

No. 10-8505

In The
Supreme Court of the United States

—◆—
SANDY WILLIAMS,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

—◆—
**On Writ Of Certiorari To The
Supreme Court Of Illinois**

—◆—
BRIEF FOR PETITIONER

—◆—
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QUESTION PRESENTED

Whether the prosecution violates the Confrontation Clause when it presents, pursuant to a state rule of evidence, the substance of a testimonial forensic laboratory report through the trial testimony of an expert witness who took no part in the reported forensic analysis, where the defendant had no opportunity to confront the analysts who authored the report.

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OPINION BELOW

The opinion of the Supreme Court of Illinois is published at 238 Ill. 2d 125, 939 N.E.2d 268 (2010). JA 143. The opinion of the Appellate Court of Illinois, First District, is published at 385 Ill. App. 3d 359, 895 N.E.2d 961 (1st Dist. 2008). JA 109.



JURISDICTION

On July 15, 2010, the Illinois Supreme Court issued an opinion affirming the judgment of the appellate court affirming Williams's conviction. The Illinois Supreme Court denied rehearing on September 27, 2010. Williams filed a timely petition for writ of certiorari on December 17, 2010. This Court granted certiorari on June 28, 2011. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).



CONSTITUTIONAL PROVISIONS INVOLVED

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

The Fourteenth Amendment of the United States Constitution provides in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV §1.



STATEMENT OF THE CASE

During the investigation of the sexual assault for which petitioner Sandy Williams was convicted, the Illinois State Police sent vaginal swabs taken from the complainant to a private laboratory, Cellmark Diagnostics, in order for the lab to conduct a DNA analysis. At trial, the prosecution presented, over defense objections, the testimony of an expert witness, who took no part in the analysis of the vaginal swabs conducted by Cellmark and had no personal knowledge of the procedures and methodologies used during the analysis. The expert stated that a male DNA profile had been deduced from the vaginal swabs. The expert testified that she conducted a statistical comparison of the profile reported by Cellmark and a profile derived from Williams's blood, and found them to match. Cellmark's forensic report itself was not introduced into evidence and none of Cellmark's analysts testified at trial. While Williams's appeal was pending in the Illinois Supreme Court, this Court decided *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, 129 S. Ct. 2527 (2009), holding that the Confrontation Clause is violated where the prosecution introduces

testimonial reports of forensic analysis into evidence without an opportunity for the defendant to cross-examine the analysts who authored the reports. *Id.* at 2532. Distinguishing *Melendez-Diaz*, the Illinois Supreme Court found no Confrontation Clause violation in this case, because under the Illinois version of Federal Rule of Evidence 703, Cellmark's DNA analysis was presented merely to explain the expert's opinion, not for its truth.

Trial

L. J. testified that on February 2, 2000, a man grabbed her from behind as she walked home from work. R. III92-95. The man claimed that he had a gun and forced her into a beige station wagon where he sexually assaulted her. R. III96-111. The man also took L. J.'s money and some of her personal belongings. R. III97, III101. After the assault, L. J. ran home and her mother called 911. R. III113-16. After giving the Chicago police a description of the offender and his car, L. J. was transported to the hospital where a vaginal swab and blood sample were taken and preserved in a sexual assault kit. R. III117-19, III52-55.

While L. J. was being treated at the hospital, the police stopped James McChristine, who fit the description of the offender and was driving a similar car near the scene of the attack. R. III20. When shown McChristine's driver's license, L. J. told the police that the person pictured on the license might be the

offender, but she wanted to see him in person. R. III21, III30. The police brought L. J. to the hospital parking lot to view McChristine. R. III119. An officer testified that L. J. positively identified McChristine as her attacker. R. III31. L. J., however, testified that she told the police McChristine was not her attacker. R. III119. When L. J. viewed McChristine a second time at the police station, she stated that McChristine was not her attacker, and he was released. R. III73-75. Over a year later, on April 17, 2001, L. J. identified Sandy Williams in a lineup. R. JJJ113.

Sandra Lambatos, an expert in DNA analysis who worked at the Illinois State Police Crime Lab, testified that she conducted a comparison of Williams's DNA profile and a male DNA profile deduced through DNA analysis of the vaginal swab taken from L. J., conducted by analysts at Cellmark Diagnostics, a laboratory in Germantown, Maryland. JA 49-56. Lambatos did not take part in any of the DNA analysis and no one from Cellmark testified at Williams's trial. JA 59. Defense counsel objected to Lambatos's testimony, arguing that she should not be allowed to testify about the analysis Cellmark performed to generate the DNA profile. JA 55. The trial court overruled the objection. JA 56.

The following testimony was presented regarding the DNA analysis that produced the DNA profiles Lambatos compared.

DNA analysis of Williams's blood

Manuel Sanchez, a health services employee at the Cook County Correctional Center, testified that on August 21, 2000, he received a court order to draw blood from Williams, who was in custody on a matter unrelated to this case. R. HHH16-19, JJJ6. Four drops of Williams's blood were placed on a piece of filter paper. R. JJJ7. When the blood sample dried, it was sealed in an envelope and sent to the Illinois State Police Crime Lab. R. JJJ7, JJJ15.

Karen Kooi Abbinanti, an expert in DNA analysis from the state police crime lab, testified that she conducted DNA analysis on the blood sample taken from Williams. JA 12-14. Abbinanti testified in detail regarding the procedures she followed to avoid contaminating either the samples or the testing equipment. JA 9-10. She also testified that she checked that the equipment was calibrated prior to conducting her analysis, and that she performed various controls to ensure the testing was performed correctly. JA 10, 17. She stated that she extracted a male DNA profile from Williams's blood sample and entered it into a state police data base that is used to compare DNA profiles with profiles from unsolved crimes. JA 14. She did not perform any analysis on the vaginal swabs taken from L. J. JA 16.

DNA analysis of the vaginal swabs

Brian Hapack, a forensic biologist at the state police crime lab, testified that he performed tests on

the swabs contained in L. J.'s sexual assault kit to determine whether or not any semen was present. JA 30-31. When the vaginal swabs tested positive for semen, he sealed them in an envelope and placed them in a secured freezer until further DNA analysis could be conducted. JA 31-34. Hapack also stated that he followed procedures to safeguard his work. JA 33.

Lambatos explained that during the years of 2000 and 2001, in order to reduce its backlog, the state police crime lab sent DNA samples from cases it worked on to Cellmark for analysis. JA 49-50. She testified that according to the police crime lab's shipping records, a vaginal swab and blood sample from L. J. were sent to Cellmark on November 28, 2000, and returned on April 3, 2001. JA 51-52, 54.

After providing general testimony regarding her comparison of the two profiles, Lambatos concluded that Williams could not be excluded as a source of the semen found on the vaginal swab. JA 57. She stated that "the profile would be expected to occur in approximately 1 in 8.7 quadrillion black, 1 in 390 quadrillion white, or 1 in 109 quadrillion Hispanic unrelated individuals." JA 57. Finally, she opined that the profile deduced by Cellmark matched Williams's profile. JA 58.

On cross-examination, Lambatos acknowledged that she neither examined nor conducted any testing on the vaginal swabs and that her testimony was based upon the testing conducted by Cellmark. JA 59. Cellmark's report contained four DNA profiles: one

derived from the female cells found on the vaginal swab, a mixed profile (a combination of the DNA profiles of L. J. and the donor of the sperm, which occurs when the sperm cells on a vaginal swab cannot be completely separated from the female cells), a profile derived from L. J.'s blood sample, and the male DNA profile Cellmark deduced from the mixed profile. JA 65, 67-69. Lambatos believed Cellmark produced the deduced male DNA profile by subtracting the profile derived from L. J.'s blood sample from the mixed profile, though she stated she would have followed a different procedure. JA 77. She testified that "[a]fter [Cellmark] made their deduced male donor profile, that was put into the data base and . . . the match was generated." JA 78.

Lambatos admitted that she was not aware of what procedures Cellmark followed to produce the deduced male DNA profile in this case, whether Cellmark had calibrated its equipment, or how Cellmark handled the samples once it received them. JA 59-61, 63. She also acknowledged that different platforms for DNA analysis exist and that she was not aware of what type of equipment Cellmark used in this case. JA 74-76. Although Lambatos reviewed an electropherogram¹ Cellmark produced for the mixed profile and agreed with Cellmark's results, she did not review any other electropherograms Cellmark produced

¹ An electropherogram is a graphical representation of data generated through the use of a genetic analyzer indicating the genetic markers detected in a DNA sample.

as part of its analysis or any of Cellmark's computer data. JA 62, 69, 87.

Lambatos acknowledged that the mixed profile provided by Cellmark indicated two instances of unaccounted-for genetic material (genetic markers that did not appear in L. J.'s profile and were not included in the deduced male profile), though she believed the first instance was likely background noise. JA 78-79. She did not see any evidence of sample degradation in the electropherogram for the mixed profile, or any evidence of a third person's profile being present. JA 81-82, 86.

After Lambatos testified, defense counsel moved to exclude the DNA evidence, arguing, among other things, that because no one from Cellmark testified, the admission of the evidence violated Williams's confrontation rights under this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). JA 90-94. The trial court denied the motion. JA 94-95.

Appeal

On appeal, Williams argued that his right to confrontation was violated where the trial court allowed Lambatos to testify regarding the DNA analysis conducted by Cellmark when he had no opportunity to cross-examine any of Cellmark's analysts. The Appellate Court of Illinois affirmed, with one justice dissenting. JA 109. The appellate court held that the Confrontation Clause was not violated because the evidence regarding Cellmark's DNA analysis did not

constitute hearsay as it was not presented to establish its truth. JA 124-27.

The Illinois Supreme Court granted Williams's petition for leave to appeal. While the case was pending, this Court issued its opinion in *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, 129 S. Ct. 2527 (2009), clarifying that forensic laboratory reports are testimonial under *Crawford*. The Illinois Supreme Court affirmed the judgment of the appellate court. Noting that under Illinois rules of evidence the facts and data disclosed by a testifying expert to explain the basis of an opinion are not considered to be admitted for their truth, the Illinois Supreme Court held that Lambatos's testimony regarding Cellmark's report did not constitute hearsay. JA 162-63. Accordingly, the Illinois Supreme Court distinguished *Melendez-Diaz* and found no Confrontation Clause violation. JA 171-72.



SUMMARY OF ARGUMENT

The State violated the Confrontation Clause by presenting testimonial statements contained in Cellmark's forensic DNA report through the in-court testimony of Sandra Lambatos, who disclosed the statements when she testified that the male DNA profile deduced by Cellmark from semen recovered from the complainant matched Williams's DNA.

1. Cellmark's report was testimonial. Similar to the forensic reports found to be testimonial in this

Court's decision in *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, 129 S. Ct. 2527 (2009), and *Bullcoming v. New Mexico*, 564 U.S. ___, 131 S. Ct. 2705 (2011), the report here was produced at the behest of the police in order to establish a fact used in the prosecution of a criminal case – in this case, the DNA profile of the offender. As such, the analysts who produced the DNA profile were witnesses against the defendant.

Although Cellmark's report was not itself admitted into evidence, the formal introduction of testimonial statements is not necessary to implicate the Confrontation Clause. The protections of the Clause are triggered where the substance of a testimonial statement is conveyed to the trier of fact. Lambatos's testimony that the profile she matched to Williams's profile had been derived from the complainant's vaginal swabs conveyed the substance of testimonial assertions contained in Cellmark's report, in violation of the Confrontation Clause.

Cellmark's statements were presented for their truth. The statements supported Lambatos's opinion only to the extent that they were true – if the profile reported by Cellmark was not what Cellmark claimed it to be, Lambatos's opinion regarding the match was meaningless. The probative value of Lambatos's opinion depended on the trier of fact's assessment of the accuracy or truthfulness of Cellmark's statements. Since Cellmark's statements were relevant only if true, they fell within the scope of the Confrontation Clause's protections.

The ability to cross-examine Lambatos regarding Cellmark's report did not satisfy the Confrontation Clause. The Confrontation Clause does not permit the testimonial statements of a forensic analyst to be introduced through the testimony of a surrogate witness. *Bullcoming*, 131 S. Ct. at 2710. Because Lambatos took no part in the analysis conducted by Cellmark and had no personal knowledge of the procedures Cellmark's analysts followed, the Clause did not permit her to testify as a surrogate for the analysts.

2. The rules of evidence do not create an exception to the Confrontation Clause for testimonial statements relied upon by an expert. The rationale underlying the rules allowing experts to testify regarding inadmissible evidence upon which they base their opinions is that if the evidence is reliable enough for the expert to consider in his professional capacity, it is sufficiently reliable for use at trial. This rationale directly conflicts with the Confrontation Clause since only confrontation, not reliability, satisfies the Clause. *Crawford v. Washington*, 541 U.S. 36, 61 (2004). Because Cellmark's statements were testimonial, they implicated Williams's right to confrontation regardless of whether they were sufficiently reliable to satisfy the rules of evidence governing expert witness testimony.

3. Finally, this Court held that because forensic evidence is not immune from distortion and manipulation, it is critical that a defendant be given the opportunity to test the analyst's "honesty, proficiency,

and methodology” through confrontation. *Melendez-Diaz*, 129 S. Ct. at 2536-38. Permitting the prosecution to present the testimonial statements of forensic analysts via expert testimony would allow the prosecution to perform an end run around the Confrontation Clause by depriving the defendant of the opportunity to test the accuracy of the analysts’ testing procedures through cross-examination. Condoning this practice would eviscerate this Court’s decisions in *Melendez-Diaz* and *Bullcoming*.

Because the Illinois Supreme Court permitted the testimonial statements of Cellmark to be admitted through the testimony of Lambatos, this Court should reverse the court’s judgment.

◆

ARGUMENT

The Confrontation Clause was violated when an expert presented a fact essential to the prosecution by recounting the substance of a forensic report produced at the behest of the police, where the expert had no knowledge of the procedures used to produce the report, and the defendant had no opportunity to cross-examine the analysts who prepared the report.

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. The Clause bars the admission of testimonial statements of a witness who does not testify at trial unless the witness is unavailable, and

the defendant had a prior opportunity to cross-examine that witness. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Consistent with this principle, when testimonial forensic reports are presented as evidence against a defendant, the Confrontation Clause guarantees the defendant the opportunity to test through cross-examination the “honesty, proficiency, and methodology” of the analyst who actually performed the forensic analysis. *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, 129 S. Ct. 2527, 2536-38 (2009); *Bullcoming v. New Mexico*, 564 U.S. ___, 131 S. Ct. 2705, 2710 (2011).

The right to confrontation does not disappear merely because an expert witness discloses the testimonial statement during in-court testimony. The Clause does not allow the prosecution to present one person’s testimonial statements through the trial testimony of another. *Crawford*, 541 U.S. at 68; *Davis v. Washington*, 547 U.S. 813, 826 (2006). So long as the forensic analyst’s testimonial statements are presented for their truth, regardless of the conduit, the analyst becomes a witness the defendant has a right to confront. *Bullcoming*, 131 S. Ct. 2716. The Illinois Supreme Court erred in concluding that Sandra Lambatos’s testimony disclosing the substance of the DNA analysis conducted by Cellmark did not violate the Confrontation Clause where Cellmark’s report was both testimonial and presented for its truth, and Williams had no opportunity to confront Cellmark’s analysts.

A. Sandra Lambatos’s trial testimony disclosing Cellmark’s testimonial statements violated Williams’s right to confrontation.

Cellmark’s forensic report is directly analogous to the forensic reports in *Melendez-Diaz* and *Bullcoming*. As in those cases, the forensic analysis was done at the behest of the police in order to establish a fact – namely, the DNA profile of the offender – to assist in the police investigation and prosecution. Without Cellmark’s report, Lambatos would not have been able to link Williams to the offense by matching the DNA profile of Williams to the purported DNA profile of the offender. As in *Melendez-Diaz* and *Bullcoming*, the police submitted the recovered evidence to the forensic lab – in this case, Cellmark – for analysis. JA 49-52; *Melendez-Diaz*, 129 S. Ct. at 2530; *Bullcoming*, 131 S. Ct. at 2710. As in *Melendez-Diaz* and *Bullcoming*, the analysts tested the evidence and submitted to the police a report of their results. JA 53-55; *Melendez-Diaz*, 129 S. Ct. at 2531; *Bullcoming*, 131 S. Ct. at 2710. Notably, Lambatos testified that the police had Cellmark produce the DNA report explicitly for the purpose of prosecuting the crime. JA 82. Because Cellmark’s report was made for an evidentiary purpose to assist the prosecution of this case, it ranks as testimonial. *Bullcoming*, 131 S. Ct. at 2717. Williams’s right to confrontation was therefore violated where Lambatos disclosed testimonial statements of Cellmark’s analysts contained in the report for the purpose of establishing their truth,

and Williams was not afforded the opportunity to cross-examine Cellmark's analysts.

1. Lambatos's trial testimony disclosed testimonial statements made by Cellmark's analysts.

Although unlike in *Melendez-Diaz* and *Bullcoming*, the written forensic report in this case was not itself introduced into evidence, the protections of the Confrontation Clause were triggered when Lambatos conveyed the substance of Cellmark's testimonial statements in her trial testimony.

a. The formal admission of a testimonial statement is not necessary for the Confrontation Clause to be implicated.

There is no requirement that a statement be conveyed verbatim at trial to be considered admitted in evidence. This Court has applied the Confrontation Clause where an in-court witness conveyed the substance of a declarant's out-of-court testimonial statements without the verbatim statements being introduced. In *Idaho v. Wright*, 497 U.S. 805 (1990), this Court held that a pediatrician's trial testimony presenting a non-detailed summation of a child's answers to his questions about sexual abuse violated the defendant's right to confrontation. *Id.* at 810-11. Similarly, this Court has applied the hearsay rule to a description of a declarant's out-of-court statement introduced at trial for its truth, although the verbatim

statement was not presented. *Moore v. United States*, 429 U.S. 20, 20-22 (1976) (police officers' testimony that a confidential informant had indicated that an apartment belonged to the defendant violated rule against hearsay where the information was used as evidence against defendant and defendant did not have opportunity to cross-examine informant). A declarant's out-of-court statement is therefore "presented" at trial where its substance is conveyed through the in-court testimony of another witness.

The principle that a witness's in-court testimony conveying the substance of another witness's testimonial statement, though not the exact statement itself, triggers the Confrontation Clause's protections has been widely recognized by other courts. For example, the in-court testimony of detectives that a witness had corroborated statements made by other witnesses, who had implicated the defendant, has been held to violate the Confrontation Clause. *Ocampo v. Vail*, No. 08-35586, ___ F.3d ___, 2011 WL 2275798 (9th Cir. June 9, 2011). Although the witness's statements themselves were never introduced at trial, the detectives' testimony conveyed to the trier of fact the critical substance of the witness's statements – that the witness implicated the defendant in the crime. *Id.* at *11-13. See also, e.g., *Favre v. Henderson*, 464 F.2d 359 (5th Cir. 1972) (officer's in-court testimony that after speaking with informants he believed to be reliable he sought to arrest the defendant violated the Confrontation Clause, even though informants' exact statements were not revealed, where the testimony

conveyed that informants had given statements implicating defendant); *Ryan v. Miller*, 303 F.3d 231, 249 (2d Cir. 2002) (“If the substance of the prohibited testimony is evident even though it was not introduced in the prohibited form, the testimony is still inadmissible.”).

This principle is consistent with the underlying concerns of the Confrontation Clause. The focus of the Clause is the prosecution’s *use of ex parte* testimonial statements against the accused without an opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 50. Whether a testimonial statement is presented verbatim or is merely summarized does not change the purpose of the prosecution’s use of the statement. The opportunity to cross-examine the declarant “to tease out the truth,” *Crawford*, 541 U.S. at 67, is no less vital where the substance of a witness’s out-of-court testimonial statement is conveyed through the live testimony of a different witness than where the statement itself is introduced. In both instances, the declarant’s assertions are evidence against the defendant. It is inconceivable that the Confrontation Clause would allow the prosecution to evade its protections by presenting a live witness to convey the substance of the out-of-court statement of a declarant where that statement could not itself be introduced verbatim. *See Davis*, 547 U.S. at 826 (the prosecution cannot evade the Confrontation Clause “by having a note-taking policeman recite the unsworn hearsay testimony of the declarant” (emphasis omitted)). Thus, a witness’s in-court testimony conveying the substance

of a testimonial forensic report authored by a different witness implicates a defendant's right to confrontation just as would the formal introduction of the report itself.

b. Cellmark's testimonial assertions were conveyed through Lambatos's testimony.

Lambatos both conveyed the substance of testimonial assertions made by Cellmark and identified Cellmark as the source of the assertions. On direct examination, she stated that the state police crime lab shipped the vaginal swabs taken from the complainant and a blood standard from the complainant to Cellmark for DNA analysis, and that Cellmark later shipped its results back to the police. JA 49-55. She further indicated that Cellmark deduced a male DNA profile from the vaginal swabs. JA 55-56. After receiving the results of Cellmark's analysis, Lambatos conducted a statistical comparison of Cellmark's profile and a profile derived from a sample of Williams's blood and found that the profiles matched. JA 55-58.

Lambatos had no personal knowledge of the processes used by Cellmark to create the purported DNA profile of the offender that she compared with Williams's profile. She neither took part in the DNA analysis nor reviewed Cellmark's procedures. JA 59-61. Her knowledge of the profile was based entirely on what had been communicated to her by Cellmark. By testifying that she generated a computer match

of Williams's profile and the profile derived from the vaginal swabs, Lambatos conveyed to the trier of fact the substance of statements that had been conveyed to her by Cellmark – that Cellmark performed DNA analysis on the vaginal swabs and successfully deduced a male DNA profile from the swabs. Lambatos's testimony therefore conveyed to the trier of fact the substance of what Cellmark's analysts would have testified to had they testified at trial. It makes no difference that the report itself was not officially admitted into evidence.

Comparing what was conveyed through Lambatos's testimony to the live testimony of Karen Abbinanti, the analyst who derived the DNA profile from Williams's blood sample, is instructive on this point. Abbinanti testified that she received a blood sample taken from Williams, conducted DNA analysis on the sample, and deduced a male DNA profile from the sample. JA 12-14. Abbinanti's testimony is directly analogous to Lambatos's in-court testimony regarding Cellmark's testing of the vaginal swab. Lambatos's in-court testimony about Cellmark's testing served as a substitute for the live testimony of Cellmark's analysts.

2. Cellmark's statements were presented for their truth as the trier of fact necessarily had to accept them for their truth in order for Lambatos's opinion to have any probative value.

The Illinois Supreme Court concluded that Lambatos's disclosure of Cellmark's out-of-court statements did not implicate Williams's right to confrontation because the statements were presented not for their truth, but rather merely to explain Lambatos's opinion. JA 162-64. This reasoning does not stand up to scrutiny. If the profile reported by Cellmark was not what Cellmark claimed it to be, Lambatos's matching of the profile to Williams's profile would have no relevance. The trier of fact therefore necessarily had to assess Cellmark's statements for their truth. While the Illinois Supreme Court is correct that the Confrontation Clause does not apply to statements admitted for reasons other than their truth, *Tennessee v. Street*, 471 U.S. 409, 413-14 (1985), Cellmark's statements disclosed by Lambatos do not fall within that category.

Other courts and commentators have recognized that the "not-for-its-truth" rationale is logically incoherent where such statements support the expert's opinion only to the extent that they are true:

To use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true. If the jury believes that the basis evidence is true, it will

likely also believe that the expert's reliance is justified; conversely, if the jury doubts the accuracy or validity of the basis evidence, that presumably increases skepticism about the expert's conclusions.

David H. Kaye et al., *The New Wigmore: Expert Evidence* §3.10.1 (Supp. 2010); *New York v. Goldstein*, 843 N.E.2d 727, 732-33 (N.Y. 2005) ("The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context."), *cert. denied*, 547 U.S. 1159 (2006); *People v. Dungo*, 98 Cal. Rptr. 3d 702, 713 (Cal. Ct. App. 2009) ("Thus, in evaluating Dr. Lawrence's opinions concerning the cause of Pina's death, the jury was required to evaluate the truth and accuracy of Dr. Bolduc's autopsy report. In other words, the weight of Dr. Lawrence's opinions was entirely dependent upon the accuracy and substantive content of Dr. Bolduc's report."), *rev. granted*, 220 P.3d 240 (Cal. Dec. 2, 2009); Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 Geo. L. J. 827, 855-56. Put simply, if the evidence an expert relies on for its truth turns out not to be true, it does not support the expert's opinion. "[T]he permitted purpose [of considering a statement to evaluate an expert's opinion] is therefore neither separate nor separable from an evaluation of the truth of the statement's contents." Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & Pol'y 791, 816 (2007).

This case provides a perfect illustration of the above principle. Lambatos did not take part in any of the analysis that purportedly produced a DNA profile from the complainant's vaginal swabs. JA 59. She had no knowledge of and did not review Cellmark's procedures or the raw data. JA 59-61, 69. Rather, she performed the statistical matching of two DNA profiles. JA 55-57. One profile was derived from a sample of Williams's blood; the second, according to Cellmark's report, was derived from the vaginal swabs. JA 55-57. Regardless of how accurate and reliable the trier of fact found the methods Lambatos employed in matching the two profiles, if the trier of fact did not accept as true that the second profile was accurately derived from the semen recovered from the complainant, Lambatos's opinion that the two profiles matched had no evidentiary value. The trier of fact necessarily had to consider her testimony regarding Cellmark's analysis for its truth in order to evaluate the probative value of her opinion. Because Lambatos's testimony regarding Cellmark's report was presented to establish the truth of that report, it fell within the scope of the Confrontation Clause's protections. *Street*, 471 U.S. at 414 (the concerns of the Confrontation Clause are implicated where the trier of fact is asked to consider an out-of-court testimonial statement for its truth).

That Lambatos's testimony regarding Cellmark's report was introduced for its truth is made clear by comparing it to the testimony of Karen Abbinanti. Abbinanti's testimony and Cellmark's report served equivalent purposes, specifically, to establish the

identities of the DNA profiles that Lambatos compared. On direct examination, Abbinanti testified regarding her credentials as an expert, and explained the procedures she followed to ensure that the results of her analysis were accurate. JA 4-15. It cannot be seriously argued that the prosecution did not intend the trier of fact to consider Abbinanti's testimony for its truth. Similarly, had Cellmark's analysts testified live, there would have been no question that their testimony was offered for its truth. Because Lambatos's testimony regarding Cellmark's report was presented as a substitute for the live testimony of Cellmark's analysts, it, like Abbinanti's testimony, was presented for its truth. Just as Williams was provided an opportunity to confront and cross-examine Abbinanti, he was entitled to confront and cross-examine the Cellmark analysts.

This case is therefore unlike *Tennessee v. Street*, where the truth of the out-of-court statement in question was irrelevant to the purpose for which it was offered. There, the defendant attacked his confession by asserting that it had been coerced, and that the police read him the confession of his co-defendant and told him to say the same thing. 471 U.S. at 411. To rebut the defendant's claims, the prosecution offered the co-defendant's confession, which contained important differences from the defendant's confession. *Id.* at 411-12. This Court held that the introduction of the co-defendant's confession raised no Confrontation Clause concerns because the prosecution offered the confession not to prove its truth, but rather to refute

the defendant's assertion that his confession was derived from his co-defendant's. *Id.* at 414-15. Whether the co-defendant's confession was true or not was not important for that purpose.

The same, however, cannot be said of the out-of-court statements introduced here. The prosecution elicited Lambatos's testimony regarding Cellmark's testing of the vaginal swabs specifically to establish as true that the profile Lambatos matched to Williams's had been derived from the swabs. If Cellmark's statements were not true, they would not have established that fact, and Lambatos's opinion regarding the match would have no relevance. The truth of Cellmark's statements was therefore critical to the purpose for which the prosecution introduced them.

3. The opportunity to cross-examine Lambatos did not satisfy the requirements of the Confrontation Clause.

In *Bullcoming*, this Court conclusively decided that the Confrontation Clause does not allow the testimonial statements of a forensic analyst to be introduced through the trial testimony of a surrogate analyst. *Bullcoming*, 131 S. Ct. at 2710. The prosecution in *Bullcoming* offered a report of blood-alcohol testing to establish the defendant's blood-alcohol concentration at the time of his arrest, but rather than calling the analyst who conducted the testing, the prosecution called a different analyst who took no part in the testing to introduce the report. *Id.* at 2710-12.

This Court rejected the argument that the surrogate witness's expertise in blood-alcohol analysis and knowledge of the lab's general procedures qualified him to stand in the actual analyst's stead for purposes of the Confrontation Clause, noting that the "testimony of the kind [the surrogate witness] was equipped to give could not convey what [the actual analyst] knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part." *Id.* at 2715.

Similarly, Lambatos did not take part in nor did she review the testing procedures Cellmark followed to produce the DNA profile from the vaginal swabs. JA 59-61. Like the testing in *Bullcoming*, the DNA analysis performed at Cellmark involved a complicated multi-step process. *Bullcoming*, 131 S. Ct. at 2711 & n.1. According to Lambatos's generalized description of DNA analysis, the sperm cells on the vaginal swab had to be separated from the female cells, the amount of DNA in the samples needed to be increased "through a series of different cycles and temperature changes," there were two separate "quantitation" steps, and the DNA had to be "tagged with fluorescent markers" before it was run through a genetic analyzer and a profile could be produced. JA 48, 67, 74. Errors in any of these steps can cause the resulting profile to be inaccurate. *See* John M. Butler, *Forensic DNA Typing* 46, 67-75 (describing processes and potential errors) (2d ed. 2005). As

Lambatos's cross-examination makes clear, she was unable to describe what particular processes and protocols Cellmark's analysts followed in this case, let alone whether they were followed correctly. JA 59-61. In addition, she admitted that Cellmark followed procedures different than those used by the Illinois State Police Crime Lab and that she was not aware of the type of equipment Cellmark used to conduct the analysis. JA 60, 74-77. Indeed, Lambatos's testimony was far less adequate than that of the witness in *Bullcoming*, who at least was employed at the lab that did the testing and had personal knowledge of the lab's procedures. *Bullcoming*, 131 S. Ct. at 2712.

That Lambatos reviewed one of Cellmark's electropherograms does not make her opinion somehow independent of Cellmark's work. JA 62. The raw data collected from a genetic analyzer must first be processed to take account of the characteristic of the fluorescence markers used and the environmental conditions at the time of the testing before an electropherogram can be produced, and errors in the processing can result in the electropherogram being inaccurate. *See* Butler, *supra*, at 335-37, 378. Furthermore, as Lambatos testified, Cellmark's analysts had to perform a number of steps before a DNA sample was ever run through the genetic analyzer. Thus, Lambatos's opinion was completely dependent on Cellmark's analysts having performed the analysis correctly.

Like the surrogate witness in *Bullcoming*, Lambatos was not equipped to testify to "the particular test

and testing process [the Cellmark analyst] employed . . . [n]or could [she] expose any lapses or lies on the . . . analyst's part." *Bullcoming*, 131 S. Ct. at 2715 (footnote omitted). Because Cellmark's analysts' testimonial statements were presented as evidence against Williams, the analysts were witnesses that Williams had the right to confront. *Id.* at 2716.

B. The evidentiary rules governing expert witness testimony do not override the Confrontation Clause's requirements for the admission of testimonial statements.

The Confrontation Clause does "not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second." *Melendez-Diaz*, 129 S. Ct. at 2546 (Kennedy, J., dissenting); *Bullcoming*, 131 S. Ct. at 2710. Nothing in the language of the Clause suggests that a court may condition the right to confrontation on the type of in-court witness who conveys to the trier of fact the testimonial statements of a second witness. U.S. Const. amend. VI; *Crawford*, 541 U.S. at 54 ("The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts."); *see also Melendez-Diaz*, 129 S. Ct. at 2534 (the Sixth Amendment "contemplates two classes of witnesses – those against the defendant and those in his favor"). A lay witness would certainly not be allowed to disclose a testimonial statement merely because it served as the basis of her in-court testimony. There is no sound

reason why this should be any different when the in-court witness happens to be an expert.

The Illinois Supreme Court's decision in this case was grounded on an Illinois rule of evidence, based upon Federal Rule of Evidence 703 ("FRE 703"), that allows an expert witness to rely on and disclose otherwise inadmissible evidence so long as the evidence is "of a type reasonably relied upon by experts in the particular field." *Wilson v. Clark*, 84 Ill. 2d 186, 192-96, 417 N.E.2d 1322, 1326-27 (1981) (adopting FRE 703); JA 172.² The rationale behind this rule of evidence is that if the information is of a type experts rely upon in their everyday professional capacity, it is sufficiently reliable for use at trial. *Wilson*, 84 Ill. 2d at 193, 417 N.E.2d at 1326 (citing Fed. R. Evid. 703 advisory committee note). However, it does not follow that being deemed reliable under a rule of evidence removes a testimonial statement from the Confrontation Clause's scope.

This Court has repeatedly rejected the notion that a testimonial statement's apparent reliability justifies dispensing with the requirement of confrontation. *Bullcoming*, 131 S. Ct. at 2715; *Crawford*, 541 U.S. at 61-62 ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth

² Illinois has not adopted the 2000 amendment to FRE 703 that prohibits otherwise inadmissible facts or data relied on by the expert to be disclosed unless the court determines their probative value outweighs their prejudicial effect. JA 164; Fed. R. Evid. 703.

Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"). The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. Accordingly, while a statement may be deemed sufficiently reliable to qualify for admission under the rules of evidence governing expert witnesses, where the statement is testimonial, "the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford*, 541 U.S. at 68-69.

Although the Confrontation Clause and the hearsay rules "protect similar values," *California v. Green*, 399 U.S. 149, 155 (1970), such that the traditional hearsay rules may provide some guidance as to the boundaries of the right to confrontation, *Michigan v. Bryant*, 562 U.S. ___, 131 S. Ct. 1143, 1156 (2011); *Bullcoming*, 131 S. Ct. at 2720 (Sotomayor, J., concurring in part), this does not apply to FRE 703, which was a creation of the second half of the 20th century and was intended to be an expansion of the traditional rules of evidence. Fed. R. Evid. 703 advisory committee note. Traditional hearsay exceptions can sometimes serve as guideposts to the scope of the Clause because the characteristics that make a statement fall under one of the exceptions typically also indicate the statement is not testimonial in nature. *Bryant*, 131 S. Ct. at 1157 & n.9; *Bullcoming*, 131 S. Ct. at 2720 (Sotomayor, J., concurring in part). In

contrast, FRE 703 and its state equivalents make no distinction between testimonial and non-testimonial statements, and thus provide no such guidance.

The Confrontation Clause does not, however, render FRE 703 and its state equivalents inapplicable in the criminal context. The Clause is only concerned with testimonial statements offered for their truth. *Davis*, 547 U.S. at 823-24; *Street*, 471 U.S. at 413-14. Where an expert is called by the defense, or where the out-of-court statements disclosed by a prosecution expert are not testimonial in nature or are not offered for their truth, there is no confrontation issue and the admissibility of the statements is governed by the applicable rules of evidence. *Bryant*, 131 S. Ct. at 1155; *Street*, 471 U.S. 413-14. On the other hand, where, as here, testimonial statements are offered for their truth, the Confrontation Clause controls.

C. Permitting the prosecution to introduce testimonial statements without providing an opportunity to confront the declarant, on the ground that it served as the basis for an expert's opinion, would open up a back door exception to the Confrontation Clause.

Because forensic evidence is not immune from distortion and manipulation, it is critical that a defendant be given the opportunity to test the analyst's "honesty, proficiency, and methodology" through confrontation. *Melendez-Diaz*, 129 S. Ct. at 2536-38. "Confrontation is designed to weed out not only the

fraudulent analyst, but the incompetent one as well,” and “an analyst’s lack of proper training or deficiency in judgment may be disclosed in cross-examination.” *Id.* at 2537. These concerns do not disappear when the substance of the forensic report is disclosed through the testimony of an expert rather than introducing the report. The defendant is still prevented from testing the “honesty, proficiency, and methodology” of the analyst who produced forensic evidence in the “crucible of cross-examination.” *Id.* at 2538; *Crawford*, 541 U.S. at 61.

Permitting the prosecution to present the testimonial statements of forensic analysts via expert testimony would allow the prosecution to perform an end run around the Confrontation Clause by depriving the defendant of the opportunity to test the reliability of the findings through cross-examination. Such a rule would eviscerate this Court’s holdings in *Melendez-Diaz* and *Bullcoming*. For example, under such a rule, the prosecution in *Melendez-Diaz* could have easily evaded the Confrontation Clause’s protections by simply having the forensic analysts who conducted the testing refrain from indicating the ultimate conclusion as to the composition of the items in their report, and introducing the forensic evidence through the testimony of an expert witness who would then opine that, based on the information received from the analysts, the items contained cocaine. The defendant’s right to test the competency of the forensic analysts through confrontation, which this Court found to be critical in *Melendez-Diaz*, 129 S. Ct. at

2536-38, would simply disappear. It is inconceivable that the Framers would have condoned the use of such an evidentiary trick to evade the right to confrontation. *Crawford*, 541 U.S. at 63.

This concern is not merely hypothetical. In a California case, a medical examiner explained that he was called to present the finding of another examiner because that examiner's questionable background made the prosecutors "feel it [was] too awkward to make them easily try their cases." *People v. Dungo*, 98 Cal. Rptr. 3d 702, 708 (Cal. Ct. App. 2009), *rev. granted*, 220 P.3d 240 (Cal. Dec. 2, 2009). The California Court of Appeals concluded that because the trier of fact necessarily had to consider the testimonial statements of the non-testifying examiner for their truth in order to evaluate the opinion of the testifying examiner, the in-court testimony regarding the non-testifying examiner's findings violated the Confrontation Clause. *Id.* at 713. In addition, the court noted that the prosecution had availed itself of the rule of evidence allowing it to use a surrogate expert witness with the specific intent of preventing the defense from testing the "honesty, proficiency, and methodology" of the examiner who conducted the autopsy through cross-examination. *Id.* at 714.

In addition, the history of DNA labs, including Cellmark, providing faulty results demonstrates that the opportunity to test the honesty, proficiency, and methodology of the actual forensic analyst through cross-examination is critical. *See* William C. Thompson,

Tarnish on the 'Gold Standard: Understanding Recent Problems In Forensic DNA Testing, 30 *Champion* 10, 11-12 (February 2006) (noting numerous instances of DNA labs, including Cellmark, producing faulty results both due to the failure to follow proper guidelines and to analysts manipulating data to cover up mistakes); Laura Cadiz, *Maryland-Based DNA Lab Fires Analyst Over Falsified Tests*, *Balt. Sun*, Nov. 18, 2004, at 1A (reporting that Cellmark fired an analyst for falsifying test data); Adam Liptak & Ralph Blumenthal, *New Doubt Cast on Crime Testing in Houston Cases*, *N.Y. Times*, Aug. 5, 2004, at A19 (reporting that a police DNA lab was shut down after it was discovered that analysts misinterpreted data, were poorly trained and kept shoddy records). The ability to cross-examine an expert who relied on the results of forensic testing but who took no part in the analysis, and thus has no personal knowledge of the procedures and methodologies used, does nothing to protect against fraudulent or faulty analysis.

The practice condoned by the Illinois Supreme Court in this case – presenting forensic evidence through the testimony of an expert who took no part in the analysis – greatly inhibits a defendant's ability to expose fraudulent or faulty analysis by depriving him of the opportunity to cross-examine the actual analyst, undermining this Court's holdings in *Crawford*, *Melendez-Diaz*, and *Bullcoming*.



CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

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