

IN THE
Supreme Court of the United States

SANDY WILLIAMS,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

**BRIEF OF *AMICI CURIAE* NEW YORK COUNTY
DISTRICT ATTORNEY'S OFFICE AND THE
NEW YORK CITY OFFICE OF THE CHIEF MEDICAL
EXAMINER IN SUPPORT OF 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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INTEREST OF *AMICI CURIAE*¹

The New York County District Attorney's Office ("Manhattan DA's Office" or "Office") prosecutes crimes that occur in the borough of Manhattan and handles more than 100,000 criminal cases each year. It has a tradition of excellence and non-partisanship and has long been considered one of the nation's preeminent prosecutor's offices.

The Manhattan DA's Office has been a pioneer in the use of advanced forensic sciences, and DNA testing has become the single most important forensic tool available to it for solving, prosecuting, and preventing crime. The Office began using DNA evidence to prosecute criminal cases in 1986. Fourteen years later, the Office developed a ground-breaking initiative, the DNA Cold Case Project, through which thousands of previously-untested sexual assault evidence kits were analyzed. With the DNA profiles generated through this project, the Office has successfully prosecuted many long-dormant sexual assaults. Last year, under the leadership of District Attorney Cyrus R. Vance, the Office created the Forensic Sciences/Cold Case Unit, which is reviewing each of the 2,350 unsolved homicides committed in Manhattan over the last 30 years to determine whether those cases can be solved using state-of-the-art DNA testing. Just as importantly, the Office has used DNA testing to exonerate individuals wrongly suspected or convicted of committing crimes.

1. Both parties have filed letters with the Court consenting to the filing of *amicus curiae* briefs in support of either or neither party. No counsel for any party authored any part of this brief, and no person or entity other than *amici* has made a monetary contribution to the preparation or submission of this brief.

The New York City Office of Chief Medical Examiner (“OCME”) is part of New York City’s Department of Health and Mental Hygiene. As part of its responsibilities, OCME performs autopsies on those who die in New York City from other than natural causes. Since 1990, it has also included a Department of Forensic Biology, which conducts forensic DNA testing in New York City cases. Under the direction of Dr. Charles S. Hirsch, the OCME performs standard STR genotyping, high sensitivity DNA testing, Y-chromosome STR typing, and mitochondrial DNA sequencing. Testing is applied in nearly every category of major crime: homicide and attempted homicide, sexual assault, felony assault, property crimes, and weapon possession. In 2010 alone, the OCME performed DNA testing on 46,415 pieces of evidence in 10,555 cases, and an OCME analyst testified in 463 of those cases. The OCME continues to perform DNA analysis to help identify victims of the September 11, 2001 World Trade Center attack, as well as daily cases of missing persons and unidentified human remains.

Amici have a strong interest in the development of evidentiary rules that ensure the reliability of DNA evidence used in criminal prosecutions. *Amici* are acutely concerned, however, that this Court not impose unnecessary conditions, under the auspices of the Confrontation Clause, that could limit the use of DNA analysis as a tool for convicting the guilty and exonerating the innocent.

SUMMARY OF ARGUMENT

Forensic DNA analysis brings extraordinary accuracy to identification of the guilty and exoneration of the innocent. The “all-technicians-must-testify” rule proposed by petitioner, however, would have dire consequences for the use of DNA testing in criminal cases, given that each case involves the participation of many technicians – in New York’s OCME laboratory, at least 12. Nor would such a rule advance the search for the truth, especially because DNA testing is highly reliable and exceedingly unlikely to result in a wrongful conviction. Having one expert testify who has reviewed the case file and compared the DNA profiles at issue provides ample opportunity for defense counsel to expose any error or bias in the testing process. Finally, the profound, and adverse, effects of petitioner’s proposed rule would reach beyond DNA testing and could make it impossible to introduce autopsy results in even the most run-of-the-mill homicide case.

ARGUMENT

I. DNA TESTING ALLOWS THE CRIMINAL JUSTICE SYSTEM TO IDENTIFY THE GUILTY AND EXONERATE THE INNOCENT

Forensic DNA analysis has revolutionized the practice of criminal law. DNA testing can bring certainty to identifications of the guilty and exonerate the innocent, some of whom have spent decades in prison. Over the past 20 years, as advances have led to more efficient and more sensitive testing methods, DNA testing has become an essential component of criminal investigations and prosecutions. DNA results that once took months can

now be obtained in a day,² allowing law enforcement to identify – or exclude – a suspect shortly after a crime occurs. While analysts once needed a bloodstain the size of a quarter, they can now perform reliable DNA testing on a sample that is the size of a pinhead.³ As a result, many samples that were once too small or degraded to yield a profile can now be analyzed successfully and used to prosecute crimes that occur today, as well as ones that took place years ago.

The establishment of the Combined DNA Index System, or “CODIS,” a computerized system administered by the FBI, has enabled law enforcement to link DNA profiles across jurisdictions. CODIS allows DNA profiles developed in local, state, and federal laboratories – all of which must comply with detailed quality assurance protocols — to be compared.⁴ When DNA profiles from two

2. John Buckleton, et al., *Forensic DNA Evidence Interpretation*, 6-8 (2005).

3. *Id.* at 7.

4. All forensic DNA testing laboratories that are permitted to access CODIS must be accredited and adhere to quality assurance standards promulgated by the FBI, which are appended at A22-A49, *infra*, and can be found at http://www.fbi.gov/about-us/lab/codis/qas_testlabs. Those standards govern, *inter alia*, the organization and management of the laboratory; education, training, and experience requirements for laboratory personnel; the laboratory’s physical facilities and security measures; control of physical evidence; validation of testing methodologies; procedures for analyzing samples, including the reagents and controls that are used in the testing process; equipment calibration and maintenance; documentation of the process used to test each sample handled by the laboratory; technical and administrative review of every case file; proficiency testing of laboratory

crimes committed in different geographic locations match, law enforcement can connect serial crimes. CODIS also includes a databank of convicted offenders. When a crime scene profile matches a convicted offender profile, the identity of the putative perpetrator is known. By making these links, CODIS allows law enforcement officials to conduct real-time investigations more effectively and to solve cold cases that otherwise would remain dormant.

II. AN “ALL-TECHNICIANS-MUST-TESTIFY” RULE WOULD HAVE DIRE CONSEQUENCES FOR THE CRIMINAL JUSTICE SYSTEM

The benefits of forensic DNA analysis – benefits that flow to defendants as well as prosecutors – would be seriously threatened by the “all technicians must testify” rule advanced by petitioner. *See* Pet. Br. at 10-11, 15, 23. The briefs filed by several of petitioner’s *amici* assume that a DNA profile is developed by only *one* analyst. *See* Br. of Innocence Network at 33 (“Lambatos’s comparison of the Cellmark profile to Williams’s profile does not render confrontation of *the* Cellmark analyst moot”) (emphasis added); Br. of D.C. Public Defender Service et al. at 24-25 (“it is essential that the defense be afforded the opportunity to confront *the* lab analyst”)(emphasis added). That assumption – which is critical to understanding how the Court’s decision here will affect the use of DNA in criminal cases — is wrong.

personnel; corrective action that addresses any discrepancies in proficiency tests and casework analysis; internal and external audits of the laboratory; environmental health and safety; and outsourcing of testing to vendor laboratories. Additionally, these procedures must be set forth in a laboratory manual. *See* A29-A30 (Standard 3.1.1).

In fact, Cellmark, like New York City's OCME, employs a process in which *many* analysts are involved in developing a DNA profile from a sample. *See People v. Johnson*, 389 Ill. App. 3d 618, 627 (2009) ("approximately 10 Cellmark analysts were involved in the laboratory work in this case"). As detailed below, in New York City, the number of technicians involved in even the most rudimentary DNA testing for a single case is more than a dozen. Requiring all of those technicians to appear in court for cross-examination would bring forensic work in the laboratory to a halt. Fewer samples would be tested, results would be delayed, and prosecutors would have to forego DNA testing in many cases where it would be dispositive of guilt or innocence.

Forensic DNA analysis involves the comparison of DNA obtained from a crime scene with DNA from a known individual (an "exemplar"). At New York City's OCME, evidence from a crime scene (including any evidence taken directly from a victim's body) and exemplars taken from a suspect are handled separately from the moment they arrive in the lab. Crime scene evidence and suspect exemplars are given different case numbers, and they are analyzed in different sections of the lab. By design, the OCME technicians involved in developing the suspect's DNA profile (his electropherogram) are generally not the same as the technicians who worked on the crime scene sample.

Not only are crime scene evidence and suspect exemplars handled separately, but the laboratory employs a "rotation system" that is designed to maintain high proficiency levels. Under this procedure, each technician performs an assigned task for a week (*e.g.*, DNA extraction)

and then rotates to a different task the next week (*e.g.*, DNA amplification).

At the OCME, the testing of each item involves five distinct stages, each of which is performed by one or more different persons. The first stage is evidence examination, in which a technician (technician 1) examines the sample for biological fluids and takes cuttings for DNA extraction. The second stage is extraction, in which a technician (technician 2) adds chemical reagents to the sample that break open the cells and free up the DNA so it is accessible for testing. The third stage is quantitation, in which a technician (technician 3) measures the amount of DNA that is present in the sample. If there is a sufficient amount of DNA, the testing proceeds to stage four, amplification, in which another technician (technician 4) uses a highly-automated process to target, tag, and copy 16 specific locations (“loci”), thereby raising them to a detectable level. The fifth stage is electrophoresis, or DNA typing, in which two more technicians (technicians 5 and 6) run the amplified DNA through machines that illuminate the tagged areas and separate, label, and display each locus. The result – an electropherogram – is a genetic DNA profile that is ready for comparison. Notably, each technician in stages one through five prepares worksheets contemporaneously with each task that is performed, which enable subsequent reviewers to verify that each step was conducted in accordance with established procedures.⁵

As noted above, each case involves the separate testing of a minimum of two different samples (a crime scene

5. A copy of forms that were completed by OCME technicians in the course of developing a DNA profile are appended at A1-A21.

sample and a suspect exemplar), and each process requires the participation of at least six different technicians. That means that each case will involve at least 12 technicians. Only at the end of these processes does an analyst, who routinely will testify in court about the case, compare the two electropherograms and prepare a report setting forth her conclusions.

More complex cases involve an even greater number of technicians. A recent homicide case helps make the point. Four evidentiary samples were tested: a right shoe stain, a ceiling sample, a wooden handle stain, and blood taken from a New York State Benefit Club Card. Because the evidentiary items arrived in the OCME laboratory at different times, 25 technicians were involved in their testing.

The OCME forensic biology laboratory now has sufficient resources that it does not send samples to other DNA laboratories for analysis, as the Illinois State Police laboratory did in *Williams*. But that was not always so. In 2000, there was a backlog of more than 17,000 untested rape kits in New York City. To address the backlog, the City entered into contracts with three private accredited laboratories – Cellmark, Bode and Genescreen, and scores of previously unidentified offenders were convicted on the basis of the DNA evidence that was produced.⁶ If

6. After the September 11, 2001 attack on the World Trade Center, the OCME laboratory contracted with other accredited laboratories, including Cellmark, to assist it in identifying human remains recovered from the rubble. Based on this testing, the OCME was able to identify the remains of 1,629 people who died in the attack. See A. Baker, *A 9/11 Victim Is Identified by the Medical Examiner*, N.Y. Times, Aug. 23, 2011. In each of these cases, an OCME analyst made the final comparison of DNA profiles

all technicians in these cases were required to testify, the costs and logistical hurdles would make it all but impossible to prosecute them successfully.

Under New York case law, the prosecution is required to call as a witness only the analyst who has compared the electropherograms. See *People v. Brown*, 13 N.Y.3d 332 (2009). If she is unavailable, another analyst can compare the electropherograms and render his independent opinion. The prosecution is *not* required to call the numerous technicians -- 12 in our modest example, but typically more -- on whose work the testifying analyst has reasonably relied in reaching her conclusion. The juror hears one analyst's in-court opinion testimony, subject to cross-examination.

If this Court were to hold that the Confrontation Clause requires the testimony of each technician on whose work the testifying expert reasonably relied in forming her opinion, the effect on DNA testing in New York City would be catastrophic. A defendant could paralyze the OCME laboratory for several days by requiring that all of the technicians who worked on his case appear in court and testify. Worse still, in those instances in which even one of the many technicians was unavailable -- a technician had died, or moved out of state, or was out on leave -- the entire test would have to be redone, assuming that a sample of

developed from the remains with known profiles of the missing. What the analyst did in *Williams* and what OCME analysts did during the backlog period -- compare profiles developed at different accredited laboratories -- is no different than what OCME analysts did after September 11 and what scientists do every day.

sufficient size was available for retesting.⁷ Inevitably, the output of the laboratory would decline, with the untoward consequence that defendants would remain in jail longer before their cases were ready for trial.

At worst, an all-technicians-must-testify rule would force the OCME to reduce the amount of DNA testing it conducts, and force prosecutors to forego forensic DNA analysis in cases where it might be highly probative. In the absence of DNA testing, defendants might well be prosecuted solely on the basis of eyewitness testimony, the reliability of which is often questioned. *See United States v. Wade*, 388 U.S. 218, 229 (1967) (“the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than another other single factor” (internal quotation and citation omitted)). Significantly, over a recent twelve-month period, nearly one in ten suspect profiles tested by the OCME for the Manhattan DA’s Office resulted in an exoneration. Indeed, in a recent “pattern rape” case in Brooklyn, DNA testing exonerated 18 suspects before the nineteenth submission led to a match. No one concerned for innocent individuals suspected of serious crimes should prefer a world in which DNA testing is needlessly curtailed.⁸

7. Since 2008, more than 40 technicians have left the OCME for other jobs, most of which were outside New York.

8. It bears noting that the laboratory to which the Illinois State Police sent the victim’s rape kit for testing is one frequently used by the Innocence Project in exonerating the wrongfully convicted. *See* H. Dao and M. Taylor, *Dispatch From Dallas: Looking Inside the Lab*, Innocence Project Blog, Oct. 23, 2008, available at <http://www.innocenceproject.org> (describing “invigorating . . . tour of [Cellmark] laboratory where many of our actual tests are done”).

If requiring the testimony of each technician would significantly advance the truth-seeking process, then the practical concerns advanced above would give way. But nothing could be less true. The reality is that OCME technicians perform thousands of tests each year and have no memory of any one test. If called to testify, a technician would be able to say “this is what I routinely do on those weeks in which I am assigned this task,” and little more. Cross examination may be a great engine for discovery of truth, but it is unlikely to discover anything of consequence when the witness is a laboratory technician who repeatedly performs the same task on each rotation.

This reality brings to mind the words of Dean Wigmore, arguing in 1923 for what is now the business record exception to the hearsay rule:

Suppose an offer of books representing transactions during several months in a large establishment. In the first place, the employees have in many cases changed and the former ones cannot be found; . . . in the [second] place, even if they could be ascertained, the production of the scores of employees, to attend court and identify in tedious succession the detailed items of transaction would interrupt and derange the work of the establishment, and the evidence would be obtained at a cost practically prohibitory; and finally, the memory of such persons, when summoned, would usually afford little real aid. . . . [T]hus the production on the stand of a regiment of bookkeepers, salesmen, shipping-clerks, teamsters, foremen, or other subordinate employees, should be dispensed with.

E. Morgan, et al., *The Law of Evidence* 62 (1927) (quoting 3 Wigmore, *Evidence* § 1530 (1923)). For similar reasons, the production to the stand of a regiment of DNA technicians whose memory would afford little real aid to the jury should not be required.

Some have suggested that the burdens described above are exaggerated because “defendants ‘regularly . . . stipulate to the admission of the analysis.’” *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2718 (2011) (quoting Br. of Public Defender Service at 20). But if there were an all-technicians-must-testify rule, no competent defense attorney would stipulate until she had assured herself that all of the technicians who worked on the defendant’s case were available to testify. The result would be that technicians would be paraded to court only to be sent back to the laboratory after defense counsel had counted heads. Surely, that prospect should not commend itself to this Court.

III. DNA TESTING IS HIGHLY RELIABLE

If the analyst who testifies has compared the crime scene electropherogram with the defendant’s electropherogram, and is subject to cross-examination, there is virtually no chance that DNA analysis will result in a wrongful conviction. Two reasons support that conclusion. First, all forensic DNA laboratories that participate in CODIS must comply with detailed quality control standards that minimize the potential for mistakes. *See* A22-A49. Second, under discovery rules, defense counsel will have access to the extensive documentation that is prepared in the course of testing. As discussed below, that information is far more effective in elucidating a laboratory’s procedures – and in revealing

the possibility for error – than the opportunity to cross-examine 12 or more technicians about their routine tasks.

Mandatory quality assurance procedures greatly reduce the risk of error and virtually ensure that the laboratory will detect and correct any error that might occur. For example, at every stage of the DNA testing process, control samples are tested alongside evidentiary samples to ensure that laboratory equipment is properly calibrated and the DNA results are reliable. Moreover, each case must go through extensive technical review before results can be released. In the OCME’s laboratory, an analyst examines the notes and data generated during the multi-step process to verify that the laboratory’s procedures have been followed in the case.

Although several of petitioner’s *amici* point to cases where a mistake in DNA testing was made, *see* Br. of Innocence Network at 6-10; Br. of D.C. Public Defender Service et al. at 12-13, the chance of laboratory contamination producing a DNA profile from a crime scene sample that happens to match the defendant’s profile is remote. Such an error could produce an inconclusive result or a false exclusion, but it would not implicate an innocent person.⁹ *See, e.g., Brown*, 13 N.Y.3d at 340-41 (“Any contamination resulting from mishandling the evidence ... would not ... alter the data to form an erroneous DNA profile.”).

9. In its brief, the Innocence Network reports that Illinois “cancelled a DNA-testing contract with one of Cellmark’s competitors, Bode Technology, because Bode had repeatedly failed to find semen on forensic samples.” Br. of Innocence Network at 28. The failure to find semen on samples where it in fact existed is obviously not an error that could lead to the conviction of an innocent person.

Some of the *amicus* briefs raise the spectre of a rogue technician falsifying test results to convict an innocent person. *See* Br. of Innocence Network at 10; Br. of Calif. Public Defenders Ass’n et al. at 16 n.3. For a laboratory organized like the OCME’s lab, that phantom cannot exist. Because it takes 12 technicians to produce the two electropherograms, no one person is in a position to falsify test results and frame a suspect. The documentation that would be needed to effect such a frame would be beyond the capabilities of anyone in any lab.

Importantly, the documentation that is available to defense counsel provides a detailed roadmap of a laboratory’s procedures. Thus, in Illinois, a prosecutor who intends to introduce DNA evidence at trial must provide defense counsel with copies of the case file, which includes, *inter alia*, (i) “all reports, memoranda, notes, phone logs, contamination records, and data relating to the testing performed in the case”; (ii) any “[laboratory] data needed for full evaluation of DNA profiles produced and an opportunity to examine the originals”; (iii) “[c]opies of any records reflecting compliance with quality control guidelines or standards” (iv) proficiency testing results, educational background, curriculum vitae, and job descriptions of personnel involved in testing and analysis of the DNA evidence; and (v) “[r]eports explaining any discrepancies in the testing, observed defects or laboratory errors in the particular case, as well as the reasons for those and the effects thereof.” Ill. Sup. Ct. R. 417. The Manhattan DA’s Office makes much the same material available to defense counsel in its cases.

The nub of petitioner’s claim, it seems, is that the testifying analyst in his case, Sandra Lambatos, could not

explain in detail the procedures of the Cellmark laboratory, where the victim's rape kit was sent. But under Illinois' discovery rule, defense counsel was entitled to receive copies of Cellmark's "laboratory procedure manuals, DNA testing protocols, [and] DNA quality assurance guidelines or standards." Ill. Sup. Ct. R. 417(b)(iv). Had Cellmark's procedures been flawed or unconventional, defense counsel could have asked Ms. Lambatos about them. Indeed, counsel could have offered the Cellmark manual into evidence had he thought it would have aided his cause. Presumably, counsel chose not to exploit what he knew about Cellmark's procedures because there was nothing to exploit.

IV. AN "ALL-TECHNICIANS-MUST-TESTIFY" RULE WOULD HAVE SERIOUS IMPLICATIONS THAT GO BEYOND DNA TESTING

The issue presented in *Williams* is not unique to DNA testing. As noted above, the OCME also performs autopsy examinations, and its examiners regularly testify in homicide cases as to the cause of death. A constitutional rule that would preclude a testifying expert from reasonably relying on information provided by others would wreak havoc in such cases. If the medical examiner who performed the autopsy died or was otherwise unavailable, a rule precluding another examiner from testifying on the basis of the autopsy results would "effectively amount to a statute of limitation on murder." *People v. Hall*, 84 A.D.3d 79, 85 (1st Dept. 2011)(permitting medical examiner who reviewed autopsy results of unavailable examiner to testify that the cause of death was a gunshot wound to the head). Moreover, even when the original examiner is available, his conclusions are often based on the work of others. For example,

it is commonplace for a testifying examiner to rely on the results of toxicology tests performed by others in reaching his conclusion as to the cause of death. In such circumstances, New York, like Illinois, does not require the prosecution to call the toxicologist to the stand. *See People v. Lovejoy*, 235 Ill. 2d 97, 144 (2009).

A well-known case underscores the burdens that would be imposed by an all-technicians-must-testify rule. A woman was charged with criminally negligent homicide for the starvation death of her son. *See* N. Bernstein, *Bronx Woman Convicted in Starving of Her Breast-Fed Son*, N.Y. Times, May 20, 1999. To establish cause of death (and exclude other causes), the OCME examiner relied upon the testing results of many different technicians at different labs: technicians from NeoGen Screening who performed metabolic testing, technicians from Bronx Lebanon Hospital who performed microbiological testing, and technicians from the OCME laboratory who performed toxicology tests. At trial, the OCME examiner was permitted to draw on all of those test results to explain how the child died.¹⁰

10. In his *amicus* brief, Professor Friedman suggests that a testifying expert can rely on the work of others “without raising a Confrontation Clause problem, unless [she has] announced gratuitously that she was [seeking assistance] for prosecutorial purposes.” Br. of Richard D. Friedman at 15-16. In the example above, presumably what this means is that the OCME examiner could rely on results from the NeoGen Screening (and the NeoGen technician would not need to be called as a witness) as long as the OCME examiner did not tell the NeoGen technician that the testing was for a criminal case. But is it really necessary for one expert (the OCME examiner) to hide her purpose from another (the NeoGen technician)? What if the second expert discerns that a criminal investigation is afoot – for example, by looking at the return address on an email or envelope? And is a defendant entitled

In these autopsy cases, like in DNA cases, the prosecution is obliged to call an expert witness to render her opinion and face the rigors of cross-examination. New York law does not permit an expert's report to be presented without an expert on the stand. *Cf. Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009). Nor does it permit the in-court expert merely to report the conclusion of another. *Cf. Bullcoming*, 131 S.Ct. at 2716 (Razatos did not testify to "any 'independent opinion' concerning Bullcoming's BAC"). It does, however, permit an expert to render an opinion that is based on the work of others if an expert in the field would reasonably rely on such information in forming an opinion. *Cf. Fed. R. Evid. 703*. That approach ensures that the jury will hear reliable scientific testimony without the crippling consequences that would ensue were this Court to adopt petitioner's "all-technicians-must-testify" rule.

to a hearing to probe the second expert's knowledge? Merely to pose these questions is to appreciate that Professor Friedman's position should not be the rule.

CONCLUSION

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

Respectfully submitted,

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