williams*, 132 S. Ct. at 2270 (Kagan, J., dissenting), that would require a witness to reveal her assumptions in reaching an expert opinion, Agent Schell here "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 Agent Schell 'would have come to the same conclusion that she did.'" Pet. App. 54a-55a.

fact was well aware that the expert relied upon tests that may or may not have been performed properly.

B. Petitioner Did Not Preserve A Challenge To Testimony Concerning The Non-Testifying Expert's Test Results And, In Any Event, The Testimony Did Not Implicate The Confrontation Clause.

To the extent that petitioner is contending his confrontation rights were violated by the admission of testimony concerning the results of the non-testifying expert's testing (rather than simply the admission of the testifying expert's opinion), petitioner did not preserve a challenge to that evidence. But even if he had preserved the issue for review, there was no Confrontation Clause violation because the evidence relied upon by the witness for the basis of her opinion was not admitted into evidence, was not offered for the truth of the matter asserted, and, in one instance, was not even testimonial.

"The defendant *always* has the burden of raising his Confrontation Clause objection[.]" *Melendez-Diaz*, 557 U.S. at 327. And "[s]tates may adopt procedural rules governing the exercise of such objections." *Id.* at 314 n.3.

Under North Carolina law, a defendant seeking to preserve a challenge to the admission of evidence must "make an objection to such evidence *at the time it is*

actually introduced at trial." *State v. Thibodeaux*, 532 S.E.2d 797, 806 (N.C. 2000), *cert. denied*, 531 U.S. 1155 (2001). An objection made prior to the introduction of the challenged evidence, even one resulting in a *voir dire* on the matter, is not sufficient to preserve the issue for review. *Id.*

Petitioner in this case did not object to the testimony concerning the results of the tests conducted by the non-testifying expert when that testimony actually was given and objected only to the question calling for Agent Schell's own expert opinion. As a result, petitioner waived any challenge to the admission of the test results under North Carolina law.[4]

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[4] The North Carolina Supreme Court did not explicitly state that it was reviewing only the admission of Agent Schell's own expert opinion. However, the court noted that petitioner's sole objection was to her expert opinion and that his only argument before the North Carolina Court of Appeals was that his confrontation rights "were violated when the trial court permitted Agent Schell to testify that the substance found on defendant was cocaine based solely on Agent Gregory's notes and lab report." Pet. App. 4a. Further, the North Carolina Supreme Court reached its decision in this case based upon its contemporaneous decision in *Ortiz-Zape*, 743 S.E.2d at 162, a case in which it reviewed only the admission of the testifying expert's opinion because no objections were made when testimony concerning test results was admitted.

A defendant seeking to preserve an issue for review under North Carolina law also must move to strike a witness's answer if the admissibility of testimony is not suggested by the question asked but only becomes apparent by virtue of the answer. *See State v. Riddle*, 340 S.E.2d 75, 77 (N.C. 1986). Because petitioner in this case did not move to strike Agent Schell's testimony when she made a passing reference to the fact that she "would have come to the same conclusion that [Agent Gregory] did," he did not preserve his challenge to this unresponsive answer.

Even if petitioner had preserved his challenge to testimony concerning the test results,[5] this case differs significantly from *Bullcoming*. Unlike *Bullcoming* but as in *Williams*, the written reports and notes of the non-testifying analyst were never admitted into evidence. To the extent that Agent Schell testified to the results of the tests conducted by the other analyst

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[5] Petitioner also did not ask for a limiting instruction that would have required the jury to consider evidence of the test results not for the truth of the matter asserted but only to show the basis for Agent Schell's expert opinion. *See State v. Jones*, 368 S.E.2d 844, 848 (N.C. 1988) ("The admission of evidence which is competent for a restricted purpose will not be held error in the absence of a request by the defendant for limiting instructions."). Petitioner could have ensured that the jury did not use the evidence for an improper purpose by objecting and requesting a limiting instruction, but he failed to do so.

and this somehow could amount to admission of the reports and notes, there nevertheless was no Confrontation Clause violation.

The evidence of the tests conducted by the non-testifying 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. *See* N.C. Gen. Stat. § 8C-1, Rule 703 (2013). Indeed, she made it clear that she was relying on work product from another analyst. And she did not vouch for the accuracy of the testing, stating only how a test ordinarily *would* have been conducted.

Further, evidence concerning the preliminary tests did not even assert that the substance *was* cocaine. The results of these first two color tests indicated only what the substance *was not*, not what it *was*. Tr. 118-21. The positive results of the crystal test also were not conclusive but only were an indication that "cocaine [wa]s more than likely present." Tr. 121-22. These are classic examples of evidence admitted to show why something further happened – to show why additional tests (including the ultimate instrument test) were conducted – rather than to show the facts that the substance was not heroin or methamphetamine or that it *might* be cocaine. In that regard, the evidence was admitted not for the truth of the matter asserted but for a non-hearsay purpose that could not implicate the Confrontation Clause. *See Crawford*, 541 U.S. at 59 n.9; *Tennessee v. Street*, 471 U.S. 409, 414 (1985) (noting that an out-of-court

confession used "not to prove what happened at the murder scene but to prove what happened when respondent confessed" was not hearsay and "raises no Confrontation Clause concerns").

The final test, the instrument test, generated a graph that Agent Schell was able to match to known standards to conclusively identify the substance as cocaine. The graph itself was not admitted into evidence. But even if this raw machine-generated data was somehow substantive evidence, it was no more a testimonial statement of a person than is a machine-generated photograph.[6] *See United States v. Maxwell*, 724 F.3d 724, 726-27 (7th Cir. 2013) ("[T]he raw data from a lab test are not 'statements' in any way that violates the Confrontation Clause."); *United States v. Washington*, 498 F.3d 225, 231 (4th Cir. 2007) (holding raw data generated by machines cannot be hearsay because only a person can be a declarant), *cert. denied*, 557 U.S. 934 (2009). Ultimately, this distinguishes the

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[6] In *Ortiz-Zape*, the decision relied upon by the North Carolina Supreme Court in this case, the court made clear that it based its decision that there was no Confrontation Clause violation in part upon its conclusion that "machine-generated raw data . . . are not statements by a person . . . [and] are 'neither hearsay nor testimonial.'" *Ortiz-Zape*, 743 S.E.2d at 162 (quoting David H. Kaye et al., *The New Wigmore: A Treatise on Evidence* § 4.12.5, at 44 (Richard D. Friedman ed., Supp. 2013)).

present case from *Bullcoming*[7] where the certification actually admitted into evidence "relat[ed] to past events and human actions not revealed in raw, machine-produced data[.]" *Bullcoming*, 131 S. Ct. at 2714.[8]

II. THE DECISION OF THE NORTH CAROLINA SUPREME COURT, CONSISTENT WITH *BULLCOMING* AND *WILLIAMS*, DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS.

Petitioner contends the decision of the North Carolina Supreme Court in this case is an outlier. However, none of the cases he cites from other jurisdictions involves an expert who testified to a straightforward application of expertise based upon

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[7] This case also is not somehow a blueprint for evading this Court's holding in *Melendez-Diaz* as contended by petitioner. Unlike *Melendez-Diaz*, in which testimonial affidavits were admitted with no live testimony presented, a witness here testified to her own expert opinion based upon a lab report, lab notes, and a graph that were not admitted into evidence and that, in any event, were either non-hearsay or non-testimonial.

[8] And machine-generated data also does not possess "the requisite 'formality and solemnity' to be considered 'testimonial' for purposes of the Confrontation Clause" under the reasoning of Justice Thomas. *Williams*, 132 S. Ct. at 2255 (Thomas, J., concurring).

machine-generated work product not admitted into evidence.

In *United States v. Soto*, 720 F.3d 51 (1st Cir.), *cert. denied*, 134 S. Ct. 336 (2013), the First Circuit found a Confrontation Clause violation where an analyst testified to findings made by a non-testifying analyst. However, the witness in *Soto*, unlike Agent Schell in the present case, presented these findings for their truth and in no way used those findings as a basis for the application of his own expertise.

In *United States v. Ignasiak*, 667 F.3d 1217 (11th Cir. 2012), the Eleventh Circuit found a Confrontation Clause violation where five autopsy reports were admitted into evidence during the testimony of an expert who had not performed and had not been present during the autopsies. However, the court did not reach the issue of whether the introduction of toxicology results – generated by a machine – implicated Confrontation Clause concerns. *Id.* at 1233 n.20.

In *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2272 (2012), the District of Columbia Circuit found a violation of confrontation rights where thirty autopsy reports and twenty drug analyses produced by non-testifying experts were admitted into evidence. The court, holding the case was analogous to *Bullcoming* because the written reports were admitted into evidence, noted that "[i]t could well be a different case where an expert witness

discussed out-of-court testimonial statements that 'were not themselves admitted as evidence.'" *Id.* at 72 n.15.

In *State v. McLeod*, 66 A.3d 1221, 1230 (N.H. 2013), the New Hampshire Supreme Court stated that it agreed "with the proposition that the Confrontation Clause is not violated when an expert testifies regarding his or her own independent judgment, even if that judgment is based upon inadmissible testimonial hearsay." While the court did hold that the out-of-court testimonial statements that formed the basis of the expert's opinion in the case before it were not admissible, the case involved hearsay statements of a non-expert witness and not machine-generated data.

In *Commonwealth v. Reavis*, 992 N.E.2d 304, 311 (Mass. 2013), the Massachusetts Supreme Court held that

> [a] substitute medical examiner who did not perform the autopsy may offer an opinion on the cause of death, based on his review of an autopsy report by the medical examiner who performed the autopsy and his review of the autopsy photographs, as these are documents upon which experts are accustomed to rely, and which are potentially independently admissible through appropriate witnesses.

In *State v. Kennedy*, 735 S.E.2d 905, 922 (W. Va. 2012), the West Virginia Supreme Court found that a substitute medical examiner was a "mere conduit" for the opinions of a non-testifying pathologist. The case did not involve an analyst rendering her own expert opinion by matching machine-generated results to known standards as in the present case.

In *Burch v. State*, 401 S.W.3d 634 (Tex. Crim. App. 2013), the Texas Court of Criminal Appeals found a Confrontation Clause violation where a non-testifying analyst's report was admitted as the sole evidence of the identity of a controlled substance. The court remarked that the report – unlike the report, notes, and graph in the present case – "was not merely mentioned as an underlying basis of the expert's opinion[.]" *Id.* at 639.

In short, none of the cases cited by petitioner is like the case presently before this Court. This is so because in those cases the out-of-court statements were admitted at trial or because there was no showing that the testifying witness was giving an opinion consistent with a straightforward application of expertise – particularly the matching of machine-generated data with known standards.

III. THIS CASE IS NOT AN APPROPRIATE VEHICLE TO FURTHER CONSIDER CONFRONTATION CLAUSE JURISPRUDENCE.

This case is not an appropriate vehicle to further examine the Confrontation Clause as it applies in scientific expert witness cases. As noted by the plurality opinion in *Williams*, the result in many of these types of cases will come down to the precise wording used in the questions asked by the prosecution and in the answers given by witnesses. *See Williams*, 132 S. Ct. at 2236 n.3 (plurality opinion) ("The small difference between what [the witness] actually said on the stand and the slightly revised version that the dissent would find unobjectionable shows that, despite the dissent's rhetoric, its narrow argument would have little practical effect in future cases."). This Court should not review a case so similar to *Williams* just to parse semantic differences.

Further, this case is complicated by the failure of petitioner to properly preserve as an issue for review the admission of anything other than the testifying expert's own opinion. Because the North Carolina Supreme Court considered only the testimony that contained the expert's own opinion and no out-of-court statement, the evidence petitioner would like this Court to address simply is not before this Court.

Finally, the record in this case below does not include documents relied upon by the witness to form

her opinion. It is true that one of the dissenting justices in the North Carolina Supreme Court stated that the lab report in this case was certified. However, it nevertheless is unclear as to the exact content of the report and whether the lab notes and graph relied upon by Agent Schell are part of the certified lab report because the "[l]ab notes are entered during the analysis" and "[t]he report is conducted after the analysis has been completed." Tr. 99. Without the actual report, lab notes, and graph, it would be difficult for this Court to determine whether they all had the "requisite 'formality and solemnity' to be considered 'testimonial'" under the test set out by Justice Thomas in his concurrence in *Williams*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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