No. 10-8505

In The
Supreme Court of the United States

SANDY WILLIAMS,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Lambatos's trial testimony conveyed the substance of testimonial statements contained in Cellmark's forensic report in violation of Williams's right to confrontation.

A. Lambatos's trial testimony clearly conveyed Cellmark's testimonial statements to the trier of fact.

The United States asserts that Williams "implicitly acknowledges that Lambatos's direct testimony did not repeat anything Cellmark said" (U.S. Br. 31) (citation omitted), and the State claims that Williams cannot "pinpoint" what statement by Cellmark Lambatos conveyed to the trier of fact. Resp. Br. 22. Both claims are false. As Williams set forth in his brief, Lambatos conveyed to the trier of fact through her direct testimony that Cellmark conducted the DNA analysis on the complainant's vaginal swabs and that Cellmark reported a male DNA profile found on the swabs. Pet. Br. 18-19. After establishing that a vaginal swab and blood standard from the complainant had been sent to Cellmark, the prosecution asked the following question:

> [Prosecutor]: Was there a computer match generated of the male DNA profile found in the semen from the vaginal swabs of [L. J.] to a male DNA profile that had been identified as having originated from Sandy Williams?
>
> [Lambatos]: Yes, there was.

JA 51-56. Lambatos took no part in and had no personal knowledge of the DNA analysis conducted on the samples in this case. JA 59-61. Her belief that the profile she compared with Williams's profile was the profile of the male donor of the sperm found on the vaginal swabs was based upon what Cellmark had represented in its report. Lambatos's testimony therefore conveyed Cellmark's statement that the complainant's vaginal swab contained a male DNA profile which, as indicated by a subsequent comparison, matched Williams's DNA profile. JA 49-56. Cellmark's statement was a critical aspect of Lambatos's testimony because without it, Lambatos's opinion regarding the matching profiles would not have linked Williams's to the crime.[1]

B. Cellmark's testimonial statements were presented to establish as true that the profile Lambatos compared with Williams's profile came from the complainant's vaginal swab.

The State and its *amici* invoke the rules of evidence governing expert witnesses to argue that there was no Confrontation Clause violation because Lambatos testified to her own independent opinion, and that Cellmark's statements were introduced for the limited purpose of assisting the trier of fact in

[1] Neither the State nor the United States contend an out-of-court witness's statement must be presented verbatim in order for the Confrontation Clause to be implicated.

assessing the value of that opinion, not for their truth. Resp. Br. 11-21; U.S. Br. 12-26; Br. of National District Attorneys Association *et al.* ("NDAA") 9-15; Br. of Ohio *et al.* ("Ohio") 9-13. The State and the United States further argue that it must be presumed that the trial judge did not consider for their truth any of Cellmark's out-of-court statements. Resp. Br. 22-25; U.S. Br. 19-21. Finally, the United States contends that the prosecution established the link between the two profiles through circumstantial evidence. U.S. Br. 28-33. These arguments all fail as they are premised on a misapprehension of the facts and based upon faulty logic.

1. Lambatos's opinion that Williams's DNA profile matched the male DNA profile Cellmark deduced from the complainant's vaginal swab was in no way independent of Cellmark's work.

The State contends that Lambatos's opinion was totally independent of Cellmark's work because she based her opinion on her review of the machine-generated data depicted in an electropherogram she received from Cellmark. Resp. Br. 20, 26. This argument is refuted by Lambatos's own testimony. Lambatos did not perform any of the testing on the samples, and her opinion was based upon the testing performed by Cellmark. JA 58-59 ("Q: And you based your testimony on testing that was done by that other lab, correct? A: Correct."). She repeatedly stated that it was the male profile reported by Cellmark that she compared with Williams's profile, explicitly stating

that "after [Cellmark] made their deduced male donor profile, that was put into the data base and then it was generated, the match was generated." JA 61, 65, 78. Even the Illinois Supreme Court recognized that Lambatos relied on the profile deduced by Cellmark to conduct the match. JA 167. The United States also acknowledges this fact. U.S. Br. 11 ("The State's DNA expert opined that the DNA profile from petitioner's blood matched the male DNA profile provided by Cellmark.").

Moreover, Lambatos would not have been able to link Williams to the sperm found on the vaginal swab had she relied solely on the raw output of the genetic analyzer. An electropherogram is a graph plotting the output of the genetic analyzer's fluorescence detectors as a function of time. John M. Butler, *Fundamentals of Forensic DNA Typing* 183, 206 (2010). Accordingly, the statements in Cellmark's report indicating what sample was analyzed to produce the deduced male profile were not revealed in the raw output of the machine. *See Bullcoming v. New Mexico*, 564 U.S. ___, 131 S. Ct. 2705, 2714 (2011) (analyst's statements "that the forensic report number and the sample number 'correspond[ed],' and that he performed on Bullcoming's sample a particular test . . . [were] not revealed in raw, machine-produced data"). Those statements were human-made representations regarding past events and human actions, and were, therefore, "meet for cross-examination." *Bullcoming*, 131 S. Ct. at 2714.

Additionally, deducing the male profile involved more than just looking at the one electropherogram Lambatos received. Lambatos testified that she received an electropherogram only for the E2 fraction of the vaginal swab. JA 61, 69. Because Cellmark was not able to completely separate the sperm cells from the complainant's epithelial cells, the E2 fraction contained DNA from both the complainant and the donor of the sperm. JA 67-68. Lambatos stated that when interpreting such a mixed profile, the male profile is deciphered by looking at the mixed "profile and *all the information that we are given*." JA 83-84 (emphasis added). She explained that in order to deduce which alleles possibly came from the male donor, and, thus, deduce the donor's DNA profile, the mixture of alleles in the E2 fraction were compared with the alleles present in the complainant's profile. JA 77, 83-84. However, Lambatos only received Cellmark's interpretation of the alleles present in the complainant's DNA, and not an electropherogram of the complainant's DNA. JA 62, 69. Even if Lambatos reviewed the information she received from Cellmark and agreed with Cellmark's conclusions, she still relied on the correctness of Cellmark's interpretations – interpretations that the State's own *amici* (Br. of Ohio 14) concede are testimonial statements. This is not a case of an expert giving an opinion based solely on machine-generated data.

The recent decision in *Derr v. State*, ___ A.3d ___, 2011 WL 4483937 (Md. Sept. 29, 2011), is instructive on this point. There, as here, the prosecution presented DNA evidence against the defendant through

the live testimony of an expert who did not take part in the actual testing but who gave her opinion that the defendant's profile matched the profile deduced from semen recovered from the victim. *Id.* at *2-3. The Maryland Court of Appeals held that this testimony violated the defendant's right to confrontation. *Id*. at *18-20. Relying on this Court's holding in *Crawford v. Washington*, 541 U.S. 36 (2004); *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, 129 S. Ct. 2527 (2009), and *Bullcoming*, the court concluded that while under Maryland's version of Federal Rule of Evidence (FRE) 703 an expert may base her opinion on inadmissible evidence, the Confrontation Clause prohibits the introduction of the testimonial statements of other analysts through the testimony of an expert who did not observe or participate in the testing. *Id.* at *5-14. Although the expert stated that she interpreted the testing in coming to her opinion, the court held that because the expert's opinion relied on the lab work and opinions of others, she did not testify simply to her own independent conclusions. *Id.* at *18. According to the court, "although [the expert] used the data to inform her testimony, the data itself was both substantive and testimonial." *Id.* at *15.

Because Lambatos's opinion depended on the work and opinions of Cellmark's analysts, her testimony was not limited to merely her own independent conclusions. *See Derr*, 2011 WL 4483937, at *17-19. In testifying that the profile she compared with Williams's profile had been deduced by Cellmark through DNA analysis of the complainant's vaginal

swab, rather than voicing her own independent opinion, Lambatos acted as a conduit for Cellmark's testimonial statements. *United States v. Meija*, 545 F.3d 179, 198-99 (2d Cir. 2008) (Confrontation Clause violated where expert relayed out-of-court testimonial statements to trier of fact); *Derr*, 2011 WL 4483937, at *14.

That Lambatos also provided her opinion that the two profiles matched does not alter this analysis. The fact that the profile Lambatos compared to Williams's was derived from the vaginal swab was a fact the prosecution had to establish as true in order for DNA evidence to link Williams to the crime. Had the prosecution established that fact by introducing Cellmark's written report into evidence, it would clearly be a violation of Williams's confrontation right. *See Bullcoming*, 131 S. Ct. at 2710; *Melendez-Diaz*, 129 S. Ct. 2532. There is no principled reason why it should be any different when, as here, the fact is established by presenting the substance of Cellmark's report through the testimony of an in-court witness. In each case, the same testimonial statements are coming in for the same evidentiary purpose.

2. Cellmark's statements were presented for their truth where the value of Lambatos's opinion depended on the truth of the statements.

Williams has explained that because Cellmark's statements supported Lambatos's opinion only to the extent they were true, there is no meaningful

distinction between considering the statements to assess the value of Lambatos's opinion and considering them for their truth. Pet. Br. 20-24; Br. of Friedman 11-12; *see, e.g.*, *Derr*, 2011 WL 4483937, at *14; *New York v. Goldstein*, 843 N.E.2d 727, 732-33 (N.Y. 2005). Nevertheless, the State and its *amici* argue that the introduction of Cellmark's statements did not implicate the Confrontation Clause because, under the rules of evidence governing expert witnesses, the statements were introduced not for their truth, but for the limited purpose of assisting the trier of fact in assessing the value of Lambatos's testimony. Resp. Br. 13; U.S. Br. 16-17, 32; Br. of NDAA 9-15; Br. of Ohio 9-13. Not surprisingly, they offer no explanation of how Cellmark's statements could have so assisted the trier of fact without the trier of fact considering whether the statements were true.

If Cellmark's statements were introduced for reasons other than their truth, whether they were true or not would have no consequence for the purpose for which they were introduced – to assist in the evaluation of Lambatos's opinion. *Cf. Tennessee v. Street*, 471 U.S. 409, 413-14 (1985) (co-defendant's confession introduced to impeach the defendant was not admitted for its truth, and therefore, did not violate defendant's confrontation right where it impeached the defendant even when considered untrue by the trier of fact). Obviously, that is not the case here. Had Lambatos admitted that the profile she compared with Williams's profile was not the profile of the male donor of the sperm found on the vaginal swabs, it

would be beyond question that Lambatos's opinion would have no value.

a. The trial judge considered Cellmark's statements for their truth.

The State and the United States contend that because Illinois evidentiary law instructs that the inadmissible facts and data an expert witness discloses to explain the basis of her opinion are to be considered only in assessing the value of the expert's opinion, and not for their truth, the trial court in this case must not have considered Cellmark's statements for their truth. Resp. Br. 22; U.S. Br. 20. This argument is predicated on the false premise that the trier of fact could have considered Cellmark's statements in assessing the value of Lambatos's opinion without also considering whether the statements were true. In any event, the record demonstrates that the trial judge did consider Cellmark's statements for their truth.

Illinois evidentiary law does not absolutely prohibit the trier of fact from considering the otherwise inadmissible basis evidence disclosed by an expert witness; rather, the law allows, and even expects, the trier of fact to consider such evidence in assessing the value of the expert's testimony. *People v. Lovejoy*, 235 Ill. 2d 97, 143, 919 N.E.2d 843, 867 (2009) (allowing an expert to disclose the facts and conclusions underlying his opinion "will undoubtedly aid the jury in

assessing the value of his opinion").[2] Indeed, both the State and the United States acknowledge that the trial judge in this case did in fact consider Cellmark's statements in assessing the value of Lambatos's opinion. Resp. Br. 22; U.S. Br. 32. Because Cellmark's statements supported Lambatos's opinion only to the extent they were true, there is no meaningful distinction between considering the statements to assess the value of Lambatos's opinion and considering them for their truth. By considering Cellmark's statements to assess the value of Lambatos's opinion, the trial judge had to consider them for their truth.

The United States asserts that the trial court relied on circumstantial evidence, rather than on Cellmark's out-of-court statements, to establish the link between the profile Lambatos matched to Williams's profile and the complainant's vaginal swab. U.S. Br. 28-33. Even assuming that in some cases the prosecution could rely on such circumstantial evidence, that

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[2] Throughout its brief, the United States refers to that fact that under FRE 703 "[f]acts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference 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, in support of its claim that the trial court in this case must not have considered Cellmark's statements. U.S. Br. 10, 16, 27. Illinois, however, has not adopted that language, and therefore, an expert is free to disclose the inadmissible facts she relied upon without the court first conducting a balancing of their probative value and prejudicial effect. *Lovejoy*, 235 Ill. 2d at 143-44, 919 N.E.2d at 869; Ill. R. Evid. 703 (2011).

is not what happened in this case. Here, the prosecution introduced Cellmark's statements that they deduced a certain DNA profile from the vaginal swabs (JA 51-56), and the record demonstrates that the trial court considered those statements for their truth.

Although a trial judge sitting as trier of fact is presumed to follow the law, that is a rebuttable presumption. *People v. Naylor*, 229 Ill. 2d 584, 603-05, 893 N.E.2d 653, 665-67 (2008) (presumption that trial judge considered only admissible evidence rebutted by the record). Here, the record established that the trial judge did consider Cellmark's statements for their truth. Not once did the trial court indicate he considered circumstantial evidence, rather than Cellmark's statements, in finding that the DNA evidence linked Williams to the crime. Rather, in explaining his finding of guilt, the judge stated:

> [A]ccording to the evidence from the *experts*, [Williams's DNA] is in the semen recovered from the victim's vagina. . . .
>
> . . . [T]here is no misidentification here. This is a match, this is 1 in 8.7 quadrillion, 50 times the population for the last 2000 years. It's an absolute match. . . .
>
> . . . This was a mixture between two people – the victim and the offender. The offender was defendant.

R. JJJ151-52 (emphasis added). It is inconceivable that the judge would not have made *any mention* of the sufficiency of the circumstantial evidence had

that been what he based his findings on. The prosecution also encouraged the judge to consider Cellmark's statements for their truth by arguing in closing statements that "the DNA evidence . . . shows that [Williams's] semen was in her vagina," and by eliciting from Lambatos that Cellmark conducted the DNA analysis on the vaginal swabs, that Cellmark was an accredited lab, and that the procedures Cellmark followed were generally accepted in the scientific community. JA 49, 51, 59, 86; R. JJJ132. Indeed, in articulating his findings, the judge commented that Cellmark was an accredited lab, indicating that he had been persuaded by the prosecution's arguments and that he found Cellmark to be credible. R. JJJ151.

Had the trial judge not considered Cellmark's statements for their truth, it would be expected that at some point he would have indicated as much when the defense challenged Lambatos's reliance on the statements. However, he never did. When overruling defense counsel's objections to Lambatos's direct testimony, the judge never stated that he was not considering Cellmark's statements for their truth. JA 49-58. In addition, in sustaining the objection to defense counsel asking Lambatos "if the results in [Cellmark's] data were wrong, would any matches be wrong?" the court indicated it would not entertain the possibility that Cellmark's statements were wrong because the question required "[s]peculation with no basis of fact." JA 69-70. If the court was not considering the statements for their truth, it would have sustained the objection on that basis – not on the incorrect basis

(since this was a hypothetical question) that the defense had not presented any evidence that Cellmark's results might have been wrong. Because the only possible speculation here was that Cellmark's results were wrong, the judge's comments demonstrate that he took them as truthful.

The United States' argument would only make sense if there was no direct evidence presented of what Cellmark did, but the prosecution *did* present such evidence through Cellmark's out-of-court statements. Never once in either responding to defense's objections to Lambatos's testimony regarding Cellmark's statements, or in closing statements did the prosecution argue that the court could ignore that testimony because the circumstantial evidence sufficiently linked Williams to the sperm on the vaginal swab. JA 55-56, 90-93. Had the prosecution intended to rely solely on circumstantial evidence, one would think they would have made that specific argument at some point. Furthermore, the only evidence the prosecution produced that could be described as circumstantial was the shipping records. JA 52-54. Those records proved only that the samples were shipped to Cellmark and were eventually returned. This evidence says nothing about whether Cellmark performed testing on the samples, what testing was performed, or what the results were. Nothing in this record supports the United States' claims.

Additionally, contrary to the United States' suggestion, Williams's argument does not depend upon a *Bruton*-type narrow exception to the general rule

about juror competence. U.S. Br. 19-21 (discussing *Bruton v. United States*, 391 U.S. 123 (1968) and *Richardson v. March*, 481 U.S. 200 (1987)). In the *Bruton* context, a statement may be used properly in one way but not in another – that is, against one defendant but not against another – and a defendant contends that the jury cannot be expected to follow an instruction drawing the distinction. But in this case, Williams's contention is not based on a perceived inadequacy of the trier of fact. Rather, Williams contends that in this setting the use cited by the State (support of the expert's opinion) *necessarily entails, as a matter of logic*, the use prohibited by the Confrontation Clause (proof of the truth of Cellmark's statements). Moreover, here, the record affirmatively shows that the judge used the evidence in a prohibited manner, hence, there is no need to rely on a *Bruton*-type presumption.

b. That a statement is admissible under local rules of evidence governing expert witnesses does not mean it is admissible under the Confrontation Clause.

Contrary to *amici*'s assertion (Br. of NDAA 13; Br. of Ohio 11), finding that Williams's right to confrontation was violated in this case does not require this Court to abrogate or invalidate FRE 703 and its state equivalents. *See* Pet. Br. 30; Br. of Friedman 22-26. The Confrontation Clause is concerned only with testimonial statements that are conveyed to the trier of

fact in order to establish the truth of assertions made in them. *Davis v. Washington*, 547 U.S. 813, 823-24 (2006). If no out-of-court statements are conveyed, or if the statements that are conveyed are non-testimonial, an expert's testimony would not implicate a defendant's right to confrontation. There also is no violation where an expert conveys the testimonial statements of another so long as that other witness testifies at trial.[3]

In *United States v. Johnson*, 587 F.3d 625 (4th Cir. 2009), a drug trafficking conspiracy case, two experts on drug trafficking testified that certain words used by the defendant in recorded calls were terms for narcotics. 587 F.3d at 633-34. The experts stated that their opinions were based on their professional experience, unusual speech patterns used by the conspirators, interviews, and other information they received about the case. *Id.* at 634. However, there was no confrontation issue because the experts did not disclose any statements, and the trier of fact was not required to accept as true any particular testimonial statements in order to accept the experts' opinions.

On the other hand, where, as here, an expert witness presents the testimonial statements of another, the Confrontation Clause's protections are triggered. *See*, *e.g.*, *Derr*, 2011 WL 4483937, at *14; *Goldstein*, 843 N.E.2d at 732-33.

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[3] And of course, a holding in Williams's favor would have no bearing on the applicability of FRE 703 in civil cases.

In its attempt to distinguish *Goldstein*, the United States proves Williams's point. The United States contends that while the statements disclosed by the expert in *Goldstein* may have violated the Confrontation Clause, the situation in this case is different. U.S. Br. 25-26. As such, the United States essentially concedes that the not-for-its-truth rationale for allowing in otherwise inadmissible evidence under FRE 703 and its state equivalents cannot be universally applicable, and so proves too much. Moreover, the United States' contention (U.S. Br. 26) that *Goldstein* is distinguishable from this case because this case involved "analytic work" is nothing more than a repeat of the forensic-evidence-is-different argument rejected in *Melendez-Diaz*. 129 S. Ct. at 2536-38.

Essentially, the argument of the State and its *amici* is that because expert witnesses and lay witnesses are treated differently by the modern rules of evidence, they should be treated differently by the Confrontation Clause. However, this Court has noted that expert witnesses are "hardly [an] 'unconventional' class of witnesses." *Melendez-Diaz*, 129 S. Ct. at 2535. Furthermore, the Clause "contemplates two classes of witness – those against the defendant and those in his favor. . . . [T]here is not a third category of witness, helpful to the prosecution, but somehow immune from confrontation." *Id.* at 2534. The Clause does not provide for a general exemption for expert witnesses. *Crawford*, 541 U.S. 36, 54 ("The text of the Sixth Amendment does not suggest any open-ended

exemptions from the confrontation requirement to be developed by the courts.").

C. Williams's ability to cross-examine Lambatos did not satisfy his right to confrontation.

The State and its *amici* argue that the opportunity to cross-examine Lambatos satisfied Williams's right to confrontation because it allowed Williams to challenge the case against him by pointing out to the trier of fact that Lambatos could not personally verify the accuracy of Cellmark's work. Resp. Br. 15; U.S. Br. 18-19; Br. of Ohio 25. "[T]he Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." *Bullcoming*, 131 S. Ct. at 2716. The opportunity to confront Lambatos about her reliance on Cellmark's testimonial statements did not provide Williams with the opportunity to confront Cellmark's analysts about their testimonial statements that had been presented against him. It is the latter that the Confrontation Clause requires. *Crawford*, 541 U.S. at 68.

Accordingly, the State's attempt (Resp. Br. 15) to analogize this case to *Delaware v. Fensterer*, 474 U.S. 15 (1985), is to no avail. Unlike Williams, the defendant in *Fensterer did* have the opportunity to confront the witness against him, and therefore, the Clause was satisfied. 474 U.S. at 18-20.

D. Cellmark's report was testimonial as it was a written document prepared at the request of the police during the course of a criminal investigation for purposes of establishing a fact used in the prosecution of the crime in question.

Cellmark's report is materially similar to the forensic reports in *Melendez-Diaz* and *Bullcoming*: in each of these cases, forensic analysis was done and the report was prepared at the behest of the police in order to establish a fact used in the prosecution of the crime in question; each of the reports, therefore, was testimonial. Pet. Br. 14; *Melendez-Diaz*, 129 S. Ct. at 2530-31; *Bullcoming*, 131 S. Ct. at 2710.

The State tries to avoid this obvious conclusion by making two arguments: that the electropherogram contained in the report constituted non-testimonial machine-generated data, and that the report was made for purposes other than creating evidence for use at trial. Resp. Br. 25-32. The first claim fails because, even assuming the machine-generated data on the electropherogram is not testimonial, as discussed earlier, *supra* Part B.1, Lambatos did not rely merely on the electropherogram for the E2 fraction she received from Cellmark. The second claim fails because Cellmark's report was clearly made for an evidentiary purpose.

Although the State initially contends Cellmark's report was not made for an evidentiary purpose, it later concedes that the report was prepared specifically for the purpose of litigation. Resp. Br. 28-32;

Bullcoming, 131 S. Ct. at 2713-14; *id.* at 2720 (Sotomayor, J., concurring) (documents made for the purpose of establishing evidence for trial are testimonial).

The State's concession aside, the argument that Cellmark's report was not testimonial because it only "facilitated further forensic analysis" is unconvincing. Resp. Br. 29. Statements taken by the police during the course of a criminal investigation fall squarely within the scope of out-of-court statements that the Confrontation Clause was intended to address. *Crawford*, 541 U.S. at 52-53 (comparing modern police investigations to the investigations of magistrates under the Marian statutes). Most statements taken by the police facilitate further investigation, but that does not make them non-testimonial. Cellmark's report, like the reports in *Melendez-Diaz* and *Bullcoming*, was a written report of forensic testing produced in response to a police request as part of a criminal investigation in order to determine the DNA profile, and thus, the identity, of the offender. *Melendez-Diaz*, 129 S. Ct. at 2530-31; *Bullcoming*, 131 S. Ct. at 2710. Cellmark's report was made specifically for the purpose of establishing evidence for possible use in the prosecution of the sexual assault, and, therefore, was testimonial.

Equally unpersuasive is the State's argument that the report was not produced for an evidentiary purpose because a trier of fact could not understand it

without the help of a testifying expert.[4] Resp. Br. 30-31. Cellmark reported that its analysis of the complainant's vaginal swab produced a DNA profile for the donor of the sperm found on the swab. JA 56. That simple yet critical fact – the DNA profile came from the vaginal swab – is something any lay person can understand, even if the technical material was more complicated. In any event, even assuming the report could not be understood by a lay person, that does not make it non-testimonial. The key fact remains that it was produced for an evidentiary purpose. Suppose a witness swore out an affidavit in a foreign language; one could hardly say that, because the affidavit could not be understood by the trier of fact without a translation, it was not testimonial and so did not invoke the Confrontation Clause. Translation of a technical statement made by an expert for evidentiary purposes is no different in principle.

Finally, the State and its *amici* contend that Cellmark's report was an informal statement, and therefore, non-testimonial. Resp. Br. 26; Br. NDAA of 15-21. This argument is largely foreclosed by the holding in *Bullcoming* rejecting the argument that because the forensic report in question was unsworn it was not testimonial; this Court noted that "[r]eading

[4] Similarly, the State's argument (Resp. Br. 31) that the report is non-testimonial because it incriminated Williams only when considered along with other evidence is merely a repetition of an argument that has been thoroughly rejected by this Court. *Melendez-Diaz*, 129 S. Ct. 2533-34.

the Clause in [such an] implausible manner . . . would make the right to confrontation easily erasable." *Bullcoming*, 131 S. Ct. at 2717; *see also Davis v. Washington*, 547 U.S. 813, 838 (2006) (Thomas, J., concurring in judgment in part and dissenting in part) ("[T]he Confrontation Clause . . . also reaches technically informal statements when used to evade the formalized process."); *Crawford*, 541 U.S. at 52 n.3 ("We find it implausible that a provision which concededly condemned trial by sworn ex parte affidavit thought trial by unsworn ex parte affidavit perfectly OK."). As in *Bullcoming*, the circumstances surrounding the creation of the forensic report established that the report was sufficiently formal – indeed, a "solemn declaration," *Crawford*, 541 U.S. at 51-53; *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring) – to be considered testimonial. 131 S. Ct. at 2717. Cellmark's report was a written document provided to the police in response to police inquiry during the course of a criminal investigation, prepared with the primary purpose of establishing a fact germane to the potential prosecution of a particular crime. Because the report was a "formal statement [made] to government officers" "for the purpose of establishing or proving some fact," the report was more like a response to a Marian investigation than an informal comment made to police officers, and therefore, was a sufficiently "solemn declaration" to rank as testimonial. *Crawford*, 541 U.S. at 51-53; *Davis*, 547 U.S. at 824; *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring).

E. Any burden that the Confrontation Clause imposes in this context does not justify creating an expert-witness exemption to the Confrontation Clause.

The State's *amici* contend that a ruling in Williams's favor would result in forensic labs becoming so overburdened they will not be able to perform their duties. Br. of New York County District Attorney ("NYCDA") 5-17; Br. of NDAA 12-37. Besides being overstated, *amici*'s basic argument has already been addressed and rejected by this Court. *Melendez-Diaz*, 129 S. Ct. at 2540-42. "The Confrontation Clause – like . . . other constitutional provisions – is binding, and we may not disregard it at our convenience." *Melendez-Diaz*, 129 S. Ct. at 2540; *see also Coy v. Iowa*, 487 U.S. 1012, 1020 (1988) ("It is a truism that constitutional protections have costs."). None of the alleged burdens raised by the State's *amici* justify creating an expert-witness exemption to the Confrontation Clause.

Contrary to the State and its *amici*, a ruling in Williams's favor would not impose an all-technicians-must-testify standard. Resp. Br. 22; Br. of NDAA 26; Br. of NYCDA 5. Williams asks only that the standard this Court set forth in *Melendez-Diaz* be applied: that when the prosecution chooses to present the testimonial statements of a witness, that witness must testify live unless he or she is unavailable and the defendant has been given a prior opportunity for cross-examination. *Melendez-Diaz*, 129 S. Ct. 2532 & n.1. Not every person involved in forensic testing

necessarily makes testimonial statements. For example, while it may be important that the machine used in forensic analysis be calibrated, if the machine is calibrated on a weekly rather than on a case-by-case basis, the technician's records indicating that the machine was properly calibrated are not necessarily testimonial because they are not case-specific assertions meant to assist a particular prosecution. Or if a technician handles the material but does not produce a testimonial statement on which the expert testifying in court must rely to form her opinion, the Confrontation Clause does not require the technician to testify. For example, if a technician treats the material according to prescribed procedures but does not report test results, there is presumably no need for her to testify. The question of who must testify is therefore under the prosecution's control to a large extent, and depends on the particular forensic process used.

Moreover, laboratories can structure themselves so as to minimize the number of witnesses necessary to introduce the result of their forensic testing. For example, in this case, only one analyst conducted the DNA analysis of Williams's blood sample. JA 12-14.

Amici's argument that there should be an expert-witness exemption to the Confrontation Clause in order to guard against the possibility that the original analyst may die ignores that this applies to all witnesses, not just forensic analysts. Br. of NDAA 30. The fact that a critical witness dies before the accused is afforded an opportunity to cross-examine does not make that witness's testimonial statements

immune from the requirements of the Clause. *Crawford*, 541 U.S. at 59 ("Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.").

Amici's argument that an expert-witness exemption is needed to account for retired analysts or those who have taken other jobs is illogical. Br. of NDAA 32. The fact that an analyst no longer works at the lab does not in any way prevent her from testifying live. Indeed, this argument is refuted by this very case. Lambatos was no longer working at the Illinois State Police Lab at the time of Williams's trial, but the prosecution nevertheless secured her live testimony. JA 43.

As this Court noted in *Melendez-Diaz*, notice-and-demand statutes can mitigate many of the supposed burdens the Confrontation Clause may bring. 129 S. Ct. at 2540-41. In addition, because DNA evidence, if properly stored, can last indefinitely, the sample can always be retested in the event the original analyst becomes available. Butler, *Fundamentals of Forensic DNA Typing*, 87-89. And according to one of the State's *amici*, samples as small as a pinhead are sufficient for DNA analysis (Br. of NYCDA 4), so it is the rare case where there will not be a sufficient amount of sample to store for future testing.

This Court need not determine in this case whether the Clause should be flexible if an analyst becomes

unavailable, as the prosecution never claimed, let alone made a showing, that Cellmark's analysts were unavailable.

F. The violation of Williams's right to confrontation was not harmless beyond a reasonable doubt.

The State argues (Resp. Br. 32) that any violation of Williams's right to confrontation was harmless. *See Chapman v. California*, 386 U.S. 18, 24 (1967). That is plainly wrong. In announcing his finding of guilt, the trial judge made clear that his finding was heavily influenced by the DNA evidence. R. JJJ152. Furthermore, the only remaining evidence against Williams was the complainant's identification, which, contrary to the State's claim (Resp. Br. 32), was of very questionable credibility. According to police testimony, shortly after the attack the complainant twice positively identified a man other than Williams as her attacker. R. III30-31. In addition, an entire year passed between the time of the attack and when the complainant first identified Williams as her attacker. R. JJJ113. Accordingly, the violation was not harmless.

CONCLUSION

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

Respectfully submitted,

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