No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Williams v. Illinois*, 132 S. Ct. 2221 (2012), this Court sought to address the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence. But this Court's fractured 4-1-4 decision in *Williams* has resulted in a split of authority among lower courts. In the wake of *Williams*, the Seventh Circuit joins at least one other federal court of appeals and six state supreme courts in holding that such surrogate testimony is permissible, whereas at least five state supreme courts have ruled that it violates the Confrontation Clause of the Sixth Amendment. This case presents the following questions:

1. Whether the Confrontation Clause prohibits a government expert, who merely reviewed a nontestifying forensic analyst's certified report, notes, and results and did not personally conduct or observe any of the relevant analyses, from testifying regarding the analyst's procedures and conclusions and opine on the analyst's results.

2. Whether the Seventh Circuit erred by applying a harmless-error standard that ignores the impact that testimony admitted in violation of the Confrontation Clause, which the government relied on in closing arguments, had on the jury, and instead focused on the sufficiency of the remaining evidence, directly conflicting with this Court's precedent and that of other federal courts of appeals.

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PETITION FOR A WRIT OF CERTIORARI

This is the second petition Danny Turner has filed in this case. After the Seventh Circuit initially affirmed his conviction, Turner successfully petitioned this Court for a writ of certiorari maintaining that the district court violated his rights under the Confrontation Clause of the Sixth Amendment by admitting surrogate testimony by the government's expert (Robert Block) regarding the particular procedures a nontestifying analyst (Amanda Hanson) used to test the alleged drug evidence in Turner's case and her conclusions regarding the nature of the evidence. Last summer, this Court remanded Turner's case for reconsideration in light of its decision in *Williams v. Illinois*, 132 S. Ct. 2221 (2012). This Court's fractured 4-1-4 decision in *Williams*, however, left lower courts with little guidance on the boundaries of surrogate expert testimony.

On remand, a quorum of the original Seventh Circuit panel again affirmed Turner's conviction. The court assumed that the district court erred by permitting Block to testify regarding the specific procedures Hanson followed and the conclusions she reached. The court further recognized that Block's improper surrogate testimony strengthened the government's case and that Turner had no meaningful opportunity to challenge any weaknesses in Hanson's testing, thereby striking at the heart of the Confrontation Clause. Nevertheless, the court held that Block's own opinions were permissible, even though Block's opinions were predicated on Hanson's statements that he improperly conveyed and would have been irrelevant without those

statements. Worse, the court held that any confrontation error was harmless, reasoning that the jury could have considered Block's opinion testimony among other evidence to find Turner guilty. The court also dismissed Turner's foundational arguments regarding authentication and chain of custody, applying a "presumption of regularity" that Hanson, as a government official, discharged her duties properly in handling and testing the evidence.

The Seventh Circuit's decision widens the deep rift among state supreme courts and federal courts of appeals regarding the admissibility of surrogate expert testimony, which now stands at eight in favor and five against in the wake of *Williams*. The decision also undermines the proper administration of criminal proceedings by providing prosecutors an unwarranted shortcut around the rigors of the Confrontation Clause while obscuring significant foundational issues. Nor does surrogate expert testimony offer much insight into the nontestifying analyst's judgment and competence, or safeguard against any error, bias, or prejudice on the analyst's part. Additionally, the Seventh Circuit's decision applied a harmless-error standard that ignores the impact of the improperly admitted testimony on the jury and instead focuses on the sufficiency of the remaining evidence, directly conflicting with this Court's precedent and that of other courts of appeals.

Further, the factual circumstances of Turner's case present a stronger confrontation case than in *Williams* and help bridge the gaps that sharply divided this Court. Thus, Turner's case provides the proper vehicle for this Court to provide further clarity on the issue of surrogate expert testimony.

OPINIONS BELOW

This Court's order granting certiorari, vacating, and remanding in light of *Williams* is reported at 133 S. Ct. 55 (2012) (No. 09-10231) and reprinted at App. 1a. The opinion of the United States Court of Appeals for the Seventh Circuit following remand is reported at 709 F.3d 1187 (7th Cir. 2013) and reprinted at App. 2a. The Seventh Circuit's order denying rehearing is unpublished and reprinted at App. 24a. The Seventh Circuit's original decision is reported at 591 F.3d 928 (7th Cir. 2010) and reprinted at App. at 26a. The judgment of conviction entered by the United States District Court for the Western District of Wisconsin is unpublished and reprinted at App. 40a.

JURISDICTION

The court of appeals denied Turner's motion for rehearing and entered judgment on April 30, 2013. App. 24a. This petition invokes the jurisdiction of this Court under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

Federal Rule of Evidence 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the

> expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

STATEMENT OF THE CASE

1. *District Court Proceedings*. Petitioner Danny Turner was charged with, and pleaded not guilty to, three counts of distributing a controlled substance in violation of 21 U.S.C. § 841(a)(1). App. 3a, 78a–79a. Each of these counts alleged that Turner distributed a mixture or substance containing crack cocaine. App. 78a–79a.

To make its case, the government sought to use forensic analysis to prove that the substances police obtained from Turner contained crack cocaine. Following Turner's arrest, the government submitted these substances to the drug identification unit of the Wisconsin State Crime Laboratory for testing.[1] App. 80a.

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[1] The crime lab is operated by the State of Wisconsin, Department of Justice. By statute, the purpose of any analysis conducted at the crime lab is to aid "in the investigation and prosecution of crimes." Wis. Stat. § 165.75(3)(a) (2006).

Standard procedures require forensic analysts at the drug identification unit to conduct several tests on evidence received by the lab: (1) a visual examination to observe its physical appearance and obtain its weight, (2) a series of color tests or a spot test, (3) a gas chromatography test, (4) a mass spectrometry test, and (5) an infrared spectrometry test. App. 52a–53a. Amanda Hanson, an analyst at the lab, tested and analyzed the evidence in Turner's case. App. 3a, 57a, 59a. As part of her forensic analysis, Hanson kept handwritten notes, generated charts and data using lab instruments, and prepared a single-page report concluding that the evidence contained cocaine base (crack cocaine). App. 14a–16a, 53a–54a. Hanson's report identified Turner and "certif[ied] this document . . . to be a true and correct report of the findings of the State Crime Laboratory." App. 80a.

The district court ordered the government to disclose its expert witnesses by May 5, 2008. App. 27a. On May 1, the government notified Turner that it would call Hanson as an expert witness regarding the weight and identification of the alleged drug evidence. *Id.* But on May 8, after the expert-disclosure deadline, the government advised Turner that it would instead call Hanson's supervisor, Robert Block, to testify in Hanson's place because Hanson was on maternity leave. App. 3a, 27a–28a.

On May 12, Turner timely moved *in limine* to exclude Block's testimony. App. 28a, 68a–69a. Turner argued that Block would necessarily convey impermissible hearsay, because he did not have personal knowledge of Hanson's analysis. App. 68a–69a. Turner further argued that the government's

proposed substitution of experts would deny him his Sixth Amendment right to confront his accuser. App. 69a, 75a–76a. After the government assured that Block would testify only to his own conclusions and not Hanson's conclusions, App. 73a n.2, the district court denied Turner's motion, App. 28a, 44a.

At trial, the government called Block as its expert witness to identify the alleged drug evidence, which was introduced as Exhibits 1-3. App. 6a, 28a–30a, 53a–54a. Block described the standard procedures and safeguards used by the crime lab, App. 6a, 53a–57a, but admitted that he did not have personal knowledge of Hanson's analysis, App. 11a–12a, 57a, 59a–61a. Over Turner's continuing objection, however, the district court permitted Block to testify affirmatively that Hanson followed the standard procedures and safeguards in Turner's case:

> Q Now the methods that you've just mentioned, were they used in conducting the examination or followed in this case?
>
> [DEFENSE COUNSEL]: Objection, lacks personal knowledge.
>
> THE COURT: You can answer.
>
> A Yes, they were.

App. 53a. Block then confirmed that he gleaned this information from Hanson's work product. App. 54a.

Further, contrary to the government's express assurances, Block affirmatively referenced Hanson's conclusions when he testified that the two of them reached the same bottom-line conclusion that Exhibits 1-3 contained crack cocaine:

> 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 conclusions* based on the information provided that each of these items contained the same material and I signed off on that peer review.

App. 54a. (emphasis added).

Although the government did not introduce Hanson's notes, results, and report into evidence, Block testified that, as the lab supervisor, he conducted a peer review of each of these items and signed off on Hanson's report. App. 29a–30a, 54a. Block also confirmed that he relied on Hanson's notes, results, and report when he testified at trial. App. 54a.

At the close of the government's case, Turner moved for a directed judgment, restating the concerns he raised in his motion *in limine* and also arguing that the government had not established a sufficient chain of custody to prove that the substances Hanson tested were the same substances obtained from Turner. App. 62a. The district court denied Turner's motion. *Id.* During closing arguments, the government argued to the jury that Block's expert opinion was that "Exhibits 1-3 are cocaine base, crack cocaine," and as a result, "this wasn't fake crack cocaine" but "the real stuff." App. 66a. Ultimately, the jury found Turner guilty on all three counts. App. 3a.

On August 12, 2008, Turner filed a notice of appeal that became effective when the district court entered a judgment of conviction on August 14, 2008.

2. *Seventh Circuit Proceedings (Turner I).* On appeal, Turner argued that the district court committed two errors. First, the district court denied him his Sixth Amendment right to cross-examine and confront Hanson by permitting Block to testify as Hanson's surrogate even though he lacked personal knowledge of Hanson's analysis. Specifically, Block predictably conveyed testimonial hearsay from Hanson's notes, results, and report by testifying affirmatively that Hanson followed particular procedures in Turner's case and that she also concluded Exhibits 1-3 contained crack cocaine.

Second, the district court erred by admitting Exhibits 1-3 into evidence, because the government failed to establish a proper chain of custody for the samples that Hanson tested and that led to her analysis on which Block relied to identify the exhibits as crack cocaine. Aside from the testimonial hearsay in Hanson's notes and report, Block did not have any knowledge that Hanson properly handled and tested the exhibits from the time Hanson received the exhibits at the lab to the time she prepared samples from those exhibits and placed them into the lab machines that generated her results. Nor did the government call any witness with personal knowledge of Hanson's analysis.

The Seventh Circuit affirmed Turner's conviction. App. 39a. Relying on its decision in *United States v. Moon*, 512 F.3d 359 (7th Cir. 2008), *cert. denied*, 555 U.S. 812 (2008),[2] the court held that Block's

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[2] The Seventh Circuit held in *Moon* that a report containing a forensic analyst's conclusions was testimonial but that the admission of the report into evidence in that case was not plain error. *Moon,* 512 F.3d at 362. The defendants in *Moon* waived

surrogate testimony did not violate Turner's right to confrontation because Federal Rule of Evidence 703 permitted Block to testify to his own conclusions as an expert based on Hanson's work product. App. 33a–34a. The court also found that Block had sufficient "personal involvement in the testing process" because he conducted a peer review of Hanson's notes and results, and signed off on her report. App. 34a. Additionally, the court dismissed Block's disclosure of Hanson's bottom-line conclusion, characterizing the disclosure as a harmless, passing reference. App. 34a–36a.

Further, the Seventh Circuit distinguished this Court's then-recent decision in *Melendez-Diaz v. Massachusetts*, quoting language from a footnote that "we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." App. 36a-37a (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 n.1 (2009)). The court of appeals also relied on the fact that Hanson's report, unlike the laboratory certificates in *Melendez-Diaz*, was not admitted into evidence, and reasoned that Block instead testified to his own conclusions as an expert witness. App. 37a. Thus, the court concluded "*Melendez-Diaz* does not control this case" and "did not do away with Federal Rule of Evidence 703." *Id.*

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any authentication and chain-of-custody arguments. *Id*. at 361. Unlike *Moon,* Turner's case is unencumbered by waiver issues or plain-error review.

Regarding Turner's chain-of-custody argument, the Seventh Circuit held that the district court did not abuse its discretion in admitting Exhibits 1-3 into evidence. App. 37a–38a. The court found that government officials had the exhibits in their custody at all times and that Hanson's conduct, including her handling and testing of the exhibits at the crime lab, was subject to a "presumption of regularity" that government officials discharged their duties properly. App. 38a–39a (citing *United States v. Prieto*, 549 F.3d 513, 524–25 (7th Cir. 2008)). Accordingly, the court affirmed Turner's conviction. App. 39a.

3. *Certiorari Proceedings.* Turner petitioned this Court for a writ of certiorari on April 12, 2010, challenging the Seventh Circuit's decision. Turner argued in his petition that the Confrontation Clause prohibits the government from identifying alleged drug evidence based solely on the in-court testimony of an expert who neither personally observed nor performed any forensic analysis of the evidence and instead merely reviewed the work product of a nontestifying forensic analyst.

On June 29, 2012, this Court granted Turner's petition, vacated the Seventh Circuit's decision in *Turner I*, and remanded for further consideration in light of its decision in *Williams v. Illinois*. App. 1a.

4. *Remand Proceedings (Turner II).* Following remand, the Seventh Circuit again affirmed Turner's conviction, App. 5a, despite finding that Block relied on, and conveyed, Hanson's out-of-court statements to the jury, App. 9a–10a, that this testimony strengthened the government's case, 5a–6a, and that Turner was deprived of the opportunity to challenge

Hanson's analysis or Block's opinions, App. 11a–12a.

Although the Seventh Circuit found that *Williams* "casts doubt" on using surrogate expert testimony, it struggled to apply this Court's fractured 4-1-4 decision, stating:

> [T]he divergent analyses and conclusions of the plurality and dissent sow confusion as to precisely what limitations the Confrontation Clause may impose when an expert witness testifies about the results of testing performed by another analyst, who herself is not called to testify at trial.

App. 4a (citing *Williams*, 132 S. Ct. at 2277 (Kagan, J., dissenting)).

The court nevertheless found two aspects of Block's testimony problematic in light of *Williams*: (1) Block testified without personal knowledge that Hanson followed standard procedures in testing the evidence in Turner's case, and (2) Block testified that he and Hanson reached the same conclusion. App. 9a. As the court acknowledged, Block had no personal knowledge of Hanson's testing and gleaned this information from Hanson's notes, test results, and written report:

> Block himself did effectively repeat the out-of-court statements made by Hanson in these written materials when he testified that Hanson had followed standard procedures in testing the substances and that he reached the same conclusion based on the resulting data that Hanson had—i.e., that the substances contained cocaine base. Block had no firsthand knowledge of either of these points; he was relying on what

> Hanson had written about her analysis. In this way, Block's testimony put Hanson's out-of-court statements before the jury, and the jury was invited to consider these statements for their truth: that Hanson had followed standard procedures in analyzing the substances, and that she, like Block, had determined the substances to contain cocaine base.

App. 9a–10a. The court further recognized that "[t]hese 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.

Analogizing Turner's case to *Williams* and *Bullcoming*, the court also acknowledged that Turner was deprived of the opportunity to probe any weaknesses in Hanson's work:

> [T]he government introduced the result of Hanson's analysis through an expert witness, Block, and allowed him to vouch for the reliability of Hanson's work notwithstanding the fact that he did not participate in the handling and analysis of the substances and thus had no direct knowledge of what Hanson did or did not do. If there was a weakness in the work that Hanson performed, Turner was deprived of the opportunity to air it. *See Bullcoming* [*v. New Mexico*, 131 S. Ct. 2705, 2715 (2011)].

App. 11a–12a.

The court further found that several aspects of Turner's case "distinguish it from *Williams*, in ways

that add force to the argument that a Confrontation Clause violation occurred." App. 12a. First, the court found that, even under the plurality's view in *Williams*, Hanson's analysis specifically targeted Turner and "was commissioned in order to establish Turner's guilt of distributing crack cocaine," thereby "plac[ing] Hanson's out-of-court statements squarely within the heartland of Confrontation Clause jurisprudence." *Id.* Second, the court recognized that the odds that out-of-court statements would be taken for their truth were increased because Turner's case was tried to a jury. *Id.* Third, the court found that Hanson's report, unlike the report in *Williams*, was the functional equivalent of the report at issue in *Bullcoming* because it "was both official and signed, it constituted a formal record of the result of the laboratory tests that Hanson had performed, and it was clearly designed to memorialize that result for purposes of the pending legal proceeding against Turner."[3] App. 15a (citing *Williams*, 132 S. Ct. at 2276 (Kagan J., dissenting); *Bullcoming*, 131 S. Ct. at 2717).

Nevertheless, the court found "the bulk of Block's testimony was permissible" and that as the lab supervisor he could testify regarding the procedures and safeguards of the lab and his experience conducting a peer review of Hanson's work. App. 6a. Additionally, the court found that Block permissibly

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[3] Although Hanson's handwritten notes and results are not part of the record, the court recognized that "[h]owever informal they may have been, then, Turner had a keen interest in having Hanson herself testify so that she could be questioned about the statements in those documents." App. 16a (citing *Williams*, 132 S. Ct. at 2267–68 (Kagan, dissenting); *Bullcoming*, 131 S. Ct. at 2715–16 & n.7.).

testified to his own opinions, based on Hanson's testing, that the substances Turner allegedly distributed contained cocaine base. *Id.* Again, citing to its previous decision in *Moon* and Federal Rule of Evidence 703, the court reasoned that "the government could establish through Block's expert testimony what the data produced by Hanson's testing revealed concerning the nature of the substances . . . without having to introduce either Hanson's documentation of her analysis or testimony from Hanson herself." *Id.* Thus, the court held that Block's testimony based on Hanson's work did not violate Turner's confrontation right. *Id.* Further, the Court again dismissed Turner's foundational arguments regarding authentication and chain of custody, reasoning that a "presumption of regularity" applied to Hanson's handling and testing of the evidence. App. 21 n.4.

Finally, the court found that any error in admitting Block's "problematic" testimony (i.e., his testimony that Hanson followed standard procedure and that Hanson reached the same conclusion) was harmless because there was "considerable evidence" the jury could have considered. App 17a–18a.[4] The

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[4] The court cited a string of cases relating to the sufficiency of the evidence in drug cases for the proposition that "expert analysis and testimony are not invariably necessary to establish the identity of the controlled substance." App. 17a-18a (citing *United States v. Sanapaw*, 366 F.3d 492, 496 (7th Cir. 2004); *United States v. Hardin*, 209 F.3d 652, 661-62 (7th Cir. 2000); *United States v. Dominguez*, 992 F.2d 678, 681 (7th Cir. 1993); *United States v. Marshall*, 985 F.2d 901, 905 (7th Cir. 1993); *United States v. Manganellis*, 864 F.2d 528, 541 (7th Cir. 1988); *United States v. Lawson*, 507 F.2d 433, 438–39 (7th

court then explained that the "permissible aspects of Block's testimony," including his own opinions based on Hanson's work product, coupled with other evidence,[5] was "more than sufficient to show beyond a reasonable doubt that Turner distributed crack cocaine." App. 21a. Thus, the court again affirmed Turner's conviction. App. 23a.

This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit's Decision Deepens the Conflict of Authority Regarding Surrogate Expert Testimony.

This Court sought in *Williams v. Illinois* to address "the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence," 132 S. Ct. at 2333 (Alito, J.) (quoting *Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J. concurring)), but its fractured 4-1-4 decision has left lower courts with little guidance. As the Seventh Circuit observed, "the divergent analyses and conclusions of the plurality and dissent sow confusion as to precisely what limitations the

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Cir. 1974); *United States v. Sweeney*, 688 F.2d 1131, 1145–46 (7th Cir. 1982)).

[5] The court referenced four other pieces of evidence: (1) testimony by Officer Meyer that the substances she purportedly received from Turner was "'suspect' crack cocaine," App. 18a–19a; (2) testimony by Officer Meyer regarding the price she paid, App. 19a; (3) testimony by Detective Hughes that the substances were "off-white" and "chalky," App. 19a–20a; and (4) testimony by Detective Hughes that a substance from one transaction was positive on a field test, App. 20a.

Confrontation Clause may impose." App. 4a (citing *Williams*, 132 S. Ct. at 2277 (Kagan, J., dissenting)). Unable to find common principles to determine the admissibility of surrogate expert testimony in the wake of *Williams*, federal courts of appeals and state high courts have sharply diverged.

The Seventh Circuit's decision below upholding Block's surrogate expert testimony, even though it was predicated on Hanson's testimonial statements that themselves were improperly admitted, adds to this growing and well-established conflict. At least five state supreme courts across the country have applied *Williams* to similar circumstances in ways that directly conflict with the Seventh Circuit. *See Martin v. State*, 60 A.3d 1100, 1108–09 (Del. 2013); *Young v. United States*, 63 A.3d 1033, 1047–48 (D.C. 2013); *State v. Navarette*, 294 P.3d 435, 436–37 (N.M. 2013), *petition for cert. filed* (U.S. Apr. 17, 2013) (No. 12-1256); *Davidson v. State*, No. 58459, 2013 1458654, at *1–2 (Nev. Apr. 9, 2013) (unpublished); *State v. Frazier*, 735 S.E.2d 727, 731–32 (W. Va. 2012).[6]

In *Navarette*, the New Mexico Supreme Court considered the admissibility of expert testimony by a forensic pathologist who "neither participated in nor observed the autopsy" at issue but instead relied on

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[6] A sixth jurisdiction, the United States Court of Appeals for the D.C. Circuit, has suggested even before *Williams* that reasoning like that employed by the Seventh Circuit is flawed. *See United States v. Moore*, 651 F.3d 30, 71–72 (D.C. Cir. 2011) (remanding for further findings because testimony of supervisor who reviewed reports but had no personal knowledge of underlying testing potentially violated the Confrontation Clause).

a report that a nontestifying pathologist prepared and that "itself was never offered into evidence."[7] *Navarette*, 294 P.3d at 436–37. Examining *Williams*, the court rejected the plurality's reasoning and concluded, based on the opinions of Justice Thomas and the dissenting Justices, *id.* at 438–42, that the admission of such surrogate expert testimony was reversible error, *id.* at 442–43. The court explained that Rule 703 does not permit an expert witness to rely on, and relate, information gleaned from out-of-court testimonial statements, and that such statements are necessarily offered for their truth. *Id*. at 440 ("Given the viewpoint of a majority of the United States Supreme Court, the Confrontation Clause analysis makes any Rule [703] analysis irrelevant in this case.").

Likewise, in *Martin*, the Supreme Court of Delaware found that a lab supervisor's testimony regarding a blood test violated the Confrontation Clause because the supervisor "merely reviewed [a nontestifying analyst's] data and representations about the test, while having knowledge of the laboratory's standard operating procedures, [but] without observing or performing the test herself." *Martin*, 60 A.3d at 1108–09. The nontestifying analyst's data on which the supervisor relied included gas chromatography results similar to Hanson's results and were contained in batch

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[7] Underscoring both the significance and ripeness of this issue, this Court is also presently considering a petition for writ certiorari filed by the State of New Mexico in *Navarette*. *See* Pet. for Certiorari in *New Mexico v. Navarette* (Jan. 19, 2010) (No. 12-1256). To the extent the Court grants that petition, it should also grant Turner's petition and consider the cases together pursuant to Supreme Court Rule 27.3.

reports that were themselves not admitted into evidence. *Id.* at 1107. Nevertheless, the court concluded the results were testimonial because "interpreting the results of a gas chromatograph machine involves more than evaluating a machine-generated number." *Id.* at 1108 (citation omitted). Relying on *Bullcoming* and the opinions of Justice Thomas and the dissenting Justices in *Williams*, the court concluded the supervisor's testimony improperly conveyed the absent analyst's testimonial statements to the jury and that these statements were admitted for their truth. *Id.* at 1107.

The District of Columbia Court of Appeals reached the same result in *Young*, albeit applying a different approach. *Young*, 63 A.3d at 1043–44. Unable to reconcile the divergent opinions in *Williams*, the court formulated an "intermediate" test based on the opinions of Justice Alito and Justice Thomas in which an out-of-court statement is testimonial "if its primary purpose is evidentiary and it is either a targeted accusation or sufficiently formal in character." *Id.* Applying this test, the court found that a lab supervisor's testimony regarding DNA analyses she did not observe or perform violated the Confrontation Clause. *Id.* at 1048. Significantly, the court rejected the argument that the supervisor's testimony was permissible simply because the underlying reports were not admitted and the supervisor merely testified to her "independent evaluation of her subordinates' work product." *Id.* at 1044, 1049.

Further, since *Williams*, the highest courts of West Virginia and Nevada have also found such surrogate testimony improper. In *Davidson*, the

Supreme Court of Nevada found that a surrogate expert's testimony that two DNA profiles matched violated the Confrontation Clause because the surrogate expert did not conduct the DNA analyses at issue and based his opinion on his review of a "nontestifying analyst's certified report and the documentation generated by that analyst." *Davidson*, 2013 WL 1458654, at *1–2. Similarly, in *Frazier*, the Supreme Court of Appeals of West Virginia relied on its previous decision in *Mechling*, which interpreted *Crawford*, and found that a supervising medical examiner's testimony based on a report of an autopsy conducted by a different examiner conveyed testimonial hearsay that violated the Confrontation Clause. *Frazier*, 735 S.E.2d at 731–32 (applying *State v. Mechling*, 633 S.E.2d 311 (W. Va. 2006)).

On the other end of the spectrum, the Seventh Circuit joins at least one other federal court of appeal and six state supreme courts that have applied *Williams* and held that an expert witness, who has no personal knowledge of the relevant testing, may testify based on the testimonial work product of nontestifying analysts.[8] *See United States v. Summers*, 666 F.3d 192, 195, 202–04 (4th Cir. 2011) (relying on *Turner I* and holding that a lab supervisor's testimony in lieu of the analyst who tested the drug evidence at issue was proper); *United*

[8] Many of these decisions upholding surrogate expert testimony have inspired vigorous dissenting opinions, and as explained below, have continued to sow confusion because they set forth a tenuous and unworkable distinction between permissible testimony that conveys "independent opinions" and impermissible testimony that does not.

States v. Shanton, No. 09-4617, 2013 WL 781939, *2 (4th Cir. Mar. 4, 2013) (unpublished) (holding that a surrogate DNA expert's testimony was proper and explaining "after *Williams*, *Summers* [*supra*] still has precedential value"); *People v. Lopez*, 286 P.3d 469, 652 (Cal. 2012) (reversing finding of confrontation violation and holding that the admission of lab reports and the testimony of a surrogate expert regarding blood alcohol testing was proper); *People v. Dungo*, 286 P.3d 442, 444 (Cal. 2012) (reversing finding of confrontation violation and holding that the testimony of a surrogate expert in lieu of the pathologist who conducted the autopsy at issue was proper); *Marshall v. People*, No. 11SC596, 2013 WL 3335095, at *4–5 (Colo. July 1, 2013) (unpublished) (disagreeing with *Moore* and *Martin*, *supra*, and holding that a lab supervisor's testimony in lieu of the analyst who tested the drug evidence at issue was proper); *Commonwealth v. Greineder*, 984 N.E.2d 804, 812 n.11, 815–18 (Mass. 2013) (holding, on remand from the Supreme Court in light of *Williams*, that a surrogate DNA expert's testimony was proper); *Galloway v. State*, No. 2010-DP-01927-SCT, 2013 WL 2436653, at *13–14 (Miss. June 6, 2013) (unpublished) (holding that a surrogate DNA expert's testimony was proper); *State v. Ortiz-Zape*, No. 32PA11, 2013 WL 3215911, at *6 (N.C. June 27, 2013) (reversing finding of confrontation violation and holding that the testimony of a surrogate expert in lieu of the analyst who tested drug evidence was proper); *State v. Brewington*, No. 235PA10, 2013 WL 3215751, at *1–2 (N.C. June 27, 2013) (unpublished) (same); *State v. McLeod*, 66 A.3d 1221, 1230–32 (N.H. 2013) (holding that the testimony of expert fire investigators based

on statements obtained from previous investigation was proper); *State v. Deadwiller*, Nos. 2010AP2363-CR, 2010AP2364-CR, 2013 WL 3612812, at *5, *10–11 (Wis. July 13, 2013) (unpublished) (holding that a surrogate DNA expert's testimony was proper).

Therefore, without sufficient guidance from this Court, the conflict among federal courts of appeals and state supreme courts over surrogate expert testimony has continued in the wake of *Williams* and is now firmly entrenched and ripe for resolution. This Court should grant review in Turner's case to resolve this conflict.

II. The Seventh Circuit's Decision Upholding Surrogate Expert Testimony Undermines the Proper Administration of Criminal Trials by Providing an Unwarranted Shortcut Around the Confrontation Clause.

The Seventh Circuit's decision does not comport with the Confrontation Clause and presents an unwarranted shortcut for prosecutors seeking to introduce testimonial hearsay under the guise of expert testimony while obscuring significant foundational issues bearing on any error, bias, or prejudice on the testing analyst's part.

Federal Rule of Evidence 703 and similar modern rules permit expert witnesses to offer opinions based on information that is otherwise inadmissible if it is of a type reasonably relied upon by other experts in the field. But as this Court firmly established in *Crawford*, a defendant's Sixth Amendment right to confrontation is not subject to the "vagaries of the rules of evidence." *Crawford*, 541 U.S. at 61. Accordingly, Rule 703 cannot cure what is otherwise

constitutionally impermissible. *Williams*, 132 S. Ct. at 2256 (Thomas, J., concurring); *id*. at 2272 (Kagan, J., dissenting).

Moreover, Rule 703 does not address underlying foundational issues that may themselves implicate the Confrontation Clause. Five Justices of this Court agreed in *Williams*, albeit in two different opinions, that "to determine the validity of [an expert] witness's conclusion, the factfinder must assess the truth of the out-of-court-statement on which it relies." 132 S. Ct. at 1268–69 (Kagan, J., dissenting); *see also id*. at 2258 ("[T]he validity of [the expert's] opinion ultimately turned on the truth of [the underlying] statements.") (Thomas, J., concurring). That is the case whether the testifying expert directly puts the out-of-court-statement on the record (as Block did here) or simply relies on the statement in giving his own opinion. Either way, the expert validates the testimonial evidence on which he relied, and the defendant cannot meaningfully challenge that evidence without access to the absent analyst. *Cf. United States v. Lawson*, 653 F.2d 299, 302 n.8 (7th Cir. 1981) ("In a criminal case, even though Rule 703 warrants the use of hearsay as a basis for opinion, the constitutional right of confrontation may require that the defendant have the opportunity to cross-examine the persons who prepared the underlying data on which the expert relies." (citation omitted)).

Turner's case illustrates the point. The government did not simply introduce Block's opinion while withholding his basis evidence from the jury. In fact, the Seventh Circuit recognized that "Block himself did effectively repeat out-of-court statements

made by Hanson in [her] written materials when he testified that Hanson followed the standard procedures in testing the substances" in Turner's case. App. 9a. Without this essential predicate testimony confirming Hanson's testing procedures and tying her results specifically to Turner, which the government introduced in violation of Turner's rights, Block's opinion based on those results would have been entirely irrelevant and inadmissible even under standard evidentiary rules.[9] For this reason, Turner moved for a directed judgment at the end of the government's case based on its failure to provide sufficient foundation for the identification of the alleged drug evidence.[10] App. 22a, 62a. Thus, the government had only two mutually exclusive alternatives: it could have either (1) violated Turner's confrontation right by introducing Block's opinion (as well as his basis evidence), or (2) failed to provide the requisite foundation for Block's opinion. It could not have avoided both without calling Hanson to testify.

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[9] *See, e.g.,* FED. R. EVID. 402 ("Irrelevant evidence is not admissible."); FED. R. EVID. 702 (expert opinion must "help the trier of fact" and be "based on sufficient facts or data"); FED. R. EVID. 901 (to authenticate evidence, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is"); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993) ("[T]he Rules of Evidence—especially Rule 702—do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.").

[10] Turner challenged on appeal, and continues to challenge, the chain of custody and authentication of the particular samples Hanson purportedly tested. *See* Seventh Circuit Dkt. No. 8 at 32–35; App. 62a. These issues are subsumed under Turner's confrontation argument.

The Seventh Circuit, however, sweeps aside these issues and other significant foundational issues by concluding that Block's opinion did not violate the Confrontation Clause while simultaneously ignoring that Block's testimony lacked the requisite foundation had the government not introduced Hanson's testimonial statements—that she followed the standard procedure and tested the correct evidence—in violation of Turner's confrontation right. Indeed, the court applied a "presumption of regularity" to Hanson's forensic testing, presuming that Hanson, as a government official, "discharged [her] duties properly." App. 37a–38a; *see also* App. 21a n.4. Thus, Turner not only was denied his right to challenge Hanson's testimonial statements through confrontation but he also was effectively denied his right to challenge the sufficiency of the government's case against him, further raising due-process concerns. *See Michigan v. Bryant*, 131 S. Ct. 1143, 1162 n.13 (2011) ("[T]he Due Process Clauses of the Fifth and Fourteenth Amendments may constitute a further bar to admission . . . .").

Moreover, the Seventh Circuit, like many of the courts upholding surrogate expert testimony, creates a loose distinction between permissible testimony that offers "independent opinions" and impermissible testimony that does not. Not only is this distinction ripe for abuse, but it also is essentially a proxy for whether the trial judge believes the testimony is sufficiently "reliable," and thus threatens to return the confrontation analysis to the amorphous reliability test that this Court expressly rejected in *Crawford*. *See Crawford v. Washington*, 541 U.S. 36, 60–61 (2004) (overruling *Ohio v. Roberts*, 448 U.S. 56 (1980)). Importantly,

the extent of a surrogate expert's reliance on, or involvement in, the underlying analyses will vary from case to case such that the admissibility of the surrogate expert's testimony will ultimately depend on the trial judge's impression of the reliability of the proffered testimony. *See United States v. McGhee*, 627 F.3d 454, 460 (1st Cir. 2010) ("The quantity and quality of [a surrogate expert's] dependence [on nontestifying analysts' work] is going to vary from case to case and, absent clarification by the Court, how Rule 703 and *Melendez-Diaz* are to be reconciled may, in some cases, involve case-by-case assessments.").

Demonstrating that the "independent opinion" distinction is tenuous and unworkable, the Supreme Court of North Carolina recently issued conflicting opinions on the same day in cases involving nearly identical circumstances, including the same lab and the same expert. *Compare Brewington*, 2013 WL 3215751, at *1–2 (N.C. June 27, 2013) (finding no confrontation violation because testimony provided independent opinion), *with State v. Craven*, No. 322PA10, 2013 WL 3215764, at *3 (N.C. June 27, 2013) (finding confrontation violation because testimony did not provide independent opinion). As the dissent observed:

> That the majority in *Craven* holds a Confrontation Clause violation occurred . . . but fails to do so [in *Brewington*], is a remarkable demonstration of the semantics embodied in the term "independent opinion." In *Craven* the State asked the substitute analyst, who coincidentally was also Agent Schell, whether she reviewed the reports of the testing analyst and whether she

> agreed with the results of the report. She answered both questions affirmatively. That exact same procedure was followed [in *Brewington*]: Agent Schell stated that she did not perform the tests, but reviewed the reports of the testing analyst and agreed with the conclusions. In both [cases] the information at issue goes to a critical element of the offense charged. Yet, in *Craven* the fatal error to achieving the classification of "independent opinion" as observed by the majority was that the State then asked, "What was [the testing analyst's] conclusion?" [In *Brewington*,] the State asked for Agent Schell's opinion. This is mere semantics.

Brewington, 2013 WL 3215751, at *14 (internal citations omitted) (Beasley, J. dissenting).

The Seventh Circuit takes the "independent opinion" distinction even further. Despite acknowledging that Block had no personal knowledge of Hanson's testing and that he necessarily relied on, and conveyed Hanson's statements, App. 4a–6a, the court nevertheless reasoned that Block testified to his own independent opinion, App. 6a–7a. Worse, as addressed further below, the court concluded that any error in admitting Block's testimony was harmless because the jury could have considered Block's independent opinions (among other evidence). That is, even though Block improperly testified that Hanson followed standard procedures and that she reached the same conclusion, *see* App. 15a, the court nevertheless found that Block's "permissible" opinion testimony cured his improper testimony, App 20a–21a. Yet, striking at the heart of the Confrontation

Clause, the Seventh Circuit acknowledged that "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.

Thus, the Seventh Circuit's decision has broad implications for other criminal proceedings and presents prosecutors with an unwarranted shortcut around the Confrontation Clause: to introduce the substance of a nontestifying analyst's report, and indeed even the report itself, while avoiding significant foundational issues, deft prosecutors need only provide some pretext of independent analysis by a surrogate expert. Such a shortcut neither satisfies the Confrontation Clause nor provides the procedural safeguards that *Crawford* contemplates. This Court should not allow it to stand.

III. The Seventh Circuit Applied a Harmless-Error Standard That Improperly Focuses on the Sufficiency of the Evidence and Conflicts with the Standard Applied by This Court, Previous Decisions by the Seventh Circuit, and Other Courts.

Under *Chapman v. California*, the Government bears the burden of showing that any constitutional error in admitting Block's testimony was "harmless beyond a reasonable doubt" such that there is no "**reasonable possibility** that the error complained of **might have contributed** to the conviction." 386 U.S. 18, 22 (1967) (emphasis added). As this Court explained in *Chapman*, "[a]n error admitting plainly relevant evidence which **possibly influenced the**

jury adversely to the litigant cannot . . . be conceived of as harmless." *Id.* at 23 (citation omitted; emphasis added). In its decision below, although the Seventh Circuit noted in passing that the error must be "harmless beyond a reasonable doubt," the court nevertheless applied an improper standard that focused on the purported sufficiency of the remaining evidence, stating that "considerable evidence" supported Turner's conviction, rather than focusing on the influence Block's impermissible testimony had on the jury.[11] App. 16a.

Moreover, the court's own factual findings demonstrate that Block's impermissible testimony was plainly relevant and *did* present a reasonable possibility that it contributed to Turner's conviction.[12] For example, the court explained that:

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[11] The Seventh Circuit also relies on a string of cases for the proposition that "expert analysis and testimony are not invariably necessary to establish the identity of the controlled substance which the defendant is charged with distributing." *See supra*, note 4. These cases, however, only underscore the court's departure from this Court's harmless-error standard. Indeed, all but one of these cases relate to challenges to the sufficiency of the evidence to uphold a drug conviction—not the influence that erroneously admitted evidence may have had on a jury's verdict. The one case that does address harmlessness (*Dominguez*) did not address a constitutional error. *Dominguez*, 992 F.2d at 681.

[12] That the court misapplied the harmless-error standard is particularly significant here because the improper testimony relates to forensic testing, which can be superficially impressive to juries and carries with it an air of infallibility as propagated by the media—often dubbed the "CSI effect." *See State v. Cooke*, 914 A.2d 1078, 1083–88 (Del. Super. Ct. 2007) (surveying academic literature on the "CSI effect" and taking judicial notice that "there is enough of a possibility of it that it

> [The 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. Indeed, the government relied on Block's testimony as the centerpiece of its case and argued in closing that in Block's opinion "Exhibits 1-3 are cocaine base, crack cocaine" and that "this wasn't fake crack cocaine" but "the real stuff." App. 66a. Further, the court conceded that "Turner lacked the opportunity to challenge [Hanson's] conclusion, and for that matter Block's conclusion (which was based on Hanson's data), that the substances contained cocaine base." App. 17a.

Under both the *Chapman* framework and *habeas* review, in which the government has a *lower* burden for proving that an error was harmless, this Court has consistently held that an error is not harmless merely if the remaining evidence is "sufficient" to uphold the verdict:

> [I]t is not the appellate court's function to determine guilt or innocence. . . . Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. . . .

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cannot be ignored"); *see also United States v. Fields*, 483 F.3d 313 (5th Cir. 2007) (taking judicial notice that "CSI effect" is plausible); Andrew P. Thomas, *The CSI Effect: Fact or Fiction*, 115 YALE L.J. Pocket Part 70 (2006) (outlining a survey in which "38% [of prosecutors] believed they had at least one trial that resulted in either an acquittal or hung jury because forensic evidence was not available").

> **[T]he question is, not [was the jury] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision.** The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.

Kotteakos v. United States, 328 U.S. 750, 763–64 (1946) (emphasis added); *see also Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993) (applying *Kotteakos* to *habeas* review); *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) ("The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error."); *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963) (finding irrelevant "whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of").

Likewise, previous decisions by the Seventh Circuit and other federal courts of appeals have rejected the sufficiency of the evidence as a standard for determining whether a constitutional error was harmless beyond a reasonable doubt. *See United States v. Jackson*, 636 F.3d 687, 697–98 (5th Cir. 2011); *Jones v. Basinger*, 635 F.3d 1030, 1053–54 (7th Cir. 2011); *United States v. Chanthadara*, 230 F.3d 1237, 1266 (10th Cir. 2000); *United States v. Maynard*, 615 F.3d 544, 568 (D.C. Cir. 2010); *United States v. Burgess*, 175 F.3d 1261, 1267–68 (11th Cir. 1999)*; United States v. Moses*, 137 F.3d 894, 904 (6th Cir. 1998) (Ryan, J. concurring).

The Fifth Circuit's decision in *Jackson* underscores the Seventh Circuit's error here. There, the court found that a confrontation violation was not harmless beyond a reasonable doubt even though it found the remaining evidence against the defendant to be sufficient. *Jackson*, 636 F.3d at 697–98. Significantly, the court reasoned that, like in Turner's case, "because the government's closing argument relied on [the] very evidence" that offends the Confrontation Clause, "[w]e cannot see how the government can conclusively show that the tainted evidence did not contribute to the conviction." *Id*. at 697. Thus, the Fifth Circuit vacated the conviction at issue and remanded for a new trial. *Id*. at 698.

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

IV. Turner's Petition Presents the Proper Vehicle for Addressing the Questions Presented.

This petition presents the proper vehicle to address the issue of surrogate expert testimony. As an initial matter, Turner's case comes to this Court on direct appeal, free of procedural constraints and under the broadest standard of review. Turner timely and unambiguously objected to Block's surrogate expert testimony on confrontation grounds, App. 27a–28a, 43a–44a, 53a, 62a, 68a–69a, 75a–76a, and properly preserved this issue on appeal, App. 30–31a.

Moreover, as the Seventh Circuit itself acknowledged, the factual circumstances of Turner's case present a stronger confrontation case than in

Williams, App. 12a–13a, and help bridge the gaps that so sharply divided this Court. First, "Hanson's analysis was commissioned in order to establish Turner's guilt of distributing crack cocaine," App. 12a, and thus satisfies the plurality's requirement that testimonial statements be made with the "primary purpose of accusing a targeted individual of engaging in criminal conduct," 132 S. Ct. at 2242–43. Second, unlike *Williams*, Turner's case was tried to a jury, App. 12a, which the plurality reasoned makes it more likely that statements conveyed by a surrogate expert would be taken for their truth, 132 S. Ct. at 2236–37, 2240. Third, there is no dispute that Hanson's report, on which Block relied, was "the functional equivalent of the report at issue in *Bullcoming*," App. 15a, and had the "requisite 'formality and solemnity' to be considered 'testimonial'" under the test Justice Thomas set forth, 132 S. Ct. 2255 (Thomas, J. concurring).

Further, Turner's inability to cross-examine Hanson presents a compelling case of prejudice. As this Court explained in *Melendez-Diaz*, confrontation through cross-examination is designed to weed out both the fraudulent analyst and the incompetent analyst. 557 U.S. at 319. This Court further explained that the very type of "gas chromatography/mass spectrometry analysis" that Hanson performed "requires an exercise of judgment and presents a risk of error" that should properly be explored on cross-examination. *Id*. at 320 (citing 2 PAUL GIANNELLI & EDWARD IMWINKELRIED, SCIENTIFIC EVIDENCE § 23.03[c] (4th ed. 2007)). For its part, the government presented Block's testimony as the centerpiece of its case and in fact relied on Block's testimony to argue in closing that "Exhibits

1-3 are cocaine base, crack cocaine" and that "this wasn't fake crack cocaine" but "the real stuff." App. 66a. Yet, as the Seventh Circuit succinctly put it: "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.

In short, Turner's case provides the proper vehicle for this Court to revisit the issue of surrogate expert testimony that it was unable to resolve with a firm majority in *Williams*, and thereby provide lower courts with much-needed guidance.

CONCLUSION

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

Respectfully submitted,

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