NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023-2024

ELANA GORDON,
Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE MASSACHUSETTS APPEALS COURT

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QUESTIONS PRESENTED

1. Whether the Confrontation Clause of the Sixth Amendment permits the prosecution in a criminal trial to present testimony by a substitute forensic expert conveying testimonial statements of a non-testifying forensic analyst on the grounds that the testifying expert offers a purportedly "independent opinion."

2. Whether the Sixth Amendment right to counsel precludes a criminal defendant's trial counsel from suggesting to a jury that trial counsel does not believe the testimony of the defendant.

PARTIES TO THE PROCEEDING

Petitioner is Elana Gordon. Respondent is the Commonwealth of Massachusetts. No party is a corporation.

RELATED PROCEEDINGS

Massachusetts Superior Court, Plymouth County:
Commonwealth v. Gordon, No. 1883 CR 00198 (Oct. 22, 2021)
(entering judgment of conviction after jury trial)

Massachusetts Appeals Court:
Commonwealth v. Gordon, No. 22-P-825 (Nov. 8, 2023)
(affirming judgment of conviction)

Supreme Judicial Court of Massachusetts:
Commonwealth v. Gordon, FAR-29587 (Jan. 12, 2024)
(denying discretionary further appellate review)

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CITATIONS TO THE OPINIONS BELOW

The Superior Court's oral ruling admitting trial testimony by the Commonwealth's substitute forensic analyst, and rejecting Petitioner's arguments that this testimony violated her rights under the Confrontation Clause, is unreported. Relevant transcript pages appear at Appendix F, pp. 42-43. The memorandum of decision and order of the Massachusetts Appeals Court affirming Petitioner's conviction is unreported but available at *Commonwealth v. Gordon*, 2023 WL 7383154 (Mass. App. Ct. Nov. 8, 2023). The Appeals Court decision also appears at Appendix C. The order of the Massachusetts Supreme Judicial Court ("SJC") denying discretionary further appellate review is reported at *Commonwealth v. Gordon*, 493 Mass. 1105 (Mass. 2024). This order also appears at Appendix A.

STATEMENT OF JURISDICTION

The Massachusetts Appeals Court issued a final judgment affirming petitioner's conviction on November 8, 2023. Appendix C. The SJC denied discretionary further appellate review on January 12, 2024. Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

Constitutional Provisions

The Sixth Amendment to the Constitution of the United States provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right …to be confronted with the witnesses against him."

The Fourteenth Amendment to the Constitution of the United States, Section 1, provides in relevant part, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws ..."

Statutes

In relevant part, 28 U.S.C. § 1257, states "(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the

treaties or statutes of, or any commission held or authority exercised under, the United States ....”

Massachusetts General Laws chapter 268, section 28 provides, “Whoever gives or delivers to a prisoner in any correctional institution, or in any jail or house of correction, any drug or article whatever, or has in his possession within the precincts of any prison herein named with intent to give or deliver to any prisoner any such drug or article without the permission of the superintendent or keeper, shall be punished by imprisonment in the state prison for not more than five years, or in a jail or house of correction for not more than two years, or by a fine of not more than one thousand dollars.”

Rules

Massachusetts Guide to Evidence 703 states, “The facts or data in the particular case upon which an expert witness bases an opinion or inference may be those perceived by or made known to the witness at or before the hearing. These include (a) facts observed by the witness or otherwise in the witness’s direct personal knowledge; (b) evidence already in the record or that will be presented during the course of the proceedings, which facts may be assumed to be true in questions put to the witness; and (c) facts or data not in evidence if the facts or data are independently admissible in evidence and are a permissible basis for an expert to consider in formulating an opinion.”

Massachusetts Appeals Court Rule 23 provides in relevant part, "(1) Summary disposition without oral argument. At any time following the filing of the appendix and the briefs of the parties on any appeal in accordance with the applicable provisions of Mass. R. A. P. 14(b), 18, and 19, a panel of the justices of this court may determine that no substantial question of law is presented by the appeal or that some clear error of law has been committed which has injuriously affected the substantial rights of an appellant and may, by its written order, affirm, modify, or reverse the action of the court below…"

STATEMENT OF THE CASE

The Commonwealth charged Petitioner Elana Gordon, an attorney, with smuggling a controlled substance, buprenorphine, into the Plymouth House of Correction on May 4, 2018 while visiting a prospective client. A grand jury returned three indictments against Petitioner: possession of a Class B controlled substance, smuggling a Class B substance into a house of correction, and conspiracy. Appendix G.

After Petitioner's arrest the alleged drug evidence was sent to the Massachusetts State Police Crime Laboratory ("MSP crime lab") for testing. This evidence was assigned to analyst Kimberly Dunlap, who performed the testing. Appendix F, pp. 28-30.

In October 2021 Petitioner was tried by a jury on the charges of possession of a Class B substance and smuggling a Class B substance into a house of correction (the conspiracy count had previously been severed). By the time of trial Dunlap had left the MSP crime lab for reasons that are not clear from the record. Carrie Labelle was allowed to testify as a substitute analyst regarding the composition of the materials tested in Petitioner's case. At the time of this testing, Labelle worked at the MSP crime lab as a Forensic Analyst III, a supervisory position. In addition to reviewing submitted evidence for the presence of controlled substances, Labelle would perform technical and administrative review of her peers' work. Labelle explained that when she performs a technical and administrative review she reads the file to make sure the analyst took all the appropriate steps, according to protocol, including weighing the substance, doing the screening test, and then doing a confirmatory test. An analyst's notebooks should include details such as the volume sampled and the solutions added to the sample. Appendix F, pp. 24-30.

Labelle performed no laboratory work analyzing the samples provided to the MSP crime lab in connection with Petitioner's case, nor was there evidence that Labelle ever observed Dunlap performing any of the laboratory work on Petitioner's case. Rather, Labelle testified that Dunlap submitted her work on

Petitioner's matter, after that work was complete, for Labelle to perform a technical and administrative review of the file. Appendix F, pp. 29-31.

Despite the fact that she did not participate in, or even observe, the hands-on work performed to test the samples, Labelle testified that Dunlap had performed certain procedures based solely on her review of Dunlap's notes. First, Labelle testified as to Dunlap's preliminary identification of the substance:

> Q Okay. As it relates to this specific case, did you perform any technical review on that identification marking?
>
> A Yes. So, the first test that the analyst performed was a pharmaceutical ID. So, what they did was, they input – they recorded in their notes what the imprint was that they observed on the actual item of evidence. They input that into their choice of a database. I believe they used drugs.com, but I can double-check on that. It gave back a preliminary identification of Buprenorphine and Naloxone, and then that printout is retained in the case record.

Appendix F, p. 33. Labelle likewise testified as to the confirmatory testing that Dunlap performed on the sample:

> Q All right. And as a result of that, was a confirmatory test done by the analyst?
>
> A Yes. Because the preliminary identification indicated a mixture of Buprenorphine and Naloxone, the analyst chose to do the GCMS [gas chromatography/mass spectroscopy] instrument. They took a portion of one of the films, they recorded it into a solvent, I believe it was methanol is what we commonly use, and then the instrument will print out data after it goes -- runs through the instrument, and then that data we retain in the case and is reviewable.

Appendix F, p. 34. Labelle then purported to form an "independent opinion" of the composition of the substance based on the data contained in Dunlap's file:

Q Okay. So, you’re able to see the data results, the same data results that the person who did the initial analysis saw?
A Correct.
Q All right. And do those data analysis allow you to make a determination, to a scientific degree of certainty, as to what type of a substance an item is?
A Yes.
Q Okay. Did you yourself, during your technical review, do a data review of the items on this particular case?
A Yes. So, in reviewing the data printouts independently, as another forensic scientist, the data supports a conclusion of Buprenorphine and Naloxone.
Q All right. So, in your opinion, can you say with a degree of scientific certainty what that controlled substance is?
A Yes.
Q Okay. And what is that?
A Again, the data supports the identification of Buprenorphine and Naloxone.
Q And that would also be considered Suboxone?
A Correct.
Q All right. And to the best of your knowledge, is that a particular class of controlled substance within Massachusetts?
A One of the items in that mixture, Buprenorphine, is a Class B controlled substance.

Appendix F, pp. 34-35. On cross examination, Labelle agreed that she did not actually test any of the materials, and that her opinion relied on the testing performed by Dunlap:

Q Okay. Would it be fair to say that at no time back in -- at that timeframe in July, did you actually conduct an independent or separate test of the items that had been offered into evidence; correct?
A No. All of our items of evidence are only tested by one chemist.
Q Okay. And would it be fair to say then that following your review of the data that you testified to, up until today, at no time you've ever retested those materials; correct?
A Correct.

Q Okay. You're relying on the conclusions and opinions of the prior individual who did the actual test; correct?

A So, I am reviewing the data currently and saying that the data supports a conclusion of the results.

Q All right. But you're relying on a test performed by another person; correct?

A Correct.

Appendix F, pp. 39-40. On redirect examination, Labelle agreed that she could have ordered retesting of the samples, but testified that she had not because she had identified no "discrepancies" during her technical and administrative review. Labelle also reiterated that she had given the jury an "independent" opinion based on her review of information in Dunlap's file:

Q Okay. And finally, as it relates to your opinion about this substance, is that based on the work of someone else or your own review of the raw data?

A In reviewing the actual case file, which I have here, I'm giving an independent conclusion based on that information.

Appendix F, p. 42. Immediately after the conclusion of Labelle's testimony, defense counsel moved to strike it in its entirety on the grounds that it had denied Petitioner her rights under the Confrontation Clause. The judge denied the motion but stated that Petitioner's rights had been preserved on this issue:

MR. PERRUZZI: Judge, I move to strike this witness and her testimony. She conducted no independent tests for the items. I thought – I wasn't sure what I was going to hear from this particular witness. All she's doing is reviewing data, testifying to conclusions that were arrived at by a person who is not here and not available for cross-examination or for direct examination for that matter. So, this testimony is lies in the face of Melendez-Diaz and all the

cases that follow regarding my client's right to confrontations not being protected, so to speak. So, –

THE COURT: Well, she's giving – it's her opinion.

MR. PERRUZZI: Correct, Judge.

THE COURT: And so, you have the right to confront and cross-examine her on her opinion.

MR. PERRUZZI: Which I have done; right. I concede that.

THE COURT: She's not giving us anyone else's opinion.

MR. PERRUZZI: Mm-hmm.

THE COURT: So, for that reason, I'm going to deny the motion to strike.

MR. PERRUZZI: Very good, Your Honor.

THE COURT: But your rights are saved on that issue.

Appendix F, p. 34.

Petitioner was convicted on both charges, and the possession charge was dismissed as a lesser included offense of the smuggling charge, Massachusetts General Laws chapter 268, section 28. Petitioner was sentenced to six months in the house of correction. Appendix G (Oct. 22, 2021 and Nov. 22, 2021 entries).

Subsequently, while serving her sentence on the smuggling charge, Petitioner pleaded guilty on the conspiracy count. Appendix G (Dec. 15, 2021 entry).

On appeal, Petitioner pressed her argument that Labelle's vital testimony, that the substance in question was buprenorphine, had violated her Confrontation Clause rights:

> After defense counsel elicited on cross examination that Labelle had not performed any hands-on testing of the substance, and had simply reviewed the file, he moved to strike her testimony in its entirety as a violation of the Confrontation Clause. 4 Tr. 43-44. The

> judge overruled the objection on the ground that Labelle had provided an "independent" analysis of the GCMS data. 4 Tr. 44.
>
> Given defense counsel's timely objection, as well as indications that some Supreme Court justices are interested in revisiting how the Confrontation Clause relates to expert reliance on hearsay, *see Stuart v. Alabama*, 139 S.Ct. 36, 36-37 (2018)(Gorsuch, J., dissenting from denial of writ of certiorari), Ms. Gordon wishes to preserve her argument that Labelle's testimony violated her confrontation rights. Insofar as Supreme Judicial Court ("SJC") precedent forecloses her argument, *see Commonwealth v. Greineder*, 464 Mass. 580, 594-95 (2013); *Commonwealth v. Chappell*, 473 Mass. 191, 201-02 (2015), this law should be overruled.

Appendix D, p. 35. In particular, Gordon argued that Labelle's testimony as to what procedures Dunlap had performed in the MSP crime lab could only have been relevant if the jury accepted it for its truth:

> Crucially, the jury had to have accepted this hearsay for its truth for Labelle's testimony to have any relevance. While Labelle had the expertise to testify that a given GCMS data set was consistent with buprenorphine, without some evidence tying that data to 61 strips recovered from the envelopes, her opinion would be irrelevant. Hearsay provided the vital link.
>
> And while defense counsel could question Labelle about lab protocol and what Dunlap should have done, Labelle was in no position to testify what Dunlap actually did. *See Stuart*, 139 S.Ct at 36 ("[T]he State effectively denied Ms. Stuart the chance to confront the witness who supplied a foundational piece of evidence in her conviction."). Given the sorry history of crime lab fraud in this state, the concern is far from hypothetical – and in any event "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." *Melendez-Diaz*, 557 U.S. at 319.

Appendix D, pp. 39-40.[1] Petitioner applied to the SJC to grant her appeal discretionary direct review (thereby bypassing the Appeals Court), but her application was denied. Appendix E. The Appeals Court affirmed Petitioner's conviction with an unpublished memorandum of decision and order pursuant to its Rule 23, dated November 8, 2023. Appendix C. The Appeals Court rejected Petitioner's Confrontation Clause argument as follows:

> The defendant argues that her confrontation rights were violated when a substitute drug analyst opined that the substance in the envelopes that the defendant gave to Bell was Suboxone, a combination of buprenorphine and naloxone.
>
> A substitute drug analyst may testify about the identification of a substance provided that she "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.'" *Commonwealth v. Greineder*, 464 Mass. 580, 595 (2013), quoting *Commonwealth v. Greineder*, 458 Mass. 207, 236 (2010).
>
> The substitute drug analyst in this case properly "described the analytic process that [the nontestifying analyst] . . . would have followed, and [her] own opinions that she had formed independently and directly from the case review and analysis she herself had performed." *Commonwealth v. Chappell*, 473 Mass. 191, 202 (2015) (testimony of DNA analyst's supervisor admissible*). See Commonwealth v. Gonzalez*, 93 Mass. App. Ct. 6, 13 (2018) (testimony of substitute chemist admissible). The defendant cross-examined the substitute drug analyst regarding the basis on which she formed her opinion, her reliance on data generated by the nontestifying analyst, and the fact that she did not personally test the evidence. We discern no error or violation of the defendant's confrontation rights.

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[1] Petitioner also argued on appeal that her trial counsel had provided ineffective assistance of counsel because his closing argument suggested to the jury that counsel did not believe his own client.

Appendix C, pp. 6-7.

Petitioner filed a timely application for discretionary further appellate review by the SJC, and continued to press her Confrontation Clause argument:

> Labelle should not have been allowed to opine that the substance found in the envelopes was buprenorphine based on a review of Dunlap's hearsay paperwork. Labelle, a laboratory supervisor, did not testify that she observed Dunlap's hands-on lab work. While Labelle could testify as to what laboratory procedures should have been followed, she was in no position to testify about what Dunlap actually did. Labelle's testimony about what Dunlap did based on her review of Dunlap's paperwork … violated Gordon's Sixth Amendment Confrontation Clause rights.

Appendix B, p. 10. The SJC denied the Petitioner's application for further appellate review on January 12, 2024. Appendix A.

REASONS FOR GRANTING THE PETITION

The Sixth Amendment's Confrontation Clause confers on the accused, "[i]n all criminal prosecutions, ... the right ... to be confronted with the witnesses against him." The Confrontation Clause is made obligatory on the States by the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400 (1965). This Court recently granted certiorari to decide whether the Confrontation Clause permits a substitute forensic analyst to testify in a manner that conveys the testimonial statements of a non-testifying analyst. *See Smith v. Arizona*, No. 22-899. As the appellant in *Smith* noted, the Court's fractured decision in *Williams v. Illinois*, 567 U.S. 50 (2012), has created considerable confusion, and inconsistent rulings, among the lower courts dealing with this common fact pattern. Some lower courts,

faced with this confusion, have allowed substitute forensic analysts to testify in a manner that admits the out-of-court testimonial statements of the original analysts who performed the laboratory work. These courts have rationalized this practice on the grounds that the testifying expert is offering an "independent" opinion, and so the original analyst's statements are not offered for their truth. *See, e.g., Commonwealth v. Chappell*, 473 Mass. 191, 201-02 (2015).[2] However, as appellant in *Smith* has cogently argued, this rationale is flawed: The truth of the original analyst's testimonial statements is always vital to testifying expert's opinion, therefore that opinion can never truly be "independent." The out-of-court statements of the original analyst are thus being tacitly offered for their truth, in violation of the Confrontation Clause. *See*, *generally*, Petition for a Writ of Certiorari, *Smith v. Arizona*, No. 22-899, pp. 20-23.

Rather than reprise in detail all the arguments made by the appellant in *Smith*, Petitioner will focus her argument on reasons why her particular case is appropriate for this Court's consideration, in conjunction with *Smith*. First, recent history in Massachusetts belies the claim that a criminal defendant can effectively

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[2] *See also State v. Joseph*, 283 P.3d 27, 29-30 (Ariz. 2012)(invoking independent opinion rationale); *State v. Hutchison*, 482 S.W.3d 893, 914 (Tenn. 2016)(same); *Hingle v. State*, 153 So.3d 659, 664 (Miss. 2014)(same); *State v. Mercier*, 87 A.3d 700, 704 (Me. 2014)(same); *cf. U.S. v. Ramos-Gonzalez*, 664 F.3d 1, 5 (1st Cir. 2011)("Where an expert witness employs her training and experience to forge an independent conclusion, albeit on the basis of inadmissible evidence, the likelihood of a Sixth Amendment infraction is minimal.").

cross-examine a substitute analyst to uncover any flaws in the original analyst's testing of the materials. *See* Part A below. Second, Petitioner's case squarely raises the issue presented and she should receive the benefit of the Court's ruling in *Smith*, to the extent it is favorable. *See* Part B below.

A. Despite A History Of Endemic Fraud By Massachusetts State Police Forensic Analysts – Resulting In Over 20,000 Criminal Cases Being Dismissed With Prejudice – Massachusetts Courts Continue To Disregard This Court's Teachings In *Melendez-Diaz* and *Bullcoming* And Allow Substitute Forensic Analysts To Base Their Purportedly "Independent" Opinions On Laboratory Work That They Never Conducted Or Observed, In Violation Of The Sixth Amendment's Confrontation Clause.

Massachusetts is a case study of all that can go wrong with the handling of forensic evidence, and its experiences demonstrate why strict application of the Confrontation Clause is necessary even when purportedly-reliable forensic evidence is at issue.

Almost contemporaneously with this Court's decision in *Williams*, allegations came to light that Annie Dookhan, a forensic analyst at the Massachusetts Department of Public Health's William A. Hinton State Laboratory Institute ("Hinton lab"), had engaged in widescale misconduct:

> In June, 2011, allegations of misconduct at the [Hinton lab] surfaced regarding work performed by Annie Dookhan, a chemist who had been employed in the forensic drug laboratory since November, 2003. As a result of this investigation, it has been alleged that, among other things, Dookhan deliberately and repeatedly falsified drug testing results, tampered with evidence, and forged signatures on documents. Although the full scope of Dookhan's purported misconduct is not yet known, it

> has been estimated conservatively that, during her tenure, Dookhan worked on at least 34,000 cases.

Commonwealth v. Charles, 466 Mass. 63, 64-65 (2013). It was later established that Dookhan had indeed engaged in egregious misconduct for over a decade, and the SJC consequently dismissed over 21,000 affected cases. *See* April 20, 2017 press release, "Supreme Judicial Court Dismisses Over 21,000 Cases Affected by the Breach at the Hinton State Laboratory Institute," https://www.mass.gov/news/supreme-judicial-court-dismisses-over-21000-cases-affected-by-the-breach-at-the-hinton-state-laboratory-institute.

While the massive scale of Dookhan's misconduct is shocking, it was not an isolated incident. Soon after the Hinton lab scandal came to light authorities learned that another state-employed forensic analyst, Sonja Farak, had also engaged in widespread misconduct at a different facility, the State Laboratory Institute at Amherst, Massachusetts:

> On January 17, 2013, the evidence officer at the Amherst drug lab, Sharon Salem, was attempting to match drug certificates with the corresponding samples when she realized that she was missing the samples in two cases. Records reflected that Farak had completed testing on those samples earlier in the month and had confirmed that the substances were cocaine. On January 18, Salem reported the missing evidence to her supervisor, James Hanchett, who searched Farak's work station and discovered, among other items, a manila envelope containing the packaging for the two missing samples, which had been cut open. Testing of the substances in the packaging was negative for cocaine, contrary to Farak's earlier analysis.

> Hanchett immediately contacted the State police, who shut down the Amherst drug lab and began an investigation.

Commonwealth v. Cotto, 471 Mass. 97, 100 (2015). Though the Commonwealth initially downplayed the scope of Farak's misconduct, it eventually came out that she had been consuming the "standards," used as the controls when testing for the presence of illicit substances, as far back as 2004. *Committee for Public Counsel Services v. Attorney General*, 480 Mass. 700, 729 (2018). The SJC ultimately dismissed thousands of affected cases:

> As far as can be determined on this record, Farak's drug use spiraled out of control at the beginning of 2009, when she nearly depleted the jar of methamphetamine oil and started to search for other sources of drugs to satisfy her addiction. Around that time, Farak began manipulating the computer system. She also started stealing from police-submitted samples before and after they were tested, and from samples that had been assigned to other chemists…
>
> In order to protect the integrity of the criminal justice system, and to afford relief to defendants whose convictions may have rested upon tampered evidence, we conclude that, in addition to those already dismissed where Farak signed the drug certificate, all convictions based on evidence that was tested at the Amherst lab on or after January 1, 2009, regardless of the chemist who signed the drug certificate, and all methamphetamine convictions where the drugs were tested during Farak's tenure at the Amherst lab, must be vacated and dismissed.

Id.

This misfeasance in Massachusetts crime labs likely went undetected for years as a result of the Massachusetts courts' lack of fidelity to this Court's Confrontation Clause jurisprudence. In *Crawford v. Washington*, 541 U.S. 36, 68

(2004), this Court held that the admission of a witness's "testimonial statement against [a defendant], despite the fact that he had no opportunity to cross-examine [the witness] … alone is sufficient to make out a violation of the Sixth Amendment." In violation of *Crawford*, the following year the SJC held that drug analysis certificates created for the express purpose of prosecuting defendants could, consistent with the Confrontation Clause, be introduced at trial in lieu of live testimony by the analyst who had tested the substance. *Commonwealth v. Verde*, 444 Mass. 279 (2005). As a result of *Verde*, criminal defendants were convicted on the strength of drug analysis certificates signed by Dookhan and Farak, without either analyst having to appear in court. This Court eventually overruled *Verde* in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and held that, under *Crawford*, drug analysis certificates are testimonial statements that cannot be admitted against a criminal defendant in lieu of live testimony by the analyst.

Even after *Melendez-Diaz* states like Massachusetts failed to fully enforce the Confrontation Clause and allowed forensic analysts who had not tested the materials at issue to testify about what the original analyst had done, until this Court limited the practice in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). In *Bullcoming*, as in Petitioner's case, the original analyst who had tested a sample using chromatography equipment was no longer employed by the state laboratory

at the time of trial. *Id*. at 655, 659. In *Bullcoming*, as in this case, the government called as a witness a substitute analyst who had neither performed the testing nor observed it. *Id*. at 655-56. And in *Bullcoming*, as in this case, the government could have retested the sample prior to trial but did not. *Id*. at 665. For the same reason that the substitute analyst testimony in *Bullcoming* violated the Confrontation Clause, Labelle's testimony deprived Petitioner of Confrontation rights: "Surrogate testimony of the kind [the substitute analyst] was equipped to give could not convey what [the original analyst] knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed." *Id*. at 661.

Despite this Court's holding in *Bullcoming*, and despite having recently learned of large-scale fraud by Dookhan and Farak, in 2015 the SJC ruled that a laboratory supervisor who had never tested a substance or observed it being tested could, consistent with the Confrontation Clause, testify as a substitute analyst about the manner in which it had been tested. The SJC reasoned that:

> [T]he defendant here certainly was able to cross-examine the Commonwealth's expert Schneeweis [the substitute analyst] meaningfully about the reliability of the underlying DNA testing procedures and data, given that Schneeweis was the crime lab's section manager for forensic biology and supervisor of the crime lab's DNA analysts (including Hughes [the original analyst]) and had been directly involved in this case as the second reader and technical reviewer … Schneeweis described the analytic process that Hughes, as an analyst in the crime lab, would have followed, and Schneeweis's own opinions

> that she had formed independently and directly from the case review and analysis she herself had performed.

Commonwealth v. Chappell, 473 Mass. 191, 201-02 (2015). This reasoning, which the Appeals Court cited when affirming Petitioner's conviction, Appendix C, p. 6, flatly contradicts this Court's holding that the Confrontation "Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." *Bullcoming*, 564 U.S. at 662. The SJC's reasoning was also flawed because a manager's familiarity with a forensic laboratory's standard "testing procedures" and "analytic process" does not imply familiarity with testing done in the particular case, and it is only the latter that is relevant; a supervisor could have testified as a substitute analyst about what Dookhan and Farak *should have done*, but this would have told the jury little about what they *in fact did*. The substitute analyst in *Bullcoming* was presumably well-versed in his laboratory's standard procedures, but this Court nonetheless found his testimony inadmissible. 564 U.S. at 657-58.

Remarkably, although *Chappell* concerned the propriety of substitute forensic analyst testimony under the Confrontation Clause, the SJC did not cite *Crawford*, *Melendez-Diaz*, *Bullcoming*, or *Williams*. 473 Mass. at 199-204. Instead, the court relied on Massachusetts Guide to Evidence 703 (the analog of the federal rule) and its own cases interpreting that provision, *id.*, as if generally-

applicable state rules of evidence trumped constitutional provisions like the Confrontation Clause. This Court has made clear that they do not. *Crawford*, 541 U.S. at 40, 68-69 (application of state law analog to Fed. R. Evid. 804(b)(3) at criminal trial violated Confrontation Clause).

In *Chappell*, as in the Appeals Court decision affirming Petitioner's conviction, the SJC relied on the legal fiction that an expert can provide an "independent" opinion based on the non-testifying analyst's (presumed) laboratory work. 473 Mass. at 201-02. But a substitute analyst can only give an opinion independent of the original analyst's *opinion*, not independent of her factual assertions in the file about the work she did. As five justices noted in *Williams*, unless these underlying factual assertions are presumed to be true, any opinion based upon them would be irrelevant. 567 U.S. at 106 ("There 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.")(Thomas, J., concurring in judgment); *id*. at 126 ("[W]hen 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.")(Kagan, J., dissenting). The better-reasoned lower court decisions are in accord. *See Martin v. State*, 60 A.3d 1100, 1107-08 (Del. 2013)(statements of original analyst on which substitute analyst's opinion is based are testimonial and offered for truth); *Young v. United States*, 63 A.3d 1033,

1045-48 (D.C. 2013)(same); *Leidig v. State*, 256 A.3d 870, 900-04 (Md. 2021)(same, in context of state constitution); *but see* cases cited at footnote 2.

Indeed, where computerized equipment is performing much of the identification work, an expert's "opinion" as to the identity of a substance may be little more than vouching for the quality of the preliminary laboratory work done to prepare the samples for the equipment. *See Bullcoming*, 564 U.S. at 659-61 (discussing government's argument that analyst was mere "scrivener" recording chromatography equipment results). However, as recent experiences in Massachusetts have shown, forensic laboratory supervisors and managers cannot vouch for the quality of testing that they never observed.

The Dookhan-Farak debacle is an unfortunate vindication of this Court's observation that "[f]orensic evidence is not uniquely immune from the risk of manipulation." *Melendez-Diaz*, 556 U.S. at 318. Yet despite this experience, and in the midst of uncertainty created in the wake of *Williams*, the Massachusetts courts have opted to water down Confrontation rights by allowing substitute analyst testimony that serves as a conduit for the original analyst's out-of-court testimonial statements. This Court should end that practice.

B. Petitioner’s Case Is Well-Situated For Resolution By The U.S. Supreme Court And She Should Receive The Benefit Of The Court's Ruling In Smith v. Arizona.

Petitioner’s case squarely raises the issue presented. The file materials that the original analyst, Dunlap, generated are undoubtedly testimonial because Petitioner had been charged with drug-related crimes at the time of the testing, which was conducted to create evidence for use against Petitioner at trial. Contrast *Williams*, 567 U.S. at 84 (original analyst’s report “plainly was not prepared for the primary purpose of accusing a targeted individual”)(plurality opinion). There is no evidence that the substitute analyst, Labelle, participated in or observed Dunlap’s testing. Contrast *Bullcoming*, 564 U.S. at 673 (“It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results.”)(Sotomayor, J., concurring). The challenged testimony by Labelle was vital to the Commonwealth’s case because there was no other trial evidence that the substance in question contained buprenorphine. Petitioner, moreover, was tried by a jury and not at a bench trial. Contrast *Williams*, 567 U.S. at 72 (“The dissent’s argument would have force if petitioner had elected to have a jury trial.”)(plurality opinion). Finally, Petitioner diligently and clearly preserved her Confrontation Clause argument throughout the lower court proceedings, as noted above.

Petitioner should receive the benefit of any ruling in favor of the appellant in the pending *Smith v. Arizona* case. *See Griffith v. Kentucky*, 479 U.S. 314, 323 (1987)(noting "*actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary" of a ruling) (emphasis in original). While Petitioner believes the relief requested in *Smith* is a straightforward application of *Crawford*, *Melendez-Diaz*, and *Bullcoming*, if she must convince the Massachusetts courts of this proposition in order to obtain relief in a collateral proceeding, it is unclear how she will fare. *See Commonwealth v. Melendez-Diaz*, 460 Mass. 238, 242 (2011)(finding this Court's ruling in *Melendez-Diaz*, which the Court itself described as a "rather straightforward application of our holding in *Crawford*" [557 U.S. at 312], a "remarkable" new constitutional rule not entitled to retroactive effect in collateral proceedings). Granting certiorari will best ensure that Petitioner, and all similarly situated criminal defendants, will receive any benefits to which they may be entitled under the Court's ruling in *Smith v. Arizona*.

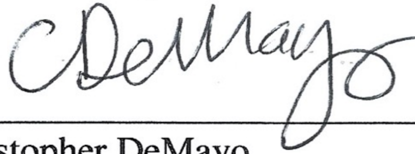
CONCLUSION

Petitioner respectfully requests the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

Elana Gordon,

By her attorney,



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