No. 10-8505

IN THE

SUPREME COURT OF THE UNITED STATES

SANDY WILLIAMS,

Petitioner,

v.

ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF ILLINOIS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certiorari to review the Illinois Supreme Court's judgment that a testifying expert's reliance on the results of DNA analysis conducted at a private laboratory did not implicate the Confrontation Clause because references to the data generated by non-testifying analysts was offered not for the truth of the matter asserted, but rather for the non-hearsay purpose of explaining the basis of the expert's own, independent opinions.

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BRIEF IN OPPOSITION

The certiorari petition should be denied. The Illinois Supreme Court's judgment rests on this Court's express pronouncement in *Crawford v. Washington*, 541 U.S. 36 (2004), that the Sixth Amendment's Confrontation Clause does not bar the admission of statements admitted for a purpose other than proving the truth of the matter asserted. In assessing whether the testimony of DNA expert Sandra Lambatos implicated petitioner's confrontation rights, the Illinois Supreme Court recognized that Lambatos referenced DNA testing conducted at Cellmark, a private laboratory, only to explain how she formed her own expert opinions. Thus, the only statements offered for the truth of the matter asserted against petitioner were Lambatos's opinions, which were introduced via her live in-court testimony and were subject to cross-examination. Cellmark's reports regarding DNA analysis of the vaginal swabs were not introduced at trial, nor did Lambatos parrot the reports during her testimony, thus distinguishing this case from *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), and *New Mexico v. Bullcoming*, 226 P.3d 1 (N.M.), *cert. granted*, 131 S.Ct 62 (2010). Despite petitioner's claim to the contrary, this case does not implicate any split in authority. Indeed, federal appellate courts and state high courts, when presented with similar facts, uniformly hold that a testifying expert may rely on the work of other experts in formulating opinions admitted pursuant to Federal Rule of Evidence 703 and its state counterparts without triggering Confrontation Clause concerns. The Illinois Supreme Court's judgment is in line with these decisions and the decisions of this Court.

STATEMENT

1. Petitioner Sandy Williams was convicted of two counts of aggravated criminal sexual assault and one count each of aggravated kidnapping and aggravated robbery. Pet. App. C1. At petitioner's bench trial, L.J. testified that petitioner approached her from behind as she walked near an alley on her way home from work on February 10, 2000. *Id.* at C2. Petitioner forced L.J. into a beige station wagon and ordered her to remove her clothes. *Id.* Petitioner vaginally penetrated L.J. with his penis while he choked her. *Id.*; R. III107-09. Petitioner then turned L.J. onto her stomach and attempted to penetrate L.J.'s anus with his penis. Pet. App. C2. Petitioner pushed L.J. out of the vehicle and drove away with L.J.'s coat, money and other items. *Id.* at C2.

L.J. ran home and her mother called the police. *Id.* Chicago police officers responded, spoke with L.J., and issued a "flash" message describing the offender and car. *Id.* Later, an emergency room doctor conducted a vaginal exam of L.J. and took vaginal swabs, which the doctor sealed in a criminal sexual assault evidence collection kit along with L.J.'s blood sample. *Id.* at C2-C3. The kit was inventoried by a Chicago Police detective and sent to the Illinois State Police ("ISP") Crime Lab for testing and analysis. *Id.* at C3.

On August 3, 2000, police arrested petitioner for an unrelated offense and, pursuant to court order, drew a blood sample from him. Pet. App. C3. Following the DNA analysis described below, L.J. identified petitioner from a line up on April 17, 2001. *Id.* at C4. Petitioner was then arrested for the instant offenses. *Id.* At trial, L.J. identified petitioner in court as the man who sexually assaulted her. R. III104.

Three witnesses testified at petitioner's trial concerning the DNA evidence in this case. First, ISP Crime Lab forensic scientist Karen Kooi testified that, using STR (short tandem repeat) DNA analysis, she extracted a DNA profile from petitioner's blood standard and entered the profile into the database at the ISP Crime Lab. *Id.* at C3.

Second, ISP Crime Lab forensic biologist Brian Hapack testified that he received L.J.'s sexual assault evidence collection kit and performed tests on the vaginal swabs that confirmed the presence of semen. *Id.* Hapack repackaged and sealed the vaginal swabs and L.J.'s blood standard in accordance with accepted procedure for preserving evidence for future DNA testing. *Id.*; R. JJJ48-49; R. JJJ52.

Third, former ISP Crime Lab forensic biologist Sandra Lambatos testified that L.J.'s vaginal swabs and blood standard were sent to Cellmark Diagnostic Laboratory in Germantown, Maryland, for DNA analysis on November 29, 2000.[1] Pet. App. C3. Cellmark returned the vaginal swabs and blood standard to the ISP Crime Lab on April 3, 2001. *Id.* After the trial court accepted Lambatos as an expert in forensic biology and forensic DNA analysis, she testified about polymerase chain reaction (PCR) DNA testing and explained how PCR-based analysis is used to identify a male DNA profile from semen. *Id.* at C4. The analyst isolates and extracts DNA from a sample, then amplifies it until a workable amount of DNA is present. *Id.* The amplified DNA is then examined through a genetic analyzer, and specific areas of interest are tagged with florescent markers, thus generating a DNA profile that can be compared to other profiles. *Id.*; R. JJJ62.

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[1] Lambatos testified that the ISP Crime Lab sent evidence samples to Cellmark during 2000-2001 to expedite the analysis of evidence and to reduce the backlog at the ISP Crime Lab, and she detailed the procedures surrounding this arrangement. R. JJJ63-65.

Lambatos testified that it is commonly accepted practice in the scientific community for one DNA expert to rely on the records of another DNA analyst to complete her own work and that she routinely relied on DNA analysis performed at Cellmark. Pet. App. C4-5. Lambatos further testified that Cellmark was an accredited laboratory and that Cellmark's testing and analysis methods were generally accepted in the scientific community. *Id.* at C4.

Lambatos testified that she was assigned to work on the instant case at the ISP Crime Lab. R. JJJ69-71. A computer match was generated of the male DNA profile identified in L.J.'s vaginal swabs to petitioner's DNA profile in the database. *Id.* After the database match was generated, Lambatos compared the male profile identified in L.J.'s vaginal swabs to the DNA profile identified by Kooi in petitioner's blood standard. *Id.*; Pet. App. C5. Lambatos explained that the ISP Crime Lab uses the database as an investigative tool; after a database search is run, the analysts examine the actual data to determine whether there is a DNA match. R. JJJ79. Thus, after the database match was generated in this case, Lambatos compared petitioner's DNA profile to the electropherogram of the E2 (sperm) fraction of L.J.'s vaginal swabs. R. JJJ91. In Lambatos's expert opinion, the semen from L.J.'s vaginal swabs was a match to petitioner. Pet. App. C5. Lambatos testified that the probability of this profile occurring in the general population was one in 8.7 quadrillion black, one in 390 quadrillion white, and one in 109 quadrillion Hispanic unrelated individuals. *Id.* Lambatos did not observe any degradation or irregularities in the sample from L.J.'s vaginal swab. *Id.*

On cross-examination, Lambatos repeated that Cellmark was an accredited

laboratory; it had to meet certain guidelines to receive accreditation and to perform DNA analysis for the ISP Crime Lab. *Id.* at C4. Lambatos further explained that calibrations and internal proficiencies had to be in place for Cellmark to perform the DNA analysis in this case. *Id.* While Lambatos did not personally observe the testing of the samples in the laboratory or do any biological testing herself, she reviewed the electropherogram of the vaginal swab and made her own determinations, interpretations, and conclusions about the evidence. *Id.* at C5; R. JJJ75-76. Specifically, Lambatos examined the electropherogram for the E2 fraction and the donor profile generated at Cellmark. R. JJJ80-82. The data indicated a mixture in the E2 fraction, and some of the alleles were consistent with the victim's profile. R. JJJ81, JJJ83. Lambatos explained that the female epithelial cells are separated from any possible sperm cells during differential extraction of a vaginal swab, thus resulting in either a single donor profile or a mixture. R. JJJ80-82.

Cellmark's report was not introduced into evidence at petitioner's trial. Pet. App. C5. While Lambatos referenced documents she reviewed in forming her own independent opinion and answered questions regarding the data at particular loci, she did not read the contents of any Cellmark report into evidence. *Id.*; R. JJJ75-87. Contrary to representations made in the petition,[2] Lambatos repeatedly testified that she reviewed the raw data generated at Cellmark, in addition to Cellmark's report and allele chart, and that she independently interpreted the data during her comparative analysis to petitioner's known DNA profile. R. JJJ75, JJJ80, JJJ81, JJJ82, JJJ91, JJJ98, JJJ101, JJJ103.

[2] Petitioner incorrectly states that Lambatos "did not review any of the raw data produced by such analysis. Rather she merely performed the statistical matching of the DNA profile provided to her by Cellmark with a profile derived from a blood sample taken from Williams." Pet. at 14.

Furthermore, in response to defense questioning, Lambatos referenced the raw data to explain how interpretation of mixtures differs from single donor profiles, to illustrate how Cellmark's process and reporting guidelines differ from those used at the ISP Crime Lab, and to field specific questions from defense counsel regarding how she would interpret the allelic patterns identified at particular loci. R. JJJ84-88, JJJ90-95, JJJ97-99.

At the conclusion of Lambatos's testimony, petitioner moved to strike the evidence of testing completed at Cellmark on foundational and Sixth Amendment Confrontation Clause grounds. Pet. App. C5. The trial court denied the motion, stating: "I don't think this is a *Crawford* scenario, and I agree with the State that *** the issue is *** what weight do you give the test, not do you exclude it and accordingly your motion to exclude or strike the testimony of the last witness or opinions based on her own independent testing of the data received from Cellmark will be denied." *Id.* at C6.

Petitioner did not present any evidence. *Id.* The trial court ultimately found petitioner guilty of two counts of aggravated criminal sexual assault and one count each of aggravated kidnapping and aggravated robbery. *Id.* The court sentenced petitioner to two concurrent terms of natural life imprisonment for the aggravated criminal sexual assault convictions and a concurrent term of 15 years' imprisonment for aggravated robbery; the court sentenced petitioner to a consecutive term of 60 years' imprisonment for aggravated kidnapping. *Id.*

2. On appeal, the Illinois Appellate Court affirmed petitioner's convictions. *Id.*; *People v. Williams*, 895 N.E.2d 961 (Ill. App. Ct. 2008). In doing so, the court concluded that Lambatos's testimony did not violate petitioner's constitutional right to confrontation,

stating: "Cellmark's report was not offered for the truth of the matter asserted; rather, it was offered to provide a basis for [Lambatos's] opinion. Lambatos clearly testified that she performed her own evaluation of the data, which included Kooi's findings, Hapack's findings and Cellmark's report, prior to forming her opinion." Pet. App. A6. One justice dissented, concluding that the State failed to lay a sufficient foundation for Lambatos's opinion testimony as a matter of Illinois law. *Id.* at A7-10.

3. The Illinois Supreme Court granted leave to appeal. In his brief to the Illinois Supreme Court, petitioner argued that Lambatos should not have been allowed to testify about Cellmark's report because the report constituted testimonial hearsay. Petitioner further argued that, because the evidentiary value of Lambatos's opinion depended on the trier of fact accepting Cellmark's report as accurate, the report was offered for the truth of the matter asserted and constituted hearsay for Confrontation Clause purposes. While petitioner's case was pending, this Court issued its opinion in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009). In his reply brief to the Illinois Supreme Court, petitioner argued that *Melendez-Diaz* was directly analogous to his case and therefore compelled reversal of the state appellate court's judgment. Pet. App. C16-18.

The Illinois Supreme Court affirmed the state appellate court's judgment regarding Lambatos's testimony.[3] Pet. App. C1-19. Like the appellate court, the Illinois Supreme Court recognized that petitioner's constitutional right to confrontation was neither implicated nor violated by Lambatos's expert testimony. Pet. App. C12-19. The court

[3] The Illinois Supreme Court reversed the state appellate court's judgment on an unrelated sentencing issue and affirmed the sentence originally imposed by the trial court. Pet. App. C19.

reasoned that, under *Wilson v. Clark*, 427 N.E.2d 1322 (Ill. 1981), and its progeny (wherein Illinois adopted the pre-amended version of Federal Rule of Evidence 703), Lambatos's references to Cellmark's analysis of the vaginal swabs was not hearsay because it was not offered for the truth of the matter asserted. Pet. App. C12-19. Rather, Lambatos referenced DNA testing completed at Cellmark for the limited purpose of explaining the basis of her opinion. *Id.* Citing this Court's express pronouncement in *Crawford v. Washington*, 541 U.S. 36 (2004), that the Confrontation Clause does not bar the admission of testimonial statements admitted for a purpose other than proving the truth of the matter asserted, the Illinois Supreme Court concluded that "*Crawford* considerations did not apply here." Pet. App. C12, C18.

The Illinois Supreme Court also rejected petitioner's argument that this case is "directly analogous" to *Melendez-Diaz*. *Id.* In distinguishing *Melendez-Diaz*, the court noted that Cellmark's analysis was confined to processing the vaginal swabs and did not include the type of comparative analysis conducted by Lambatos. *Id.* at C18. The Illinois Supreme Court again highlighted that no Cellmark reports were introduced or read into evidence and that Lambatos testified about her own expertise, judgment and skill in interpreting the specific alleles identified in the vaginal swabs and her general knowledge of the protocols and procedures in place at Cellmark. *Id.* at C18.

Two justices opined in a special concurrence that the DNA evidence should have been excluded on Illinois-law foundational grounds, but concluded that the foundational error was harmless. Pet. App. C20-27. The specially concurring justices did not address the Sixth Amendment Confrontation Clause issue. *Id.*

REASONS FOR DENYING THE PETITION

I. The State Court Judgment Is In Accord With *Crawford* And Its Progeny And This Case Implicates No Split In Authority.

Forensic DNA expert Sandra Lambatos opined in court that petitioner's DNA profile was consistent with the male DNA profile identified in the victim's vaginal swabs. Lambatos's opinion was based on her comparative review of the reports and data generated during the DNA analysis of defendant's blood standard, the victim's blood standard, and the victim's vaginal swabs by forensic scientists at the Illinois State Police ("ISP") Crime Lab and Cellmark Diagnostic ("Cellmark"), a private laboratory. Although petitioner repeatedly suggests that Lambatos presented the DNA test "results" or "findings" of a non-testifying DNA analyst during her testimony, in fact no such out-of-court statement was elicited during Lambatos's testimony. Pet. at 10, 21. Lambatos did not read from any reports or parrot the findings of another DNA analyst at trial. Rather, Lambatos presented her own independent opinions regarding the physical evidence and was subject to extensive cross-examination regarding those opinions. Accordingly, her testimony did not implicate petitioner's confrontation right.

Because no Cellmark report was admitted into evidence at petitioner's trial, the Illinois Supreme Court correctly recognized that *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), did not control its analysis of petitioner's Sixth Amendment confrontation claim.[4] *See also Davis v. Washington*, 547 U.S. 813, 832 n.6 (2006) ("The Confrontation Clause in no way governs police conduct, because it is the trial *use* of, not

[4] This case is likewise distinct from *New Mexico v. Bullcoming*, 226 P.3d 1 (N.M. 2010), *cert. granted*, 131 S.Ct. 62 (2010), which involved the admission of a report written by a different analyst than the analyst who testified at trial.

the investigatory *collection* of, *ex parte* testimonial statements which offends that provision") (emphasis in original); *United States v. Turner*, 591 F.3d 928, 932-934 (7th Cir.) (noting that "*Melendez-Diaz* did not do away with Federal Rule of Evidence 703"), *cert. pending*, No. 09-10231 (Apr. 12, 2010). The Illinois Supreme Court adhered to this Court's explicit pronouncement in *Crawford v. Washington*, 541 U.S. 36 (2004), that the Confrontation Clause does not bar the use of statements admitted for purposes other than proving the truth of the matter asserted, to determine that Lambatos's expert testimony did not violate the Sixth Amendment. *See Crawford* 541 U.S. at 59 n.9, *citing Tennessee v. Street*, 471 U.S. 409, 414 (1985). The Illinois Supreme Court found that, under Federal Rule of Evidence 703 ("FRE 703"),[5] any references to the data and facts underlying Lambatos's opinion were offered not for the truth of the matter asserted, but rather for the non-hearsay purpose of explaining the basis of her opinion. Thus, the Illinois Supreme Court properly concluded that Lambatos's testimony about Cellmark did not constitute "hearsay" and "*Crawford* considerations did not apply here." Pet. App. C18.

The Illinois Supreme Court's finding that Lambatos's reliance on laboratory tests and analysis performed by other scientists did not implicate petitioner's Sixth Amendment confrontation right is rooted in the text of *Crawford* and is in accord with federal appellate court and other state high court opinions. Thus, the judgment below does not, as petitioner maintains, undermine this Court's holdings in *Crawford* and *Melendez-Diaz,* nor does it implicate any split of authority regarding expert testimony. To the contrary, federal and

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[5] The Illinois Supreme Court adopted FRE 703 in *Wilson v. Clark*, 417 N.E.2d 1326-1327 (Ill. 1981). Illinois has not adopted the 2000 amendment to FRE 703. Pet. App. C14; *see also* Fed. R. Evid. 703 (2000).

state court decisions that address expert testimony and the Confrontation Clause uniformly hold that testifying experts may rely on the work of non-testifying experts to form independent opinions and explain the bases of their own opinions at trial.

In *United States v. Pablo*, 625 F.3d 1285, 1290-1295 (10th Cir. 2010), the testifying DNA analyst had no role in the serology or DNA analysis performed on the evidence or in preparing the lab reports attendant to the laboratory bench work. The testifying expert conveyed to the jury that serology and DNA analysis connected Pablo to DNA found on the victim's genitalia and a condom recovered from the crime scene. *Id.* at 1290. Neither the serology report nor the DNA report was admitted into evidence. *Id.* at 1294-1295. Reviewing the claim for plain error, the Tenth Circuit found that Pablo failed to demonstrate a Confrontation Clause violation. *Id.* at 1290-1295. The Court noted that, under FRE 703, an expert may testify to her opinion even if she based that opinion on otherwise inadmissible facts or data, including testimonial statements, and that such testimony typically does not implicate a defendant's confrontation rights because the statements are not offered for their substantive truth. *Id.* at 1292. The Court also distinguished such testimony from an expert who fails to convey her own independent judgment and simply parrots another's testimonial hearsay, as well as cases involving the actual admission of out-of-court testimonial statements as evidence, like *Melendez-Diaz*. *Id.* at 1292, 1294; *see also United States v. Richardson*, 537 F.3d 951, 960-961 (8th Cir. 2008) (DNA expert's testimony, informed by reports of others, was not hearsay because it related her own independent conclusion, and therefore did not violate Confrontation Clause), *cert. denied*, 129 S.Ct. 2378 (2009); *United States v. McGhee*, 627 F.3d 454, 459-

460 (1st Cir. 2010) (inclusion of technical test data in report allowed expert to draw own scientific conclusion regarding nature of substance); *United States v. Moon*, 512 F.3d 359, 362 (7th Cir.) ("the Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself"), *cert. denied*, 129 S.Ct. 39 (2008).

Similarly, in *Smith v. State*, 28 So.3d 838, 553-555 (Fla. 2009), the Florida Supreme Court held that the Confrontation Clause was not implicated when an FBI DNA lab supervisor testified to her own opinion regarding a DNA match because, although other biologists completed the bench work on the evidence samples, the testifying expert performed the comparative analysis of the data and calculated the statistical probability of the match. In *Pendergrass v. State*, 913 N.E.2d 703, 705-709 (Ind. 2009), *cert. denied*, 130 S.Ct. 3409 (2010), the Indiana Supreme Court found no Confrontation Clause violation where the State did not present testimony from the DNA analyst who conducted the laboratory bench work on tissue from the victim's aborted fetus, but instead presented testimony from a technical reviewer regarding the DNA analysis and another expert who relied on the raw data to form an opinion regarding paternity of the aborted fetus. In *State v. Gomez*, 244 P.3d 1163, 1167-1168 (Ariz. 2009), the Arizona Supreme Court also held that a DNA expert's reliance on data generated by non-testifying DNA technicians in arriving at her opinion did not violate the Confrontation Clause. And, in *Commonwealth v. Banville*, 931 N.E.2d 457, 466-467 (Mass. 2010), the Massachusetts high court held that DNA expert opinion testimony based on hearsay does not offend the Sixth Amendment if the expert does not testify to the details of the hearsay on direct examination.

These cases illustrate the consensus among federal and state courts, a consensus in

line with the Illinois Supreme Court's holding that Lambatos's in-court testimony about her own opinion, albeit informed by reports and data generated by other analysts, neither implicated nor violated the Confrontation Clause. Petitioner nonetheless describes federal courts of appeals, state high courts, and state appellate courts as "split as to whether out-of-court statements presented to explain the basis of an expert witness's opinion constitutes hearsay, and thus triggers the defendant's rights under the Confrontation Clause." Pet. at 17. But the alleged split is illusory and fails to acknowledge a key distinguishing fact on which the outcomes of the cited cases turned — in every case that petitioner cites, and unlike this case, the testifying expert recited the testimonial hearsay statement of an out-of-court declarant at trial. *See United States v. Mejia*, 545 F.3d 179 (2d Cir. 2008); *Commonwealth v. Avila*, 912 N.E.2d 1014 (Mass. 2009); *New York v. Goldstein*, 843 N.E.2d 727 (N.Y. 2005), *cert. denied,* 547 U.S. 1159 (2006).

In petitioner's lone federal appellate decision, a police officer testified as an expert on a specific organized gang and opined on various aspects of the gang's structure and activities, including that the gang put a "tax" on narcotics sales in certain bars. *Mejia*, 545 F.3d at 186-187, 197-199. The "officer expert" learned about the drug tax from a gang member during a custodial interrogation. *Id.* at 187-188. The Second Circuit held that the officer's reliance on, and repetition of, the out-of-court statement about the drug tax violated Mejia's confrontation right and exceeded the scope of FRE 703. *Id.* at 197-199. In so holding, the Second Circuit noted that the officer did not apply his own expertise to reach his conclusion about the drug tax; rather, he merely repeated the statement of an out-of-court declarant. *Id.*

In *Avila*, also cited by petitioner, the Massachusetts high court held that a testifying medical examiner could not recite, on direct examination, the conclusions of an unavailable medical examiner contained in the autopsy report. 912 N.E.2d at 1027-1030. Finally, in *Goldstein*, New York's high court found that the admission of out-of-court statements made to a forensic psychiatrist retained by the prosecution violated *Crawford*. The psychiatrist interviewed several people and recounted the substance of their statements at trial when she gave her opinion regarding Goldstein's mental condition. *Goldstein*, 843 N.E.2d at 729-734.[6]

Rather than establishing a split, these cases fully support the Illinois Supreme Court's judgment. Indeed, testifying expert Lambatos did not recite the conclusions or statements of another DNA analyst or in any way act as a conduit for Cellmark's findings or results. Rather, she compiled, reviewed, and interpreted data and reports generated by DNA analysts at the ISP Crime Lab and Cellmark to conduct a comparative analysis of known DNA profiles to the male DNA profile identified in the vaginal swabs. Lambatos then drew her own conclusions about the data and presented her opinions to the court. *Avila* would allow such testimony, because the *Avila* court also found that the substitute medical examiner's own opinions and conclusions, though based on tests or procedures

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[6] The two state appellate court cases cited by petitioner also involved experts who disclosed out-of-court statements during their testimony. Pet. at 18. In *People v. Dungo*, 98 Cal. Rptr. 3d 702, 708 (Ct. App.), *review granted*, 220 P.3d 240 (Cal. 2009), the testifying medical examiner disclosed portions of the autopsy report written by another pathologist when he explained the basis of his own opinions regarding the victim's death. In *People v. Dendel*, No. 247391, 2010 Mich. App. Lexis 1602, *31-37 (Mich. Ct. App. Aug. 24, 2010), *held in abeyance*, 2011 Mich. Lexis 410 (Feb. 4, 2011), the testifying medical examiner stated at trial that the victim died with a blood glucose level of zero, which relayed the results of tests performed by a non-testifying toxicologist.

performed by another, did not offend the Confrontation Clause as interpreted by this Court in *Crawford* and *Melendez-Diaz*. *See Avila*, 912 N.E.2d at 1028-1029; *accord, Commonwealth v. Nardi*, 893 N.E.2d 1221, 1229 (Mass. 2008); *Commonwealth v. Durand*, 931 N.E.2d 950, 957-962 (Mass. 2010).

Lambatos's testimony likewise would survive the reasoning set out in *Mejia*, because Lambatos applied her own expertise to reach her conclusions about the comparative match and did not convey the substance of another's statements to the trial court. *See Mejia*, 545 F.3d at 197-199; *see also United States v. Johnson*, 587 F.3d 625, 635-636 (4th Cir. 2009) (distinguishing *Mejia* from case where experts did not act as mere conduits for testimonial hearsay), *cert. denied sub nom., Martin v. United States*, 130 S.Ct 2128 (2010). In short, *Mejia*, *Avila*, and *Goldstein* do not conflict with the Illinois Supreme Court's judgment because, in each of those cases, out-of-court testimonial statements were relayed directly to the trier of fact by the testifying expert witness.

Notwithstanding the lack of any out-of-court testimonial statement admitted in this case, petitioner maintains that Lambatos's testimony about Cellmark was offered for the truth of the matter asserted and was, therefore, hearsay subject to Confrontation Clause protections. Pet. at 13. Pulling primarily from the academic works of Professors Richard D. Freidman and Jennifer L. Mnookin, petitioner submits that Lambatos's testimony about the basis of her opinion was necessarily offered for its truth because its probative value was dependent on the accuracy of Cellmark's test results. Pet. at 14. Putting aside that this argument does nothing to refute the absence of any split in authority implicated by this case, it also depends on a misunderstanding of the nature of Lambatos's testimony. In fact,

the probative value of Cellmark's analysis did not hinge on the accuracy of the test results, but was dependent only on a showing that the data Lambatos reviewed was actually derived from L.J.'s vaginal swabs. This was accomplished through testimony establishing relevance, foundation, and chain of custody for the evidence. The reliability of Lambatos's expert opinion, in turn, was tested via the procedure the Constitution prescribes, cross-examination, which challenged the reasonableness of Lambatos's reliance on data derived from forensic testing that she did not perform herself and her ability to synthesize the primary source material. *See Wilson*, 417 N.E.2d at 1326-1327, *citing United States v. Sims*, 514 F.2d 147, 149 (9th Cir. 1975).

In the traditional expert witness scenario, the expert testifies in court to her own opinion, which was developed from her own expertise, knowledge, and review of specific data relevant to the case as permitted by FRE 703 and its Illinois counterpart. *Wilson*, 417 N.E.2d at 1326-1327; *see also* Fed. R. Evid. 705 (adverse party may require expert to reveal facts or data underlying opinion). That is precisely what occurred here — Lambatos's testimony about the vaginal swabs explained the basis of her own opinion that petitioner could not be excluded as a DNA donor to the sample recovered from the victim's vagina. When Lambatos discussed the mixture in the vaginal swabs, she was not making a statement about the truth or reliability of the data reported from Cellmark, as petitioner suggests. Pet. at 13. Rather, she was making a statement about the propriety of drawing particular inferences from that data to form her opinion about the possible DNA contributors to the mixture. Such testimony was non-hearsay and, therefore, did not implicate *Crawford* and its progeny. *See Crawford* 541 U.S. at 59 n.9; *see also Street*, 471

U.S. at 414; *Turner*, 591 F.3d at 934.

The Illinois Supreme Court's finding that Lambatos's testimony about Cellmark did not constitute "hearsay" and, therefore, did not implicate *Crawford* is rooted in the text of *Crawford* and is in accord with federal appellate court and state high court opinions that have addressed the admission of expert testimony under FRE 703 and its state counterparts. No split of authority exists on this issue. This case, therefore, does not warrant certiorari review.

II. This Case Is A Poor Vehicle For Addressing The Question The Petition Presents Because Any Error In The Admission Of The Expert Testimony Was Harmless Beyond A Reasonable Doubt.

Even if error, the admission of Lambatos's testimony about Cellmark was harmless beyond a reasonable doubt. *See generally Schneble v. Florida*, 405 U.S. 427, 428 (1972) (erroneous admission of testimonial hearsay subject to harmless error review); *Harrington v. California*, 395 U.S. 250, 254 (1969) (same); *see also Melendez-Diaz* 129 S.Ct. at 2542 n.14, *citing Coy v. Iowa*, 487 U.S. 1012, 1021-1022 (1988). Harmlessness is determined by assessing: (1) whether the improperly admitted evidence was essentially corroborative of properly admitted evidence, and thus had little prejudicial impact; and (2) the independent evidence of guilt. *Schneble*, 405 U.S. at 430-431. Both considerations demonstrate that the admission of the testimony to which petitioner objects was harmless beyond a reasonable doubt, thus providing an alternative ground to sustain the trial court's finding of guilt regardless of this Court's answer to the question presented in the petition. *See* Pet. App. C26 (wherein concurring justices found any foundational error in admission of Lambatos's testimony harmless).

The DNA evidence was independent of the victim's credible identifications of petitioner from a line-up and at trial as the individual who attacked and sexually assaulted her. L.J.'s identifications of petitioner from the line-up and at trial were unequivocal. L.J. had ample opportunity to view petitioner while he repeatedly raped her in the backseat of his station wagon. The sexual assault was prolonged, and L.J. was face-to-face with petitioner when he vaginally raped her. In finding petitioner guilty, the trial court specifically found that the victim's testimony was credible and it, therefore,

provided an adequate basis for the trial court to convict petitioner. R. JJJ152-53.

Petitioner contends that the identification evidence was weak because the victim identified another man as her assailant on the night of the assault and did not identify petitioner until a year later. Pet. at 5, 17. Contrary to petitioner's suggestion, however, this was not a case involving a mistaken identification of another man. On the night of the offense, two Chicago Police officers stopped James McChristine, who was driving a beige station wagon, near the location where the assaulted occurred. R. III20, III29. McChristine agreed to accompany the officers to the hospital where L.J. was receiving treatment. R. III20. An officer took McChristine's driver's license into the hospital and showed it to L.J. R. III121. L.J. said that the photograph might depict her attacker but asked to view McChristine in person. R. III119. L.J. then viewed McChristine while he sat in a squad car in the hospital parking lot. *Id.* L.J. testified that she still was not sure whether McChristine was her attacker when she saw him in the squad car. R. III119-20.

Later that night, L.J. told a detective that, although she first thought McChristine's photo resembled her attacker, she had considerable doubts after viewing McChristine outside the hospital. R. III73. After L.J. was released from the hospital at 2:30 a.m., she viewed McChristine again at a police station. R. III75, III9. At that time, L.J. confirmed that McChristine was not her attacker, and McChristine was released. R. III75, III36-38. Notably, the trial judge specifically discussed McChristine when reflecting on the strength of L.J.'s identifications of petitioner and found that those events in no way undermined L.J.'s eventual identification of petitioner. R. JJJ149-54. Indeed, the judge commented that the situation with McChristine showed this was a case

"where the system actually worked." R. JJJ150.

Petitioner also submits that the claimed error was not harmless because DNA has a "'mystical aura' of infallibility" and tends to overwhelm other evidence. Pet. at 16. Such is not the case here, however. Petitioner was found guilty following a bench trial, where the trial judge specifically discussed the strength of the victim's identifications, and where the judge's comments about the DNA evidence demonstrate that he was not swayed by any perceived infallibility of DNA analysis or evidence.

In short, the evidence of petitioner's guilt was overwhelming, independent of the DNA testimony admitted at petitioner's bench trial. Because Lambatos's testimony did not violate the Confrontation Clause, and because any error in the admission of her testimony was nonetheless harmless, this case presents a poor vehicle for addressing the question presented in the petition, for even a ruling favorable to petitioner on that question would not affect the outcome in this case. The certiorari petition should be denied.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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