No. 09-10231

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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QUESTION PRESENTED

Whether the Confrontation Clause of the Sixth Amendment forbids the introduction of a supervisory forensic analyst's expert testimony about the nature and quantity of suspected narcotics in the absence of the forensic analyst who conducted the laboratory testing.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is published at 591 F.3d 928.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2010. The petition for a writ of certiorari was filed on April 12, 2010. 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 cocaine base (*i.e.*, crack cocaine), in violation of 21 U.S.C. 841(a)(1). He was sentenced to 210 months of imprison-

ment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-14a.

1. In January 2008, local authorities learned that petitioner was selling crack cocaine in Madison, Wisconsin. An undercover officer purchased crack cocaine from petitioner on three occasions. Petitioner was then arrested. In February 2008, a federal grand jury in the Western District of Wisconsin indicted petitioner on three counts of distributing cocaine base (*i.e.*, crack cocaine), in violation of 21 U.S.C. 841(a)(1). Pet. App. 2a.

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. 2a-3a.

Petitioner moved in limine to exclude Block's testimony. Petitioner argued that Block's testimony would convey impermissible hearsay regarding Hanson's analysis and would violate his Sixth Amendment right to confront Hanson. Pet. App. 43a-44a. In its opposition, the government stated that Block would testify to his own conclusions, not Hanson's. *Id.* at 45a-48a. The district court denied petitioner's motion. *Id.* at 19a; see *id.* at 3a.

At trial, the government called Block as an expert witness to identify the substances that the undercover officer purchased from petitioner. In his testimony, Block 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. 3a; see *id.* at 28a-32a, 35a-36a. 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." *Id.* at 4a. 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 29a. 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, lab report, and data charts in reaching his conclusion, none of those documents was introduced into evidence. *Id.* at 5a.

At the close of the government's case, petitioner moved for a directed verdict. Petitioner 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 motion in

limine, petitioner also argued that Block had not provided "eyewitness testimony as far as the certainty of his opinion." Pet. App. 37a. The district court denied the motion for a directed verdict. *Ibid.*

Petitioner did not put on any evidence. The jury returned guilty verdicts on all three counts of the indictment. Concluding that petitioner qualified as a career offender under the advisory Sentencing Guidelines, see Sentencing Guidelines § 4B1.1, the district court sentenced petitioner to concurrent terms of 210 months of imprisonment on each count, to be followed by three years of supervised release. Pet. App. 5a; Judgment 3.

3. The court of appeals affirmed. Pet. App. 1a-14a. 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 6a-12a. 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 7a. Relying on *United States* v. *Moon*, 512 F.3d 359 (7th Cir.), cert. denied, 129 S. Ct. 39, and 129 S. Ct. 40 (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. 7a-8a. 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, *id.* at 8a (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. 9a. 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 9a-11a.

The court of appeals noted that the conclusion that 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*, 129 S. Ct. 2527 (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. 11a-12a. 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 12a. 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*, 129 S. Ct. at 2532 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. 12a-14a. 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 13a-14a (quoting *United States* v. *Prieto*, 549 F.3d 513, 524-525 (7th Cir. 2008)).

ARGUMENT

Petitioner renews (Pet. 9-15) his contention that the admission of Block's testimony violated his Sixth Amendment right of confrontation. He further argues (Pet. 9-11) that this Court's review is warranted to resolve a conflict of authority about the admissibility of a supervisory forensic chemist's expert testimony about the nature and quantity of suspected narcotics in the absence of the chemist who conducted the laboratory testing. The court of appeals correctly rejected petitioner's Confrontation Clause challenge to the admission of Block's testimony, and petitioner identifies no conflict of authority that warrants this Court's intervention.

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. In *Crawford* v. *Washington*, 541 U.S. 36, 68 (2004), this Court held that the Sixth Amendment's confrontation guarantee generally forbids the introduction of the "testimonial" statement of an absent witness at a criminal trial, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine. In *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527 (2009), this Court held that a certificate of forensic analysis qualifies as such a testimonial statement, and thus generally may not be admitted unless the analyst is present at trial and available for cross-examination. *Id.* at 2532.

2. The court of appeals in this case correctly concluded that the admission of Block's testimony did not violate petitioner's Sixth Amendment right of confrontation. Block testified live at trial and he was subject to cross-examination. That Block's conclusions about the nature of the government's drug exhibits were based in part on the results of testing performed by another person does not alter the Confrontation Clause analysis. As the court below observed, "the Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself." Pet. App. 8a (quoting *United States* v. *Moon*, 512 F.3d 359, 362 (7th Cir.), cert. denied, 129 S. Ct. 39, and 129 S. Ct. 40 (2008)). And although Block relied on Hanson's raw data and report in formulating his opinion, neither her report, nor her notes, nor her machine-generated results were admitted into evidence. See *id.* at 5a. *Crawford* did not alter the settled rule that an expert witness may offer an opinion based on inadmissible facts or data. See *United States* v. *Henry*, 472 F.3d 910, 914 (D.C. Cir.), cert. denied, 552 U.S. 888 (2007); Fed. R. Evid. 703. Thus, even "if the

Confrontation Clause precludes admitting [the employee's] report, this does not spoil [the chemist's] testimony." Pet. App. 8a (quoting *Moon*, 512 F.3d at 361) (brackets in original).*

Petitioner contends that, because Block did not personally conduct the testing, he "necessarily conveyed testimonial hearsay from Hanson's notes and report when he testified that Hanson followed specific procedures in [petitioner's] case, and that he and Hanson both concluded that the drug exhibits contained crack cocaine." Pet. 13 (citations omitted). But as the court of appeals explained, because Block's "job was to personally check Hanson's test results, * * * 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. 9a. And as the court of appeals noted, any error in admitting Block's testimony that he agreed with Hanson's conclusions "would have been harmless under any standard," since "Block's statement was a passing reference

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* As other courts have concluded, the Confrontation Clause does not bar the admission of facts or data containing testimonial statements of absent witnesses if they are admitted for the non-hearsay purpose of assisting the jury to evaluate the expert's opinion. See, *e.g.*, *State* v. *Tucker*, 160 P.3d 177, 194 (Ariz.), cert. denied, 552 U.S. 923 (2007); cf. *Crawford*, 541 U.S. at 60 n.9 (affirming that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted") (citing *Tennessee* v. *Street*, 471 U.S. 409, 414 (1985)). But see, *e.g.*, *People* v. *Goldstein*, 843 N.E.2d 727, 732-733 (N.Y. 2005) (concluding that a psychiatrist could not testify about statements made in interviews with individuals acquainted with the defendant and that any distinction between offering such statements for their truth and in assisting in evaluating an expert opinion was "not meaningful" in that context), cert. denied, 547 U.S. 1159 (2006).

to Hanson in the context of explaining the procedures for processing and testing the evidence at the laboratory." *Id.* at 9a-10a.

Petitioner also contends that, "even if Block merely conveyed his own opinions based on Hanson's results," his right of confrontation was violated because there was no testimony from a "witness with personal knowledge" who "properly authenticate[d] the samples that Hanson tested and the results she obtained." Pet. 13. But as this Court made clear in *Melendez-Diaz*, the Confrontation Clause does not demand 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." 129 S. Ct. at 2532 n.1; see Pet. App. 11a-12a. Rather, "'gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility,'" and it "is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence." *Melendez-Diaz*, 129 S. Ct. at 2532 n.1 (citation omitted; brackets in original). Petitioner was free to cross-examine Block on whether Block had personally witnessed Hanson handle the evidence in the government exhibits or watched her conduct the tests, and he indeed did so. See Pet. App. 34a. But Hanson's absence at trial did not bar Block from testifying about his conclusions based on her testing.

3. Petitioner contends (Pet. 9-11) that this Court's review is warranted to resolve a conflict among state high courts and federal courts of appeals "regarding whether surrogate expert testimony complies with the Confrontation Clause." Pet 9. Petitioner is incorrect.

In support of his contention, petitioner refers (Pet. 10-11 & nn.3-4) to the conflict of authority alleged in the

petition for a writ of certiorari in *Pendergrass* v. *Indiana*, cert. denied, No. 09-866 (June 14, 2010). This Court has denied review in *Pendergrass*, and there is no reason for a different result in this case. That is particularly so because the decision below does not implicate the question raised in *Pendergrass*, and which petitioner contends has divided the lower courts: whether the government may introduce into evidence the forensic report or other testimonial statement of a nontestifying analyst through the in-court testimony of a surrogate expert. Pet. 10. The court below rejected petitioner's Confrontation Clause claim after concluding that the government had not "introduced any statements from Hanson that were testimonial," Pet. App. 7a; the court explained that neither Hanson's report, nor her notes, nor her machine-generated results were entered into evidence, and to the extent that Block's testimony mentioned Hanson's conclusion about the nature of the drug exhibits, it was "a passing reference" that reflected his own personal involvement in checking her results, *id.* at 7a, 9a. Thus, as the petition in *Pendergrass* itself noted, the decision below is not inconsistent with decisions prohibiting the introduction of a forensic report or other testimonial statements of a nontestifying expert through a surrogate expert. See Pet. at 13, *Pendergrass*, *supra* (discussing *Moon* and this case).

Petitioner also contends (Pet. 11), that the decision below conflicts with *State* v. *Mangos*, 957 A.2d 89 (Me. 2008). In *Mangos*, a lab supervisor testified, based on the report of a lab technician, that the technician had created DNA swabs from clothing found near the scene of the robbery. *Id.* at 91. The court held that the failure of the technician to testify "created a complete break in the chain of custody of the DNA evidence," *id.* at 92, and

that the supervisor's testimony violated the defendant's right of confrontation because the supervisor "lacked personal knowledge" that the technician had used the clothing found at the scene and admitted at trial to create the DNA swabs, *id*. at 93. *Mangos*, however, was decided before *Melendez-Diaz*, and the court therefore did not have the benefit of this Court's instruction that the Confrontation Clause does not require the government to present evidence of every link in the chain of custody. *Melendez-Diaz*, 129 S. Ct. at 2532 n.1. It is, in any event, not clear from the brief discussion in *Mangos* that the Maine Supreme Judicial Court would disagree with the court below that the Confrontation Clause permits a supervisory forensic analyst responsible for reviewing another employee's work to describe the forensic testing process and his conclusions based on the employee's work product. There is, in short, no conflict between the decision below and *Mangos* that warrants this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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