No. 13-637

In the Supreme Court of the United States

NORMAN BRUCE DERR,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

SECONDARY SOURCES

REPLY BRIEF FOR THE PETITIONER

The Confrontation Clause problem here is that the State's DNA expert, Jennifer Luttman, did not have personal knowledge of the serological or DNA evidence that constituted the sole evidence of identification of Mr. Derr, and no witness who did have personal knowledge testified at his trial before a Charles County, Maryland jury. Mr. Derr objected because Ms. Luttman's testimony would violate his right to confront the individuals whose testimonial statements would be transmitted through her testimony. The trial court overruled the objection, and allowed Ms. Luttman to testify that Mr. Derr's DNA profile was found in the semen on the vaginal swabs collected from the victim. The trial court also permitted the State to support Ms. Luttman's testimony by introducing documentation of the serology and DNA results that the nontestifying individuals with personal knowledge of the results had prepared. Thus, Mr. Derr had no opportunity to confront the competence, integrity, or reliability of the witnesses who provided the most incriminating evidence against him at trial.

In closing, the prosecutor forcefully argued the strength of the DNA evidence, telling the jury that, "The DNA profiles speak loud and they speak clear." Referring directly to the charts of the DNA profiles that had been generated by a witness who did not testify, the prosecutor encouraged the jury to "look at all of these numbers, … all of the electropheragram, the peaks." The prosecutor emphasized that Ms. Luttman had "looked at all the electropheragram [sic] and you saw them too. And they're in evidence and you can look at them when you [go] back if you want to look at

them." To support Ms. Luttman's testimony that Mr. Derr was "the source of that semen," the prosecutor encouraged the jury to look for themselves. "He's the source of that semen because, as we can all look, and you can take this back as well with you to the jury room, these numbers all match up…. They all line up. They're all the same."

To support Ms. Luttman's testimony that semen was present on evidence samples that she had *never* examined, the prosecutor told the jury that, "[W]e've also brought in reports that were written a long time ago. What's the significance of the 1985 report? [Ms. Luttman] said, well, looking at that sheet, and you'll have it when you go back there, you'll see that [the nontestifying examiner] put the strokes down when he saw semen on the slide." The prosecutor went on to explain that the 1985 report was "confirmed" by the 2002 DNA analysis that Ms. Luttman also had no personal knowledge about.

The resolution of this Confrontation Clause problem involves a straightforward application of the Court's decisions in *Crawford v. Washington*, 541 U.S. 36 (2004), *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, 564 U.S. __, 131 S. Ct. 2705 (2011). However, after the sharply divided 4-1-4 decision in *Williams v. Illinois*, 567 U.S. __, 132 S. Ct. 2221 (2012), there has been substantial confusion and deep conflict in lower courts over what standard governs the application of the right of confrontation to the results of forensic analysis. That confusion is evident in the lower court's determination that the "formality" standard drawn from Justice Thomas' singular opinion concurring in the judgment in

Williams now controls the application of the right of confrontation in Maryland.[1] Authoritative guidance from the Court is sorely needed to resolve the divergent governing standard in Maryland that has deepened the conflict among the lower courts.

1. The State's brief in opposition primarily argues three reasons to deny the petition. Its lead argument is that Confrontation Clause problem here is "functionally identical" to that presented in *Williams*, which is of such recent "vintage" that it should not be overruled. BIO at 5-7. The defect in this argument is that the *Williams* plurality determined the expert testimony there did *not* convey the truth of the matter asserted, "*i.e.*, that the matching DNA profile was 'found in semen from the vaginal swabs.'" *Williams*, 132 S. Ct. at 2237. Here, Ms. Luttman *did* transmit to the jury the truth of the matter asserted, *i.e.*, that Mr. Derr's DNA profile was found in semen from the vaginal swabs. That point is indisputable. Ms. Luttman directly transmitted to the jury the statements, opinions, and conclusions of witnesses who received, manipulated, and tested the most important pieces of evidence against Mr. Derr, but who *never* testified live in court subject to confrontation and cross-examination. Moreover, documentation of the results—admitted for the truth of the matters

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[1] In the companion case of *Cooper v. State*, 73 A.3d 1108 (2013), *cert. pending*, Docket #13-644 (filed Nov. 22, 2013), the lower court applied the "formality test" announced in *Derr II* to affirm the admission of two pages of a non-testifying DNA examiner's report that contained a list of evidentiary items that the examiner tested and statements about the resulting DNA profiles from those evidence samples.

asserted—was used by the prosecutor in closing to support Ms. Luttman's opinion. Petitioner's case is plainly not "functionally identical" to *Williams*.

2. The State's second argument is that the conflict among the lower courts is shallow. However, that argument is premised on an alternative rationale not adopted by the lower court, namely, the State's unworkable "raw data" test. On this basis, the State claims, "[T]he states and federal circuits are in general agreement that an expert may, in fact, testify as to his or her opinions even when those opinions are based, in part, on raw data generated by others." BIO at 8. By "raw data" the State evidently means a "nonstatement." Read another way, the State's point is only that an expert may base an opinion on a "nonstatement" without offending the Confrontation Clause. The State misses the mark. The controversy in the lower courts is *not* over whether an expert may testify based on "nonstatements." The controversy *is* over which standard should distinguish a testimonial statement from a statement or nonstatement, with lower courts adopting divergent standards that mirror one or more (or none) of the divergent standards articulated in *Williams*.

3. The State suggests its "raw data" test will resolve the controversy. It does not. The State's expansive definition of "raw data" would essentially create a "forensic scientist" exception to the right of confrontation. To begin with, the State asserts, "Only Luttman's testimony constituted evidence against Derr." BIO at 14. According to the State, everything else constitutes "raw data" that "had no relevance to any issue before the jury in Derr's case." *Id*. That is

incorrect. Ms. Luttman did not assume the existence of a statement, report, or result; she directly *transmitted* the statements, report, and results of forensic testing for their truth to support her testimony that Mr. Derr was the source of semen on the vaginal swabs collected from the victim.

For example, when the prosecutor asked Ms. Luttman how she determined that semen was present on the vaginal (and other) swabs, she stated, "The samples came into the laboratory in 1985, into the FBI laboratory for testing. In 1985 they were tested for the presence of semen and based on the serology report and the serology notes semen was found on those items." Ms. Luttman was not competent to testify about such matters. She did not conduct any independent assessment of "raw data" to reach her own conclusion. Ms. Luttman accepted the statement of the nontestifying witness (here, either a special agent "examiner" or civilian employee of the FBI) as true, and transmitted the conclusion, *i.e.*, semen was present on the vaginal swabs, to the jury. Thus, the evidence against Mr. Derr came from a witness who never testified in court subject to confrontation and cross-examination.

4. For these same reasons, the State's claim has no merit that the outcome in the lower court would be the same in the First Circuit, Second Circuit, and Seventh Circuit—as well as a majority of state courts of last resort. BIO at 8. These decisions reflect a deep conflict over the standard governing when forensic analysis is testimonial, but they do not stand for the complete exemption the State advocates for here. The Seventh Circuit in *Turner v. United States*, 709 F.3d 1187, 1190

(7th Cir. 2013), noted the difficulty of applying the fractured decision in *Williams*, and assumed the conclusion or finding of an expert documented in an official report was sufficiently formal to be testimonial. In *United States v. Mallay*, 712 F.3d 79, 95 (2d Cir. 2013), the Second Circuit confined *Williams* to its facts, and applied the "primary purpose" standard to determine whether a pathology report is testimonial. And the First Circuit, in *United States v. Soto*, 720 F.3d 51, 59 (1st Cir. 2013), after reviewing the various standards discussed in *Williams*, acknowledged that a Confrontation Clause violation may occur when a testifying expert who has reexamined evidence repeats the conclusions of a nontestifying analyst to bolster his opinion. In contrast, the lower court's decision broadly excludes reports of forensic analysis from the Confrontation Clause under an entirely different standard. This conflict requires the Court's intervention to resolve.

5. The State's last argument is that petitioner offers no "viable" theory and that the application of the right of confrontation to modern forensic science is "difficult and nuanced." BIO at 13. Petitioner notes that a straightforward application of the right of confrontation in the circumstances of this case would not "cripple the State's ability to use forensic science" *id.* at 4, or impose a "de facto statute of limitations." *Id.* The State's bogeyman arguments once again widely miss the point that the basic concept of confrontation is *desirable* in our society, precisely because it does set a high value on ensuring a *process* that is designed to promote accuracy in fact-finding. Without it, errors and mistakes in the testing of evidence will be insulated by the testimony of an expert who has no

personal knowledge about the accuracy or correctness of the tests performed.

In sum, the right of confrontation is of extraordinary importance, but lower courts are in sharp conflict over its application and require guidance from this Court.

6. There are many examples of how the State's approach will undermine accuracy in factfinding, but one is particularly relevant to debunking the belief that an accredited laboratory operates without any error or incompetence. In 2002, Jacqueline Blake worked at the FBI as a DNA analyst. She performed the "bench work" and generated results (*i.e.*, DNA profiles), that the State claims constitute meaningless "raw data." While performing analysis on hundreds of cases over a two-year period of time, she fabricated data for negative controls—one of the critical mechanisms for detecting contamination in a DNA laboratory. Her fabrication of data was discovered only by accident. The Inspector General investigated, and made the following findings:

> Our textual analysis of the FBI protocols that govern the DNA [unit] concluded that 31 out of 172 topical sections are *significantly vulnerable to inadvertent or willful noncompliance by DNA [unit] staff members*. One of four reasons typically accounted for each of the vulnerabilities: 1) the protocol lacks sufficient detail; 2) the protocol fails to inform the exercise of staff discretion; 3) the protocol fails to ensure the precision of manual note taking; and 4) the protocol is outdated. In addition, in the course of completing fieldwork that examined how staff

> members implement the protocols that we identified as problematic, we discovered operational vulnerabilities in the areas of team functions, training, information sharing, and evidence tracking.

The FBI DNA Laboratory: A Review of Protocol and Practice Vulnerabilities (May 2004) (emphasis supplied) (tinyurl.com/mfugcgl) (last viewed March 21, 14). Of course, an expert testifying about Ms. Blake's profiles would have no personal knowledge of her fabricated data.

7. Underlying the importance of cross-examination of the analysts who perform forensic testing is the reality that DNA analysis is a highly analytical and complex task that requires an analyst to interpret data and results at each stage of the process, and which can, as a result, produce different sets of data for interpretation. *See* 2 P. Giannelli & E. Imwinkelried, SCIENTIFIC EVIDENCE § 18.04, pp. 48-77, LexisNexis (4th ed. 2007) ("To begin with, as powerful as the various technologies are, there is still the possibility of human error."); Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CAL. L. REV. 721, 754-56 & nn. 149-56 (2007) (cataloguing the series of scandals that have besieged DNA typing); William C. Thompson, *Tarnish on the "Gold Standard": Understanding Recent Problems in Forensic DNA Testing*, Champion, Jan.-Feb. 2006, at 10, 15 ("It is not just jurors, fed on a media diet of CSI-style fantasies, who think [DNA evidence is virtually infallible]. Most members of the academic and legal community believe it as well."); Bruce Budowle, *et al.*, *A Perspective on*

Errors, Bias, and Interpretation in the Forensic Sciences and Direction for Continuing Advancement, 54 J. FORENSIC SCI. 4, 798, 800 (2009) ("Even with safeguards in place, errors can occur in any endeavor involving humans.").[2] The potential for data intended for use in a criminal prosecution to be manipulated and distorted is the essence of a testimonial statement. That is particularly the case when the data is generated for the purpose of establishing the fact of a perpetrator's DNA profile for use in a criminal prosecution. The information about the perpetrator's DNA profile conveys in a graphic form precisely what the analyst would be expected to testify about on direct examination at trial. DNA test results thus fit squarely within *Crawford's* definition of "testimonial statements" subject to the Confrontation Clause.

8. Justice Kagan's dissent in *Williams* presciently observed that the diverging rationales "have left

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[2] Another example of an error in DNA testing involved the Office of the Chief Medical Examiner in New York City, which has been at the forefront of advocating for the introduction of DNA test results without the testimony of the analyst who performed the test. *The New York Times* reported that an analyst in this laboratory contaminated DNA recovered from skin cells on a slain woman's portable compact disc player and DNA recovered from a chain near the "Occupy Wall Street" protest, *see Suspected DNA Link to 2004 Killing was the Result of a Lab Error*, NY TIMES (July 12, 2012). The trend towards testing low levels of "touch" DNA samples increases the likelihood of laboratory error. *See*, William C. Thompson, *The Potential for Error in Forensic DNA Testing*, GENEWATCH (tinyurl.com/mkpjlc5) (last viewed March 23, 14); *see also*, William C. Thompson, *Forensic DNA Evidence, The Myth of Infallibility*, GENETIC EXPLANATIONS: SENSE AND NONSENSE, Chp. 15 (Sheldon Krimsky and Jeremy Gruber, Ed.) (Harvard University Press 2013).

significant confusion in their wake. What comes out of four Justices' desire to limit *Melendez-Diaz* and *Bullcoming* in whatever way possible, combined with one Justice's one-justice view of those holdings, is—to be frank—who knows what." *Williams*, 132 S. Ct. at 2277. The uncertainty and confusion that *Williams* has caused (and continues to cause) is evident in the decision of the court below to adopt a rigid "formality" test that broadly exempts forensic analysis from the Confrontation Clause.

CONCLUSION

The right of confrontation is of fundamental importance to the structure of a fair trial. The substantial confusion and sharp conflict in the lower courts over its application to forensic science threatens the truth-seeking function of a trial and ultimately, confidence in the integrity of scientific evidence that determines the outcome of many criminal cases. This case presents an ideal vehicle to resolve the continuing confusion and deep conflict in the lower courts.

In the public interest, the petition for issuance of a writ of certiorari should, respectfully, be granted.

Respectfully Submitted,

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