

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

JASON SMITH,)
)
) Petitioner,)
)
) v.) No. 22-899
)
ARIZONA,)
)
) Respondent.)

Pages: 1 through 102
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JASON SMITH,)

Petitioner,)

v.) No. 22-899

ARIZONA,)

Respondent.)

- - - - -

Washington, D.C.

Wednesday, January 10, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 22-899, Smith versus Arizona.

Mr. Santhanam.

ORAL ARGUMENT OF HARI SANTHANAM

ON BEHALF OF THE PETITIONER

MR. SANTHANAM: Mr. Chief Justice, and may it please the Court:

Jason Smith was denied his Sixth Amendment confrontation right when the State used a substitute expert, Gregory Longoni, to convey the out-of-court testimonial statements of the witness who actually analyzed the evidence in his case, Elizabeth Rast. Longoni had no personal knowledge of the testing that Rast performed. And -- and in terms of what Rast did, Longoni -- Longoni had no personal knowledge of what Rast did in terms of her testing.

But what he did do was he conveyed Rast's statements from her own documents, from her report and notes, where he conveyed specifically the tests that she performed, the

1 specific items that she tested, the procedures
2 that she used. And when he purported to give
3 his own opinions, Longoni was actually reciting
4 verbatim the same statements that Rast made in
5 her report to set forth her conclusions.

6 Rast's statements were testimonial
7 because any reasonable, objective person would
8 understand that she prepared those statements
9 for the primary purpose of creating evidence to
10 use against Smith in his prosecution. The
11 State's request in this case at Pet. App. 127a
12 specifically identified Smith, the charges
13 against him, that trial had been set in his
14 case, and as the record shows at Pet. App. 99a,
15 the -- the State's attorney actually coordinated
16 with Rast on her testing.

17 And it is no wonder that in this case
18 that the United States agrees that the judgment
19 below cannot stand.

20 The court of appeals nonetheless found
21 that Longoni's testimony was permissible, and it
22 did so applying the legal fiction that an expert
23 may state the basis for his underlying
24 conclusions and opinions under Rule 703 without
25 offering that basis for the truth.

1 That legal fiction, as this -- as the
2 plurality in this Court recognized in Williams,
3 is unrealistic. It's unrealistic to expect that
4 a jury such as Smith would understand that
5 fiction. And, in this case, for the jury to
6 have understood what Longoni's opinions were and
7 to have evaluated those opinions, it necessarily
8 had to have considered the truth of those
9 underlying statements that were offered to
10 support them.

11 The State here made a strategic choice
12 to make Rast a witness against Smith, and in
13 doing so, it -- it elicited Rast's statements
14 from -- through Longoni, and when it did so, it
15 was required to present Rast for
16 cross-examination. Its failure to do so
17 violated Smith's confrontation right.

18 I welcome the Court's questions.

19 JUSTICE THOMAS: Would you take a step
20 back and explain why you, first, think that this
21 is -- that the -- is -- is testimonial and, two,
22 how is it different from what -- the report in
23 Williams?

24 MR. SANTHANAM: Sure. Rast's
25 statements here are testimonial because any

1 reasonable, objective person would understand
2 that they were prepared for the primary and --
3 and indeed, sole, exclusive purpose of creating
4 evidence for Smith's prosecution.

5 Again, that -- that's -- that's set
6 out from the State's initial request identifying
7 Rast, the charges against him, that trial had
8 been set, she coordinated with the State's
9 attorney, and it was all generated through a
10 formalized process in which she prepared notes
11 and a report all on typewritten DPS letterhead
12 bearing the seal of the DPS. And -- and it
13 bears emphasis that these are documents that
14 were served as part of discovery in this case,
15 you know, to prove the facts that the
16 prosecution was going to put on.

17 So all of those circumstances meet the
18 primary evidentiary purpose test, they meet the
19 targeted individual test, and they also meet any
20 requirement of solemnity that's required of
21 Rast.

22 JUSTICE ALITO: If we're --

23 CHIEF JUSTICE ROBERTS: I -- I was
24 just going to ask, why isn't it enough for the
25 defense counsel to be able to ask Longoni about

1 what happened in the lab? And he's going to
2 have to say, you know, I don't know. Well, then
3 you're just relying on, you know, what something
4 -- somebody told you, right? Well, on -- what
5 basis do you have for that? You -- you say
6 you're relying on, you know, this particular
7 type of test. How do you know that was done?
8 How long -- how do -- do you know how long that
9 was kept in whatever?

10 In other words, it seems to me that
11 there is a -- it's a two-edged sword. I mean,
12 you put somebody up there like Longoni, whose
13 knowledge is very limited. It -- he seems that
14 he's ripe for cross-examination. It could be
15 pretty effective.

16 MR. SANTHANAM: Right. So there's a
17 -- yeah, Mr. Chief Justice, to answer your --
18 your question, this is not a scenario where the
19 State put on Longoni to testify about data that
20 he reviewed in the abstract, that, you know --
21 and that would have been fine. There are a lot
22 of things that -- that the State could have done
23 here that would have been fine. They could have
24 had Longoni retest the evidence. They could
25 have asked for a continuance so that they could

1 secure Rast's presence.

2 But, at the end of the day, what they
3 could have done was simply had Longoni take the
4 stand and testify that I reviewed certain data
5 in the abstract and that is consistent with
6 certain illicit substances.

7 What the State couldn't do through
8 Rast -- through Longoni was to say recount
9 Rast's statements that I -- that she performed
10 certain tests on specific evidence in Smith's
11 case. Those came from her testimonial
12 documents, and that's what implicates the
13 confrontation issue here.

14 So the -- we're not suggesting that a
15 expert witness cannot rely on others. It's the
16 moment when they introduce the testimonial
17 statement of someone else where the
18 confrontation right is implicated.

19 JUSTICE SOTOMAYOR: Counsel --

20 JUSTICE ALITO: Well, that --

21 JUSTICE SOTOMAYOR: -- there's --

22 JUSTICE ALITO: -- that's an
23 interesting -- I mean, that's an interesting
24 point, and I think it's correct. And if it is
25 correct, then I don't understand why, in your

1 brief and in your introductory statement this
2 morning, you've gone out of your way to trash
3 Rule 703. I mean, you just -- what are you
4 trying to do?

5 MR. SANTHANAM: Well, under Rule
6 703 -- I think Rule 703, Justice Alito, operates
7 in conjunction or in parallel with the Sixth
8 Amendment. Rule 703, you know, it's -- as a
9 rule of evidence, it can prohibit certain
10 evidence, and if you pass the hurdle in Rule
11 703, when you deal with testimonial statements,
12 you have to pass the higher burdle -- burden of
13 the Sixth Amendment confrontation.

14 JUSTICE ALITO: Yeah, of course. But
15 703 does not provide that the facts on which an
16 expert relies in reaching his or her expert
17 opinion are put before the trier of fact for the
18 truth of the matter asserted. Isn't that
19 correct?

20 MR. SANTHANAM: We disagree with that.
21 Logic tells us, commentators, jurists, legal
22 treatises all tell us, that when you put forth
23 an expert's underlying statements that are
24 offered -- on which the expert bases an opinion
25 and the -- those statements can only support the

1 expert's opinion insofar as they're true, then
2 you're necessarily offering those statements for
3 --

4 JUSTICE ALITO: Oh, okay. Well, I
5 understood you in your introductory statement to
6 retreat from that, so that's what I want to
7 pursue.

8 You can win this case if you establish
9 that Rast's notes were intro -- were testimonial
10 and introduced -- therefore, introduced for the
11 truth of the matter asserted. You don't have to
12 take -- you don't have to take out Rule 703 in
13 order to do that.

14 Now suppose Longoni had testified in
15 the old style by answering a hypothetical
16 question, which is what I understood you to talk
17 about before.

18 Would there be a Confrontation Clause
19 problem there?

20 MR. SANTHANAM: If it was simply he
21 was asked to assume certain facts before
22 providing his opinion, we don't think there
23 would be a confrontation violation. And --

24 JUSTICE ALITO: Okay. All right.
25 Step 2. This is a trial. Now this was a jury

1 trial. And a lot of the stuff that was done is
2 kind of mind-boggling. There was no request for
3 an instruction to the jury that they should not
4 accept Rast's statements -- the information in
5 Rast's reports or notes for the truth of the
6 matter asserted, right? There was no request
7 for that?

8 MR. SANTHANAM: That's correct,
9 Justice Alito, but our position is that there
10 was no need for it because, in this case, the --
11 when you get to an instruction --

12 JUSTICE ALITO: I -- I understand.
13 But, really, I don't understand why competent
14 defense counsel wouldn't at least do that.
15 There was not a request for a judgment of
16 acquittal on the ground that there was no
17 competent evidence to show that the substances
18 that your client possessed were controlled
19 substances.

20 MR. SANTHANAM: There was a judgment,
21 a motion for a judgment of acquittal.

22 JUSTICE ALITO: Yeah, on other
23 grounds. All right. Let me get to the step 2,
24 beyond the hypothetical.

25 So let's say it's a -- it's a bench

1 trial before a very experienced trial judge, and
2 the trial judge says: Look, I've been a judge
3 for 25 years, and I don't -- I don't need to do
4 with this business with the hypothetical. I
5 know that you, Mr. Expert, Ms. Expert, you've
6 looked at an -- an actual report, so tell me
7 what's in the report and the conclusion --
8 excuse me -- that you drew from the report, and
9 I will not consider the underlying facts for the
10 truth of the matter asserted. Swear on the
11 Bible, I'm not going to consider them for that
12 purpose. I've been a judge a long time. I -- I
13 can do that.

14 Confrontation Clause problem there?

15 MR. SANTHANAM: Well, you know, first
16 off, it's important to remember this was a jury
17 trial. But our --

18 JUSTICE ALITO: I -- I understand.
19 But what's the answer to the hypothetical?

20 MR. SANTHANAM: Our answer is that
21 regardless of whether this case or any case is
22 tried to a judge or a jury, there will still be
23 a confrontation violation here because, at the
24 end of the day, the underlying statement is
25 offered for the truth to prove the -- the basis

1 of the expert's opinion.

2 And I think there's a -- to -- a -- to
3 kind of explain that, if we look at the delta
4 between a scenario where the expert offers an
5 opinion based on a hypothetical set of facts and
6 what occurred here, which is where Longoni
7 specifically stated Rast did certain things,
8 reached certain results, used certain
9 procedures, the delta between that is the truth
10 of the statements.

11 JUSTICE ALITO: I -- I understand
12 that. But get back to my bench trial. You --
13 you don't believe the trial judge? The trial
14 judge says, I'm not going to consider this for
15 the truth of the matter asserted. If you
16 Ms. Prosecutor, Mr. Prosecutor, want to prove
17 that this was meth or marijuana, you're going to
18 have to produce other evidence.

19 MR. SANTHANAM: The problem --

20 JUSTICE ALITO: Confrontation Clause
21 problem there?

22 MR. SANTHANAM: Yeah, the problem --
23 we -- we do think so. And the problem I have
24 with that hypothetical, Justice Alito, is that
25 even when it's a judge that's the trier of fact,

1 when you begin with the premise that you're
2 offering a statement for the truth, it makes no
3 sense to say, I'm not considering it for the
4 truth.

5 JUSTICE ALITO: If you're offering it
6 for the truth. What if you're not offering it
7 for the truth and the judge says, I'm not going
8 to consider it for the truth?

9 MR. SANTHANAM: Right. And -- and our
10 position is, as we've laid out in the briefing,
11 if a expert's underlying statements are
12 presented and those statements only support the
13 expert's opinion insofar as they're true, then
14 they are offered for the truth in all -- all
15 respects.

16 JUSTICE SOTOMAYOR: Counsel, the
17 common law is very different from Rule 703. 703
18 is a modern rule, isn't it?

19 MR. SANTHANAM: Yes, it is.

20 JUSTICE SOTOMAYOR: In the common law,
21 an expert couldn't even often do a hypothetical.
22 In the common law, they had to be evidence
23 presented at trial from which the expert then
24 offered an opinion, correct?

25 MR. SANTHANAM: That -- that is

1 correct.

2 JUSTICE SOTOMAYOR: And so we've now
3 very -- strayed very far. I -- I take your
4 point in your brief that the Confrontation
5 Clause under anybody's theory on the bench
6 that's been articulated previously, if -- if she
7 -- if the lab technician had written an
8 affidavit, I swear under the penalties of
9 perjury that I did X, Y, and Z tests, that these
10 were the results, these are my notes, I attach
11 them hereto, and the expert got up and read that
12 affidavit without saying, I hereby say, that
13 that would be a clear Confrontation Clause
14 violation?

15 MR. SANTHANAM: Yes. That's -- that's
16 the Court's holdings in Melendez-Diaz and
17 Bullcoming.

18 JUSTICE SOTOMAYOR: All right. So the
19 fiction of 703 that somehow you read somebody
20 else's notes, procedures, conclusions -- I think
21 this is your argument, isn't it?

22 MR. SANTHANAM: Yes, it is.

23 JUSTICE SOTOMAYOR: Is just that,
24 correct?

25 MR. SANTHANAM: That's correct,

1 Justice Sotomayor.

2 JUSTICE ALITO: It's a fiction --

3 JUSTICE SOTOMAYOR: So they gave the
4 rule --

5 JUSTICE ALITO: Go ahead.

6 JUSTICE SOTOMAYOR: -- they gave the
7 game away according to you when they said this
8 was testimonial, correct?

9 MR. SANTHANAM: That's correct.

10 JUSTICE SOTOMAYOR: Because, once you
11 just give someone else's testimony and it is the
12 only basis for your opinion, then it's really
13 you being a conduit.

14 It's the policeman getting up at the
15 Star Chamber and reading your notes and saying:
16 This guy is guilty because of that. Put this
17 guy away because he did all these things.

18 That's what a policeman did in the
19 Star Chamber, right?

20 MR. SANTHANAM: That -- that's
21 correct, Justice Sotomayor. And -- and to -- to
22 carry your -- your hypothetical for -- forward,
23 we can imagine a scenario where a police officer
24 goes to a crime scene and records notes of his
25 or her observations at the crime scene, even

1 generates an affidavit summarizing what he or
2 she had observed.

3 Now, under this Court's precedent, it
4 would be a violation of the confrontation right
5 if the report were introduced without
6 confrontation. It would be a confrontation
7 violation if the notes are introduced without
8 confrontation.

9 JUSTICE BARRETT: Why would that be?
10 Let's imagine that he takes the notes, but he
11 never actually produces the affidavit. I -- I
12 think it depends how close -- I mean, if -- if
13 you stretch out primary purpose tests too far,
14 then it covers every antecedent.

15 I mean, if he's just taking notes,
16 like window was open, footprint was outside, I
17 mean, that's not created as a substitute for
18 trial testimony anyway.

19 MR. SANTHANAM: Well, a -- a couple of
20 answers, Justice Barrett. In that hypothetical
21 of the police officer, we would also submit that
22 if a second police officer took the stand and --
23 and recited statements from the notes, that too
24 would be improper.

25 But, to answer your -- Your Honor's --

1 JUSTICE BARRETT: But it has to be the
2 notes, right? The notes then would be the --
3 the statement that mattered, the testimonial
4 statement on the notes?

5 MR. SANTHANAM: That is -- that is
6 correct. And -- and the -- if -- there -- there
7 shouldn't be a distinction drawn in this case
8 between the notes and the report.

9 JUSTICE BARRETT: Not this case. You
10 -- you said -- I'm -- I'm taking your
11 hypothetical. And you said it wouldn't be any
12 different if a police officer went to the scene
13 and jotted some notes down, that there would be
14 no functional difference between the notes and
15 the affidavit.

16 That doesn't seem right to me, so I'm
17 wondering why.

18 MR. SANTHANAM: The -- the reason is
19 is that the police officer's recording those
20 notes, depending on the circumstances, for a
21 primary evidentiary purpose, that, you know,
22 this -- these statements could later be used at
23 trial --

24 JUSTICE BARRETT: But everything --

25 JUSTICE KAVANAUGH: Well, that --

1 JUSTICE BARRETT: -- in an
2 investigation is done for the purpose of
3 establishing a case against the defendant. So
4 you're saying everything, everything you jot
5 down?

6 MR. SANTHANAM: Well, not everything.
7 It has to be a primary purpose, right?

8 JUSTICE KAVANAUGH: Well --

9 MR. SANTHANAM: So, if the police
10 officer, as -- as the Court has addressed in
11 past cases like Davis, Hammon, Bryant, Clark --

12 JUSTICE BARRETT: He jots it down for
13 himself. He's never intending to produce it to
14 anyone. He jots it down for himself because,
15 when he goes back and thinks about the case and
16 thinks about who he's going to target, he wants
17 to have his notes there about what the scene
18 looked like.

19 MR. SANTHANAM: Right. And -- and if
20 we can imagine how that would translate here to
21 the scenario of a forensic examiner.

22 JUSTICE BARRETT: No, no, no, no, no.

23 MR. SANTHANAM: Yeah.

24 JUSTICE BARRETT: Stick with the
25 hypothetical.

1 MR. SANTHANAM: Right. From our
2 perspective, that would be testimonial because
3 the police officer is going there with a, you
4 know, objective, primary purpose of recording
5 observations at a crime scene knowing that that
6 will be --

7 JUSTICE KAVANAUGH: On the -- on the
8 --

9 JUSTICE BARRETT: How --

10 JUSTICE KAGAN: But it must depend on
11 the facts, right? I mean, it must depend on the
12 facts as to whether the notes are sufficiently
13 closely tied to the report to fall within the
14 same umbrella or not. I mean, there are some
15 notes that wouldn't and some notes that would.

16 MR. SANTHANAM: I -- I -- I agree,
17 Justice Kagan.

18 JUSTICE BARRETT: But you just said
19 the notes in that hypothetical would under your
20 test.

21 MR. SANTHANAM: Well, I -- yeah,
22 Justice Barrett, so I'm assuming in that
23 hypothetical that the notes were prepared in
24 conjunction knowing that an affidavit would be
25 prepared.

1 JUSTICE KAVANAUGH: Can -- can I
2 just --

3 JUSTICE BARRETT: That -- that -- that
4 wasn't the hypothetical I gave you, though. I
5 said it was just for himself and he wanted to
6 take it back as he thought about who to target
7 in this investigation, and you said that would
8 be testimonial.

9 MR. SANTHANAM: Yeah. From -- from --
10 from our perspective, that -- there's a link
11 there between their notes and the report if it
12 --

13 JUSTICE KAVANAUGH: On the question of
14 what is testimonial, I guess one question I
15 have, which goes back a ways, which is what
16 tests to apply. And so I just have a question,
17 why shouldn't we adopt the test that Justice
18 Thomas has been advocating in his opinions since
19 White, and under Justice Thomas's test, under
20 that test about formality and solemnity, why
21 don't you lose here?

22 MR. SANTHANAM: Well, first off, as we
23 understand Justice Thomas's opinions in -- in
24 White, in Williams and -- and Clark, the
25 circumstances matter. It's -- it doesn't have

1 to be that the statements are necessarily in a
2 formalized affidavit or deposition testimony.
3 The circumstances matter.

4 JUSTICE KAVANAUGH: Why shouldn't we
5 adopt that test was the first question.

6 MR. SANTHANAM: Because I think it
7 strikes too narrowly. It would preclude the
8 Sixth Amendment from applying to a vast swath of
9 the types of problems that -- inspired the
10 Confrontation Clause to begin with. It -- it
11 would -- it would provide a means for
12 prosecutors to come up with ways to introduce
13 statements simply by making things less formal,
14 and they -- you know, they don't necessarily
15 have to do it in a way that is deceptive. They
16 could enter -- enact policies where everything
17 is done instead of just --

18 JUSTICE KAVANAUGH: It seems like it
19 would be more predictable, more easily applied
20 and, therefore, helpful in that respect. Do you
21 agree with that?

22 MR. SANTHANAM: It -- it certainly
23 would draw brighter lines. I -- I -- I agree
24 with that. But, at the end of the day, it
25 strikes too narrowly for the protections that

1 are intended by the Sixth Amendment
2 Confrontation Clause.

3 JUSTICE KAVANAUGH: And under that
4 test, suppose that test, why do you win here?

5 MR. SANTHANAM: Right. In the -- in
6 this case, the notes, the report, however you
7 want to consider them, they were created as part
8 of a formalized process, a formalized dialogue,
9 if you may. The prosecuting attorney, the
10 State's attorney, coordinated with Rast on her
11 testing. She prepared her statements as part of
12 a formalized process at a crime lab that
13 resulted in her typewriting nine pages of
14 reports, three pages -- of -- of notes, three
15 pages of a report, all on DPS letterhead. These
16 things were served. These weren't handwritten
17 notes on scrap pieces of paper. They were
18 served as part of discovery in this case to
19 prove facts.

20 All of those circumstances together
21 reflect a level of formality and solemn --
22 solemnity that we feel meets the -- the --
23 whatever tests members of this Court have --
24 have articulated.

25 JUSTICE SOTOMAYOR: This -- in this

1 report, this is very close to Bullcoming, isn't
2 it?

3 MR. SANTHANAM: Our -- our view is
4 that it is.

5 JUSTICE SOTOMAYOR: And not to
6 Williams. Williams, the report wasn't signed,
7 wasn't admitted into evidence, nothing else,
8 correct?

9 MR. SANTHANAM: That's correct.

10 JUSTICE SOTOMAYOR: Here, like in
11 Bullcoming, which Justice Thomas signed onto, it
12 was signed, even though it wasn't an affidavit
13 in its traditional sense?

14 MR. SANTHANAM: The report was signed.
15 That's correct.

16 JUSTICE SOTOMAYOR: And the notes --

17 JUSTICE KAVANAUGH: Not the notes,
18 though.

19 JUSTICE SOTOMAYOR: -- here were
20 attached to that report?

21 MR. SANTHANAM: Pardon me?

22 JUSTICE SOTOMAYOR: And the notes here
23 were attached to that?

24 MR. SANTHANAM: Yes. The notes
25 essentially were an appendix to the report that

1 Rast prepared. She --

2 JUSTICE SOTOMAYOR: There might be an
3 argument that we don't really know when they
4 were appended, but that's -- they -- that's how
5 they were introduced.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas, anything further?

9 Justice Alito?

10 JUSTICE ALITO: Well, just to follow
11 up on your answer to something that Justice
12 Sotomayor asked, I thought that when -- when we
13 finished our little questioning that you -- you
14 were saying that Rule 403 -- I'm sorry -- 703
15 created a problem under the Confrontation
16 Clause, but do you want to go further than that
17 and say that experts not only can't answer
18 hypothetical questions but also that they can't
19 take into account any facts that are not proved
20 at trial in their presence?

21 MR. SANTHANAM: I -- I -- I don't
22 think we would go that far. So I -- I think,
23 under Rule 703, a hypothetical question is fine
24 so long as you're not saying -- reciting Rast's
25 statements that I did X, got X, Y -- Y results.

1 I think that's fine.

2 Where, again, the problem arises is
3 when someone like Longoni takes the stand and --
4 and provides those statements.

5 JUSTICE ALITO: Okay. So, you're not
6 making the argument that that's what the common
7 -- that was the state of the common law in 1791
8 and, therefore, that's what the Confrontation
9 Clause incorporates? You're not making that
10 argument?

11 MR. SANTHANAM: We're not making that
12 argument, but also we --

13 JUSTICE ALITO: Okay.

14 MR. SANTHANAM: -- we ought to be
15 mindful that the notion that you can introduce a
16 statement through an expert under Rule 703 also
17 wasn't around at the time.

18 JUSTICE ALITO: Okay. Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor?

21 JUSTICE SOTOMAYOR: There's a circuit
22 split on two separate questions. The first is
23 what test exists for an out-of-court statement
24 to be testimonial. That's Justice Thomas's
25 position and the one that Justice Kavanaugh

1 asked you about, does it have to be sworn and
2 signed, sworn how and signed, et cetera, et
3 cetera.

4 Here, I understand Arizona conceded
5 that. I know in its brief it raises that
6 question. But the Question Presented,
7 everything, centers around that concession that
8 it was testimonial, right?

9 MR. SANTHANAM: Well, the seat of
10 Arizona, the State did not challenge whether any
11 of these statements were testimonial in the
12 proceedings below. That's correct.

13 JUSTICE SOTOMAYOR: So the question
14 before us is whether, under the facts of this
15 case, the statements were offered for the truth?

16 MR. SANTHANAM: That's correct.

17 JUSTICE SOTOMAYOR: That's a separate
18 question, and that's the second part of the
19 split among the circuits, right?

20 MR. SANTHANAM: It -- it -- it -- that
21 is correct, Justice Sotomayor. And, you know,
22 to the extent that there is a consensus on the
23 Court, we do think the Court should decide the
24 full issue here and condemn this practice of,
25 you know, using a substitute expert to convey

1 testimonial statements. But the Court may, for
2 prudential reasons, decide to -- write an
3 opinion that's narrower.

4 JUSTICE SOTOMAYOR: Just on the second
5 split, which is --

6 MR. SANTHANAM: That's correct.

7 JUSTICE SOTOMAYOR: -- whether this is
8 testimonial the way it was done?

9 MR. SANTHANAM: That's correct.

10 JUSTICE SOTOMAYOR: All right.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?
12 Justice Gorsuch?

13 Justice Kavanaugh?

14 Justice Barrett?

15 Justice Jackson?

16 JUSTICE JACKSON: Good morning. Can I
17 just -- I want to give you an opportunity to
18 speak to the administrative burden point. As I
19 read some of the arguments on the other side,
20 there's a concern about criminal defendants
21 challenging every piece of forensic evidence and
22 bringing the criminal justice system to a halt
23 under your rule.

24 Are they right about that? And if --
25 if not, why not?

1 MR. SANTHANAM: So I -- we respond
2 with, you know, that there are three significant
3 practical limitations on the confrontation right
4 that would prevent the sorts of outreach that
5 the State and the United States complain of.

6 The first is that you have to deal
7 with statements. Most of what experts deal with
8 are physical evidence, photographs, things found
9 at a crime scene. And we're not suggesting that
10 an expert can't rely on that simply because
11 someone else collected that physical evidence.

12 The second is, is that the -- even if
13 a statement is involved, it has to be
14 testimonial. So, as this Court has recognized
15 in Melendez-Diaz, Bullcoming, statements that
16 are made in a hospital context, for example, for
17 treatment purposes aren't testimonial.
18 Similarly, most statements in a -- in the course
19 of a business that isn't directed to generating
20 evidence isn't going to be testimonial. And
21 experts can rely on all of that.

22 And then, third, I think very
23 critically, the State, the prosecution does not
24 have to put on every statement to prove its
25 case. And to kind of provide an example here

1 with this case, what -- you know, again, what
2 the State could have done was simply have
3 Longoni testify in a hypothetical, abstract
4 fashion that he reviewed certain data and that's
5 consistent with the -- the findings of -- that
6 this is a illicit drug.

7 But they went further than that. They
8 had Longoni actually recount, recite statements
9 saying Rast did X, she used Y procedures, and
10 she reached Z results. And that, in our sense,
11 underscores the truth of the matter asserted.
12 That is the reason that they are presenting it,
13 because without --

14 JUSTICE JACKSON: And is it your
15 position as well that that really raises the
16 Confrontation Clause problem? Because to what
17 extent could a defendant actually challenge
18 those statements --

19 MR. SANTHANAM: That is --

20 JUSTICE JACKSON: -- that she did X or
21 Y, because the person who's testifying did --
22 doesn't know. He's just looking at the report
23 that says that.

24 MR. SANTHANAM: That -- that's
25 correct, Justice Jackson.

1 JUSTICE JACKSON: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Feigin?

5 ORAL ARGUMENT OF ERIC J. FEIGIN
6 FOR THE UNITED STATES, AS AMICUS CURIAE,
7 SUPPORTING NEITHER PARTY

8 MR. FEIGIN: Thank you, Mr. Chief
9 Justice, and may it please the Court:

10 We agree with Petitioner that
11 Longoni's testimony here may have gone too far.
12 Our principal interest is in making clear that
13 careful application of the federal rules can
14 avoid confrontation concerns.

15 Two main points on that. Number one
16 is that there's no confrontation problem when an
17 expert comes up and testifies to the expert's
18 bare fact of the bottom-line conclusion that the
19 expert's drawn, like these are drugs. The
20 problem comes in when evidence surrounding that
21 so-called basis evidence or methodology evidence
22 comes in.

23 The second point is that methodology
24 evidence can sometimes come in subject to
25 careful limiting instructions in some

1 appropriate cases.

2 It's a little bit hard for me to tell,
3 admittedly, but I think Petitioner largely
4 agrees with us on the first point and to some
5 degree on the second point. So I think the
6 Court can resolve this case narrowly without
7 suggesting that we need Justice Pryor --
8 Breyer's parade of 13 witnesses every time we
9 want to introduce a DNA match.

10 JUSTICE THOMAS: Do you think that
11 Ms. Rast's notes are testimonial?

12 MR. FEIGIN: So I -- I'd like to --
13 Justice Thomas, I think it's very important
14 there to break this into pieces. There are
15 actually three different pieces of Rast's
16 materials in the appendix, and we think that you
17 could potentially go different directions with
18 each of them, and they kind of match how we do
19 it in the federal system as well.

20 So there is an attested report on --
21 or a close to, you know, signed report on
22 stationery that's three pages long. That may
23 well be testimonial.

24 There are some further lab notes about
25 that -- they aren't quite notes, but they're a

1 little more data about what the material -- how
2 the material was tested and so forth. Those may
3 or may not be testimonial. I'd need to know
4 more about exactly how they were prepared and
5 for what purpose. They may not be testimonial
6 if all that was intended to go into court is
7 that one report I mentioned earlier, which is
8 like the first three or four pages of the Pet.
9 App.

10 And then, third, you have kind of just
11 Rast's notes, and, by and large, we think those
12 probably aren't testimonial. In particular,
13 they contain materials the Petitioner appears to
14 agree don't implicate the Confrontation Clause,
15 like the graphs from the gas chromatographer
16 mass spectrometry machine.

17 JUSTICE KAGAN: So why do you --

18 CHIEF JUSTICE ROBERTS: And so there
19 -- there are a lot -- sorry -- there are a lot
20 of "mays" and "probablys" in your presentation
21 this morning and there were in your brief as
22 well. You said -- began by saying you agree
23 with Petitioner that, you know, that may have
24 gone too far.

25 Petitioner's -- position's actually a

1 little more than that. They think it did go too
2 far. What -- what is the basis of your
3 reservation?

4 MR. FEIGIN: Well, Your Honor, I think
5 there is some dispute between the parties as to
6 how the jury would have understood this, the
7 degree to which Rast may have been testifying --
8 I'm sorry, Longoni may have been testifying sort
9 of verbatim from Rast's notes or how well the
10 jury might have understood that to be the case.
11 And we're not really taking a position on any of
12 that.

13 All -- all that said, you know, if the
14 Court wanted to narrowly reverse this case, we
15 think this is a much easier case than a case
16 that we think would follow scrupulously under
17 the federal rules.

18 And we think, under the federal rules,
19 you could have done something like this in -- in
20 a case like this. There'd -- there'd be
21 basically three steps to it. Longoni testifies
22 to his independent conclusion that these
23 materials are drugs, saying that he reviewed the
24 GCMS data that even Petitioner agrees is not
25 testimonial.

1 Second, there'd need to be some chain
2 of custody evidence that could come in as it did
3 in this case from Longoni himself based on his
4 personal familiarity with the procedures at the
5 lab that would at least supply circumstantial
6 evidence that connected up the bottom-line
7 conclusion he's drawing with the case. And
8 then, at that point, as you pointed out, Mr.
9 Chief Justice, the defense could just savage him
10 for not having an -- an appropriate basis here.

11 But we think those two things would at
12 least get you over the line to sufficiency,
13 which is a -- in any event, a state law or -- or
14 federal law evidence issue, and it wouldn't
15 present any confrontation concerns because, even
16 if you gave the jury a not for the truth of the
17 matter instruction in a case like that, I think
18 the jury would be very confused.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 MR. FEIGIN: Well, what am I not
22 considering?

23 CHIEF JUSTICE ROBERTS: Thank you.

24 JUSTICE KAGAN: But if -- if I can
25 understand, Mr. Feigin, your position and why it

1 is that you're not supporting the State as you
2 do in most cases. I'm -- I'm -- I'm just going
3 to read you a -- a portion of the testimony and
4 you tell me whether this is appropriate or not
5 and, you know, whether -- oh, that -- that's
6 fine or no, that's the reason why we're not
7 supporting the State as we usually do.

8 So this is after Mr. Longoni gets up
9 and they establish that he's reviewed the -- the
10 Rast report and also the Rast notes. So the --
11 the -- the prosecutor says: Did you notice
12 whether the policies and practices that you've
13 just described were followed? Because he's also
14 described the lab's policies and practices.

15 And he says: "Yes.

16 Prosecutor: Were they followed?

17 Yes.

18 From your review of the lab notes in
19 this case, can you tell me what scientific
20 method was used to analyze Item 26?

21 Answer: Yes. The microscopic
22 examination and the chemical color test were
23 used.

24 Question: That was done in this case?

25 Answer: Yes, it was.

1 Question: Was there a blank done to
2 prevent contamination?

3 Answer: According to the notes, yes."

4 Now is that the kind of thing that you
5 think there's no other -- that there's nothing
6 else going on there than the truth of the matter
7 asserted?

8 MR. FEIGIN: So, for that, Justice
9 Kagan, I'm going to go with Option B. That is
10 why we are not supporting the State as we
11 usually would. But I'd emphasize that if there
12 were more --

13 JUSTICE KAGAN: Because explain that a
14 little bit further. I mean, I -- I -- get to
15 the second part of your answer. I don't mean to
16 cut you off. But that is why you're not on the
17 other side, because what?

18 MR. FEIGIN: Well, so, as I was
19 explaining in response to the Chief Justice, we
20 do think that you could introduce circumstantial
21 evidence about what procedures and tests might
22 have -- were likely run in a particular case by
23 just saying every time we get something that we
24 think might be methamphetamine --

25 JUSTICE KAGAN: Yeah, I understand

1 that, but I was asking --

2 MR. FEIGIN: They went much further
3 here, and we don't think that's the way this
4 should come in, and that's not how we would try
5 to introduce it in federal court or, if we did,
6 we'd have someone who could testify from
7 personal knowledge to that.

8 There, you might have a problem, and
9 that's not even the kind of thing we necessarily
10 think you could get in not for the truth of the
11 matter asserted.

12 The kinds of things you might be able
13 to get in not for the truth of the matter
14 asserted, to take a couple of -- of simpler
15 conceptual examples, are, number one, you could
16 imagine some ballistics evidence where one
17 expert does it by taking some measurements and
18 calculating based on math and another expert
19 sets up some sort of experimental setup.

20 The jury might not be able to
21 understand the -- either the math or the
22 experimental physics, but they might have some
23 intuition as to which methodology they thought
24 was more reliable.

25 Another example might be a case where

1 both the --

2 JUSTICE GORSUCH: Mr. Feigin, I'm
3 sorry to interrupt you, but --

4 MR. FEIGIN: I'm sorry. No, no.

5 JUSTICE GORSUCH: -- I -- I just want
6 to --

7 MR. FEIGIN: You have every right,
8 Justice Gorsuch.

9 (Laughter.)

10 JUSTICE GORSUCH: Whether I have a
11 right or not, I'm still sorry. But, before you
12 go on, I just wanted to make sure I understood
13 your answer to Justice Kagan.

14 And I -- I think the distinction
15 you're drawing -- and I just think this -- is,
16 on the one hand, if the expert had gotten up and
17 said industry standards or forensic standards
18 require these tests and assuming they were done,
19 then, yes, the -- the -- I believe this was a
20 controlled substance. Permissible.

21 I hear that more or less as what
22 you're saying you want to reserve and make sure
23 is possible versus saying, Ms. Rast ran these
24 tests, Ms. Rast found that they -- they meet the
25 criteria, and, therefore, I believe they are

1 controlled substances.

2 Is that a fair distinction that you're
3 -- is -- is that a fair understanding of the
4 distinction you're drawing with Justice Kagan?

5 MR. FEIGIN: Yes, if -- I -- I -- I
6 think that is basically fair. If I could just
7 qualify it in slightly --

8 JUSTICE GORSUCH: Sure.

9 MR. FEIGIN: -- two ways? I think the
10 problem with the second -- with the second one
11 is simply testifying that Rast did something.

12 JUSTICE GORSUCH: Did these things,
13 yes.

14 MR. FEIGIN: And as to the first one,
15 I'd just add on something -- I think the expert
16 could testify or someone else could provide this
17 testimony that not only do forensic standards
18 require this, but our lab is accredited, our
19 accreditation requires it, this is what we
20 invariably do.

21 JUSTICE GORSUCH: Based on his
22 personal knowledge?

23 MR. FEIGIN: Based on his personal
24 knowledge of what the lab does.

25 JUSTICE GORSUCH: So it's either

1 personal knowledge, an industry standard, or a
2 hypothetical would be all okay. The line is
3 saying, I -- I am telling -- I am sitting here
4 telling you what Ms. Rast did for the truth of
5 that?

6 MR. FEIGIN: That's correct, Your
7 Honor.

8 JUSTICE GORSUCH: All right. Perfect.
9 That's it.

10 MR. FEIGIN: But we do think that the
11 former evidence would be sufficient under the
12 federal rules --

13 JUSTICE GORSUCH: Right.

14 MR. FEIGIN: -- because it's evidence
15 that --

16 JUSTICE GORSUCH: No, I -- I just
17 wanted to make sure --

18 MR. FEIGIN: Yeah.

19 JUSTICE GORSUCH: -- I understood the
20 distinction. I'm sorry for interrupting.
21 Perhaps when I --

22 JUSTICE KAVANAUGH: Can I -- can I
23 take you -- oh, I won't.

24 CHIEF JUSTICE ROBERTS: Thank you.
25 Thank you, counsel.

1 Justice Thomas?

2 Justice Sotomayor?

3 JUSTICE SOTOMAYOR: It's just a
4 follow-up at the end of the questioning of -- of
5 -- of Petitioner's counsel.

6 I understand that only about 3 percent
7 of criminal drug cases ever go to trial?

8 MR. FEIGIN: I -- I think that's true.

9 JUSTICE SOTOMAYOR: Generous actually?

10 MR. FEIGIN: I think that's true of
11 most federal trials, yes, Your Honor.

12 JUSTICE SOTOMAYOR: So most -- most
13 people -- most cases go by plea and you don't
14 need an expert at all, correct?

15 MR. FEIGIN: I don't think that's
16 quite correct, Your Honor, because, of course,
17 we don't know when they're going to plead, and
18 we've had cases where we get all the witnesses
19 lined up that we need --

20 JUSTICE SOTOMAYOR: Absolutely. But
21 --

22 MR. FEIGIN: -- and they plead at the
23 last minute. And they have every right. And I
24 don't contest the --

25 JUSTICE SOTOMAYOR: But we're still

1 talking --

2 MR. FEIGIN: Yeah.

3 JUSTICE SOTOMAYOR: -- I mean --

4 MR. FEIGIN: Sorry.

5 JUSTICE SOTOMAYOR: -- the statistic
6 is at least 85 percent are pleas, correct?

7 MR. FEIGIN: Well --

8 JUSTICE SOTOMAYOR: California has the
9 rule that Petitioner wants. Are you aware of
10 some massive problem in California with --

11 MR. FEIGIN: Well, Your Honor, I don't
12 --

13 JUSTICE SOTOMAYOR: -- the prosecution
14 being able to prove its case?

15 MR. FEIGIN: I don't think they have a
16 rule that either precludes an independent expert
17 from -- an independent reviewer from testifying
18 or a -- a rule that requires a parade of
19 witnesses.

20 And you don't have to take my word for
21 it. You can look --

22 JUSTICE SOTOMAYOR: No, that's --

23 MR. FEIGIN: -- at the Alameda PD
24 brief --

25 JUSTICE SOTOMAYOR: Mm-hmm.

1 MR. FEIGIN: -- which just describes
2 the California rule as really going to the kind
3 of basis evidence that I've been talking about
4 today that may or may not be problematic.

5 JUSTICE SOTOMAYOR: Then I phrased the
6 question wrong. California follows the rule as
7 you understand it and we don't have a parade of
8 witnesses, correct?

9 MR. FEIGIN: I think California may
10 follow a somewhat stricter rule than the one
11 we'd urge in the federal courts, but they don't
12 go all the way to a point where I -- I don't
13 even think Petitioner's urging the Court to go,
14 but they really don't go all the way to a rule
15 that says this kind of thing is out.

16 JUSTICE SOTOMAYOR: Mr. Feigin, my
17 bottom line --

18 MR. FEIGIN: Yeah.

19 JUSTICE SOTOMAYOR: -- is the parade
20 of horrors is not happening.

21 MR. FEIGIN: The parade of horrors
22 --

23 JUSTICE SOTOMAYOR: You paint it as
24 you --

25 MR. FEIGIN: -- is not happening, but

1 if this Court were to suggest to us that -- or
2 to suggest to the lower courts either that you
3 can't have even a "substitute expert" who, to be
4 clear, is doing the exact same thing a reviewer,
5 a second reviewer at the time would be doing, or
6 if the Court were to suggest that we really do
7 need a parade of witnesses in these cases, I
8 think it would get substantially worse, not
9 necessarily because the cases would go to trial
10 but because defendants -- and I -- I don't
11 begrudge them this -- would have every right to
12 put us to our proof, see if we can actually come
13 up with the 13 witnesses we need at once and
14 only then deciding to plead. And I -- I think
15 it --

16 JUSTICE SOTOMAYOR: All right. You --

17 MR. FEIGIN: -- there would be
18 agencies --

19 JUSTICE SOTOMAYOR: -- want to qualify
20 everything.

21 MR. FEIGIN: Yeah.

22 JUSTICE SOTOMAYOR: You've answered
23 the question.

24 MR. FEIGIN: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice Kagan?

1 JUSTICE KAGAN: No.

2 CHIEF JUSTICE ROBERTS: Justice
3 Gorsuch?

4 JUSTICE GORSUCH: No.

5 CHIEF JUSTICE ROBERTS: Justice --

6 JUSTICE GORSUCH: Oh, I'm -- I'm
7 sorry, Chief.

8 I did interrupt you. You wanted to go
9 say something else entirely. Here's your shot,
10 if you can still remember.

11 MR. FEIGIN: Thank you, Justice
12 Gorsuch. I believe, if -- if I recall
13 correctly -- I'm tempted to go any number of
14 directions with this, but --

15 (Laughter.)

16 JUSTICE GORSUCH: No, no.

17 MR. FEIGIN: I believe, when I was
18 interrupted --

19 JUSTICE GORSUCH: That is not -- that
20 is not the invitation I gave you, Mr. Feigin.

21 (Laughter.)

22 MR. FEIGIN: Understanding what you're
23 asking me, I believe I was in the middle of
24 giving a second example of methodology evidence
25 that a jury might be able to separate -- easily

1 separate out from any -- for truth purpose.

2 And the -- the second -- the second
3 one would be where, for example, both sides
4 might be relying on the same piece of evidence,
5 and one side thinks it proves one thing and the
6 other side thinks it proves another thing.
7 They're both applying the same -- you know,
8 they're both looking at the same X-ray. One
9 radiologist thinks the carcinoma was caused by
10 this. The other thinks it was caused by this.

11 And I -- I would emphasize that under
12 the federal rules, you are entitled under Rule
13 105 to a limiting instruction that it not be
14 used for the truth, and we presume that juries
15 follow those instructions.

16 Thank you, Justice Gorsuch.

17 JUSTICE GORSUCH: No, thank you.

18 MR. FEIGIN: I appreciate it.

19 JUSTICE GORSUCH: Appreciate it.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh?

22 JUSTICE KAVANAUGH: Can I take you
23 back to your answers to Justice Thomas at the
24 beginning about whether it's testimonial? What
25 test were you applying?

1 MR. FEIGIN: There, I was applying
2 what I think the Court has announced as its
3 test, which is the primary purpose of creating
4 an out-of-court substitute for trial testimony.
5 I think that's basically a direct quote from
6 Bryant.

7 JUSTICE KAVANAUGH: Do you have a
8 position on whether the test that Justice Thomas
9 articulated in Williams versus primary purpose
10 is more consistent with the constitutional --
11 Constitution or better in application?

12 MR. FEIGIN: We don't have one that
13 we're -- we don't have a position that we're
14 presenting today because that hasn't really been
15 the focus of the case. I think one thing on
16 remand would be whether the testimoniality of
17 the statements is still open to question.

18 But, as between the two of them, you
19 know, if -- if the Court wanted to open that up
20 again or to adopt Justice Thomas's test, we --
21 we wouldn't oppose it doing that. We just
22 haven't, as we admittedly might sometimes do,
23 exceeded our focused amicus by suggesting the
24 Court take this case as an opportunity to do so.

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett?

3 JUSTICE BARRETT: Mr. Feigin, you said
4 at one point, I can't remember in response to
5 who, perhaps Justice Thomas, that Rast's notes
6 came in a couple of different categories and you
7 stepped through them -- maybe it was Justice
8 Thomas -- and you stepped through them and you
9 said some might be testimonial, et cetera. You
10 would need to know more, I think you said, about
11 the circumstances under which they were
12 prepared.

13 Could you say a little bit more about
14 that? Is that just the application? I guess I
15 just want to make sure -- let's say that I think
16 --

17 MR. FEIGIN: Sure.

18 JUSTICE BARRETT: -- they're all being
19 introduced for their truth. Are you saying that
20 you would need more information to figure out
21 whether they were created with the primary
22 purpose of creating a substitute for trial
23 testimony?

24 MR. FEIGIN: That's -- that's right,
25 Justice Barrett, and let me -- maybe I can go a

1 little bit further and explain that. The sort
2 of bare report of these are drugs, this was the
3 weight, I'm signing this, this is on our
4 stationery, to the extent that was created with
5 an understanding that it go into court as
6 opposed to, I -- I don't know, some, like,
7 national security purpose or something like
8 that, I mean, that's probably going to be
9 testimonial.

10 JUSTICE BARRETT: Yeah.

11 MR. FEIGIN: Then you have these two
12 other pieces of it. One is just kind of a
13 further explication of what the expert did, and
14 then the other is what we might call raw data.

15 We think the raw data is very unlikely
16 to be testimonial. And the middle kind of, you
17 know, here's a little more detail could or could
18 not be. And the things you might want to know
19 are, number one, was this just being written
20 down because of lab procedures or to document it
21 for someone else or for some later internal
22 review as opposed to for the purpose of it ever
23 coming into court.

24 And another one just might be, what do
25 the accreditation requirements require?

1 Because, in -- for a lot of forensic science,
2 there are accreditation requirements that
3 require that notes be -- notes be gathered and
4 -- and made so that they can do, for example,
5 reviews of whether you're following your
6 accreditation provisions.

7 JUSTICE BARRETT: So it sounds like
8 your answer would be different. You know,
9 Petitioner said in -- in response to the
10 hypothetical he raised about a police officer
11 taking notes at the scene of the crime that
12 because those would be made with the primary
13 purpose of creating evidence or establishing a
14 fact material to the case, that those would be
15 testimonial. It sounds like, under your
16 definition and your approach to Rast's notes,
17 you would disagree with that?

18 MR. FEIGIN: Well, I -- I would agree
19 with Justice Kagan that it would depend on the
20 facts and circumstances under which the
21 notes were taken.

22 JUSTICE BARRETT: Right, but the facts
23 and circumstances being he's jotting notes down
24 that he's not doing because he anticipates
25 incorporating them into a later affidavit. He's

1 just jotting them down so that when he goes back
2 and he looks, he can say, you know, here was the
3 lay of the land, who do I think the suspect
4 might be.

5 I understood Petitioner to say that's
6 testimonial.

7 MR. FEIGIN: Yeah, I think something
8 that is created for an investigatory purpose, as
9 opposed to with a focus on court, may well be --
10 not be testimonial.

11 JUSTICE BARRETT: And so, in your
12 response to me about Rast's notes, it's kind of
13 like the further away the notes get from the
14 report she was creating, that's some evidence or
15 a factor to take into account in determining
16 whether they were created for the primary
17 purpose of being a substitute for testimony?

18 MR. FEIGIN: I -- I think that's a
19 very important factor, Your Honor, because
20 particularly -- I mean, there's admittedly a
21 little bit of a chicken-and-egg thing going on
22 here with the Court's ruling versus how I'm
23 answering this question --

24 JUSTICE BARRETT: Right.

25 MR. FEIGIN: -- because I think, you

1 know, a lot of experts are fairly likely to be
2 aware of how the Court is construing these
3 things, but to the extent that you have what you
4 have in basically every case, no scientist is an
5 island, some collaborative lab work, and I'm
6 just preparing some work for you to look at, and
7 then you're kind of running the show, I -- I --
8 I don't know that what I'm preparing for you are
9 just careful documentation in accord with
10 accreditation or internal review procedures. I
11 don't think that's going to be testimonial.

12 JUSTICE BARRETT: Okay. Thank you,
13 Mr. Feigin.

14 CHIEF JUSTICE ROBERTS: Justice
15 Jackson?

16 JUSTICE JACKSON: So I found Justice
17 Gorsuch's question very, very helpful, and I'm
18 just trying to bear down again on the
19 government's position about methodology --
20 methodological evidence, as you've articulated
21 it.

22 So I think I hear you saying that when
23 an expert testifies in general about, as -- as
24 Justice Gorsuch said, you know, industry
25 standard, this is the way this kind of testing

1 is ordinarily done, this is from my own personal
2 knowledge how the methodology is typically taken
3 care of in these situations, that that's --
4 could be okay and no Confrontation Clause
5 problem but that the problem arises, I guess in
6 this case, when the expert's testimony actually
7 relies on the statements in this lab report
8 about what was done to this evidence and sort of
9 vouches for that, right?

10 When -- when the expert says not this
11 is the way things are normally tested and I'm
12 telling you that from my expert view, but in
13 this particular case, the evidence that was
14 collected was tested in a certain way, I'm
15 assuming that that's actually true and now my
16 testimony is X on the basis of that assumption.

17 Is it the government's view that that
18 is not being offered for truth or it is in the
19 latter scenario?

20 MR. FEIGIN: Well, let -- let me just
21 make one -- one thing clear on your first
22 scenario.

23 JUSTICE JACKSON: Yes.

24 MR. FEIGIN: The -- the general
25 evidence that the witness could testify about

1 through personal knowledge, essentially, they're
2 a fact witness on this, it doesn't even need to
3 be the same expert, could be very specific to
4 this lab as well. It doesn't just --

5 JUSTICE JACKSON: Yes, yes.

6 MR. FEIGIN: -- have to be about
7 accreditation.

8 JUSTICE JACKSON: It doesn't have to,
9 but -- but -- but it's not specific to the
10 testing of this evidence necessarily. That's
11 the distinction I'm trying to make.

12 MR. FEIGIN: Okay. And then the -- as
13 to the second, I guess I would -- that -- there
14 were a couple of different pieces in there. One
15 would be, if you really just had testimony like
16 this was done in this case, I know it, that
17 would be -- we -- we -- we don't -- we're not
18 arguing that that would be permissible.

19 If -- depending on exactly how it --

20 JUSTICE JACKSON: And that's because
21 why?

22 MR. FEIGIN: Well, there, you're
23 attesting to something outside the personal
24 knowledge. You really are just repeating the
25 statement -- in effect repeating the substance

1 of out-of-court statements.

2 JUSTICE JACKSON: And offering it for
3 its truth, right? Because you're assuming that
4 it actually was done in that way, in the way
5 that you're testifying.

6 MR. FEIGIN: So where the statement is
7 to the jury, you know, Expert B, who is not me
8 and you're not hearing from, did these tests,
9 that's a problem -- that's problematic.

10 I think there might be -- I would
11 reserve, Justice Jackson, just depending on how
12 it comes in as trial -- at trial and how it
13 actually winds up being shaped and what kind of
14 limitations there are on it, something like the
15 notes purported to say that these tests were run
16 in this case, I have no reason to believe
17 otherwise and I have proceeded on that
18 assumption, that that --

19 JUSTICE JACKSON: Why is that --
20 and -- and your objection or the reason why you
21 think that's okay is because why?

22 MR. FEIGIN: Well, there, the expert
23 is making clear that the expert is not making
24 this direct testimony about what, in fact,
25 happened in the case. I think it may well in

1 that -- those circumstances be a lot closer to
2 the circumstantial evidence. And it's -- it
3 shows what --

4 JUSTICE JACKSON: But isn't he still
5 offering it for truth to the extent that he's
6 assuming that it is -- that it did happen in
7 that way?

8 MR. FEIGIN: I think, in that
9 circumstance, all the expert's offering for the
10 truth is that the expert's assuming it.

11 I think, to get back to the Chief
12 Justice's point that these people can be savaged
13 on cross-examination, you'd say you're just
14 assuming that because that's what -- because
15 that's what usually happens and that's what
16 purported to happen in this case, but, actually,
17 you -- you don't know for a fact that that
18 happened, do you?

19 And I think you could --

20 JUSTICE JACKSON: How would a
21 defendant ever, without the lab technician,
22 actually challenge the assumption? Are you
23 saying the Confrontation Clause doesn't speak to
24 the defendant's ability to challenge the
25 assumption in a meaningful way?

1 MR. FEIGIN: First of all, Your Honor,
2 I -- I -- I just want to be quite clear that we
3 don't think that testimony has to come in in the
4 way I was just describing to you for the expert
5 to testify. I think the expert can testify very
6 simply at a somewhat higher level of abstraction
7 in line with what I was --

8 JUSTICE JACKSON: Right. But, if he
9 doesn't --

10 MR. FEIGIN: -- explaining to the
11 Chief Justice.

12 JUSTICE JACKSON: -- my question is --
13 yeah.

14 MR. FEIGIN: But, if he does, then I
15 think where the defense gets its opportunity to
16 cross-examine -- and, again, nobody is actually
17 saying in this circumstance that the expert did
18 these things. The -- the -- sorry, that the
19 testing analyst actually did these things. The
20 testifying expert is simply saying, I am -- you
21 know, this is how we usually do it. I've
22 reviewed a case file that says it was done in
23 this case. I've no reason to disbelieve that.
24 But makes clear I don't personally -- I can't
25 personally tell you that's exactly what happened

1 in this case.

2 JUSTICE JACKSON: Okay. Thank you.

3 MR. FEIGIN: Okay. Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Samuels.

7 ORAL ARGUMENT OF ALEXANDER W. SAMUELS

8 ON BEHALF OF THE RESPONDENT

9 MR. SAMUELS: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 This Court has long been clear and
12 Petitioner I don't think disputes that evidence
13 that is not offered for the truth of the matter
14 asserted, is not offered to prove the truth of
15 the matter asserted, does not implicate the
16 Confrontation Clause.

17 Meanwhile, Arizona law has long been
18 clear that evidence offered only for the purpose
19 of explaining the basis of an expert's opinion
20 is not and cannot be offered for the truth of
21 the matter asserted.

22 In a case like this, everyone agrees
23 that a testifying expert like Longoni cannot
24 serve as a mere conduit for the conclusions of a
25 testing expert like Rast. That's just not what

1 happened here, though.

2 Longoni explicitly testified that he
3 could form independent conclusions and then
4 testified that he had formed independent
5 conclusions and revealed what those conclusions
6 were. He based those conclusions on information
7 in Rast's notes and the computer-generated
8 graphs from her testing.

9 The trial judge who heard that
10 testimony thus correctly found that Longoni had
11 testified to his own opinion and correctly held
12 that there was no Confrontation Clause
13 violation.

14 The judgment below could also be
15 affirmed on the independent ground that Rast's
16 notes were non-testimonial. That is not
17 something that the State has ever affirmatively
18 conceded in this case.

19 The notes, which were the source of
20 the statements here, were neither prepared to be
21 a substitute for trial testimony, nor were they
22 sufficiently formal or solemn to qualify as
23 testimonial.

24 The notes differ in many key ways from
25 the report, and Petitioner, perhaps recognizing

1 this, repeatedly tries to make the report the
2 focus of this Court's inquiry, but there is just
3 nothing in the record to support the assertion
4 that any statements from the report were
5 referenced at trial here.

6 The closest they get to coming to that
7 is they say that he recited the conclusions from
8 the report. There's no indication in the record
9 that's what he did. He said the same words, but
10 it's just a standard conclusion, it's the
11 standard language that a lab analyst would use
12 that a substance has a usable quantity of fill
13 in the blank.

14 In this way and in other ways,
15 Petitioner encourages the Court to look well
16 beyond the unique facts of this case, and he
17 sets his sights instead on a far-reaching new
18 rule without any real workable limiting
19 principle. We don't think the Confrontation
20 Clause requires the anomalous results that would
21 result from Petitioner's rule.

22 And we think this Court should decline
23 Petitioner's invitation to greatly expand the
24 reach of the Confrontation Clause, which is what
25 they think they -- what we think they invite.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: You put quite a bit
3 of weight on the argument that Ms. Rast's
4 statements or notes were not in -- introduced
5 for the truth of those state -- of those notes.
6 But, if they were inaccurate or just flat out
7 wrong, what would be the value of Mr. Longoni's
8 testimony?

9 MR. SAMUELS: We don't dispute, Your
10 Honor, that the value of Longoni's testimony is
11 very much directly related to Rast's notes and
12 -- and whether they are reliable or not. But we
13 think that's exactly what 703 gets at, which is
14 that the jury can use that information, the
15 underlying, what we've called basis evidence
16 here, to evaluate Longoni's opinion, but not for
17 other purposes.

18 JUSTICE THOMAS: Well, the -- you
19 don't think that in the context of this trial,
20 of a criminal trial, that that has some friction
21 with the Confrontation Clause, if the truth does
22 -- is necessary in order for the opinion to be
23 useful?

24 MR. SAMUELS: No, Your Honor. I -- I
25 think it's helpful to take a step back and think

1 about what this case would have looked like if a
2 limiting instruction had been given, because a
3 limiting instruction is something that the
4 defendant would have been entitled to if he had
5 asked for one.

6 JUSTICE THOMAS: Mm-hmm.

7 MR. SAMUELS: And if one had been
8 given, I -- I think this Court would presume
9 that a limiting instruction would be followed.
10 It presumes that in nearly all cases, with the,
11 you know, one exception I think of Bruton.

12 And we think, you know, counsel for
13 criminal defendants have stood at this lectern
14 and have argued many times in other contexts
15 that certain instructions are very difficult for
16 a jury to follow and, nonetheless, the
17 presumption applies.

18 And we think it would similarly apply
19 in this case. That -- that then begs the
20 question, well, why does that matter here
21 because there was no limiting instruction here,
22 but I think the answer to that question is
23 simply that the Petitioner never requested the
24 limiting instruction, and for that reason, I --
25 I think there's not a Confrontation Clause

1 violation here.

2 JUSTICE SOTOMAYOR: Counsel, can I go
3 back to one point and that was your argument
4 that this is non-testimonial. The government
5 says that's not unclear. To be frank with you,
6 I don't see it argued anywhere below and
7 anywhere at trial actually.

8 You didn't -- I don't see it anywhere
9 in your cert stage briefs in the courts below.
10 I see it in your red brief, and you argue it
11 here, but you sort of have a footnote on that
12 argument and that's all.

13 I -- I don't know of any time that
14 we've ever addressed a question that wasn't
15 raised in the cert brief in opposition here,
16 wasn't raised by courts below, was raised in a
17 footnote at best in the red brief.

18 Isn't the entire premise of the
19 question before us that the information was
20 testimonial?

21 MR. SAMUELS: I don't think so, Your
22 Honor, and I'd like to say a couple things about
23 that. Let me start with the red brief and maybe
24 rewind.

25 JUSTICE SOTOMAYOR: No, why don't

1 you -- why don't you work with the court below.

2 MR. SAMUELS: Well --

3 JUSTICE SOTOMAYOR: Where did you
4 argue that in the court below?

5 MR. SAMUELS: Happy to proceed in the
6 other fashion.

7 JUSTICE SOTOMAYOR: Okay.

8 MR. SAMUELS: So, in the court of
9 appeals, there was a citation to Justice
10 Thomas's concurrence in Williams, which was only
11 helpful for the State on the testimonial
12 question.

13 JUSTICE SOTOMAYOR: Have we ever had a
14 case where a mere citation preserves such a
15 consequential argument as overturning precedent?

16 Where did you point out that this --
17 that all components of this report were
18 non-testimonial or testimonial?

19 MR. SAMUELS: Candidly, Your Honor, we
20 didn't further develop the argument in the
21 Arizona court of appeals. There was --

22 JUSTICE SOTOMAYOR: Okay. So now come
23 here.

24 JUSTICE KAGAN: Or in the trial court,
25 am I right?

1 MR. SAMUELS: No. I -- I mean, I
2 don't think that there was any reason to discuss
3 it in the trial court given that the -- the
4 trial court's ruling was what it was on the
5 other question. And that --

6 JUSTICE KAGAN: Yeah. I mean, but on
7 -- in both the Arizona courts and then also in
8 your -- in -- in -- in your -- the filing that
9 you filed in the Arizona Supreme Court, although
10 they never took the case, but in all these
11 filings, everything was about the truth of the
12 matter asserted?

13 MR. SAMUELS: Well, in the trial
14 court, that was the focus. In the court of
15 appeals, like I said, it was except for this
16 citation. In the Arizona Supreme Court --

17 JUSTICE KAGAN: Yeah. I mean, it's a
18 citation in, like, a 30-page brief which clearly
19 focuses on, you know, the first question that
20 you started your -- your -- when you got up to
21 the podium, you started with. It was all about
22 that. It was all about the hearsay question.

23 MR. SAMUELS: I take the point. That
24 was certainly the primary focus in the state
25 courts. I -- I would like to explain why, which

1 is it had been settled for, I think, a little
2 more than a decade at this point in the Arizona
3 courts that that first preliminary question, the
4 -- the not for the truth question, settled this
5 case. I mean, this was a case decided in an
6 unpublished opinion without oral argument in the
7 Arizona Court of Appeals on that question.

8 And so the State didn't develop a
9 testimonial argument right there. But I think
10 there was -- frankly, there was never going to
11 be any relevance to that argument unless the
12 very unlikely event that this Court granted
13 certiorari.

14 Now I would like to talk about what --
15 (Laughter.)

16 MR. SAMUELS: Perhaps that looks less
17 unlikely now.

18 (Laughter.)

19 MR. SAMUELS: But I -- I would like to
20 talk briefly --

21 JUSTICE KAGAN: In hindsight.

22 MR. SAMUELS: Yes. Our briefs here --
23 because I -- I think I would disagree with some
24 of the premises of your question, Justice
25 Sotomayor. In the red brief, I think we spend

1 nine or 10 pages talking about whether these
2 statements were testimonial or -- or not.

3 JUSTICE KAVANAUGH: Eleven pages.

4 MR. SAMUELS: Eleven pages. Thank
5 you, Justice Kavanaugh.

6 JUSTICE KAVANAUGH: Yeah.

7 JUSTICE KAGAN: No, I agree with you.
8 It's been totally briefed here. The question is
9 whether it's been forfeited below.

10 MR. SAMUELS: Understood. And -- and
11 last thing I'll say, because this is maybe the
12 last brief I haven't mentioned yet, is, in our
13 brief in opposition at the cert stage, I think
14 even Petitioner understood us to be arguing that
15 Justice Thomas's view supported our case here.
16 Again, that's only helpful on the testimonial
17 question.

18 In their reply at the cert stage, they
19 say -- they assert that we didn't dispute that
20 this was testimonial under the tests applied by
21 the plurality or the dissent in Williams.
22 Notably absent from that is Justice Thomas's
23 view and which we laid out and -- and talked
24 about how it -- you know, again, not developed
25 with very specific facts, I don't dispute that,

1 but did talk about how that supports the --

2 JUSTICE KAGAN: Can I talk about the
3 substance --

4 JUSTICE JACKSON: Can --

5 JUSTICE KAGAN: -- of the testimonial
6 question for a minute? I -- I want to start
7 with this -- the -- the report question, which I
8 think Mr. Feigin said, you know, on any test
9 that we've ever used in this Court is pretty
10 clearly testimonial.

11 And I think you -- you sort of
12 acknowledged that by suggesting that the real
13 thing is, oh, he'd only relied on the notes.
14 But is -- is that really true? I mean, I'm just
15 looking -- I'm just going to read you some
16 places where the witness really couldn't seem to
17 answer questions without, you know, reviewing
18 the report.

19 So there's a question: "Did your
20 review help show how State's Exhibit 26 was
21 tested in this case?"

22 And Longoni says: "May I review the
23 report, Your Honor?"

24 The court says: "You may. "

25 Another question: "Do you know who

1 was responsible for intake?"

2 Longoni says: "If I may refer again
3 to the report, Your Honor?"

4 The court says: "You may."

5 Another question: "Did you also look
6 at what was done to Item 28?"

7 Longoni says: "Again, can I refer to
8 the report, Your Honor?"

9 The court says: "You may."

10 I mean, this report is all over the --
11 the -- the transcript.

12 MR. SAMUELS: The word "report,"
13 Justice Kagan, is all over the transcript, and I
14 -- I -- we made this point in the brief, but I
15 want to emphasize a close look at the record
16 reveals he couldn't possibly have been looking
17 at the report for those statements. So I think
18 you're looking at Pet. App. 40. That first
19 question, did you review how State's Exhibit 26
20 was tested in this case? And he's, you know,
21 referencing to the report at that point. That
22 information is not in the report.

23 JUSTICE KAGAN: So I -- I -- I take
24 that point, but it just sort of shows how, in
25 this case, he's up there on the stand and he has

1 both the official report and some of the notes
2 in an -- essentially an appendix, and he's kind
3 of going back and forth between them.

4 And, you know, that just shows how
5 closely related the two were. That's what he
6 prepared from. You know, he reviewed the report
7 and he reviewed those underlying notes, which --
8 which basically, you know, went through --
9 because the -- the report, as you say, is just
10 the conclusions, but it's the notes that tell
11 you exactly what Ms. Rast did in the case. And
12 he is repeating the -- the -- the notes
13 essentially to say this is how it was tested,
14 this is the -- you know, this -- this -- this is
15 what Rast did.

16 MR. SAMUELS: We don't dispute that
17 he's relaying some information from the notes,
18 certainly. But, as it relates to the notes
19 versus report question, you know, we're not
20 saying here that he never would have looked at
21 the report or that he was totally ignorant of
22 it. But there's no indication in the record
23 that he ever relayed anything from it.

24 The only thing in the report was the
25 conclusions, and --

1 JUSTICE KAGAN: And he does state the
2 exact same conclusions in the exact same words
3 after using the notes to say -- you know, to go
4 through essentially in the same words again
5 everything that Rast said about what she did.

6 MR. SAMUELS: He uses the same words.
7 I made the point in my opening, and I -- and I
8 think it's an important one, that this is just
9 standard language for this. You know, usable
10 quantity of X is the legal thing that you have
11 to prove in a case like this. And I think the
12 folks at the lab know that.

13 I think it's -- it's also the case
14 that if you think about what it is that he is
15 actually testifying to, if you look at his
16 actual testimony, he's asked specifically if he
17 can form an independent opinion. I don't think
18 he would have said yes to that question if he
19 couldn't form it from, for example, the graphs,
20 which he specifically says he looked at.

21 JUSTICE JACKSON: But we don't have to
22 -- we don't have to just accept his word for it,
23 right? I mean, we -- we do have to kind of
24 figure out the extent to which his opinion is
25 independent, and I guess that takes me back to

1 Justice Thomas's initial question about your
2 argument with respect to this being offered for
3 the truth of the matter asserted.

4 And I created a hypothetical that I'm
5 hoping you can respond to that would help me to
6 understand what you mean about it not being
7 offered for truth.

8 So suppose we have a murder that the
9 police believe was committed with some kind of
10 unconventional weapon that they find in the
11 defendant's possession. So I'm envisioning
12 something like a unique 3D-printed gun or
13 something. And at trial, the state puts on a
14 ballistics expert who has not examined the
15 weapon himself, but he bases his opinion on a --
16 a report of a lab technician who has tested this
17 weapon.

18 And the lab report says how the weapon
19 works, it explains how the technician figured
20 that out, it says that the technician took the
21 weapon in both of his hands, he stood three feet
22 away from the target, he lifted it at a certain
23 angle, pointed it, the projectile came out at a
24 certain angle and velocity, and here is the
25 photographs even of the final result, et cetera,

1 of how it entered, and here are the
2 measurements, the scatter plot.

3 On the stand, the expert says, I
4 reviewed the report and the photos and the
5 measurements and also the pathologist's report
6 of the wound on the victim, and in my expert
7 opinion, this is the weapon that killed the
8 victim.

9 I take it that your argument is that
10 the underlying lab reports are not being offered
11 for truth in that situation, but I guess I don't
12 understand why. The lab report is what is
13 explaining to the expert how this weapon
14 actually worked since he never tested it, and
15 he's unquestionably assuming the truth of the
16 testing as the technician laid it out.

17 So why -- why is it that he's not --
18 that -- that -- that it's not being offered for
19 truth in this way?

20 MR. SAMUELS: Well, in -- in talking
21 about that hypothetical, I think it's important
22 to emphasize these cases can be very
23 fact-specific in evaluating a question like
24 that. It's easy to think about two poles, but I
25 think there really is a spectrum. And there's a

1 spectrum in part because of, you know, as we've
2 said, mere conduit testimony is not permitted.

3 And so I think there's an evaluation
4 that's required in any case and in a case like
5 that one to figure out is the expert who's
6 testifying really adding something and is his --
7 is his testimony really the central thing that
8 matters.

9 JUSTICE JACKSON: Yes, he's adding
10 something in my hypothetical because the
11 technician is not saying anything about whether
12 this is the actual gun that killed the victim.
13 The technician is just saying this is how this
14 machine that you found in the defendant's
15 possession works.

16 But that's a basis, right? The expert
17 is saying, I have to assume that it works in
18 this way because I never -- I never tested it
19 myself, and on the assumption that it works in
20 the way that the technician says it does, my
21 testimony is that this is the murder weapon.

22 MR. SAMUELS: So I -- it's possible
23 that testimony like that, obviously, might not
24 come in because of Daubert or other reasons, but
25 --

1 JUSTICE JACKSON: Yes.

2 MR. SAMUELS: -- setting that aside,
3 if -- if the expert was not familiar at all with
4 the type of weapon involved, I -- I'm not quite
5 sure how they could offer a completely
6 independent opinion. But, again, assume that
7 they have enough expertise in -- in this
8 particular type of 3D printing or something like
9 that to do that. I do think it's possible that
10 the different basis evidence that you're talking
11 about there could be referenced.

12 And, again, the defendant --

13 JUSTICE JACKSON: But let me ask you,
14 isn't -- isn't this exactly the Confrontation
15 Clause problem that the Constitution worries
16 about? Because the expert gets up and he relies
17 on this report that explains how this machine
18 works, but he has not actually tested it. So
19 the defendant could say, I agree with you, Mr.
20 Expert, that if the machine worked in this way,
21 it is the murder weapon. What I'd like to do is
22 interrogate whether or not the testing of this
23 machine was accurate. And what -- what you
24 haven't done, State, is presented to me the
25 person who actually tested it.

1 I want to say, says the defendant,
2 that the photographs that are here are not
3 really the photographs, this is not what
4 happened, or that you didn't really stand only
5 three feet, you stood a lot closer in order to
6 make this result. But I can't do that because
7 the expert is not -- the person who tested it is
8 not before me.

9 I feel like that's the real problem
10 that -- that the Confrontation Clause is about
11 and that you'd say I couldn't do without a
12 Confrontation Clause issue.

13 MR. SAMUELS: I -- I just think expert
14 testimony is different in several ways, and I
15 think that is well established for -- for quite
16 some time. And it -- it's different in a few
17 ways, I think, that really matter here.

18 One is, under 703, there's going to be
19 an instruction if the defendant requests it, and
20 the jury, we would presume, would follow it.
21 And -- and I think that that's really important
22 in this context.

23 And so I -- I'm just not sure that it
24 is what the Confrontation Clause is designed to
25 get at because the jury would be told not to

1 consider it as substantive evidence.

2 I also think, in the context of expert
3 testimony, this is maybe a less important point,
4 but -- but it's still worth noting that there
5 are other ways to confront expert testimony that
6 are available that are not available in other
7 contexts. So it's, it -- you know, folks from
8 this Court and others have noted that the
9 defendant could subpoena the analyst, but set
10 that aside for a moment. It's also the case
11 that defendants can hire defense experts.
12 They'll have disclosures about this testing
13 before trial. They can attack this in other
14 ways.

15 And so I -- I'm not sure that that
16 necessarily is critical to the Confrontation
17 Clause analysis, but I do think it's worth
18 noting that it makes expert testimony -- it's
19 yet another way that expert testimony is
20 different from the percipient witness testimony
21 that we think lies really at the heart of the
22 Confrontation Clause.

23 JUSTICE GORSUCH: Mr. Samuels --

24 JUSTICE ALITO: What about --

25 JUSTICE GORSUCH: -- you mentioned --

1 oh, I'm sorry, please.

2 JUSTICE ALITO: An expert's -- an
3 expert's opinion is always worthless unless the
4 facts on which the expert relied in reaching the
5 opinion are -- are true.

6 And so, if we were to say that an
7 expert cannot -- that anytime an expert
8 testifies based on -- on facts, that that
9 suggests that the facts are true, regardless of
10 whether they are -- the -- the -- the facts are
11 omitted because of a hypothetical or the trier
12 of fact knows or is instructed that they're not
13 admitted for the truth of the matter asserted.
14 I don't know what's left of expert testimony,
15 but there's the problem of whether those facts
16 are proved.

17 So, here, what evidence in the record
18 shows that the substances in question were meth
19 and marijuana?

20 MR. SAMUELS: Sure. And if -- if I
21 may, I'd like to address the first -- the first
22 part of that question just briefly, which is
23 I -- I do think, and -- and some commentators
24 have observed, that if this Court were to adopt
25 a rule like what Petitioner proposes, it doesn't

1 necessarily just have criminal law implications
2 because it -- it really does change the
3 landscape of Rule 703. And so it could have
4 implications beyond that.

5 To get to the -- the last part of your
6 question about what evidence was in the record,
7 I -- I want to be clear, but I take Your Honor
8 to be asking about the evidence that -- that
9 this particular substance was tested, or are you
10 asking about that this particular substance was
11 what it --

12 JUSTICE ALITO: Was. So, if the --
13 you know, the facts on which the expert -- on
14 which Longoni relied as an expert in reaching
15 his conclusion were not offered for the truth of
16 the matter asserted, then what evidence is there
17 in the record that the substances were meth and
18 marijuana?

19 MR. SAMUELS: So there is -- there's
20 Longoni's opinions, first of all, which
21 obviously are offered for the truth of the
22 matter asserted. And I do think there's, as
23 there was in Williams, independent evidence from
24 which the jury could draw the conclusion that
25 this was the evidence that was tested.

1 JUSTICE ALITO: Well, what is that?

2 MR. SAMUELS: So that would be --
3 there's a line drawn all the way literally from
4 the crime scene to the courtroom.

5 JUSTICE ALITO: Yeah.

6 MR. SAMUELS: So, if I start at the
7 end there, the three substances, Items 20, 26,
8 and 28, were admitted as physical exhibits at
9 trial. So they were present in the courtroom
10 for the jury.

11 Photos of that's -- of those --

12 JUSTICE ALITO: Well, what good does
13 that do? I mean, the -- the jury would taste it
14 or sample these --

15 (Laughter.)

16 MR. SAMUELS: I should hope not.

17 JUSTICE ALITO: -- sample these drugs
18 and see what they were?

19 MR. SAMUELS: But I think, in terms of
20 them being able to draw the conclusion that
21 these really were the substances that were
22 tested and thus, you know, Longoni had something
23 relevant to rely on in terms of the testing, so
24 starting at the crime scene, photographs of
25 those exact same items were admitted at trial so

1 the jury could see that these are the same
2 things.

3 JUSTICE ALITO: All right. So.

4 MR. SAMUELS: There's chain-of-custody
5 evidence that was testified to by law
6 enforcement about how it got from the crime
7 scene to an evidence locker --

8 JUSTICE ALITO: Right.

9 MR. SAMUELS: -- that the only reason
10 it left an evidence locker, the only time --

11 JUSTICE ALITO: Right.

12 MR. SAMUELS: -- was to go to the lab.
13 And then the physical exhibits actually bear
14 initials and a date that's just a few days after
15 the evidence got to the lab.

16 JUSTICE ALITO: Yeah, okay. So that
17 the -- those exhibits were the ones that were
18 taken from the scene, and let's say they --
19 those are the exhibits that were sent to the --
20 to the lab, okay? What -- what evidence is
21 there that they were tested at the lab and they
22 -- and -- and this is -- this data is the -- the
23 data that was produced?

24 MR. SAMUELS: So, in terms of evidence
25 that these particular items were actually tested

1 by Rast, I think, in terms of substantive
2 evidence, a lot of the details that are in the
3 record obviously couldn't be considered as
4 substantive evidence, but I do think Longoni,
5 even if you set all that basis aside, basis
6 evidence aside, and pretend it never was
7 referenced at all, Longoni testified that he was
8 asked to evaluate the materials from a
9 particular case, a particular case number. That
10 case number was otherwise in the record from law
11 enforcement.

12 And I think, if you imagine no basis
13 evidence at all, I think at the very least he
14 could say, as he did here, that he reviewed the
15 records from this particular case number, he
16 independently reviewed the materials that were
17 there, and these are his independent
18 conclusions. And I think --

19 JUSTICE GORSUCH: Certainly --

20 MR. SAMUELS: -- that's what I
21 understand --

22 JUSTICE GORSUCH: -- certainly, if he
23 had done so himself and -- and replicated the
24 tests, I -- I follow everything you're saying.
25 I get it.

1 I also understand that if he had said,
2 well, I -- as Mr. Feigin indicated, that I
3 assumed that traditional processes were followed
4 and here's what those traditional processes are,
5 it would still be incumbent upon the State to
6 prove up that that assumption's a valid
7 assumption because, as it was done in common
8 law, a hypothetical is only as good as the
9 hypothetical, right, the hypothetical opinion?

10 And if -- if the hypo -- if the bases
11 aren't proven up, then the expert's opinion can
12 be stricken even at common law.

13 And, here, I -- I think Justice Alito
14 is just pointing out how could it -- the only
15 thing that this testimony could have been
16 offered for does seem to be the truth that Rast
17 did these tests and found these results.

18 And I'm just struggling with how is it
19 not the truth, counsel?

20 MR. SAMUELS: Sure. And -- and let me
21 try to explain why. If you think about the
22 hypothetical I just posed where none of that
23 basis evidence was ever referenced at trial,
24 and -- and assume Longoni was permitted to
25 testify that he reviewed the case records for

1 this case --

2 JUSTICE GORSUCH: No, no, no, no.

3 But, see, that's the whole point. I -- I -- he
4 -- let's put Rast aside. Rast doesn't exist.
5 He -- he just comes in and says, I think this is
6 meth and marijuana. That would be stricken,
7 right?

8 MR. SAMUELS: If --

9 JUSTICE GORSUCH: I -- I -- I assume
10 something happened and you never prove up the
11 assumptions of what happened. That would be
12 stricken?

13 MR. SAMUELS: I think the link I'm
14 talking about, which is to say he reviewed the
15 records from a particular case number, I think
16 would be required in order to make the evidence
17 relevant. I -- I'd point out that relevance is
18 really not a constitutional concern, but --

19 JUSTICE GORSUCH: No, of course not.
20 We're not talking about relevance. We're
21 talking about Confrontation Clause, right, to
22 confront the witnesses against you, right? It
23 doesn't say witnesses who put their testimony
24 with wax seals. It says witnesses, all
25 witnesses.

1 And -- and, here, it just -- he
2 completely and utterly, as I think even the
3 federal government recognizes, it's quite
4 unusually to come in not with the State, as
5 Justice Kagan points out, and and says well, in
6 this case, there's a lot of stuff in which he --
7 he says Rast says this and Rast says that, the
8 report says this, the report says that, and I'm
9 taking it as true and that's important for my
10 opinion.

11 MR. SAMUELS: And that's why I think
12 there's a critical difference potentially
13 between him just being able to say that he
14 reviewed these materials and not reveal anything
15 about them and him revealing so many details
16 about the materials. That's what I understand
17 the United States' concern to be.

18 Obviously, we don't think they're
19 right about that. We think they misread the
20 record a little bit here. But set that
21 disagreement aside. I still think under the
22 United States' view that, you know, one of the
23 options that really should be preserved even if
24 Petitioner were to succeed in this case, and
25 this would require a significant narrowing, I

1 think, of Petitioner's suggested rule, is that
2 the independent opinion testimony should still
3 be possible even if the detailed basis evidence
4 can't be revealed.

5 JUSTICE GORSUCH: Oh, I -- I -- I --
6 again -- well, I'm sorry. I'll get back to it.

7 JUSTICE JACKSON: But it seems --

8 CHIEF JUSTICE ROBERTS: Justice
9 Thomas? Anything?

10 Justice Alito?

11 Justice Sotomayor?

12 Justice Kagan?

13 Back to you, Justice Gorsuch.

14 (Laughter.)

15 JUSTICE GORSUCH: I've almost
16 forgotten where I was at.

17 I -- I -- I certainly took the United
18 States and understood them to say, all right, he
19 can testify based on assumptions, hypotheticals,
20 he can -- that have to -- all those have to be
21 proven up later to the satisfaction of the jury
22 that -- that they're true in order for the
23 opinion to be valid.

24 And, here, again, the only thing -- he
25 didn't do that. He said, Rast did this and,

1 therefore, I have this opinion. He didn't say,
2 well, if somebody did this and then the State
3 later comes back and proves Rast did this
4 because they called Rast or something else, that
5 didn't happen here. So I -- I get that there
6 are many ways to skin the evidentiary cat, but
7 this case just seems to fall on the wrong line
8 of it.

9 And -- and then, when we get to the
10 testimonial question, whether it was preserved
11 or not preserved, it's a big question, and the
12 Court has splintered on -- on that in the past.
13 And you're asking us to essentially adopt a --
14 a -- a very thoughtful view of one of my
15 colleagues, but one of my colleagues, and -- and
16 that's -- that's a heavy lift in a case where it
17 hasn't been argued below, isn't it?

18 MR. SAMUELS: Well, a couple things.
19 One is, you know, we briefed both Justice
20 Thomas's view and the primary purpose tests in
21 the briefs, and -- and we think ultimately these
22 are non-testimonial under either view. And
23 so --

24 JUSTICE GORSUCH: So we don't need to
25 decide that question?

1 MR. SAMUELS: Well, in terms of what
2 the test is, I mean, we do think Justice
3 Thomas's view is persuasive, but we don't think
4 you need to revisit the primary purpose test
5 because we think, even under the primary purpose
6 test, for some of the reasons that I think
7 Justice Barrett was getting at with some of her
8 questioning, the notes here just are
9 non-testimonial under that test as well. So we
10 don't think you necessarily need to confront
11 whether to get rid of the primary purpose test
12 or anything like that.

13 And as to the preservation question, I
14 do think it's well established that this Court
15 has the discretion to affirm on alternative
16 grounds. And this really is a subsidiary
17 question to the Question Presented. I mean,
18 ultimately, the Question Presented here --

19 JUSTICE GORSUCH: All right. Okay.
20 Thank you, counsel. I appreciate it.

21 CHIEF JUSTICE ROBERTS: Justice
22 Kavanaugh?

23 JUSTICE KAVANAUGH: Finish that.

24 MR. SAMUELS: Yeah. Thank you,
25 Justice Kavanaugh.

1 (Laughter.)

2 MR. SAMUELS: My point was, you know,
3 that this Court's rule, 14.1, says that a
4 Question Presented comprises every subsidiary
5 question. Really, at its core, the Question
6 Presented here was, was there a Confrontation
7 Clause violation? And deciding that question
8 without the testimonial issue just doesn't make
9 a lot of sense. Even Petitioner, as I
10 understood them this morning, encourages the
11 Court to reach that question, I think, unless
12 it's going to come out against them, and then
13 maybe issue a narrow ruling. And I -- I just
14 think that this Court really should reach that
15 question. I think there's adequate briefing in
16 front of it.

17 And I would also point out, to the
18 extent that the Court is concerned that the test
19 -- the Question Presented assumes that
20 statements are testimonial, as it's framed by
21 Petitioner, that was exactly true in Bullcoming.
22 Nonetheless, it was a significant focus in this
23 Court. And again, in Williams, Petitioner tried
24 to reframe the question that way. Five Justices
25 found that this was non-testimonial.

1 JUSTICE KAVANAUGH: And you said you
2 had briefed both the primary purpose test and
3 the historical test that Justice Thomas had --
4 has advocated. If you were to lose under the
5 primary purpose test but prevail under the
6 Justice Thomas test, then you -- you would say
7 we should consider which test is the better
8 test, I assume.

9 MR. SAMUELS: Yes, and I'll do one
10 better and make it less blatantly
11 outcome-determinative in that --

12 (Laughter.)

13 JUSTICE KAVANAUGH: No, there's
14 nothing wrong with being -- I mean, that's --
15 that's -- you're -- as an advocate, that's fine.
16 But go ahead.

17 MR. SAMUELS: Well, my point is only
18 that, you know, we think Justice Thomas is right
19 regardless. But we just ultimately don't think
20 the Court necessarily needs to revisit the
21 primary purpose test. And we recognize that's
22 the test the Court has applied. And so, you
23 know, while we think Justice Thomas is right, we
24 just don't think you need to reach that question
25 here.

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett?

4 JUSTICE BARRETT: You didn't ask us to
5 overrule Davis and the cases setting forth the
6 primary purpose test, did you?

7 MR. SAMUELS: No. I -- and -- and,
8 again, I think the reason for that is that under
9 our view, we win under either of the tests.
10 These are just non-testimonial statements either
11 way. And so we just don't think it's a question
12 that this Court needs to confront in this case.
13 It might want to confront it down the road.

14 CHIEF JUSTICE ROBERTS: Justice
15 Jackson?

16 JUSTICE JACKSON: Yeah, I just am
17 trying to understand the extent to which it
18 matters that the testifying witness in this case
19 actually revealed the source of the statements.
20 There's been a lot of talk about how -- and this
21 is primarily from the SG, and I apologize
22 because I didn't ask him this -- but, you know,
23 what's really problematic here is that when he
24 was on the stand, he was basically saying:
25 Well, the lab technician said X, Y, and Z. The

1 report she wrote said X, Y, and Z.

2 And I guess I'm not sure that it
3 really matters in terms of whether or not we
4 think it's problematic. So could you speak to
5 that?

6 MR. SAMUELS: Certainly. So I -- I --
7 I do think the core disagreement between us and
8 the United States is, you know, they say in
9 their brief that Longoni appears to have
10 possibly served as a mouthpiece for Rast's
11 conclusions, testimony, et cetera. Obviously,
12 we disagree with that assessment of the record,
13 but we do think it matters to some extent.

14 So assume the Court is, you know,
15 persuaded by the United States' view or at least
16 is heading in that direction and thinks too much
17 of the basis evidence came out here or the way
18 it came out is problematic in some ways. We do
19 think it's still important to preserve the
20 possibility to offer independent opinion
21 testimony even if the basis evidence itself
22 can't be revealed. And this was what I was
23 trying to get at with Justice Gorsuch.

24 JUSTICE JACKSON: But is that really
25 possible? And, again -- yes, you were trying to

1 get at that with Justice Gorsuch. And I guess
2 I'm trying to understand. So you think there's
3 a difference between an expert who says my
4 opinion is that this is drugs because the lab
5 report said so, right -- that's world one; he --
6 he's testifying to that on the stand -- versus
7 the opinion -- the expert who says my opinion is
8 that this is drugs, period, but it turns out
9 that the only reason, the basis for him saying
10 that, was because the lab report said so?

11 MR. SAMUELS: Well, in the -- in the
12 hypothetical scenario I'm envisioning, he would
13 reveal what he's looking at. He would say, I --
14 I was asked to pull the records from this case
15 number, I pulled them, I looked at them, and
16 here's my independent conclusion, without
17 telling you anything about --

18 JUSTICE JACKSON: No, he'd say it was
19 independent. But that's the question. Is it
20 really independent if he hasn't done the -- the
21 testing on his own? If he has no other basis
22 for determining that this is drugs other than
23 what the lab report says, does it matter that he
24 reveals that or that he just says this is my
25 "independent position"?

1 MR. SAMUELS: I think it matters a
2 lot, especially as a practical perspective. So
3 take this out of the drug context and put it in
4 the DNA context for a second. Oftentime the key
5 witness in the DNA context who -- who is
6 evaluating things at the end wasn't necessarily
7 involved in the testing or maybe performed one
8 out of five key steps, and then, ultimately,
9 they evaluate the materials and reach an
10 independent opinion, which is what we think
11 Longoni did here.

12 And so, if the Court were to conclude
13 that, in fact, in order for an expert to rely on
14 underlying materials when they weren't involved
15 in the testing, that's where we really get
16 afraid of the multi-analyst scenario where you
17 have the parade of witnesses --

18 JUSTICE JACKSON: What if the
19 conclusion is not that he can't rely on it?
20 Sure, he can be put up there, he can rely on it,
21 but you have to make available the person who
22 actually did the testing, because what I want to
23 do is, as the defendant, challenge the veracity
24 or reliability of the testing, and I think
25 that's what the Confrontation Clause allows me

1 to do.

2 MR. SAMUELS: Well, the Confrontation
3 Clause, of course, is a procedural and not a
4 substantive right. And I think that type of
5 reasoning starts to put it more in substantive
6 territory to say that he's allowed to do a
7 certain thing rather than to confront the
8 evidence that's offered against him. And we
9 perceive the key evidence being offered against
10 him in --

11 JUSTICE JACKSON: Is the testimony?

12 MR. SAMUELS: -- in a case like this
13 one is the testimony.

14 JUSTICE JACKSON: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Rebuttal -- rebuttal, counsel?

18 REBUTTAL ARGUMENT OF HARI SANTHANAM
19 ON BEHALF OF THE PETITIONER

20 MR. SANTHANAM: Yes. Thank you, Mr.
21 Chief Justice.

22 My friend agreed that -- that there
23 was never an argument in the proceedings below
24 that the evidence was -- was testimonial. Maybe
25 a citation here or a citation there. No

1 argument in the proceedings below. So, as the
2 case comes here to this Court, it comes here on
3 the assumption that the statements were
4 testimonial, and the Court can treat it as such
5 in deciding this case.

6 But, to the extent that the Court does
7 reach the testimonial question, we recognize
8 that there is going to be a difficulty. There
9 are going to be marginal cases where
10 circumstances are different, and it's going to
11 be difficult to apply either the primary purpose
12 test, the targeted individual test, or Justice
13 Thomas's solemnity test.

14 But I'd like to emphasize here that
15 this is not a marginal case. This is a case
16 where, under any of those tests, the statements
17 here are testimonial. And I'd urge the Court to
18 take a look at Pet. App. 127a. That is the
19 prosecution, the State, telling Rast that this
20 trial has been set in Smith's case, that these
21 are the charges against him, and that she needs
22 to create forensic analyses, evidence, to
23 support the prosecution's case against Mr.
24 Smith.

25 And it also bears emphasis, if you

1 look at the notes in this case, they start on
2 page 88 of Petitioner's Appendix, and if you
3 look at the notes, they are written -- they --
4 these are not scrap pieces of paper; they're
5 written on letterhead of the Arizona Department
6 of Public Services with their seal. They're
7 typewritten. And they were created on the exact
8 same day that the report was created as
9 essentially an appendix to that report.

10 And so these are not some scraps of
11 paper that were scrounged up and provided in
12 this case. They are formalized documents that
13 reflect the solemnity of Rast's statements in
14 those -- in those documents. And so all of
15 those factors, we emphasize, were not present in
16 Williams with respect to the report in that
17 case.

18 Now, to the extent that -- and I -- I
19 do want to go back to the hypothetical that I
20 was discussing with Justice Barrett. And we are
21 not suggesting that notes, any and all notes
22 that are created, are going to be testimonial.
23 It is, of course, going to be
24 circumstance-dependent. But what is equally
25 true is that a set of notes cannot be said to be

1 non-testimonial simply because they use
2 shorthand to set forth factual statements.

3 So going back to the example of the
4 police officer, if the police officer is taking
5 statements from a witness -- and this is a
6 hypothetical that comes right out of Davis -- if
7 the police officer is taking statements from a
8 witness and happens to do so in shorthand, that
9 does not give the prosecution right to put on
10 that police officer to introduce those
11 statements from a witness. Nor does it provide
12 a license to the prosecution to put on a
13 different police officer and read statements
14 from those notes, interpreting those shorthand.
15 But, at the end of the day, you're conveying a
16 set of testimonial statements, out-of-court
17 statements, that have not been confronted.

18 Now I want to address a few -- few
19 other points. The -- the United States made the
20 point that there -- there may be circumstantial
21 evidence. And, in fact, in Williams, the
22 plurality recognized that there was ample
23 circumstantial evidence in there that -- that
24 the prosecution might have relied on in addition
25 to those testimonial statements. And that's

1 likely to be true in a lot of cases, but, you
2 know, that is not what was done here.

3 In this case, they didn't rely on
4 circumstantial evidence. They -- they could
5 have said Longoni looked at certain data and
6 reached certain conclusions based on that data
7 in the abstract, but they went further. They
8 went further by having Longoni recite and
9 recount from Rast's statements the specific
10 items she tested, the particular procedures she
11 used, and the results she reached.

12 And the reason -- and, of -- of
13 course, if -- if the State rested on
14 circumstantial evidence, their case would be
15 much -- not as strong, certainly not as strong.
16 But the strength of their case, as been -- as
17 has been noted, is not a confrontation issue,
18 and it doesn't raise a confrontation violation.
19 The reason that the State recognized that it
20 needed to introduce Rast's statements into the
21 record through Longoni is that it strengthened
22 their case, and that in a nutshell underscores
23 why her statements were being offered for the
24 truth of the matter asserted.

25 One other point I'd like to address,

1 which is this notion of a limiting instruction.
2 My friend at the State indicated that several
3 times that Smith did not request a limiting
4 instruction.

5 It bears emphasis that you get to
6 the -- the -- the notion of a limiting
7 instruction only after you have a legitimate
8 non-hearsay purpose for admitting the statements
9 in the first place. If in the first instance
10 they are offered for the truth, such as when the
11 statement is -- you know, would support the
12 expert's opinion only insofar as it is true,
13 then it makes no sense from a logical standpoint
14 to tell the jury do not consider it.

15 CHIEF JUSTICE ROBERTS: Thank you.
16 Thank you, counsel.

17 The case is submitted.

18 (Whereupon, at 11:33 a.m., the case
19 was submitted.)

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Official

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