No. 10-8505

In The

Supreme Court of the United States

SANDY WILLIAMS,

Petitioner,

v.

THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF OF RICHARD D. FRIEDMAN, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is a legal academic holding the title of Alene and Allan F. Smith Professor of Law at the University of Michigan Law School. Since 1982 he has taught Evidence law, among other subjects. He is general editor of THE NEW WIGMORE: A TREATISE ON EVIDENCE, author of THE ELEMENTS OF EVIDENCE (3d ed. 2004), and co-author of EVIDENCE (11th ed. 2009; with Jon Walz and Roger C. Park).

Much of the academic work of *amicus* has dealt with the right of an accused under the Sixth Amendment "to be confronted with the witnesses against him." He has written many articles and essays on that right, and since 2004 he has maintained The Confrontation Blog, www.confrontationright.blogspot.com, to report and comment on developments related to it. *Amicus* successfully represented the petitioners in *Hammon v. Indiana* (decided together with *Davis v. Washington*, 547 U.S. 813 (2006)), and *Briscoe v. Virginia*, 130 S.Ct. 1316 (2010).

As he has previously done in several cases before this Court, *amicus* submits this brief on behalf of

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[1] Each party has filed with the clerk a global consent to the filing of any *amicus* brief on the merits of this case. Part of the cost of preparing and submitting this brief was paid for by research funds provided by the University of Michigan Law School to *amicus* and under his control. The brief does not necessarily reflect the views of that Law School or of any of its faculty other than *amicus*. Except as just noted, no persons or entities other than the *amicus* made any monetary contribution to the preparation or submission of this brief, which was not authored in any part by counsel for either party.

himself only; he has not asked any other person or entity to join in it. He is doing this so that he can express his own thoughts, entirely in his own voice. In some situations, such as the one presented by *Giles v. California*, 554 U.S. 353 (2008), his views principally favor the prosecution; in others, as in this case, his views principally favor the defense. His desire, in accordance with his academic work, is to promote a sound understanding of the confrontation right, one that recognizes the importance of the right in our system of criminal justice and at the same time is practical in administration and does not unduly hamper prosecution of crime.

Amicus believes that the doctrine of the Confrontation Clause, and indeed criminal trial practice in general, would be seriously distorted if this Court were to adopt a theory under which a statement presented in support of an expert witness's testimony is deemed to be outside the scope of the Confrontation Clause even though it supports that opinion only if it is true. *Amicus* further believes that the Clause would be significantly weakened if this Court were to hold that conveying the substance of a written statement to the trier of fact cannot violate the Clause unless the statement is formally introduced into evidence.

SUMMARY OF ARGUMENT

1. The Cellmark report asserted that present on the vaginal swabs taken from the victim was material containing male DNA of a profile specified by the report; Cellmark deduced the presence of this profile by subtracting out the victim's known profile from the mixed profile that it found. Though the report was not formally introduced into evidence, this crucial assertion concerning the male DNA profile was conveyed to the trier of fact; the prosecution's in-court expert indicated that the male DNA profile reported by Cellmark was such that she and a computer both matched it to the DNA profile of Petitioner. That is sufficient to invoke the Confrontation Clause. The Clause would be a sham – and the doctrine would have perverse consequences – if a prosecutor could avoid it by refraining from introducing a statement formally. Written testimonial statements as well as oral ones should be deemed to have been presented to the trier of fact, so that the Confrontation Clause is potentially invoked, if the substance of the statement is conveyed to the trier.

2. Cellmark's assertion concerning the DNA profile was clearly a testimonial statement. This is an important point to bear in mind because it frames the context of this case. It is not true that recognizing Petitioner's confrontation right in this case would require every person involved in the testing and analysis of DNA to testify at trial; the only persons who must testify live at trial are those who make testimonial statements that are effectively presented at trial. And, by the same token, if a person does make a testimonial statement, then, under the precedents of

this Court, it was functionally identical to live, in-court testimony – which means that if it was presented for the truth of a matter that it asserted then the confrontation right should apply.

3. If the judge, as trier of fact, concluded that the Cellmark report was not truthful, the report would be of no use to the prosecution. Accordingly, the report was presented for the truth of a matter that it asserted. The fact that the in-court expert used the report in support of her opinion has no bearing on this matter. Indeed, if such use were permitted to provide a basis for admission of a testimonial statement absent confrontation of the witness who made that statement, the door would be open to serious distortion of the criminal justice process.

ARGUMENT

I. THE SUBSTANCE OF TESTIMONIAL STATEMENTS THAT WERE PART OF THE CELLMARK REPORT WAS PRESENTED TO THE TRIER OF FACT, THUS INVOKING THE CONFRONTATION CLAUSE.

A. There is no per se rule that the Confrontation Clause is inapplicable to a statement that is not formally admitted into evidence.

The Cellmark report was not formally introduced into evidence. But this fact does not preclude application of the Confrontation Clause. If such a *per se* rule of non-applicability existed, the

Clause would be rendered a virtual nullity: A witness could make a testimonial statement in writing out of court, and then another witness could testify at trial as to the substance of the statement. The concerns underlying the Clause would be fully invoked, because the witness who made the written testimonial statement would have managed to convey to the trier of fact the substance of her testimony. And yet she would never have to take an oath, or confront the accused, or subject herself to cross-examination.

In modern practice, written statements, like other tangible exhibits, are often formally introduced into evidence.[2] But as *Douglas v. Alabama*, 380 U.S. 415 (1965), makes clear, such formal admission is not necessary for the Confrontation Clause to be invoked. In *Douglas*, the prosecutor, purportedly to refresh the memory of an alleged confederate of the accused, questioned him on the basis of a document that was assertedly his confession. The document was never offered into evidence, but that did not matter. This Court, in holding that the procedure had "plainly" violated the accused's confrontation right, noted that under the circumstances "the jury might improperly infer both that the statement had been made and that it was true." 380 U.S. at 419. And more recently, in *Davis v. Washington*, 547 U.S. 813, 826 (2006), the Court asserted, "[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman recite the

[2] Indeed, the original document rule, sometimes labeled the "best evidence" rule, imposes a presumptive requirement that a party seeking to prove the contents of a document must present the document itself. *See, e.g.,* FED. R. EVID. 1001 *et seq*.

unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition."

That applicability of the Confrontation Clause does not depend on formal introduction of a tangible manifestation of the statement in question is made obvious by considering oral statements that have not been recorded. By definition, no tangible manifestation of such a statement exists. Accordingly, the prosecution must present an in-court witness to testify to the substance of the statement. But if the witness who does so is not the person who made the statement, there is a potential Confrontation Clause problem.

It is well established that a verbatim repetition of the statement, or even an attempt to quote it, is not necessary for the Confrontation Clause to come into play. In *Idaho v. Wright*, 497 U.S. 805 (1990), for example, the in-court witness reported conversation from notes that were "not detailed," 497 U.S. at 811.[3]

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[3] The examination of the in-court witness in *Wright* illustrates the summary nature of the testimony by which out-of-court testimonial statements are often reported to the trier of fact:

> "Q. . . . [W]hat was, as best you recollect, what was her response to the question 'Do you play with daddy?'
>
> "A. Yes, we play – I remember her making a comment about yes we play a lot and expanding on that and talking about spending time with daddy.
>
> "Q. And 'Does daddy play with you?' Was there any response?
>
> "A. She responded to that as well, that they played

See, e.g., Ocampo v. Vail, 2011 WL 2275798 (9th Cir. June 9, 2011) (even before *Crawford v. Washington*,

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> together in a variety of circumstances and, you know, seemed very unaffected by the question.
>
> "Q. And then what did you say and her response?
>
> "A. When I asked her 'Does daddy touch you with his pee-pee,' she did admit to that. When I asked, 'Do you touch his pee-pee,' she did not have any response.
>
> "Q. Excuse me. Did you notice any change in her affect or attitude in that line of questioning?
>
> "A. Yes.
>
> "Q. What did you observe?
>
> "A. She would not – oh, she did not talk any further about that. She would not elucidate what exactly-what kind of touching was taking place, or how it was happening. She did, however, say that daddy does do this with me, but he does it a lot more with my sister than with me.
>
> "Q. And how did she offer that last statement? Was that in response to a question or was that just a volunteered statement?
>
> "A. That was a volunteered statement as I sat and waited for her to respond, again after she sort of clammed-up, and that was the next statement that she made after just allowing some silence to occur."

497 U.S. at 810-11.

541 U.S. 36 (2004), Supreme Court case law clearly established that out-of-court statements "trigger[] the protections of the Confrontation Clause, even if the in-court testimony described rather than quoted the out-of-court statements"; citing *Wright*); *State v. Swaney*, 787 N.W.2d 541, 554 (Minn. 2010) (holding that trial court "violates the Confrontation Clause when it admits testimony that inescapably implies a nontestifying witness's testimonial hearsay statement," even though the in-court witness does not "expressly state" the out-of-court testimonial statement).

Indeed, a rule that made the Clause inapplicable unless the exact oral statement were presented to the trier of fact would make no sense and would render the Clause a virtual nullity: In most situations, the in-court witness is not able to quote an earlier testimonial statement exactly. Moreover, even if she is able to do so, such a rule would provide an easy way to avoid the Clause, simply by having the in-court witness offer a paraphrase or summary of the statement, or for that matter any other testimony from which the substance of the statement might be inferred. In *United States v. Meises*, 645 F.3d 5 (1st Cir. 2011), for example, the prosecutor, recognizing that statements made by a cooperating arrestee to law enforcement agents were testimonial, did not ask a testifying agent what the arrestee said; instead, he secured the agent's testimony that after the interview "the targets of [the] investigation change[d]" and that the accused was taken into federal detention. The Court of Appeals for the First Circuit saw through this blatant ruse:

"It makes no difference that the government

> took care not to introduce [the out-of-court witness's] 'actual statements.' . . . [A]ny other conclusion would permit the government to evade the limitations of the Sixth Amendment . . . by weaving an unavailable declarant's statements into another witness's testimony by implication."

Id. at 12-13.

And plainly out-of-court written statements should receive no different treatment in this respect from oral statements. That is true as a matter of principle: The purpose of the Confrontation Clause is to ensure that witnesses give their testimony in a prescribed manner, in the presence of the accused and subject to cross-examination. If a witness makes a testimonial statement out of court and the substance of that statement is presented to the trier of fact, to prove the truth of the matter asserted and without the accused having had an opportunity for confrontation, the Clause is violated – and it makes no difference whether the witness made the testimonial statement in writing or orally.

Furthermore, a bizarre consequence would follow if written statements, unlike oral ones, could be made categorically exempt from Confrontation Clause scrutiny through the simple expedient of an in-court witness testifying to the substance of the statement. Any witness who made an oral testimonial statement but did not want to confront the accused could repeat the statement in writing. Another witness could then testify at trial to the substance of the written statement, and the Clause would provide no protection

to the accused. Such a rule would, in fact, tend perversely to denigrate the quality of the evidence offered at trial, because prosecutors would have an incentive to present their testimony in summary form.

Accordingly, formal admission of a statement, whether it was made orally or in writing, is not necessary for the statement to fall within the scope of the Confrontation Clause. The Clause is invoked if the substance of the statement is conveyed to the trier of fact – so long, of course, as (a) the statement is testimonial and (b) the basis for communicating that substance to the trier of fact is to prove its truth.[4]

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[4] The substance so communicated may be part of or embedded in a longer statement. If so, it is immaterial how important the portion communicated to the trier of fact is in comparison to the rest of the statement (however such comparative importance might be measured) . If any portion of the longer statement is testimonial, and is conveyed to the trier of fact to prove the truth of that portion, then there is a presumptive Confrontation Clause violation with respect to that portion. *Cf. Williamson v. United States*, 512 U.S. 594 (1994) (holding that "statement" within the meaning of Federal Rule of Evidence 804(b)(3) means "a single declaration or remark" rather than the "extended declaration" of which it may be a part).

In some cases, a difficult question may arise if the prosecution claims some purpose for presenting evidence of the statement other than to prove the truth of an aspect of it. *Cf.* Richard D. Friedman, *When is a statement presented for purposes of the Confrontation Clause*, <http://confrontationright.blogspot.com/2011/06/when-is-statement-presented-for.html>. That issue does not arise in this case; it is clear that the evidence of the Cellmark report would have had no value other than to prove the truth of a matter asserted by the report. *See infra* Part II.

B. The substance of statements that were part of the Cellmark report was communicated to the trier of fact.

Here, it is clear that part of the substance of the Cellmark report was communicated to the trial judge, sitting as trier of fact. Sandra Lambatos, the prosecution's in-court DNA expert, testified at length to establish that vaginal swabs from the victim and a blood standard taken from her were sent to Cellmark for DNA analysis. She was then asked whether "the male DNA profile found in semen from the vaginal swabs of [the victim]" – that is, the male profile reported by Cellmark – was determined by computer to match the DNA profile found in Petitioner's blood. She answered in the affirmative. The prosecutor then asked whether she had compared the two profiles and found a match. She said she had. He asked what the frequency of such a match would be if someone other than Petitioner were the source, and she answered with very low numbers. Finally, the prosecutor asked, "In your expert opinion, can you call this a match to Sandy Williams?" and she responded simply, "Yes." JA 56-58. Her testimony subsequently clarified how Cellmark had determined the male DNA profile in the vaginal swabs: The sample included a mixture of the victim's DNA with that of the perpetrator, JA 68, 71, and by subtracting out the victim's known DNA Cellmark "deduced" a male profile. JA 71, 72, 77.

Thus, Lambatos's testimony was explicitly based in critical part on the Cellmark report.[5] Lambatos's

[5] Accordingly, the Court need not address the issue of whether the Confrontation Clause applies if an expert

testimony conveyed to the trier of fact that Cellmark had made a statement that the vaginal swabs included male DNA of a given profile – a profile that, as indicated by comparisons made both by computer and Lambatos personally, JA 56, was the same as that on the swabs taken from Petitioner.

The Cellmark report may have included machine printouts but, like the reports in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), and *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011), it was not simply the product of a machine. Rather, it required the exercise of human judgment.[6] Indeed, at

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assembles information from one or more testimonial statements and then draws an inference based at least in part on that information without disclosing what the information is or what its sources are. In the view of *amicus*, even in such a circumstance the Confrontation Clause should not be deemed *per se* inapplicable. It still might be that the trier of fact would likely infer that the expert's opinion was based on a statement to a certain effect. And even if this were not true, concern should be raised by the possibility that the expert's opinion is being used to repackage information contained in an undisclosed testimonial statement. But these issues are not presented by this case.

[6] Note this exchange from cross-examination:

> Q You look at the E2 fraction from the vaginal swabs and compare that to the victim's profile, correct?
>
> A In my opinion that's what [Cellmark] did.
>
> Q And that's how you would do it in your casework, right?
>
> A We have slightly different guidelines so it would be a little bit different.

one of the DNA locuses tested one of the alleles found was inconsistent with the profiles of both the victim and of Petitioner, but Cellmark did not include it in the deduced male donor profile. JA 78, 79. Lambatos, while noting that "[Cellmark]'s interpretation guidelines differ from ours," suggested that this allele was properly treated as "background noise." JA 79.[7]

It does not matter that the trial judge was not presented with details of the male profile that

> Q Well, the goal here is to try to determine the male donor?
>
> A Correct.
>
> Q And in the E2 fraction or vaginal swab assuming the victim's profile is present and subtract that out?
>
> A In my opinion that's how [Cellmark] approached it, yes.

JA 77.

[7] Even if the male DNA profile of the material from the vaginal swabs were deduced entirely by machine, that fact would not alter the analysis. Taken by themselves, machine printouts are mere pieces of paper useless to the case. They could become significant only if characterized by a human statement that (a) they are the product of the performance of a given test on a DNA sample (not, say, a human creation to resemble an electropherogram), and (b) the sample subjected to this test was the one taken from the particular vaginal swabs involved in the case. *See Bullcoming*, 131 S.Ct. at 2714 (rejecting state court's holding that report by testing analyst was not within Confrontation Clause because he was a "mere scrivener," the "true accuser" being the machine; testing analyst's report certified, among other facts, "that he performed *on Bullcoming's sample* a *particular test*, adhering to a precise protocol") (emphasis added).

Cellmark deduced. The crucial matter is that Lambatos conveyed to the judge that (a) Cellmark reported a DNA profile, and (b) this profile was such that it matched the known profile of Petitioner. The situation is essentially the same as if Lambatos had testified, "Somebody at the scene described the person she saw commit the crime, and the description closely matched Williams." It would be absurd to hold that the Confrontation Clause did not apply because the witness did not furnish details of the description to the trier of fact.

C. The statements in the Cellmark report were testimonial.

There is no doubt, furthermore, that the statements made by the Cellmark report were testimonial in nature. The report was made for the sole purpose of aiding investigation and prosecution of a crime.[8] Though the testimonial quality of the

[8] Lambatos testified explicitly that "all reports in this case were prepared for this criminal investigation [and] the eventual litigation here." JA 82. The samples tested by the Cellmark lab in Germantown, MD, were sent to it by the Illinois State Police ("ISP") – to expedite testing and reduce the ISP's backlog – by courier "in a sealed condition," and were returned the same way by Cellmark to the ISP. This was the regular practice of the ISP and of Cellmark; in fact, the ISP and Cellmark each sent these samples to the other in the same shipment with numerous samples from other unrelated cases. JA 49-55, 63 (at least 20 other cases batched and sent to Cellmark). Cellmark's corporate parent described the Germantown lab, which it closed in 2005, as a "forensic DNA testing facility." ORCHID CELLMARK INC.,

statement appears indisputable after *Melendez-Diaz* and *Bullcoming*, it is worth emphasizing, for two reasons.

First, other issues raised by this case – involving the extent to which the Confrontation Clause prevents an in-court expert from testifying on the basis of information transmitted in an out-of-court statement – arise *only* if that statement is testimonial in nature. If the statement is not testimonial, then there is simply no Confrontation Clause issue. *Davis, supra*, 547 U.S. at 823-25; *Whorton v. Bockting*, 549 U.S. 406, 420 (2007). Thus – contrary to an assertion by the Illinois Appellate Court, JA 127, and an apparent implication by the Illinois Supreme Court, JA 170 – the position advocated by Petitioner (and by *amicus*) would *not* amount to a broad restriction against an in-court witness relying on information provided out of court; *see, e.g.*, *People v. Hill*, 120 Cal. Rptr.3d 251, 278-79 (Cal. Ct. Apps. 1st Dist. 2011) (concluding that under proper analysis statements introduced in support of expert opinion on gang structure might be considered admitted for their truth, and yet holding that most of the statements were not testimonial and so posed no Confrontation Clause issue); *cf.* Fed. R. Evid. 703 (allowing testifying expert to base an opinion on facts or data not admissible in evidence if they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject"). For example, a physician gathering medical information to form an opinion in anticipation of testimony for a prosecutor could requisition routine blood tests without raising a Confrontation Clause problem, unless the physician announced gratuitously

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2005 ANNUAL REPORT, at 7.

that she was doing so for prosecutorial purposes. Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & POL. 791, 804-05 (2007) ("When a doctor relies on other medical records made in the course of treatment, or an appraiser relies on comparable prior sales, or an expert in gang structure relies on interviews conducted with former gang members over many years and not related to the particular case, no plausible understanding of 'testimonial' would encompass these statements.").

Second, if, as in this case, a statement on which an expert relies *is* testimonial, then, under the decisions of this Court, that means it was made for the "primary purpose . . . to create a record for trial." *Michigan v. Bryant*, 131 S.Ct. at 1155. And that fact should frame consideration of any further issues in the case. Given that the statement was made for that purpose, a court should guard against allowing the statement to be used to prove a matter that it asserted without the witness who made the statement, or another who is able to testify from personal knowlede to its contents, being subjected to confrontation.

II. THE STATEMENT IN ISSUE WAS COMMUNICATED TO THE TRIAL JUDGE TO PROVE THE TRUTH OF WHAT IT ASSERTED. THAT FACT IS NOT AFFECTED BY THE IN-COURT EXPERT'S USE OF THE STATEMENT AS A PREDICATE FOR HER OPINION.

A. There is no meaningful distinction in this context between presenting a statement to support an expert's opinion and presenting it for the truth of what it asserts.

Amicus has argued thus far that Lambatos's in-court testimony concerning the Cellmark report effectively communicated to the trier of fact a testimonial statement contained in the report. If that communication was made to prove the truth of the matter asserted in the statement, then there was a Confrontation Clause violation, because Petitioner never had an opportunity to cross-examine the author of the report or any other person who had personal knowledge of its contents.

The Illinois Supreme Court held that "the State did not offer Lambatos' testimony regarding the Cellmark report for the truth of the matter asserted." Rather, it said, the State introduced her testimony "for the limited purpose of explaining the basis for her opinion on the critical issue concerning whether there was a DNA match between the defendant's blood sample and the semen sample recovered from [the victim]." JA 172. But this distinction proceeds from a logical error.

The Cellmark report supported Lambatos's

opinion only if it was true; if the eletropherogram was not the product of a properly performed DNA test on the vaginal swabs taken from the victim, then the DNA profile reported by Cellmark had no bearing on the case and could not support Lambatos's opinion that the DNA profile from the swabs matched Petitioner's profile. In this context, therefore, it makes no sense to say that the statement was not presented for its truth because it was used to support the expert's opinion. *See, e.g., People v. Goldstein*, 843 N.E. 727, 732-33 (N.Y. 2005) (holding, in case in which testimonial statements could buttress expert's opinion only if true, that "[t]he distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context"); *People v. Hill*, *supra*, 120 Cal. Rptr.3d at 270-74 (reviewing cases and academic literature, and characterizing *Goldstein*'s logic as "compelling").

B. That the expert witness provided "added value" does not alter the analysis.

It is true that in forming her opinion Lambatos – unlike the in-court expert in *Bullcoming* – did more than simply transmit the data reported to her; rather, she used the Cellmark report as one of the bases on which she drew her inference (which squared with an inference drawn by computer) that Petitioner's DNA matched that found on the vaginal swabs. But that does not alter the situation. Put simply, proof of that proposition required three components – factual proof concerning the DNA profile on the vaginal swabs, factual proof concerning Petitioner's DNA profile, and

analysis (whether based on human expertise or electronic computing power) to draw the inference that the two profiles matched to an extent that would be rare if they were not from a common source. The prosecution's obligation to comply with the Confrontation Clause in proving the results of forensic lab tests, the first two components, should not be diminished by the fact that *in addition* to proving those results it had to prove the third component, a relatively complex scientific inference.

Indeed, if bearing an extra burden of proving a scientific inference eased the prosecution's burden of proving underlying data, the prosecution would have a perverse incentive to claim that it needed to prove such an inference. The holdings of *Melendez-Diaz* and *Bullcoming* would, as a practical matter, be essentially nullified in many contexts. A forensic laboratory report – testimonial in nature because made for the purpose of assisting in prosecution – could give data without stating ultimate conclusions, such as the presence of cocaine in a sample. An in-court expert witness could draw the final inference, perhaps one obvious to experts in the field given the data, and explain that she was basing her conclusions on those data, as communicated by the lab report. Neither the author of that report nor anyone else who could testify from personal knowledge to the facts asserted in it would have to testify live, subject to confrontation, because the report would supposedly just be used in support of the in-court expert's opinion. And so, with the cooperation of forensic laboratory technicians, who knew exactly what they were doing, prosecutors could achieve a neat evasion of the confrontation right as it has recently, and clearly, been articulated by this

Court.

But the consequences of a doctrine that presenting a statement in support of an expert's opinion removes the statement from the scope of the Confrontation Clause are not limited to the context of forensic laboratory reports. Such a doctrine would mean that, so far as the Clause is concerned, a state could allow a prosecutor to present an expert on, say, crime reconstruction, who could testify that in her opinion – based on descriptions of the incident she had received, of a type reasonably relied on by experts in the field – the accused had committed the crime. It would not matter that some of the statements on which she based her opinion were testimonial, because that is true in this case as well. Nor would it matter that the expertise is a litigation-focused one, because that also is true in this case as well. A state could, without constraint by the Confrontation Clause, adopt a fundamentally transformed system of criminal justice, one in which the prosecution could decide as to each of its witnesses whether to bring her in live or transmit her testimony through an in-court expert of its choosing.

Amicus believes this is a perfectly realistic scenario. Accident reconstruction expert witnesses are a regular fixture of civil litigation.[9] They appear far

[9] If there were any doubt about this, it should be resolved by the ease with which a quick internet search turns up numerous websites devoted to helping lawyers find such expert witnesses. *E.g.,* Accident Reconstruction Network, *ARC Network Expert Witness Directory*, <http://www.accidentreconstruction.com/expertsearch.asp>. *See also, e.g., United States v. Griffith*, 762 F.Supp.2d 1179, 1182 (D.Ariz. 2010) (noting that former police officer had

less frequently in criminal prosecutions, but they are not unknown. *See Galiana v. McNeil*, 2010 WL 3219316 (S.D.Fla. 2010) (on habeas); *Warthan v. State*, 927 N.E.2d 425 (table) (Ind. Ct. Apps. 2010). And neither are "crime reconstruction" experts. *E.g.*, *Knight v. Dunbar*, 2010 WL 5313530 (D.Colo. 2010); *People v. Higgins,* 2011 WL 3373648 (Cal. Ct. App. 2d Dist. Aug. 5, 2011); *State v. Eggleston*, 108 Wash.App. 1011, 2001 WL 1077846 (Wash. Ct. Apps. Div. 2 2001) (retired police officer "had testified as a crime-scene reconstruction expert over 200 times"). If this Court countenances expert inference as a method of shoe-horning testimonial statements into evidence, notwithstanding the lack of opportunity for confrontation, it is inevitable that some states will take full advantage of the opportunity. A foretaste is provided by numerous decisions holding that the Confrontation Clause is categorically inapplicable to an opinion offered by a police officer testifying as a gang expert, based in part on statements made to him while investigating the case, that an individual is a member of a gang and committed a crime for gang-related purposes. *E.g.*, *People v. Thomas*, 30 Cal. Rptr. 582 (Cal. Apps. 4th Dist. 2005); *contra*, *United States v. Mejia*, 545 F.3d 179, 199 (2d Cir. 2008) (holding that gang expert's "reliance on and repetition of out-of-court testimonial statements made by individuals during the course of custodial interrogations violated Appellants's rights under the Confrontation Clause").

"testified in federal and state court throughout Arizona and California on . . . accident reconstruction . . .").

C. Federal Rule of Evidence 703 does not alter the analysis.

Amicus recognizes that Federal Rule of Evidence 703, the original version of which Illinois has adopted by judicial decision, *Wilson v. Clark*, 417 N.E.2d 1322 (Ill. 1981),[10] provides that ordinary evidence law does not prevent a witness in Lambatos's position from testifying to an opinion formed on the basis of facts that are not themselves otherwise admissible in evidence. Indeed, in some circumstances, courts applying this Rule have allowed expert witnesses to testify as to those underlying facts and even to the out-of-court statements from which they learned them, *e.g.*, *United States v. Rollins*, 862 F.2d 1282 (7th Cir. 1988) (FBI agent presents who monitored taped conversations between informant and drug dealer, presents his interpretation of the language used, drawing in part on explanation provided to him by informant), and Fed. R. Evid. 703 has been revised to govern this possibility.[11]

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[10] Rule 703 has been amended several times since *Wilson* adopted it. Apparently the adoption is not dynamic. That is, the Illinois law appears to be Rule 703 as it stood in 1981, *see* JA 154-55 (Illinois Supreme Court quoting 1981 version of the Rule).

[11] The last sentence of Rule 703, added in 2000, creates a presumption against allowing the proponent to present in support of the opinion facts that otherwise would be inadmissible. But the presumption may be overcome if the trial court determines that the probative value of the fact in assisting the trier of fact to assess the opinion "substantially outweighs their prejudicial effect." In effect, this sentence simply moves a thumb from its usual position on the side of

But this is irrelevant to the analysis under the Confrontation Clause. The Clause and non-constitutional evidence doctrine are two separate bodies of law; a rule of ordinary evidence law cannot abrogate a constitutional provision according an accused the right to be confronted with the witnesses against him.

The Court has noted that in some contexts "standard rules of hearsay" are "relevant" to the determination of whether a statement is made for the "primary purpose . . . to establish or prove past events potentially relevant to later criminal prosecution." *Bryant*, *supra*, 131 S.Ct. at 1154-55, *quoting in part Davis*, 547 U.S. at 822. But that has no bearing here; there is no doubt that the purpose of the Cellmark report was to prove facts important to a prosecution.

Nor does this case exemplify the proposition that

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the scale favoring admissibility, *see* Fed. R. Evid, 403, to the other side. The sentence does not distinguish between admissibility of the facts and of the statement by which the expert learned those facts; most often, as in *Rollins*, if the expert testifies to the underlying facts, the testimony will give at least some indication of the statement. The sentence was incorporated into the Rule before *Crawford* and shows no explicit sensitivity to the question of whether the statement from which the expert learned the facts was testimonial in nature; the test set up by the sentence depends instead on the balance of probative value and prejudicial effect. *Amicus* believes, though, that it was probably largely motivated by an implicit sense – still inchoate in that pre-*Crawford* era – that in some situations allowing expert opinion to provide a basis for admitting otherwise inadmissible statements provided a manipulative route around a criminal defendant's central constitutional rights.

some traditional components of hearsay doctrine tend to support a determination as to whether the "primary purpose" of a statement brings it within the scope of the Confrontation Clause. *Bryant*, *supra*, 131 S.Ct. 1143, 1155 (2011). When that is so, it is because some hearsay principles, like confrontation doctrine, sort out statements that are made in anticipation of use in prosecution from those that are not. *See Bullcoming*, 131 S.Ct. at 2720 (Sotomayor, J., concurring) ("The hearsay rule's recognition of the . . . evidentiary purpose [of the certificates in *Melendez-Diaz*] . . . *confirmed our decision* that the certificates were testimonial under the primary purpose analysis required by the Confrontation Clause.")(emphasis added). But that is not the case here, for two reasons.

First, the aspect of Rule 703 allowing an expert to base opinions on facts not otherwise admissible[12] does not reflect traditional law. Rather, it is a creation of the second half of the 20th century, and it reflected a deliberate decision to loosen the law then prevailing.[13]

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[12] As a formal matter, this rule is not a part of the law of hearsay, but it is often treated as in effect an exception to the hearsay rule. *See, e.g.,* DAVID F. BINDER, HEARSAY HANDBOOK (4th ed. 2002), ch. 48.

[13] The Advisory Committee on the Federal Rules of Evidence, in proposing Rule 703, pointed out that under it facts on which an expert based an opinion could be based on three sources. The first, the expert's own first hand observations, was "traditionally allowed." Similarly, the second, presentation of the facts as evidence at trial, "also reflect[ed] existing practice." But the Rule's allowance of the third basis, the one involved here – "presentation of the data outside of court and other than by his own perception" – was "designed to broaden the basis for expert opinions beyond that current in many jurisdictions . . . ." Advisory

Second, this aspect of the Rule has no bearing on principles underlying the Confrontation Clause. It does not attempt to sort out statements made with litigation in mind. Rather, it is based on the perception that if experts in a given field rely, in ordinary practice "when not in court," on sources of information of a given type, even for "life-and-death decisions," then reliance by an expert in court on similar information sources "ought to suffice for judicial purposes." Advisory Committee's Note, 56 F.R.D. 183, 283 (1972). Thus, the Rule was clearly based on an assessment of the reliability of the outside information. And that has nothing to do with the Confrontation Clause. *See Bullcoming*, 131 S.Ct. at 2720 n.1 (Sotomayor, J., concurring) ("The rules of evidence, not the Confrontation Clause, are designed primarily to police reliability; the purpose of the Confrontation Clause is to determine whether statements are testimonial and therefore require confrontation.").

It bears emphasis that a holding for Petitioner would not amount to a holding that Rule 703 is unconstitutional. First, as noted above, *see* note 5 *supra*, this is not a case in which an expert testifies as to an opinion formed on the basis of outside information but without revealing the information or the source of it. In this case, Lambatos's testimony made clear that she was basing her opinion on the profile as reported by Cellmark.

Second, a holding for Petitioner could bear on the operation of Rule 703 only in the relatively narrow circumstance in which a prosecution expert offers

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Committee's Note, 56 F.R.D. 183, 283 (1972).

against an accused an opinion that is based on a *testimonial* statement made by an outside source. Routine reports prepared by technicians without any contemplation of assisting in a prosecution would be unaffected.

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Melendez-Diaz rightly characterized its holding as a "rather straightforward application" of Crawford." 129 S.Ct. at 2533. And yet that holding has been under continuous assault. In *Briscoe v. Virginia*, 130 S.Ct. 1316 (2010), the state argued – the express holding of *Melendez-Diaz* to the contrary notwithstanding – that the burden of calling the person who prepared the lab report as an in-court witness could be imposed on the accused. The Court rejected that attempt. In *Bullcoming*, the state argued that it sufficed to present as an in-court witness an analyst who had neither written the report nor observed performance of the reported test. The Court rejected that attempt as well. The attempt here is subtler, but in a sense it is more dangerous, because if it succeeds states would have a road map not only to avoid the rulings of this Court with respect to forensic lab reports but more broadly to eviscerate the Confrontation Clause.

A state could achieve the narrower goal by asking a lab analyst to write a report that provides data in support of a given inference but that avoids stating the inference. The prosecution could then put on the witness stand any person whom the state court would accept as an expert qualified to give an opinion adopting the inference in question. That expert could explain to the trier of fact how she based her opinion in part on the report of the absent lab analyst, and in part

on her background knowledge and other information of a type on which such experts commonly rely. The Confrontation Clause would become little more than a nuisance in this realm.

And states could achieve the broader goal by characterizing as experts witnesses who would draw inferences about the incidents at issue based wholly or in part on testimonial statements made to them. Not only would the Confrontation Clause be rendered a sham but the whole structure of the common law trial – based on witnesses testifying in person – would be threatened.

Amicus does not mean to be unduly alarmist. Presumably some states would not take advantage of the leeway they would have if this Court once again adopted an ineffectual form of the Confrontation Clause – just as even before *Melendez-Diaz* and *Bullcoming* some states conscientiously adhered to the practice that those decisions now require. But the Court should bear in mind that before *Crawford* adopted a rigorous doctrine of the Confrontation Clause some states routinely admitted, notwithstanding the absence of confrontation, "core testimonial statements that the Confrontation Clause plainly meant to exclude." *Crawford*, 541 U.S. at 63-65. It is not enough to hope that the states will act properly of their own accord; the protection of the rights guaranteed by the Constitution requires the vigilance of this Court.

CONCLUSION

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

Respectfully submitted,

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