No. 19-5806

IN THE SUPREME COURT OF THE UNITED STATES

JOHN BRADHAM, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

PATRICK M. KUHLMANN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly determined that any Confrontation Clause error in petitioner's trial was harmless beyond a reasonable doubt.

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-5806

JOHN BRADHAM, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1, at 1-8) is not published in the Federal Reporter but is reprinted at 777 Fed. Appx. 294.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2019. The petition for a writ of certiorari was filed on August 30, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of distribution of cocaine base, in violation of 21 U.S.C. 841(a)(1), and one count of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. A2, at 1. He was sentenced to 262 months of imprisonment, to be followed by 5 years of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. A1, at 1-8.

1. On October 17, 2017, petitioner sold a gun and crack cocaine to a confidential informant (CI). The CI arranged the deal in telephone calls monitored by detectives. Pet. App. A1, at 2-3. The CI initially planned to meet petitioner on October 12, but detectives aborted that meeting out of concern for the CI's safety. Presentence Investigation Report (PSR) ¶¶ 4, 12.

Before the October 17 meeting, detectives provided the CI with a blue backpack containing $460 ($400 for the gun and $60 for cocaine). Pet. App. A1, at 3. They also outfitted him with a covert camera, which recorded audio and video, and a cell phone with an open line, enabling the detectives to hear the conversation between the CI and petitioner in real time. Pet. C.A. App. 205-206.

The CI met petitioner at a bus terminal, and the two men took a bus to a bus stop near a storage facility. PSR ¶¶ 19, 21. While the CI waited at the bus stop, petitioner entered the storage

facility and went to a storage unit. PSR ¶ 22. After petitioner left the storage facility, petitioner and the CI reconvened on a nearby bench. PSR ¶¶ 24-25. A detective listening on the open cell phone line heard a gun being manually adjusted, or "racked," and petitioner telling the CI how to treat the gun with baby oil. Pet. App. A1, at 4; PSR ¶ 25. Detectives surveilled the CI and petitioner throughout the course of the transaction. PSR ¶ 17.

After the deal was complete, detectives met with the CI. The CI handed over the blue backpack, which now contained one piece of crack cocaine and a firearm with a magazine containing five rounds of ammunition. PSR ¶ 27. The $460 was gone. Ibid. Shortly thereafter, the police arrested petitioner. Pet. App. A1, at 4. Police searched petitioner's backpack incident to his arrest and discovered the cash used to purchase the firearm. Ibid. After obtaining a search warrant, detectives searched petitioner's storage unit. PSR ¶¶ 30-31. Inside, detectives found a revolver handgun with five rounds of ammunition. Ibid.

2. A federal grand jury charged petitioner with distribution of cocaine base, in violation of 21 U.S.C. 841(a)(1), and possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. A2, at 1. At trial, the government presented the testimony of four officers, who described the transaction between the CI and petitioner. Pet. C.A. App. 174, 189, 242, 295. The government also presented the testimony of a forensic expert who opined that the substance recovered from

petitioner was .08 grams of cocaine base. Id. at 337-338. In addition, the government played for the jury audio recordings of calls between the CI and petitioner and the audio-video recording of the sale taken by the CI. Pet. App. A1, at 5, 7. Petitioner did not present any testimony or witnesses. Pet. C.A. App. 343.

Petitioner had objected to the admission of the audio-video recording on the grounds that the testifying detectives could not authenticate the recording and that admission of the recording would violate the Confrontation Clause because it contained statements made by the CI, who had not been called as a witness at trial. Pet. App. A1, at 5. After one detective testified that the recording was consistent with what he heard live over the open cell phone line, and another detective testified that the recording was consistent with what he witnessed, the district court admitted the recording. Ibid.

The recording, which ran about two minutes, showed the latter portion of the meeting between the CI and petitioner. Pet. App. A1, at 5. The recording shows petitioner racking a handgun and telling the CI that he can keep the gun clean by wiping it down with baby oil. Ibid. The recording also includes the following statements by the CI, which formed the basis for petitioner's Confrontation Clause challenge: "My problem's over"; "No sit right here, oh OK"; "Ooh nice"; "Oh my god"; "Ain't no bullets in there, right, take it out, take it out"; "That's good, that's good. I don't want to accidentally fire so leave the clip out"; "I don't

want to shoot myself"; "So we done dealing, right"; "All right. I'm heading home to some friends. All right. I'll let you know who my first victim is"; "Yeah, yeah, appreciate it"; "Baby oil, just rag it"; "Appreciate it. I got you. OK. All right, all right. OK. OK I hear you. OK cool"; and "Done deal. I'm walking south on 27th." Id. at 5-6.

The jury found petitioner guilty on both counts. Petitioner moved for a new trial, arguing that the audio-video recording was not authenticated properly. Gov't C.A. Supp. App. 15-17. The district court denied the motion, finding that a proper foundation for admission of the recording had been laid, noting in the course of doing so that the "circumstantial evidence was overwhelming." Id. at 21.

3. The court of appeals affirmed. Pet. App. A1, at 1-8. As to petitioner's Confrontation Clause challenge, the court of appeals "assume[d]" without deciding, that the admission of the recording violated the Confrontation Clause, but determined that any such error "was harmless beyond a reasonable doubt because the contents of the recording were cumulative of the other 'overwhelming' circumstantial evidence that the government presented at trial." Id. at 7. The court observed that, in addition to the challenged recording, the government introduced "audio recordings of cell phone conversations" in which the CI arranged to buy crack cocaine from petitioner, evidence demonstrating that the CI returned from his meeting with petitioner

with a gun and crack cocaine, and evidence showing that the money the CI used to buy the gun was found in petitioner's backpack. Ibid. The court further observed that detectives testified that they observed or overheard the meeting between petitioner and the CI, including petitioner racking the gun and describing how to oil it. Ibid. In light of that evidence, the court determined that it could "confidently say that any constitutional error was harmless beyond a reasonable doubt." Ibid.

ARGUMENT

Petitioner briefly asserts, in a single sentence (Pet. 13), that the court of appeals erred in finding the admission of the audio-video recording was harmless beyond a reasonable doubt. He also renews his contention (Pet. 11-13), not passed on by the court of appeals, that the admission of the audio-video recording violated the Confrontation Clause. Neither contention warrants this Court's review. Petitioner's passing harmlessness challenge is fact-bound, and the decision below is correct and does not conflict with any decision of this Court or another court of appeals. Petitioner's Confrontation Clause claim is similarly fact-bound, was not addressed by the court of appeals, and is meritless in any event. The petition for a writ of certiorari should be denied.

1. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const. Amend.

VI. In Crawford v. Washington, 541 U.S. 36 (2004), this Court held that the Confrontation Clause bars the admission at a criminal trial of "testimonial statements of a witness who did not appear at trial unless he [is] unavailable to testify, and the defendant ha[s] had a prior opportunity for cross-examination." Id. at 53-54. The Confrontation Clause "does not," however, "bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Id. at 59 n.9 (citing Tennessee v. Street, 471 U.S. 409, 414 (1985)).

Confrontation Clause errors are subject to harmless-error review, and thus do not warrant relief if "the error was harmless beyond a reasonable doubt." Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). The harmlessness inquiry turns on "a host of factors," including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." Ibid.

The court of appeals correctly determined that any error in this case was harmless beyond a reasonable doubt given the "overwhelming" evidence of petitioner's guilt. Pet. App. A1, at 7. The evidence at trial included: audio recordings of cell phone conversations in which the CI arranged to buy crack cocaine from petitioner; testimony that a firearm and cocaine were found in the

CI's backpack after the meeting; testimony that the cash given to the CI was found in petitioner's possession after the meeting; and testimony from detectives who witnessed and listened to the meeting itself. Ibid. The court of appeals explained that much of the evidence in the challenged recording was "cumulative," and "confidently" determined "that any constitutional error was harmless beyond a reasonable doubt." Ibid. (citing Van Arsdall, 475 U.S. at 681).

Petitioner's unsupported one-sentence assertion (Pet. 13) that the court of appeals "erred in deeming the admission [of the audio-video recording] harmless" is undeveloped and lacking in merit. Petitioner does not contend that the court of appeals applied the wrong harmless-error standard, nor does he identify any conflict between the decision below and decisions of this Court or other courts of appeals. He also fails to address the other "overwhelming" evidence presented by the government or to identify any particular statement made by the CI relevant to the truth of the matter asserted that would have prejudiced him. His undeveloped factual disagreement with the court of appeals' harmlessness determination does not warrant this Court's review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."); cf. Pope v. Illinois, 481 U.S. 497, 504 (1987) ("Although we plainly have the authority to decide whether, on the facts of

a given case, a constitutional error was harmless * * * , we do so sparingly.").

2. Petitioner devotes most of his petition for a writ of certiorari to an issue that the court below did not address – namely, whether the admission of the recording violated the Confrontation Clause in the first place. See Pet. 11-13. That argument likewise does not warrant this Court's review. The court of appeals did not resolve petitioner's Confrontation Clause claim on the merits; instead, it "assume[d]" without deciding that an error occurred and disposed of the case on harmlessness grounds. Pet. App. A1, at 7. This Court does not ordinarily review issues that are not decided by the court below. See Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) (explaining that this is a "court of review, not of first view"). Petitioner identifies no reason to depart from the usual practice here.

In any event, petitioner's Confrontation Clause claim lacks merit. The statements made by the CI on the audio-video recording were admitted to give context to petitioner's statements, not for the truth of any matters that the CI asserted. See Gov't C.A. Br. 25-27; Pet. App. A1, at 5-6 (listing statements). Petitioner's brief contrary assertion (Pet. 12-13) lacks supporting authority or explanation. Nor does he identify any reason for the Court to address his entirely fact-bound claim. See Johnston, 268 U.S. at 227.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

PATRICK M. KUHLMANN
Attorney

DECEMBER 2019