

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SANDY WILLIAMS, :

4 Petitioner :

5 v. : No. 10-8505

6 ILLINOIS. :

7 - - - - - x

8 Washington, D.C.

9 Tuesday, December 6, 2011

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 11:05 a.m.

14 APPEARANCES:

15 BRIAN W. CARROLL, ESQ., Chicago, Illinois; for

16 Petitioner.

17 ANITA ALVAREZ, ESQ., State's Attorney, Chicago,

18 Illinois; for Respondent.

19 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,

20 Department of Justice, Washington, D.C.; for

21 United States, as amicus curiae, supporting

22 Respondent.

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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 10-8505, Williams v. Illinois.

5 Mr. Carroll.

6 ORAL ARGUMENT OF BRIAN W. CARROLL

7 ON BEHALF OF THE PETITIONER

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

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

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

20 Now, Ms. Williams' -- or Ms. Lambatos'
21 testimony on direct examination clearly conveyed
22 Cellmark's statements. She testified that the vaginal
23 swab and blood sample from the victim were sent from --
24 to Cellmark for DNA analysis. She later was asked, was
25 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've 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: Yes, 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 records.

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 was testing did testify at the trial, right? It wasn't
18 just Lambatos -- Lambatos, but the one who had tested
19 the blood?

20 MR. CARROLL: The -- the person who
21 tested or who analyzed Mr. Williams' blood did testify
22 live at the 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's 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 -- those --
13 that information is not being introduced to prove the
14 truth of the matter asserted, that -- the truth of those
15 underlying facts; only that those are the facts that the
16 expert has relied on in reaching an opinion? And that
17 has not been considered to be hearsay.

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

23 MR. CARROLL: In this case, where the --
24 where the basis evidence the expert testifies to, where
25 it's -- the expert's opinion depends on that -- 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 -- let
5 me put it this way: Let's say the expert -- people from
6 the -- the expert testifies, I received the -- I looked
7 at the report from -- from the lab; I looked at the
8 report from -- I looked at the report from Cellmark, the
9 outside lab; I looked at the report that we did; and
10 there -- there is a match.

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

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

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

25 But this was not -- nobody asked -- asked

1 her to assume those things at all. She testified
2 that -- that she had a match between what she had done
3 and what had been done on the -- on the DNA of this
4 individual by somebody else.

5 MR. CARROLL: That's correct.

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

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

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

12 JUSTICE BREYER: You were going to agree
13 with that. And --

14 (Laughter.)

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

1 in books.

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

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

20 And all the Wigmore factors for both
21 exceptions could support a similar exception here, which
22 would have the following virtue: It would have the
23 virtue of not requiring 10 people to come in and
24 testify, whom the defense is, of course, free to call;
25 and it would also have the virtue of removing the

1 temptation for prosecutors to stop relying on the more
2 reliable evidence, DNA, and instead encourage them to
3 rely on the less reliable evidence; namely, the
4 eyewitness testimony in a case.

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

7 (Laughter.)

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

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

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

23 JUSTICE SCALIA: You're not objecting to
24 hearsay, are you, counsel? You're 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've said the contrary,
9 though, haven't we?

10 (Laughter.)

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

1 Confrontation Clause was not there. So -- so, that's
2 what's basing my question, and I'd like your reaction.
3 It's a long question, considers an exception, and I'd
4 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 I --

13 JUSTICE SCALIA: -- Justice Breyer's
14 dissent.

15 JUSTICE BREYER: And I mean it because I see
16 extending those cases from one individual from a
17 laboratory being familiar with the results to requiring,
18 in ordinary cases, the calling of what could be up to 10
19 technicians -- I see that as making a sea change in
20 normal criminal law practices, and my motive is as I
21 said: I fear it will push the system in the direction
22 of relying on less reliable eyewitness testimony rather
23 than more reliable technical laboratory DNA-type
24 evidence. Now, you have my -- I've made the point, and
25 I really want to get your response.

1 JUSTICE GINSBURG: Mr. Carroll, are we
2 talking about 10 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 1 person, not 10.

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

10 JUSTICE ALITO: Well, 10 isn't -- 10 is not
11 a far-fetched hypothetical. We have an amicus brief
12 from the Manhattan District Attorney's Office and the
13 New York City Chief Medical Examiner's Office, and they
14 say that their very fine crime lab involves at least 12
15 technicians in the analysis of DNA.

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

24 Is that just a -- do you think that's just a
25 practical consequence that we have to accept under

1 Crawford?

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

10 JUSTICE SCALIA: It's up to the prosecutor
11 which of those 12 he wants to bring in, whether he wants
12 to bring in all 12 or just 1. If he thinks the jury
13 will be sufficiently persuaded by bringing in just one,
14 he can bring in just one, right?

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

16 JUSTICE ALITO: How will bringing in --

17 JUSTICE SCALIA: But he has to bring in the
18 one and not -- and not hearsay about what the one would
19 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 1 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 The amplification step, the person who, you
11 know, copies the DNA and tags it -- I don't think that's
12 a testimonial statement. And in this case, no
13 statements from someone who did that was presented.

14 Next step, quantization --

15 JUSTICE ALITO: Well, why is that not a
16 testimonial statement?

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

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

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

23 JUSTICE ALITO: And that's not testimony?

24 MR. CARROLL: In that case, it would be
25 testimony. However, that person doesn't have to testify

1 in order for the State to present its evidence. If the
2 State chooses to present that person's testimonial
3 statement at trial, then, yes, the Confrontation Clause
4 would require them to present that testimony live.

5 However --

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

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

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

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

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

24 JUSTICE KAGAN: So, why is that a
25 Confrontation Clause issue? Why isn't it just that the

1 prosecutor has failed to prove an element of his case?

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

6 JUSTICE KAGAN: Well, is that right? I
7 mean, I thought that the judge here said: No, I'm not
8 taking this for the truth of the matter asserted; I'm
9 only taking your statements about the lab tests as an
10 indication, as -- as the basis for your opinion. So,
11 I'm listening to your opinion.

12 The problem is in this whole case, there has
13 been no factual testimony about what the results were
14 from the swab on the victim. Isn't that right?

15 MR. CARROLL: Well --

16 JUSTICE KAGAN: Or am I missing something?

17 MR. CARROLL: You are missing something,
18 Your Honor. And the trial judge in this case never
19 stated he was not considering the evidence for its
20 truth. No place in the record does it -- the trial
21 judge state that. And, in fact, in the finding of
22 facts, he states that he was convinced of the -- that
23 there was a match because the evidence from the experts
24 established that victim -- that Williams' semen was
25 found on the victim. And he notes that, well, Cellmark

1 was an accredited lab. If he wasn't considering
2 Cellmark's statement for the truth, he wouldn't care if
3 they were accredited.

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

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

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

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

22 MR. CARROLL: No, Your Honor.

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

1 MR. CARROLL: No, Your Honor.

2 JUSTICE ALITO: That was -- that was
3 addressed by the -- by the 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 matched.

14 Now, the police officer -- he compared the
15 photographs. You know, we're not contesting Lambatos'
16 match. But the statement that this is a 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 that to DNA from the defendant,
2 and 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're a DNA lab;
6 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, do they -- did they just
10 ignore it and not do anything?

11 Well, yes, I didn't -- I'm not testifying to
12 what happened at Cellmark. I'm just 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 is connected to
7 this --

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

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

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

1 profile that was the male DNA profile found in the semen
2 from the vaginal swab.

3 That's a statement from Cellmark. That's
4 not Lambatos' statement. And --

5 JUSTICE KENNEDY: And she -- and she goes
6 further. She says: And based on that, which I believe
7 to be true. She didn't say that, but this is the
8 implication. Based on that, which I believe to be true,
9 this belongs to Williams. This DNA is Williams's DNA.

10 And if she weren't relying on the truth of
11 the assertion from Cellmark, it would be irrelevant for
12 the jury. Isn't that your point?

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

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

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

25 JUSTICE BREYER: All right. But still there

1 is the conceptual difference. And as long as there is
2 that conceptual difference, don't we have a basis for
3 distinguishing this case from Melendez?

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

14 If there's any more -- I'll --

15 JUSTICE KENNEDY: Well, you're -- you're
16 saying that the State of Illinois case is weaker here
17 than in Melendez, where they had a certificate, and in
18 Bullcoming, where they had somebody from the lab testify
19 as to lab procedures. Here they have neither. And,
20 yet, Illinois somehow says it comes in.

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

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Ms. Alvarez.

25 ORAL ARGUMENT OF ANITA ALVAREZ

1 ON BEHALF OF THE RESPONDENT

2 MS. ALVAREZ: May it please the Court.

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

4 JUSTICE SOTOMAYOR: Counsel, on your theory
5 of this case -- and I think you say, first, it's not a
6 statement; and, second, that if it is, it was not
7 offered for the truth. Under your theory, if this lab
8 technician had introduced Cellmark's report, that would
9 have been okay, because it wasn't offered for the truth.

10 MS. ALVAREZ: The Cellmark report was not
11 introduced as evidence --

12 JUSTICE SOTOMAYOR: I'm changing the facts.

13 MS. ALVAREZ: -- and if she had --

14 JUSTICE SOTOMAYOR: Under your theory, she
15 could have introduced the lab report?

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

19 JUSTICE SOTOMAYOR: I don't understand the
20 difference. Meaning, the fact that you didn't
21 physically introduce the report makes a difference?

22 MS. ALVAREZ: The -- Ms. Lambatos testified
23 consistent with the Confrontation Clause here. She
24 testified --

25 JUSTICE SOTOMAYOR: She testified that she

1 reviewed lab samples --

2 MS. ALVAREZ: As an expert.

3 JUSTICE SOTOMAYOR: -- that matched the
4 defendant. So, what's the difference between that and
5 saying I have the report in my hand, I match that report
6 with the Williams report, and this is my conclusion?

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

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

14 MS. ALVAREZ: Right.

15 JUSTICE SOTOMAYOR: So, she said that.

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

22 JUSTICE SOTOMAYOR: So, what's the
23 difference between this and Justice Kennedy's question
24 about Bullcoming? Could the expert in Bullcoming have
25 said, as one of the amici here said, that all they would

1 have had to do in Bullcoming is to read or to give a
2 report that gave the blood alcohol content, the .5 or
3 .10 or whatever it was, and have an expert come in and
4 say that number shows he's drunk?

5 MS. ALVAREZ: Well, if the --

6 JUSTICE SOTOMAYOR: Is that any different
7 than this situation?

8 MS. ALVAREZ: If the expert in Bullcoming
9 did more than what he simply did in Bullcoming -- and
10 that was just simply read the report and testify that
11 that's what that lab did. If he actually did his own
12 independent analysis based on his expertise, based on
13 his skill --

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

18 MS. ALVAREZ: If he were -- if he were to
19 give his independent opinion, based on his analysis and
20 what he had done, then we would have seen a situation
21 closer --

22 JUSTICE SOTOMAYOR: He has done nothing.

23 MS. ALVAREZ: -- closer to this.

24 JUSTICE SOTOMAYOR: All the report did was
25 give a number. And the supervisor comes in and says

1 that number violates -- is legal drunkenness.

2 MS. ALVAREZ: Well, if the --

3 JUSTICE SOTOMAYOR: How is that different
4 from that?

5 MS. ALVAREZ: If that -- if that report is
6 being used, is being offered to prove the truth of the
7 matter asserted --

8 JUSTICE SOTOMAYOR: All right, but you're
9 not telling me why that's not the same here, because he
10 -- what this expert said is the Cellmark report is from
11 this victim. So, it's the same set of numbers as in
12 Bullcoming. Now he's taking a step and saying, instead
13 of legal drunkenness, it matches someone else's that I
14 took.

15 MS. ALVAREZ: But, no, what happened here
16 was Ms. Lambatos testified based -- and gave her own
17 independent expert opinion based on her skills, her
18 knowledge, her expertise. She relied --

19 JUSTICE GINSBURG: You -- you said
20 "independent," and I don't -- you said that in your
21 brief. I don't understand how Lambatos's testimony can
22 be independent of the test results supplied. I mean,
23 it's based on the test results. She -- it can't be
24 independent of them because it's entirely dependent on
25 them.

1 MS. ALVAREZ: But an expert can always
2 testify about the material that they relied on, whether
3 that material is ever admitted into evidence, and
4 sometimes that material could never be admitted into
5 evidence. But she, in fact, testified to what she
6 relied on, in addition to what --

7 JUSTICE SCALIA: No, but didn't she say, I
8 relied on stuff that I received from -- from Caremark --
9 whatever the name of the lab was?

10 MS. ALVAREZ: Cellmark.

11 JUSTICE SCALIA: She said: I -- I relied on
12 material that was a swab containing the DNA, the -- the
13 sperm of this particular individual. And she did not
14 know that.

15 MS. ALVAREZ: She testified that she relied
16 on those materials, and she can testify --

17 JUSTICE SCALIA: She didn't just say, I got
18 something back from the lab, and I relied on whatever
19 that said. No, she said what she had gotten back from
20 the lab, and she did not know, of her personal
21 knowledge, that it was what she said it was.

22 MS. ALVAREZ: She knew from the -- the
23 procedures and the chain of custody and the shipping
24 manifest that what was sent initially to Cellmark after
25 preliminary tests were done at the Illinois State police

1 crime lab showing the presence of sperm, that it was
2 sent to Cellmark, and it was analyzed at Cellmark and
3 came back from --

4 JUSTICE SCALIA: She didn't know if they had
5 incompetent people there. The last case we had
6 involving this kind of an issue, the reason they didn't
7 bring in the lab technician to testify was that he had
8 been fired in the interim for some reason which we
9 didn't know, but it was pretty clear why -- why he would
10 not have been a very good witness. We don't know how
11 good this lab was. We don't know how good the
12 individuals who did the test were.

13 And that's why it's up to the State to bring
14 forward testimony saying what the lab did. And the only
15 testimony they brought forward was the testimony of this
16 witness who was not there.

17 MS. ALVAREZ: The testimony of Ms. Lambatos
18 satisfies the Confrontation Clause because she is the --
19 the witness against the accused in this case, and the
20 fact that she testifies that she relies on material that
21 was generated by Cellmark does not make Cellmark the
22 witness against the accused.

23 JUSTICE SCALIA: If she said that, I would
24 agree with you. But she said more than that. She said,
25 I relied on material provided by Cellmark which is....

1 And then she described what that material was, and she
2 had no personal knowledge of that.

3 MS. ALVAREZ: She had no personal knowledge
4 of that, and that came through during this
5 cross-examination. Ms. Lambatos was subjected to a
6 very -- quite lengthy and a quite -- a specific
7 cross-examination.

8 JUSTICE ALITO: Well, there are two types of
9 evidence that are -- that are involved here. One is
10 chain of custody evidence. Was the result that was sent
11 back the result that was done on the sample that was
12 sent to Cellmark? That's just purely chain of custody.
13 That has nothing whatsoever to do with the -- the
14 accuracy or the professionalism of what was done at
15 Cellmark. And she did make a statement. She did say
16 that the sample -- that the result that came back from
17 Cellmark was -- was done -- was based on a test of the
18 vaginal swab that was sent there.

19 The other has to do with what Cellmark did,
20 how well they did it. She didn't say anything about
21 that.

22 Now, as to the chain of custody, if that's
23 testimonial, isn't -- isn't it simply duplicative of the
24 very strong circumstantial evidence regarding the chain
25 of custody, the sending of it out with certain markings

1 and the receipt back with certain markings?

2 MS. ALVAREZ: Right. The -- the chain of
3 custody was -- was strong -- was strong in this case,
4 the evidence that was presented through the shipping
5 manifest, through the other witnesses that testified in
6 this case. The -- the fact that Ms. Lambatos testified
7 that she did not know exactly what they did at
8 Cellmark -- again, as an expert, she was able to talk
9 about what material she relied on, the Cellmark
10 materials. The Cellmark materials were never --

11 JUSTICE KENNEDY: But the -- the chain of --
12 the chain of custody are just supporting actors. The
13 key actor in the play, the Hamlet in the play, is the
14 person who did the test at Cellmark, and she or he is
15 not here. And if you want to say, oh, this is not --
16 tell the jury, now, we're not saying that this is
17 admitted for the truth, we're not saying that this is
18 Williams' DNA, the judge would say, well, then it's
19 irrelevant, it's excluded.

20 MS. ALVAREZ: But the matching --

21 JUSTICE KENNEDY: And it seems to me, in --
22 as in response to Justice Scalia, that not only does he
23 indicate that this is hard to distinguish from
24 Bullcoming; in Bullcoming, at least you had an expert
25 say how the laboratory works. Here, you don't even have

1 that.

2 MS. ALVAREZ: Well --

3 JUSTICE KENNEDY: You have less here with
4 reference to Cellmark than you did in Bullcoming.

5 MS. ALVAREZ: Ms. Lambatos did testify both
6 on direct examination and cross-examination that
7 Cellmark was an accredited lab. The Illinois State
8 Police crime lab routinely uses -- outsources --

9 JUSTICE KENNEDY: Well, in Bullcoming, we
10 said that was not sufficient. And in that case, the
11 person was from that lab.

12 MS. ALVAREZ: But -- but Ms. Lambatos -- we
13 never introduced any Cellmark reports in this case.
14 There were no testimonial statements conveyed through
15 her testimony. There were no out-of-court statements
16 used to prove the truth of the matter asserted.

17 What was presented was the expert opinion of
18 Ms. Lambatos, who was a duly qualified expert in -- in
19 forensic biology, in DNA. And not only did she have the
20 ability to look at the Cellmark material; she
21 interpreted the material that -- that came from
22 Cellmark. And what came from Cellmark, the
23 electropherogram, what I would submit to you is not
24 testimonial -- it's a machine-generated chart that, to
25 the naked eye, to a trier of fact means absolutely

1 nothing unless an expert actually interprets that. And
2 Ms. Lambatos testified to how she interpreted that. She
3 talks about the alleles and the peaks --

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

6 MS. ALVAREZ: I -- well, Melendez-Diaz, what
7 we had in Melendez-Diaz was, in fact, a certificate, an
8 affidavit. It was -- it was -- it was created --

9 JUSTICE KENNEDY: In other words, you had
10 something more than you have here; and, therefore, it
11 goes out and this comes in? That doesn't make sense.

12 MS. ALVAREZ: No, I think in Melendez-Diaz,
13 it's clear because that was -- that report was drafted,
14 created, for the primary purpose of being used as
15 substitute of live testimony. I submit to you that the
16 Cellmark reports were not. The electropherogram, again,
17 which would need expert interpretation; the allele
18 chart, again, I would submit is not testimonial, that
19 those reports were not created in lieu of live
20 testimony.

21 And Ms. Lambatos looked at that. She
22 interpreted it. In fact, she even said that there was
23 something on the electropherogram that she didn't agree
24 with Cellmark on, and it was a certain one peak that was
25 higher that she felt was, just in her expert opinion,

1 background noise. So --

2 JUSTICE GINSBURG: If the report had been
3 introduced, the Cellmark report, it would be
4 testimonial; is that -- is that right?

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

7 JUSTICE GINSBURG: Yes. Right.

8 MS. ALVAREZ: -- it would have been offered
9 for the truth of the matter asserted. And we -- and it
10 would be -- it would be a -- it would implicate the
11 Confrontation Clause.

12 JUSTICE GINSBURG: Well, how does it
13 become --

14 MS. ALVAREZ: -- but that's not what
15 happened here.

16 JUSTICE GINSBURG: How does it become
17 non-testimonial when it's relayed by the recipient of
18 the report? I mean, if -- if the -- you're not
19 introducing it for the truth, then it's not relevant.

20 MS. ALVAREZ: Right. I think the key is the
21 use. How are these statements used? How are these
22 reports used? And in this particular case, they were
23 not used to prove the truth of the matter asserted.
24 They were used for the limited purpose of explaining the
25 expert's opinion and for the expert to testify to what

1 she relied on in getting to her opinion.

2 JUSTICE KAGAN: How do we know that, Ms.
3 Alvarez? Is there a statement from the finder of fact,
4 who's the trial judge here, that he's understanding her
5 testimony to be not for the truth of the matter
6 asserted? What's the best evidence that that's what the
7 court was thinking?

8 MS. ALVAREZ: There is. And in the joint
9 appendix on page 172, the language from the trier of
10 fact, he says just that, that he's considering these for
11 the limited purpose. In fact, the Illinois appellate
12 court also affirmed, stating that this evidence came in
13 for a limited purpose, as well as the Illinois --

14 JUSTICE KENNEDY: It's the limited purpose
15 of -- of explaining the basis for her opinion. But her
16 opinion is that this is matched to Lambatos.

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

18 JUSTICE KENNEDY: Her opinion is that this
19 is a match to Lambatos. But if -- if the match material
20 isn't admitted for the truth of the matter asserted or
21 isn't considered for the matter asserted, then that
22 testimony is irrelevant and meaningless.

23 MS. ALVAREZ: Well, not irrelevant, but I
24 believe it goes to the weight of her testimony, and that
25 is for the trier of fact to determine. And here, it was

1 a bench trial. It was a judge. But if in fact the
2 State presents the evidence in the way that was -- we
3 presented it here, we're always taking the chance that
4 it would weaken the -- the case. And it has to be
5 considered for the weight to be given to Ms. Lambatos'
6 testimony.

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

11 MS. ALVAREZ: No, Your Honor. I would say
12 no. I believe there was the testimony of the victim in
13 this case, who identifies this defendant as the
14 perpetrator in -- in this rape. In addition, the judge
15 made a finding when -- in his ruling. The trier of fact
16 said that he believed her 100 percent, and he found her
17 extremely credible.

18 JUSTICE KAGAN: But I guess what I'm trying
19 to suggest is that if there's no evidence in the case
20 that the -- that the match is to the victim, where is
21 your case?

22 MS. ALVAREZ: Well, then we probably would
23 have problems with the Illinois evidentiary rules and --
24 and the law in Illinois.

25 We obviously presented in this case a

1 sufficient chain, a sufficient foundation, to show
2 where -- when that -- we -- we presented the testimony,
3 not only of the victim but the doctor who was present
4 when the swab was taken, of the officers who brought the
5 sealed swab to the Illinois State Police crime lab, how
6 that sealed swab was first looked at, preliminary tests
7 by Mr. Hapack in -- in ISP, in order to -- before they
8 sent it to Cellmark, and then Cellmark extracts a DNA
9 profile of a woman -- a female and a man.

10 Cellmark never makes the match here.
11 Cellmark never says this is Mr. Williams' DNA. That is
12 done by Ms. Lambatos. Through her expert and her
13 expertise, she makes the match.

14 JUSTICE SCALIA: No, but Cellmark says this
15 is the male DNA that was found in the sample that was
16 sent. Cellmark made that decision, right? And her
17 testimony was based upon the fact -- was based upon
18 comparing that male DNA with -- with her own blood
19 sample. It's meaningless unless that male DNA was
20 indeed the defendant's.

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

25 JUSTICE SCALIA: You know, I would believe

1 that if the prosecution put the question to -- to her
2 this way: Assume that you got a report which said that
3 this was the defendant's DNA. And if you were to match
4 that with this -- the work you've done on the blood
5 sample, would you find that -- that, you know, that the
6 sample was taken from the defendant? And she would say
7 yes. And the jury would say: So what?

8 I mean, you've just -- you've just made a
9 hypothesis. "If you had been told." That -- that would
10 be worth nothing.

11 Her testimony was, I received information
12 that this was indeed the DNA taken from -- the male DNA
13 taken from the -- from the swab that was sent. Without
14 that, the testimony was worthless. It's just, you know,
15 a hypothesis. She responds to a hypothesis. That was
16 not the way this was played out in the trial, was it?

17 MS. ALVAREZ: The -- again, our position is
18 that her testimony was consistent with the Confrontation
19 Clause. The Confrontation Clause is concerned about
20 what statements are admitted, what evidence is admitted.
21 No Cellmark reports were admitted here. She did not
22 parrot the testimony -- I mean, the report of Cellmark.

23 She testified to what she did, how she
24 arrived at her own independent opinion on this, which --
25 again, we did not offer any out-of-court statements to

1 prove the truth of the matter asserted. We offered Ms.
2 Lambatos, who was subjected to a lengthy
3 cross-examination, and that satisfies the Confrontation
4 Clause. And the inability to test the reliability of
5 what happened at Cellmark does not trigger the
6 Confrontation Clause.

7 JUSTICE GINSBURG: I thought you earlier
8 recognized that her -- her opinion could not be
9 independent of the test results. It depended entirely
10 on the test results. So, I -- now you've -- you've
11 inserted "independent" again, and I thought you had --
12 you had given up on that.

13 MS. ALVAREZ: Well, I think, you know, what
14 we saw in Bullcoming was not an independent opinion of
15 an expert. With -- he offered no independent analysis.
16 He simply read off a report that was prepared by another
17 lab, and that -- in Bullcoming, that was offered to
18 prove the truth of the matter asserted.

19 We did not offer Cellmark reports here to
20 prove the truth of the matter asserted. We offered the
21 expert opinion of Ms. Lambatos, and her credibility was
22 attacked through a very vigorous cross-examination here,
23 and that satisfies the Confrontation Clause.

24 Testimonial statements, again, are -- are
25 statements that are -- are made in lieu of live

1 testimony, and the key is the live testimony here, which
2 we presented live testimony. The reports from Cellmark
3 in our -- our conclusion is that they are not
4 testimonial in nature.

5 And what Petitioner is asking you here -- to
6 do here today is to expand Crawford, to expand the
7 Confrontation Clause, to expand the definition of
8 hearsay and the definition of "testimonial."

9 And -- and our position simply is to ask you
10 to maintain the rule of Crawford, which is quite clear,
11 that a witness becomes -- an out-of-court declarant
12 becomes a witness against an accused within the concept
13 of the Confrontation Clause when their extrajudicial
14 statements are offered to prove the truth of the matter
15 asserted. And so, the witness here --

16 JUSTICE GINSBURG: Does Illinois -- does
17 Illinois have notice and demand?

18 MS. ALVAREZ: No.

19 JUSTICE GINSBURG: It does not?

20 MS. ALVAREZ: No. No. And so, our -- our
21 position, Your Honors, is to maintain the rule of
22 Crawford. There is no such thing as inferential
23 hearsay, as the Petitioner wants you to believe. A
24 statement is a statement. Hearsay is hearsay. There is
25 no such thing as inferential hearsay. What was

1 presented here in this case was consistent with the
2 Confrontation Clause; it was satisfied. And for -- and
3 for that, we respect your opinion here today, but we ask
4 that you maintain the ruling of Crawford.

5 JUSTICE SCALIA: She was asked, just -- just
6 to be clear what she was testifying to: "Did you
7 compare the semen that had been identified by Brian
8 Hapack from the vaginal swabs of Latonia Jackson to the
9 male DNA profile that had been identified by Karen Kooi
10 from the blood of Sandy Williams?"

11 "Yes, I did."

12 She is accepting and -- and affirming this
13 statement that what she was comparing was the semen that
14 had been identified from the vaginal swabs.

15 MS. ALVAREZ: She -- she is accepting and
16 she is relying on the material that was generated by
17 Cellmark, but, again, the State did not admit into
18 evidence or -- or try to admit into evidence the
19 Cellmark report or any statements from Cellmark.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Dreeben.

22 ORAL ARGUMENT OF MICHAEL R. DREEBEN

23 ON BEHALF OF THE UNITED STATES,

24 AS AMICUS CURIAE, SUPPORTING RESPONDENT

25 MR. DREEBEN: Thank you, Mr. Chief Justice,

1 and may it please the Court:

2 Sandra Lambatos's testimony really has to be
3 analyzed as having two components to it. The first
4 component is the match, the match between the data
5 reflecting the allele charts from Cellmark and the data
6 that was produced in analyzing Petitioner's blood. As
7 to that component of her testimony, she's a live
8 witness. She's subject to cross-examination. I don't
9 think that anyone asserts there's a Confrontation Clause
10 issue.

11 But as several members of the Court have
12 pointed out, that testimony is entirely irrelevant and
13 nonprobative unless it can be linked to the semen that
14 was taken from the victim and that was subsequently
15 analyzed to generate a DNA profile. As to that issue,
16 Illinois State law provides that her testimony cannot
17 prove for the truth of the matter asserted what Cellmark
18 did. She cannot repeat on the witness stand, when she
19 gives the basis for her testimony, things that Cellmark
20 said and have them be taken for the truth --

21 JUSTICE SOTOMAYOR: But, Mr. Dreeben, she
22 did repeat what Cellmark said. I asked your -- the
23 State's attorney whether, if she had read the data
24 report from the laboratory analysis, would that have
25 been a violation of the Confrontation Clause? Not

1 clear. She says, only if you admitted it.

2 But in fact that's what she did. If you
3 read her testimony -- I give you an example at page
4 79 -- she tells on cross-examination exactly what the
5 steps were in the Cellmark report, what numbers they
6 gave, and she tells and explains -- she -- the State's
7 attorney took pride in this -- she said, I disagree with
8 that number that they came up with; I think the number
9 should be....

10 So, she's really reading the report.

11 MR. DREEBEN: Well, first of all, Justice
12 Sotomayor, that did come in on cross-examination, and I
13 don't think that Petitioner is contending that evidence
14 that he himself elicits on cross-examination --

15 JUSTICE SOTOMAYOR: All right. So, then
16 let's --

17 MR. DREEBEN: -- would violate the
18 Confrontation Clause.

19 JUSTICE SOTOMAYOR: All right. So, let's --
20 so, let's get to --

21 MR. DREEBEN: Can I focus on --

22 JUSTICE SOTOMAYOR: Could the State have
23 done this?

24 MR. DREEBEN: Can I focus on your question?
25 I think, because she clearly did link the DNA that she

1 compared to the blood DNA to the semen that was sent to
2 Cellmark, and I think that several members of the Court
3 have raised the question, is she implicitly thereby
4 repeating what Cellmark said and then making Cellmark
5 the out-of-court witness?

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

10 JUSTICE KENNEDY: If that's so, why isn't
11 there insufficient evidence in this case?

12 MR. DREEBEN: And this brings me to my
13 second reason for saying that this is not a
14 Confrontation Clause problem.

15 It's in essence what the Chief Justice
16 described and what Justice Alito referred to as the
17 circumstantial way in which the factfinder can infer
18 that Cellmark tested the DNA in the semen that was sent
19 to it. There's a shipping manifest that shows that the
20 semen goes out to the lab; there's a shipping manifest
21 that shows that it comes back. And Cellmark tenders
22 a --

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

25 MR. DREEBEN: Correct. And that is I think

1 the crucial point here. The State may have a very weak
2 case if it doesn't produce a witness from the lab who
3 can attest to the fact that the lab did what it was
4 supposed to do and conducted a properly authorized DNA
5 examination. It has to get by with the very skimpy
6 circumstantial showing of we sent the material out --

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

12 MR. DREEBEN: Yes. Yes.

13 CHIEF JUSTICE ROBERTS: The State can make
14 its case a lot stronger --

15 MR. DREEBEN: And it did that here by saying
16 that Cellmark is an accredited laboratory and Sandra
17 Lambatos participated in designing proficiency
18 examination. But she had to admit on cross-examination
19 that she had no idea what Cellmark actually did in this
20 case. She could draw inferences. And the inferences
21 that she drew are what enable her to say my opinion is
22 there is a match between the DNA in the semen and the
23 DNA in the blood.

24 JUSTICE KENNEDY: As you understand our
25 precedents, would this have been a stronger or a weaker

1 case if a representative, an employee, of Cellmark had
2 come and said, although I didn't do this sample, I want
3 to tell you how our procedures work and why we're a
4 respectable lab, et cetera, et cetera?

5 MR. DREEBEN: It would have been relatively
6 stronger had a witness been able to actually come from
7 Cellmark and validate that Cellmark is an accredited
8 laboratory and conducts procedures in a certain way.
9 But the crucial point here --

10 JUSTICE SOTOMAYOR: Mr. Dreeben, if no
11 expert from either lab came in, if an expert had the
12 Cellmark information and the Illinois State Police
13 information, not offered for the truth of the matter,
14 and came in and said, I matched this and I matched that,
15 and it's the defendant -- could that have been done?

16 MR. DREEBEN: Only if as a matter of State
17 law there was a sufficient foundation for the factfinder
18 to conclude that the DNA actually came from the blood
19 and the DNA came from the semen.

20 JUSTICE SCALIA: Mr. Dreeben, that seems to
21 me -- I mean, we have a Confrontation Clause which
22 requires that the witnesses against the defendant appear
23 and testify personally. And -- and the crucial evidence
24 here is the testing of the semen found on the swab.
25 That is -- that's the crux of this evidence. And you're

1 telling me that this Confrontation Clause allows you to
2 simply say, well, we're not going to bring in the person
3 who did the test; we're simply going to say this is a
4 reliable lab.

5 I don't know how that complies with the
6 Confrontation Clause.

7 MR. DREEBEN: The Confrontation Clause,
8 Justice Scalia, does not obligate the State to present a
9 strong case. It does not prevent the State from
10 presenting a relatively weaker case, so long as it does
11 not rely on testimonial statements to prove the truth of
12 the matter asserted.

13 This Court held, in Bruton v. United States,
14 that there is a very narrow exception to the almost
15 invariable presumption that juries will follow the
16 instructions that they're given. If they are told not
17 to take evidence for the truth of the matter asserted,
18 they are presumed to follow that instruction. Here
19 Illinois State law supplies that filter.

20 Everything that the judge heard, he filtered
21 through Illinois State law that says the basis for the
22 expert's opinion doesn't prove its truth. So, the State
23 gave up the right to say you can believe that this DNA
24 report is reliable and trustworthy because Cellmark says
25 so. The State doesn't get that benefit, and as a result

1 of not getting that benefit, it is not obligated to
2 treat Cellmark as if it's a witness. Cellmark --

3 JUSTICE KAGAN: I suppose the problem is,
4 Mr. Dreeben, that if the -- if the State put up Ms.
5 Lambatos and Ms. Lambatos had to say I did a match -- I
6 was given two reports; there was a match, but I have no
7 idea where this other report came from; you know, it
8 might have been from the victim, but it might not have
9 been; I don't have a clue -- the State would never have
10 put that prosecution on, because the State would have
11 understood that there was no case there.

12 The State is relying on the fact that people
13 will take what Ms. Lambatos says about what she knows
14 about where the report came from as a fact, as the truth
15 of the matter, that in fact this report did come from
16 the victim. And so, the jury can be given instructions
17 saying you can't consider this except for the truth of
18 the matter asserted.

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

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

1 The State can introduce that marijuana to impeach his
2 testimony. And the jury is instructed you may not use
3 that as proof that he possessed marijuana, only to
4 impeach his testimony.

5 The same is true with unwarned statements in
6 violation of Miranda.

7 JUSTICE SCALIA: What was the instruction
8 here? That --

9 MR. DREEBEN: There's no instruction here,
10 Justice Scalia, because this is a bench trial. And in a
11 bench trial, the judge is presumed to follow the law,
12 and as my colleague read to the Court --

13 JUSTICE SCALIA: So, we simply have a
14 presumption even though -- even though the court's
15 statement seems to indicate that he does take it for the
16 truth of the matter.

17 MR. DREEBEN: Well, the Illinois --

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

20 MR. DREEBEN: The Illinois Supreme Court
21 found as a matter of State law that he did comply with
22 State evidentiary rules and he did not take the Cellmark
23 report for the truth of the matter asserted. And there
24 is in this case an alternative route of proof which is
25 circumstantial. And I take the Chief Justice's

1 amendment of my description of the facts to include that
2 Cellmark is an accredited laboratory. That does add to
3 the probative value. But it's a much weaker chain of
4 support to conclude that the DNA male profile came from
5 the semen than if they had produced Cellmark. But not
6 having produced Cellmark, they do not need to afford
7 confrontation on Cellmark.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Mr. Carroll, you have 4 minutes remaining.

10 REBUTTAL ARGUMENT OF BRIAN W. CARROLL

11 ON BEHALF OF THE PETITIONER

12 MR. CARROLL: Thank you, Your Honor.

13 First, the State cited page 7 -- or 172 in
14 the joint appendix as a reference to the trial judge
15 stating that he was not considering Cellmark's statement
16 for its truth. That's not a cite to the transcript of
17 the trial. That's a cite to the Illinois Supreme
18 Court's opinion.

19 Nowhere in the actual trial transcripts did
20 the judge ever state, I'm not considering this evidence
21 for its truth. In fact, in the statement of facts on
22 page JJJ 151 of the record, he states that it's the --
23 it's the testimony of the expert that makes this link.
24 Cellmark's an accredited lab.

25 And it's inconceivable that, in the face of

1 the evidence of Cellmark's work that the prosecution
2 presented through Lambatos' testimony and during defense
3 counsel's objections to that testimony, that the judge
4 would never state at any point, hey, I'm not considering
5 this for its truth.

6 JUSTICE SOTOMAYOR: Are you saying that we
7 owe no deference to the Illinois Supreme Court's
8 judgment on this evidentiary issue? And if so, no
9 deference, tell me what proposition of law supports that
10 or are you saying deference is due, but we shouldn't
11 give it. Which of the two positions are you taking?

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

14 JUSTICE SCALIA: Why is deference due? I
15 mean, it's either the fact or it's not the fact. If a
16 State supreme court opinion says something that
17 contradicts the -- you know, the record, we owe it
18 deference? I don't know any such rule.

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

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

22 MR. CARROLL: I guess I -- if this Court
23 would like not to give the Illinois Supreme Court
24 deference, I'd be more than happy --

25 JUSTICE SCALIA: I think we should give it

1 deference where deference is due and not give it
2 deference where deference is not due. And on statement
3 of facts that either are erroneous or not, I don't -- I
4 don't know why deference is applicable.

5 MR. CARROLL: Yes, Your Honor.

6 CHIEF JUSTICE ROBERTS: You do think our law
7 is established, though, that a jury will follow an
8 instruction in this situation to -- not to take the
9 testimony for truth of the evidence, for truth of the
10 matter.

11 MR. CARROLL: Not in this situation, Your
12 Honor.

13 CHIEF JUSTICE ROBERTS: Do we have any --
14 any case saying that instruction is inadequate in a case
15 like this?

16 MR. CARROLL: Not in this particular fact
17 pattern. But this case is different than a Bruton type
18 situation where there are -- there's a proper way to
19 consider the evidence and an improper, and there's a
20 fear that the jury is going to -- or the trier of fact
21 is going to consider the improper. Here Illinois law
22 did allow the trier of fact --

23 JUSTICE KENNEDY: Are you aware that in
24 Illinois they have an instruction -- assuming it was a
25 jury case, this is a bench case, but if it were a jury

1 case: Ladies and gentlemen of the jury, you are not to
2 presume or assume that the DNA tested by Cellmark came
3 from this sample.

4 MR. CARROLL: Yes, Your Honor. There is
5 such an instruction in Illinois law; however --

6 JUSTICE KENNEDY: And then they routinely
7 give that to juries?

8 MR. CARROLL: I believe they do, Your Honor.
9 However, in this case -- or Illinois law does not
10 prohibit the trier of fact from considering Cellmark's
11 statements. The trier of fact is allowed and is
12 expected to consider it in assisting the trier of fact
13 in evaluating Lambatos' opinion.

14 And in this situation, where Lambatos -- the
15 only way that the Cellmark statements support Lambatos'
16 opinion is if they are true, there is no meaningful
17 difference between considering the statements in
18 assessing Lambatos' opinion and considering them for the
19 truth.

20 JUSTICE SOTOMAYOR: I'm sorry. I'm going
21 back to Justice Kennedy's question. There is an
22 Illinois requirement that the trial judges give the
23 instruction he described?

24 MR. CARROLL: I believe there is a
25 recommended jury instruction for -- that the basis

1 evidence is not to be considered for its truth, Your
2 Honor.

3 JUSTICE ALITO: Under Rule 703 of the
4 Illinois Rules of Evidence, are the facts that an --
5 that an expert takes into account in reaching his or her
6 opinion introduced for the truth of the matter asserted?

7 MR. CARROLL: Not under the language of the
8 rule, Your Honor, no.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 The case is submitted.

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

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