No. 13-633

In The
Supreme Court of the United States

MARIO EDUARDO ORTIZ-ZAPE,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF AMICUS CURIAE NORTH CAROLINA ADVOCATES FOR JUSTICE IN SUPPORT OF PETITIONER

M. Gordon Widenhouse, Jr.
Counsel of Record
RUDOLF WIDENHOUSE & FIALKO
312 West Franklin Street
Chapel Hill, North Carolina 27516
(919) 967-4900
mgwidenhouse@RWF-law.com

Counsel for Amicus Curiae *Dated: December 26, 2013*

THE LEX GROUP^{DC} ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
(202) 955-0001 ♦ (800) 856-4419 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

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INTEREST OF *AMICUS CURIAE*

With the consent of all parties,[1] the North Carolina Advocates for Justice (NCAJ) submits its brief in support of petitioner. NCAJ is a nonprofit, nonpartisan association that has dedicated itself to protecting people's rights through advocacy and education for more than fifty years. Part of NCAJ's mission is to champion the rights of those accused of crime. Nearly 800 criminal defense attorneys are NCAJ members, representing the accused of crimes in federal and state courts every day. In submitting this brief, NCAJ seeks to help the Court understand generally how the North Carolina criminal justice process works and specifically how the North Carolina courts have struggled, as have courts around the nation, with the application of the constitutional right to confront witnesses in the wake of this Court's decisions from *Crawford v. Washington*, 541 U.S. 36 (2004), through *Williams v. Illinois*, 132 S. Ct. 2221 (2012).[2]

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[1] The parties were notified of NCAJ's intention to file its brief of *amicus curiae* within the time provided by Supreme Court Rule 37.2(a). All parties have given blanket consent to the filing of amicus briefs in this matter by letter filed with the Clerk of this Court. As required by Rule 37.6, NCAJ states that no counsel for a party authored this brief in whole or in part, and that no counsel or party made a monetary or in kind contribution intended to fund the preparation or submission of this brief. No person other than NCAJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] The lineage from *Crawford* to *Williams* includes *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); and *Davis v. Washington*, 547 U.S. 813 (2006).

Throughout its more than fifty-year history, NCAJ has pursued actively an effort to impact the judicial and legislative decisions in ways that benefit the people its members represent. In particular, its Criminal Defense Section, the largest single section in the organization, has endeavored to be a forceful advocate for those accused of crimes, both by urging a resort to fundamental constitutional principles and a fair interpretation of the laws. In particular, it has been extremely active in educating its members about the proper role of the Confrontation Clause and in assisting the courts through the submission of amicus briefs on this subject.

SUMMARY OF THE ARGUMENT

This Court should erase the confusion that has engulfed the lower courts that have tried to apply the fractured decision in *Williams v. Illinois*, 132 S. Ct. 2221 (2012). This outgrowth from *Williams* primarily resulted from a plurality opinion with only four votes for its rationale, a dissenting opinion of four votes for a diametrically opposite rationale, and a fifth concurring opinion agreeing only with plurality's result but which also concurred with much of the dissent's constitutional analysis. This disagreement among the members of this Court as to the proper interpretation and application of the Confrontation Clause has left the lower courts in disarray.

Specifically, this Court needs to clarify what is testimonial with respect to expert opinion that based in whole or insubstantial part on the analysis and opinion of an out-of-court expert. This case presents the scenario in which the issue can be definitely

resolved. First, the trial below was to a jury and not to the bench. Second, the testifying expert did not render her own opinion based on her observations or consideration of the testing by the non-testifying expert. Third, the out-of-court report and analysis were affirmed by affidavit of the non-testifying analyst. Fourth, the testifying expert did not conduct, assist in, or observe the testing and analysis by the non-testifying expert. This Court should grant certiorari to decide this important question.

ARGUMENT

NCAJ agrees with and joins in the arguments of petitioner. This case presents an optimal opportunity for this Court to remedy the confusion that has confounded the lower federal and state courts in their effort to apply the fractured decision in *Williams v. Illinois*, 132 S. Ct. 2221 (2012). The splintered result in *Williams* primarily resulted from a plurality opinion that commanded only four votes for its rationale, a dissenting opinion that garnered four votes for a diametrically opposite rationale, and Justice Thomas' concurring opinion that agreed with plurality's result but adopted much of the dissent's constitutional analysis. This disagreement among the members of this Court as to the proper interpretation and application of the Confrontation Clause has left the lower courts in disarray.[3] *See generally United*

[3] Indeed, there are multiple petitions for review pending before this Court involving some variation of an issue involving the proper interpretation of *Williams* via-a-vis the Confrontation Clause. *See*, *e.g.*, *Medina v. Arizona*, No. 13-735 (filed 17 December 2013); *Cooper v. Maryland*, No. 13-644 (filed 22 November 2013); *Derr v. Maryland*, No. 13-637 (filed 20 November 2013); *James v. United States*, No. 13-632 (filed 22

States v. James, 712 F.3d 79, 95-96 (2d Cir. 2013) (divided opinions in *Williams* do not "yield a single, useful holding relevant to the case before us").

This Court needs to clarify what is testimonial in and delineate the contours of a testifying expert's opinion that based in whole or insubstantial part on the analysis and opinion of a non-testifying expert. This case presents the scenario in which the issue can be definitely resolved. First, the trial below was to a jury and not to the bench. Second, the testifying expert did not render her own opinion based on her observations or consideration of the testing by the non-testifying expert. Third, the out-of-court report and analysis were affirmed by affidavit of the non-testifying analyst. Fourth, the testifying expert did not conduct, assist in, or observe the testing and analysis by the non-testifying expert. The very issue upon which this Court granted review in *Williams*, but which was not finally resolved, is presented here. This Court should grant certiorari to decide this important question.

Specifically, the North Carolina courts have struggled with the proper interpretation of *Crawford* and its progeny. In this very appeal, the decision was sharply divided, with four justices finding no confrontation violation after *Williams* and two justices finding a prejudicial confrontation violation.[4] *State v.*

November 2013); *Brewington v. North Carolina*, No. 13-504 (filed 17 October 2013); *Turner v. United States*, No. 13-167 (filed 29 July 2013).

[4] The seventh justice had been on the panel of the North Carolina Court of Appeals when it decided this case and, pursuant to the lower court's practice, did not participate in the

Ortiz-Zape, 743 S.E.2d 156 (N.C. 2013). The lack of a definitive resolution of the confrontation claim in *Williams* has been disruptive to the constitutional rights of the accused and to the fair and consistent administration of justice.[5] As petitioner himself observed, "the fractured *Williams* decision perpetuates an end run around *Crawford*, *Melendez-Diaz*, and *Bullcoming*." Petition for Writ of Certiorari at 13, *Ortiz-Zape v. North Carolina*, No. 13-633. Given the reluctance of the North Carolina courts to apply this Court's confrontation jurisprudence in a forthright manner since *Crawford*, as explained more fully below, this case presents an excellent vehicle through which to clarify the confusion wrought by the fractured ruling in *Williams*.

I. The Divided Result in *Williams v. Illinois* Has Proved Unwieldy and Disruptive.

As noted above, the fractured decision in *Williams* has resulted in at least six petitions for review, aside from the one filed by petitioner, which are now pending before this Court. These filings illustrate confusion among the lower courts as to the proper interpretation of the Confrontation Clause after *Williams*. Justice Kagan forecasted this likely

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decision of the Supreme Court of North Carolina. When the Court of Appeals considered this case, she found a violation of the Confrontation Clause albeit before the decision in *Williams*. *State v. Ortiz-Zape*, 714 S.E.2d 275 *2-3 (N.C. App. 2011) (unpublished), *rev'd*, 743 S.E.2d 156 (N.C. 2013).

[5] As explained in more detail below, the situation in North Carolina has remained in flux because of the inability of the lower courts to definitely interpret *Williams*.

conundrum in her dissenting opinion. She lamented, the *Williams* plurality "left significant confusion in [its] wake" because of an apparent desire to retreat from the *Crawford*, *Melendez-Diaz*, and *Bullcoming* trilogy, resulting in a view of "who knows what" because "no proposed limitation commands the support of a majority." *Williams*, 132 S. Ct at 2277 (Kagan, J., dissenting). Her warning proved correct. As the Second Circuit noted, it could not discern a single holding from *Williams* relevant to the matter before it. *James*, 712 F.3d at 95-96; *accord United States v. Turner*, 709 F.3d 1187, 1189 (7th Cir.), *certiorari pending*, No. 08-3109 (4 March 2013) (describing fractured result in *Williams* "somewhat challenging to apply").

In particular, North Carolina courts have experienced significant difficulty in discerning the application of *Williams*. On 27 June 2013, the Supreme Court of North Carolina decided seven cases involving the Confrontation Clause, which it had heard together in oral argument several months earlier. *See State v. Craven*, 744 S.E.2d 458 (N.C. 2013); *State v. Williams*, 744 S.E.2d 155 (N.C. 2013); *State v. Brewington*, 743 S.E.2d 626 (N.C.), *certiorari pending*, No. 13-127 (17 October 2013); *State v. Hough*, 743 S.E.2d 174 (N.C. 2013); *State v. Hurt*, 743 S.E.2d 173 (N.C. 2013); *State v. Ortiz-Zape*, 743 S.E.2d 156 (N.C. 2013); *State v. Brent*, 743 S.E.2d 152 (N.C. 2013). Each case had previously been decided by the North Carolina Court of Appeals; each case had previously resulted in a ruling in favor of the defendant except for *Hough*.[6]

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[6] Only in *Craven* did the defendant prevail in the Supreme Court of North Carolina on his confrontation Clause claim. As

The Supreme Court of North Carolina had held the state's petitions for review in many of these cases for several years. It was ostensibly awaiting this Court's decisions: first in *Melendez-Diaz*, then in *Bullcoming*, and finally in *Williams*. Over the years and throughout the course of the multifaceted litigation, fourteen justices and judges in the state's appellate division participated in these cases. In the final analysis, the Supreme Court of North Carolina was as splintered as was this Court in *Williams*, with *Ortiz-Zape* decided 4-2 (with one justice not participating) and *Brewington* decided 4-3.[7]

This set of disjointed opinions is hardly surprising, as North Carolina did not come quietly into the new world of confrontation under *Crawford* and its progeny. From the outset, North Carolina courts misapplied *Crawford*. *See*, *e.g.*, *State v. Lewis*, 360 N.C. 1, 619 S.E.2d 830 (2005) (no

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the lower court properly recognized, the testifying expert "merely parroted" the opinion and analysis of the non-testifying analyst. 744 S.E.2d at 462.

[7] *Brent* was reversed because a majority of the lower court found he failed to preserve the confrontation claim and waived review of the issue, with three justices expressly disavowing any of the dicta involving confrontation. 743 S.E.2d at 154. *Hough* was left standing without precedential value, pursuant to the procedure of the state supreme court, when one justice did not participate (because she was on the panel of the Court of Appeals that decided the case) and the remaining members of the court were equally divided. 743 S.E.2d at 174. *Hurt* was reversed in a *per curiam* decision based on *Ortiz-Zape*, with three justices dissenting. 743 S.E.2d at 173. *Williams* was reversed because the confrontation error was deemed harmless beyond a reasonable doubt due to the defendant himself testifying and identifying the controlled substance as cocaine, with one justice dissenting. 744 S.E.2d at 125.

confrontation violations), *vacated and remanded*, *Lewis v. North Carolina*, 126 S. Ct. 2983 (2005), *on remand*, 648 S.E.2d 824 (N.C. 2007) (*reversing and ordering new trial*); *State v. Forest*, 596 S.E.2d 22 (N.C. App. 2004) (no confrontation violation with one judge dissenting), *aff'd per curiam*, 359 N.C. 424, 611 S.E.2d 833 (2005), *vacated and remanded*, *Forest v. North Carolina*, 126 S. Ct. 2977, *on remand*, 636 S.E.2d 656 (N.C. 2006) (*vacating and dismissing as moot*).[8] *Crawford* had proved complicated to apply,

[8] In *Forest*, police were dispatched to a house where they believed the defendant was present and armed with a knife and gun. They observed him walk in and out of the house several times holding a knife against the victim's back and throat. Eventually the police restrained and arrested him. 596 S.E.2d at 23-24. At trial, the victim did not testify. Rather, the prosecution introduced the testimony of a police detective who interviewed the victim after police had arrested *Forest* rescued her and secured the scene. When he interviewed the victim, the detective was attempting to gather evidence against defendant. The victim did not speak to the detective in an effort to obtain assistance. *Id*. at 28. Ruling after *Crawford*, but before *Davis*, a majority of the Court of Appeals found this hearsay statement was properly admitted and did not violate *Crawford* because it was similar to a victim's telephone call to 911 for assistance. *Id*. at 27. The Court of Appeals determined the victim's statements concerning her kidnapping and violent assault were not testimonial because they were made immediately after the police rescued her leaving no time for reflection and were initiated by her. She was nervous, shaking, and crying and "immediately abruptly started talking." Her demeanor never changed during the conversation with the detectives. *Id*. at 26-28. The Supreme Court of North Carolina affirmed in a *per curiam* decision. 611 S.E.2d at 833. But this Court vacated and remanded in light of *Davis*, which clarified what was considered "testimonial." On remand, and applying *Crawford* and *Davis*, the Supreme Court of North Carolina vacated the opinion of the Court of Appeals. 636 S.E.2d at 565.

particularly in the area of expert testimony.[9] *Compare Martin v. State*, 936 So. 2d 1190 (Fla. Dist. Ct. App. 2006) (holding a laboratory report was testimonial); *with Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005) (holding certificates of

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Lewis involved two statements potentially implicating *Crawford*: (1) a statement by the victim to the police officer at the scene after the perpetrator had left the scene; and (2) a statement by the victim during a later photographic line-up to another police officer at the hospital. *Lewis*, 603 S.E.2d at 561. The trial court admitted these statements under the residual exception to the hearsay rule. *See* N.C. R. Evid. 804. On appeal, the Court of Appeals held both statements were testimonial. 603 S.E.2d at 563. But the Supreme Court of North Carolina reversed the Court of Appeals and held the statement to a police officer by the victim in her apartment was not testimonial because it was not the result of structured police questioning aimed at developing evidence for use at a subsequent trial. *Lewis*, 619 S.E.2d at 835. The statement identifying the defendant in a photographic array was testimonial because it was the result of structured police questioning, but its admission was harmless beyond a reasonable doubt. *Id*. at 841. As with *Forest*, this Court vacated the judgment and remanded for reconsideration in light of *Davis*. 126 S. Ct. at 2983. On remand, the North Carolina Supreme Court held both statements were testimonial and violated the Confrontation Clause. *State v. Lewis*, 648 S.E.2d 824, 829 (N.C. 2007).

[9] *Crawford* was also a divided opinion with five justices in the majority and four justices dissenting. Further guidance from the court as to the contours of "testimonial" became important. Some of that guidance came in *Bullcoming v. New Mexico*, 131 S. Ct. 2507 (2011) (laboratory reports were testimonial even if admitted through a testifying expert where the witness did not perform the tests himself); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (certificates of analysis were testimonial). Notably, these three cases were also divided decisions; again with five justices in the majority and four justices dissenting.

analysis were non-testimonial). An expert may testify to an independent opinion–based on her own observations and analysis –without generally running afoul of the Confrontation Clause. Where an expert is able to assess independently a non-testifying expert's analysis and opinion and formulate a truly independent opinion, there is generally no Confrontation Clause violation. *See United States v. Mejia*, 545 F.3d 179, 199 (2d Cir. 2008) (reversing where court "at a loss" to how expert applied expertise in conveying testimonial statements to the jury).

However, absent truly independent observations and analysis, it is unconstitutional to admit a non-testifying expert's report. *Bullcoming*, 131 S. Ct. at 2716 (2011). *Bullcoming* specifically addressed whether "the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification–made for the purpose of proving a particular fact–through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." *Id*. at 2710. This Court rejected two of the state court justifications for admitting the certificates: (1) that the certifying, non-testifying analyst, was a "'mere scrivener' who 'simply transcribed the results generated by the gas chromatograph machine,'" and (2) that the testing analyst could act as a surrogate witness because "although he did not participate in testing Bullcoming's blood, [he] 'qualified as an expert witness with respect to the gas chromatograph machine,'" and was available for cross-examination. *Id.* at 2713. Both of these

arguments failed because the defendant was unable to meaningfully confront the testimonial evidence admitted against him. *Id.* at 2715-16. The defendant was entitled to cross-examine the witness who conducted the testing because cross-examination was the only means to confront this evidence.

Although *Crawford*, *Davis*, *Melendez-Diaz*, and *Bullcoming* were rendered by five-to-four votes, each decision had a clear rationale that garnered the support of at least five justices. On the other hand, *Williams* was a four-one-four decision without a position supported by five justices, unless the report the testifying analyst parroted was endowed with formality and solemnity.[10]

This Court needs to clarify how the Confrontation Clause is implicated when an expert testifies and renders an opinion, based in whole or in substantial part, on the analysis and opinion of a non-testifying expert: the issue *Williams* should have but did not clearly resolve. This Court should grant certiorari to decide this important question.

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[10] Justice Thomas based his decision on the absence of any "formality and solemnity" in the two laboratory results of DNA profiles that the testifying expert used in reaching her opinion. *Williams*, 132 S. Ct. at 2255-64 (Thomas, J., concurring in judgment, not joining plurality opinion).

II. North Carolina Requires Certification of Forensic Analysis By Sworn Affidavit.

As the decision below notes, the testifying expert in this case did none of the laboratory testing or analysis of the controlled substance at issue. She was not even present when the testing and analysis was done by the non-testifying analyst. *State v. Ortiz-Zape*, 743 S.E.2d 156, 159 (N.C. 2013). Rather she performed only a "peer review" of the work done by the non-testifying analyst and then reviewed the laboratory notes and data from the testing by the non-testifying analyst. *Id*. at 158-59.

At first blush, this situation mirrors the testimony deemed unconstitutional by a majority of this Court in both *Bullcoming* and *Melendez-Diaz*. But the majority below side-stepped this confrontation problem by basing its analysis on a faulty premise: if the challenged testimony was not hearsay, i.e. was not offered for the truth of the matter asserted, then whether it was "testimonial" was of no consequence. *Ortiz-Zape*, 743 S.E.2d at 162 n.1. By describing the opinion, analysis, and data of the non-testifying analyst as having been admitted solely as the basis for the testifying expert's opinion, the majority below determined it was not offered for its truth and therefore was non-hearsay, making its testimonial nature immaterial. *Id*. But as five justices of this Court appear to understand, when a testifying expert renders an opinion based solely on the opinion, analysis, and data of the non-testifying analyst and the very opinion, analysis, and data of the non-testifying

analyst is admitted into evidence before a jury, the jury would consider it for its truth; a lay jury could hardly do otherwise. However, this problem did not manifest itself in *Williams*, in part, because the case was tried to the bench and not to a jury.

In *Williams*, the petitioner was convicted of rape at a bench trial. *Id*. at 2223. In a bench trial, the judge as finder of fact would understand the challenged machine-generated results were not admitted for the truth of the matter asserted, and the right to confrontation would not be impaired. The four-justice plurality, without the support of Justice Thomas, found her testimony did not violate confrontation because she did not testify about the report or the quality of the lab's work. *Id*. at 2235. But Justice Thomas, as well as the four *Williams* dissenters, disagreed with this analysis, as well as the plurality's reliance on a narrower interpretation of "testimonial." The plurality assumed a trial judge would understand this testimony was not substantive evidence. *Id*. at 2236. This distinction was lost on the court below.

Another reason Justice Thomas did not join either the plurality or the dissent in *Williams* involved the absence of formality or solemnity in the reports and findings of the non-testifying expert. The tests results at issue in *Williams* were machine-generated results of DNA strands; they were not the laboratory reports written by a non-testifying, human analyst revealing her findings as to DNA profiles and opinions about them. *Williams*, 132 S. Ct. at 2253-38. On the contrary, the challenged evidence in this case was a report by a non-testifying

analyst of the results of the testing he conducted and his opinion as to the nature of the controlled substance, which he verified in an affidavit as North Carolina requires by statute. *See* N.C. Gen. Stat. § 8-58.20(c)(requiring forensic analyst to sign her report "and complete an affidavit" averring to her qualifications, the manner of the testing, and the results of her analysis). Thus, the formality and solemnity missing in *Williams*, but which had been present in *Melendez-Diaz*, exists here. It is likely a majority of this Court that would disagree with the decision below.

This case affords this Court an opportunity to rectify the confusion engulfing the lower courts in the wake of *Williams* and bring consistency to the application of the Confrontation Clause to all defendants, irrespective of the jurisdiction in which their trials occur. Amicus urges this Court to accept this case for review.

CONCLUSION

For the reasons stated herein, the North Carolina Advocates for Justice respectfully request that this Court grant petitioner a writ of certiorari.

This the 26th day of December, 2013.

M. Gordon Widenhouse, Jr.*
RUDOLF WIDENHOUSE & FIALKO
312 West Franklin Street
Chapel Hill, NC 27516
(919) 967-4900
mgwidenhouse@RWF-law.com

NORTH CAROLINA
ADVOCATES FOR JUSTICE
AMICUS CURIAE
*Counsel of Record
for *Amicus Curiae*