No. 15-405

IN THE

Supreme Court of the United States

JOSHUA KATSO,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

RICHARD D. FRIEDMAN
Counsel of Record
625 South State Street
Ann Arbor, Michigan 48109
(734) 647-1078
rdfrdman@umich.edu

MAJOR ISAAC C. KENNEN
CAPTAIN JOHNATHAN D. LEGG
Appellate Defense Counsel
United States Air Force
Appellate Defense Division
1500 W. Perimeter Rd, Ste. 1100
Joint Base Andrews, MD 20762
(240) 612-4770
isaac.c.kennen.mil@mail.mil

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

SECONDARY SOURCE

I. RESOLUTION OF THIS CASE DEPENDS ON AN IMPORTANT AND FREQUENTLY RECURRING QUESTION OF CONSTITUTIONAL LAW ON WHICH THE COURTS ARE CLEARLY DIVIDED.

This case presents an important and recurring question of constitutional law on which the lower courts are in conflict, as the CAAF majority recognized: One analyst makes a report or other testimonial statement but does not testify subject to confrontation against the accused. Instead, a surrogate analyst who performed some sort of reviewing role testifies to the surrogate's own opinion. Is that testimony permissible under the Confrontation Clause, even though it is necessarily based on the truth of the first analyst's testimonial statements as to factual matters that the surrogate did not personally observe? Notwithstanding the Respondent's attempts to transform the CAAF decision into a narrow, factbound application of accepted principles, it is clear that

- the CAAF majority decided this question of law in the affirmative;

- resolution of this case depended on the CAAF's decision of this question; and

- as the CAAF majority recognized, the courts are in conflict on this question.

It may help to clarify the issue at stake by first recognizing principles that are agreed on all sides. On the one hand, the Confrontation Clause is

concerned only with testimonial statements. Thus, for example, if a nurse does a blood draw but does no analysis and makes no testimonial statements on which the analyst who testifies in court relies, there is no need for her testimony.[1] Similarly, a prosecution expert witness may without violating the Confrontation Clause, and if authorized by a rule such as Fed. R. Evid. 703 or Mil. R. Evid. 703, testify to an opinion that is based entirely on non-testimonial materials, even if those materials are not otherwise admissible. Such materials may include, for example, non-testimonial statements by humans and properly authenticated machine outputs. On the other hand, the CAAF majority recognizes that the expert may not simply repeat a testimonial statement made by a person who does not testify subject to confrontation. *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011).

But this case presents the issue that *is* in dispute among the courts, because, while the testimonial statements made by Fisher, the absent

---

[1] *See, e.g., Russell v. State*, No. 14-15-00036-CR, 2016 WL 720818 (Tex. App. Houston 14th Dist. Feb. 23, 2016) (inability of accused to cross-examine nurse who drew blood but provided no testimonial statements held not violative of confrontation right; "the opportunity to cross-examine the analyst who performed the tests and provided the testimonial statements—the blood test results—is all that is necessary to satisfy the Confrontation Clause"). Similarly, there is no Confrontation Clause problem with the introduction of routinely produced certificates that are not testimonial in nature. *E.g., United States v. Rainbow*, No 15-1936, No. 15-1937, 2016 WL 683113 (8th Cir. N.D. Feb. 19, 2016).

analyst, were not formally introduced at trial, Davenport, the testifying surrogate, relied on those statements in formulating an opinion to which he testified. Indeed, this case sets up particularly neatly the question of whether the Confrontation Clause allows this procedure, because the CAAF majority explicitly took as premises that (a) Fisher's Final Report was testimonial, and (b) the crucial opinion offered at trial by Davenport relied in part on this testimonial hearsay. App. 19a. As Respondent emphasizes, the CAAF majority stressed that Davenport *also* relied on materials that the CAAF majority did not regard as testimonial – but it repeatedly asserted its premise that Davenport relied in part on the Final Report. App. 19a (assuming that Davenport "may have relied in part on the Final Report . . . *as well as* the evidence that underlay it) (emphasis added), 28a, ("Even if Mr. Davenport's in-court statements . . . were based in part on the Final Report, they were admissible."), 30a ("Even if those conclusions may have derived in part from the Final Report . . .") And the premise was inescapable, because Davenport himself acknowledged that he relied in part on the Final Report. App. 109a-113a.

Further, in deciding the question the CAAF majority applied what it considered to be a clear-cut rule: As long as the expert in this situation does not actually *repeat* an out-of-court testimonial statement on which he or she relies, "the admissibility of the expert's opinion hinges on the degree of independent analysis the expert undertook in order to arrive at that opinion." App. 25a.

Moreover, the CAAF majority explicitly recognized that its rule conflicts with the decisions of other jurisdictions. After citing cases that supported its purported rule, the majority said, "Some courts eschew this rule, however, and find a Confrontation Clause violation even if the expert had a high degree of involvement in the testing process or thoughtfully formulated her own conclusions." It then cited three of the cases cited by the Petition. App. 27a-28a.

The conflict is indeed clear. Some courts, including CAAF, take the view that, even if the surrogate expert relies on factual assertions made in out-of-court testimonial statements that have not been subjected to confrontation, that is not troublesome so long as the surrogate offers "value added" in the form of his or her own opinion. And other courts recognize that this procedure violates the Confrontation Clause: Communicating the substance of a testimonial statement to the trier of fact, without the accused having an opportunity to be confronted with the maker of the statement, violates the Clause. The problem cannot be relieved by *adding* a chain in the link of inference – that is, by the fact that, *in addition* to the substance being conveyed to the trier, an expert testifying at trial offers an opinion that relies on that substance.[2]

[2] There is no need in this case to determine whether an expert may testify to an opinion based in part on testimonial statements of an absent analyst if such reliance is not apparent to the trier of fact. In this case, as the Petition demonstrates at 20-21, it was necessarily apparent Fisher's statements were

As noted above, the CAAF majority cited some cases demonstrating the conflict. The Petition, at 11-14, cites others. Respondent does not even cite any of these cases or make any attempt – which would be futile – to demonstrate that the cases are not in fact in conflict. And since the time of the Petition, the cases have continued to cascade.[3] Forensic testing is

---

essential predicates for Davenport's opinion concerning the DNA evidence.

[3] *Compare Williams v. United States*, No. 13-CF-1312, 2016 WL 275301 (D.C. Jan. 21, 2016) (acting on assumption that ballistics worksheets prepared by lead examiner, who did not testify at trial, were testimonial; concluding that "their erroneous admission was harmless"); *Holland v. Lackner*, No. 13-cv-02094-JD, 2015 WL 5935372 (N.D. Cal. Oct. 13, 2015) (on habeas; state court had determined that confrontation right was violated where expert witnesses gave opinions based on statements by absent forensic analysts; determination of harmlessness confirmed); *People v. Smith,* 2015 Ill. App. 133323-U, 2015 WL 7280919 (Ill. App. Ct. 1st Dist. Oct. 9, 2015) (holding that Confrontation Clause was violated where, as here, testifying expert opined as to DNA match based on work of absent analyst whose work testifying analyst reviewed; error held harmless); *Trigo v. State*, No. 01-15-00382-CR, 2016 WL 430879 (Tex. App. Houston 14th Dist. Feb. 4, 2016) (reaffirming rule governing in Texas that "[w]ithout having the testimony of the analyst who actually performed the tests, or at least one who observed their execution, the defendant has no way to explore the types of corruption and missteps the Confrontation Clause was designed to protect against"); *with, e.g., State v. Munoz,* No. 2014AP702-CR, 2016 WL 783267 (Wis. Ct. Apps. March 1, 2016) (no confrontation violation where medical examiner testified to opinion as to cause of death on the basis of review of autopsy file prepared by another examiner).

such a large part of the modern criminal justice system that cases reflecting the conflict will continue to abound – until this Court resolves it.

We have discussed the matter so far on the terms assumed by the CAAF majority, that only the Final Report was testimonial; this assumption was an important part of the rationale of the CAAF majority, which concluded that the "independent analysis" standard it articulated was satisfied because Davenport "performed an extensive independent review of the case file." App. 28a.[4] But as the Petition demonstrates, pp. 15-19, the assumption is not true:[5] Fisher's preliminary

[4] CAAF held that Davenport learned the names of the parties the same way Fisher did, "through the underlying data in the case file." App. 18a; *see also* BIO at 19-20. But that is simply wrong. The only way Davenport could know that Fisher tested the swabs he was supposed to, and did so without corrupting them, was that Fisher said so in his written work product. It is true that "gaps" in the chain of custody go to weight, not admissibility, of evidence. BIO at 18. But that just means the evidence that is presented can leave room for reasonable inference. *See Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 311 n. 1 (2009). It does *not* mean that a prosecution can present a witness who says, "I've looked at the file, and I'm satisfied that the proper swabs were tested, and that the tests were conducted and recorded properly."

[5] Curiously, Respondent contends that this question is not properly before the Court because it does not fall within the Question Presented in the Petition. The contention fails for two basic reasons. First, under this Court's Rule 14.1(a), "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." In construing this Rule, the Court has treated a question as subsidiary if it is "predicate" to the explicitly stated question.

writings, which culminated in the Final Report, were clearly made with the solemn anticipation of creating evidence against Petitioner, the only suspect ever considered in the case.[6]

If Davenport is allowed to testify to an opinion based (in whole or in part) on Fisher's preparatory work, then, just as if he is allowed to testify to an opinion based (in whole or in part) on Fisher's Final

---

E.g., Ohio v. Robinette, 519 U.S. 33, 38 (1996); STEPHEN M. SHAPIRO et al., SUPREME COURT PRACTICE 457-58 (10th ed. 2013). The Question Presented by the Petition involves testimony by the surrogate analyst that "necessarily relies on testimonial assertions made by the first analyst," and so clearly the question of whether a given statement on which the surrogate relied should be deemed testimonial is a subsidiary or predicate issue. Second, the scope of the Question Presented in the Petition is immaterial at this point, because at the certiorari stage the phrasing of that question does not limit the Court in deciding what issues it will consider. STEPHEN M. SHAPIRO et al., *supra*, at 460-62 (discussing the Court's "power to add questions not advanced by the parties"). There is no occasion here to play "gotcha."

[6] As the Air Force Court of Criminal Appeals said:

> This case, unlike *Williams*, involved a jury trial and a known suspect, against whom charges had been preferred, and who was in pretrial confinement for the suspected offense prior to the DNA testing. At the time Mr. Fisher created the DNA profiles, he knew the appellant's identity and further knew the results of his analysis would be turned over to the [Air Force Office of Special Investigations] for potential prosecution.

App. 62a-63a (footnotes omitted).

Report, this Court's decision in *Bullcoming* is essentially a dead letter. One laboratory analyst could do all the work necessary to generate, and for the purpose of generating, a result incriminating the suspect targeted in the case. She could then write her factual findings and any conclusions in a document labeled "notes." Whether or not she also wrote a document labeled as a final report, she would thus put the prosecution in a position (without even the need to show unavailability of the lab analyst[7]) to pick the expert of its choice – who need not have had anything to do with the testing – to testify to an "independent" opinion, based entirely on the lab analyst's findings, as to what the test proved. Though the Petition, at 16, pointed out this consequence of the CAAF decision, the Respondent makes no attempt to suggest that it would not in fact follow.

---

[7] Fisher was not in fact unavailable. Respondent argues that the defense suggested that if the trial were delayed for Fisher it would have to be delayed for several weeks to accommodate a defense expert. BIO at 6 & n.1. That is not so. The defense expert in question was a forensic psychologist, appointed to help the defense assess the complainant's testimony. The military court would not have had to delay the whole trial to accommodate Fisher; the complainant could have testified as scheduled, and a very slight continuance, at most a couple of days, would have been enough to allow Fisher to testify at trial. In any event, under *Crawford v. Washington*, 541 U.S. 36, 543-54, 68 (2004), unavailability would help the prosecution only if the accused had an opportunity to cross-examine Fisher, which of course he did not have.

The fact that the prosecution failed to make Fisher's statements underlying his Final Report part of the record does not, as Respondent contends, make this case a poor vehicle for resolution of the basic constitutional issue presented here. On the contrary, it highlights the danger of the procedure used in this case. According to the CAAF decision, it is perfectly permissible for an analyst to do all the work of a forensic test, including the recording of what that analyst did and the results yielded, and then for a surrogate analyst to testify to a conclusion that is necessarily based on the first analyst's statements,[8] *but without the text of those statements ever even being disclosed to the accused*. This is not, as the Respondent would have it, BIO at 19-20, simply a problem that goes to the weight of the evidence. For centuries, the openness of the confrontational style of testimony – the fact that it is given face-to-face with the accused, rather than written "in a corner," *Case of the Union of the Realms*, 72 Eng. Rep. 908, 913 (K.B. 1604) (Popham, L.C.J.) – has been one of the great prides of the common-law system of adjudication. The Confrontation Clause does not permit a prosecution to present the shadow of testimonial evidence in the hope, often borne out by a verdict of guilt, that the jury will not discount the value of the evidence so much as to prevent conviction. Rather, if the prosecution wants to use a testimonial statement to prove the truth of a matter that the statement asserts, it must adhere to the time-honored procedure sanctioned by the Clause, presenting the testimony of the witness who made

[8] See *note 2 supra*.

the statement, under oath, subject to cross-examination, and face to face with the accused. *Crawford v. Washington*, 541 U.S. 52, 57, 69 (2004).

II. THE ERROR WAS CLEARLY PREJUDICIAL.

Finally, little need be said in response to the Respondent's suggestion that any Confrontation Clause violation was harmless because at trial Petitioner did not challenge the proposition that he and the complainant had sexual contact. The majority of the Air Force Court of Criminal Appeals squarely rejected this contention, properly concluding that "the testimonial hearsay was an important piece of evidence leading to the appellant's conviction." App. 73a. Concurring, Senior Judge Marksteiner elaborated: "[O]nce the military judge ruled against the appellant on the admissibility of Mr. Davenport's statement . . ., it would have been beyond benign futility – indeed it would likely have been affirmatively detrimental to the appellant's case – to argue the [Petitioner] did not have sex with [the complainant]." App. 76a. It is important to bear in mind that the assessment of harmlessness cannot be based on speculation as to what would have occurred had Fisher testified live at trial, *Coy v. Iowa*, 487 U.S. 1012, 1021-22 (1987); rather, a court must act on the basis that the improper evidence was not admitted and then "harmlessness must . . . be determined on the basis of the remaining evidence." *Id.* When the improper evidence in this case is set aside, the only evidence tying Petitioner to the crime was the uncertain identification of the victim, who saw the assailant in the dark as she awakened from a drunken stupor. And indeed, *before* the military

judge made the ruling allowing Davenport's testimony, Respondent contended that it was a crucial one to its case, because of the weakness of the other identity evidence. Pet. at 25; App. at 106a-107a. There is no force to the Respondent's contention, made *after* it won that ruling, that the decision did not matter.

CONCLUSION

For the reasons stated above and in the Petition, the Petition should be granted.

Respectfully Submitted,

RICHARD D. FRIEDMAN
Counsel of Record
625 South State Street
Ann Arbor, Michigan 48109
(734) 647-1078
rdfrdman@umich.edu

MAJOR ISAAC C. KENNEN, USAF
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, Maryland 20762
(240) 612-4770
isaac.c.kennen.mil@mail.mil

CAPTAIN JOHNATHAN D. LEGG, USAF
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, Maryland 20762
(240) 612-4770
johnathan.d.legg.mil@mail.mil

Counsel for Petitioner