Nos. 07-1251 and 07-10255

In the Supreme Court of the United States

ANTHONY ALEXANDER, PETITIONER

v.

UNITED STATES OF AMERICA

GEORGE MOON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a forensic chemist's expert testimony that various government exhibits contained marijuana, cocaine hydrochloride, or cocaine base violated petitioners' Sixth Amendment right to confront the chemist who operated the data-generating machines in the laboratory and constituted reversible plain error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a)[1] is reported at 512 F.3d 359.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-9a) was entered on January 3, 2008. The petitions for a

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 07-1251.

writ of certiorari were filed on April 2, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioners were convicted of conspiring to possess with intent to distribute and to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. 846, and two counts of using a cellular telephone to facilitate a drug-trafficking offense, in violation of 21 U.S.C. 843(b). Petitioner Anthony Alexander (Alexander) also was convicted of five counts of distributing cocaine, 50 grams or more of cocaine base, and marijuana, in violation of 21 U.S.C. 841(a)(1). Petitioner George Moon (Moon) was convicted of possessing five kilograms or more of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Gov't C.A. Br. 4-6. Alexander was sentenced to life imprisonment on one count and concurrent aggregate terms of 120 months of imprisonment on the remaining counts. *Id.* at 6. Moon was sentenced to aggregate terms of 190 months of imprisonment, to be followed by five years of supervised release. *Ibid.* The court of appeals affirmed. Pet. App. 1a-9a.

1. In February 2004, the Drug Enforcement Administration (DEA) began an investigation of drug trafficking activity by Alexander in Gary, Indiana. On four occasions during May and June of 2004, confidential informants purchased quantities of marijuana, powder cocaine, and crack cocaine from Alexander for a total of $14,500. Gov't C.A. Br. 7-8.

Based in part on those purchases, the DEA received court authorization to intercept calls on two cellular telephones used by Alexander. The wiretap was active

between July 22, 2004, and August 20, 2004, and intercepted a series of conversations between Alexander and Moon. The conversations revealed that Moon would "front[]" drugs to Alexander, and Alexander would pay Moon for the drug supply after he sold part or all of the inventory. Gov't C.A. Br. 7-10; Pet. App. 7a-8a.

On August 11, 2004, a confidential informant purchased $12,000 of cocaine from Alexander. That same day, Alexander called Moon. Using coded language, Moon informed Alexander that he would supply Alexander with four to six kilograms of cocaine the following week. On the morning of August 17, 2004, Moon called Alexander and indicated that he (Moon) was on a "tarmac" and was driving a "nice Baron," which was a type of small airplane. Moon called Alexander again five hours later and indicated that he was "moving toward [Alexander's] way" and would arrive in around 30 minutes. Gov't C.A. Br. 10-12.

That day, DEA agents observed Moon meet with Alexander in front of Alexander's mother's house. Moon opened the rear hatch of his car, removed a nylon cooler bag, and walked toward the front yard of the residence with Alexander. Moon returned alone to the car five or six minutes later, replaced the cooler bag in the car, and drove away. Upon instruction from the DEA, an officer with the Gary Police Department conducted a traffic stop on Moon. Moon initially consented to a search of his car, but he retracted his consent when the officer reached for the cooler bag in the rear compartment. A drug-detection dog arrived and alerted to the back door of the car; agents impounded the vehicle. Agents obtained a federal warrant to search the car and recovered $60,000 packaged in heat-sealed plastic bags and 28 kilograms of cocaine. The serial numbers on $5808 of the

cash matched those of the currency that the confidential informant had used to purchase cocaine from Alexander six days earlier. A heat sealer was subsequently recovered from Alexander's mother's house. Gov't C.A. Br. 12-14 & n.5.

On August 20, 2004, Moon arranged to meet with Alexander to "wrap things up." Moon arrived at the designated meeting place in a Cadillac driven by someone else. Agents observed Alexander walk toward the Cadillac with something in his hands and then lean into the passenger side window of the car. After the Cadillac drove away, officers stopped the car and arrested Moon on a federal warrant. A bag containing $20,000 was recovered from the back seat of the car. Gov't C.A. Br. 15-17.

2. On October 22, 2004, a grand jury in the Northern District of Indiana returned a nine-count superseding indictment charging both petitioners with conspiring to possess with intent to distribute and to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. 846, and two counts of using a cellular telephone to facilitate a drug-trafficking offense, in violation of 21 U.S.C. 843(b). Alexander was charged individually with five counts of distributing cocaine, 50 grams or more of cocaine base, and marijuana, in violation of 21 U.S.C. 841(a)(1). Moon was charged individually with possessing five kilograms or more of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Gov't C.A. Br. 4-5.

3. At trial, the government presented expert testimony from James DeFrancesco (DeFrancesco), a senior forensic chemist in the DEA laboratory where the controlled substances related to this case were analyzed. Ragnar Olson (Olson), the forensic chemist who con-

ducted the chemical analyses in the laboratory, had left the DEA to attend law school and did not testify at trial. DeFrancesco reviewed the data Olson had generated, Olson's handwritten notes about the procedures he used, and Olson's report of his conclusions. For each drug exhibit, DeFrancesco testified about the conclusion Olson had reached about the identity of the controlled substance and about his own independent conclusion on the same question. DeFrancesco based his independent opinions on the data and information in Olson's paperwork. DeFrancesco's independent conclusions were consistent with Olson's conclusions. Pet. App. 1a-2a; Gov't C.A. Br. 17-19. Neither petitioner objected to DeFrancesco's testimony. Pet. App. 2a. In fact, Moon's counsel indicated affirmatively that he "ha[d] no objections to the conclusions reached by [DeFrancesco]," and Alexander, who represented himself at trial, concurred. *Id.* at 47a-48a. On February 28, 2005, the jury returned guilty verdicts on all counts. Gov't C.A. Br. 6.

4. On appeal, petitioners asserted for the first time that DeFrancesco's testimony violated the Confrontation Clause. Petitioners claimed that DeFrancesco's reliance on Olson's work as the basis for his testimony deprived petitioners of their right to confront and cross-examine Olson. Pet. App. 2a. The court of appeals affirmed. Pet. App. 3a-6a.

The court of appeals first noted that appellate review of petitioners' claim was "limited to plain error." Pet. App. 2a. The court recognized that defendants may have an incentive not to raise a Confrontation Clause objection to hearsay evidence at trial because a successful objection "would compel the prosecution to produce a stronger witness." *Ibid.* In this case, the court noted that petitioners "would have been worse off" if Olson

had testified. *Ibid.* Without Olson, petitioners "could undermine DeFrancesco's testimony by reminding the jury that he had not done any of the work and that flaws in Olson's procedures may have been omitted from the lab notes." *Id.* at 2a-3a. The court observed that the fact "[t]hat it may be to defendants' advantage to accept the hearsay version of evidence makes it problematic to entertain a *Crawford* [v. *Washington*, 541 U.S. 36 (2004),] claim via the plain-error clause of Fed. R. Evid. 103(d)." *Id.* at 3a.

The court of appeals also held that "there was no problem with DeFrancesco's testimony." Pet. App. 3a. The court noted that DeFrancesco testified as an expert, and "the facts or data [upon which the expert relies] need not be admissible in evidence in order for the opinion or inference to be admitted." *Ibid.* (quoting Fed. R. Evid. 703). Accordingly, regardless of whether Olson's reports or the conclusions they contained were admissible under the Confrontation Clause, DeFrancesco's expert testimony was properly admitted. *Ibid.*

The court of appeals then addressed the admissibility under the Confrontation Clause of Olson's reports. Pet. App. 3a-4a.[2] The court observed that the reports "ha[d] two kinds of information: the readings taken from the instruments, and Olson's conclusion that these readings mean that the tested substance was cocaine." *Ibid.* The court held that Olson's conclusion that "this substance was cocaine" was testimonial because the primary pur-

[2] Although the court of appeals suggested that Olson's reports themselves were admitted into evidence, the transcript does not support that conclusion. But DeFrancesco did testify, without objection, about the test results and conclusions that were contained in Olson's reports. Pet. App. 23a-26a, 29a-31a, 34a, 38a, 40a-41a, 44a-46a, 54a.

pose of that statement was "to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 4a (quoting *Davis* v. *Washington*, 547 U.S. 813, 822 (2006)). The readings from the instruments, however, were not "statements" at all, let alone testimonial ones, the court held. *Id.* at 4a-5a. The court reasoned that "data are not 'statements' in any useful sense" and a machine is not "a 'witness against' anyone." *Id.* at 4a. "[H]ow could one cross-examine a gas chromatograph?" observed the court. *Id.* at 4a-5a.

The court of appeals concluded that "the Confrontation Clause does not forbid the use of raw data produced by scientific instruments, though the interpretation of those data may be testimonial." Pet. App. 5a. Accordingly, DeFrancesco was "entitled to analyze the data that Olson had obtained," and admission of the background data—which, the court noted, was not required to be presented to the jury at all under Federal Rule of Evidence 703—did not implicate the Confrontation Clause. *Ibid.* The court determined that Olson's conclusions about what the raw data meant "should have been kept out of evidence," but any error in their admission was not prejudicial because DeFrancesco reached the same conclusions independently and was available for cross-examination. *Id.* at 5a-6a.

ARGUMENT

Petitioners contend (07-1251 Pet. 7-14; 07-10255 Pet. 4-6) that the court of appeals erred by holding that machine-generated data do not constitute testimonial statements of witnesses subject to the Confrontation Clause. Alexander (Pet. 7) asks the Court to hear this case with *Melendez-Diaz* v. *Massachusetts*, cert. granted, No. 07-591 (Mar. 17, 2008), or to hold the peti-

tions for a writ of certiorari pending the resolution of *Melendez-Diaz*. Further review is unwarranted. The court of appeals' decision is correct and does not conflict with any decision of this Court, another federal court of appeals, or a state court of last resort. Nor is it necessary to hold the petitions for a writ of certiorari pending resolution of *Melendez-Diaz*.

1. a. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const. Amend. VI. In *Crawford* v. *Washington*, 541 U.S. 36, 68 (2004), this Court held that where the government offers into evidence a "testimonial" statement of an absent witness at a criminal trial, the Confrontation Clause requires both that the witness be unavailable and that the defendant have had a prior opportunity to cross-examine the witness. Although the Court in *Crawford* did not define the scope of "testimonial" hearsay comprehensively, it noted that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Ibid.* In *Davis* v. *Washington*, 547 U.S. 813 (2006), the Court applied the "testimonial" standard to statements made to law enforcement personnel during a 911 call and at a crime scene. The Court held that in that context, statements are nontestimonial when the circumstances "objectively indicat[e] that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," and statements are testimonial when there is no ongoing emergency and "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 822.

b. The court of appeals correctly concluded that raw data generated by a machine in a laboratory are not testimonial statements of witnesses subject to the Confrontation Clause. In *Crawford*, the Court held that the term "witnesses" in the Confrontation Clause refers to those who "bear testimony." 541 U.S. at 51. As the court of appeals noted, machines cannot be "witnesses" in the sense intended by the Sixth Amendment because they cannot be called to the witness stand to respond to cross-examination. Pet. App. 4a-5a. A machine that generates chemical data in the laboratory is no more a "witness" than is a video camera that takes surveillance photographs during a bank robbery.

Although Alexander characterizes the court of appeals' analysis of that question as "novel" (Pet. 12), the court followed the only other decision of a federal court of appeals that had addressed the same issue at that time. Pet. App. 4a. In *United States* v. *Washington*, 498 F.3d 225, 230 (4th Cir. 2007), petition for cert. pending, No. 07-8291 (filed Dec. 14, 2007), the court held that raw data produced by a gas chromatograph machine used to analyze a sample of the defendant's blood were "the 'statements' *of the machines* themselves, not their operators." Consistent with the ruling here, the Fourth Circuit held that "'statements' made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause." *Ibid.*

Recently, the Eleventh Circuit also held that data generated by a machine, and without the assistance of contemporaneous human interpretation or analysis, are not statements of human witnesses subject to the Confrontation Clause. *United States* v. *Lamons*, No. 06-14427 (July 3, 2008), slip op. 15-24. In *Lamons*, the court analyzed whether a compact disc containing

telephone-call data and a printed report of certain data extracted from that disc constituted testimonial hearsay. Citing *Washington* and the Seventh Circuit's decision in this case, the court held that "the witnesses with whom the Confrontation Clause is concerned are *human* witnesses, and * * * the evidence challenged in this appeal does not contain the statements of human witnesses." *Id.* at 20. The court observed that although humans participate in the design and construction of any machine, "certain statements involve so little intervention by humans in their generation as to leave no doubt that they are wholly machine-generated for all practical purposes." *Id.* at 21 n.23.

Alexander contends (Pet. 12-14) that the court of appeals' analysis "oversimplifies the science behind gas chromatography mass spectrometry" and "ignores the possibility of operator bias, malfeasance, or plain incompetence." Moon asserts (Pet. 5) that the court "failed to distinguish between machine-generated data produced through human assistance or input and machine-generated data produced without human assistance or input." Having failed even to object at trial to the admissibility of the data that they now challenge, however, petitioners lack a record on which to assert that the court "oversimplifie[d] the science" of the chemical analyses performed in this case or "failed to distinguish" between various types of machine-generated data. And as the court of appeals explained (Pet. App. 5a), the possibility that the machine-generated data were unreliable because of operator error or malfeasance was a topic that petitioners could have—but did not—address in questions to DeFrancesco about the foundation for his

expert opinions about what the raw data meant.[3] This case thus is a poor vehicle for further review of the question petitioners urge on the Court.

The cases on which Alexander relies (Pet. 10-11) do not conflict with the decision in this case. All but one of the cases Alexander cites as supporting his view that "laboratory reports are 'testimonial'" (Pet. 10) involved the admission of a laboratory report containing a *conclusion* about what the raw data meant without testimony from the author of the report *or* from an expert witness who had independently analyzed the data.[4] In holding that the laboratory reports were testimonial statements admitted in violation of the Confrontation Clause, those courts had no occasion to parse differences between machine-generated data and conclusions derived from

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[3] The only questions concerning Olson's skills and competence were posed to DeFrancesco by the prosecutor in direct examination. DeFrancesco testified that Olson left the DEA on "[f]antastic terms" and that he was "outstanding" and had never been the subject of allegations of misconduct or incompetence. Tr. 5/95.

[4] See *Hinojos-Mendoza* v. *People*, 169 P.3d 662, 664 (Colo. 2007) (en banc) (pursuant to statute, laboratory report containing conclusion that "[a]nalysis disclosed the presence of cocaine, schedule II" entered into evidence without testimony of technician who prepared the report) (brackets in original), petition for cert. pending, No. 07-9369 (filed Feb. 4, 2008); *State* v. *March*, 216 S.W.3d 663 (Mo.) (en banc) (laboratory report identifying seized substance as cocaine base entered into evidence without testimony of analyst), cert. dismissed, 128 S. Ct. 1441 (2007); *State* v. *Caulfield*, 722 N.W.2d 304 (Minn. 2006) (pursuant to statute, laboratory report identifying seized substance as cocaine entered into evidence without testimony of technician who prepared the report). Alexander also cites (Pet. 11) *City of Las Vegas* v. *Walsh*, 124 P.3d 203 (Nev. 2005), cert. denied, 547 U.S. 1071 (2006), which involved the admission of an affidavit of a nurse describing the procedures she used to draw a blood sample for chemical analysis. That case did not involve raw data or a scientific test result and is inapposite.

such data. In this case, where an expert witness testified and was subject to cross-examination about his own independent conclusions concerning the meaning of the raw data—a fact that rendered harmless the admission of the laboratory analyst's identical conclusions—the court of appeals had occasion to and did address the distinct question of whether the raw data itself was testimonial hearsay.[5]

The remaining case cited by Alexander, *Roberts* v. *United States*, 916 A.2d 922 (D.C. 2007), also establishes no conflict warranting the Court's review. In *Roberts*, a DNA expert provided opinion testimony pursuant to Rule 703 of the Federal Rules of Evidence and, as here, relied on the results of scientific tests conducted by others. *Id.* at 937-938. The court of appeals found that the expert witness had rested his opinion in part on "*conclusions* reached by the team that did the actual laboratory analysis" and held that those "conclusions" were testimonial statements subject to the Confrontation Clause. *Id.* at 938 (emphasis added). The court held that "[t]o the extent that [those] conclusions were used as substantive evidence against [the defendant] at trial," the Sixth Amendment was violated. *Ibid.* *Roberts* thus is consistent with the Seventh Circuit's holding in this case that Olson's conclusions were testimonial and that the admission of DeFrancesco's testimony reciting those conclusions was error (but not prejudicial error). *Roberts* did not address whether raw data produced by a scientific instrument is a testimonial statement of the

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[5] To the extent that Alexander contends (Pet. 18-19) that the court of appeals erred by concluding that DeFrancesco reached his opinions independently and did not simply recite Olson's conclusions, that factbound claim does not warrant review.

individual who operated the machine, and further review of that separate question therefore is not warranted.

c. Even if petitioners could establish a disagreement between the court of appeals' decision and a decision of another court on the Confrontation Clause analysis, this Court's intervention would be unwarranted. As the court of appeals emphasized, petitioners failed to raise any challenge to DeFrancesco's testimony at trial. Pet. App. 2a-3a. Contrary to Alexander's argument (Pet. 15-19), any Confrontation Clause error in the admission of DeFrancesco's testimony concerning the raw data in Olson's report would not be subject to the harmless-error standard of *Chapman* v. *California*, 386 U.S. 18 (1967). The plain-error standard applies instead and imposes on *petitioners* the burden to demonstrate that an "obvious" error affected their substantial rights and "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Olano*, 507 U.S. 725, 732 (1993) (citations and internal quotation marks omitted).

Petitioners cannot meet the plain-error standard. At the outset, any error in the admission of testimony about the machine-generated data was not "obvious." Nor can petitioners make the additional *Olano* showings. Although petitioners contend that they were deprived of the opportunity to cross-examine Olson about whether he operated the instruments in the laboratory properly, they had the opportunity at trial to cross-examine DeFrancesco about the possibility that "flaws in Olson's procedures" (Pet. App. 3a) could have affected the reliability of the data on which DeFrancesco based his conclusions. They did not do so. There is no basis on this record for concluding that admission of the machine-generated data documented by Olson had any effect on

petitioners' substantial rights or that it seriously affected the fairness and integrity of the trial. See Pet. App. 3a ("The lack of a demand for testimony by an available declarant leads to the conclusion that the appellate argument is strategic rather than sincere."). Cf. *Roberts*, 916 A.2d at 939-940 & n.22 (admission of testimonial conclusions of laboratory technicians did not seriously affect fairness and integrity of trial where expert witness's independent analysis of DNA test results were "key constituents" of his opinions, expert was subject to thorough cross-examination about kinds of tests performed in laboratory and the bases for his conclusions, and defendant had "never suggested" how the results of the underlying tests were inaccurate or presented testimony undermining those results). Further review therefore is unwarranted.

2. There is no need to hold the petitions for a writ of certiorari pending the Court's resolution of *Melendez-Diaz* v. *Massachusetts*, cert. granted, No. 07-591 (Mar. 17, 2008). *Melendez-Diaz* presents the question whether the Confrontation Clause is violated by the admission into evidence of a sworn certificate of the result of a controlled-substance analysis without live testimony from the analyst who prepared it. Unlike petitioners, the defendant in *Melendez-Diaz* had no opportunity to cross-examine any witness about the procedures used to analyze the controlled substances in the laboratory. Nonetheless, if the issue presented by petitioners were properly preserved, the Court might have wished to hold this case for *Melendez-Diaz* because the opinion in that case might shed light on the distinction, for "testimonial" hearsay purposes, between machine-generated data and conclusions drawn from such data. But petitioners did not properly preserve any Confrontation

Clause objection in the district court. And because petitioners cannot satisfy the stringent requirements for relief under the plain-error standard, the Court's resolution of *Melendez-Diaz* will not affect the outcome here.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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