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IN THE SUPREME COURT OF THE UNITED STATES

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 SANDY WILLIAMS, :  
 Petitioner :  
 v. : No. 10-8505  
 ILLINOIS :  
 - - - - - x

Washington, D.C.  
 Tuesday, December 6, 2011

The above-entitled matter came on for oral  
 argument before the Supreme Court of the United States  
 at 11:05 a.m.

APPEARANCES:

BRIAN W. CARROLL, ESQ., Chicago, Illinois; on behalf of  
 Petitioner.  
 ANITA ALVAREZ, ESQ., State's Attorney, Chicago,  
 Illinois; on behalf of Respondent.  
 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,  
 Department of Justice, Washington, D.C.; for  
 United States, as amicus curiae, supporting  
 Respondent.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 10-8505, Williams v. Illinois. Mr. Carroll.

ORAL ARGUMENT OF BRIAN W. CARROLL  
ON BEHALF OF THE PETITIONER

MR. CARROLL: Mr. Chief Justice, and may it please the Court:

In this case, Sandra Lambatos testified that Mr. Williams' DNA matched a DNA profile that, according to assertions made by analysts from a Cellmark lab, was the genetic description of the purported offender.

Because no one from Cellmark appeared at Mr. Williams' trial, Lambatos' testimony conveying the testimonial statements from Cellmark violated Mr. Williams' rights under the Confrontation Clause. For these reasons the Illinois Supreme Court's decision should be reversed.

Ms. Williams' -- or Ms. Lambatos' testimony on direct examination clearly conveyed Cellmark's statement. She testified that the vaginal swab and blood sample from the victim were sent from -- to Cellmark for DNA analysis. She later was asked, was there a computer match generated from the male DNA

1 profile found in the semen from the vaginal swabs of the  
2 victim and the male DNA profile that had been identified  
3 as having originated from Mr. Williams.

4 JUSTICE SOTOMAYOR: Counsel, it hasn't been  
5 the focus of the briefing, but you've just made it the  
6 focus here. I know that you have been claiming that her  
7 statements about what constituted the Cellmark lab  
8 results are a statement that violates the Confrontation  
9 Clause. But are you taking the position that her  
10 statements and the admission of the documents, mailing  
11 the lab sample to the laboratory and them getting it  
12 back, that all of those business records were improperly  
13 admitted?

14 MR. CARROLL: As --

15 JUSTICE SOTOMAYOR: Because she testified  
16 that in her records she sees that her lab -- and she  
17 says -- I think those records were produced, I could be  
18 wrong -- that --

19 MR. CARROLL: The shipping records were  
20 produced.

21 JUSTICE SOTOMAYOR: They were produced and  
22 admitted into evidence. That the lab sample taken from  
23 the victim, L.J., was mailed to the laboratory, and that  
24 it came back.

25 Are you taking the position that those

1 shipping documents were not business records? Are you  
2 taking the position that those were improperly admitted?

3 MR. CARROLL: No, Your Honor, at this stage  
4 we are not challenging the admission of the shipping  
5 record.

6 JUSTICE SCALIA: Well, that would just show  
7 that the material went to and came back from the lab.  
8 It wouldn't show what the lab results were. It was the  
9 results that she testified to, right?

10 MR. CARROLL: That's correct, Your Honor.

11 JUSTICE SCALIA: And what other evidence was  
12 there of the results besides her testimony?

13 MR. CARROLL: There was no other evidence.

14 JUSTICE SCALIA: No other.

15 JUSTICE GINSBURG: In the case of the blood  
16 that was tested in the police lab, there the person who  
17 tested did testify at the trial, right? It wasn't just  
18 Lambatos -- Lambatos, but the one who had tested the  
19 blood?

20 MR. CARROLL: The -- the person who  
21 tested or who analyzed Mr. Williams' blood did testify  
22 live at trial.

23 JUSTICE GINSBURG: Yes.

24 JUSTICE KENNEDY: Abbinanti testified that  
25 she did the blood test and it went into the State

1 database with reference to the other crime, not this  
2 crime; am I correct?

3 MR. CARROLL: Yes, Your Honor. The -- when  
4 he was arrested for an unrelated matter.

5 JUSTICE KENNEDY: But she is an expert, she  
6 testified how she did the test, and what the -- and that  
7 she put the DNA result into -- into the data bank?

8 MR. CARROLL: That's correct, Your Honor.

9 JUSTICE ALITO: Hasn't it long been accepted  
10 that experts may testify to the facts that form the  
11 basis for their opinions on the ground that when the  
12 experts go over those facts they are not -- that  
13 information is not being introduced to prove the truth  
14 of the matter asserted, the truth of those underlying  
15 fact; only that those are the facts that the expert has  
16 relied on in reaching an opinion? And that has not been  
17 considered to be hearsay.

18 Now, do you argue that those -- that that is  
19 incorrect, those -- those statements cannot be testified  
20 to by an expert without their -- their constituting  
21 either hearsay or testimony within the meaning of the  
22 Confrontation Clause?

23 MR. CARROLL: In this case, where the --  
24 where the basis evidence that the expert testifies to,  
25 where it's -- the expert's opinion depends on those

1 statements being considered true, in those instances  
2 then, yes, we are arguing that the Confrontation Clause  
3 does not allow --

4 JUSTICE ALITO: Well, let's say that --

5 MR. CARROLL: Right.

6 JUSTICE ALITO: Let me put it this way.  
7 Let's say the expert -- people from the -- the expert  
8 testifies: I received the -- I looked at the report  
9 from -- from the lab; I looked at the report from --  
10 from -- I looked at the report from Cellmark, the  
11 outside lab; I looked at the report that we did; and  
12 there -- there is a match.

13 And so the expert is -- is mentioning facts  
14 that form the basis of the opinion but not testifying to  
15 the truth of those. Is that a violation of the  
16 Confrontation Clause at that point?

17 MR. CARROLL: If the -- if the expert is  
18 not, you know, asserting that the statements are true,  
19 then no. However, that is not what happened in this  
20 case, Your Honor. Ms. Lambatos --

21 JUSTICE SCALIA: It would be utterly  
22 irrelevant, would it not, if the statements were not  
23 true? I mean, it's one thing for an expert to testify  
24 about a hypothetical, you know: Assuming this, this,  
25 this, Mr. Expert, what would the result be? Well, on

1 those assumptions it would be this.

2 But this was not -- nobody asked -- asked  
3 her to assume those things at all. She testified  
4 that -- that she had a match between what she had done  
5 and what had been done on the -- on the DNA of this  
6 individual by somebody else.

7 MR. CARROLL: That's correct.

8 JUSTICE SCALIA: That seems to me quite  
9 different from the -- from the ordinary hypothetical put  
10 to an expert.

11 JUSTICE BREYER: Yes, I would have  
12 thought -- yes. You can -- sorry, go ahead.

13 MR. CARROLL: No, I was just going to --

14 JUSTICE BREYER: You were going to agree  
15 with that.

16 (Laughter.)

17 JUSTICE BREYER: I know. I mean, I'm sure  
18 you've looked at this. The most -- one of the more  
19 interesting things I've found in these briefs were the  
20 references to Wigmore. So I went back and read what  
21 Wigmore said about scientific evidence, expert evidence,  
22 and business records. And he certainly concedes and  
23 agrees with Justice Scalia, and those opinions are  
24 filled with hearsay. I mean, there is no expert who  
25 isn't relying on what his teachers told him in college,



1 which reflect dozens of out-of-court statements given to  
2 dozens of people who wrote them up in books.

3           So expert opinion is always built on  
4 hearsay, almost, and -- and so are business records;  
5 they are filled with hearsay. But Wigmore writes a  
6 treatise, doesn't he, where he says exceptions have been  
7 recognized since the 17th century or earlier to cover  
8 that kind of material?

9           So my question for you is why shouldn't we  
10 recognize a similar, related kind of exception here? We  
11 are trying to discover the meaning of "testimonial."  
12 The difference here is a police lab or a lab that  
13 reports to a police lab, the individuals there probably  
14 know that there is a fairly good chance that what they  
15 say will be used in a criminal trial. They don't know  
16 it for sure, but they are controlled by the canons, by  
17 accreditation, by tests of reliability, by the fact that  
18 they are not normally interested in the results of the  
19 trial, as here they couldn't care less; they don't even  
20 care if it is used in the trial.

21           And all the Wigmore factors for both  
22 exceptions could support a similar exception here, which  
23 would have the following virtue: It would have the  
24 virtue of not requiring ten people to come in and  
25 testify, whom the defense is of course free to call; and

1 it would also have the virtue of removing the temptation  
2 for prosecutors to stop relying on the more reliable  
3 evidence, DNA, and instead encourage them to rely on the  
4 less reliable evidence, namely the eyewitness testimony  
5 in a case.

6 Now, that -- that really is all my questions  
7 in one.

8 (Laughter.)

9 JUSTICE BREYER: Because I understand every  
10 argument you are making -- - fitting it in with hearsay,  
11 I agree with that. And I also agree to a degree with  
12 the testimonial point. And I see the need for an  
13 exception and Wigmore provides all the reasons, and  
14 since we are incorporating that word "testimonial" don't  
15 we have the power and why shouldn't we create one out of  
16 the word "testimonial"?

17 MR. CARROLL: Well, Your Honor, the  
18 Confrontation Clause guarantees the defendant to right  
19 to confront and cross-examine the witnesses against him,  
20 and that's the reason why this Court should not make an  
21 exception --

22 JUSTICE BREYER: Well, I'll go further in --

23 JUSTICE SCALIA: You are not objecting to  
24 hearsay, are you, counsel? You are objecting to a  
25 violation of the Confrontation Clause --

1 MR. CARROLL: That's right.

2 JUSTICE SCALIA: -- which is quite different  
3 from what -- what Mr. Wigmore was writing about, which  
4 was hearsay.

5 JUSTICE BREYER: Yes, but Wigmore actually  
6 believed that the Confrontation Clause simply  
7 encapsulated the hearsay rule.

8 JUSTICE SCALIA: We have said the contrary,  
9 though, haven't we?

10 (Laughter.)

11 JUSTICE BREYER: I'm asking you the  
12 question, and I -- I will go further in your direction.  
13 I will go further. Because I would say, what about  
14 saying this: that not only do we recognize the  
15 exception, but it isn't a full exception; that if the  
16 defendant can show some reason to believe that either  
17 the laboratory is not properly accredited, it isn't  
18 doing things properly; or that the individual technician  
19 has something personal or knows about -- about the  
20 defendant that makes it suspect, immediately the  
21 presumption that the exception applies disappears, and  
22 the prosecutor has to call the -- the witness.

23 You can say, well, we shouldn't make that  
24 up, but I believe if you go back to the 18th century you  
25 will discover that your interpretation of the

1 Confrontation Clause was not there. So -- so that's  
2 what's basing my question, and I would like your  
3 reaction. It's a long question, concerns an exception,  
4 and I would like you to give me your reaction to that.

5 MR. CARROLL: Well, Your Honor, I think that  
6 this Court's decisions in Crawford and Melendez-Diaz and  
7 Bullcoming largely foreclose on making such an  
8 exception. The --

9 JUSTICE SCALIA: Justice Breyer dissented  
10 from those opinions.

11 (Laughter.)

12 JUSTICE BREYER: I did, but --

13 JUSTICE SCALIA: -- not just Justice Breyer.

14 JUSTICE BREYER: And I mean it, because I  
15 see extending those cases from one individual from a  
16 laboratory being familiar with the results to requiring  
17 in ordinary cases the calling of what could be up to ten  
18 technicians.

19 I see that as making a sea change in normal  
20 criminal law practices, and my motive is as I said: I  
21 fear it will push the system in the direction of relying  
22 on less reliable eyewitness testimony rather than more  
23 reliable technical laboratory DNA-type evidence. Now,  
24 you have my -- I have made the point, and I really want  
25 to get your response.

1 JUSTICE GINSBURG: Mr. Carroll, are we  
2 talking about ten witnesses? I thought we were talking  
3 about just one witness, from Cellmark.

4 MR. CARROLL: Yes, on this record, Your  
5 Honor, the -- the statements that were produced were the  
6 statements of the authors of the report. So --

7 JUSTICE GINSBURG: That's one person, not  
8 ten.

9 MR. CARROLL: I believe there are two  
10 signatories to the report.

11 JUSTICE ALITO: Well, ten is not -- ten is  
12 not a far-fetched hypothetical. We have an amicus brief  
13 from the Manhattan District Attorney's office and the  
14 New York City Chief Medical Examiner's office, and they  
15 say that their very fine crime lab involves at least 12  
16 technicians in the analysis of DNA.

17 They break it down that way because it  
18 increases accuracy, it decreases the chance of any  
19 favoritism for the prosecution, and they say that: It  
20 is impossible for us to bring all 12 of those  
21 technicians into court to testify in every case in which  
22 there is DNA evidence; and if we have to do that we will  
23 just not be able to use DNA evidence in court; we will  
24 have to rely on less reliable evidence.

25 Is that just a -- Do you think that's just a

1 practical consequence that we have to accept under  
2 Crawford?

3 MR. CARROLL: No, Your Honor, because even  
4 in the worst case scenario described in the New York  
5 County's brief, not all 12 people in that situation make  
6 testimonial statements and not all 12 people's  
7 testimonial statements are presented at trial.  
8 The Confrontation -- for the Confrontation Clause to be  
9 satisfied, it is only those witnesses who the  
10 prosecution chooses to present at trial who must  
11 testify.

12 JUSTICE SCALIA: It's up to the prosecutor  
13 which of those 12 he wants to bring in, whether he wants  
14 to bring in all 12 or just one. If he thinks the jury  
15 will be sufficiently persuaded by bringing in just one,  
16 he can bring in just one, right?

17 MR. CARROLL: That's correct, Your Honor.

18 JUSTICE SCALIA: But he has to bring in the  
19 one and not hearsay about what the one would say.

20 JUSTICE ALITO: How will bringing in one  
21 satisfy the Confrontation Clause problem? If 12 people  
22 perform steps in the analysis and one person testifies  
23 about what 11 other people did, don't you have the same  
24 Confrontation Clause problem?

25 MR. CARROLL: No, Your Honor. Again, it's

1 who's testifying.

2 JUSTICE ALITO: You don't?

3 MR. CARROLL: No, we don't, because the  
4 question is whose statement is being presented. Now,  
5 given the five steps in the brief, the electrophoresis  
6 step, the person who does the DNA typing and determines  
7 what alleles are present in the sample, that person  
8 probably has to testify because that's really what the  
9 results are, what alleles are present.

10 Amplification step, the person who copies  
11 the DNA and tags it, I don't think that's a testimonial  
12 statement; and in this case, no statements from someone  
13 who did that was presented. Next step,  
14 quantification --

15 JUSTICE ALITO: Why is that not a  
16 testimonial statement?

17 MR. CARROLL: Well, just performing a test  
18 is not a testimonial statement. I'm just stating --

19 JUSTICE ALITO: If the person were in court,  
20 the person would say: This is what I did.

21 MR. CARROLL: If the person was in court --

22 JUSTICE ALITO: And that's not testimony?

23 MR. CARROLL: In that case, it would be  
24 testimony. However, that person doesn't have to testify  
25 in order for the State to present its evidence. If the

1 State chooses to present that person's testimonial  
2 statement at trial, then yes, the Confrontation Clause  
3 would require them to present that testimony live.

4 However --

5 JUSTICE KAGAN: Mr. Carroll, I'm just trying  
6 to figure out -- this out, and I'm -- here's my  
7 question: Suppose you had two witnesses, one from --  
8 one who had done the lab analysis on Mr. Williams and  
9 one who had done the lab analysis from the victim. And  
10 they both testified. And now an expert comes in, and  
11 the expert says: I've looked at both reports and  
12 there's a match.

13 Now there would be no problem at all with  
14 that; is that right?

15 MR. CARROLL: That's correct, Your Honor.

16 JUSTICE KAGAN: Okay. So now we only have  
17 one of the lab technicians and we take away the other  
18 lab technician. And what you are saying is, well, now  
19 we have this expert and she's saying she could do a  
20 match, but the question is: a match of what? That's  
21 the question, right?

22 MR. CARROLL: That's correct, Your Honor.

23 JUSTICE KAGAN: So why is that a  
24 Confrontation Clause issue? Why isn't it just that the  
25 prosecutor has failed to prove an element of his case?



1 MR. CARROLL: It's a Confrontation Clause  
2 issue because the prosecution presented the statement of  
3 the person who did the analysis on the victim's vaginal  
4 swabs.

5 JUSTICE KAGAN: Well, is that right? I  
6 mean, I thought that the judge here said: No, I'm not  
7 taking this for the truth of the matter asserted; I'm  
8 only taking your statements about the lab tests as an  
9 indication, as the basis for your opinion. So I'm  
10 listening to your opinion. The problem is in this whole  
11 case there has been no factual testimony about what the  
12 results were from the swab on the victim.

13 Isn't that right? Or am I missing  
14 something?

15 MR. CARROLL: Well, you are missing  
16 something, Your Honor. And the trial judge in this case  
17 never stated he was not considering the evidence for the  
18 truth. No place in the record does have -- does the  
19 trial judge state that. And in fact, in the finding of  
20 facts, he states he is convinced of the -- that there  
21 was a match because the evidence from the experts  
22 established that the victim -- that Williams' semen was  
23 found on the victim, and in the notes it said that,  
24 well, Cellmark was an accredited lab. If he wasn't  
25 considering Cellmark's statements for the truth, he

1 wouldn't care if they were accredited.

2 JUSTICE ALITO: Well, what did the Illinois  
3 appellate court say about that, about whether the  
4 information, whether the evidence was admitted for the  
5 truth of the matter asserted?

6 MR. CARROLL: The appellate court held as a  
7 matter of Illinois law these statements considered --  
8 statements that serve as the basis of an expert's  
9 opinion are generally deemed not to be admitted for  
10 their truth.

11 However, in this case, there is no  
12 meaningful distinction between considering Cellmark's  
13 statements to -- you know, in assisting in the  
14 evaluation of Lambatos' testimony and considering it for  
15 the truth. If the statements weren't true, then  
16 Lambatos' testimony would not link Williams' DNA to the  
17 crime.

18 JUSTICE ALITO: But isn't Justice Kagan's  
19 question there the correct question? Isn't that a  
20 question of Illinois evidence law, not a Federal  
21 constitutional question?

22 MR. CARROLL: No, Your Honor.

23 JUSTICE ALITO: Was there sufficient  
24 foundation laid for the introduction of the expert's  
25 testimony?

1 MR. CARROLL: No, Your Honor.

2 JUSTICE ALITO: That was addressed by the  
3 Illinois court?

4 MR. CARROLL: No, Your Honor. The question  
5 here isn't whether the State's evidence was sufficient.  
6 It's whether the evidence the State did present violated  
7 Mr. Williams' rights under the Confrontation Clause.

8 Now this -- I can give an example or an  
9 analogy. Suppose a police officer were to testify: A  
10 witness gave me this photograph and told me: This is a  
11 photograph of the offender. I compared this photograph  
12 to a photograph of the defendant. I found that they  
13 match.

14 Now, the police officer, he compared the  
15 photographs. You know, we are not contesting Lambatos'  
16 match. But the statement that this is the photo of the  
17 offender, that's not the officer's statement. That's a  
18 statement of the witness who gave him that photograph.

19 CHIEF JUSTICE ROBERTS: But that's just  
20 because the photographing is something that people  
21 wouldn't dispute. I mean, what if the State presents  
22 testimony saying: I took the sample; I put it in the  
23 sample case; I sent it to Cellmark saying, give us a DNA  
24 analysis of this sample; we got back from Cellmark the  
25 analysis with the same name on it; and the expert

1 testifies, I compared it to DNA from the defendant and  
2 it was a match.

3                   You would be free in cross-examining to say:  
4 Do you know what they did at Cellmark?

5                   And she would say: Well, they are a DNA  
6 lab; we asked them to do a DNA analysis.

7                   But do you know what happened?

8                   No, I don't.

9                   As far as you know, did they ignore it and  
10 not do anything?

11                   Well, yeah, I didn't-- I'm not testifying to  
12 what happened at Cellmark. I am telling you, we sent  
13 the DNA there, and this is what we got back.

14                   Why is that not perfectly fine?

15                   MR. CARROLL: Because that person's  
16 testimony that the results we got back were connected to  
17 the samples we sent --

18                   CHIEF JUSTICE ROBERTS: They did not -- she  
19 does not say that. She said: We sent the sample marked  
20 "crime scene" or whatever it was. We got back a data  
21 sheet that said "crime scene."

22                   Well, expert, do you know that they didn't  
23 mix them up?

24                   No, I don't. All I know is what we sent and  
25 what we got back.

1 MR. CARROLL: Your Honor, I still believe  
2 that would be a Confrontation Clause violation because  
3 the writing on the data sheet that said "crime scene," a  
4 person at Cellmark had to write that down on the data  
5 sheet. So someone from Cellmark was making a  
6 representation that that data sheet was connected --

7 CHIEF JUSTICE ROBERTS: And all the witness  
8 is -- all the witness is testifying to is what they sent  
9 and what they got back. And you are free to  
10 cross-examine about what went on at Cellmark, and a jury  
11 is free to say, well, I believe the circumstantial  
12 evidence about what happened. Or defense counsel can  
13 say, why don't they have anybody here from Cellmark, and  
14 the jury can say, well, yeah, that's a good point.

15 It just seems to me that nobody from  
16 Cellmark is testifying, and that's what you are  
17 objecting to, but they don't need that testimony to  
18 present the expert's conclusion to the jury.

19 MR. CARROLL: Well, Your Honor,  
20 hypothetically the State could -- I believe the State  
21 could present its evidence through circumstantial  
22 evidence, but that's not what happened in this case.  
23 Lambatos did testify that -- she didn't simply state  
24 that: I got a profile back. She testified: "I got a  
25 profile that was a male DNA profile found in the semen

1 from the vaginal swab." That's a statement from  
2 Cellmark. That's not Lambatos' statement.

3 JUSTICE KENNEDY: And she goes further. She  
4 says: "And based on that" -- which I believe to be  
5 true; she didn't say that, but this is the  
6 implication -- "based on that," which I believe to be  
7 true, "this belongs to Williams." This DNA is Williams'  
8 DNA. And if she weren't relying on the truth of the  
9 assertion from Cellmark, it would be irrelevant for the  
10 jury. Isn't that your point?

11 MR. CARROLL: That's correct, Your Honor.

12 JUSTICE BREYER: That's true whenever --  
13 whenever an expert -- an expert makes a statement, there  
14 is a conceptual difference between their testifying to  
15 something out of court for its truth and that being the  
16 basis for the expert opinion. In the one case she's  
17 relying upon a statement in order to form her opinion  
18 and in the other case she is introducing the statement.  
19 And you are saying in this case that's a distinction  
20 without a difference. Isn't that what's going on?

21 MR. CARROLL: That's correct, Your Honor.

22 JUSTICE BREYER: All right. But still there  
23 is the conceptual difference. And as long as there is  
24 that conceptual difference, don't we have a basis from  
25 distinguishing this case from Melendez?

1 MR. CARROLL: I do not believe so, Your  
2 Honor. Had -- had Cellmark's statement been presented  
3 in the report itself, the report being admitted itself,  
4 I think there would be no question that that would be a  
5 violation of the clause under Melendez-Diaz and  
6 Bullcoming. The fact that the same statements were  
7 coming in for the same evidentiary reason through the  
8 live testimony of Lambatos shouldn't change that  
9 situation. It's the same statements coming in for the  
10 same reason.

11 If there is any more questions --

12 JUSTICE KENNEDY: You are saying that the  
13 State of Illinois case is weaker here than in Melendez,  
14 where they had a certificate, and in Bullcoming, where  
15 they had somebody from the lab testify as to lab  
16 procedures. Here they had neither and yet Illinois  
17 somehow says it comes in.

18 MR. CARROLL: That's right, Your Honor.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
20 Ms. Alvarez.

21 ORAL ARGUMENT OF ANITA ALVAREZ

22 ON BEHALF OF THE RESPONDENT

23 MS. ALVAREZ: May it please the Court.

24 Mr. Chief Justice, may it please the Court:

25 JUSTICE SOTOMAYOR: Counsel, on your theory

1 of this case, I think you say first it's not a  
2 statement; and second that if it is it was not offered  
3 for the truth. Under your theory, if this lab  
4 technician had introduced Cellmark's report, that would  
5 have been okay, because it wasn't offered for the truth.

6 MS. ALVAREZ: The Cellmark report was not  
7 introduced as evidence --

8 JUSTICE SOTOMAYOR: I'm changing the facts.

9 MS. ALVAREZ: And if she had --

10 JUSTICE SOTOMAYOR: Under your theory, she  
11 could have introduced the lab report?

12 MS. ALVAREZ: If we offered her -- the  
13 Cellmark report into evidence for the truth of the  
14 matter asserted, it would be a different situation.

15 JUSTICE SOTOMAYOR: I don't understand the  
16 difference. Meaning the fact that you didn't physically  
17 introduce the report makes a difference?

18 MS. ALVAREZ: The -- Ms. Lambatos testified  
19 consistent with the Confrontation Clause here. She  
20 testified --

21 JUSTICE SOTOMAYOR: She testified that she  
22 reviewed lab samples.

23 MS. ALVAREZ: As an expert.

24 JUSTICE SOTOMAYOR: That matched the  
25 defendant. So what's the difference between that and



1 saying; I have the report in my hand; and I match that  
2 report with the Williams report, and this is my  
3 conclusion.

4 MS. ALVAREZ: She did not parrot the  
5 Cellmark report, as we have seen in Bullcoming. She did  
6 not testify that Cellmark said this was the defendant's  
7 profile, that Cellmark said this was a match. She did  
8 much more.

9 JUSTICE SOTOMAYOR: No. She said that:  
10 Cellmark said this is L.J.'s vaginal swab DNA.

11 MS. ALVAREZ: Right.

12 JUSTICE SOTOMAYOR: So she said that.

13 MS. ALVAREZ: Because the vaginal swab that  
14 was taken from the victim -- and there was a chain of  
15 custody here and proper foundation that was laid -- the  
16 vaginal swab that was taken from the victim -- and this  
17 bore out through the business records that came in on  
18 the shipping manifest --

19 JUSTICE SOTOMAYOR: So what's the difference  
20 between this and Justice Kennedy's question about  
21 Bullcoming? Could the expert in Bullcoming have said,  
22 as one of the amici here said, that all they would have  
23 had to do in Bullcoming is to read or to give a report  
24 that gave the blood alcohol content, the .5 or .10 or  
25 whatever it was, and have an expert come in and say,

1 that number shows he's drunk. Is that any different  
2 from this situation?

3 MS. ALVAREZ: If the expert in Bullcoming  
4 did more than what he simply did in Bullcoming and that  
5 was just simply read the report and testify that that's  
6 what that lab did, if he actually did his own  
7 independent analysis based on his expertise, based on  
8 his skill --

9 JUSTICE SOTOMAYOR: No, no. The only part  
10 of his expertise is the report says point .10; I'm not  
11 offering it for the truth; I'm assuming that that's  
12 true; then he was legally drunk.

13 MS. ALVAREZ: If he were -- if he were to  
14 give his independent opinion, based on his analysis and  
15 what he had done, then we would have seen a situation  
16 closer to this.

17 JUSTICE SOTOMAYOR: He has done nothing.  
18 All the report did was give a number. And the  
19 supervisor comes in and says that number violates -- is  
20 legal drunkenness. How is that different from that?

21 MS. ALVAREZ: If that report is being used,  
22 is being offered to prove the truth of the matter  
23 asserted --

24 JUSTICE SOTOMAYOR: All right, but you're  
25 not telling me why that's not the same here because what

1 this expert said is, the Cellmark report is from this  
2 victim so it's the same set of numbers as in Bullcoming.  
3 Now he's taking a step and saying, instead of legal  
4 drunkness, it matches someone else's that I took.

5 MS. ALVAREZ: But no -- what happened here  
6 is Ms. Lambatos testified based on -- and gave her own  
7 independent expert opinion based on her skills, her  
8 knowledge, her expertise. She relied --

9 JUSTICE GINSBURG: You said independent, and  
10 I don't -- you said that in your brief. I don't  
11 understand how Lambatos' testimony can be independent of  
12 the test results supplied. I mean, it's based on the  
13 test results. It can't be independent of them because  
14 it is entirely dependent on them.

15 MS. ALVAREZ: But an expert can always  
16 testify about the material that they relied on, whether  
17 that material is ever admitted into evidence and  
18 sometimes that material could never be admitted into  
19 evidence. But she in fact testified to what she relied  
20 on, in addition to what --

21 JUSTICE SCALIA: No, but didn't she say, I  
22 relied on stuff that I received from Caremark --  
23 whatever the name of the lab was.

24 MS. ALVAREZ: Cellmark.

25 JUSTICE SCALIA: She said: I relied on

1 material that was a swab containing the DNA, the sperm  
2 of this particular individual. And she did not know  
3 that.

4 MS. ALVAREZ: She testified that she relied  
5 on those materials and she can testify --

6 JUSTICE SCALIA: She didn't just say: I got  
7 something back from the lab and I relied on whatever  
8 that said. No, she said what she had gotten back from  
9 the lab, and she did not know of her personal knowledge  
10 that it was what she said it was.

11 MS. ALVAREZ: She knew from the procedures  
12 and the chain of custody and the shipping manifest that  
13 what was sent initially to Cellmark after preliminary  
14 tests were done at the Illinois State police crime lab  
15 showing the presence of sperm that it was sent to  
16 Cellmark and it was analyzed at Cellmark and came  
17 back --

18 JUSTICE SCALIA: She didn't know if they had  
19 incompetent people there. The last case we had  
20 involving this kind of an issue, the reason they didn't  
21 bring in the lab technician to testify was that he had  
22 been fired in the interim for some reason which we  
23 didn't know. But it was pretty clear why he would not  
24 have been a very good witness. We don't know how good  
25 this lab was.

1           We don't know how good the individuals who  
2 did the test were. And that's why it's up to the State  
3 to bring forward testimony saying what the lab did. And  
4 the only testimony they brought forward was the  
5 testimony of this witness who was not there.

6           MS. ALVAREZ: The testimony of Ms. Lambatos  
7 satisfies the Confrontation Clause because she is the  
8 witness against the accused in this case, and the fact  
9 that she testified that she relies on material that was  
10 generated by Cellmark does not make Cellmark the witness  
11 against the accused.

12           JUSTICE SCALIA: But she said that -- I  
13 would agree with you. But she said more than that. She  
14 said I relied on material provided by Cellmark which is,  
15 and then she described what that material was. And she  
16 had no personal knowledge of that.

17           MS. ALVAREZ: She had no personal knowledge  
18 of that, and that came through during this  
19 cross-examination. Ms. Lambatos was subjected to a  
20 very -- quite lengthy and a quite -- a specific  
21 cross-examination.

22           JUSTICE ALITO: Well, there are two types of  
23 evidence that are -- that are involved here. One is  
24 chain of custody evidence. Was the result that -- that  
25 was sent back the result that was done on the sample

1 that was sent to Cellmark? That's just purely chain of  
2 custody.

3 It has nothing whatsoever to do with the --  
4 the accuracy or the professionalism of what was done at  
5 Cellmark. And she did make a statement. She did say  
6 that the sample -- that the result that came back from  
7 Cellmark was -- was done -- was based on a test of the  
8 vaginal swab that was sent there.

9 The other has to do with what Cellmark did,  
10 how well they did it. She didn't say anything about  
11 that. Now, as to the chain of custody, if that's  
12 testimonial, isn't -- isn't it simply duplicative of the  
13 very strong circumstantial evidence regarding the chain  
14 of custody -- the sending of it out with certain  
15 markings, and the receipt back with certain markings?

16 MS. ALVAREZ: Right. The -- the chain of  
17 custody was -- was strong -- was strong in this case;  
18 the evidence that was presented through the shipping  
19 manifest, through the other witnesses that testified in  
20 this case. The -- the fact that Ms. Lambatos testified  
21 that she did not know exactly what they did at Cellmark,  
22 again, as an expert, she was able to talk about what  
23 material she relied on, the Cellmark materials.

24 The Cellmark materials --

25 JUSTICE KENNEDY: But -- the -- the chain of

1 custody are just supporting actors. The key actor in  
2 the play, the Hamlet in the play, is the person who did  
3 the test at Cellmark.

4 And she or he is not here. And if you want  
5 to say, oh, this is not -- tell the jury -- now, we're  
6 not saying that this is admitted for the truth. We're  
7 not saying that this is Williams' DNA. The judge would  
8 say, well, then it is irrelevant. It's excluded.

9 MS. ALVAREZ: But the matching --

10 JUSTICE KENNEDY: And -- and it seems to me,  
11 in -- as in response to Justice Scalia, not -- not only  
12 does he indicate that this is hard to distinguish from  
13 Bullcoming, in Bullcoming at least you had an expert say  
14 how the laboratory works. Here, you don't even have  
15 that. You have less here with reference to Cellmark  
16 than you did in Bullcoming.

17 MS. ALVAREZ: Ms. Lambatos did testify both  
18 on direct examination and cross-examination that  
19 Cellmark was an accredited lab. The Illinois State  
20 Police crime lab routinely uses out -- outsourcing --

21 JUSTICE KENNEDY: In Bullcoming, we said  
22 that was not sufficient. And in that case, the person  
23 was from that lab.

24 MS. ALVAREZ: But -- but Ms. Lambatos -- we  
25 never introduced any Cellmark reports in this case.

1 There were no testimonial statements conveyed through  
2 her testimony. There were no out-of-court statements  
3 used to prove the truth of the matter asserted.

4 What was presented was the expert opinion of  
5 Ms. Lambatos, who was a duly qualified expert in -- in  
6 forensic biology, in DNA.

7 And not only did she have the ability to  
8 look at the Cellmark material, she interpreted the  
9 material that -- that came from Cellmark. And what came  
10 from Cellmark, the electrophoretogram, I would submit to  
11 you is not testimonial; it's a machine-generated chart  
12 that to the naked eye to a trier-of-fact means  
13 absolutely nothing unless an expert actually interprets  
14 that. And Ms. Lambatos testified to how she interpreted  
15 that. She talked about the alleles --

16 JUSTICE KENNEDY: I don't know how that's  
17 any different from Bullcoming and Melendez-Diaz.

18 MS. ALVAREZ: Well, I -- well,  
19 Melendez-Diaz, what we had in Melendez-Diaz was in fact  
20 a certificate, an affidavit. It was -- it was  
21 created --

22 JUSTICE KENNEDY: In other words, you had  
23 something more than you have here. And therefore, it  
24 goes out and this comes in? That doesn't make sense.

25 MS. ALVAREZ: No, I think in Melendez-Diaz,



1 it's clear because that was -- that report was drafted,  
2 created, for the primary purpose of being used as  
3 substitute of live testimony. I submit to you that the  
4 Cellmark reports were not. The electrophoretogram,  
5 again, which would -- needs expert interpretation; the  
6 allele chart -- again, I would submit is not  
7 testimonial, that those reports were not created in lieu  
8 of live testimony.

9           And Ms. Lambatos looks at that, she  
10 interpreted it. In fact, she even said that there was  
11 something on the electrophoretogram that she didn't  
12 agree with Cellmark on. It was a certain one piece that  
13 was higher that she felt was just in her expert opinion  
14 background noise. So --

15           JUSTICE GINSBURG: But if the report had  
16 been introduced, the Cellmark -- the Cellmark report, it  
17 would be testimonial; is that -- is that right?

18           MS. ALVAREZ: Well, I -- I believe if -- if  
19 the State had tried to introduce that Cellmark report --

20           JUSTICE GINSBURG: Right.

21           MS. ALVAREZ: -- it would have been offered  
22 for the truth of the matter asserted. And we -- and it  
23 would be -- it would be a -- it would implicate the  
24 Confrontation Clause.

25           JUSTICE GINSBURG: Well, how does it

1 become --

2 MS. ALVAREZ: -- but that's not what  
3 happened here.

4 JUSTICE GINSBURG: -- how does it become  
5 non-testimonial when it's relayed by the recipient of  
6 the report? I mean, if -- if the matters are being  
7 introduced for the truth, then it's not relevant.

8 MS. ALVAREZ: Right. I think -- the key is  
9 the use. How were these statements used? How were  
10 these reports used? And in this particular case, they  
11 were not used to prove the truth of the matter asserted.  
12 They were used for the limited purpose of explaining the  
13 expert's opinion, and for the expert to testify to what  
14 she relied on in getting to her opinion --

15 JUSTICE KAGAN: How -- how do we know that,  
16 Ms. Alvarez? Is there a statement from the finder of  
17 fact, the trial judge here, that he's understanding her  
18 testimony to be not for the truth of the matter  
19 asserted?

20 What's the best evidence that that's what  
21 the Court was thinking?

22 MS. ALVAREZ: There is. And in the joint  
23 appendix on page 172, the language from the  
24 trier-of-fact, he says just that, that he's considering  
25 these for the limited purpose. In fact, the Illinois

1 appellate court also affirmed, state -- stating that  
2 this evidence came in for a limited purpose, as well  
3 as --

4 JUSTICE KENNEDY: If the limited purpose  
5 of -- of explaining the basis for her opinion. But her  
6 opinion is that this is matched to Lambatos.

7 MS. ALVAREZ: I'm sorry, Your Honor, I --

8 JUSTICE KENNEDY: Her opinion is that this  
9 is a match to Lambatos. But if -- if the match material  
10 isn't admitted for the truth of the matter asserted, or  
11 isn't -- considered for the matter asserted, then that  
12 testimony is irrelevant and meaningless.

13 MS. ALVAREZ: Well, not irrelevant, but I  
14 believe it goes to the weight of her testimony. And  
15 that is for the trier-of-fact to determine. And here,  
16 it was a bench trial with a judge. But if in fact the  
17 State presents the evidence in the way that was -- we  
18 presented it here, we are always taking the chance that  
19 it would weaken the -- the case. And it has to be  
20 considered for the weight to be given to Ms. Lambatos'  
21 testimony --

22 JUSTICE KAGAN: Suppose the State had not  
23 presented evidence of the shipments, so that you didn't  
24 even have that. Would -- at that point, should the  
25 judge have just thrown out the case?

1 MS. ALVAREZ: No, Your Honor. I would say  
2 no. I believe there was testimony of the victim in this  
3 case, who identifies this defendant as the perpetrator  
4 in this rape. And in addition, the judge made a finding  
5 in his ruling, the trier-of-fact said he believed her  
6 100 percent, and he found her extremely credible --

7 JUSTICE KAGAN: But I guess what I'm trying  
8 to suggest is that if there's no evidence in the case  
9 that the -- that the match is to the victim, where is  
10 your case?

11 MS. ALVAREZ: Well then, we probably would  
12 have problems with the Illinois evidentiary rules,  
13 and -- and the law in Illinois.

14 We obviously presented in this case a  
15 sufficient chain, a sufficient foundation, to show  
16 where -- when that -- we presented the testimony, not  
17 only of the victim, but the doctor who was present when  
18 the swab was taken, of the officers who brought the  
19 sealed swab to the Illinois State Police crime lab, how  
20 that sealed swab was first looked at, preliminary tests  
21 by Mr. Hapack in ISP, in order to -- before they sent it  
22 to Cellmark, and as Cellmark extracts a DNA profile of a  
23 woman -- a female and a man.

24 Cellmark never makes the match here.  
25 Cellmark never says, "this is Mr. Williams' DNA." That

1 is done by Ms. Lambatos, through her experts and her  
2 expertise. She makes the --

3 JUSTICE SCALIA: But -- but Cellmark says  
4 "this is the male DNA that was found in the sample that  
5 was sent." Cellmark made that decision, right? And her  
6 testimony was based upon the fact -- was based upon  
7 comparing that male DNA with her own blood sample. It's  
8 meaningless unless that male DNA was indeed the  
9 defendant's.

10 MS. ALVAREZ: And she can testify to what  
11 she relied on. Again -- and it goes to her weight if  
12 the trier-of-fact chooses not to believe it. The -- but  
13 the evidence here was clear --

14 JUSTICE SCALIA: You know, I -- I would  
15 believe that if the prosecution put the question to her  
16 this way: "Assume that you got a report which said that  
17 this was the defendant's DNA. And if you were to match  
18 that with the -- this -- the work you've done on the  
19 blood sample, would you find that -- that, you know,  
20 that the sample was taken from the defendant?"

21 And she would say "yes." And the jury would  
22 say "so what?" I mean, you've just -- you've just made  
23 a hypothesis. "If you had been told." That -- that  
24 would be worth nothing.

25 Her testimony was, I received information

1 that this was indeed the DNA taken from -- the male DNA  
2 taken from the -- from the swab that was sent. Without  
3 that, the testimony was worthless. It's just, you know,  
4 a hypothesis. She -- she responds to a hypothesis.  
5 That's not the way this was played out in the trial, was  
6 it?

7 MS. ALVAREZ: Yes, the -- again, our  
8 position is that her testimony was consistent with the  
9 Confrontation Clause. The Confrontation Clause is  
10 concerned about what statements are admitted, what  
11 evidence is admitted. No Cellmark reports were admitted  
12 here. She did not parrot the testimony -- I mean, the  
13 report of Cellmark.

14 She testified to what she did, how she  
15 arrived at her own independent opinion on this, which  
16 again, we did not offer any out of court statements to  
17 prove the truth of the matter asserted. We offered Ms.  
18 Lambatos who was subjected to a lengthy  
19 cross-examination, and that satisfies the Confrontation  
20 Clause, and the inability to tested the reliability of  
21 what happened at Cellmark does not trigger the  
22 Confrontation Clause.

23 JUSTICE GINSBURG: I think you earlier  
24 recognized that her -- her opinion could not be  
25 independent of the test results; it depended entirely on

1 the test results. So I -- now you -- you've inserted  
2 independence again, and I thought you had -- you had  
3 given up on that.

4 MS. ALVAREZ: Well, I think, you know, what  
5 we saw in Bullcoming was not an independent opinion of  
6 an expert. It was -- he offered no independent  
7 analysis. He simply read off a report that was prepared  
8 by another lab, and that -- in Bullcoming that was  
9 offered to prove the truth of the matter asserted. We  
10 did not offer Cellmark reports here to prove the truth  
11 of the matter asserted. We offered the expert opinion  
12 of Ms. Lambatos, and her credibility was attacked  
13 through a very vigorous cross-examination here, and that  
14 satisfies the Confrontation Clause.

15 The testimonial statements again are -- are  
16 statements that are -- are made in lieu of live  
17 testimony, and the key is the live testimony here, which  
18 we presented live testimony. The reports from Cellmark  
19 in our -- in our conclusion is that they are not  
20 testimonial in nature; and what Petitioner is asking you  
21 here, to do here today is to expand Crawford, to expand  
22 the Confrontation Clause, to expand the definition of  
23 hearsay and the definition of testimonial.

24 And -- and our position simply is to ask you  
25 to maintain the rule of Crawford which is quite clear,

1 that a -- a witness becomes -- an out-of-court declarant  
2 becomes a witness again and -- accuser -- within the  
3 context of Confrontation Clause when their extrajudicial  
4 statements are offered to prove the truth of the matter  
5 asserted. And so the witness here --

6 JUSTICE GINSBURG: Does Illinois -- does  
7 Illinois have notice and demand?

8 MS. ALVAREZ: No.

9 JUSTICE GINSBURG: It does not.

10 MS. ALVAREZ: No. No. And so our -- our  
11 position, Your Honors, is to maintain the rule of  
12 Crawford. There is no such thing as inferential  
13 hearsay, as the Petitioner want you to believe. A  
14 statement is a statement. Hearsay is hearsay. There is  
15 no such thing as inferential hearsay. What was  
16 presented here in this case was consistent with the  
17 Confrontation Clause; it was satisfied; and for -- and  
18 for that we respect your opinion here today, but we ask  
19 that you maintain the ruling of Crawford.

20 JUSTICE SCALIA: She was asked, just -- just  
21 to be clear what she was testifying to: "Did you  
22 compare the semen that had been identified by Brian  
23 Hapack from the vaginal swabs of Latonia Jackson to the  
24 male DNA profile that had been identified by Karen Kooi  
25 from the blood of Sandy Williams?"



1 "Yes, I did."

2 She is accepting and --and affirming this  
3 statement that what she was comparing was the semen that  
4 had been identified from the vaginal swabs.

5 MS. ALVAREZ: She -- she is accepting and  
6 she is relying on the material that was generated by  
7 Cellmark, but again, the State did not admit into  
8 evidence or -- or -- or try to admit into evidence the  
9 Cellmark report or any statements from Cellmark.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 Mr. Dreeben.

12 ORAL ARGUMENT OF MICHAEL R. DREEBEN,

13 FOR THE UNITED STATES,

14 AS AMICUS CURIAE, SUPPORTING RESPONDENT

15 MR. DREEBEN: Thank you, Mr. Chief Justice,  
16 and may it please the Court:

17 Sandra Lambatos' testimony really has to be  
18 analyzed as having two components to it. The first  
19 component is the match, the match between the data  
20 reflecting the allele charts from Cellmark, and the data  
21 that was produced in analyzing Petitioner's blood. As  
22 to that component of her testimony, she's a live  
23 witness, she's subject to cross-examination. I don't  
24 think that anyone asserts there is a Confrontation  
25 Clause issue.

1           But as several members of the Court have  
2 pointed out, that testimony is entirely irrelevant and  
3 nonprobative unless it can be linked to the semen that  
4 was taken from the victim and that was subsequently  
5 analyzed to generate a DNA profile. As to that issue,  
6 Illinois State law provides that her testimony cannot  
7 prove for the truth of the matter asserted what Cellmark  
8 did. She cannot repeat on the witness stand when she  
9 gives the basis for her testimony things that Cellmark  
10 said and have them be taken for the truth.

11           JUSTICE SOTOMAYOR: But, Mr. Dreeben, she  
12 did repeat what Cellmark said. I asked your -- the  
13 State's attorney whether, if she had read the data  
14 report from the laboratory analysis, would that have  
15 been a violation of the Confrontation Clause? I'm not  
16 clear. She says, only if you admitted it. But in fact  
17 that's what she did.

18           If you read her testimony -- I give you an  
19 example at page 79 -- she tells on cross-examination  
20 exactly what the steps were in the Cellmark report, what  
21 numbers they gave, and she tells and explains -- she --  
22 the State's attorney took pride in this -- she said I  
23 disagree with that number that they came up with. I  
24 think the number should be -- so she's really reading  
25 the report.

1 MR. DREEBEN: Well, first of all, Justice  
2 Sotomayor, that did come in on cross-examination and I  
3 don't think that Petitioner is contending evidence that  
4 he himself elicits on cross-examination would violate  
5 the Confrontation Clause.

6 JUSTICE SOTOMAYOR: All right. So then  
7 let's -- all right. So let's get to --

8 MR. DREEBEN: Can I focus on -- on --

9 JUSTICE SOTOMAYOR: Could the State have  
10 done this?

11 MR. DREEBEN: Can I focus on your question?  
12 I think, because she clearly did link the DNA that she  
13 compared to the blood DNA to the semen that was sent to  
14 Cellmark, and I think that several members of the Court  
15 raised the question is she implicitly thereby repeating  
16 what Cellmark said and then making Cellmark the  
17 out-of-court witness.

18 My answer to that is twofold. First of all,  
19 as a matter of Illinois State law, she could not do  
20 that. She is not permitted to give the basis for her  
21 opinion in that respect and have it taken for the truth.

22 JUSTICE KENNEDY: If -- if that's so, why  
23 isn't there insufficient evidence in this case?

24 MR. DREEBEN: And this brings me to my  
25 second reason for saying that this is not a

1 Confrontation Clause problem.

2           It's in essence what the Chief Justice  
3 describes and what Justice Alito referred to as the  
4 circumstantial way in which the fact finder can infer  
5 that Cellmark tested the DNA in the semen that was sent  
6 to it. There is a shipping manifest that shows that the  
7 semen goes out to the lab; there is a shipping manifest  
8 that shows that it comes back. And Cellmark tenders --

9           JUSTICE KENNEDY: None of -- none of which  
10 has anything to do with the accuracy of the test.

11           MR. DREEBEN: Correct. And that is I think  
12 the crucial point here. The State may have a very weak  
13 case if it doesn't produce a witness from the lab who  
14 can attest to the fact that the lab did what it was  
15 supposed to do and conducted a properly authorized DNA  
16 examination. It has to get by with the very skimpy  
17 circumstantial showing of, we sent the material out --

18           CHIEF JUSTICE ROBERTS: No, it doesn't -- it  
19 doesn't though. It could have -- could it have a  
20 witness saying Cellmark is the nation's foremost DNA  
21 testing laboratory; they hire only people who have  
22 Ph.D.'s in DNA testing? I mean, is that all right?

23           MR. DREEBEN: Yes, yes.

24           CHIEF JUSTICE ROBERTS: The State can make  
25 its case a lot stronger --

1           MR. DREEBEN:  And it did that here by saying  
2   that Cellmark is an accredited laboratory and Sandra  
3   Lambatos participated in designing proficiency  
4   examination.  But she had to admit on cross-examination  
5   that she had no idea what Cellmark actually did in this  
6   case.  She could draw inferences.  And the inferences  
7   that she drew are what enabled her to say, my opinion is  
8   there is a match between the DNA in the semen and the  
9   DNA in the blood.

10           JUSTICE KENNEDY:  As you understand our  
11   precedents, would this have been a stronger or a weaker  
12   case if a representative, and employee of Cellmark had  
13   come and said although I didn't do this sample, I want  
14   to tell you how our procedures worked and why we are a  
15   respectable lab, etcetera, etcetera?

16           MR. DREEBEN:  It would have been relatively  
17   stronger had a witness been able to actually come from  
18   Cellmark and validate that Cellmark is an accredited  
19   laboratory and conducts procedures in a certain way.  
20   But the crucial point here --

21           JUSTICE SOTOMAYOR:  Mr. Dreeben, if no  
22   expert from either lab came in, if an expert had the  
23   Cellmark information and the Illinois State police  
24   information, not offered for the truth of the matter,  
25   and came in and said I match this and I match that, and

1 it's the defendant -- could that have been done?

2 MR. DREEBEN: Only if as a matter of State  
3 law there was a sufficient foundation for the fact  
4 finder to conclude that the DNA actually came from the  
5 blood and the DNA came from the semen.

6 JUSTICE SCALIA: Mr. Dreeben, that seems to  
7 me extra -- I mean, we have a Confrontation Clause which  
8 requires that the witnesses against the defendant appear  
9 and testify personally, and -- and the crucial evidence  
10 here is the testing of the semen found on the swab.  
11 That is -- that's the crux of this evidence, and you're  
12 telling me that this Confrontation Clause allows you to  
13 simply say, well, we're not going to bring in the person  
14 who did the test; we are simply going to say, this is a  
15 reliable lab. I don't know how that complies with the  
16 Confrontation Clause.

17 MR. DREEBEN: The Confrontation Clause,  
18 Justice Scalia, does not obligate the State to present a  
19 strong case. It does not prevent the State from  
20 presenting a relatively weaker case, so long as it does  
21 not rely on testimonial statements to prove the truth of  
22 the matter asserted.

23 This Court held in Bruton v. United States  
24 that there is a very narrow exception to the almost  
25 invariable presumption that juries will follow the

1 instructions that they are given. If they are told not  
2 to take evidence for the truth of the matter asserted,  
3 they are presumed to follow that instruction. Here  
4 Illinois State law supplies that filter.

5 Everything that the judge heard, he filtered  
6 through Illinois State law that says the basis for the  
7 expert's opinion doesn't prove its truth. So the State  
8 gave up the right to say, "You can believe that this DNA  
9 report is reliable and trustworthy because Cellmark says  
10 so." The State doesn't get that benefit; and as a result  
11 of not getting that benefit, it is not obligated to  
12 treat Cellmark as if it's a witness.

13 JUSTICE KAGAN: I suppose the problem is,  
14 Mr. Dreeben, that if the State put up Ms. Lambatos and  
15 Ms. Lambatos had to say: I did a match -- I was given  
16 two reports; there is a match, but I have no idea where  
17 this other report came from. You know, it might have  
18 been from the victim but it might not have been. I  
19 don't have a clue.

20 The State would never have put that  
21 prosecution on, because the State would have understood  
22 that there was no case there. The State is relying on  
23 the fact that people will take what Ms. Lambatos says  
24 about what she knows about where the report came from as  
25 a fact, as the truth of the matter, that in fact this

1 report did come from the victim. And so the jury can be  
2 given instructions saying: You can't consider this  
3 except for the truth of the matter asserted.

4 But it's a bit of a cheat, no?

5 MR. DREEBEN: No. I think, Justice Kagan,  
6 when you consider the things that this Court has held  
7 juries can properly apply limiting instructions to, they  
8 can hear the fact that evidence was seized from the  
9 defendant, marijuana was found at his house. The  
10 defendant gets up on the stand and says, no, it wasn't.

11 The State can introduce that marijuana to  
12 impeach his testimony, and the jury is instructed: You  
13 may not use that as proof that he possessed marijuana,  
14 only to impeach his testimony. The same is true with  
15 unwarned statements in violation of Miranda.

16 JUSTICE SCALIA: What is the instruction  
17 here? That --

18 MR. DREEBEN: There is no instruction here,  
19 Justice Scalia, because this is a bench trial. And in a  
20 bench trial, the judge is presumed to follow the law,  
21 and as my colleague read to the Court --

22 JUSTICE SCALIA: So we simply have a  
23 presumption even though -- even though the court's  
24 statement seems to indicate that he does take it for the  
25 truth of the matter.



1 MR. DREEBEN: Well the only --

2 JUSTICE SCALIA: And you're saying, well he  
3 couldn't have because that would be against the law.

4 MR. DREEBEN: The Illinois Supreme Court  
5 found as a matter of State law that he did comply with  
6 State evidentiary rules and he did not take the Cellmark  
7 report for the truth of the matter asserted. And there  
8 is in this case an alternative route of proof which is  
9 circumstantial, and I take the Chief Justice's amendment  
10 of my description of the facts to include that Cellmark  
11 is an accredited laboratory.

12 That does add to the probative value. But  
13 it is a much weaker chain of support to conclude that  
14 the DNA male profile came from the semen than if they  
15 had produced Cellmark. But not having produced  
16 Cellmark, they do not need to afford confrontation on  
17 Cellmark.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Carroll, you have four minutes  
20 remaining.

21 REBUTTAL ARGUMENT OF BRIAN CARROLL

22 ON BEHALF OF THE PETITIONER

23 MR. CARROLL: Thank you, Your Honor.

24 First it was State cited page 7 or -- 172 in  
25 the Joint Appendix as a reference to the trial judge

1 stating that he was not considering Cellmark's  
2 statements for its truth. That's not a cite to the  
3 transcript of the trial. That's a cite to the Illinois  
4 Supreme Court's opinion.

5           Nowhere in the actual trial transcript did  
6 the judge ever state, "I'm not considering this evidence  
7 for its truth. " In fact, in the statement of fact on  
8 page JJJ 151 of the record, he states that, it's the  
9 testimony of the experts that makes this link.  
10 Cellmark's an accredited lab.

11           And it's inconceivable that in the face of  
12 the evidence of Cellmark's work that the prosecution  
13 presented through Lambatos's testimony and during  
14 defense counsel's objection to that testimony, that the  
15 judge would never state at any point, "hey, I'm not  
16 considering this for its truth. "

17           JUSTICE SOTOMAYOR: Are you saying that we  
18 owe no deference to the Illinois Supreme Court's  
19 judgment on this evidentiary issue? And if so, no  
20 deference, tell me what proposition of law supports that  
21 or are you saying deference is due but we shouldn't give  
22 it. Which of the two positions do you take?

23           MR. CARROLL: I think deference is due but  
24 you shouldn't take it given the record in this case.

25           JUSTICE SCALIA: Why is deference given? I

1 mean it's either the fact or its not the fact. If the  
2 State Supreme Court opinion says something that  
3 contradicts the -- you know, the record we owe a  
4 deference, I don't know of any such rule.

5 MR. CARROLL: Well, if the Court --

6 JUSTICE SCALIA: We owe deference to its  
7 interpretation of Illinois law, I suppose.

8 MR. CARROLL: I guess I -- if this Court  
9 would like not to give the Illinois Supreme Court  
10 deference, I would be more than happy --

11 JUSTICE SCALIA: I think we should give it  
12 deference where deference is due and not give it  
13 deference where deference is not due. And on statement  
14 of facts that are either erroneous or not, I don't know  
15 why deference is applicable.

16 MR. CARROLL: Yes, Your Honor.

17 CHIEF JUSTICE ROBERTS: We do think our law  
18 has established though that a jury will follow an  
19 instruction in this situation to -- not to take the  
20 testimony for truth of the evidence, for truth of the  
21 matter.

22 MR. CARROLL: Not in this situation, Your  
23 Honor.

24 CHIEF JUSTICE ROBERTS: Do we have any case  
25 saying that instruction is inadequate in a case like

1 this?

2 MR. CARROLL: Not in this particular fact  
3 pattern. But this case is different than a Bruton type  
4 situation where there are -- there is the proper way to  
5 consider the evidence and an improper, and there is a  
6 fear that the jury is going to -- or the trier-of-fact  
7 is going to consider the improper. Here Illinois law  
8 did allow the trier-of-fact --

9 JUSTICE KENNEDY: Are you aware that in  
10 Illinois they have an instruction -- assuming it was a  
11 jury case, this is a bench case, but if it were a jury  
12 case, "Ladies and Gentlemen of the jury you are not to  
13 presume or assume that the DNA tested by Cellmark came  
14 from this sample."

15 MR. CARROLL: Yes, Your Honor. There is  
16 such an instruction in Illinois law; however.

17 JUSTICE KENNEDY: And then they routinely  
18 give that to juries?

19 MR. CARROLL: I believe they do, Your Honor.  
20 However, in this case -- or Illinois law does not  
21 prohibit the trier-of-fact from considering Cellmark's  
22 statement. The trier-of-fact is allowed and is expected  
23 to consider it in assisting the trier-of-fact in  
24 evaluating Lambatos's opinion.

25 And in this situation, where Lambatos is --

1 the only way that the Cellmark statement supports  
2 Lambatos's opinion is if they are true, there is no  
3 meaningful difference between considering the statements  
4 in assessing Lambatos's opinion and considering them for  
5 the truth.

6 JUSTICE SOTOMAYOR: I'm sorry, I'm going  
7 back to Justice Kennedy's question. There is an  
8 Illinois requirement that the trial judges give the  
9 instruction he described?

10 MR. CARROLL: I believe there is a  
11 recommended jury instruction for -- that the basic  
12 evidence is not to be considered for its truth, Your  
13 Honor.

14 JUSTICE ALITO: Under rule 703 of the  
15 Illinois rules of evidence, are the facts that an expert  
16 takes into account in reaching his or her opinion  
17 introduced for the truth of the matter asserted?

18 MR. CARROLL: Not under the language of the  
19 rule, Your Honor, no.

20 CHIEF JUSTICE ROBERTS: Thank you, Counsel.  
21 The case is submitted.

22 (Whereupon, at 12:06 p.m., the case in the  
23 above-entitled matter was submitted.)

24

25

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