No. 10-8505

IN THE

Supreme Court of the United States

SANDY WILLIAMS,

Petitioner,

v.

ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a criminal defendant's Sixth Amendment right to confront witnesses against him is satisfied where a prosecution expert testifies live at trial to her independent, expert opinions and is subject to unrestricted cross-examination.

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STATEMENT

At petitioner's 2006 bench trial in the Circuit Court of Cook County, Illinois, the following evidence was adduced.

1. On the evening of February 10, 2000, petitioner approached L.J. from behind on the sidewalk, forced her into a station wagon and ordered her to remove her clothes. R. III91-102. Inside the vehicle, petitioner vaginally penetrated L.J. with his penis while he choked her and then attempted to penetrate L.J.'s anus with his penis. R. III107-110. After the assault, petitioner pushed L.J. out of the vehicle and drove away with L.J.'s coat, money, and other items. R. III112-113. L.J. ran home, and her mother called the police. R. III113-116. Chicago police officers responded, and an ambulance transported L.J. to an emergency room where a doctor conducted a vaginal exam and took vaginal swabs, which were sealed in a criminal sexual assault evidence collection kit along with a sample of L.J.'s blood. R. III52-55, III59-63, III116-118. The items were later inventoried by a Chicago Police detective and sent to the Illinois State Police (ISP) Lab for testing and analysis. R. III73-74, III76.

On August 3, 2000, petitioner was arrested for an unrelated offense and, pursuant to a subsequent court order, a blood sample was drawn on August 21, 2000 and sent to the ISP Lab. R. HHH15-19, JJJ6-16. L.J. identified petitioner from a line-up on April 17, 2001. R. JJJ112-115. At trial, L.J. identified petitioner in court as the man who sexually assaulted her. R. III104.

2. Phlebotomist Manuel Sanchez testified that, pursuant to a court order, he drew blood from petitioner on August 21, 2000 at the health services office of the Cook County Correctional Center. R. JJJ6. Cook County State's Attorney's Office Investigator John Duffy testified that he was present for the blood draw and then hand-carried the sealed envelope containing the blood sample to the Chicago Police Department's Forensic Services Unit. R. JJJ114-JJJ115. Investigator Duffy maintained sole care and custody of the envelope until he inventoried it under Chicago Police inventory number 2391661. *Ibid.*

ISP Lab forensic scientist Karen Kooi Abbinanti[1] testified that she received Chicago Police inventory number 2391661 (consisting of petitioner's blood sample) in a sealed condition. J.A. 13-14. Using short tandem repeat (STR) DNA analysis, Abbinanti extracted a DNA profile from petitioner's blood sample. J.A. 13-15. Abbinanti entered the DNA profile into a computer database used to compare known DNA profiles with profiles from unsolved cases. J.A. 14-15.

3. Dr. Nancy Schubert testified that, at the hospital on the evening of the assault, she took vaginal swabs from L.J., which were sealed in a criminal sexual assault evidence collection kit along with L.J.'s blood sample. R. III52-55, III59-63. The sealed kit was stored in an emergency room lock box. R. III62, III70. Dr. Shubert identified People's Exhibit 1 as L.J.'s sexual assault evidence collection kit and noted her markings on the kit. R. III59-62. Chicago Police Detective Michael Baker

1. The state court decisions below refer to Abbinanti by her maiden name, Karen Kooi. J.A. 111-112, 146-147.

likewise identified People's Exhibit 1 and testified that he assumed custody of the kit at the hospital and maintained exclusive care, custody, and control of the kit until he inventoried it under Chicago Police inventory number 2276053. R. III73-76.

4. The trial court accepted ISP Lab forensic biologist Brian Hapack as an expert in forensic biology without defense objection. J.A. 30. Hapack testified that he received L.J.'s sexual assault evidence collection kit, identified by Chicago Police inventory number 2276053 and ISP Lab case number C00007770, in a sealed condition. J.A. 30-31. After opening the kit and inventorying its contents, Hapack performed two tests on the vaginal swabs that are generally accepted in the scientific community for determining whether semen is present on a sample. J.A. 31-34. First, Hapack performed the acid phosphatase test, which detects an enzyme present in semen in high concentrations, and received a "four plus" positive result, the highest indication of the presence of semen. J.A. 32. Next, Hapack performed the Abacard test, which tests for the P30 protein, and received a positive result. J.A. 32-33. Hapack repackaged and sealed both the swabs and L.J.'s blood sample in accordance with accepted procedures for preserving evidence and stored the items in a secure freezer at the ISP Lab. J.A. 34-36, 38-39. At trial, Hapack identified People's Exhibit 1 as the sexual assault evidence collection kit. J.A. 36-37. On cross-examination, Hapack testified that he used built-in controls and proper procedures when he tested the vaginal swabs. J.A. 39-42.

5. The trial court accepted former ISP Lab forensic biologist Sandra Lambatos as an expert in forensic biology and forensic DNA analysis without defense objection. J.A.

47. On direct examination, Lambatos testified generally about polymerase chain reaction (PCR) DNA testing and explained how PCR-based analysis is used to identify a male DNA profile from semen. J.A. 47-49. The analyst takes the evidence sample, which typically comes in low amounts, and multiplies it using a series of cycles and temperature changes, resulting in millions of areas of interest on the DNA molecule. J.A. 48. The analyst uses a genetic analyzer to examine the amplified DNA, and specific areas are tagged with fluorescent markers, thus generating a DNA profile that can be compared to other profiles. *Ibid.* In this way, DNA testing can be used to exclude or include a person as a possible contributor to a sample. *Ibid.* In the case of an inclusion, the alleles comprising the DNA profile are put into a frequency database to generate a statistical probability for the profile. J.A. 48-49. Lambatos testified that both PCR-based DNA analysis and the method used by the ISP Lab to determine the statistical probability of a DNA profile are generally accepted in the scientific community. J.A. 47, 49.

Lambatos further testified that, in 2000 and 2001, the ISP Lab sent evidence samples to Cellmark Diagnostics Laboratory (Cellmark) in Germantown, Maryland, to expedite the analysis of evidence and reduce the backlog at the ISP Lab, and she detailed the procedures surrounding this arrangement. J.A. 49-52. Lambatos testified that it is a commonly accepted practice in the scientific community for a DNA expert to rely on the records of another DNA analyst to complete her own work. J.A. 51. Lambatos further testified that Cellmark was an accredited laboratory. J.A. 49.

Lambatos explained that the ISP Lab sent evidence to, and received evidence back from, Cellmark in a sealed condition via Federal Express and maintained the shipping manifests in the ordinary course of business. J.A. 49-50. The manifests were housed in a secure area of the lab, used to record the chain of custody of samples, and ordinarily relied upon by analysts. J.A. 50. This method of transporting evidence was generally accepted in the scientific community. J.A. 51. Lambatos testified that samples from ISP Lab case number C00007770, specifically vaginal swabs and a victim's blood sample, were sent to Cellmark in a sealed condition via Federal Express on November 28, 2000. J.A. 51-52, 55. Lambatos identified People's Exhibit 25 as the shipping manifest documenting the shipment of these items to Cellmark and their arrival at Cellmark on November 29, 2000. J.A. 52-53. Lambatos identified People's Exhibit 26 as the return shipping manifest documenting the shipment of the vaginal swabs and blood sample from ISP Lab case number C00007770 from Cellmark to the ISP Lab on April 3, 2001. J.A. 53-55.

Lambatos testified that she was assigned to work on the instant case at the ISP Lab. J.A. 55. A computer match was generated of the male DNA profile found in semen from the vaginal swabs to petitioner's DNA profile in the database. J.A. 55-56. Lambatos compared the DNA profiles and, in her expert opinion, petitioner's profile matched the profile of the semen identified in the vaginal swabs. J.A. 56-58, 88-89. Lambatos testified that the probability of this profile occurring in the general population was approximately one in 8.7 quadrillion black, one in 390 quadrillion white, and one in 109 quadrillion Hispanic unrelated individuals. J.A. 57.

6. On cross-examination, Lambatos testified that Cellmark was an accredited laboratory; it had to meet certain guidelines to receive accreditation and to perform DNA analysis for the ISP Lab. J.A. 59-60. Lambatos further explained that calibrations and internal proficiencies had to be in place for Cellmark to perform DNA analysis. *Ibid.* While Lambatos admitted that she did not personally observe the testing of the samples at Cellmark or undertake the biological testing herself, she reviewed the electropherogram of the sperm (E2) fraction and made her own determinations, interpretations, and conclusions about the evidence after the database indicated a match to petitioner's profile. J.A. 59-66.

Lambatos also described how the ISP Lab uses the database as an investigative tool; after a database search is run and the computer identifies a match, the analysts examine the actual data to determine whether there is, in fact, a DNA match. J.A. 56-57, 65-66. Thus, after the computer generated a match in this case, Lambatos compared petitioner's DNA profile to the electropherogram of the sperm fraction. J.A. 56-57, 62, 78. Lambatos testified that she reviewed the data generated at Cellmark, in addition to Cellmark's report and allele chart, and that she independently interpreted the data when she compared it to petitioner's DNA profile. J.A. 61-62, 67-69, 87-89. Furthermore, during cross-examination, Lambatos explained how interpretation of mixtures differs from single-donor profiles and how Cellmark's process and reporting guidelines differ from those used at the ISP Lab; she also responded to defense counsel's questions regarding how she interpreted the data at particular loci. J.A. 70-74, 76-81, 83-85.

On re-direct examination, Lambatos reiterated that she performed her own interpretation of the data. J.A. 87-88. She also testified that she observed no indication of contamination or problems with the chain of custody, and that she routinely relied on DNA analysis performed at Cellmark. *Ibid.* Lambatos did not read the contents of the Cellmark report into evidence, nor was that report introduced into evidence. J.A. 42-90.

7. At the conclusion of Lambatos's testimony, petitioner moved to strike her testimony on foundational and Sixth Amendment Confrontation Clause grounds. J.A. 90-94. The trial court denied the motion, stating:

> I don't think this is a *Crawford* [*v. Washington*, 541 U.S. 36 (2004)] scenario, and I agree with the State that * * * the issue is * * * what weight do you give the test, not do you exclude it and accordingly your motion to exclude or strike the testimony of the last witness or opinions based on her own independent testing of the data received from [Cellmark] will be denied.

J.A. 94-95.

Petitioner did not present any evidence, R. JJJ122, and the trial court found petitioner guilty of two counts of aggravated criminal sexual assault and one count each of aggravated kidnapping and aggravated robbery. R. JJJ149-154.

8. The Illinois Appellate Court affirmed petitioner's convictions. J.A. 129. The court concluded that Lambatos's expert opinion testimony did not violate petitioner's Sixth

Amendment right to confrontation because Lambatos's references to the analysis completed at Cellmark were offered not for their truth, but for the non-hearsay purpose of explaining the basis of Lambatos's own expert opinion. J.A. 123-127. The appellate court also rejected petitioner's state-law arguments regarding Lambatos's testimony, finding that the State had sufficiently established both foundation, J.A. 117-120, and chain of custody, J.A. 120-123. One Justice dissented, concluding that the foundation for Lambatos's opinion testimony was insufficient as a matter of Illinois law. J.A. 130-141.

9. The Illinois Supreme Court granted leave to appeal and affirmed the state appellate court's judgment regarding Lambatos's testimony. J.A. 174.[2] Like the appellate court, the Illinois Supreme Court held that petitioner's constitutional right to confrontation was not violated by the admission of Lambatos's expert testimony. J.A. 160-173. The court reasoned that, under *Wilson v. Clark*, 417 N.E.2d 1322 (Ill. 1981), and its progeny, Lambatos's references to Cellmark's laboratory testing of the vaginal swabs were not hearsay because these references were not offered for the truth of the matter asserted. J.A. 163-165, 172. Rather, Lambatos referenced DNA testing completed at Cellmark for the limited purpose of explaining the basis of her independent expert opinion. J.A. 167, 172. Citing *Crawford*'s holding that the Confrontation Clause does not bar the admission of testimonial statements admitted for a purpose other

2. Before the Illinois Supreme Court, petitioner abandoned the chain-of-custody argument he had raised in the appellate court, but continued to challenge the foundation for Lambatos's testimony. A majority of the Illinois Supreme Court rejected petitioner's state-law foundation argument. J.A. 153-160.

than proving the truth of the matter asserted, the Illinois Supreme Court concluded that "*Crawford* considerations did not apply here." J.A. 161-162, 172. The Illinois Supreme Court also distinguished *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), noting that Cellmark's analysis was confined to processing the vaginal swabs and did not include the type of comparative analysis conducted by Lambatos. J.A. 167-172. The court emphasized that no Cellmark reports were introduced or read into evidence and that Lambatos testified to the application of her own expertise, judgment, and skill in interpreting the data and her general knowledge of the protocols and procedures in place at Cellmark. J.A. 171-172.

Two Justices opined in a special concurrence that Lambatos's testimony should have been excluded on state-law foundation grounds, but they concluded that this error was harmless. J.A. 174-185. The specially concurring Justices did not address the Confrontation Clause issue.

SUMMARY OF ARGUMENT

The Sixth Amendment guarantees an accused the opportunity to confront the "witnesses against him." This right applies not only to those witnesses who testify in open court, but also to those extrajudicial, testimonial statements the prosecution presents in lieu of live testimony if those statements are offered for the truth of the matter asserted. If the out-of-court statements are used for a purpose other than to prove the truth of the matter asserted, however, the Confrontation Clause is not implicated. Thus, when a scientific expert testifies at trial to her own, independent opinion, even if that opinion is derived from outside data that would be considered

testimonial hearsay if it were offered into evidence, she does so consistently with the defendant's confrontation right.

In this case, no out-of-court testimonial statements were admitted into evidence, and forensic DNA analyst Sandra Lambatos did not serve as a conduit for any hearsay, testimonial or otherwise. Lambatos relied on her own expertise and knowledge to reach an independent opinion that petitioner's DNA matched the male DNA profile present in the data she reviewed. Lambatos did not perform the laboratory tests on the DNA samples, as she candidly conceded during extensive cross-examination on that very point. The trial judge, sitting as trier of fact, recognized the limited purpose for which he could consider Lambatos's references to Cellmark and considered only Lambatos's independent expert analysis and opinions, not any work by Cellmark, as substantive evidence of petitioner's guilt. The Confrontation Clause, therefore, was satisfied when petitioner received the opportunity to cross-examine Lambatos.

Alternatively, even if the Court concludes that Lambatos's testimony included hearsay about work that Cellmark performed, any such hearsay was nontestimonial. Just as not all those questioned by police are "witnesses" under the Sixth Amendment, not all scientific reports are testimonial statements subject to the Confrontation Clause. An informal report comprised of DNA test results and machine-generated data is not produced for the primary purpose of creating an out-of-court substitute for trial testimony, but to facilitate further examination and forensic analysis of the physical evidence. Thus, such a report is not testimonial, and the scientists who generate

it are not "witnesses against" a criminal defendant under the Confrontation Clause.

Finally, and in the further alternative, if any confrontation error occurred in this case, it was harmless beyond a reasonable doubt. The prosecution's DNA evidence was independent of the victim's credible and unequivocal identification of petitioner both in a line-up and at trial as the individual who attacked and sexually assaulted her.

Accordingly, the judgment below should be affirmed.

ARGUMENT

I. THE CONFRONTATION CLAUSE DOES NOT PROHIBIT OPINION TESTIMONY OF A SCIENTIFIC EXPERT THAT IS BASED ON THE WORK OF OTHERS.

A. The Confrontation Clause Is Satisfied When An Expert Witness Testifies Exclusively To Her Own Opinion And Is Subject To Cross-Examination.

1. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him," U.S. Const. amend. VI, and gives the accused the opportunity to cross-examine all those who "bear testimony" against him, *Crawford v. Washington*, 541 U.S. 36, 51 (2004). See also *White v. Illinois*, 502 U.S. 346, 359 (1992) (Thomas, J., concurring in part and concurring in judgment) ("critical phrase within the Clause * * * is 'witnesses against

him'"). Thus, testimonial hearsay—*i.e.* extrajudicial statements used as the "functional equivalent" of in-court testimony—may only be admitted at trial if the declarant is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 53-54. To run afoul of the Confrontation Clause, therefore, out-of-court statements introduced at trial must not only be "testimonial" but must also be hearsay, for the Clause does not bar the use of even "testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 51-52, 60 n.9 (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)); see also *Michigan v. Bryant*, 131 S. Ct. 1143, 1162 (2011) (because declarant's statements will be introduced for truth of the matter asserted, those statements "must * * * pass the Sixth Amendment test"). Thus, in *Street*, on which *Crawford* relied, the Court upheld the introduction of an accomplice's confession—through the testimony of the sheriff and without in-court testimony from the accomplice himself—because the prosecution did not introduce it to establish what happened during the crime (that is, for its truth), but rather to reveal the circumstances surrounding the defendant's own confession. See *Street*, 471 U.S. at 413-414. Because the accomplice's confession was not introduced for its truth, the Sixth Amendment was satisfied by the defendant's ability to cross-examine the sheriff. See *id.* at 414 (citing *Anderson v. United States*, 417 U.S. 211, 219-220 (1974)).

Here, no testimonial hearsay was admitted into evidence against petitioner. Instead, the prosecution presented a forensic scientist who gave live, in-court testimony against petitioner, consisting of her independent expert opinion that petitioner's DNA profile matched the DNA profile data received from Cellmark, which had

been sent the vaginal swabs for testing. As the Illinois Supreme Court recognized, the expert's "testimony about Cellmark's report was not admitted for the truth of the matter asserted," but rather "to show the underlying facts and data Lambatos used before rendering an expert opinion in this case." J.A. 165. Under *Crawford* and *Street*, this was proper and did not implicate the Confrontation Clause.

2. Petitioner argues that *Street* is inapplicable because it is factually distinct, Pet. Br. 23-24, but this misses the point. Like the sheriff in *Street*, in testifying against a defendant, experts may rely on out-of-court information, even "testimonial" information, so long as it is not introduced for its truth at trial. And such a process is consistent with the very nature of expert testimony, whose value lies in the expertise the in-court witness brings to bear on an underlying body of material—material that need not be introduced independently for its own truth.

The law has long recognized this characteristic of expert testimony. See, *e.g.*, *United States v. Scheffer*, 523 U.S. 303, 317 n.13 (1998) (when polygraph examiner testifies at trial, "the evidence introduced is the expert opinion testimony of the polygrapher about whether the subject was truthful or deceptive in answering questions about the alleged crime," not the "raw results of a polygraph exam" such as the subject's pulse, respiration, and perspiration rates). Illinois Rule of Evidence 703, modeled after its federal counterpart, see *Wilson v. Clark*, 417 N.E.2d 1322, 1326-1327 (Ill. 1981) (adopting Federal Rules of Evidence 703 and 705), thus permits an expert witness to base an opinion or inference on facts or data "perceived or made known to the expert at or before the

hearing." Ill. R. Evid. 703 (2011).[3] When an expert testifies to her opinion, the facts or data on which the expert relies "need not be admissible in evidence," so long as they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject[.]" *Ibid.*; see also *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 592 (1993) ("Unlike an ordinary witness, * * * an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation.").

The goal of Rule 703 is to "bring the judicial practice [regarding expert testimony] into line with the practice of the experts themselves when not in court." Fed. R. Evid. 703 Advisory Committee Note to 1972 Proposed Rules. Moreover, as the Illinois Supreme Court recognized below, allowing expert witnesses to explain how they formed their opinions aids the factfinder in its assessment of what, if any, weight to give the expert's opinion. J.A. 172 ("By allowing the expert to reveal the information for this purpose alone, it undoubtedly aided the judge, sitting as the factfinder, in assessing the value of Lambatos' opinion.").

3. These rules "[respect] the functions and abilities of both the expert witness and the trier of fact, while assuring that the requirement of witness confrontation is fulfilled[,]" because the expert herself is present in court and subject to cross-examination about both

3. Prior to 2011, Illinois rules of evidence were dispersed throughout case law, statutes, and Illinois Supreme Court rules. In 2011, the Illinois Supreme Court adopted formal rules of evidence incorporating existing evidentiary law, except where noted. See Ill. R. Evid. (2011), Introduction and Committee Commentary.

her opinions and the reasonableness of her reliance on particular material. *United States v. Sims*, 514 F.2d 147, 149 (9th Cir. 1975); cf. *United States v. Wade*, 388 U.S. 218, 228 (1967) (analyzing Sixth Amendment's guarantee of right to counsel, Court noted that cross-examination of expert witnesses provided opportunity for meaningful confrontation of blood tests).

If the prosecution chooses not to call a witness with first-hand knowledge of the underlying data on which the in-court expert relies, then the prosecution gives up the ability to rely on that material for its truth, and it opens its expert to cross-examination highlighting her inability to attest to the data's origins or accuracy. For, as this Court has already made clear, "it is not the case * * * that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2532 n.1 (2009). If the prosecution opts not to call a witness who can speak to chain of custody, authenticity, or accuracy, this decision may weaken the State's case, but it is not a Sixth Amendment violation.

In the same way, the expert who testified for the prosecution in *Delaware v. Fensterer*, 474 U.S. 15, 17 (1985) (*per curiam*), recounted his forensic conclusions, although he could not recall the methods he used to reach them. Like the expert who may not vouch for the accuracy of the underlying data, the forgetful expert in *Fensterer* raised no Sixth Amendment problem; the defense could "probe and expose" his lack of recollection "through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the

witness' testimony." *Id.* at 22. So, too, may defense counsel question the opinions of an expert who cannot speak to the origins or accuracy of underlying data (precisely as petitioner's counsel did here, see *infra* pp. 20-21).

Nor is cross-examination the only safeguard against the misuse of expert testimony. The ability to call defense witnesses, including competing experts; state rules surrounding hearsay, foundation, and limits on the admission of unduly prejudicial evidence; and due process requirements offer additional protection. See U.S. Const. amend. VI (compulsory process); *Daubert*, 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); *Bryant*, 131 S. Ct. at 1162 n.13 ("Of course the Confrontation Clause is not the only bar to admissibility of hearsay statements at trial. * * * Consistent with [state and federal hearsay] rules, the Due Process Clauses of the Fifth and Fourteenth Amendments may constitute a further bar to admission of, for example, unreliable evidence.").

4. The claim that prosecutors and lab technicians would use a favorable ruling in this case to engineer an "end run" around the Confrontation Clause is therefore misplaced. Pet. Br. 31; see also Brief for Richard D. Friedman as *Amicus Curiae* Br. 19 (suggesting that, unless the State is required to produce testing analysts at trial, prosecutors, "with the cooperation of forensic laboratory technicians, who knew exactly what they were doing," could "achieve a neat evasion of the confrontation right"). Not only does the Sixth Amendment alone prohibit abusive tactics, see *Davis v. Washington*, 547 U.S. 813,

838 (2006) (Thomas, J., concurring in the judgment in part and dissenting in part) (prosecution's attempt to use of out-of-court statements to circumvent literal right of confrontation would violate Clause, regardless of nature of out-of-court statement), but these additional state and federal safeguards provide an independent source of protection, as does the government's own self-interest in avoiding exploitable weaknesses in their expert testimony.

B. Lambatos Did Not Serve As A Conduit For The Admission Of Hearsay.

1. To be sure, a testifying expert may not step outside of her traditional role and serve as a conduit for the admission of another, non-testifying expert's opinions or other hearsay. This exception, announced in *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710, 2716 (2011), was a straightforward application of *Melendez-Diaz*, where this Court made clear that testimonial statements about scientific evidence should not be treated differently than any other testimonial statements. See *Melendez-Diaz*, 129 S. Ct. at 2531-2533, 2542; *id.* at 2543 (Thomas, J., concurring). Just as prosecutors may not admit an eyewitness's affidavit without giving the defendant an opportunity to cross-examine that witness, they may not use certified lab reports in lieu of live testimony or offer the testimony of one expert to introduce the affidavit or other testimonial statements of another, for the truth of the matter asserted in those statements, without subjecting the out-of-court declarant to cross-examination. See *id.* at 2533-2534; *Bullcoming*, 131 S. Ct. at 2716; see also *Crawford*, 541 U.S. at 51 ("Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court.").

Thus, in *Melendez-Diaz*, the prosecution offered into evidence a sworn certificate from lab analysts that the substance recovered from the defendant was cocaine, without any live witnesses testifying against the defendant in support of this conclusion. See 129 S. Ct. at 2530-2531. Likewise, in *Bullcoming*, the in-court witness parroted another analyst's blood-alcohol findings without offering any independent expert opinion. See 131 S. Ct. at 2715-2716.

In contrast, and as a host of courts have recognized, an expert who merely relies on data, without introducing it for its truth, does not violate a defendant's Sixth Amendment rights. For example, in *United States v. Turner*, 591 F.3d 928, 932-934 (7th Cir.), cert. pending, No. 09-10231 (2010), the Seventh Circuit rejected the defendant's Confrontation Clause challenge to the Government's expert witness, stating: "we see no problem with [the] expert testimony, especially in light of the fact that [the testing analyst]'s summaries, which contained some testimonial statements, were not admitted into evidence." Similarly, in *United States v. McGhee*, 627 F.3d 454, 459-460 (1st Cir. 2010), the First Circuit held that the inclusion of technical test data in a report allowed the expert witness to draw his own scientific conclusion regarding the nature of the substance and did not violate the Sixth Amendment.[4]

4. See also *United States v. Johnson*, 587 F.3d 625, 635-636 (4th Cir.) ("*Crawford* forbids the introduction of testimonial hearsay as evidence in itself, but it in no way prevents expert witnesses from offering their independent judgments merely because those judgments were in some part informed by their exposure to otherwise inadmissible evidence"; so long as the expert's opinion is an original product that is tested on cross-examination, no Confrontation Clause problem arises), cert.

2.a. In this case, Sandra Lambatos did not step out of her role as a testifying expert and serve as a conduit for

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denied sub nom., *Martin v. United States*, 130 S. Ct. 2128 (2010); *United States v. Pablo*, 625 F.3d 1285, 1290-1295 (10th Cir.) (reviewing for plain error, DNA expert's testimony in reliance on other analysts' work did not offend Confrontation Clause), cert. pending, No. 10-9789 (2011); *United States v. Richardson*, 537 F.3d 951, 960-961 (8th Cir.) (DNA expert's testimony, informed by reports of others, was not hearsay because it related her own independent conclusion), cert. denied, 129 S. Ct. 2378 (2009); *Smith v. State*, 28 So.3d 838, 853-855 (Fla.) (Confrontation Clause not implicated where FBI lab supervisor testified to own opinion regarding DNA match and statistical analysis), cert. denied, 131 S. Ct. 3087 (2011); *Pendergrass v. State*, 913 N.E.2d 703, 705-709 (Ind.) (no Confrontation Clause violation where supervisor testified about DNA analysis and gave own opinion), cert. denied, 130 S. Ct. 3409 (2010); *State v. Gomez*, 244 P.3d 1163, 1167-1168 (Ariz.) (DNA expert's reliance on data generated by non-testifying DNA technicians in arriving at her opinion did not violate Confrontation Clause), cert. denied, 131 S. Ct. 2460 (2011); *Commonwealth v. Banville*, 931 N.E.2d 457, 466-467 (Mass. 2010) (DNA expert opinion testimony based on hearsay does not offend Sixth Amendment if expert does not testify to details of hearsay on direct examination). But see *New York v. Goldstein*, 843 N.E.2d 727, 732-734 (N.Y. 2005), cert. denied, 547 U.S. 1159 (2006) (distinction between statement offered for its truth and statement offered to shed light on testifying expert's opinion was "not meaningful" in context of forensic psychiatrist's testimony, where expert provided detailed descriptions of interviews conducted with witnesses to defendant's behavior and where prosecution "expected the jury to take those statements as true"); *Derr v. State*, 2011 WL 4483937, *14 (Md. Sept. 29, 2011) (although state rule allows expert to base opinion on inadmissible evidence, if evidence on which expert bases opinion is testimonial, then Confrontation Clause prohibits admission of such testimonial statements through testimony of DNA expert who did not observe or participate in testing).

the unconstitutional introduction of testimonial hearsay. Rather, she testified to her own, independent opinion that petitioner's DNA profile matched the male DNA profile present in the data she reviewed. She explained generally that PCR-based DNA analysis is a scientifically accepted means of identifying a male DNA profile from semen and determining whether an individual may be included or excluded as a possible donor. J.A. 47-49. Lambatos further testified that she routinely relied on DNA analysis performed by others to complete her own work, including DNA analysis performed at Cellmark, an accredited laboratory whose testing methods are generally accepted in the scientific community. J.A. 49, 51, 86-87.

Specific to this case, Lambatos indicated that L.J.'s vaginal swabs and blood sample were sent to Cellmark for profiling and that she interpreted the results of those DNA tests in conducting her own analysis. J.A. 50-57, 62, 87-88. In her independent, professional opinion, there were only two DNA profiles depicted on the electropherogram, and petitioner was the source of the male DNA. J.A. 57, 81, 86-89. During cross-examination, Lambatos openly admitted that she did not perform the laboratory tests on L.J.'s vaginal swabs. J.A. 59-61, 63, 69-70, 73-74. Rather, she explained how, using her expertise in the field of forensic DNA analysis, she was able to make her own visual and interpretive comparisons of the data she reviewed to reach a conclusion about whether petitioner's DNA profile matched the male DNA profile depicted on the electropherogram. J.A. 62, 67-69, 77-79, 84, 87-89. In fact, she specifically stated that her interpretation of the electropherogram differed from that of Cellmark at one locus, where Cellmark reported a possible allele that Lambatos opined was actually instrument-generated "background noise." J.A. 79.

To the extent Lambatos discussed Cellmark's work in delivering her opinion, she did so only for the non-hearsay purpose of explaining the basis of her expert opinion, as *Crawford* permits. See, *e.g.*, J.A. 49-58 (testifying that she was assigned to this case and that after samples were sent to Cellmark and computer database match was generated, she compared profiles and calculated statistical probability of the profile).

And, in any event, most of Lambatos's statements about work that Cellmark performed were elicited by defense counsel on cross-examination, and are therefore immaterial for Confrontation Clause purposes. See *Diaz v. United States*, 223 U.S. 442, 452-453 (1912) (accused waived right of confrontation as to testimony he put into evidence); see, *e.g.*, J.A. 58-59 (directing Lambatos to her own report, Defense Exhibit 6, as indicating that Cellmark tested vaginal swabs and victim standard); J.A. 61 (directing Lambatos to Cellmark's report dated Feb. 15, 2001).[5] In fact, petitioner's trial counsel used cross-examination and closing argument precisely as the Constitution contemplates under these circumstances—he had Lambatos concede that she was not present for Cellmark's testing, and he used her inability to vouch for the accuracy of this testing to attack the weight of her opinion. See J.A. 60-61, 63, 73-74, 86 (cross-examination); R. JJJ141-144 (closing argument).

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5. Although not admitted into evidence, the record demonstrates that trial counsel had full access to the Cellmark report. R. FFF3 (prosecutor and defense counsel inform trial judge that discovery was complete); Ill. Sup. Ct. R. 417 (mandating disclosure of "all relevant materials" related to DNA evidence).

In short, this case bears no resemblance to those in which the prosecution called in-court witnesses to summarize the substance of out-of-court conversations or an absent declarant's hearsay was used as evidence of the accused's guilt. See Pet. Br. 15-17 (discussing *Idaho v. Wright*, 497 U.S. 805 (1990), and citing *Moore v. United States*, 429 U.S. 20 (1976); *Ocampo v. Vail*, 649 F.3d 1098 (9th Cir. 2011); *Favre v. Henderson*, 464 F.2d 359 (5th Cir. 1972); and *Ryan v. Miller*, 303 F.3d 231 (2d Cir. 2002)). Indeed, petitioner himself cannot pinpoint what out-of-court statement Lambatos conveyed to the trial court or at what point in her testimony she conveyed it. Pet. Br. 18-19. This is because Lambatos confined her testimony to her own expert analysis and opinions, as the Confrontation Clause requires.

b. Moreover, it is clear that the trial judge, sitting as the factfinder in this case, understood the limited purpose for which he could consider Lambatos's references to Cellmark and that he considered only Lambatos's opinion, not any Cellmark actions, as substantive evidence of petitioner's guilt. Indeed, when the judge ruled on petitioner's motion to strike Lambatos's testimony, he specifically noted that the fact that Cellmark tested the vaginal swabs went to the weight of Lambatos's own testimony. J.A. 94-95; see also R. JJJ151-153 (verdict). Moreover, the state appellate court reviewed the record and concluded that it did "not affirmatively show that the instant trial judge considered anything but competent evidence." J.A. 126 (citing *People v. Schmitt*, 545 N.E.2d 665, 669 (Ill. 1989)). This is consistent with Illinois law, which did not permit the trial court to consider the Cellmark report, or any statements by Lambatos about steps she presumed Cellmark undertook, for their truth.

See *People v. Pasch*, 604 N.E.2d 294, 311 (Ill. 1992) ("While the contents of reports relied upon by experts would clearly be inadmissible as hearsay if offered for the truth of the matter asserted, an expert may disclose the underlying facts and conclusions for the limited purpose of explaining the basis for his opinion.") (emphasis omitted).

Federal law is to the same effect, for although the rules of evidence allow an expert to consider materials beyond her firsthand knowledge, they have never allowed an expert witness to serve as a mere conduit for "hearsay"—testimonial or not. See Fed. R. Evid. 703 Notes of Advisory Committee on 2000 amendments (noting that underlying information is not admissible simply because expert's opinion is admitted); *United States v. Mejia*, 545 F.3d 179, 197 (2d Cir. 2008). If the expert witness is called upon to disclose or discuss the basis for her opinions, either on direct or cross-examination, she may do so only for that limited purpose. See Fed. R. Evid. 703 Notes of Advisory Committee on 2000 amendments[6]; *Wilson v. Merrell Dow Pharm. Inc.*, 893 F.2d 1149, 1153 (10th Cir. 1990) (applying rule of limited admissibility before 2000 amendment to Rule 703). And a limiting instruction, if requested, may be used to ensure that juries do not consider an expert's testimony about the basis of her opinion as substantive

6. The 2000 amendment to Federal Rule of Evidence 703 instructs federal courts not to permit disclosure of otherwise inadmissible facts or data relied upon by an expert witness "unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." Fed. R. Evid. 703 (2000). When the court permits the expert witness to disclose underlying facts or data, they are admitted for the same limited purpose provided by Illinois's rule.

evidence. See Fed. R. Evid. 703 Notes of Advisory Committee on 2000 amendments (noting that appropriate limiting instruction must be given upon request); see also *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) ("juries are presumed to follow their instructions").

Finally, as this Court recognized in *Bryant*, trial courts can determine in the first instance whether "any transition from nontestimonial to testimonial occurs" in the context of statements made to police officers following an emergency. 131 S. Ct at 1159. The same goes for in-court expert opinion testimony; trial (and reviewing) courts can determine whether a testifying expert functions as a true expert or a mere conduit for out-of-court testimonial material.

3. Nor is there anything to petitioner's claim that—even without parroting out-of-court declarations for their truth—every expert implicitly vouches for the accuracy of the underlying data by using it in her analysis. Relying on scholarly writings, petitioner submits that an expert's discussion of the basis of her opinion is necessarily offered for its truth because the evidentiary value of the expert's opinion depends on the accuracy of the underlying source material. Pet. Br. 20-24. But this argument proves too much, for it would run afoul of this Court's recent admonition that not everyone "whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." *Melendez-Diaz*, 129 S. Ct. at 2532 n.1. Petitioner's theory—that an expert vouches for the accuracy and pedigree of the underlying data merely by testifying—would require precisely what *Melendez-Diaz* says is unnecessary: calling

each person involved in the chain to testify to custody, authenticity, and testing accuracy in every case. In any event, as explained above, Illinois law did not permit the trial judge to consider for its truth anything Lambatos said (or implied) about Cellmark's work in this case, and we assume that judges follow the law, just as we assume that juries abide by limiting instructions directing them not to consider background evidence for its truth. See *supra* pp. 23-24; *Lambrix v. Singletary*, 520 U.S. 518, 531 n.4 (1997) (trial judge presumed to know law) (citing *Walton v. Arizona*, 497 U.S. 639, 653 (1990)).

II. CELLMARK'S MACHINE-GENERATED ELECTROPHEROGRAM, PRODUCED FOR THE PURPOSE OF FACILITATING FURTHER FORENSIC ANALYSIS, WAS NOT A TESTIMONIAL STATEMENT SUBJECT TO THE CONFRONTATION CLAUSE.

Even if the Court concludes that Lambatos testified to hearsay, the judgment below should be affirmed on the independent ground that such hearsay was not testimonial. In *Crawford*, this Court established that a person becomes a "witness against" the accused under the Confrontation Clause when his out-of-court "testimonial" statements are admitted against the defendant for the truth of the matter asserted. 541 U.S. at 68-69; see also *White*, 502 U.S. at 365 (Thomas, J., concurring in part and concurring in judgment) ("The federal constitutional right of confrontation extends to any witness who actually testifies at trial, but the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.").

Here, no such formalized, extrajudicial statements were offered against petitioner at his trial. Instead, Lambatos identified the basis of her expert opinion, a machine-generated electropherogram, which was created by Cellmark for the purpose of facilitating further forensic analysis and not as a substitute for live testimony. Thus, petitioner's confrontation rights were fully satisfied when he was provided the opportunity to cross-examine the prosecution's expert witness at trial and thereby test the "honesty, proficiency, and methodology" of her testimony. *Melendez-Diaz*, 129 S. Ct. at 2538.

A. Machine-Generated Results, By Themselves, Are Not Testimonial Statements.

The term "witnesses" in the Confrontation Clause refers to those who "'bear testimony.'" *Crawford*, 541 U.S. at 51 (quoting 2 N. Webster, An American Dictionary of the English Language (1828)). In turn, this Court explained, "testimony" is typically "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Ibid.* Because solemnity is a human trait, and because a defendant may not cross-examine anyone other than a human being, the "witnesses" to whom the Confrontation Clause refers must logically be human witnesses. See, *e.g.*, *United States v. Lamons*, 532 F.3d 1251, 1260-1261, 1263 (11th Cir. 2008) ("In light of the constitutional text and the historical focus of the Confrontation Clause, we are persuaded that the witnesses with whom the Confrontation Clause is concerned are *human* witnesses, and that the evidence challenged in this appeal[,]" a compact disc of data from telephone calls and a call report created from the compact disc, "does not contain the statements of human witnesses") (emphasis in original).

Here, Lambatos testified that she based her expert opinion on her independent interpretation of the DNA profile data, as represented in the machine-generated electropherogram received from Cellmark. See, *e.g.*, J.A. 62, 67, 68, 78, 81, 84. An electropherogram resembles a line graph, with peaks representing the lengths of the DNA strands at the STR locations. J.A. 147-148. It is the product of electrophoresis and is generated by a laboratory instrument in the final step of DNA testing. See John M. Butler, *Fundamentals of Forensic DNA Typing* 196-200 (electrophoresis stage performed by specialized instrument) (Academic Press 2010). While there is some level of human involvement in producing an electropherogram, the same is true of any machine-generated data. This fact alone, however, does not transform such data into a human statement subject to the Confrontation Clause. See, *e.g.*, *United States v. Washington*, 498 F.3d 225, 229-231 (4th Cir.) (printed graph from chromatograph not "statement" and machine not "declarant"), cert. denied, 129 S. Ct. 2856 (2009); *United States v. Moon*, 512 F.3d 359, 361-362 (7th Cir.) (output of infrared spectrometer and gas chromatograph not "statements"), cert. denied, 129 S. Ct. 39 (2008).

When the laboratory employee's role is limited to actions such as adding chemicals to a sample, mixing chemicals, and placing samples into and running instruments, the machine output at the end of the testing process contains no assertion by the employee and is, therefore, not that employee's statement for Confrontation Clause purposes. See J. Butler, *supra,* at 99-106 (discussing steps taken during extraction); *id.* at 114-121 (outlining quantitation procedures); *id.* at 125-142 (describing amplification procedures); *id.* at 175-203 (explaining electrophoresis stage).

And here, unlike in either *Melendez-Diaz* or *Bullcoming*, the prosecution introduced no statements from Cellmark either explaining the significance of the machine-generated electropherogram or documenting or certifying the procedures used in generating the data. See *Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring in part). Instead, at most, the prosecution simply introduced the "raw data generated by a machine in conjunction with the testimony of an expert witness." *Ibid.*

B. Forensic Reports Produced Not For The Primary Purpose Of Creating Evidence For Use At Trial, But Rather For The Purpose Of Facilitating Further Forensic Analysis, Are Not Testimonial Statements.

1. Cellmark's report was not produced for the "primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, 131 S.Ct. at 1155. As such, it was not a testimonial statement subject to the Confrontation Clause. See *ibid.*

Melendez-Diaz held that the sworn reports of state forensic analysts certifying that a tested substance was cocaine were testimonial. See 129 S. Ct. at 2532. This Court reasoned that the certificates were "quite plainly affidavits" and, therefore, "fall within the 'core class of testimonial statements'" described in *Crawford*. *Melendez-Diaz*, 129 S. Ct. at 2531-2532; see also *id.* at 2543 (Thomas, J., concurring). The certificates also had a clear evidentiary purpose because, under Massachusetts law, they were admissible as prima facie evidence of the composition, quality, and net weight of the narcotic analyzed. *Id.* at 2532. Likewise, in *Bullcoming,* this Court

found that a "report of blood alcohol analysis" certifying the results of tests performed on the defendant's blood resembled the documents at issue in *Melendez-Diaz* in "all material respects" and, thus, were testimonial. *Bullcoming*, 131 S. Ct. at 2717. In so holding, the Court noted that Bullcoming's blood was provided to the lab to assist in a police investigation and that the report contained a legend referring to the municipal and magistrate courts' rules providing for the admission of certified blood-alcohol analyses in trials. *Ibid.* The Court also found that the formalities attending the certificate were "more than adequate" to qualify the analyst's assertions in the document as testimonial. *Ibid.*; see also *id.* at 2721 (Sotomayor, J., concurring in part) (formality derived from fact that non-testifying analyst signed his name and "certified" results and statements on form).

Just as "not all those questioned by the police are witnesses and not all 'interrogations by law enforcement officers' * * * are subject to the Confrontation Clause[,]" *Bryant*, 131 S. Ct. at 1153 (quoting *Crawford*, 541 U.S. at 53), not all forensic reports implicate the confrontation right. Unlike the forensic reports in *Melendez-Diaz* and *Bullcoming*, Cellmark's report here was not produced for the primary purpose of creating evidence for use at trial. Rather, it was produced for the primary purpose of facilitating further forensic analysis.

Aside from the fact that Cellmark's report was not admitted into evidence at petitioner's trial, its report differs from the documents at issue in *Melendez-Diaz* and *Bullcoming* in several crucial respects. The only thing that is clear on this record is that Cellmark's report included (a) results of DNA laboratory tests in the form of

an electropherogram, and (b) a report on those results by a laboratory employee or employees. Neither category of information constitutes a formal certification akin to an affidavit, deposition, or prior testimony. While formality is not the "sole touchstone" of the testimonial inquiry, the complete absence of any formality surrounding the documents in this case, such as a certification or oath, strongly indicates that Cellmark's report was not created with a primary purpose of being used at trial. See *Bryant*, 131 S. Ct. at 1160; *Bullcoming*, 131 S. Ct. at 2721 (Sotomayor, J., concurring in part); cf. *Davis*, 547 U.S. at 826 (Confrontation Clause cannot "readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition") (emphasis in original).

Cellmark's report is further distinguishable from the certificates in *Melendez-Diaz* and *Bullcoming*, where the sole purpose of those certificates was to create evidence that could be admitted at trial to prove an element of the charged criminal offense. Indeed, in *Melendez-Diaz* and *Bullcoming*, the certificates contained citations to the court rules or statutory provisions that allowed them to serve as substantive evidence in a criminal trial, and thus had a clear evidentiary purpose that the certifying analyst understood when he completed them. In contrast, Cellmark's report here was an informal report that transmitted and summarized the results of DNA tests done at one laboratory to scientists at another laboratory for the purpose of facilitating further forensic analysis. It neither suggested nor served any direct evidentiary purpose.

The fact that Cellmark's report was comprised of documents that could only be understood by other scientists

further demonstrates that its primary purpose was not to create evidence for use at trial. See *Bryant*, 131 S. Ct. at 1160-1161 (primary purpose of police interrogation, in many instances, may be most readily ascertained by looking at the "contents" of questions and answers). The absent analyst's certification that Bullcoming's blood alcohol concentration was 0.21, which was above the legal limit, and the analyst's conclusion that the items seized by the police in *Melendez-Diaz* contained cocaine, could be understood by the average juror or judge and required no further explanation or interpretation before they could serve a meaningful evidentiary purpose. In contrast, an electropherogram and a chart listing alleles at thirteen STR locations would have been meaningless to the fact-finder in this case. Nor could the presence of a male DNA profile on the electropherogram prove an element of the charged criminal offense. The fact that Cellmark's report could not serve as an alternative to trial testimony strongly suggests that it was not made with that purpose in mind.

2. Petitioner submits that "Cellmark's forensic report is directly analogous to the forensic reports in *Melendez-Diaz* and *Bullcoming*" because it was prepared "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." Pet. Br. 14. To be sure, Cellmark completed DNA testing on the samples in this case at the request of the ISP Lab,[7] and, during

7. While certain Cellmark employees were undoubtedly aware that some of the samples they tested in their laboratory during 2000-2001 were obtained from the ISP Lab, it is unclear whether the scientists who performed DNA tests on samples or reported those test results knew anything more about the case they were processing than the case numbers of the samples they tested.

cross-examination, Lambatos answered affirmatively when asked whether "the reports that you prepared in this case and all reports in this case were prepared for this criminal investigation" and "for the purpose of the eventual litigation here[.]" J.A. 82. But Cellmark was not tasked with identifying an "offender" in this case, contrary to petitioner's suggestion. Cellmark did not process any suspect's blood sample or compare their test results to any male DNA profiles—Cellmark simply extracted DNA profiles from the samples it received, deduced a profile for the male DNA, and reported its results for the purpose of facilitating further forensic analysis at the ISP Lab.

In sum, on this record it cannot be said that the documents in Cellmark's report were generated with a primary purpose of creating an out-of-court substitute for trial testimony. Thus, contrary to petitioner's contention, Cellmark employees were never "witnesses against him" for Confrontation Clause purposes.

III. IF THE TRIAL COURT ERRED IN ADMITTING ANY PART OF LAMBATOS'S TESTIMONY, THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

Even if error, the admission of any part of Lambatos's testimony was harmless beyond a reasonable doubt. See *Bullcoming*, 131 S. Ct. at 2719 n.11 (Confrontation Clause errors are subject to harmless error inquiry); *Delaware v. Van Arsdall*, 475 U.S. 673, 683-684 (1986) (same). Lambatos's testimony was independent of the victim's credible and unequivocal identification of petitioner in a line-up and again at trial as the individual who attacked and sexually assaulted her. R. III104, III120-121 (victim's

in-court identification of petitioner and testimony about line-up identification); R. JJJ112-118 (Chicago Police Detective Robert McVicker's testimony regarding line-up). Petitioner was found guilty following a bench trial, where the trial judge specifically discussed the strength of the victim's identifications and the credibility of her testimony, and where the judge's comments about the DNA evidence demonstrate that he was not swayed by any perceived infallibility of DNA analysis or evidence. R. JJJ149-154 (verdict); see also J.A. 184-185 (wherein concurring Justices of the Illinois Supreme Court found any foundational error in admission of Lambatos's testimony harmless). Thus, if this Court concludes that the admission of Lambatos's testimony, in whole or in part, violated the Confrontation Clause, any error was harmless beyond a reasonable doubt. The judgment of the Supreme Court of Illinois, therefore, should be affirmed.

CONCLUSION

The decision of the Supreme Court of Illinois should be affirmed.

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