No. 15-405

In the Supreme Court of the United States

JOSHUA KATSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the testimony of a forensic analyst who provided an expert opinion about forensic testing based on his review the forensic case file—which included chain-of-custody documents, machine-generated data, and analyst notes—but who did not personally conduct or observe the testing, violated the Confrontation Clause of the Sixth Amendment.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-41a) is reported at 74 M.J. 273. The opinion of the United States Air Force Court of Criminal Appeals (Pet. App. 42a-83a) is reported at 73 M.J. 630. The order of the military judge denying petitioner's motion *in limine* (Pet. App. 84a-97a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on June 30, 2015. The petition for a writ of certiorari was filed on September 25, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(2).

STATEMENT

Petitioner, an airman basic in the United States Air Force, was convicted by general court-martial of ag-

gravated sexual assault, burglary, and unlawful entry, in violation of Articles 120, 129, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920, 929, and 934. Pet. App. 2a. Petitioner was sentenced to ten years of confinement, forfeiture of all pay and allowances, and a dishonorable discharge. *Ibid.* The Air Force Court of Criminal Appeals (CCA) set aside the conviction. *Id.* at 42a-83a. The Court of Appeals for the Armed Forces (CAAF) reversed and remanded. *Id.* at 1a-41a.

1. In the early morning hours of December 11, 2010, after a night celebrating her twenty-first birthday, Senior Airman C.A. was raped in her room in an on-base military dormitory in Grand Forks, North Dakota. Pet. App. 4a, 44a; see Court-Martial Tr. (Tr.) 756-757. C.A. promptly identified petitioner as her rapist. Pet. App. 4a, 44a.

C.A. had become acquainted with petitioner several weeks before her rape. Tr. 757. In their first encounter, petitioner approached C.A. while she was working the midnight-meal shift in a military dining facility. *Ibid.* In a drunken state, petitioner asked to take his picture with her. *Ibid.* C.A. eventually assented. Tr. 757-758. C.A. and petitioner later exchanged phone numbers and became Facebook friends, and petitioner posted his photo with C.A. on his Facebook page. Tr. 759-760. Petitioner learned of C.A.'s upcoming birthday when he heard her talking about partying to celebrate. Tr. 760-761.

From the morning of C.A.'s birthday (December 10) and extending well into the night, petitioner used his cell phone to post eight comments about C.A.'s birthday on her Facebook page. Tr. 796-799; C.A. J.A. 399-406 (posts). Petitioner's posts, *inter alia*, asked

C.A. if she was "ready to get all f---ed up tonight?" and indicated that he wanted to get "messed up" that evening. Tr. 797. In addition, petitioner texted C.A. on her cell phone at least five times between 6:42 p.m. and 12:07 a.m. that night while C.A. was celebrating with friends. Tr. 792-793. Petitioner asked petitioner by text, "Hey, are you drunk yet?" Tr. 767, 792-793.

Meanwhile, C.A. celebrated her twenty-first birthday with friends and a substantial amount of alcohol. She drank an initial shot of tequila, three to five cocktails (with little food) at dinner, and about ten additional shots of liquor at a military dorm before going to a bar with friends. Tr. 761, 765-766, 768-771. Although C.A. did not invite petitioner to join the celebration, petitioner arrived at the bar where C.A. was already drunk. Tr. 767, 771-772; see Tr. 646. C.A. did not remember most of what happened at the bar. Tr. 772-773. Her friends, however, testified that, sometime after their arrival, they found her sitting on petitioner's lap with petitioner's arm around her. Tr. 648-650; see Tr. 619. C.A.'s friends decided that she needed to go home and one of her male friends went to help her up. Tr. 648, 650. Rather than assist, petitioner grabbed C.A.'s arm to prevent her departure and stated that he was "going to take care of her." Tr. 650. C.A.'s friends insisted on departing and carried C.A. out of the bar. Tr. 621, 650, 652. C.A. vomited multiple times on the trip home. Tr. 622-623, 652. When they arrived on base, C.A.'s friends left C.A. in her own bed. Tr. 654.

Petitioner departed the bar and returned to base, where he played video games late at night with two other airmen. Tr. 695, 697. At 2:53 a.m. on December 11, petitioner then posted a message on C.A's Face-

book page: "Hey, C[.], you had a good night. You were all f---ed up, no f---ing doubt. Hope you got home safe." Tr. 798; see C.A. J.A. 399. After a few hours of playing video games, petitioner departed, telling his friends that he would be "right back." Tr. 697. Petitioner was wearing jeans, a black shirt, and a black jacket. *Ibid.* Petitioner, who wore glasses, was wearing the same outfit at the bar. Tr. 651. Petitioner did not return to his friends as promised. Tr. 697.

Instead, around 6:00 a.m., C.A. awoke in her bed to petitioner having vaginal intercourse with her. Tr. 773-774; see Tr. 706. Petitioner's face was only an arm's length away from C.A.'s face, Tr. 774, and although the room was dimly lit, C.A. was able to see "who it was" because she was able to see his face and his features like one would see them in "a black and white photo." Tr. 776. C.A. was also able to feel petitioner's glasses and clothing as she struggled to get out from under him, and she testified that he was wearing glasses, denim pants, a beanie hat, and a bulky item that she thought was a coat. Tr. 773-777. C.A. was able to halt the intercourse by pulling away and, after further attempts to push petitioner away, petitioner left her room. Tr. 772, 775-776.

C.A. ran to the room of friend, who called the military police to report the rape. Tr. 778-781. As the friend was on the phone with authorities, C.A. was crying and stated, "I think it was [petitioner]." Tr. 711. When the military police arrived shortly thereafter, "[C.A.] identified [petitioner] as the perpetrator." Tr. 889. C.A. subsequently identified petitioner as her assailant at petitioner's court-martial. Tr. 683-684.

On December 13, when military investigators questioned petitioner in a videotaped interview, petitioner

made several incriminating denials. Cf. Tr. 1002-1085 (video playback); Tr. 1047 (date). Petitioner asserted to investigators that he never saw C.A. at the bar on the night of her rape. Tr. 1075. Petitioner also initially denied ever texting C.A., Tr. 1053, but later changed his story to admit that he sent her a text message "right after [he] got her number," Tr. 1076. In the sworn written statement (C.A. J.A. 393-395) that petitioner gave to investigators during the interview, petitioner added that he did "not remember texting [C.A.]" between December 9 and 12. *Id.* at 395; see Tr. 1079. And although petitioner consented to a December 13 search of his phone, Tr. 1046, petitioner's multiple cell-phone texts to C.A. from those dates—which investigators identified from cellular-carrier records, C.A. J.A. 380, 391-392; Tr. 692-693—had already been selectively deleted from his phone. Tr. 983-986.

A sexual-assault nurse examiner collected vaginal, rectal, and oral swabs and a blood sample from C.A. Pet. App. 5a. Another examiner collected penile and scrotal swabs and blood and saliva samples from petitioner. *Ibid.* The samples and swabs were sent to the United States Army Criminal Investigation Laboratory (USACIL or lab), where an analyst identified DNA on C.A.'s rectal swabs that was consistent with the DNA collected from petitioner. *Id.* at 12a. The analysis also identified DNA on petitioner's penile and scrotal swabs that was consistent the DNA collected from C.A. *Ibid.*

2. a. In February 2011, the government charged petitioner under the UCMJ on specifications of aggravated sexual assault, burglary, and unlawful entry. Pet. App. 2a; Tr. 2. The military judge granted peti-

tioner's motion to continue his trial date from March 28 to May 2, 2011. Tr. 11-13.

On April 26, 2011, the analyst who conducted the DNA testing, Robert Fisher, informed the parties that his mother had been scheduled for a major, emergency surgery in Florida and, for that reason, he would be unavailable to participate in the court-martial until around May 5. Pet. App. 6a; C.A. J.A. 408-409. On April 28, petitioner's counsel informed prosecutors that if they sought the short extension needed to accommodate that family emergency, a further extension of more than two additional months would be necessary because petitioner's expert would be unavailable until the week of July 11. C.A. J.A. 409, 439. Prosecutors thereafter notified petitioner's counsel that the government would call David Davenport, the analyst who conducted the technical review of the DNA testing at issue, to testify about the DNA analysis. *Id.* at 409; Pet. App. 3a, 6a.[1] Petitioner moved to exclude Davenport's testimony on the ground that it would violate the Confrontation Clause. Pet. App. 6a.

b. At the hearing on that motion, Davenport testified about the testing procedures followed at USACIL and his own technical review of the specific testing relevant to this case. Pet. App. 6a-11a; Tr. 177-240. Davenport explained that he had reviewed all the

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[1] Petitioner repeatedly criticizes the government for failing to seek a "very brief[]" and "mildly inconvenient" continuance to allow Fisher to testify. Pet. 2, 4, 15, 26. Although the government itself would have needed the court-martial to be postponed for only a few days, petitioner's demand (C.A. J.A. 409, 439) meant that, if any such delay were sought, an additional continuance of more than two months would have been necessary.

documents in the lab's "case file," which "contained, inter alia, the request for analysis and forms submitted by [the Air Force Office of Special Investigations to the lab], Mr. Fisher's handwritten notes, records of the quality control measures used during testing, all printouts generated during the testing process, the raw DNA profile data, and [Fisher's] Final Report." Pet. App. 9a, 17a. Based on his own independent review of those materials, Davenport stated that he was able to determine that appropriate "quality control measures, such as running positive and negative controls, recording the lot numbers of the chemicals used, processing an unrelated known DNA sample along with the samples at issue, and processing test tubes that contain reagent but not DNA" had been performed. *Id.* at 9a. Davenport also stated that he was able to determine whether "undocumented mistakes [had occurred] by checking for irregularities in the results" and that, for instance, "objective measures [would] enable the technical reviewer to determine that cross-contamination did not occur." *Id.* at 10a. Davenport explained that the case-file materials, including Fisher's notes and the data generated, allowed him to "determine that the proper protocol was followed." *Id.* at 7a n.2.

The military judge denied petitioner's *in limine* motion. Pet. App. 84a-97a. The judge concluded that Davenport, who "reviewed the data and tests performed and formulated his own opinion," would be able to provide his own "independent testimony" in this case. *Id.* at 96a. "So long as Mr. Davenport does not become a conduit of inadmissible testimonial hearsay," the judge concluded, "[he] may give his independent opinion concerning the reliability of testing

procedures used in this case" and the relevant "findings/results." *Ibid.*

c. In addition to eyewitness testimony from C.A. and others linking petitioner to the rape (see pp. 2-4, *supra*), Davenport testified that, in his opinion, DNA consistent with DNA from both C.A. and petitioner were found on the rectal swabs taken from C.A. and on the penile and scrotal swabs taken from petitioner. Pet. App. 12a.

In closing arguments, petitioner's counsel did not argue that petitioner did not have sex with C.A. Counsel instead explained that "[w]e barely had any questions for the DNA expert because ultimately [petitioner's] boy parts were on [C.A.'s] girl parts. Her girl parts were on his boy parts. That doesn't tell us anything else." Tr. 1286. Counsel argued that the DNA evidence did not address whether C.A. consented to sex, whether "she was actively engaging in intercourse," or "where the sex occurred." Tr. 1287. Petitioner's counsel argued that the evidence was insufficient to establish a sexual assault because "[C.A.] might have said yes," Tr. 1289, and the government failed to prove beyond a reasonable doubt that C.A. withheld consent or was "substantially incapacitated" by alcohol so as to be unable to consent. Tr. 1288-1290. The court-martial found petitioner guilty and petitioner appealed.

3. a. The CCA set aside the conviction and authorized a retrial. Pet. App. 42a-83a; see *id.* at 75a. The court first concluded that admitting Davenport's testimony violated the Confrontation Clause. *Id.* at 52a-70a. The court explained that the Confrontation Clause prohibits the admission of "testimonial hearsay" unless the witness whose statements are commu-

nicated through such hearsay evidence is unavailable and was subject to prior cross-examination. *Id.* at 52a. The court then concluded that "Fisher's DNA analysis report is * * * testimonial" because Fisher "knew [petitioner's] identity" when he "created the DNA profiles" and "knew the results of his analysis would be turned over to the [Air Force Office of Special Investigations] for potential prosecution." *Id.* at 62a-63a. The court also determined that Davenport "was able to identify [petitioner] by name only by repeating the testimonial statement contained in Mr. Fisher's report that directly linked [petitioner] to the generated DNA profile." *Id.* at 68a. For that reason, Davenport's testimony violated the Confrontation Clause. *Id.* at 70a.

The CCA held that that Confrontation Clause error was not harmless because it concluded that a reasonable possibility exists that the DNA evidence contributed to petitioner's conviction. Pet. App. 70a-74a.

b. Judge Orr dissented in part. Pet. App. 80a-83a. He concluded that the admission of Davenport's testimony was harmless beyond a reasonable doubt in light of the record as a whole, which showed, *inter alia*, that petitioner's counsel did not contest the fact of sexual contact and focused instead on challenging whether C.A. was "substantially incapacitated" and did not "consent[] to sexual intercourse." *Id.* at 83a.

4. a. The CAAF reversed and remanded for further proceedings, Pet. App. 1a-41a, based on its conclusion that Davenport's testimony did not violate the Confrontation Clause. *Id.* at 14a-31a.

In reaching that conclusion, the CAAF assumed *arguendo* that the CCA had correctly determined that Fisher's four-page DNA report (C.A. J.A. 415-418)

was testimonial. Pet. App. 19a. The court also assumed *arguendo* that Davenport's testimony "may have relied in part on the Final Report" because he was aware of its contents given that "he had to conduct the technical review of [the report]." *Ibid.* But because Fisher's report was not itself "introduced [into evidence] or repeated at trial" by Davenport, the court analyzed whether "Davenport's opinion was admissible." *Ibid.*

The CAAF determined that "many of the out-of-court data and 'statements' relied upon by Mr. Davenport in reaching his conclusion were not testimonial." Pet. App. 17a. Davenport, the court concluded, based his testimony on his review of the documents in the case file, including "computer-generated raw data and Mr. Fisher's handwritten notes," which are "not in the record." *Ibid.* But based on its review of the information in the record, the court determined that "the [Air Force Office of Special Investigations] documents, which appear to primarily serve a chain of custody function"; the "computer-generated raw data"; and Fisher's "notes [and] his other lab results" within the case file were not testimonial. *Id.* at 17a-18a. "Nothing" indicated that the chain-of-custody documents were testimonial or that the computer-generated data qualified as "statement[s]," much less testimonial ones. *Id.* at 17a. "Nor is there any indication" that "Fisher's notes or his other lab results that underlay [his] Final Report were signed, certified anything, or bore indicia of formality" or that "Fisher expected them to be used at trial." *Id.* at 17a-18a. As a result, the CAAF determined, "Davenport's statements regarding proper testing, receipt, inventory, and analysis of the evidence, as well as his identifica-

tion of the parties, relied on nontestimonial items in the case file" and, for that reason, were admissible. *Id.* at 18a-19a.

The CAAF explained that the relevant question was whether Davenport could sufficiently "reach an independent conclusion as to the object of his testimony and his expert opinion" based on the nontestimonial documents in the case file without relying on testimonial statements in Fisher's DNA report. Pet. App. 20a. That "highly fact-specific inquiry," the court explained, would govern whether Davenport was himself "a 'witness' rather than a 'conduit'" for testimonial statements in Fisher's final report. *Ibid.*

The CAAF held that Davenport's testimony reflected "his independent review" and constituted "his own opinion." Pet. App. 28a-30a. "The witness against [petitioner]," the court determined, "was not Mr. Fisher or the Final Report, but Mr. Davenport who appeared in person at trial." *Id.* at 30a. The court explained that "Davenport performed an extensive independent review of the case file" that did not depend on Fisher's testimonial report because he "reli[ed] on other, nontestimonial factual bases" that "allowed him to render his own opinion." *Id.* at 28a, 30a. Such nontestimonial materials, the court explained, allowed Davenport to "determine[] that Mr. Fisher took the prescribed quality control measures, that no accidents occurred, and that the results were logically consistent." *Id.* at 29a. Davenport also "reanalyzed the DNA profile data * * * to verify that the matches that Mr. Fisher reported and recalculated the frequency statistics." *Ibid.* Davenport thus "presented his own expert opinion at trial, which he formed as a result of his independent review." *Ibid.*

The fact that "Davenport did not himself perform aspects of the tests," the court added "'goes to the weight, rather than to the admissibility' of his opinion." *Ibid.* (citation omitted).

b. Judge Ohlson dissented. Pet. App. 31a-41a. Judge Ohlson stated that he agreed "with much of the [majority's] analysis and many of [its] conclusions" and that his judgment was different "in regard to just one point," namely, whether petitioner was entitled to confront Fisher on whether "he precisely followed the required protocols" which, if not followed, may have led him to "contaminate[] the evidentiary DNA sample[s]" with "the known DNA sample[s]" from C.A. and petitioner. *Id.* at 31a. Judge Ohlson additionally stated his conclusion "the DNA evidence was a central and integral element of the Government's case" and that the Confrontation Clause error was not harmless beyond a reasonable doubt. *Id.* at 40a-41a.

ARGUMENT

Petitioner argues (Pet. 15-24) that the CAAF erred in upholding the admission of Davenport's testimony, which, in petitioner's view, violated the Confrontation Clause. Petitioner bases that argument on his contention that the CAAF held that Davenport could properly "formulate[] his own 'independent opinion'" and testify about it even though Davenport "relied crucially on *testimonial* statements of Fisher." Pet. 8 (quoting Pet. App. 26a) (emphasis added). Petitioner thus concludes that "[i]t did not matter to [the] CAAF that * * * essential factual predicates for [Davenport's] opinion lay in *testimonial* statements made by [Fisher]." Pet. 13 (emphasis added). Petitioner's arguments rest on a misreading of the CAAF's opinion, which makes clear that the court concluded that Dav-

enport formulated his own independent opinion in this case based not on testimonial statements in Fisher's DNA report but "on other, *nontestimonial* factual bases" in the case file. Pet. App. 30a (emphasis added); see *id.* at 17a-19a. That fact-bound conclusion is correct on the record of this case and does not conflict with any decision of this Court or any decision of any federal court of appeals or state court of last resort.

Moreover, this case would be a poor vehicle for review for at least two reasons. Review would be significantly hindered by the absence from the record of the nontestimonial case-file materials on which Davenport based his opinion, including machine-generated data, chain-of-custody documents, and analyst's notes. The absence of those documents would make it difficult for the Court to conduct a full analysis of the scope of permissible testimony of an expert who did not conduct the actual tests. Cf. *Williams* v. *Illinois*, 132 S. Ct. 2221, 2245-2248 (2012) (Breyer, J., concurring) (discussing complications in Confrontation Clause analysis when addressing "crime laboratory reports and underlying technical statements made by laboratory technicians"). And even assuming that aspects of Davenport's testimony were erroneously admitted, any error would have been harmless beyond a reasonable doubt in light of the powerful evidence of petitioner's guilt and petitioner's own failure to dispute that he engaged in sex with his victim. Further review is unwarranted.

1. The Confrontation Clause of 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 the government may not offer into evidence a "testimonial" statement of an absent witness at a criminal trial unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. The CAAF correctly held on the facts of this case that Davenport's testimony was supported by his review of *nontestimonial* statements to form an independent expert opinion, and, for that reason, Davenport's testimony did not violate the Confrontation Clause.

a. This Court has concluded that statements made in response to law-enforcement inquiries will be testimonial if their "primary purpose" is to "creat[e] an out-of-court substitute for trial testimony." *Michigan* v. *Bryant*, 562 U.S. 344, 358-359 (2011). "Where no such primary purpose exists," however, the "rules of evidence, not the Confrontation Clause," govern the admissibility of testimony that conveys the hearsay statements of another. *Id.* at 358-359.

In *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305 (2009), the Court held that formal, sworn statements by state laboratory analysts made in affidavits that reported the final results of their forensic drug testing were "testimonial" because they had been created "sole[ly]" as evidence for criminal proceedings. *Id.* at 310-311 (emphasis omitted); see *id.* at 330 (Thomas, J., concurring) (joining the Court's opinion because the documents at issue were "quite plainly affidavits") (quoting *id.* at 310 (opinion of the Court)).

In *Bullcoming* v. *New Mexico*, 131 S. Ct. 2705, 2710, 2715-2716 (2011), the Court applied *Melendez-Diaz*'s rationale to hold that the Confrontation Clause forbids the admission of an analyst's signed, forensic report certifying the final results of a blood-alcohol

test when the report's statements were offered through the "surrogate 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. Justice Sotomayor joined the five-Justice majority opinion, *id.* at 2709 n.*, but wrote separately to emphasize that the underlying forensic report was "testimonial" because its "'primary purpose'" was to "'creat[e] an out-of-court substitute for trial testimony.'" *Id.* at 2719-2720 (Sotomayor, J., concurring in part) (quoting *Bryant*, 562 U.S. at 358).

In *Williams* v. *Illinois*, this Court more recently concluded that admitting a DNA's expert's opinion testimony, which relied in part on a DNA profile provided in the final report of a non-testifying analyst, did not violate the Confrontation Clause. 132 S. Ct. 2221. No single opinion commanded a majority of the Court, and no single rationale for the judgment can be identified under the approach of *Marks* v. *United States*, 430 U.S. 188, 193 (1977).

The four-justice plurality in *Williams* concluded that the expert-opinion evidence was permissible for two reasons. First, the plurality found that the expert's opinion was based on her independent comparison of two DNA profiles and that, to the extent that it incorporated a statement from the non-testifying analyst's report attributing one profile to semen found in the victim's vaginal swab, that statement was not admitted for its truth. 132 S. Ct. at 2235-2240; see *id.* at 2240 (noting that the Confrontation Clause does not apply to statements not admitted for their truth). Second, the plurality concluded that even if the analyst's statement in the DNA report had been admitted for its truth, it did not implicate the Confrontation

Clause because the report's "primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against" an identified defendant. *Id.* at 2243; see *id.* at 2242-2244. Justice Thomas concurred in the judgment, finding that the report on which the testifying expert relied was admitted for its truth, but that it lacked the requisite "formality and solemnity" to be testimonial because it was "neither a sworn nor a certified declaration of fact" similar to "an affidavit or deposition." *Id.* at 2255, 2260-2261.

Justice Kagan's dissent, in turn, rejected the plurality's conclusion that the non-testifying analyst's attribution of the DNA profile to semen found in the victim's vaginal swab was not admitted for its truth. 132 S. Ct. 2268-2272. She also rejected the plurality's interpretation of the primary-purpose test, *id.* at 2273-2275, and Justice Thomas's solemnity requirement, *id.* at 2275-2277. Justice Kagan concluded that a certified forensic report will be "testimonial" when it has a "clear 'evidentiary purpose'" because it was made under circumstances in which an objective witness would reasonably believe that the report itself "would be available for use at a later trial." *Id.* at 2266 (citation omitted). Justice Kagan thus concluded that the DNA report in *Williams* was testimonial because it was made so that the report itself could be used "to establish '[a] fact' in a criminal proceeding," namely, the identity of a specific victim's rapist. *Ibid.* (citation omitted); see *id.* at 2277.

b. In this case, the CAAF distinguished between the admission of expert testimony based on testimonial statements of an out-of-court witness, which would violate the Confrontation Clause, and the admission of expert testimony based on nontestimonial statements,

which would not. Compare Pet. App. 25a (recognizing that an expert cannot testify as a "conduit for repeating testimonial hearsay") with *id.* at 26a (experts may rely on the work of others so long as they reach an independent conclusion). The CAAF correctly concluded that the Confrontation Clause does not prohibit an expert from testifying to his own independent opinions based on nontestimonial statements.

The CAAF accepted for the purposes of this case that Fisher's final DNA report—which was not admitted at trial—was testimonial. Pet. App. 19a; see *id.* at 11a (noting that the "Final Report was not admitted into evidence"). But the court explained that Davenport did not "repeat[] at trial" any of the report's testimonial statements, *id.* at 19a, and that he "only referenced the Final Report to note that he reviewed Mr. Fisher's interpretation of the results and checked the Final Report against the documents submitted by [the Air Force Office of Special Investigations] to make sure that the report properly listed and identified the items submitted as evidence," *id.* at 11a-12a. The court further assumed that Davenport's testimony "may have relied in part on the Final Report" in the sense that Davenport was aware of the report "since he had to conduct the technical review of it" before trial. *Id.* at 19a. But the court explained that if "Davenport had sufficient personal knowledge to reach an independent conclusion" based on "other, nontestimonial" materials, the admission of his opinions based on those materials would not violate the Confrontation Clause. *Id.* at 20a, 30a. That proposition is not controversial: even petitioner appears to acknowledge (Pet. 19) that Davenport's testimony

would be admissible "if he relied on information learned other than through testimonial statements."

The documents in the case file, the CAAF explained, provided the nontestimonial information on which Davenport based his testimony "regarding proper testing, receipt, inventory, and analysis of the evidence, as well as his identification of the parties." Pet. App. 18a-19a. Records documenting the chain of custody of evidence, which link the evidence to a particular defendant and his victim, are not normally testimonial; any gaps in the chain go to the weight not the admissibility of evidence. *Melendez-Diaz*, 557 U.S. at 311 n.1. Moreover, "[n]othing suggests" such documents in the case file here "were testimonial," Pet. App. 17a, and petitioner disclaims (Pet. 19-20) any argument that "everyone who handles DNA evidence" must testify. Similarly, "[n]othing suggests" that the machine-generated "raw data" in the case file qualified as a statement by a witness, much less a testimonial one. Pet. App. 17a; see Pet. 19 (disclaiming any confrontation right regarding "the output of a machine"). In addition, the record here does not suggest that Fisher would have "expected [his notes and the raw lab results in the case file] to be used at trial" or that such materials "were signed, certified anything, [or] bore indicia of formality." Pet. App. 17a-18a; see *id.* at 8a n.2; *Williams*, 132 S. Ct. at 2255 (Thomas, J., concurring in the judgment) (requiring "formality and solemnity" for lab materials to qualify as testimonial). Such underlying materials fundamentally differ from an analyst's formal final report, which is sent to investigators and could, but for the rule in *Melendez-Diaz* and *Bullcoming*, be viewed as having

the primary purpose of being "an out-of-court substitute for trial testimony," *Bryant*, 562 U.S. at 358.

The CAAF explained that such nontestimonial materials formed a sufficient basis for Davenport's independent opinion testimony. For instance, Davenport stated that he was able to determine that appropriate "quality control measures, such as running positive and negative controls, recording the lot numbers of the chemicals used, processing an unrelated known DNA sample along with the samples at issue, and processing test tubes that contain reagent but not DNA" had been performed. Pet. App. 9a. He thus explained that "objective measures [would] enable [him] to determine that cross-contamination did not occur" and that he was able to identify "undocumented mistakes" by looking for certain "irregularities in the results." *Id.* at 10a. Testimony based on such independent analysis of nontestimonial materials in a case file, including machine-generated data and results, does not violate the Confrontation Clause.

Petitioner asserts (Pet. 20) that "statements by Fisher were plainly essential for any opinion concerning the DNA evidence" because if Fisher did not conduct the tests or had corrupted the evidence, Davenport's opinion would have no value. That position confuses whether Davenport's opinion relied on Fisher's testimonial assertions (a concern of the Confrontation Clause) with whether Davenport's opinion had probative "value" (which is not a Confrontation Clause concern). As the CAAF observed, "Mr. Davenport did not rely on some assertion or assurance by Mr. Fisher (which nowhere resides in the record)" that proper protocol was followed. Pet. App. 8a n.1. Rather, he drew that inference from nontestimonial documenta-

tion in the file. That meant, of course, that Davenport could not rule out the possibility of contamination or error in Fisher's testing, although he explained why he concluded from the nontestimonial materials that this was unlikely. *Id.* at 101a-105a. But weaknesses in an expert's opinion do not establish a Confrontation Clause violation. See *Williams*, 132 S. Ct. at 2237 (plurality opinion) ("an expert's opinion based on disputed premises 'might not go for much; but still it [is] admissible evidence'") (citation omitted); see also *id.* at 2238 (explaining that an expert opinion about a DNA match whose supporting premises were not proved might be "irrelevant, but the Confrontation Clause * * * * does not bar the admission of irrelevant evidence"). Thus, even accepting *arguendo* that it violates the Confrontation Clause "if the only source for an essential factual predicate of the trial testimony of a prosecution witness lies in the testimonial statement of another expert who has not been subject to confrontation" (Pet. 11), that conclusion does not apply where the testifying expert draws his conclusions from nontestimonial evidence. The testifying expert's opinion may have reduced probative value if his reasoning process has logical or factual gaps because he did not perform the underlying tests. But, as the CAAF recognized, that fact "goes to the weight, rather than the admissibility of his opinion." Pet. App. 29a (internal quotation marks omitted); see also *Williams*, 132 S. Ct. at 2237 (plurality opinion).[2]

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[2] This case is unlike *Williams*, in which the testifying analyst relied on testimonial statements from a non-testifying analyst to connect the defendant's DNA profile to the victim's vaginal swab, and the question in this Court was whether the trial judge properly disregarded that statement in the expert's opinion and instead

2. Petitioner ultimately rests his arguments, and his claim that this case implicates disagreement in the lower courts, on a misreading of the CAAF's decision.

a. Petitioner asserts that "[i]t did not matter to [the] CAAF that * * * essential factual predicates for [Davenport's] opinion lay in *testimonial* statements made by [Fisher]" and that the CAAF therefore deemed Davenport's testimony admissible even though he "relied crucially on *testimonial* statements of Fisher" in "formulat[ing] his own 'independent opinion.'" Pet. 8, 13 (quoting Pet. App. 26a) (emphasis added). The question presented and most of the petition similarly assumes that Davenport's testimony "necessarily relies on testimonial assertions," Pet. i, without grappling with the CAAF's determination that the underlying materials in the case file on which Davenport relied were not in fact testimonial. Because petitioner simply assumes that the expert testimony here necessarily relied on testimonial statements of an absent witness, the petition attacks a holding not made by the CAAF or raised by the facts of the case. The CAAF's decision did not suggest that reliance on testimonial statements of a non-testifying analyst as an essential predicate of an expert's testi-

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relied on other admissible evidence to connect the DNA profile to the semen from the victim's vaginal swab. Compare *Williams*, 132 S. Ct. at 2236-2240 (plurality opinion) (finding no reliance by the judge on testimonial hearsay) with *id.* at 2256-2259 (Thomas, J., concurring in the judgment) and *id.* at 2268-2272 (Kagan, J., dissenting) (rejecting that conclusion). Here, Davenport had ample nontestimonial sources—including chain-of-custody documentation and raw lab data—to connect the test results to petitioner and the victim. The gaps about his knowledge of Fisher's actions did not mean that he had relied on *Fisher's* testimonial statements in the Final Report for his conclusions.

mony would be appropriate and concluded instead that Davenport's independent opinions were based on nontestimonial information.

Petitioner's claim (Pet. 9-14) that this Court's review is warranted to resolve a division of authority among the lower courts similarly rests on the mistaken premise that the CAAF approved the admission of expert testimony that necessarily relies on testimonial statements of others. In petitioner's view, the CAAF's decision conflicts with other courts of appeals and state courts that have held that the Confrontation Clause prohibits expert testimony "if the only source for an essential factual predicate of the trial testimony * * * lies in the testimonial statement of another." Pet. 11. But as explained, the CAAF did not conclude that the "only source" for essential factual predicates for Davenport's testimony was "testimonial" statements by Fisher. Quite the contrary, the court concluded that Davenport was able to provide an independent opinion based on *non*testimonial materials in the case file. Petitioner identifies no decisions finding a Confrontation Clause violation in circumstances in which an expert relies on nontestimonial information to form the basis for his opinion, much less a significant division of authority warranting this Court's review.

b. Petitioner briefly suggests (Pet. 15 n.9, 16) that the portions of the case file containing "Fisher's preliminary writings" and his "statements in preparation of [his Final Report]" are testimonial. But petitioner identifies nothing in the record to support that view. Petitioner indicates (Pet. 15 n.9) that the CCA determined as much, but the CCA merely concluded that "Fisher's DNA analysis *report* is * * * testimonial"

because he knew petitioner's identity and that "the *results* of his analysis would be turned over to [investigators] for potential prosecution." Pet. App. 62a-63a (emphasis added). That conclusion does not encompass, much less analyze, an analyst's notes and other materials that may reside in the case file.

In any event, the petition does not present any question about whether the materials on which Davenport based his opinion were testimonial. Petitioner's question simply asks whether expert testimony is admissible *if* it necessarily relies on testimonial statements of another. Pet. i. "The fact that [petitioner] discussed" whether case file materials were testimonial "in the text of his petition for certiorari does not bring [that issue] before [the Court]" because "Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for [this Court's] review." *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) (citation omitted, brackets omitted).

3. This case would be a particularly poor vehicle for review of the scope of permissible expert testimony by one analyst based in part on testing conducted by another who does not testify, for two independent reasons.

First, the case-file materials on which Davenport based his opinion are "not in the record." Pet. App. 17a. The limitations of the record in this case would hinder the Court's assessment of the type of records that experts in general, and Davenport in particular, rely on in formulating opinions. To the extent that the Court would wish to consider whether any such materials were testimonial, but see p. 23, *supra* (noting that this would fall outside the question presented), the record would make it impossible for this Court to

determine the degree to which the materials that Davenport reviewed have the formality associated with testimonial materials. See *Bullcoming*, 131 S. Ct. at 2713-2714 (describing "[a]n analyst's certification prepared in connection with a criminal investigation or prosecution" as "testimonial"); *Melendez-Diaz*, 557 U.S. at 310-311 (affidavits with an "evidentiary purpose"); see also *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). Nor would the record allow the Court to evaluate the materials under any other test for testimonial statements. See *Williams*, 132 S. Ct. at 2276 (Kagan, J., dissenting) (discussing characteristics of the "official and signed" forensic report at issue that made it "testimonial"). An assessment of the proper role of expert DNA testimony based in part on lab work conducted by others, see *id.* at 2244-2248 (Breyer, J., concurring), would also be difficult in the absence of a clear record of how those others documented their work.

Second, any Confrontation Clause error was harmless beyond a reasonable doubt. The expert DNA testimony in this case was relevant to the question whether petitioner had sexual contact with C.A., and it supported the inference that petitioner's DNA was found on a rectal swab taken from C.A. and that C.A.'s DNA was found on penile and scrotal swabs taken from petitioner. Petitioner, however, did not dispute at trial that such sexual contact occurred. To the contrary, petitioner's counsel admitted to the mem-

bers of the court-martial that "ultimately [petitioner's] boy parts were on [C.A.'s] girl parts" and "[h]er girl parts were on his boy parts" but that fact could not establish that petitioner was guilty of a sexual assault and the evidence was insufficient to establish the circumstances under which the sexual conduct occurred. Tr. 1286. Counsel instead argued that the evidence was insufficient to prove beyond a reasonable doubt that C.A. withheld consent or was "substantially incapacitated" by alcohol so as to be unable to consent. Tr. 1288-1290. According to counsel's argument, "[C.A.] might have said yes," Tr. 1289, and the circumstances surrounding the contact, including whether C.A. consented to sex, whether "she was actively engaging in intercourse," or "where the sex occurred," Tr. 1287, had not been sufficiently established.

The evidence, moreover, directly established that petitioner had sexual contact with C.A. C.A. knew petitioner, was able to see his features in her dimly lit room, identified the clothing petitioner wore during the assault, and promptly identified petitioner as her rapist to authorities. See pp. 2-4, *supra*. The circumstantial evidence likewise logically linked petitioner and C.A. on the evening of the rape and provided a timeline consistent with petitioner's role in the assault. See *ibid.* Moreover, the evidence demonstrated that petitioner made incriminating denials to investigators to distance himself from C.A., falsely stating that he did not see C.A. that evening and did not exchange text messages with her during the relevant period. See p. 5, *supra*. Similarly, the evidence showed that when petitioner consented a search of his cell phone a mere two days after the rape, he had

already deleted his text messages to C.A. See *ibid.* That evidence, in conjunction with petitioner's admission through counsel that "his boy parts were on her girl parts" and vice versa, Tr. 1286, demonstrates that any Confrontation Clause error was harmless beyond a reasonable doubt.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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