No. 13-127

In the Supreme Court of the United States

DANNY TURNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITIONER'S REPLY BRIEF

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I. The Government Fails to Rebut the National Significance and Growing Conflict of Authority Surrounding Turner's Confrontation Challenge.

The government does not, and cannot, dispute the growing conflict of authority among state supreme courts and federal courts of appeals regarding the admissibility of surrogate expert testimony in the wake of *Williams v. Illinois,* 132 S. Ct. 2221 (2012).[1] Pet. 15-21. Rather, the government's principal argument is that the Seventh Circuit *assumed* that Block's testimony conveying Hanson's statements—that she followed standard procedures in analyzing the evidence in Turner's case and concluded it contained crack cocaine—violated Turner's confrontation right, and that this *assumption* does not conflict with the cases Turner's petition cites. Brief in Opposition ("BIO") 17-18. As an initial matter, the government misses the thrust of Turner's confrontation argument: the Seventh Circuit erred in permitting Block to testify regarding not only Hanson's procedures and findings *but also* Block's opinion based on Hanson's testimonial work product. Turner could not challenge any of this testimony without directly cross-examining Hanson.

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[1] This court is currently considering at least three other petitions raising similar confrontation issues: *Brewington v. North Carolina*, No. 13-504; *Maxwell v. United States*, No. 13-7394; *Ortiz-Zape v. North Carolina*, No. 13-__.

Moreover, the Seventh Circuit's assumption aggravates, rather than alleviates, the confrontation violation. As the government concedes, the cases Turner's petition cites as conflicting with the Seventh Circuit were decided under circumstances nearly identical to Turner's case, "address[ing] 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." BIO 17. Yet, in each of these cases, the court found confrontation violations requiring reversal. The court in *Young v. United States*, for example, squarely addressed both the expert's opinion and her basis evidence, explaining that "it would 'require an impossible feat of mental gymnastics' to 'disaggregate' [the expert's] own non-hearsay conclusions from the interwoven hearsay on which she relied" and that the expert's "supervisory role and independent evaluation of her subordinates' work product are not enough to satisfy the Confrontation Clause." 63 A.3d 1033, 1048 (D.C. 2013) (citations omitted). In direct conflict, the Seventh Circuit artificially bifurcated its analysis—assuming on the one hand that Block's disclosure of Hanson's procedures and conclusions violated the Confrontation Clause while finding on the other hand that Block's opinion based on this improper evidence was permissible, App. 6a-7a, 16a-17a—and disregarded significant foundational issues that themselves implicate the Confrontation Clause.

Embodying this problem, the government oversimplifies Block's analysis and argues that he properly testified to his independent opinion based on machine-generated, raw data. BIO 13-14. But Hanson conducted several analyses, not all of which

involved lab machines, and Block based his opinion on not only Hanson's machine printouts, but also her handwritten notes and certified report recording her analyses. App. 6a, 9a-10a, 52a-54a. Moreover, the fact that Block relied, in part, on Hanson's printouts does not render his opinion permissible. Absent Block's improper testimony establishing that Hanson tested the correct evidence and tested it properly, Hanson's printouts and Block's opinion based on them would have lacked any relevance. Pet. 22-23. Although the government contends that "other circumstantial evidence," namely Block's discussion of standard procedures, laid a sufficient foundation for Block's opinion, BIO 15, the mere existence of standard procedures does not provide foundation, directly or circumstantially, for Block's opinion, which required Hanson to have followed them.

The government further misapprehends Turner's arguments regarding the foundation for Block's opinion as relating to a rule-of-evidence error rather than a confrontation error. BIO 15-16. "It is up to the prosecution to decide what [foundational] steps . . . are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live" to satisfy the Confrontation Clause. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 n.1 (2009) (emphasis in original). Here, evidentiary considerations regarding the foundation for Block's opinion are part and parcel of Turner's confrontation challenge because the government improperly introduced Hanson's statements through Block to establish a foundation for his opinion rather than call Hanson to testify live. App. 52a-53a. Nor is this Court precluded from addressing evidentiary or due-

process considerations incidental to Turner's confrontation challenge to the extent they provide a backstop to the government's strategic maneuvering around the Confrontation Clause. *See* Pet. 23-24; *Bruton v. United States*, 391 U.S. 123, 128 n.3 (1968); *Michigan v. Bryant,* 131 S. Ct. 1143, 1162 n.13 (2011).

Finally, the government concedes that Turner's petition permits this Court to address whether a surrogate expert may opine on raw data generated by a nontestifying analyst as part of a criminal investigation targeting the defendant, an issue that remains unsettled and warrants review. Justice Sotomayor's concurrence in *Bullcoming* expressly left this issue open, *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2722 (2011) (Sotomayor, J., concurring), and this Court's fractured decision in *Williams* did not resolve it. Without this Court's guidance, lower courts have diverged on the issue. *Compare Young*, 63 A.3d at 1047-48 (holding surrogate testimony based on raw data is impermissible), *and Martin v. State*, 60 A.3d 1100, 1108-09 (Del. 2013) (same), *and Davidson v. State*, No. 58459, 2013 WL 1458654, at *1-2 (Nev. Apr. 9, 2013) (unpublished) (same), *with United States v. Maxwell*, 724 F.3d 724, 726-727 (7th Cir. 2013) (holding surrogate testimony based on raw data is permissible), *and United States v. Washington*, 498 F.3d 225, 230 (4th Cir. 2007) (same).

This Court should grant review to address the boundaries of surrogate expert testimony.

II. The Government Fails to Rebut the Critical Factors that Make Turner's Case the Ideal Vehicle to Address Surrogate Expert Testimony.

As the Seventh Circuit acknowledged, the circumstances of Turner's case present a stronger confrontation case than *Williams* in ways that help bridge the gaps that so sharply divided this Court. Hanson conducted her analyses for the sole purpose of accusing Turner, "creating evidence for use at [his] trial," and "establish[ing] [his] guilt," thereby "plac[ing] Hanson's out-of-court statements squarely within the heartland of Confrontation Clause jurisprudence." App. 12a (citing *Williams,* 132 S. Ct. at 2243). That Turner's case was tried before a jury further increased the odds that the improper statements were taken for their truth. App. 12a (citing *Williams,* 132 S. Ct. at 2236). Additionally, Hanson's certified report "was both official and signed" and a "formal record" of her analyses, and "arguably the functional equivalent of the report at issue in *Bullcoming*." App. 15a (citations omitted). The government does not dispute any of these critical factors that make Turner's case the ideal vehicle for this Court to provide guidance on the boundaries of surrogate expert testimony.

Instead, the government argues, without basis, that the record here "will be of far less use than a decision considering the impact [that *Melendez-Diaz*, *Bullcoming*, and *Williams*] had on day-to-day practice by courts and the parties seeking to implement them." BIO 18-19. The Seventh Circuit, however, explicitly considered and addressed at length the implications of *Williams*, as well as *Melendez-Diaz* and *Bullcoming,* in its decision below.

See, e.g., App. 1a, 4a-5a, 7a-16a. Nor does the government identify any aspect of day-to-day practice that this Court cannot address with the present record. Indeed, the government concedes that the array of post-*Williams* decisions Turner cites in his petition, as showing a growing conflict of authority, all addressed nearly identical circumstances. BIO 17. Thus, courts and the parties appearing before them empirically continue to struggle with the very circumstances and issues that Turner's case presents, requiring this Court's guidance.

Similarly, the government's criticism that "most of the materials that Block reviewed . . . are not in the record," BIO 19, falls short. The issues that Turner's petition raises do not turn on the contents of these materials but rather on their nature and the circumstances under which Hanson produced them. Hanson performed her analyses in a formalized fashion pursuant to both statute and standard laboratory procedures, with the express purpose of aiding in Turner's prosecution. App. 15a; Pet. 4-5. Hanson's certified report, which culminated her analysis, is part of the record. App. 80a-81a. Although Hanson's notes and printouts are not in the record, Hanson prepared them under the same formalized circumstances,[2] and their contents are not in dispute. Indeed, Block himself explained the

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[2] To the extent the government argues Hanson's notes and printouts are not sufficiently formal, at least with respect to Justice Thomas' approach, BIO 19, this merely embodies Justice Thomas' concern over prosecutorial "attempts to evade the formalized process," *Williams*, 132 S. Ct. at 2261 (Thomas, J., concurring).

analyses Hanson performed and the contents of her notes and printouts. App. 52a-54a. Notably, even without Hanson's notes and printouts, the Seventh Circuit determined with confidence that these materials "document what steps Hanson took in testing the substances" at issue and that "they *no doubt* were the bases for Block's testimony that Hanson had followed standard testing processes in performing her analysis." App. 16a (emphasis added). The court further found that "Turner had a keen interest in having Hanson herself testify so that she could be questioned about the statements in those documents." *Id.*

Thus, Turner's case presents the ideal vehicle for this Court to provide guidance on surrogate expert testimony.

III. The Government Fails to Rebut the Fundamental Flaws in the Seventh Circuit's Harmless-Error Standard, Further Warranting This Court's Review.

Under *Chapman v. California*, the government bears the burden of showing that a constitutional error is "harmless beyond a reasonable doubt," and "[a]n error admitting plainly relevant evidence which possibly influenced the jury adversely to the litigant cannot . . . be conceived of as harmless." 386 U.S. 18, 23-24 (1967). Contravening these principles and decisions from other lower courts, the Seventh Circuit applied a harmless-error standard that disregarded the impact that Block's improper testimony had on the jury and instead substituted the court's reasoning, based solely on the sufficiency of the remaining evidence, for arguments the government never presented at trial and that the

jury never considered. That is despite the compelling nature of the forensic evidence at issue and the court's own finding that:

> [The admittedly impermissible] portions of Block's testimony strengthened the government's case; and conversely, their exclusion would have diminished the quantity and quality of evidence showing that the substances Turner distributed comprised cocaine base in the form of crack cocaine.

App. 5a-6a. This Court should grant review to address the Seventh Circuit's improper standard.

Contrary to the government's assertions, BIO 22, nothing in *Neder v. United States*, 527 U.S. 1 (1999) altered *Chapman's* mandate, or the reasoning of later decisions such as *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993), that a reviewing court must consider the impact of improperly admitted evidence on the jury before making a finding on harmlessness and may not rely solely on its review of other untainted evidence. Nor does *Neder* support the government's contention that *Chapman's* harmless-error inquiry "whether the error in question 'influenced the jury' or 'contributed to the conviction' . . . is just another way of asking whether a reasonable jury would have acquitted the defendant absent the error." BIO 22-23 (citation omitted). The government's formulation improperly shifts the burden to the defendant to show the jury would have *acquitted* him, rather than requiring the government to show beyond a reasonable doubt that the error did not "*contribute* to the verdict," as both *Chapman* and *Neder* demand, 527 U.S. at 17 (emphasis added; quoting *Chapman*, 386 U.S. at 24).

Moreover, Turner does not contest that a reviewing court in its harmless-error analysis may examine other evidence the jury considered, only that the court may not ignore (or, in the Seventh Circuit's case, *disregard*) the impact of the improper evidence on the jury. *Neder* does not counsel otherwise. The error at issue in *Neder* was the omission of an element of the crime, which by its nature the jury never considered, and this Court found the error did not contribute to the jury's verdict, because the omitted element was not only "supported by overwhelming evidence" but also "uncontested." 527 U.S. at 16-17. Here, the very basis of Turner's confrontation argument is that the jury *did* consider the improper evidence—it was the centerpiece of the government's case—and he was denied the opportunity to challenge that evidence.

The government also fails to address the cases Turner cites as showing a conflict between the Seventh Circuit and other courts of appeals regarding the proper harmless-error standard, Pet. 30-31, and instead characterizes it as an *intra*-circuit conflict, BIO 22. The conflict, however, is not so limited; other courts have also struggled with this issue. For example, Tenth Circuit decisions vacillate on the proper standard, inquiring in some cases "whether the jury would have returned the same verdict absent the error," *United States v. Nash*, 482 F.3d 1209, 1219 (10th Cir. 2007), while inquiring in other cases whether "the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was

harmless error," *United States v. Glass*, 128 F.3d 1398, 1403 (10th Cir. 1997).

In contrast, the D.C. and Sixth Circuits have squarely addressed the issue and concluded that the proper inquiry is "whether the Government has shown beyond a reasonable doubt that the error at issue did not have an effect on the verdict, not merely whether, absent the error, a reasonable jury could nevertheless have reached a guilty verdict." *United States v. Cunningham*, 145 F.3d 1385, 1388 (D.C. Cir. 1998); *accord Wilson v. Mitchell*, 498 F.3d 491, 503-04 (6th Cir. 2007).[3]

The fact that conflicts exist both within and between circuits only underscores this is a pressing national issue that shows no sign of resolving itself. The Seventh Circuit denied *en banc* review in Turner's case and declined to resolve the conflict with its previous decisions. App. 24a-25a. And as the government acknowledges, just in the last year, this Court has considered at least three other petitions requesting guidance on the proper harmless-error standard. BIO 23.

Further, the Seventh Circuit's own findings demonstrate its error and do not require any fact-bound analysis by this Court. Fundamentally, the so-called "other evidence" on which the Seventh Circuit based its finding of harmlessness *includes Block's opinion*, which was predicated on Hanson's testimonial statements. App. 9a-10a, 20a-21a; BIO

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[3] Contrary to the government's assertions, BIO 23 n.4, *Neder* did not overrule *Cunningham* for the reasons discussed above. In any event, other courts, including the Sixth Circuit in *Wilson*, have continued to apply similar rationales.

20. But without Hanson's statements establishing that she tested the correct evidence and tested it properly, Block's opinion would have lacked any relevance. Pet. 22-23. The fact that the Seventh Circuit assumed Block's disclosure of Hanson's underlying statements was error but nevertheless relied on Block's opinion based on those statements as support for why the error was harmless demonstrates that the court *disregarded* the impact that Block's improper testimony had on the jury.

Aside from Block's opinion, the government points to Officer Meyer's and Detective Hughes' testimony as providing "overwhelming" evidence of Turner's guilt. BIO 20. But although the Seventh Circuit discussed this testimony as supporting the jury's verdict, it did not conclude that it was "overwhelming," as the government suggests, much less articulate how important it was in relation to Block's improper testimony. More importantly, if the government genuinely believed Meyer's and Hughes' testimony provided "overwhelming" evidence of Turner's guilt, it could have decided not to call Block to testify regarding Hanson's analyses. Instead, over Turner's objections, the government strategically chose to make Block's testimony a centerpiece of its case. Tellingly, in its closing arguments to the jury, the government relied *exclusively* on Block's testimony to identify the substances Turner purportedly distributed. App. 64a-66a.[4]

Indeed, the government had a compelling reason for presenting Block's testimony: forensic evidence is

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[4] The government referenced Meyer's and Hughes' testimony in summation merely to identify Turner's presence at the alleged transactions.

especially powerful to jurors. Pet. 28 n.12. Empirically, jurors not only expect to see forensic evidence in criminal cases but also often will not vote to convict absent forensic evidence. *See* Hon. Donald E. Shelton et al., *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the "CSI Effect" Exist?*, 9 VAND. J. ENT. & TECH. L. 331, 357 (2006); Andrew P. Thomas, *The CSI Effect: Fact or Fiction*, 115 YALE L.J. Pocket Part 70 (2006).

Moreover, even if Turner did not affirmatively advance a theory that the substances at issue were something other than crack cocaine, as the government suggests, BIO 20-21, this does not detract from the error. The government itself referenced Block's improper testimony in summation to argue that "this wasn't a mistake or accident" and that "this wasn't fake crack cocaine" but the "real stuff." App. 66a. At a minimum, Turner was entitled to cross-examine Hanson to rebut the government's theory. Moreover, it was not Turner's burden to disprove the substances were crack cocaine; rather it was the government's burden to prove this element beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 364 (1970).

Finally, "when the complaint is that [Turner] was deprived of his rightful opportunity to prepare a defense, the Government cannot take comfort from the fact that no defense was prepared." *United States v. Henry*, 528 F.2d 661, 665-66 (D.C. Cir. 1976); *see also United States v. Dominguez*, 992 F.2d 678, 687 n.3 (7th Cir. 1993) (Rovner, J., dissenting). Indeed, the Seventh Circuit found that Turner had *no* opportunity to challenge the evidence against him: "because [Turner] could not question Hanson herself, Turner lacked the opportunity to challenge

her conclusion, and for that matter Block's conclusion (which was based on Hanson's data), that the substances contained cocaine base." App. 17a.

Therefore, this Court should grant review to address the Seventh Circuit's harmless-error standard.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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