No. 13-127

In the Supreme Court of the United States

DANNY TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION 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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QUESTIONS PRESENTED

1. Whether the testimony of a supervisory forensic analyst who did not personally conduct or observe the specific forensic testing at issue, but who provided an expert opinion and other testimony based on the analyst's work product, violated the Confrontation Clause of the Sixth Amendment on the facts of this case.

2. Whether the court of appeals correctly concluded that any Confrontation Clause error was harmless beyond a reasonable doubt.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 709 F.3d 1187 (Pet. App. 2a-23a). A prior opinion of the court of appeals is reported at 591 F.3d 928 (Pet. App. 26a-39a).

JURISDICTION

The judgment of the court of appeals was entered on March 4, 2013. A petition for rehearing was denied on April 30, 2013 (Pet. App. 24a-25a). The petition for a writ of certiorari was filed on July 29, 2013. 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 Western District of Wisconsin, petitioner was convicted on three counts of distributing co-

caine base (*i.e.*, crack cocaine), in violation of 21 U.S.C. 841(a)(1). The district court sentenced petitioner to 210 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 26a-39a. This Court granted certiorari, vacated the court of appeals' judgment, and remanded for further consideration in light of *Williams* v. *Illinois*, 132 S. Ct. 2221 (2012). Pet. App. 1a. On remand, the court of appeals again affirmed. *Id.* at 2a-23a.

1. In January 2008, local authorities learned that petitioner was selling crack cocaine in Madison, Wisconsin. An undercover police officer, Kim Meyer, purchased crack cocaine from petitioner on three occasions. Petitioner was then arrested. In February 2008, a federal grand jury indicted petitioner on three counts of distributing crack cocaine, in violation of 21 U.S.C. 841(a)(1). Pet. App. 27a.

2. Before trial, the government notified petitioner that it intended to call as an expert witness Amanda Hanson, the chemist at the Wisconsin State Crime Laboratory who tested the substances purchased from petitioner. A week later, the government notified petitioner that Hanson would be on maternity leave during the trial and that the government would instead call Hanson's supervisor, Robert Block, a senior forensic chemist and head of the drug identification unit at the crime laboratory. Pet. App. 27a-28a.

Petitioner moved to suppress Block's testimony. Petitioner argued that the testimony would convey impermissible hearsay about Hanson's analysis and would violate his Sixth Amendment right to confront Hanson. Pet. App. 68a-69a. In its opposition, the government stated that Block would testify to his own

conclusions, not Hanson's. *Id.* at 70a-73a. The district court denied petitioner's motion. *Id.* at 44a; see *id.* at 28a.

At trial, the government admitted evidence to identify the substances that petitioner had sold to Officer Meyer, which included testimony from Block as an expert witness. Block's testimony described, among other things, "the crime lab's procedures for processing and testing the evidence" and "safeguards used by the lab to prevent the commingling and tampering of evidence." Pet. App. 28a; see *id.* at 53a-57a, 60a-61a. He explained that the lab's analysts perform three chemical tests on suspected drug substances using instruments that "produce a printout" of the resulting data. *Id.* at 52a-53a, 58a. Because "the results that are generated [by the instruments] are unique to [each] drug," Block testified, the machine-generated data allows analysts to identify drug substances. *Id.* at 58a.

Block also described "how each chemist's analysis must undergo a peer review, and that, as the unit head, he peer-reviewed Hanson's tests in this case." Pet. App. 29a. He testified:

> Prior to the report leaving the laboratory, every report must undergo a peer review by another qualified analyst within the unit. As the unit head, I perform the peer review of the other analysts within the drug identification section. I reviewed this report that Amanda Hanson generated for the analysis of the chunky material in Exhibits 1, 2 and 3, reviewing the handwritten notes and the generated data, and came to the same conclusion based on the information provided that each of these

> items contained the same material and I signed off on that peer review.

Id. at 54a. Petitioner raised no contemporaneous objection to this portion of the testimony. *Ibid.* Block then testified to his conclusion: "My opinion based upon the examinations that were performed on the chunky materials within Exhibits 1, 2 and 3, along with my experience, is that each of these items in 1, 2 and 3 contain cocaine base." *Ibid.* Although Block relied on Hanson's notes, her lab report, and the machine-generated data printouts in reaching his conclusion, none of those documents was introduced into evidence. *Id.* at 30a.

At the close of the government's case, petitioner moved for a directed verdict. He argued, among other things, that the government had not offered sufficient evidence of the chain of custody to establish that the drugs tested were the drugs the undercover agent had purchased from him. Referring to his suppression motion, petitioner also argued that Block had not provided "eyewitness testimony as far as the certainty of his opinion." Pet. App. 62a. The district court denied petitioner's motion. *Ibid.*

Petitioner did not put on any evidence. The jury found petitioner guilty on all three counts.

3. The court of appeals affirmed. Pet. App. 26a-39a. The court rejected the argument that the district court violated petitioner's right of confrontation by permitting Block to testify about Hanson's testing. *Id.* at 31a-37a. The court noted that "nothing from Hanson's notes, machine test results, or her final report was introduced into evidence," aside from Block's "passing comment" that he reached the same conclusion about the nature of the drug exhibits. *Id.*

at 32a. Relying on *United States* v. *Moon*, 512 F.3d 359 (7th Cir.), cert. denied, 555 U.S. 812 (2008), the court concluded that the Confrontation Clause did not bar Block from testifying as an expert witness to his own conclusions based on his review of the results of Hanson's testing. Pet. App. 32a-33a. The court explained that Federal Rule of Evidence 703 permits the admission of an expert opinion even if the opinion is based on inadmissible facts or data, Pet. App. 33a (citing *Moon*, 512 F.3d at 361), and that "the Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself," *ibid.* (quoting *Moon*, 512 F.3d at 362).

The court of appeals also held that Block's testimony that he reached the same conclusion as Hanson about the nature of the drug exhibits was not impermissible because Block's "job was to personally check Hanson's test results," and, "[a]s such, he could testify about his personal involvement in the testing process, about the accuracy of the tests, and about agreeing with Hanson when he signed off on her report." Pet. App. 34a. The court held that any error in that respect would have been harmless in any event, since "Block's statement was a passing reference to Hanson in the context of explaining the procedures for processing and testing the evidence" and not an effort "to introduce Hanson's opinion through the back door or to bolster her conclusion in order to make Block's own opinion more believable." *Id.* at 34a-36a.

The court of appeals noted that the conclusion that the admission of Block's testimony did not violate petitioner's right of confrontation was consistent with this Court's then-recent decision in *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305 (2009), which held that

the Confrontation Clause bars the admission of a certificate of forensic laboratory analysis unless the analyst is present at trial and available for cross-examination. Pet. App. 36a-37a. The court of appeals explained that "Hanson's report was not admitted into evidence, let alone presented to the jury in the form of a sworn affidavit," but "[i]nstead, Block testified as an expert witness presenting his own conclusions about the substances in question to the jury." *Id.* at 37a. The court of appeals also noted that *Melendez-Diaz* had rejected the proposition that the Confrontation Clause demands that "anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." *Ibid.* (quoting *Melendez-Diaz*, 557 U.S. at 311 n.1).

Finally, the court of appeals rejected petitioner's argument that the district court abused its discretion in admitting into evidence Exhibits 1-3 in the absence of testimony from "any witness who had personal knowledge of Hanson's handling and testing of the substances the undercover officer bought from [petitioner]." Pet. App. 37a-39a. The court explained that, because "the substances purchased from [petitioner] remained in official custody at all times," the government was entitled to a "'presumption of regularity,' presuming that the government officials who had custody of the exhibits discharged their duties properly," and any gaps in the chain of custody "go to the weight of the evidence, not its admissibility." *Id.* at 38a-39a (quoting *United States* v. *Prieto*, 549 F.3d 513, 524-525 (7th Cir. 2008)).

4. Petitioner filed a petition for a writ of certiorari arguing that the admission of Block's testimony violated his Sixth Amendment confrontation rights. This Court granted the petition, vacated the court of appeals' judgment, and remanded the case "for further consideration in light of [its intervening decision in] *Williams* v. *Illinois*, [132 S. Ct. 2221] (2012)." Pet. App. 1a.

5. On remand, the court of appeals again affirmed. Pet. App. 2a-23a. The court assumed *arguendo* that portions of Block's testimony had abridged petitioner's confrontation rights, *id.* at 4a-16a, but held that "any Confrontation Clause error that occurred during Block's testimony was harmless beyond a reasonable doubt," *id.* at 5a, see *id.* at 16a-23a.

a. The court of appeals identified two categories of evidence elicited from Block and concluded that one raised Confrontation Clause concerns. Pet. App. 4a-5a, 8a-9a. The court explained that "the bulk of Block's testimony" concerned matters "within his personal knowledge" and that such testimony did not violate the Confrontation Clause because Block was subject to cross-examination. *Id.* at 6a, 8a. The court thus concluded that Block properly testified about "how suspect substances are tested," the "procedures and safeguards" that state crime-lab employees "are expected to follow," and "the steps that he took" in reviewing Hanson's work under the lab's "standard peer review procedure." *Ibid.*

The court of appeals likewise concluded that Block properly testified about his own expert opinion that the machine-generated "data produced by Hanson's testing" indicated that the tested substances contained cocaine base. Pet. App. 6a-7a. The court ex-

plained that, as it explained in its prior opinion, an expert testifying about his own expert opinion may formulate that opinion on facts that are not themselves "admi[tted] into evidence." *Id.* at 7a.

The court of appeals, however, stated that *Williams* "arguably casts doubt" on the constitutionality of portions of Block's testimony concerning the reliability of the data that he used to formulate his opinion and other matters about which "Block had no first-hand knowledge." Pet. App. 9a. "Because it was Hanson who actually tested the substances that [petitioner] distributed to the undercover officer, only she could testify as to the process she followed in testing those substances and as to the results of her own analysis." *Ibid.* The court explained that, because petitioner did not have the opportunity to question Hanson, confrontation concerns were implicated when the government "introduced the result of Hanson's analysis through" testimony by Block, who "vouch[ed] for the reliability of Hanson's work" even though he "had no direct knowledge of what Hanson did or did not do" in testing the substances in the case. *Id.* at 11a-12a. Block, the court observed, "effectively repeat[ed] the out-of-court statements made by Hanson" in her written materials and "invited [the jury] to consider those statements for their truth" when he testified that (1) "Hanson had followed standard procedures in testing the substances" and that (2) he had "reached the same conclusion [as Hanson] based on the resulting data." *Id.* at 9a-10a.

The court of appeals discussed the "ramifications of introducing such out-of-court statements through an expert" in light of *Williams*. Pet. App. 10a-15a. But rather than decide the Confrontation Clause question,

the court simply "assume[d]" that those aspects of "Block's testimony in fact did violate [petitioner's] confrontation rights," *id.* at 15a-16a.

b. Having assumed that the district court erroneously "allow[ed] Block to testify about the procedures Hanson followed and as to what she concluded," the court of appeals held that "any Confrontation Clause error that occurred during Block's testimony was harmless beyond a reasonable doubt." Pet. App. 5a, 16a; see *id.* at 16a-23a. The court stated that it was "confident that any error did not affect the outcome of the trial" because (1) the trial record contained "considerable evidence" other than the arguably tainted testimony that established that the substances that petitioner sold were crack cocaine and (2) even "[petitioner] himself did not contest [at trial] that they were, in fact, crack cocaine." *Id.* at 6a, 18a.

The court of appeals explained that "[t]he only aspect of the case affected by the asserted Confrontation Clause error was the proof that the substances [petitioner] distributed * * * contained cocaine base." Pet. App. 17a. But the court found it "clear that the jury would have rendered the same verdict" even absent the arguably tainted evidence given the other "considerable evidence" in the record showing that the substances contained crack cocaine. *Id.* at 18a, 23a. The evidence showed, *inter alia*, that Officer Meyer had contacted petitioner "for the express purpose of buying crack cocaine"; Meyer testified based on her extensive narcotics experience that the substances petitioners sold her were "crack cocaine or 'suspect' crack cocaine," *id.* at 18a-19a; the price Meyer paid petitioner "was consistent with the prices charged for crack cocaine," *id.* at 19a; a detective

testified that he performed "a presumptive field test of the substance" obtained from petitioner in the first drug transaction and that the substance tested "positive" for "the presence of cocaine base," *id.* at 20a; and Block permissibly testified that the data he reviewed indicated that the tested substances "contained cocaine base," *id.* at 20a-21a.

The court of appeals further emphasized that petitioner's trial defense was that he had been framed and thus "did not distribute anything to Meyer, not that he distributed something other than crack cocaine." Pet. App. 21a-22a. Defense counsel never suggested in his opening or closing statement that the substances were not crack cocaine and "never explored this possibility during cross-examination of any government witness." *Id.* at 22a. Nor did defense counsel elicit any "evidence that the substances could have been something other than crack cocaine." *Ibid.* Given that the defense never disputed the other evidence showing that the substances were crack cocaine and in light of the "ample evidence" establishing that the substances contained crack cocaine, the court of appeals held any error was "entirely harmless" and "clear[ly]" did not affect the jury's verdict. *Id.* at 22a-23a.

ARGUMENT

Petitioner contends (Pet. 1, 15-27) that admitting Block's expert testimony, which relied on (and to an extent, transmitted) the analytical work product of a non-testifying forensic analyst violated petitioner's Sixth Amendment confrontation rights; he further contends that review is warranted to resolve a division of authority about the admissibility of such expert testimony in the wake of *Williams* v. *Illinois*, 132 S. Ct. 2221 (2012). The court of appeals correctly

concluded that the opinion of an expert like Block may be based on machine-generated data without violating the Confrontation Clause. That decision does not implicate any division of authority warranting review. The court of appeals also found that certain other aspects of Block's testimony raised confrontation concerns and assumed without deciding that those portions of the testimony constituted a Confrontation Clause violation. But the court ultimately held that the assumed error was harmless beyond a reasonable doubt. Petitioner argues (Pet. 27-31) that review is warranted because the court of appeals misapplied harmless-error analysis. The court of appeals' harmless-error holding is correct, factbound, and not in conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. 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. The court of appeals correctly concluded that the Confrontation Clause does not prohibit an expert from testifying about his own expert opinion based on machine-generated raw data produced by others that were not admitted into evidence.

In *Crawford* v. *Washington*, 541 U.S. 36 (2004), the Court held that the Confrontation Clause bars the introduction into evidence at a criminal trial of "testimonial statements of a witness who did not appear at trial" unless the witness is unavailable to testify and the defendant has had a prior opportunity for cross-examination. *Id.* at 50-51, 53-54, 68. That prohibition "applies only to testimonial hearsay," *Davis* v. *Washington*, 547 U.S. 813, 823 (2006), *i.e.*, "[o]ut-of-court

statements * * * offered in evidence to prove the truth of the matter asserted," *Anderson* v. *United States*, 417 U.S. 211, 219 (1974); Fed. R. Evid. 801(c). Accordingly, the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 U.S. at 60 n.9 (citing *Tennessee* v. *Street*, 471 U.S. 409, 414 (1985)).

In *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305 (2009), this Court held that affidavits reporting the results of forensic drug testing that had been created "sole[ly]" as evidence for criminal proceedings were "testimonial" and could not be admitted as substantive evidence under the Confrontation Clause, unless the State produced a live witness at trial competent to testify to the truth of the statements in the affidavits. *Id.* at 311 (emphasis omitted). In *Bullcoming* v. *New Mexico*, 131 S. Ct. 2705, 2710, 2715-2716 (2011), the Court applied *Melendez-Diaz* to hold that the Confrontation Clause did not allow the admission of an analyst's signed, forensic report certifying the results of a blood-alcohol test when offered through the testimony of another scientist who "did not sign the certification or perform or observe the test" and who had no "independent opinion" about its results. Such "surrogate testimony," the Court stated, does not satisfy the dictates of the Confrontation Clause. *Id.* at 2710.

In *Williams*, this Court recently concluded that admitting a DNA's expert's opinion testimony did not violate the Confrontation Clause, even though the expert formulated that opinion by relying in part on data from the DNA report of a non-testifying analyst. No single opinion commanded a majority of the Court, and no single rationale for the judgment can be identi-

fied under the approach of *Marks* v. *United States*, 430 U.S. 188, 193 (1977). A four-justice plurality concluded that the expert-opinion evidence was permissible because any mention of the DNA report had not been considered for its truth, 132 S. Ct. at 2234-2238, and, in any event, the report was not testimonial because its "primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner," *id.* at 2243. Justice Thomas concurred in the judgment, finding that the DNA evidence on which the expert relied was not testimonial, but on a different basis than the plurality. *Id.* at 2255. Because the DNA report was "neither a sworn nor a certified declaration of fact," Justice Thomas concluded that it lacked the requisite "formality and solemnity" to be testimonial. *Id.* at 2260-2261.

a. The court of appeals correctly concluded that the Confrontation Clause did not prohibit Block's testimony about his own expert opinion: that the machine-generated data he reviewed indicated that substance analyzed in the machines contained cocaine base. Block gave this independent opinion as an expert forensic chemist, and as the court of appeals explained, an expert who expresses an opinion about the nature of a controlled substance may formulate that opinion using raw data generated by equipment operated by an analyst who does not herself testify. Pet. App. 7a.

Williams supports that conclusion. The plurality and dissent in *Williams* agreed that there is "nothing wrong" with a DNA expert "testifying that two DNA profiles" that she did not personally compile "matched each other" because that would be a "straightforward application of [her] expertise." *Williams*, 132 S. Ct. at

2236 (plurality opinion) (quoting *id.* at 2270 (Kagan, J., dissenting)). The same holds true here. In a straightforward application of his own independent expertise, Block examined raw machine-generated data and testified that he concluded that the data showed that the substance at issue contained cocaine base. See Pet. App. 54a, 58a.

The data that Block used to formulate his opinion was not admitted into evidence. Pet. App. 9a. But even if the data had been admitted as substantive evidence, admitting the data would not have implicated Confrontation Clause concerns. Just as a machine-generated photograph is not a testimonial statement from a person, the machine-generated data upon which Block based his expert analysis were not "testimonial" statements of any "witness." Block's opinion testimony based on such data thus could not have violated the Confrontation Clause. See, *e.g.*, *United States* v. *Maxwell*, 724 F.3d 724, 726-727 (7th Cir. 2013) ("[T]he raw data from a lab test are not 'statements' in any way that violates the Confrontation Clause."); *United States* v. *Washington*, 498 F.3d 225, 230 (4th Cir. 2007) ("[T]he raw data printed out by [drug testing] machine[s]" are not "statements *of the lab technicians* who operated the machines."), cert. denied, 557 U.S. 934 (2009); *State* v. *Navarette*, 294 P.3d 435, 443 (N.M.) (concluding that "an expert witness may express an independent opinion regarding his or her interpretation of raw data without offending the Confrontation Clause"), cert. denied, No. 12-1256 (Oct. 7, 2013).[1]

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[1] Nor does machine-generated data possess "the requisite 'formality and solemnity' to be considered 'testimonial' for purposes of the Confrontation Clause" under the reasoning adopted by Justice

Block's expert opinion evidence was admissible as evidence relevant to this case because other circumstantial evidence laid a sufficient foundation for its admission. The government sufficiently established the chain of custody of the tested substances, Pet. App. 38a-39a, and Block testified about the state laboratory's standard operating procedures for handling and testing suspected drug substances, *id.* at 6a. Such evidence provided a circumstantial showing that Hanson received the substances sold by petitioner and followed proper testing procedures that led to the machine-generated data that Hanson independently analyzed. Cf. *Williams*, 132 S. Ct. at 2239 (plurality opinion) (noting "strong circumstantial evidence" of the reliability of the DNA laboratory's work). Although petitioner appears (Pet. 23) to dispute the sufficiency of that showing, any gaps in a chain of custody go to the weight and not the admissibility of the evidence. *Melendez-Diaz*, 557 U.S. at 311 n.1. In any event, even if petitioner were correct (Pet. 23) that the Block's testimony should have been deemed "irrelevant" and excluded Fed. R. Evid. 401 and 402 for want of a sufficient foundation, any such rule-of-evidence error would not constitute a violation of the Confrontation Clause and thus would not address the question petitioner presents, see Pet. i. Cf. *Melendez-Diaz*, 557 U.S. at 329 n.14 (The Confrontation Clause

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Thomas. *Williams*, 132 S. Ct. at 2255 (Thomas, J., concurring in the judgment) (quoting *Michigan* v. *Bryant*, 131 S. Ct. 1143, 1167 (2011) (Thomas, J., concurring in the judgment)). Petitioner thus has not sought to establish that Block based this aspect of his testimony on "'formalized testimonial materials,' such as depositions, affidavits, and prior testimony, or statements resulting from 'formalized dialogue,' such as custodial interrogation." *Id.* at 2260 (quoting *Bryant*, 131 S. Ct. at 1167).

does not "alter[] the type of evidence (including circumstantial evidence) sufficient to sustain a conviction.").

b. Petitioner principally takes issue with the court of appeals' analysis because, in his view, Block's testimony "was predicated on Hanson's testimonial statements that themselves were improperly admitted." Pet. 16; see also Pet. 23. Petitioner thus purports (Pet. i) to challenge Block's "testi[mony] regarding [Hanson's] procedures and conclusions" that Hanson memorialized in her written notes and report.[2] He further contends (Pet. 21-25) that the court of appeals endorsed an "unwarranted shortcut for prosecutors seeking to introduce [such] testimonial hearsay under the guide of expert testimony." Pet. 21. But even petitioner acknowledges (Pet. 1) that the court of appeals "assumed that the district court erred by permitting Block to testify regarding the specific procedures Hanson followed and the conclusions she reached." Because the court assumed the Confrontation Clause error that petitioner asserts, see Pet. App. 15a; pp. 8-9, *supra*, no further review is warranted to

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[2] The focus of petitioner's challenge is not entirely clear. The court of appeals concluded that Block properly testified about his own expert opinion about what "the *data* [that Hanson] had produced in testing" itself indicated, Pet. App. 6a (emphasis added), and Block's testimony shows that the data in question were "printed version[s] of data from [three] machine[s]" that "generate[d] printouts" graphically presenting the data as "peaks" and "spectr[a]" that were "unique to [each] drug," *id.* at 58a. Petitioner, by contrast, appears to focus on the portion of Block's testimony based "on Hanson's testimonial statements that themselves were improperly admitted" when Block "effectively repeat[ed] out-of-court statements made by Hanson in *[her] written* materials," Pet. 16, 22-23 (emphasis added), *i.e.*, Hanson's notes and report.

examine petitioner's claim that the Sixth Amendment was violated in these respects. See *Decker* v. *Northwest Envt'l Def. Ctr.*, 133 S. Ct. 1326, 1335 (2013) (This Court is "a court of review, not of first view.") (citation omitted).

c. Petitioner contends (Pet. 15-21) that review is warranted because the court of appeals' decision conflicts with decisions of state supreme courts. Petitioner is incorrect. Each of the Confrontation Clause decisions on which petitioner relies (Pet. 16-19) addressed testimony from experts who not only offered their own expert opinions but who also testified about the procedures actually followed by, or the conclusions of, non-testifying analysts.[3] Those decisions thus do

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[3] See *Martin* v. *State*, 60 A.3d 1100, 1101, 1107-1109 (Del. 2013) (en banc) (testifying expert "relied on [another expert's] reports, conclusions, and notes" and "certified the unsworn hearsay testimony of the testing analyst" in a "report submitted into evidence"); *Young* v. *United States*, 63 A.3d 1033, 1038, 1045 (D.C. 2013) (expert who had "no personal knowledge of how or from what sources the [DNA] profiles were produced" impermissibly "relay[ed], for their truth, the substance of out-of-court assertions by absent lab technicians" by testifying that the DNA profiles that she examined were "derived from the vaginal swabs and tissue furnished by [the victim] and the reference sample furnished by [the defendant]"); *Navarette*, 294 P.3d at 436-437, 443 (expert testified that the non-testifying medical examiner who prepared the written autopsy report on which he relied "followed the standard procedure for performing autopsies" and "did not see any evidence of a close range shooting" when she performed her medical examination); *State* v. *Frazier*, 735 S.E. 2d 727, 730-732 (W. Va. 2012) ("State concede[d]" that admitting non-testifying expert's autopsy report as substantive evidence of homicide violated Confrontation Clause); see also *Davidson* v. *State*, No. 58459, 2013 WL 1458654, at *1 (Nev. April 9, 2013) (unpublished, nonprecedential decision) (expert testified that non-testifying analyst "could not have made

not conflict with the court of appeals' *assumption* that Block's testimony violated petitioner's confrontation rights by addressing "the procedures Hanson followed" and her analytical "conclu[sions]" about the substance in this case. Pet. App. 16a. And none of those decisions holds that an expert like Block is precluded from basing his own expert opinion on machine-generated data that is not admitted into evidence. Compare, *e.g.*, *Navarette*, 294 P.3d at 443 (concluding, like the court of appeals here, that "an expert witness may express an independent opinion regarding his or her interpretation of raw data without offending the Confrontation Clause") with Pet. 16-17 & n.7 (relying on *Navarette*). In short, the decision of the court of appeals does not implicate a division of authority that might warrant this Court's review.

d. Finally, review is unwarranted because this case would be a poor vehicle to address the Confrontation Clause question petitioner presents for at least three reasons.

First, the testimony in this case was elicited before this Court's decisions in *Melendez-Diaz*, *Bullcoming*, and *Williams*. Neither the government nor the trial court had the benefit of those decisions in determining what precise questions to ask and what evidence to admit. This Court would be better served in seeking to provide guidance to prosecutors, defense lawyers, and lower courts if it permitted them to absorb the lessons of the Court's recent Confrontation Clause decisions and to reframe their actions in light of them. A decision here, based on a record that predated the relevant decisions, will be of far less use than a deci-

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any mistakes" based on "documentation contained in the analyst's case file" and based testimony on "analyst's certified report").

sion considering the impact that those decisions have had on day-to-day practice by courts and parties seeking to implement them.

Second, most of the materials that Block reviewed before testifying and that form the factual foundation for petitioner's Confrontation Clause claim are not in the record. The record contains Hanson's one-page report, which she signed without "certif[ying] anything" and which the state Attorney General's designee later certified merely to be a "true and correct report of the [lab's] findings." Pet. App. 13a-14a. But the record does not contain Hanson's notes or the raw data on the lab-instrument printouts that Block reviewed. *Id.* at 15a. The record would therefore present challenges for this Court's review. Among other things, the record would make it difficult for this Court to determine whether the materials that Block reviewed have the "requisite 'formality and solemnity' to be considered 'testimonial'" under Justice Thomas's understanding of that principle. See *Williams*, 132 S. Ct. at 2255 (Thomas, J., concurring in the judgment) (citation omitted); *id.* at 2259-2260 (explaining that "the Confrontation Clause regulates only the use of statements bearing 'indicia of solemnity'" and examining the actual report in question to determine if it was testimonial) (citation omitted). The Court would also lack a definitive analysis of that issue by the court of appeals. Pet. App. 14a-16a (discussing considerations relevant to the formality issue and observing that "[a]part from Hanson's final report," which "was not certified in the sense that Justice Thomas deemed relevant," "we know next to nothing about the nature of her notes, raw test results, and any other docu-

ments that Block reviewed in forming his opinion that the substances contained cocaine base").

Finally, even entirely disregarding Block's testimony as assumed error, any error would be harmless beyond a reasonable doubt for essentially the same reasons discussed by the court of appeals. See Pet. App. 16a-20a. The court of appeals' based its harmlessness holding on six factors, only one of which was Block's independently formed opinion testimony that he based on machine-generated data. See *id.* at 20a-21a. Even without that evidence, the other factors overwhelmingly established that the substances in question were crack cocaine. As the court of appeals recognized, *id.* at. 17a-18a, the "law is quite clear that the introduction of a chemical analysis of the substance is not essential to conviction." *United States* v. *Baggett*, 954 F.2d 674, 677 (11th Cir.) (citation omitted), cert. denied, 504 U.S. 992 (1992). The identity of drug substances may instead be established with lay testimony or circumstantial evidence. *Ibid.*; see, *e.g.*, *United States* v. *Dolan*, 544 F.2d 1219, 1221 (4th Cir. 1976); *United States* v. *Agueci*, 310 F.2d 817, 828 (2d Cir. 1962), cert. denied 372 U.S. 959 (1963).

The evidence showed that Officer Meyer had contacted petitioner "for the express purpose of buying crack cocaine"; Meyer testified based on her extensive narcotics experience that the substances that petitioners then sold to her as crack were "crack cocaine or 'suspect' crack cocaine"; the price petitioner charged Meyer reflected the price "charged for crack cocaine"; and the field test that a detective performed on the substance petitioner sold to Meyer was "positive" for "the presence of cocaine base," *id.* at 18a-20a. Notably, petitioner never disputed that the substances

were crack cocaine: defense counsel never suggested in his opening or closing statement to the jury that the substances were not crack cocaine; never even "explored this possibility during cross-examination of any government witness"; and never elicited any "evidence that the substances could have been something other than crack cocaine." *Id.* at 21a-22a. The record evidence discussed above compellingly shows that it *was* crack cocaine. And given that petitioner's theory at trial was that he never sold "anything to Meyer," *id.* at 22a—a position the jury necessarily rejected unanimously—no reasonable doubt exists that the jury would have reached the same verdict even without Block's testimony.

2. Petitioner contends (Pet. 27-31) that this Court should review the court of appeals' harmless-error analysis. The court of appeals' harmless-error decision is correct and does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

Petitioner argues (Pet. 28-31) that the court of appeals applied the wrong standard of harmlessness by basing its holding on the "sufficiency of the remaining evidence." But petitioner himself acknowledges that this court of appeals has already "rejected the sufficiency of the evidence" as the standard for harmless constitutional error, Pet. 30, and nothing in its decision in this case suggests any departure from its own binding precedents. See, *e.g.*, Pet. App. 16a, 18a, 21a, 23a (concluding that the "considerable evidence" in the record other than the arguably tainted testimony "was more than sufficient to show beyond a reasonable doubt" that the substance was crack cocaine and, given that evidence, "it is clear that the jury *would*

have rendered the same verdict" absent any error, rending the assumed error "harmless beyond a reasonable doubt") (emphasis added). In any event, even if there were any tension within the Seventh Circuit's decisions, such an intra-circuit conflict would not warrant the Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Petitioner also appears to argue (Pet. 27-28, 30) that the court of appeals erroneously failed to consider the "effect" or "influence Block's [arguably] impermissible testimony had on the jury" in this case. That is incorrect. Although this Court has articulated the harmless-error inquiry as asking whether the error in question "influenced the jury" or "contributed to the conviction," *Chapman* v. *California*, 386 U.S. 18, 23 (1967) (citation omitted), that formulation is just another way of asking whether a reasonable jury would have acquitted the defendant absent the error. As the Court explained in *Neder* v. *United States*, if "a reviewing court concludes beyond a reasonable doubt" that the evidence of guilt is sufficiently strong "that the jury verdict would have been the same absent the error," the "error 'did not contribute to the verdict obtained.'" 527 U.S. 1, 17 (1999) (quoting *Chapman*, 386 U.S. at 24). Indeed, *Neder* addressed an error that indisputably affected the jury's actual verdict because the error "prevent[ed] the jury from making a finding on [an] element" of the offense. *Id.* at 4, 10-11. This Court nevertheless found the constitutional error harmless based on the evidentiary record because a "rational jury would have found the defendant guilty

absent the error," *i.e.*, the "verdict would have been the same absent the error," *id.* at 17-18.[4]

The court of appeals' conclusion that "any error did not affect the outcome of the trial" and was "harmless beyond a reasonable doubt" because it "is clear that the jury would have rendered the same verdict" absent the error, Pet. App. 5a-6a, 23a, is consistent with those principles. This Court has recently denied certiorari on similar questions. See, *e.g.*, *Demmitt* v. *United States*, No. 12-10116 (Oct. 15, 2013); *Ford* v. *United States*, 133 S. Ct. 2795 (2013) (No. 12-7958); *Acosta-Ruiz* v. *United States*, 133 S. Ct. 2795 (2013) (No. 12-6908). No different result is warranted here.

Finally, to the extent that petitioner challenges the application of the harmless-error standard to his case, that fact-bound contention merits no further review. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

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[4] In 1998, the D.C. Circuit concluded that an "'effect on the verdict' inquiry" is different from a "'guilt-based' inquiry," and that the Sixth Amendment's jury-trial guarantee prohibits the latter to the extent that it "'hypothesize[s] a guilty verdict that was never rendered.'" *United States* v. *Cunningham*, 145 F.3d 1385, 1394 (quoting *Sullivan* v. *Louisiana*, 508 U.S. 275, 279 (1993)), cert. denied, 525 U.S. 1059 (1998) and 525 U.S. 1128 (1999). But that conclusion preceded the Court's 1999 decision in *Neder* and did not survive *Neder*'s analysis, which, among other things, limited *Sullivan*'s rationale to structural errors and made clear that harmless-error review reflects an objective test that considers the weight of the evidence of guilt when determining the error's likely effect on the verdict. 527 U.S. at 10-11, 17-18.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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