IN THE SUPREME COURT OF THE UNITED STATES

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SANDY WILLIAMS, :

Petitioner :

v. : No. 10-8505

ILLINOIS :

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Washington, D.C.

Tuesday, December 6, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

BRIAN W. CARROLL, ESQ., Chicago, Illinois; on behalf of Petitioner.

ANITA ALVAREZ, ESQ., State's Attorney, Chicago, Illinois; on behalf of Respondent.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 10-8505, Williams v. Illinois.

Mr. Carroll.

ORAL ARGUMENT OF BRIAN W. CARROLL

ON BEHALF OF THE PETITIONER

MR. CARROLL: Mr. Chief Justice, and may it please the Court:

In this case, Sandra Lambatos testified that Mr. Williams' DNA matched a DNA profile that, according to assertions made by analysts from a Cellmark lab, was the genetic description of the purported offender.

Because no one from Cellmark appeared at Mr. Williams' trial, Lambatos' testimony conveying the testimonial statements from Cellmark violated Mr. Williams' rights under the Confrontation Clause. For these reasons the Illinois Supreme Court's decision should be reversed.

Ms. Williams' -- or Ms. Lambatos' testimony on direct examination clearly conveyed Cellmark's statement. She testified that the vaginal swab and blood sample from the victim were sent from -- to Cellmark for DNA analysis. She later was asked, was there a computer match generated from the male DNA

profile found in the semen from the vaginal swabs of the victim and the male DNA profile that had been identified as having originated from Mr. Williams.

JUSTICE SOTOMAYOR: Counsel, it hasn't been the focus of the briefing, but you've just made it the focus here. I know that you have been claiming that her statements about what constituted the Cellmark lab results are a statement that violates the Confrontation Clause. But are you taking the position that her statements and the admission of the documents, mailing the lab sample to the laboratory and them getting it back, that all of those business records were improperly admitted?

MR. CARROLL: As --

JUSTICE SOTOMAYOR: Because she testified that in her records she sees that her lab -- and she says -- I think those records were produced, I could be wrong -- that --

MR. CARROLL: The shipping records were produced.

JUSTICE SOTOMAYOR: They were produced and admitted into evidence. That the lab sample taken from the victim, L.J., was mailed to the laboratory, and that it came back.

Are you taking the position that those

shipping documents were not business records? Are you taking the position that those were improperly admitted?

MR. CARROLL: No, Your Honor, at this stage we are not challenging the admission of the shipping record.

JUSTICE SCALIA: Well, that would just show that the material went to and came back from the lab. It wouldn't show what the lab results were. It was the results that she testified to, right?

MR. CARROLL: That's correct, Your Honor.

JUSTICE SCALIA: And what other evidence was there of the results besides her testimony?

MR. CARROLL: There was no other evidence.

JUSTICE SCALIA: No other.

JUSTICE GINSBURG: In the case of the blood that was tested in the police lab, there the person who tested did testify at the trial, right? It wasn't just Lambatos -- Lambatos, but the one who had tested the blood?

MR. CARROLL: The -- the person who tested or who analyzed Mr. Williams' blood did testify live at trial.

JUSTICE GINSBURG: Yes.

JUSTICE KENNEDY: Abbinanti testified that she did the blood test and it went into the State

database with reference to the other crime, not this crime; am I correct?

MR. CARROLL: Yes, Your Honor. The -- when he was arrested for an unrelated matter.

JUSTICE KENNEDY: But she is an expert, she testified how she did the test, and what the -- and that she put the DNA result into -- into the data bank?

MR. CARROLL: That's correct, Your Honor.

JUSTICE ALITO: Hasn't it long been accepted that experts may testify to the facts that form the basis for their opinions on the ground that when the experts go over those facts they are not -- that information is not being introduced to prove the truth of the matter asserted, the truth of those underlying fact; only that those are the facts that the expert has relied on in reaching an opinion? And that has not been considered to be hearsay.

Now, do you argue that those -- that that is incorrect, those -- those statements cannot be testified to by an expert without their -- their constituting either hearsay or testimony within the meaning of the Confrontation Clause?

MR. CARROLL: In this case, where the -- where the basis evidence that the expert testifies to, where it's -- the expert's opinion depends on those

statements being considered true, in those instances then, yes, we are arguing that the Confrontation Clause does not allow --

JUSTICE ALITO: Well, let's say that --

MR. CARROLL: Right.

JUSTICE ALITO: Let me put it this way. Let's say the expert -- people from the -- the expert testifies: I received the -- I looked at the report from -- from the lab; I looked at the report from -- from -- I looked at the report from Cellmark, the outside lab; I looked at the report that we did; and there -- there is a match.

And so the expert is -- is mentioning facts that form the basis of the opinion but not testifying to the truth of those. Is that a violation of the Confrontation Clause at that point?

MR. CARROLL: If the -- if the expert is not, you know, asserting that the statements are true, then no. However, that is not what happened in this case, Your Honor. Ms. Lambatos --

JUSTICE SCALIA: It would be utterly irrelevant, would it not, if the statements were not true? I mean, it's one thing for an expert to testify about a hypothetical, you know: Assuming this, this, this, Mr. Expert, what would the result be? Well, on

those assumptions it would be this.

But this was not -- nobody asked -- asked her to assume those things at all. She testified that -- that she had a match between what she had done and what had been done on the -- on the DNA of this individual by somebody else.

MR. CARROLL: That's correct.

JUSTICE SCALIA: That seems to me quite different from the -- from the ordinary hypothetical put to an expert.

JUSTICE BREYER: Yes, I would have thought -- yes. You can -- sorry, go ahead.

MR. CARROLL: No, I was just going to --

JUSTICE BREYER: You were going to agree with that.

(Laughter.)

JUSTICE BREYER: I know. I mean, I'm sure you've looked at this. The most -- one of the more interesting things I've found in these briefs were the references to Wigmore. So I went back and read what Wigmore said about scientific evidence, expert evidence, and business records. And he certainly concedes and agrees with Justice Scalia, and those opinions are filled with hearsay. I mean, there is no expert who isn't relying on what his teachers told him in college,

which reflect dozens of out-of-court statements given to dozens of people who wrote them up in books.

So expert opinion is always built on hearsay, almost, and -- and so are business records; they are filled with hearsay. But Wigmore writes a treatise, doesn't he, where he says exceptions have been recognized since the 17th century or earlier to cover that kind of material?

So my question for you is why shouldn't we recognize a similar, related kind of exception here? We are trying to discover the meaning of "testimonial." The difference here is a police lab or a lab that reports to a police lab, the individuals there probably know that there is a fairly good chance that what they say will be used in a criminal trial. They don't know it for sure, but they are controlled by the canons, by accreditation, by tests of reliability, by the fact that they are not normally interested in the results of the trial, as here they couldn't care less; they don't even care if it is used in the trial.

And all the Wigmore factors for both exceptions could support a similar exception here, which would have the following virtue: It would have the virtue of not requiring ten people to come in and testify, whom the defense is of course free to call; and

it would also have the virtue of removing the temptation for prosecutors to stop relying on the more reliable evidence, DNA, and instead encourage them to rely on the less reliable evidence, namely the eyewitness testimony in a case.

Now, that -- that really is all my questions in one.

(Laughter.)

JUSTICE BREYER: Because I understand every argument you are making -- - fitting it in with hearsay, I agree with that. And I also agree to a degree with the testimonial point. And I see the need for an exception and Wigmore provides all the reasons, and since we are incorporating that word "testimonial" don't we have the power and why shouldn't we create one out of the word "testimonial"?

MR. CARROLL: Well, Your Honor, the Confrontation Clause guarantees the defendant to right to confront and cross-examine the witnesses against him, and that's the reason why this Court should not make an exception --

JUSTICE BREYER: Well, I'll go further in --

JUSTICE SCALIA: You are not objecting to hearsay, are you, counsel? You are objecting to a violation of the Confrontation Clause --

MR. CARROLL: That's right.

JUSTICE SCALIA: -- which is quite different from what -- what Mr. Wigmore was writing about, which was hearsay.

JUSTICE BREYER: Yes, but Wigmore actually believed that the Confrontation Clause simply encapsulated the hearsay rule.

JUSTICE SCALIA: We have said the contrary, though, haven't we?

(Laughter.)

JUSTICE BREYER: I'm asking you the question, and I -- I will go further in your direction. I will go further. Because I would say, what about saying this: that not only do we recognize the exception, but it isn't a full exception; that if the defendant can show some reason to believe that either the laboratory is not properly accredited, it isn't doing things properly; or that the individual technician has something personal or knows about -- about the defendant that makes it suspect, immediately the presumption that the exception applies disappears, and the prosecutor has to call the -- the witness.

You can say, well, we shouldn't make that up, but I believe if you go back to the 18th century you will discover that your interpretation of the

Confrontation Clause was not there. So -- so that's what's basing my question, and I would like your reaction. It's a long question, concerns an exception, and I would like you to give me your reaction to that.

MR. CARROLL: Well, Your Honor, I think that this Court's decisions in Crawford and Melendez-Diaz and Bullcoming largely foreclose on making such an exception. The --

JUSTICE SCALIA: Justice Breyer dissented from those opinions.

(Laughter.)

JUSTICE BREYER: I did, but --

JUSTICE SCALIA: -- not just Justice Breyer.

JUSTICE BREYER: And I mean it, because I see extending those cases from one individual from a laboratory being familiar with the results to requiring in ordinary cases the calling of what could be up to ten technicians.

I see that as making a sea change in normal criminal law practices, and my motive is as I said: I fear it will push the system in the direction of relying on less reliable eyewitness testimony rather than more reliable technical laboratory DNA-type evidence. Now, you have my -- I have made the point, and I really want to get your response.

JUSTICE GINSBURG: Mr. Carroll, are we talking about ten witnesses? I thought we were talking about just one witness, from Cellmark.

MR. CARROLL: Yes, on this record, Your Honor, the -- the statements that were produced were the statements of the authors of the report. So --

JUSTICE GINSBURG: That's one person, not ten.

MR. CARROLL: I believe there are two signatories to the report.

JUSTICE ALITO: Well, ten is not -- ten is not a far-fetched hypothetical. We have an amicus brief from the Manhattan District Attorney's office and the New York City Chief Medical Examiner's office, and they say that their very fine crime lab involves at least 12 technicians in the analysis of DNA.

They break it down that way because it increases accuracy, it decreases the chance of any favoritism for the prosecution, and they say that: It is impossible for us to bring all 12 of those technicians into court to testify in every case in which there is DNA evidence; and if we have to do that we will just not be able to use DNA evidence in court; we will have to rely on less reliable evidence.

Is that just a -- Do you think that's just a

practical consequence that we have to accept under Crawford?

MR. CARROLL: No, Your Honor, because even in the worst case scenario described in the New York County's brief, not all 12 people in that situation make testimonial statements and not all 12 people's testimonial statements are presented at trial. The Confrontation -- for the Confrontation Clause to be satisfied, it is only those witnesses who the prosecution chooses to present at trial who must testify.

JUSTICE SCALIA: It's up to the prosecutor which of those 12 he wants to bring in, whether he wants to bring in all 12 or just one. If he thinks the jury will be sufficiently persuaded by bringing in just one, he can bring in just one, right?

MR. CARROLL: That's correct, Your Honor.

JUSTICE SCALIA: But he has to bring in the one and not hearsay about what the one would say.

JUSTICE ALITO: How will bringing in one satisfy the Confrontation Clause problem? If 12 people perform steps in the analysis and one person testifies about what 11 other people did, don't you have the same Confrontation Clause problem?

MR. CARROLL: No, Your Honor. Again, it's

who's testifying.

JUSTICE ALITO: You don't?

MR. CARROLL: No, we don't, because the question is whose statement is being presented. Now, given the five steps in the brief, the electrophoresis step, the person who does the DNA typing and determines what alleles are present in the sample, that person probably has to testify because that's really what the results are, what alleles are present.

Amplification step, the person who copies the DNA and tags it, I don't think that's a testimonial statement; and in this case, no statements from someone who did that was presented. Next step, quantification --

JUSTICE ALITO: Why is that not a testimonial statement?

MR. CARROLL: Well, just performing a test is not a testimonial statement. I'm just stating --

JUSTICE ALITO: If the person were in court, the person would say: This is what I did.

MR. CARROLL: If the person was in court --

JUSTICE ALITO: And that's not testimony?

MR. CARROLL: In that case, it would be testimony. However, that person doesn't have to testify in order for the State to present its evidence. If the

State chooses to present that person's testimonial statement at trial, then yes, the Confrontation Clause would require them to present that testimony live. However --

JUSTICE KAGAN: Mr. Carroll, I'm just trying to figure out -- this out, and I'm -- here's my question: Suppose you had two witnesses, one from -- one who had done the lab analysis on Mr. Williams and one who had done the lab analysis from the victim. And they both testified. And now an expert comes in, and the expert says: I've looked at both reports and there's a match.

Now there would be no problem at all with that; is that right?

MR. CARROLL: That's correct, Your Honor.

JUSTICE KAGAN: Okay. So now we only have one of the lab technicians and we take away the other lab technician. And what you are saying is, well, now we have this expert and she's saying she could do a match, but the question is: a match of what? That's the question, right?

MR. CARROLL: That's correct, Your Honor.

JUSTICE KAGAN: So why is that a Confrontation Clause issue? Why isn't it just that the prosecutor has failed to prove an element of his case?

MR. CARROLL: It's a Confrontation Clause issue because the prosecution presented the statement of the person who did the analysis on the victim's vaginal swabs.

JUSTICE KAGAN: Well, is that right? I mean, I thought that the judge here said: No, I'm not taking this for the truth of the matter asserted; I'm only taking your statements about the lab tests as an indication, as the basis for your opinion. So I'm listening to your opinion. The problem is in this whole case there has been no factual testimony about what the results were from the swab on the victim.

Isn't that right? Or am I missing something?

MR. CARROLL: Well, you are missing something, Your Honor. And the trial judge in this case never stated he was not considering the evidence for the truth. No place in the record does have -- does the trial judge state that. And in fact, in the finding of facts, he states he is convinced of the -- that there was a match because the evidence from the experts established that the victim -- that Williams' semen was found on the victim, and in the notes it said that, well, Cellmark was an accredited lab. If he wasn't considering Cellmark's statements for the truth, he

wouldn't care if they were accredited.

JUSTICE ALITO: Well, what did the Illinois appellate court say about that, about whether the information, whether the evidence was admitted for the truth of the matter asserted?

MR. CARROLL: The appellate court held as a matter of Illinois law these statements considered -- statements that serve as the basis of an expert's opinion are generally deemed not to be admitted for their truth.

However, in this case, there is no meaningful distinction between considering Cellmark's statements to -- you know, in assisting in the evaluation of Lambatos' testimony and considering it for the truth. If the statements weren't true, then Lambatos' testimony would not link Williams' DNA to the crime.

JUSTICE ALITO: But isn't Justice Kagan's question there the correct question? Isn't that a question of Illinois evidence law, not a Federal constitutional question?

MR. CARROLL: No, Your Honor.

JUSTICE ALITO: Was there sufficient foundation laid for the introduction of the expert's testimony?

MR. CARROLL: No, Your Honor.

JUSTICE ALITO: That was addressed by the Illinois court?

MR. CARROLL: No, Your Honor. The question here isn't whether the State's evidence was sufficient. It's whether the evidence the State did present violated Mr. Williams' rights under the Confrontation Clause.

Now this -- I can give an example or an analogy. Suppose a police officer were to testify: A witness gave me this photograph and told me: This is a photograph of the offender. I compared this photograph to a photograph of the defendant. I found that they match.

Now, the police officer, he compared the photographs. You know, we are not contesting Lambatos' match. But the statement that this is the photo of the offender, that's not the officer's statement. That's a statement of the witness who gave him that photograph.

CHIEF JUSTICE ROBERTS: But that's just because the photographing is something that people wouldn't dispute. I mean, what if the State presents testimony saying: I took the sample; I put it in the sample case; I sent it to Cellmark saying, give us a DNA analysis of this sample; we got back from Cellmark the analysis with the same name on it; and the expert

testifies, I compared it to DNA from the defendant and it was a match.

You would be free in cross-examining to say: Do you know what they did at Cellmark?

And she would say: Well, they are a DNA lab; we asked them to do a DNA analysis.

But do you know what happened?

No, I don't.

As far as you know, did they ignore it and not do anything?

Well, yeah, I didn't-- I'm not testifying to what happened at Cellmark. I am telling you, we sent the DNA there, and this is what we got back.

Why is that not perfectly fine?

MR. CARROLL: Because that person's testimony that the results we got back were connected to the samples we sent --

CHIEF JUSTICE ROBERTS: They did not -- she does not say that. She said: We sent the sample marked "crime scene" or whatever it was. We got back a data sheet that said "crime scene."

Well, expert, do you know that they didn't mix them up?

No, I don't. All I know is what we sent and what we got back.

MR. CARROLL: Your Honor, I still believe that would be a Confrontation Clause violation because the writing on the data sheet that said "crime scene," a person at Cellmark had to write that down on the data sheet. So someone from Cellmark was making a representation that that data sheet was connected --

CHIEF JUSTICE ROBERTS: And all the witness is -- all the witness is testifying to is what they sent and what they got back. And you are free to cross-examine about what went on at Cellmark, and a jury is free to say, well, I believe the circumstantial evidence about what happened. Or defense counsel can say, why don't they have anybody here from Cellmark, and the jury can say, well, yeah, that's a good point.

It just seems to me that nobody from Cellmark is testifying, and that's what you are objecting to, but they don't need that testimony to present the expert's conclusion to the jury.

MR. CARROLL: Well, Your Honor, hypothetically the State could -- I believe the State could present its evidence through circumstantial evidence, but that's not what happened in this case. Lambatos did testify that -- she didn't simply state that: I got a profile back. She testified: "I got a profile that was a male DNA profile found in the semen

from the vaginal swab." That's a statement from Cellmark. That's not Lambatos' statement.

JUSTICE KENNEDY: And she goes further. She says: "And based on that" -- which I believe to be true; she didn't say that, but this is the implication -- "based on that," which I believe to be true, "this belongs to Williams." This DNA is Williams' DNA. And if she weren't relying on the truth of the assertion from Cellmark, it would be irrelevant for the jury. Isn't that your point?

MR. CARROLL: That's correct, Your Honor.

JUSTICE BREYER: That's true whenever -- whenever an expert -- an expert makes a statement, there is a conceptual difference between their testifying to something out of court for its truth and that being the basis for the expert opinion. In the one case she's relying upon a statement in order to form her opinion and in the other case she is introducing the statement. And you are saying in this case that's a distinction without a difference. Isn't that what's going on?

MR. CARROLL: That's correct, Your Honor.

JUSTICE BREYER: All right. But still there is the conceptual difference. And as long as there is that conceptual difference, don't we have a basis from distinguishing this case from Melendez?

MR. CARROLL: I do not believe so, Your Honor. Had -- had Cellmark's statement been presented in the report itself, the report being admitted itself, I think there would be no question that that would be a violation of the clause under Melendez-Diaz and Bullcoming. The fact that the same statements were coming in for the same evidentiary reason through the live testimony of Lambatos shouldn't change that situation. It's the same statements coming in for the same reason.

If there is any more questions --

JUSTICE KENNEDY: You are saying that the State of Illinois case is weaker here than in Melendez, where they had a certificate, and in Bullcoming, where they had somebody from the lab testify as to lab procedures. Here they had neither and yet Illinois somehow says it comes in.

MR. CARROLL: That's right, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Alvarez.

ORAL ARGUMENT OF ANITA ALVAREZ

ON BEHALF OF THE RESPONDENT

MS. ALVAREZ: May it please the Court. Mr. Chief Justice, may it please the Court:

JUSTICE SOTOMAYOR: Counsel, on your theory

of this case, I think you say first it's not a statement; and second that if it is it was not offered for the truth. Under your theory, if this lab technician had introduced Cellmark's report, that would have been okay, because it wasn't offered for the truth.

MS. ALVAREZ: The Cellmark report was not introduced as evidence --

JUSTICE SOTOMAYOR: I'm changing the facts.

MS. ALVAREZ: And if she had --

JUSTICE SOTOMAYOR: Under your theory, she could have introduced the lab report?

MS. ALVAREZ: If we offered her -- the Cellmark report into evidence for the truth of the matter asserted, it would be a different situation.

JUSTICE SOTOMAYOR: I don't understand the difference. Meaning the fact that you didn't physically introduce the report makes a difference?

MS. ALVAREZ: The -- Ms. Lambatos testified consistent with the Confrontation Clause here. She testified --

JUSTICE SOTOMAYOR: She testified that she reviewed lab samples.

MS. ALVAREZ: As an expert.

JUSTICE SOTOMAYOR: That matched the defendant. So what's the difference between that and

saying; I have the report in my hand; and I match that report with the Williams report, and this is my conclusion.

MS. ALVAREZ: She did not parrot the Cellmark report, as we have seen in Bullcoming. She did not testify that Cellmark said this was the defendant's profile, that Cellmark said this was a match. She did much more.

JUSTICE SOTOMAYOR: No. She said that: Cellmark said this is L.J.'s vaginal swab DNA.

MS. ALVAREZ: Right.

JUSTICE SOTOMAYOR: So she said that.

MS. ALVAREZ: Because the vaginal swab that was taken from the victim -- and there was a chain of custody here and proper foundation that was laid -- the vaginal swab that was taken from the victim -- and this bore out through the business records that came in on the shipping manifest --

JUSTICE SOTOMAYOR: So what's the difference between this and Justice Kennedy's question about Bullcoming? Could the expert in Bullcoming have said, as one of the amici here said, that all they would have had to do in Bullcoming is to read or to give a report that gave the blood alcohol content, the .5 or .10 or whatever it was, and have an expert come in and say,

that number shows he's drunk. Is that any different from this situation?

MS. ALVAREZ: If the expert in Bullcoming did more than what he simply did in Bullcoming and that was just simply read the report and testify that that's what that lab did, if he actually did his own independent analysis based on his expertise, based on his skill --

JUSTICE SOTOMAYOR: No, no. The only part of his expertise is the report says point .10; I'm not offering it for the truth; I'm assuming that that's true; then he was legally drunk.

MS. ALVAREZ: If he were -- if he were to give his independent opinion, based on his analysis and what he had done, then we would have seen a situation closer to this.

JUSTICE SOTOMAYOR: He has done nothing. All the report did was give a number. And the supervisor comes in and says that number violates -- is legal drunkenness. How is that different from that?

MS. ALVAREZ: If that report is being used, is being offered to prove the truth of the matter asserted --

JUSTICE SOTOMAYOR: All right, but you're not telling me why that's not the same here because what

this expert said is, the Cellmark report is from this victim so it's the same set of numbers as in Bullcoming. Now he's taking a step and saying, instead of legal drunkness, it matches someone else's that I took.

MS. ALVAREZ: But no -- what happened here is Ms. Lambatos testified based on -- and gave her own independent expert opinion based on her skills, her knowledge, her expertise. She relied --

JUSTICE GINSBURG: You said independent, and I don't -- you said that in your brief. I don't understand how Lambatos' testimony can be independent of the test results supplied. I mean, it's based on the test results. It can't be independent of them because it is entirely dependent on them.

MS. ALVAREZ: But an expert can always testify about the material that they relied on, whether that material is ever admitted into evidence and sometimes that material could never be admitted into evidence. But she in fact testified to what she relied on, in addition to what --

JUSTICE SCALIA: No, but didn't she say, I relied on stuff that I received from Caremark -- whatever the name of the lab was.

MS. ALVAREZ: Cellmark.

JUSTICE SCALIA: She said: I relied on

material that was a swab containing the DNA, the sperm of this particular individual. And she did not know that.

MS. ALVAREZ: She testified that she relied on those materials and she can testify --

JUSTICE SCALIA: She didn't just say: I got something back from the lab and I relied on whatever that said. No, she said what she had gotten back from the lab, and she did not know of her personal knowledge that it was what she said it was.

MS. ALVAREZ: She knew from the procedures and the chain of custody and the shipping manifest that what was sent initially to Cellmark after preliminary tests were done at the Illinois State police crime lab showing the presence of sperm that it was sent to Cellmark and it was analyzed at Cellmark and came back --

JUSTICE SCALIA: She didn't know if they had incompetent people there. The last case we had involving this kind of an issue, the reason they didn't bring in the lab technician to testify was that he had been fired in the interim for some reason which we didn't know. But it was pretty clear why he would not have been a very good witness. We don't know how good this lab was.

We don't know how good the individuals who did the test were. And that's why it's up to the State to bring forward testimony saying what the lab did. And the only testimony they brought forward was the testimony of this witness who was not there.

MS. ALVAREZ: The testimony of Ms. Lambatos satisfies the Confrontation Clause because she is the witness against the accused in this case, and the fact that she testified that she relies on material that was generated by Cellmark does not make Cellmark the witness against the accused.

JUSTICE SCALIA: But she said that -- I would agree with you. But she said more than that. She said I relied on material provided by Cellmark which is, and then she described what that material was. And she had no personal knowledge of that.

MS. ALVAREZ: She had no personal knowledge of that, and that came through during this cross-examination. Ms. Lambatos was subjected to a very -- quite lengthy and a quite -- a specific cross-examination.

JUSTICE ALITO: Well, there are two types of evidence that are -- that are involved here. One is chain of custody evidence. Was the result that -- that was sent back the result that was done on the sample

that was sent to Cellmark? That's just purely chain of custody.

It has nothing whatsoever to do with the -- the accuracy or the professionalism of what was done at Cellmark. And she did make a statement. She did say that the sample -- that the result that came back from Cellmark was -- was done -- was based on a test of the vaginal swab that was sent there.

The other has to do with what Cellmark did, how well they did it. She didn't say anything about that. Now, as to the chain of custody, if that's testimonial, isn't -- isn't it simply duplicative of the very strong circumstantial evidence regarding the chain of custody -- the sending of it out with certain markings, and the receipt back with certain markings?

MS. ALVAREZ: Right. The -- the chain of custody was -- was strong -- was strong in this case; the evidence that was presented through the shipping manifest, through the other witnesses that testified in this case. The -- the fact that Ms. Lambatos testified that she did not know exactly what they did at Cellmark, again, as an expert, she was able to talk about what material she relied on, the Cellmark materials.

The Cellmark materials --

JUSTICE KENNEDY: But -- the -- the chain of

custody are just supporting actors. The key actor in the play, the Hamlet in the play, is the person who did the test at Cellmark.

And she or he is not here. And if you want to say, oh, this is not -- tell the jury -- now, we're not saying that this is admitted for the truth. We're not saying that this is Williams' DNA. The judge would say, well, then it is irrelevant. It's excluded.

MS. ALVAREZ: But the matching --

JUSTICE KENNEDY: And -- and it seems to me, in -- as in response to Justice Scalia, not -- not only does he indicate that this is hard to distinguish from Bullcoming, in Bullcoming at least you had an expert say how the laboratory works. Here, you don't even have that. You have less here with reference to Cellmark than you did in Bullcoming.

MS. ALVAREZ: Ms. Lambatos did testify both on direct examination and cross-examination that Cellmark was an accredited lab. The Illinois State Police crime lab routinely uses out -- outsourcing --

JUSTICE KENNEDY: In Bullcoming, we said that was not sufficient. And in that case, the person was from that lab.

MS. ALVAREZ: But -- but Ms. Lambatos -- we never introduced any Cellmark reports in this case.

There were no testimonial statements conveyed through her testimony. There were no out-of-court statements used to prove the truth of the matter asserted.

What was presented was the expert opinion of Ms. Lambatos, who was a duly qualified expert in -- in forensic biology, in DNA.

And not only did she have the ability to look at the Cellmark material, she interpreted the material that -- that came from Cellmark. And what came from Cellmark, the electrophoretogram, I would submit to you is not testimonial; it's a machine-generated chart that to the naked eye to a trier-of-fact means absolutely nothing unless an expert actually interprets that. And Ms. Lambatos testified to how she interpreted that. She talked about the alleles --

JUSTICE KENNEDY: I don't know how that's any different from Bullcoming and Melendez-Diaz.

MS. ALVAREZ: Well, I -- well, Melendez-Diaz, what we had in Melendez-Diaz was in fact a certificate, an affidavit. It was -- it was created --

JUSTICE KENNEDY: In other words, you had something more than you have here. And therefore, it goes out and this comes in? That doesn't make sense.

MS. ALVAREZ: No, I think in Melendez-Diaz,

it's clear because that was -- that report was drafted, created, for the primary purpose of being used as substitute of live testimony. I submit to you that the Cellmark reports were not. The electrophoretogram, again, which would -- needs expert interpretation; the allele chart -- again, I would submit is not testimonial, that those reports were not created in lieu of live testimony.

And Ms. Lambatos looks at that, she interpreted it. In fact, she even said that there was something on the electrophoretogram that she didn't agree with Cellmark on. It was a certain one piece that was higher that she felt was just in her expert opinion background noise. So --

JUSTICE GINSBURG: But if the report had been introduced, the Cellmark -- the Cellmark report, it would be testimonial; is that -- is that right?

MS. ALVAREZ: Well, I -- I believe if -- if the State had tried to introduce that Cellmark report --

JUSTICE GINSBURG: Right.

MS. ALVAREZ: -- it would have been offered for the truth of the matter asserted. And we -- and it would be -- it would be a -- it would implicate the Confrontation Clause.

JUSTICE GINSBURG: Well, how does it

become --

MS. ALVAREZ: -- but that's not what happened here.

JUSTICE GINSBURG: -- how does it become non-testimonial when it's relayed by the recipient of the report? I mean, if -- if the matters are being introduced for the truth, then it's not relevant.

MS. ALVAREZ: Right. I think -- the key is the use. How were these statements used? How were these reports used? And in this particular case, they were not used to prove the truth of the matter asserted. They were used for the limited purpose of explaining the expert's opinion, and for the expert to testify to what she relied on in getting to her opinion --

JUSTICE KAGAN: How -- how do we know that, Ms. Alvarez? Is there a statement from the finder of fact, the trial judge here, that he's understanding her testimony to be not for the truth of the matter asserted?

What's the best evidence that that's what the Court was thinking?

MS. ALVAREZ: There is. And in the joint appendix on page 172, the language from the trier-of-fact, he says just that, that he's considering these for the limited purpose. In fact, the Illinois

appellate court also affirmed, state -- stating that this evidence came in for a limited purpose, as well as --

JUSTICE KENNEDY: If the limited purpose of -- of explaining the basis for her opinion. But her opinion is that this is matched to Lambatos.

MS. ALVAREZ: I'm sorry, Your Honor, I --

JUSTICE KENNEDY: Her opinion is that this is a match to Lambatos. But if -- if the match material isn't admitted for the truth of the matter asserted, or isn't -- considered for the matter asserted, then that testimony is irrelevant and meaningless.

MS. ALVAREZ: Well, not irrelevant, but I believe it goes to the weight of her testimony. And that is for the trier-of-fact to determine. And here, it was a bench trial with a judge. But if in fact the State presents the evidence in the way that was -- we presented it here, we are always taking the chance that it would weaken the -- the case. And it has to be considered for the weight to be given to Ms. Lambatos' testimony --

JUSTICE KAGAN: Suppose the State had not presented evidence of the shipments, so that you didn't even have that. Would -- at that point, should the judge have just thrown out the case?

MS. ALVAREZ: No, Your Honor. I would say no. I believe there was testimony of the victim in this case, who identifies this defendant as the perpetrator in this rape. And in addition, the judge made a finding in his ruling, the trier-of-fact said he believed her 100 percent, and he found her extremely credible --

JUSTICE KAGAN: But I guess what I'm trying to suggest is that if there's no evidence in the case that the -- that the match is to the victim, where is your case?

MS. ALVAREZ: Well then, we probably would have problems with the Illinois evidentiary rules, and -- and the law in Illinois.

We obviously presented in this case a sufficient chain, a sufficient foundation, to show where -- when that -- we presented the testimony, not only of the victim, but the doctor who was present when the swab was taken, of the officers who brought the sealed swab to the Illinois State Police crime lab, how that sealed swab was first looked at, preliminary tests by Mr. Hapack in ISP, in order to -- before they sent it to Cellmark, and as Cellmark extracts a DNA profile of a woman -- a female and a man.

Cellmark never makes the match here. Cellmark never says, "this is Mr. Williams' DNA." That

is done by Ms. Lambatos, through her experts and her expertise. She makes the --

JUSTICE SCALIA: But -- but Cellmark says "this is the male DNA that was found in the sample that was sent." Cellmark made that decision, right? And her testimony was based upon the fact -- was based upon comparing that male DNA with her own blood sample. It's meaningless unless that male DNA was indeed the defendant's.

MS. ALVAREZ: And she can testify to what she relied on. Again -- and it goes to her weight if the trier-of-fact chooses not to believe it. The -- but the evidence here was clear --

JUSTICE SCALIA: You know, I -- I would believe that if the prosecution put the question to her this way: "Assume that you got a report which said that this was the defendant's DNA. And if you were to match that with the -- this -- the work you've done on the blood sample, would you find that -- that, you know, that the sample was taken from the defendant?"

And she would say "yes." And the jury would say "so what?" I mean, you've just -- you've just made a hypothesis. "If you had been told." That -- that would be worth nothing.

Her testimony was, I received information

that this was indeed the DNA taken from -- the male DNA taken from the -- from the swab that was sent. Without that, the testimony was worthless. It's just, you know, a hypothesis. She -- she responds to a hypothesis. That's not the way this was played out in the trial, was it?

MS. ALVAREZ: Yes, the -- again, our position is that her testimony was consistent with the Confrontation Clause. The Confrontation Clause is concerned about what statements are admitted, what evidence is admitted. No Cellmark reports were admitted here. She did not parrot the testimony -- I mean, the report of Cellmark.

She testified to what she did, how she arrived at her own independent opinion on this, which again, we did not offer any out of court statements to prove the truth of the matter asserted. We offered Ms. Lambatos who was subjected to a lengthy cross-examination, and that satisfies the Confrontation Clause, and the inability to tested the reliability of what happened at Cellmark does not trigger the Confrontation Clause.

JUSTICE GINSBURG: I think you earlier recognized that her -- her opinion could not be independent of the test results; it depended entirely on

the test results. So I -- now you -- you've inserted independence again, and I thought you had -- you had given up on that.

MS. ALVAREZ: Well, I think, you know, what we saw in Bullcoming was not an independent opinion of an expert. It was -- he offered no independent analysis. He simply read off a report that was prepared by another lab, and that -- in Bullcoming that was offered to prove the truth of the matter asserted. We did not offer Cellmark reports here to prove the truth of the matter asserted. We offered the expert opinion of Ms. Lambatos, and her credibility was attacked through a very vigorous cross-examination here, and that satisfies the Confrontation Clause.

The testimonial statements again are -- are statements that are -- are made in lieu of live testimony, and the key is the live testimony here, which we presented live testimony. The reports from Cellmark in our -- in our conclusion is that they are not testimonial in nature; and what Petitioner is asking you here, to do here today is to expand Crawford, to expand the Confrontation Clause, to expand the definition of hearsay and the definition of testimonial.

And -- and our position simply is to ask you to maintain the rule of Crawford which is quite clear,

that a -- a witness becomes -- an out-of-court declarant becomes a witness again and -- accuser -- within the context of Confrontation Clause when their extrajudicial statements are offered to prove the truth of the matter asserted. And so the witness here --

JUSTICE GINSBURG: Does Illinois -- does Illinois have notice and demand?

MS. ALVAREZ: No.

JUSTICE GINSBURG: It does not.

MS. ALVAREZ: No. No. And so our -- our position, Your Honors, is to maintain the rule of Crawford. There is no such thing as inferential hearsay, as the Petitioner want you to believe. A statement is a statement. Hearsay is hearsay. There is no such thing as inferential hearsay. What was presented here in this case was consistent with the Confrontation Clause; it was satisfied; and for -- and for that we respect your opinion here today, but we ask that you maintain the ruling of Crawford.

JUSTICE SCALIA: She was asked, just -- just to be clear what she was testifying to: "Did you compare the semen that had been identified by Brian Hapack from the vaginal swabs of Latonia Jackson to the male DNA profile that had been identified by Karen Kooi from the blood of Sandy Williams?"

"Yes, I did."

She is accepting and --and affirming this statement that what she was comparing was the semen that had been identified from the vaginal swabs.

MS. ALVAREZ: She -- she is accepting and she is relying on the material that was generated by Cellmark, but again, the State did not admit into evidence or -- or -- or try to admit into evidence the Cellmark report or any statements from Cellmark.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN,

FOR THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING RESPONDENT

MR. DREEBEN: Thank you, Mr. Chief Justice, and may it please the Court:

Sandra Lambatos' testimony really has to be analyzed as having two components to it. The first component is the match, the match between the data reflecting the allele charts from Cellmark, and the data that was produced in analyzing Petitioner's blood. As to that component of her testimony, she's a live witness, she's subject to cross-examination. I don't think that anyone asserts there is a Confrontation Clause issue.

But as several members of the Court have pointed out, that testimony is entirely irrelevant and nonprobative unless it can be linked to the semen that was taken from the victim and that was subsequently analyzed to generate a DNA profile. As to that issue, Illinois State law provides that her testimony cannot prove for the truth of the matter asserted what Cellmark did. She cannot repeat on the witness stand when she gives the basis for her testimony things that Cellmark said and have them be taken for the truth.

JUSTICE SOTOMAYOR: But, Mr. Dreeben, she did repeat what Cellmark said. I asked your -- the State's attorney whether, if she had read the data report from the laboratory analysis, would that have been a violation of the Confrontation Clause? I'm not clear. She says, only if you admitted it. But in fact that's what she did.

If you read her testimony -- I give you an example at page 79 -- she tells on cross-examination exactly what the steps were in the Cellmark report, what numbers they gave, and she tells and explains -- she -- the State's attorney took pride in this -- she said I disagree with that number that they came up with. I think the number should be -- so she's really reading the report.

MR. DREEBEN: Well, first of all, Justice Sotomayor, that did come in on cross-examination and I don't think that Petitioner is contending evidence that he himself elicits on cross-examination would violate the Confrontation Clause.

JUSTICE SOTOMAYOR: All right. So then let's -- all right. So let's get to --

MR. DREEBEN: Can I focus on -- on --

JUSTICE SOTOMAYOR: Could the State have done this?

MR. DREEBEN: Can I focus on your question? I think, because she clearly did link the DNA that she compared to the blood DNA to the semen that was sent to Cellmark, and I think that several members of the Court raised the question is she implicitly thereby repeating what Cellmark said and then making Cellmark the out-of-court witness.

My answer to that is twofold. First of all, as a matter of Illinois State law, she could not do that. She is not permitted to give the basis for her opinion in that respect and have it taken for the truth.

JUSTICE KENNEDY: If -- if that's so, why isn't there insufficient evidence in this case?

MR. DREEBEN: And this brings me to my second reason for saying that this is not a

Confrontation Clause problem.

It's in essence what the Chief Justice describes and what Justice Alito referred to as the circumstantial way in which the fact finder can infer that Cellmark tested the DNA in the semen that was sent to it. There is a shipping manifest that shows that the semen goes out to the lab; there is a shipping manifest that shows that it comes back. And Cellmark tenders --

JUSTICE KENNEDY: None of -- none of which has anything to do with the accuracy of the test.

MR. DREEBEN: Correct. And that is I think the crucial point here. The State may have a very weak case if it doesn't produce a witness from the lab who can attest to the fact that the lab did what it was supposed to do and conducted a properly authorized DNA examination. It has to get by with the very skimpy circumstantial showing of, we sent the material out --

CHIEF JUSTICE ROBERTS: No, it doesn't -- it doesn't though. It could have -- could it have a witness saying Cellmark is the nation's foremost DNA testing laboratory; they hire only people who have Ph.D.'s in DNA testing? I mean, is that all right?

MR. DREEBEN: Yes, yes.

CHIEF JUSTICE ROBERTS: The State can make its case a lot stronger --

MR. DREEBEN: And it did that here by saying that Cellmark is an accredited laboratory and Sandra Lambatos participated in designing proficiency examination. But she had to admit on cross-examination that she had no idea what Cellmark actually did in this case. She could draw inferences. And the inferences that she drew are what enabled her to say, my opinion is there is a match between the DNA in the semen and the DNA in the blood.

JUSTICE KENNEDY: As you understand our precedents, would this have been a stronger or a weaker case if a representative, and employee of Cellmark had come and said although I didn't do this sample, I want to tell you how our procedures worked and why we are a respectable lab, etcetera, etcetera?

MR. DREEBEN: It would have been relatively stronger had a witness been able to actually come from Cellmark and validate that Cellmark is an accredited laboratory and conducts procedures in a certain way. But the crucial point here --

JUSTICE SOTOMAYOR: Mr. Dreeben, if no expert from either lab came in, if an expert had the Cellmark information and the Illinois State police information, not offered for the truth of the matter, and came in and said I match this and I match that, and

it's the defendant -- could that have been done?

MR. DREEBEN: Only if as a matter of State law there was a sufficient foundation for the fact finder to conclude that the DNA actually came from the blood and the DNA came from the semen.

JUSTICE SCALIA: Mr. Dreeben, that seems to me extra -- I mean, we have a Confrontation Clause which requires that the witnesses against the defendant appear and testify personally, and -- and the crucial evidence here is the testing of the semen found on the swab. That is -- that's the crux of this evidence, and you're telling me that this Confrontation Clause allows you to simply say, well, we're not going to bring in the person who did the test; we are simply going to say, this is a reliable lab. I don't know how that complies with the Confrontation Clause.

MR. DREEBEN: The Confrontation Clause, Justice Scalia, does not obligate the State to present a strong case. It does not prevent the State from presenting a relatively weaker case, so long as it does not rely on testimonial statements to prove the truth of the matter asserted.

This Court held in Bruton v. United States that there is a very narrow exception to the almost invariable presumption that juries will follow the

instructions that they are given. If they are told not to take evidence for the truth of the matter asserted, they are presumed to follow that instruction. Here Illinois State law supplies that filter.

Everything that the judge heard, he filtered through Illinois State law that says the basis for the expert's opinion doesn't prove its truth. So the State gave up the right to say, "You can believe that this DNA report is reliable and trustworthy because Cellmark says so." The State doesn't get that benefit; and as a result of not getting that benefit, it is not obligated to treat Cellmark as if it's a witness.

JUSTICE KAGAN: I suppose the problem is, Mr. Dreeben, that if the State put up Ms. Lambatos and Ms. Lambatos had to say: I did a match -- I was given two reports; there is a match, but I have no idea where this other report came from. You know, it might have been from the victim but it might not have been. I don't have a clue.

The State would never have put that prosecution on, because the State would have understood that there was no case there. The State is relying on the fact that people will take what Ms. Lambatos says about what she knows about where the report came from as a fact, as the truth of the matter, that in fact this

report did come from the victim. And so the jury can be given instructions saying: You can't consider this except for the truth of the matter asserted.

But it's a bit of a cheat, no?

MR. DREEBEN: No. I think, Justice Kagan, when you consider the things that this Court has held juries can properly apply limiting instructions to, they can hear the fact that evidence was seized from the defendant, marijuana was found at his house. The defendant gets up on the stand and says, no, it wasn't.

The State can introduce that marijuana to impeach his testimony, and the jury is instructed: You may not use that as proof that he possessed marijuana, only to impeach his testimony. The same is true with unwarned statements in violation of Miranda.

JUSTICE SCALIA: What is the instruction here? That --

MR. DREEBEN: There is no instruction here, Justice Scalia, because this is a bench trial. And in a bench trial, the judge is presumed to follow the law, and as my colleague read to the Court --

JUSTICE SCALIA: So we simply have a presumption even though -- even though the court's statement seems to indicate that he does take it for the truth of the matter.

MR. DREEBEN: Well the only --

JUSTICE SCALIA: And you're saying, well he couldn't have because that would be against the law.

MR. DREEBEN: The Illinois Supreme Court found as a matter of State law that he did comply with State evidentiary rules and he did not take the Cellmark report for the truth of the matter asserted. And there is in this case an alternative route of proof which is circumstantial, and I take the Chief Justice's amendment of my description of the facts to include that Cellmark is an accredited laboratory.

That does add to the probative value. But it is a much weaker chain of support to conclude that the DNA male profile came from the semen than if they had produced Cellmark. But not having produced Cellmark, they do not need to afford confrontation on Cellmark.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Carroll, you have four minutes remaining.

REBUTTAL ARGUMENT OF BRIAN CARROLL

ON BEHALF OF THE PETITIONER

MR. CARROLL: Thank you, Your Honor.

First it was State cited page 7 or -- 172 in the Joint Appendix as a reference to the trial judge

stating that he was not considering Cellmark's statements for its truth. That's not a cite to the transcript of the trial. That's a cite to the Illinois Supreme Court's opinion.

Nowhere in the actual trial transcript did the judge ever state, "I'm not considering this evidence for its truth. " In fact, in the statement of fact on page JJJ 151 of the record, he states that, it's the testimony of the experts that makes this link. Cellmark's an accredited lab.

And it's inconceivable that in the face of the evidence of Cellmark's work that the prosecution presented through Lambatos's testimony and during defense counsel's objection to that testimony, that the judge would never state at any point, "hey, I'm not considering this for its truth. "

JUSTICE SOTOMAYOR: Are you saying that we owe no deference to the Illinois Supreme Court's judgment on this evidentiary issue? And if so, no deference, tell me what proposition of law supports that or are you saying deference is due but we shouldn't give it. Which of the two positions do you take?

MR. CARROLL: I think deference is due but you shouldn't take it given the record in this case.

JUSTICE SCALIA: Why is deference given? I

mean it's either the fact or its not the fact. If the State Supreme Court opinion says something that contradicts the -- you know, the record we owe a deference, I don't know of any such rule.

MR. CARROLL: Well, if the Court --

JUSTICE SCALIA: We owe deference to its interpretation of Illinois law, I suppose.

MR. CARROLL: I guess I -- if this Court would like not to give the Illinois Supreme Court deference, I would be more than happy --

JUSTICE SCALIA: I think we should give it deference where deference is due and not give it deference where deference is not due. And on statement of facts that are either erroneous or not, I don't know why deference is applicable.

MR. CARROLL: Yes, Your Honor.

CHIEF JUSTICE ROBERTS: We do think our law has established though that a jury will follow an instruction in this situation to -- not to take the testimony for truth of the evidence, for truth of the matter.

MR. CARROLL: Not in this situation, Your Honor.

CHIEF JUSTICE ROBERTS: Do we have any case saying that instruction is inadequate in a case like

this?

MR. CARROLL: Not in this particular fact pattern. But this case is different than a Bruton type situation where there are -- there is the proper way to consider the evidence and an improper, and there is a fear that the jury is going to -- or the trier-of-fact is going to consider the improper. Here Illinois law did allow the trier-of-fact --

JUSTICE KENNEDY: Are you aware that in Illinois they have an instruction -- assuming it was a jury case, this is a bench case, but if it were a jury case, "Ladies and Gentlemen of the jury you are not to presume or assume that the DNA tested by Cellmark came from this sample."

MR. CARROLL: Yes, Your Honor. There is such an instruction in Illinois law; however.

JUSTICE KENNEDY: And then they routinely give that to juries?

MR. CARROLL: I believe they do, Your Honor. However, in this case -- or Illinois law does not prohibit the trier-of-fact from considering Cellmark's statement. The trier-of-fact is allowed and is expected to consider it in assisting the trier-of-fact in evaluating Lambatos's opinion.

And in this situation, where Lambatos is --

the only way that the Cellmark statement supports Lambatos's opinion is if they are true, there is no meaningful difference between considering the statements in assessing Lambatos's opinion and considering them for the truth.

JUSTICE SOTOMAYOR: I'm sorry, I'm going back to Justice Kennedy's question. There is an Illinois requirement that the trial judges give the instruction he described?

MR. CARROLL: I believe there is a recommended jury instruction for -- that the basic evidence is not to be considered for its truth, Your Honor.

JUSTICE ALITO: Under rule 703 of the Illinois rules of evidence, are the facts that an expert takes into account in reaching his or her opinion introduced for the truth of the matter asserted?

MR. CARROLL: Not under the language of the rule, Your Honor, no.

CHIEF JUSTICE ROBERTS: Thank you, Counsel. The case is submitted.

(Whereupon, at 12:06 p.m., the case in the above-entitled matter was submitted.)