No. 23-7150

In the
Supreme Court of the United States

ELANA GORDON,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MASSACHUSETTS APPEALS COURT

BRIEF OF RESPONDENT

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QUESTION 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 statements of a non-testifying forensic analyst, on the grounds that the testifying expert offers an "independent opinion."

[1] Petitioner also presented the following second question: "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." Pet. 1. However, she does not include any argument as to this question in her petition and therefore appears to have abandoned it. For at least that reason, review of the second question in the petition is unwarranted.

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OPINION BELOW

The opinion of the Massachusetts Appeals Court ("MAC") (Pet. App. C) is not published but is available at 2023 WL 7383154.

JURISDICTION

The judgment of the MAC was entered on November 8, 2023. Pet. App. C. Further appellate review was denied by the Massachusetts Supreme Judicial Court on January 12, 2024. Pet. App. A. The petition for a writ of certiorari was filed on April 2, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATEMENT

1. On May 3, 2018, Elana Gordon ("petitioner"), an attorney, participated in two three-way telephone calls with her client, Jassel Castillo ("Castillo"), an inmate at the house of correction in Plymouth County, Massachusetts, and Castillo's sister. Pet. App. C, 1-2. During those calls, Castillo instructed petitioner to visit Noah Bell ("Bell"), another inmate at the house of correction, the following day and give Bell two manila envelopes that Bell would then transmit to Castillo. *Id.* at 2.

The next day, petitioner visited the house of correction and met with Bell. *Id.* At that meeting, petitioner handed Bell two manila envelopes. *Id.* Afterwards, officers at the house of correction searched Bell and found in the envelopes sixty-one strips of Suboxone, which contains buprenorphine, a class B controlled substance. *Id.* The officers subsequently arrested petitioner. *Id.* at 3.

2. In May 2018, a Plymouth County grand jury returned indictments charging petitioner with conspiracy to violate the drug laws, in violation of Mass. Gen. Laws, ch. 94C, § 40, possession of a class B controlled substance with intent to

distribute, in violation of Mass. Gen. Laws, ch. 94C, § 32A(a), and delivering a class B controlled substance to a prisoner, in violation of Mass. Gen. Laws, ch. 268, § 28. Pet. App. G. In October 2021, the case proceeded to a jury trial on the charges of possession of a class B controlled substance with intent to distribute and delivering a class B controlled substance to a prisoner.[2] *Id.*

3. By the time of trial, the analyst who had originally tested the substance that petitioner delivered to Bell was no longer employed at the state crime laboratory. Pet. App. F, 30. Accordingly, at trial, the Commonwealth called a substitute analyst to testify as to her opinion regarding the substance found in the two manila envelopes. *Id.* at 24-25. On direct examination, the substitute analyst testified as to the protocol that drug analysts in her lab follow when conducting an analysis of a substance, and the process that she undertakes when conducting a technical and an administrative review of another analyst's work. *Id.* at 30-33. She also testified as to certain tests that the original analyst performed to identify the substance, and as to the original analyst's data results. *Id.* at 33-35. Based on her review of the data results, the substitute analyst opined that the substance in the manila envelopes was Suboxone, a drug containing a class B controlled substance. *Id.* at 34-35. There was no objection during or after her direct examination. *Id.* at 26-36.

[2] In December 2021, petitioner pleaded guilty to the charge of conspiracy to violate the drug laws and the offense was placed on file for six months with petitioner's consent. Pet. App. G. *See generally* Mass. R. Crim. P. 28(e) (describing process of placing a case "on file"); *see also Commonwealth v. Simmons*, 863 N.E.2d 549, 554-555 (Mass. 2007) (explaining the process of placing a case on file and characterizing it as "a predecessor to modern probation" that allows "the would-be sentencing judge discretion in circumstances adjudged to be unduly harsh").

On cross-examination, petitioner's counsel asked the substitute analyst whether she had ever conducted an independent test of the substances in this case. *Id.* at 39-40. She replied that she had not. *Id.* at 40. On redirect examination, she testified that there were no discrepancies between the initial analysis of the substances and her technical and administrative review. *Id.* at 41-42.

Following redirect examination, petitioner moved to strike the substitute analyst's testimony on the ground that she had conducted no independent examination of the substance in question and had testified to conclusions that were arrived at by an analyst who was unavailable for cross-examination. *Id.* at 42-43. The trial judge denied petitioner's motion but stated that petitioner's rights were "saved." *Id.* at 43.

The jury ultimately found petitioner guilty on both indictments. Pet. App. G. After trial, petitioner's conviction for possession of a class B controlled substance with intent to distribute was dismissed as duplicative. *Id.*

4. The MAC affirmed petitioner's conviction in an unpublished decision. Pet. App. C. Among the arguments petitioner made on appeal was that the testimony offered by the substitute analyst violated her rights under the Sixth Amendment's Confrontation Clause. *Id.* at 6-7. The MAC rejected petitioner's Confrontation Clause claim for two reasons. First, the MAC found that the substitute analyst "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.'" *Id.*, quoting

Commonwealth v. Chappell, 40 N.E.3d 1031, 1040 (Mass. 2015). And, second, the MAC noted that the petitioner had the opportunity to, and did, cross-examine the substitute analyst as to the basis on which she formed her opinion. Pet. App. C, 6-7. The MAC concluded that there was "no error or violation of [petitioner's] confrontation rights." *Id.* at 7.

REASONS TO GRANT, VACATE, AND REMAND

Petitioner contends that her case squarely raises the issue that was presented in *Smith v. Arizona*, 144 S. Ct. 1785 (2024) ("*Smith*"), a case concerning the Confrontation Clause that was pending at the time she filed her petition for a writ of certiorari and that was decided on June 21, 2024. *See* Pet. 19-20. The Commonwealth agrees that *Smith* announced principles that apply to the question of whether the substitute analyst's testimony in the instant case was constitutionally permissible. Therefore, the Commonwealth asks this Court to grant the petition as to Question 1, vacate the decision below, and remand to the MAC for further proceedings consistent with *Smith*. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final").

The Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." It enables a criminal defendant to bar the admission of statements of a witness who does not appear at trial, unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine him. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). The statements at issue must be both "testimonial" in

nature, *see Davis v. Washington*, 547 U.S. 813, 823-825 (2006), and offered for the truth of the matter asserted, *see Crawford*, 541 U.S. at 59-60 n.9.

Smith involved the application of the latter of these requirements—whether certain testimony was offered for its truth—to "a case in which an expert witness restate[d] an absent lab analyst's factual assertions to support his own opinion testimony." *Smith*, 144 S. Ct. at 1791. After a jury trial, Smith was convicted of possessing dangerous drugs (methamphetamine) for sale, possessing marijuana for sale, possessing narcotic drugs (cannabis) for sale, and possessing drug paraphernalia. *Id*. at 1795. On appeal, Smith challenged the state's introduction of testimony from a substitute expert, who had not participated in any of the relevant drug testing, but who, when offering his independent expert opinion, referred to the report and notes of a non-testifying laboratory analyst who had originally tested the drugs. *Id*. at 1795-1796. Smith argued that this testimony violated his Confrontation Clause rights because Smith did not have the opportunity to cross-examine the absent laboratory analyst. *Id*. at 1796. The Arizona Court of Appeals affirmed Smith's convictions and held that the substitute expert's testimony was constitutionally permissible because the substance of the non-testifying expert's analysis was introduced only to show the basis of the substitute expert's opinion and not for its truth. *Id.*

Rejecting the Arizona court's reasoning, this Court held that "[w]hen an expert conveys an absent analyst's statements in support of his opinion, and the statements provide that support only if true, then the statements come into

evidence for their truth[,]" and, thus, constitute hearsay. *Id.* at 1791, 1797-1801. This Court vacated the judgment of the state court and remanded the case to the Arizona Court of Appeals to resolve the question of whether the hearsay statements were testimonial. *Id.* at 1801-1802.

In the instant case, out-of-court statements of an absent lab analyst were introduced at trial. During direct examination, the substitute analyst relayed statements made by the absent analyst that were documented in the case file. *See* Pet. App. F., 33-34. Specifically, when discussing her technical review of the absent analyst's work, the substitute analyst described to the jury the tests that the absent analyst conducted, the way that she conducted them, and the results that she reached. *Id.* *Smith* bears on whether such testimony constitutes hearsay for purposes of petitioner's Confrontation Clause claim.[3] *See Smith*, 144 S. Ct. at 1800-1801 (where the State used the substitute analyst to relay what the absent lab analyst wrote in her notes about how she identified the seized substances, the substitute analyst "effectively became [the absent lab analyst's] mouthpiece"). And if those statements are also testimonial, then their admission violates the Confrontation Clause. *Id.* at 1791-1792.

Because certain portions of the substitute analyst's testimony should be analyzed under this Court's holding in *Smith*, the MAC's decision rejecting the

[3] This Court determined that the testimony introduced in *Smith* qualified as hearsay. *See Smith*, 144 S. Ct. at 1799 ("Q From your review of the lab notes in this case, can you tell me what scientific method was used to analyze Item 26? A Yes[;] Q And what was used? A The microscopic examination and the chemical color test . . .[;] Q That was done in this case? A Yes, it was.[;] Q Was there a blank done to prevent contamination, make sure everything was clean? A According to the notes, yes.").

petitioner's Confrontation Clause claim must be vacated. Therefore, the Commonwealth asks this Court to grant the petition, vacate the decision below, and remand to the MAC.

CONCLUSION

The petition for a writ of certiorari should be granted limited to Question 1 presented by the Petition, the decision below vacated, and the case remanded to the MAC for further consideration in light of *Smith*.

Respectfully submitted,

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