No. _____

IN THE

Supreme Court of the United States

JOSHUA KATSO,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

If a forensic analyst reports on tests targeting the accused but does not appear at trial, does the Confrontation Clause permit another analyst, who did not observe any of the testing, to testify to an opinion that necessarily relies on testimonial assertions made by the first analyst?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joshua Katso respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Armed Forces, App. 1a-41a, is reported at United States v. Katso, 74 M.J. 273, No. 14-5008/AF, 2015 CAAF LEXIS 588 (C.A.A.F. 2015). The decision of the United States Air Force Court of Criminal Appeals, App. 42a-83a, is reported at United States v. Katso, 73 M.J. 630 (A.F. Ct. Crim. 2014). The opinion of the trial court, App. 84a-97a, is unreported.

JURISDICTION OF THIS COURT

The Court of Appeals for the Armed Forces issued its decision on June 30, 2015 under 10 U.S.C. § 867(a)(2) (2012). Therefore, this Court has jurisdiction under 10 U.S.C. § 867a (2012).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

Petitioner was convicted by a court-martial of aggravated sexual misconduct and other crimes. Identity was an essential part of the prosecution's case, and critical proof of identity was DNA evidence. A single analyst at a forensic crime laboratory performed all the testing on the DNA evidence and wrote a formal report stating his conclusions. But that analyst was temporarily unavailable at the time the trial began. Rather than postponing the trial very briefly to enable the reporting analyst to testify at trial, the judge, over defense objections, permitted another analyst, who had not observed any of the testing, to offer his own conclusions. Essential factual predicates for the second analyst's conclusions were assertions made in the report and other testimonial statements by the absent analyst.

Senior Airman CA (the Complainant), who resided in a dormitory on the Grand Forks Air Force Base in North Dakota, celebrated her 21st birthday on December 10, 2010, with a bout of heavy drinking that lasted into the next morning. According to her testimony, she lost memory of several hours but awoke early the next morning while a man was sexually assaulting her. After the assailant left, she reported the incident to a friend, who testified that the Complainant said, "I think it was Katso," referring to the Petitioner, an Airman Basic who also resided on the base. Appendix (App.) 107a-108a. Accordingly, suspicion immediately focused on Petitioner; no other suspect was considered. As it happens, Petitioner had also drunk heavily overnight, enough that he was unresponsive when

criminal investigators came to question him, and he also had no memory of much of the night. In particular, he denied any memory of ever going to the Complainant's room or of engaging in sexual contact with her.

To enable DNA testing, nurses took blood and saliva samples from the Complainant and from Petitioner and also collected a saliva sample from Petitioner (the "known samples"), vaginal and rectal swabs from the Complainant, and swabs from the penile head, penile shaft, and scrotum of Petitioner (the "evidentiary samples"). All these materials were sent in a double-sealed package to the United States Army Criminal Investigation Laboratory (USACIL) in Forest Park, Georgia, which performs forensic testing for all the armed forces. Upon arrival, the outer seal was broken and the evidence was logged in. The case was assigned to a single examiner, Robert Fisher, meaning that he alone had responsibility over the case from that point through the drafting of a final report stating his conclusions.

Accordingly, *assuming Fisher acted according to protocol as later described by another analyst*, he did the following: First, he retrieved the package from the evidence-processing unit. Transcript (Tr.) 186. He then broke the inner seal of the package, inventoried its items, performed a serology test on the evidentiary samples taken from the Complainant to determine whether semen might be found, and then conducted all steps of DNA testing: purifying the DNA, assessing its quantity, amplifying certain areas of the DNA, generating DNA profiles, and then interpreting the results. Tr. 187-89. He then wrote

a report stating his conclusions. Tr. 194. The report asserted that DNA that was almost certainly from Petitioner was found on the vaginal and rectal swabs taken from the Complainant, and that DNA that was almost certainly from the Complainant was found on swabs taken from Petitioner.

Petitioner was charged with aggravated sexual assault, burglary, and unlawful entry, in violation of 10 U.S.C. §§ 920, 929, and 934, respectively, and he was tried by a court-martial on the grounds of the Grand Forks base; the trier of fact was a panel composed of officers and enlisted personnel. The prosecution planned to present Fisher as a live witness, but on April 26, 2011, shortly before trial, he stated that, because his mother was having surgery, he would be unable to travel for several days; ultimately, he said not before May 5. The prosecution declined to ask for a slight postponement. Instead, it announced that it would present the live testimony of David Davenport, another USACIL lab analyst. App. 86a. Davenport had acted as technical reviewer of the report, but he had played no role in the testing or in drafting the report; everything he knew about the case, he knew from Fisher's work product. Indeed, in a suppression hearing, Davenport acknowledged that he would not "be able to tell" if Fisher was dishonest in at least some respects, App. 100a, that he "wouldn't have any knowledge of" whether Fisher departed from laboratory protocol in performing that work if Fisher "didn't write it down," App. 100a, 102a, that he would not be able to answer questions about such undocumented anomalies, App. 102a, and that he would not have any knowledge of whether Fisher's

performance of work contaminated the samples in at least some respects, App. 103a-104a; as the prosecutor summarized a portion of Davenport's testimony, he answered, "Of course not," to the question of whether he could "speak for Mr. Fisher or what Mr. Fisher did." App. 104a. Over Petitioner's objection, based principally on the Confrontation Clause of the Sixth Amendment to the Constitution, the military judge nevertheless allowed Davenport to testify at trial. Davenport did so, on the evening of May 5. He offered his opinion that, to a high degree of probability, Petitioner's DNA was found on swabs taken from the Complainant and that the Complainant's DNA was found on swabs taken from Petitioner. Davenport's trial testimony made clear – and indeed, the prosecutor emphasized – that the factual predicates for his conclusion were completely drawn from the absent analyst's report and other work product. *E.g.*, App. 113a ("Q. And that's your opinion based on your technical review?"), App. 114a ("Q. . . . Based on your review, have you formed an opinion whether DNA was present on Airman [A]'s rectal swab?").

A two-thirds majority of the court found Petitioner guilty on all three charges. He was sentenced to confinement for ten years, a dishonorable discharge, and forfeiture of all pay and allowances.

The United States Air Force Court of Criminal Appeals (AFCCA), however, set aside the findings of guilt and the sentence. The court concluded unanimously that the findings on the first two charges violated Petitioner's rights under the

Confrontation Clause.[1] The court carefully examined this court's decision in *Williams v. Illinois*, 132 S.Ct. 2221 (2012), which it said "provided no clear guidance concerning the extent to which a surrogate expert may testify about testing performed by another analyst." App. 60a. Unlike Williams, the court noted, this case

> involved a jury trial and a known suspect, against whom charges had been preferred, and who was in pretrial confinement for the suspected offense prior to the DNA testing. At the time Mr. Fisher created the DNA profiles, he knew the appellant's identity and further knew the results of his analysis would be turned over to [forensic investigators] for potential prosecution.

App. 62a-63a. And for similar reasons, unlike in *Williams*, the court could not dismiss the possibility that "sample contamination, sample switching, mislabeling, or fraud" could have explained apparently incriminatory evidence; the proper way to assess these possibilities was "confrontation and the crucible of cross-examination." App. 63a n.6. Fisher's report was therefore testimonial, and Davenport "was able to identify [Petitioner] by name only by repeating" Fisher's statement in the report "directly link[ing]" Petitioner "to the generated DNA profile." App. 68a. And "[b]ecause Mr. Davenport repeated testimonial hearsay to the factfinder, [Petitioner's] right to confront Mr. Fisher was

[1] The court also set aside the findings on the third count, for failure to allege an essential element of the crime.

violated." App. 70a. The majority also rejected the Government's argument that the error was harmless. App. 70a-74a. As Senior Judge Marksteiner noted in a concurrence, "it is simply impossible to unring the DNA evidence bell" so as to preclude a "reasonable possibility that Mr. Davenport's testimony might have contributed to the conviction." App. 80a.[2]

A divided panel of the United States Court of Appeals for the Armed Forces (CAAF) reversed. The majority emphasized that Davenport "conducted a thorough review of the entire case file," that he "personally compared" the DNA profiles generated by Fisher's work, and that he "reran the statistical analysis, and formulated his own carefully considered conclusions." App. 4a. It placed emphasis on the fact that, unlike the absent analyst in *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2012), Fisher was not absent because he was "on unpaid leave for unexplained reasons"; rather, he "missed the trial in order to be with his ill mother." App. 22a. The majority operated on the assumption that Fisher's Final Report was testimonial,[3] and it recognized that Davenport relied in part on the

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[2] Senior Judge Orr, dissenting from the conclusion that the error was not harmless, pointed out that at trial Petitioner did not challenge identity. App. 82a-83a. But, as explained in the concurrence, once the military judge ruled that the DNA evidence was admissible, "it would have been beyond benign futility – indeed it likely would have been affirmatively detrimental to the appellant's case" to contest the identity issue. App. 76a.

[3] The Report formally asserted that it contained the findings of Fisher, the signing "Forensic DNA Examiner." App. 4a.

Report.[4] App. 19a. Nevertheless, it concluded that Davenport's testimony did not violate the Confrontation Clause. The court's rationale – which it recognized has been rejected by some other jurisdictions, both federal and state, App. 27a-28a n.7 – was that although Davenport relied crucially on testimonial statements of Fisher, he had formulated his own "independent opinion," App. 26a; he had been able to "satisfy [him]self of the reliability of the results" and that he offered "his own expert opinion" based on "his independent review." App. 29a, quoting in part *State v. Roach*, 95 A.3d 683, 697 (N.J. 2014). In reaching this conclusion, the majority relied on the principle of Mil. R. Evid. 703 – which is identical to Fed. R. Evid. 703 – that expert opinion may be based on information that is not in itself admissible evidence, App. 25a-26a; the majority did not address whether this principle can apply constitutionally when the source on which a prosecution witness relies is testimonial evidence.

Judge Ohlson dissented. He emphasized that Fisher handled all the samples, creating potential for contamination, especially if he did not follow the prescribed protocol, App. 32a-33a, and that this was a point on which Petitioner sought, unsuccessfully, to cross-examine Fisher. App. 33a-34a. Further,

[4] The court also stated that there was no "indication that Mr. Fisher's notes or his other lab results that underlay the Final Report were signed, certified anything, bore indicia of formality, or that Mr. Fisher expected them to be used at trial." App. 17a-18a. Of course, Fisher's notes were used at trial, as an underlying basis for Davenport's testimony, Tr. 214-23, 231, just as they would have been an underlying basis for Fisher's trial testimony, had he appeared at trial.

Davenport's "verification" that Fisher followed the required protocol consisted of reviewing Fisher's out-of-court testimonial assurances that he had done so, assurances that Davenport "effectively repeated" at trial. App. 33a, 37a. Accordingly, denying Petitioner's Confrontation Clause objection "effectively rendered impervious to cross-examination and attack the issue of whether Mr. Fisher contaminated the evidentiary sample." App. 37a. Fisher "knew from the outset[,] when he wrote his notes and conducted his tests, he likely was 'creat[ing] evidence for use at trial,'" App. 39a (quoting in part *Williams*, 132 S.Ct. at 2245 (opinion of Alito, J.)) – and that this evidence was "a central and integral element" of the prosecution case. App. 40a.[5] Accordingly, he concluded that denial of the right to cross-examine Fisher was a violation of the Confrontation Clause requiring reversal.

The majority decision being to the contrary, this petition follows.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURTS ARE IN IRRECONCILABLE CONFLICT ON THE CRUCIAL QUESTION PRESENTED BY THIS PETITION.

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[5] Judge Ohlson also noted correctly that Fisher "should not have been considered unavailable to testify at [Petitioner's] trial," App. 40a – though even if he had it would not avail the prosecution, because Petitioner had no opportunity to cross-examine Fisher. *See Crawford v. Washington*, 541 U.S. 36, 59 (2004).

The issue presented by this case is a critical one that recurs with great frequency, and the lower courts are irreconcilably divided on how to handle it: A forensic lab analyst performs one or more tests, focusing on a known suspect of a crime, and makes testimonial statements concerning the conduct and results of those tests. But for one reason or another, that analyst does not testify at trial, and the accused never has an opportunity to cross-examine him. Instead, the prosecution presents the trial testimony of another analyst, often one employed at the same lab, who did not observe the testing. The testimonial statements of the testing analyst are an essential factual predicate for the trial testimony of the second analyst – and so the Confrontation Clause appears to have been violated. *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011). Is that apparent violation excused if the second analyst, though not having observed the testing, was assigned to review the testing analyst's work, or offers his own opinion as to inferences that may be drawn from the facts reported by the testing analyst?

Many courts have addressed these issues. As CAAF recognized in this case, App. 27a-28a n.7, and as other courts and judges have recognized, the lower courts are in clear conflict – reaching inconsistent and divergent results. *See State v. Michaels*, 95 A.3d 648, 676-77 (N.J. 2014) (suggesting a four-part split in the lower courts); *Marshall v. People*, 309 P.3d 943, 947 n.8 (Col. 2013); *id.* at 953 (Bender, C.J., concurring in part and dissenting in part); *United States v. Turner*, 709 F.3d 1187, 1189, 1193 (7th Cir. 2013) (explaining that "the divergent analyses and conclusions of the plurality and dissent [in *Williams*]

sow confusion as to precisely what limitations the Confrontation Clause may impose when an expert witness testifies about the results of testing performed by another analyst, who herself is not called to testify").

Numerous courts have applied the ordinary principles of confrontation: If a person makes a testimonial statement that is used against an accused at trial for the truth of what it asserts, that person must testify in the presence of the accused, under oath and subject to cross-examination. Thus, if the only source for an essential factual predicate of the trial testimony of a prosecution expert lies in the testimonial statement of another expert who has not been subject to confrontation – the expert who testifies at trial did not personally observe the matters reported by the other one – then there is a Confrontation Clause violation. That the trial expert may have had a role as supervisor or reviewer of the testing analyst's report or other testimonial statement does not excuse the violation. Neither does the fact that the trial expert presents his own opinion as to inferences that may be drawn from factual assertions made in the testing analyst's testimonial statement.[6]

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[6] *United States v. Ignasiak*, 667 F.3d 1217, 1229-35 (11th Cir. 2013) (Confrontation Clause violated by allowing chief medical examiner and records custodian to testify to opinion based on autopsy reports that she did not perform or observe); *United States v. Moore*, 651 F.3d 30, 71-72 (D.C. Cir. 2011) (holding Confrontation Clause was violated by admission of report that in-court witness reviewed; witness did not observe the testing and assumed that the testing analyst did the tests noted on his worksheet); *Martin v. State*, 60 A.3d 1100, 1108 (Del.2013)

The CAAF decision is one of many that stand in sharp contrast to these decisions. CAAF believed that it was sufficient to avoid a Confrontation Clause violation here that Davenport, the analyst who testified in court, had a reviewing role with respect to the formalized report and offered an "independent"

(holding that "the defendant has the right to confront the testing analyst as well [as the certifying analyst], where the certifying and testing analyst are not the same person and the certifying analyst does not observe the testing process"); *State v. Navarette*, 294 P.3d 435, 436 (N.M. 2013) ("the statements in the autopsy report were related to the jury as the basis for the pathologist's opinions and were therefore offered to prove the truth of the matters asserted"); *Jenkins v. United States*, 75 A.3d 174, 184 (D.C.2013) (violation of confrontation right in allowing testimony by lab supervisor who prepared report asserting DNA match on the basis of findings by other lab analysts); *Burch v. Texas*, 401 S.W.3d 634, 637 (Tex. Crim. App. 2013) (supervisor testifying in court had no "personal knowledge that the tests were done correctly or that the tester did not fabricate the results"; "[s]he could say only that the original analyst wrote a report claiming to have conformed with the required safeguards"); *Derr v. State*, 29 A.3d 533, 553 (Md. 2011) (holding that "the Confrontation Clause prohibits the admission of . . . testimonial statements [made by out-of-court analysts] through the testimony of an expert who did not observe or participate in the testing"). This Court vacated the decision in *Derr* for reconsideration in light of its decision in *Williams*. *Maryland v. Derr*, 133 S.Ct. 63 (2012). On remand, the Maryland court held that the statements involved in that case – which, like *Williams*, involved a cold hit – were not in fact testimonial, a conclusion that does not undercut the general assertion quoted above. 73 A.3d 254 (2013), cert. denied, 134 S.Ct. 2723 (2014). *See also United States v. Soto*, 720 F.3d 51, 60 (1st Cir. 2013) (Confrontation Clause violation where out-of-court testimonial statement "bolstered" trial witness's independent conclusion).

opinion. It did not matter to CAAF that, Davenport not having personally observed any of the testing, essential factual predicates for his opinion lay in testimonial statements made by an analyst who never confronted the accused. App. 28a-29a. Numerous courts share CAAF's view. Though one might try to discern subtle distinctions among their decisions, they all agree with the basic holding of CAAF: They believe that if one analyst makes a report or other testimonial statement but does not testify subject to confrontation, a surrogate analyst who performs some sort of reviewing role may testify to the surrogates' own opinion, even though it is necessarily based on the truth of the first analyst's testimonial statements as to factual matters that the surrogate did not personally observe.[7]

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[7] *E.g.*, *State v. Griep*, 863 N.W.2d 567 (Wis. 2015), *petition for cert. pending*, No. 15-126 (testing analyst on leave at time of trial; section chief from lab reviews report and offers "independent opinion" as to results of blood alcohol test; held that "the review necessary to protect a defendant's right of confrontation need not be formal peer review"); *State v. Michaels*, 95 A.3d 648, 651 (N.J. 2014) ("[W]e join the many courts that have concluded that a defendant's confrontation rights are not violated if a forensic report is admitted at trial and only the supervisor/reviewer testifies and is available for cross-examination, when the supervisor is knowledgeable about the testing process, reviews scientific testing data produced, concludes that the data indicates the presence of drugs, and prepares, certifies, and signs a report setting forth the results of the testing."); *Marshall v. People*, 309 P.3d 943, 947-48 (Col. 2013); *Jenkins v. State*, 102 So.3d 1063, 1069 (Miss. 2012) ("While Gross was not involved in the actual testing, he reviewed the report for accuracy and signed the report as the 'case technical reviewer.'"); *State v. McLeod*, 66 A.3d 1221, 1230 (N.H. 2013) ("the Confrontation Clause is not violated when an

This conflict has persisted since the decision in *Bullcoming*. Though propositions confirmed by a majority of the Court in *Williams v. Illinois*, *supra*, show the error of the CAAF decision, *see infra*, Part II, the 4-1-4 split in *Williams* has meant that the lower courts have derived very little guidance from the case. Indeed, it has become virtually commonplace for courts – including both AFCCA and CAAF in this case – to note that point.[8] The result in *Williams* may help in a case closely resembling it, in which there is no prior suspect and the DNA evidence leads to a "cold hit." But that is not this case. *See infra*, Part II. Nor is it the majority of cases since *Williams*. Intervention by this Court is

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expert testifies regarding his or her independent judgment, even if that judgment is based upon inadmissible testimonial hearsay"); *Commonwealth v. Yohe*, 79 A.3d 520, 540-41 (Pa. 2013), *cert. denied*, 134 S.Ct. 2662 (2014); *State v. Brewington*, 743 S.E.2d 626 (2013), *cert. denied*, 134 S.Ct. 2660 (2014); *Ledger v. Georgia*, 732 S.E.2d 53, 60 (Ga. 2012).

[8] *See* App. 26a (CAAF majority); App. 31a-32a (Ohlson, J., dissenting); App. 60a (AFCCA majority). *Accord*, *e.g.*, *United States v. Maxwell*, 724 F.3d 724, 727 (7th Cir. 2013); *United States v. Pablo*, 696 F.3d 1280, 1293 (10th Cir. 2012); *State v. Norton*, 117 A.3d 1055, 1069-71 (Md. 2015) (gathering cases and summarizing disparate treatment of *Williams*); *State v. Stanfield*, 347 P.3d 175, 184 (Idaho 2015); *Young v. United States*, 63 A.3d 1033, 1043 (D.C. Cir. 2013); *Jenkins v. United States*, 75 A.3d 174, 184 (D.C. 2013); *State v. Ortiz-Zape*, 743 S.E.2d 156, 161 (N.C. 2013) ("lack of definitive guidance"), *cert. denied*, 134 S.Ct. 2660 (2014); *State v. Michaels*, 95 A.3d 648, 665 (N.J. 2014); *Martin v. State*, 60 A.3d 1100, 1104 (Del. 2013); *People v. Lopez*, 286 P.3d 469, 483 (Cal. 2012) (Liu, J., dissenting).

the only way that the conflicts reflected in this case will be resolved.

II. THE CAAF DECISION WAS WRONG AND OFFERS AN EASY PATH FOR VIOLATION OF THE CONFRONTATION RIGHT.

The decision of CAAF is fundamentally wrong as a matter of Confrontation Clause doctrine recently elucidated by this Court. But the problem is worse than that: The CAAF decision presents an easy path for prosecutors to evade the confrontation right. It was Fisher whose testimonial statements – both in his Final Report and in the work leading up to it[9] – describing matters that he observed firsthand provided the essential facts that underlay the opinion that was a crucial aspect of the prosecution's case. And so it was Fisher who should have testified subject to confrontation. But it was mildly inconvenient for Fisher to testify at trial – no more than that, because a very short continuance would have allowed him to do so. And so the prosecution substituted another analyst, Davenport, who had not

[9] Fisher's preliminary writings were not only made in anticipation of his Final Report but, like that Report, were clearly made, as the AFCCA decision recognized, App. 62a-63a, with the anticipation of providing evidence against Petitioner, the only suspect ever considered in the case; the solemnity of the setting was as clear as could be. *Cf. State v. Norton*, 117 A.3d 1055, 1073 (Md. 2015) (attempting to synthesize *Williams* by holding that a statement is testimonial either if it "is formal, as analyzed by Justice Thomas . . . or, if not, whether it is accusatory, in that it targets an individual as having engaged in criminal conduct, under Justice Alito's rationale").

observed the testing, and who indeed had no role in the case until the draft report was complete.

If the CAAF decision is correct, then, notwithstanding *Bullcoming*, a prosecution that can call on the cooperation of a forensic lab never need present the analyst whose testimonial statements are critical to its case. Instead, it can present the in-court testimony of some other analyst – "the analyst-witness of [the prosecutor's dreams]," *Williams*, 132 S.Ct. at 2272 (Kagan, J., dissenting) – who is formally designated as a reviewer or supervisor and who examines all the work product of the testimonial analyst, and it then can ask that analyst for an "independent" opinion as to the conclusion that can be drawn from that material. *See id.* (summarizing the approach – "If the Confrontation Clause prevents the State from getting its evidence in through the front door, then the State could sneak it in through the back." – and noting that five Justices reject it). But in fact CAAF was wrong; the Confrontation Clause does not tolerate such an evasive procedure.

At the outset, it is important to recognize the sharp differences between this case and *Williams* that make it clear that the Final Report, together with Fisher's statements in preparation of it, was testimonial. Here, in contrast to *Williams*, the report was produced, and indeed all the testing was done, after the eventual accused had been identified as a suspect, compare *Williams*, 132 S.Ct. at 2242-43 (opinion of Alito, J.), and indeed as the only person the authorities ever targeted as a suspect in the case. Here, in contrast to *Williams*, the report was plainly sought "for the purpose of obtaining evidence to be

used against petitioner," not "for the purpose of finding a rapist who was on the loose." *Id.* at 2228. Here, in contrast to *Williams*, the DNA profiles to which the report referred were "inherently inculpatory." *Id.* In *Williams*, the Cellmark lab produced a profile that, taken by itself, proved nothing and pointed to nobody; that profile tended to prove Williams's guilt only in conjunction with another profile taken from Williams at another time and by another lab. Here, Fisher reported facts indicating that, in samples taken from the Complainant and from the Petitioner, the DNA of both was present; it is hard to imagine anything more inculpatory. Finally, in *Williams*, the possibility was "beyond fanciful" that some error, intentional or accidental, could have led to the production of a profile that happened to match that of a person who happened to live in the vicinity of the crime and who, as it later turned out, was implicated by other evidence. *Id.* at 2245. Here, by contrast, one analyst performed all the tests on all the samples, knowing full well what result the authorities were seeking. [10] Especially in light of the well-known history of critical errors by forensic labs,[11] both intentional and accidental – a history in

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[10] Furthermore, in this case, unlike *Williams*, the trier of fact was a panel composed of laypeople. *Cf.* 132 S.Ct. at 2234, 2236-37 (emphasizing that *Williams* was a bench trial and that the judge would understand that certain evidence was not admitted for the truth of the matter asserted).

[11] *See, e.g.*, ERIN E. MURPHY, INSIDE THE CELL: THE DARK SIDE OF FORENSIC DNA (forthcoming, Oct. 6, 2015). WILLIAM C. THOMPSON, *Forensic DNA Evidence: The Myth of Infallibility*, in

which the very lab involved in this case figures very prominently[12] – the Court cannot put aside a claim of

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SHELDON KRIMSKY & JEREMY GRUBER, eds., GENETIC EXPLANATIONS: SENSE AND NONSENSE 227 (2013). Murphy says:

> By now, tales of forensic science failures are as common in the newspapers as tales of forensic science successes. . . . In fact, nearly every major DNA unit, from the most applauded and sophisticated to the most amateur and haphazard, has endured a scandal of some kind.

Murphy, *supra*, at 53. *Accord*, Thompson, *supra*, at 229 (reports of errors – which "may be the tip of an iceberg of undetected or unreported error" – "are sufficiently numerous to refute claims that errors are extremely rare or unlikely events"). Murphy emphasizes "the simple ease with which contamination may occur":

> Study after study has shown that DNA has a way of ending up where it should not be. And as labs process more low-quantity samples, even the slightest amount of contamination may compromise the entire test result.

Murphy, *supra*, at 56. *Accord*, Thompson, *supra*, at 229-30 (cross-contamination of samples is "a common problem in laboratories"). And, Murphy says,

> [T]here are also far too many stories of deliberate fraud. These acts tend to derive from sheer laziness, a desire to appear industrious, or an attempt to mask incompetence.

Murphy, *supra*, at 67-68. Thompson adds another explanation: "The guilty analysts" – including one at the lab involved in this case – "appear to have been motivated partly by a desire to help police and prosecutors convict the 'right' people." Thompson, *supra*, at 239.

[12] As summarized by Thompson, *supra*, at 238:

a Confrontation Clause violation by simply assuming the truth of testimonial statements made by Fisher. *See Williams*, 132 S.Ct. at 2264-65 (Kagan, J., dissenting) ("[T]he Confrontation Clause prescribes a particular method for determining whether [forensic evidence has been properly produced]. . . . Cross examination of the analyst is especially likely to reveal whether vials have been switched, samples contaminated, tests incompetently run, or results inaccurately recorded.")

It is also important to understand what Petitioner does not contend. Petitioner does not contend that it would be improper for Davenport to testify to his opinion if the facts underlying that opinion were properly proven, or if he relied on information learned other than through testimonial statements made by a witness not subject to confrontation. Nor does Petitioner contend that there is a confrontation right with respect to the output of a machine. Nor does he contend that in a case of this sort the Confrontation Clause requires everyone who handles DNA evidence (if the lab

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> A multi-year investigation by the McClatchy news organization, beginning in 2005, revealed that an analyst at the U.S. Army Criminal Investigation Laboratory had a history of cross-contaminating samples, had violated laboratory protocols, and had falsified test results. An independent investigation found significant problems in one-quarter of all the cases this analyst had handled. Laboratory managers failed to disclose these problems to lawyers involved in the relevant cases and took other steps to cover up these problems.

chooses to organize itself so that multiple people handle it) to testify.

Rather, Petitioner's argument is based on the fundamental proposition that if the prosecution uses a testimonial statement to prove the truth of a proposition asserted in the statement, then the accused must have an opportunity to be confronted with the witness who made that statement. In this case, statements by Fisher were plainly essential predicates for any opinion concerning the DNA evidence: If Fisher did not perform the tests he said he did on the samples he said he did, or if he purposely corrupted the samples (a possibility Davenport expressly acknowledged[13]), then no opinion about matching profiles would have any value whatsoever.[14] Moreover, if he did not follow the lab's protocol, so as to minimize the chance of accidental contamination, then the value of any such opinion would be severely impaired. Davenport did not know the truth with respect to these propositions from personal knowledge[15]; plainly, he relied, at least

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[13] Asked by the prosecutor whether cross-contamination of an unknown sample by using a known sample was possible, Davenport replied, "Sure." App. 105a.

[14] The prosecutor conceded that testimonial hearsay was part of the basis for Davenport's opinion. Tr. 253 ("Mr. Davenport's independent opinion based on his review of *not only* . . . testimonial hearsay . . .").

[15] The CAAF majority asserted:

> Mr. Davenport relied on his own analysis of the data to rule out certain mistakes, such as contamination, that would produce unusual or

in significant part, on Fisher's testimonial assertions as to them.[16]

> illogical results. For example, Mr. Davenport testified that had the swabs from the victim been contaminated with the known samples from Appellee, he would have noticed a male non-semen DNA profile on the swabs.

App. 19a. Petitioner does not concede that Davenport could determine – without relying on the truth of assertions by Fisher – that certain violations of protocol, intentional or unintentional, that would produce "illogical" results did not occur. But even assuming that is so, Davenport plainly did not testify, and could not have plausibly maintained that without relying on Fisher's statements he could determine that no violations of protocol occurred – and that there was no contamination.

For example, if Fisher had simply rubbed the vaginal swabs together with the penile swabs, there could have been contamination and Davenport would have no way of knowing about it. In fact, it appears that Davenport only testified that if the known sample taken from Petitioner were switched with the evidence sample taken from Complainant, that would produce an illogical and detectable result, Tr. 232, and that if someone else's semen were substituted for Petitioner's in the evidence sample, then it would not "match the people involved in the case." Tr. 233. Of course, if that other person's known sample were also switched with Petitioner's, then it would appear to match the people "involved in the case."

[16] Fisher's testimonial statements were not formally introduced, but that does not matter; it has never been true that a statement raises a Confrontation Clause problem only if introduced verbatim, and such a rule would eviscerate the protections of the Clause. Note that in *Williams*, the in-court witness "did not quote or read from the report" 132 S.Ct. at 2230 (opinion of Alito, J.). Nevertheless, five members of this Court recognized that the prosecution "'elected to introduce' the

How, then, could Davenport testify to his opinion without Fisher testifying subject to cross-examination? The CAAF majority indicates that the fact that Davenport was assigned as a reviewer of the report is a crucial consideration. But it cannot be. Davenport had no role in the case until the Final Report was drafted; he never observed any of the underlying factual matters reported by Fisher. (If he had observed the testing, even if he did not perform it or write the report, this case would be altogether different, because then his opinion could be based on his own personal knowledge rather than on Fisher's testimonial statements.) Moreover, if Davenport's status as a reviewer excused what would otherwise be a Confrontation Clause violation, a forensic lab could simply pick its preferred witnesses, designate them as reviewers, and present their live testimony at trial rather than that of the analysts who personally observed the matters and made the testimonial statements crucial to the case.

The CAAF majority also relied on the fact that Davenport offered what he called "independent" opinions. But no matter how many times Davenport

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substance of Cellmark's report into evidence" through that witness, 132 S.Ct. at 2268 (Kagan, J., dissenting) (quoting in part *Bullcoming*, supra, 131 S.Ct. at 2716, thus implicating the Clause. *See Martin v. State*, 60 A.3d 1100, 1107 (Del. 2013) (concluding, where in-court expert, Wert, "relied on" statements by out-of-court expert, Smith, in forming opinion, that "the State introduced the substance of Wert's statements during Smith's testimony"); *State v. Navarette*, 294 P.3d 435, 439 (N.M. 2013) (holding, on the basis of five Justices' votes in *Williams*, that Confrontation Clause was violated where autopsy report was not formally offered into evidence but statements in it were disclosed as the basis for in-court witness' opinion).

recited the mantra that his opinions were independent – and he did many times – those opinions were independent only in the sense that he drew his own inferences, but *based on the facts determined and reported by Fisher*. Davenport's presentation of his own opinion did not nullify the fact that the prosecution relied on Fisher's factual observations and testimonial reports.

"[W]hen a witness, expert or otherwise," bases a conclusion on an out-of-court statement, "the statement's utility is then dependent on its truth," *Williams*, *supra*, 132 S.Ct. at 2268 (Kagan, J., dissenting); there is thus no effective difference between using the statement for its truth and using it as support for the expert's opinion. *Id.* at 2268-69 (asserting that five Justices agree on the point); *accord*, *id.* at 2257 (Thomas, J., concurring in the judgment) ("There is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth.").[17]

The CAAF majority nevertheless relied on the principle underlying Mil. R. Evid. 703, which is identical to Fed. R. Evid. 703[18]: An expert may present an opinion that relies on evidence not

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[17] A somewhat narrower proposition, which leads to the same result in this case, is that when an opinion depends on the truth of an out-of-court statement, using the statement to support the opinion necessarily entails using it for its truth.

[18] The CAAF majority quoted the form of the rule that was in effect at the time of trial; the rule has since been restyled to match the restyled Federal Rule.

otherwise admissible if it is of a type reasonably relied on by experts in the field. Petitioner does not dispute the usefulness in many contexts of Rule 703. But it must be recognized that this is not a traditional rule of evidence.[19] On the contrary, it was, as its drafters recognized, contrary to the common law. *Williams*, 132 S.Ct. at 2257 (Kagan, J., dissenting); Reporter's Memorandum No. 4, Advisory Committee on Evidence, p. 7 (c. 1965), available at <https://www.law.umich.edu/facultyhome/richardfriedman/Documents/4. Art 7 1st draft.pdf>. This rule cannot be constitutionally applied when an expert testifying against an accused at trial relies on an out-of-court testimonial statement; otherwise, the obvious effect would be to allow the out-of-court witness to testify without being subjected to confrontation.

Indeed, if the CAAF decision were correct, it is hard to see what limits there could be: If the law of the jurisdiction allowed, an expert could testify to an opinion of guilt, basing the opinion on out-of-court testimonial statements of any sort, so long as the expert testified that experts in the field reasonably relied on statements of that sort. This would represent not only a flagrant violation of the confrontation right but a fundamental alteration of the way in which criminal trials have always been conducted in the common-law system.

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[19] For all its defects, the justly repudiated doctrine of *Ohio v. Roberts*, 448 U.S. 56 (1980), by referring to "firmly rooted" hearsay exceptions, at least attempted to adhere to traditional principles. But the approach adopted by CAAF here attempts to constitutionalize a procedure, contrary to well established prior practice, that was developed in the late twentieth century.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR CONSIDERATION OF THE QUESTION PRESENTED.

This case raises the Question Presented in a clean and crisp form. The case arises on direct appeal. This Court's jurisdiction is clear. The issue was explicitly preserved at the trial level and since. There can be no serious doubt that the error was prejudicial. Apart from the DNA evidence, the only proof of identity was identification by the Complainant. She observed the assailant only in the dark, having just been awakened after a night of heavy drinking, and her first statement, immediately after the incident, was that she thought the Petitioner was the perpetrator. App. 107a-108a. Indeed, at the suppression hearing, the prosecutor announced that, if the trial judge excluded the evidence, he would consider taking an interlocutory appeal; especially given the darkness of the room, he explained, the DNA evidence was important to the Government's case. App. 106a-107a. ("[T]he identity would be an issue. She said that it was a dark room. She identified Katso, but the defense would challenge that so the confirmation of that identity through the DNA testing would be a substantial piece of evidence.")

Perhaps even more fundamentally, the basic structure of this case makes it an excellent vehicle for consideration of the Question Presented. Despite the fact that this case involves DNA evidence, a particularly complex form of forensic lab testing, only one analyst performed all the tests and made all the testimonial statements at issue. App. 98a. There is,

therefore, no concern here that vindicating the confrontation right would require a parade of trial witnesses from the lab. (And, indeed, the fact that this major lab organized its work this way indicates that others could do the same, effectively eliminating the supposed multi-witness problem.) The Government sent one analyst from Georgia to testify at trial in North Dakota, and Petitioner does not suggest that it needed to have sent more than that. Moreover, the one analyst who should have testified at trial could have done so if there had been a very brief continuance. The CAAF decision therefore reflects a view that, for virtually any reason at all, a prosecution can, rather than presenting the live testimony of the person who made the testimonial statements on which its case fundamentally relies, pick an expert who can testify to an opinion for which those statements are essential predicates.

Thus, this case presents as starkly as can be the consequences of a frequently recurring issue on which the lower courts are in clear conflict.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully Submitted,

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