No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2010

SANDY WILLIAMS, Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Supreme Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violates the Confrontation Clause.

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affirming Petitioner's conviction and reversing appellate court's judgment modifying Petitioner's sentence. *People v. Williams*, 238 Ill. 2d 125 (2010).

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The petitioner, Sandy Williams, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois.

OPINION BELOW

The opinion of the Supreme Court of Illinois is published at *People v. Williams*, 238 Ill. 2d 125 (2010). A copy of the opinion is attached as Appendix C. A copy of the order denying rehearing is attached as Appendix D.

JURISDICTION

On July 15, 2010, the Illinois Supreme Court issued an opinion affirming the judgment of the appellate court affirming Petitioner's conviction. (App. C) The Illinois Supreme Court denied rehearing on September 27, 2010. (App. D) This petition is being filed within 90 days of the order of the Illinois Supreme Court denying the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend VI.

STATEMENT OF THE CASE

In *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), this Court held that the Confrontation Clause is violated where the prosecution introduces reports of forensic analysis into evidence without the defendant being given an opportunity to cross-examine the analysts who authored the reports. *Id.* at 2532. In this case, the prosecution presented, over defense objections, the results of forensic DNA analysis through the testimony of an expert witness who took no part in the analysis and had no personal knowledge of the procedures and methodologies used during the analysis. The forensic report itself was not introduced into evidence. Under the Illinois rules of evidence, an expert witness is permitted to testify to the facts and data underlying her opinion, even when such evidence would otherwise be inadmissible, so long as the facts and data are of a type reasonably relied upon by experts in the field. *Wilson v. Clark*, 84 Ill. 2d 186, 192–96 (1981) (adopting Federal Rules of Evidence 703 and 705). Distinguishing *Melendez-Diaz*, the Illinois Supreme Court found no Confrontation Clause violation in this case, holding that the evidence regarding the DNA analysis was presented merely to explain the expert's opinion, not for its truth.

Trial

At trial, L. J. testified that on February 2, 2000, a man grabbed her from behind as she walked home from work. The man claimed that he had a gun and forced her into a beige station wagon, where he sexually assaulted her. The man

also took L. J.'s money and some of her personal belongings. After the assault, L. J. ran home and her mother called 911.

After L. J. told the responding officers what had happened, the officers issued a "flash" message for a black male, 5' 8", wearing a black skull cap, black jacket, and jeans driving a beige station wagon. L. J. was then transported to the hospital, where a vaginal swab and blood sample were taken in order to prepare a sexual assault kit.

While L. J. was being treated at the hospital, the police stopped James McChristine near the scene of the attack. McChristine fit the description of the offender and he was driving a beige station wagon. The police brought McChristine to the hospital, and while he stayed in the parking lot, one of the officers brought his driver's license inside to show L. J. L. J. told the officer that the person pictured on the license might be the offender, but she wanted to see him in person. The officer brought her out to the parking lot to view McChristine. The officer testified that L. J. positively identified McChristine as her attacker. L. J., however, testified that she told the police McChristine was not her attacker. The officers brought McChristine to the police station and handed the investigation over to a detective. The detective went to the hospital to pick up the assault kit and talk with L. J. He brought L. J. back to the station, where she again viewed McChristine. She stated that McChristine was not her attacker, and he was released.

Sandy Williams was arrested over a year later on April 17, 2001. That same day, L. J. identified Williams in a lineup.

Sandra Lambatos, a forensic scientist from the Illinois state police crime labs, testified that the samples from L. J.'s sexual assault kit were sent to Cellmark diagnostic laboratory in Germantown, Maryland, for DNA analysis. Lambatos testified that Cellmark derived a DNA profile for the person whose semen was recovered from L. J. Lambatos conducted no analysis of the assault kit samples and she stated that her testimony was based upon the report provided by Cellmark. She further stated that she was not aware of what procedures Cellmark used to produce the DNA profile in this case, whether Cellmark had calibrated its equipment, or how Cellmark handled the samples once it received them. Over defense counsel's objections, Lambatos testified that it was her opinion that the DNA profile provided by Cellmark statistically matched the profile for Williams contained in the police crime database.

On cross-examination, Lambatos stated that Cellmark reported a mix of genetic profiles from which it had deduced the profile of L. J.'s attacker. Lambatos also stated that Cellmark's report indicated the presence of genetic material that did not match either L. J.'s profile or the deduced profile of the offender. No one representing Cellmark testified at trial. Cellmark's report itself was not introduced into evidence.

After Lambatos testified, defense counsel moved to exclude the DNA evidence, arguing, among other things, that because no one from Cellmark testified as to the testing procedures, the admission of the evidence violated Williams's

confrontation rights under *Crawford v. Washington*, 541 U.S. 36 (2004). The trial court denied the motion.

The trial court found Williams guilty of two counts of aggravated criminal sexual assault, and one count each of aggravated kidnapping and aggravated robbery. Williams again argued in his motion for new trial that the DNA evidence violated his right to confrontation. The trial court denied the motion and sentenced Williams to nature life for the sexual assault charges, a 60-year term for the aggravated kidnapping count, and a 15-year term for the aggravated robbery count.

Appeal

On appeal, Williams argued, among other things, that his right to confrontation was violated where the trial court allowed Lambatos to testify as to the results of the DNA analysis conducted by Cellmark when he was not given an opportunity to cross-examine any of Cellmark's analysts. The Appellate Court of Illinois affirmed Williams's conviction, with one justice dissenting.[1] *People v. Williams*, 385 Ill. App. 3d 359 (1st Dist. 2008). As is relevant here, the appellate court held that the Confrontation Clause was not violated because the evidence

[1] The dissenting justice wrote that the DNA evidence should have been excluded because the State failed to establish a proper foundation. *Williams*, 385 Ill. App. 3d at 371–77 (Cunningham, J., dissenting). The justice further wrote that because of the weakness of L. J.'s identification of Williams and the devastating effect the DNA evidence had on Williams's defense, the erroneous admission of the DNA evidence was not harmless. *Id.* The justice did not reach the Confrontation Clause issue.

regarding Cellmark's DNA analysis did not constitute hearsay as it was not presented to establish its truth. *Id.* at 368–70.

The Illinois Supreme Court granted Williams's petition for leave to appeal. While the case was pending, this Court issued its opinion in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), clarifying that forensic laboratory reports are testimonial under *Crawford*. The Illinois Supreme Court affirmed the judgement of the appellate court. Noting that under Illinois rules of evidence, the facts and data disclosed by an testifying expert to explain the basis of her opinion are not considered to be admitted for their truth, a majority of the Illinois Supreme Court held that Lambatos's testimony regarding Cellmark's report did not constitute hearsay. (App. C-12–19) Accordingly, the Illinois Supreme Court distinguished *Melendez-Diaz* and found no Confrontation Clause violation. (App. C-19) Two specially concurring justices wrote that the DNA evidence should have been excluded for lack of proper foundation, but that the error was harmless. (App. C-20–26) The justices did not reach the Confrontation Clause issue. Williams's petition for rehearing was denied.

REASON FOR GRANTING CERTIORARI

The Confrontation Clause of the Sixth Amendment requires that a defendant be given the opportunity to test in the "crucible of cross-examination" the "honesty, proficiency, and methodology" of the analyst who produced forensic evidence presented against the defendant at trial. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2538 (2009); *Crawford v. Washington* 541 U.S. 36, 61 (2004). The Illinois Supreme Court's holding that the Confrontation Clause is not offended when the prosecution presents the results of forensic testing performed by non-testifying analysts through the testimony of an expert witness who took no part in the analysis is therefore incorrect. The Illinois Supreme Court's conclusion that the out-of-court statements were not introduced for their truth is unsupportable, as logic dictates that the trier of fact necessarily must have considered the truth and accuracy of the statements in order to evaluate the expert's testimony. Both federal and state courts are divided over whether such testimony violates the Confrontation Clause. Given the widespread use of forensic evidence in criminal trials, the resolution of this issue is of critical importance to the interests of justice. For these reasons, this Court should grant certiorari in this case.[2]

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[2] A similar issue—whether the prosecution may introduce a forensic report authored by a non-testifying analyst via a surrogate expert witness— is currently pending before this Court in *New Mexico v. Bullcoming*, 226 P.3d 1 (N.M. 2010), *cert. granted*, 131 S. Ct. 62 (Sept. 28, 2010). However, in *Bullcoming*, unlike here, the forensic report in question was itself entered into evidence against the defendant.

I. The Illinois Supreme Court's conclusion that out-of-court statements made by non-testifying forensic analysts presented to explain the basis an expert witness's opinion do not constitute hearsay is incorrect and undermines this Court's holdings in *Crawford* and *Melendez-Diaz*.

This Court has held that under the Confrontation Clause of the Sixth Amendment, the testimonial statements of a witness against a defendant are inadmissible unless the witness appears at trial or, if the witnesses is unavailable, the defendant had a prior opportunity to cross-examination that witness. U.S. Const. amend. VI; *Crawford v. Washington*, 541 U.S. 36, 68 (2004); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531 (2009). The Confrontation Clause therefore does not allow the prosecution to present one person's testimonial statements through the trial testimony of another. *Crawford*, 541 U.S. at 68; *Davis v. Washington*, 547 U.S. 813 (2006). In *Melendez-Diaz*, this Court further instructed that when forensic reports are presented as evidence against a defendant, the Confrontation Clause guarantees the defendant the opportunity to test through cross-examination the "honesty, proficiency, and methodology" of the analyst who actually performed the forensic analysis. *Melendez-Diaz*, 129 S. Ct. at 2536–38.

It is clear from these principles that the Confrontation Clause does not allow an expert witness to testify about the results of a forensic analysis conducted by non-testifying analysts. First, as this Court explained in *Melendez-Diaz*, forensic reports used to prove facts establishing a defendant's guilt constitute testimonial

statements.[3] *Id.* at 2532. Second, because the expert witness has no personal knowledge of the procedures and methodologies employed, the defendant is not able to test the reliability of the forensic analysis in "the crucible of cross-examination" as the Confrontation Clause requires. *Crawford*, 541 U.S. at 61; *Melendez-Diaz*, 129 S. Ct. at 2536–38. The Illinois Supreme Court's conclusion that the Confrontation Clause was not implicated in this case was therefore erroneous.

The Illinois Supreme Court's decision was based upon Illinois's adoption of Federal Rule of Evidence 703 ("FRE 703") which provides that an expert witness may rely on otherwise inadmissible evidence so long as the evidence is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." *Wilson v. Clark*, 84 Ill. 2d 186, 192–96 (1981) (adopting FRE 703). According to the Illinois Supreme Court, out-of-court statements introduced pursuant to this rule do not constitute hearsay because the statements are presented not for their truth, but rather merely to help explain the basis of the testifying expert's opinion. *People v. Lovejoy*, 235 Ill. 2d 97, 142–43 (2009).

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[3] Although the issue was not reached by the Illinois Supreme Court, Cellmark's report is clearly testimonial under *Melendez-Diaz*. The report was used to establish facts demonstrating Williams guilt of the charged offense: the DNA profile of the offender. In addition, because the report was made at the request of the police, it was "made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial." *Melendez-Diaz*, 129 S. Ct. at 2532, 2535.

The rationale underlying FRE 703 and its Illinois counterpart is that if the court finds that the underlying data is of a type reasonably relied upon by experts in the particular field, it is sufficiently reliable. Fed. R. Evid. 703 advisory committee note ("[The expert's] validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes."); *Wilson*, 84 Ill. 2d at 193 ("[T]he key element in applying Federal Rule 703 is whether the information upon which the expert bases his opinion is of a type that is reliable."). After *Crawford*, however, this rationale is no longer valid in the criminal context. In *Crawford*, this Court instructed that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. Allowing the prosecution to introduce testimonial statements of non-testifying witnesses through the testimony of an expert witness simply because the statements have been deemed reliable "is little more than an invitation to return to [the] overruled decision in [*Ohio v. Roberts*, 448 U.S. 56 (1980).]" *Melendez-Diaz*, 129 S. Ct. at 2536.

In addition, this evidentiary rule is merely one of convenience. *Wilson*, 84 Ill. 2d at 194 ("[A]llowing expert opinions based on facts not in evidence dispenses with 'the expenditure of substantial time in producing and examining various authenticating witnesses.'" (quoting FRE 703 advisory committee's note)). While such a rule may be appropriate in the civil context, criminal trials involve concerns—namely, a defendant's constitutional rights—that do not exist in civil

trials, and that trump evidentiary rules of convenience. This Court has repeatedly stated that a defendant's right to confrontation may not be set aside simply because it introduces additional burdens. *Melendez-Diaz*, 129 S. Ct. at 2540; *Davis*, 547 U.S. at 832–33.

Furthermore, the notion that the relied upon out-of-court statements introduced to help the trier of fact evaluate a testifying expert's opinion are not presented for their truth is logically bankrupt. Evidence upon which an expert bases his opinion supports the expert's opinion only to the extent that the evidence is reliable. Logic therefore dictates that for such basis evidence to assist the trier of fact in evaluating the expert's opinion, the trier of fact necessarily must first assess the reliability of the basis evidence itself. *See* Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & Pol'y 791, 816 (2007) ("Using the information for the permissible purpose of evaluating the expert thus necessarily requires a preliminary determination about the information's truth. The permitted purpose is therefore neither separate nor separable from an evaluation of the truth of the statement's contents."); *New York v. Goldstein*, 843 N.E.2d 727, 732–33 (N.Y. 2005) (out-of-court statements relied upon by expert constituted inadmissible testimonial hearsay under *Crawford* because the trier of fact had to accept the statements as true in order to evaluate the expert's testimony), *cert. denied*, 547 U.S. 1159 (2006). Even the Illinois Supreme Court, despite its adoption of FRE 703, has recognized that unless the

trier of fact considers the accuracy of the facts underlying an expert's opinion, the expert's opinion is a "meaningless conclusion." *People v. Anderson*, 113 Ill. 2d 1, 11 (1986). Accordingly, because the probative value of the out-of-court statements is dependant on the statements' truth, the statements are presented for the truth of the matter asserted. Richard D. Friedman, *The Elements of Evidence*, at 183 (2d ed. 1998) (an out-of-court statement is offered to prove the truth of the matter asserted "if the probative value of the out-of-court statement depends on its being true"). Indeed, it has been recognized that, while not labeled as such, Illinois's adoption of FRE 703 essentially created a new hearsay exception. Michael H. Graham, *Graham's Handbook of Illinois Evidence* § 703.1, at 684 (10th ed. 2010) (noting that the effect of Rule 703 is the same as if an additional exception to the rule against hearsay had been created).

This case provides a perfect illustration of the above principle. Lambatos did not provide any input into the determination of the DNA profile derived from the semen samples recovered from the victim. She did not preform any of the biological analysis on the DNA samples, and she did not review any of the raw data produced by such analysis. Rather, she merely performed the statistical matching of the DNA profile provided to her by Cellmark with a profile derived from a blood sample taken from Williams. Regardless of how accurate and reliable the trier of fact found the methods Lambatos employed in matching of the two profiles, if the trier of fact did not believe the Cellmark profile to be accurate—in other words, that it was not the profile of the offender—Lambatos's opinion that the two profiles matched would

have no evidentiary value. The trier of fact necessarily had to consider the truth and accuracy of Cellmark's profile in order to evaluate Lambatos's opinion. Cellmark's report therefore did constitute hearsay.

The fact that Williams was able to cross-examine Lambatos did not satisfy the requirements of Confrontation Clause. In *Melendez-Diaz*, this Court stressed that because forensic analysis is neither fool-proof nor immune from manipulation, the ability of a defendant to cross-examine the analysts who actually produced the evidence is critical to the defendant's right to confrontation. *Melendez-Diaz*, 129 S. Ct. at 2536–38. Lambatos took no part in the analysis that deduced the male DNA profile from the semen samples, and she did not even review the procedures Cellmark followed in deducing the DNA profile. As such, the opportunity to cross-examine Lambatos did not afford Williams the opportunity to challenge the "honesty, proficiency, and methodology" of Cellmark's analysts through the crucible of cross-examination, as the Confrontation Clause demands. *Melendez-Diaz*, 129 S. Ct. at 2538.

The Illinois Supreme Court's decision would also allow the prosecution to easily evade this Court's holdings in *Crawford* and *Melendez-Diaz*. For example, under Illinois's rule, the prosecution in *Melendez-Diaz* could have avoided the requirements of the Confrontation Clause by not introducing the forensic report itself but instead presenting the forensic evidence via an expert witness without affording the defendant any opportunity to test the honesty, proficiency, and methodology of the analysts through cross-examination. Surely, the Founders

would not condone a rule of evidence that would permit the prosecution to circumvent the Confrontation Clause in such a way. *Crawford*, 541 U.S. at 51 ("Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.").

Finally, the erroneous admission of the DNA evidence was not harmless beyond a reasonable doubt.[4] *Chapman v. California,* 386 U.S. 18, 24 (1967) (government has the burden of demonstrating that constitutional error in admitting improper evidence was harmless beyond a reasonable doubt). First, DNA evidence has a "mystical aura" of infallibility that has the power to overwhelm other evidence. *See* Joel D. Lieberman *et al.*, *GOLD versus PLATINUM: DO JURORS RECOGNIZE THE SUPERIORITY AND LIMITATIONS OF DNA EVIDENCE COMPARED TO OTHER TYPES OF FORENSIC EVIDENCE?*, 14 Psychol. Pub. Pol'y & L. 27 (February 2008) (summarizing studies indicating that DNA evidence is largely considered by the public to be almost 100% persuasive of a defendant's guilt). Second, the only remaining evidence against Williams, the victim's eventual

[4] Although the specially concurring justices of the Illinois Supreme Court found the admission of the DNA evidence to be harmless, they did so by reasoning that the testimony of a single witness "is sufficient to convict a defendant." (App. C-26). This misstates the constitutional harmless error test, since the question of whether the remaining evidence was sufficient to sustain a conviction is a separate question from whether the error was harmless beyond a reasonable doubt. *United States v. Lane*, 474 U.S. 438, 86–87 (1963). Notably, the dissenting justice in the Illinois Appellate Court found that the admission of the evidence was not harmless, stating that the DNA evidence was devastating.

identification of him, was very weak. One of the officers who questioned the victim shortly after the assault indicated that the victim initially identified a man other than Williams as her attacker. It was not until over a year after the incident that the victim first identified Williams. It therefore cannot be said that the DNA evidence was harmless beyond a reasonable doubt.

For these reason, this Court should not allow the decision of the Illinois Supreme Court to stand.

II. There is a conflict among the state and federal courts on this issue.

Since this Court's decision in *Crawford*, both state and federal courts have been split as to whether out-of-court statements presented to explain the basis of an expert witness's opinion constitutes hearsay, and thus triggers the defendant's rights under the Confrontation Clause. This Court's decision in *Melendez-Diaz* has not served to resolve the conflict.

At least one federal appeals court and two state supreme courts have held that the Confrontation Clause does not permit out-of-court testimonial statements to be presented through expert testimony. *United States v. Mejia*, 545 F.3d 179 (2d Cir. 2008) (gang expert could not transmit testimonial statements directly to jury); *Commonwealth v. Avila*, 912 N.E.2d 1014 (Mass. 2009) (medical examiner could not testify to the underlying factual findings of non-testifying examiner who performed autopsy); *New York v. Goldstein*, 843 N.E.2d 727 (N.Y. 2005) (out-of-court statements of laypersons regarding the defendant's behavior relied upon by the prosecution's psychiatric expert constituted inadmissible testimonial hearsay under

Crawford because the trier of fact had to accept the statements as true in order to evaluate the expert's testimony), *cert. denied*, 547 U.S. 1159 (2006). A number of state appellate courts have come to similar conclusions. *E.g., People v. Dendel*, No. 247391, ___ N.W.2d ___, 2010 WL 3385552 (Mich. Ct. App. Aug. 24, 2010) (expert's testimony regarding the results of analysis of decedent's blood glucose level performed by non-testifying analysts upon which the expert based his opinion as to cause of death violated the Confrontation Clause); *People v. Dungo*, 98 Cal. Rptr. 3d 702 (Cal. Ct. App. 2009) (medical examiner's testimony regarding non-testifying examiner's autopsy report violated Confrontation Clause because jury necessarily had to evaluate truth and accuracy of the report in order to evaluate the testifying examiner's opinion), *rev. granted*, 220 P.3d 240 (Cal. Dec. 2, 2009).

In contrast, other federal appeal courts and state supreme courts have held that out-of-court statements relied upon by expert witnesses do not implicate a defendant's confrontation rights under the rationale that the statements do not constitute hearsay because they are introduced not for their truth but rather to explain the basis of the expert's opinion. *E.g., United States v. Pablo*, No. 09-2091, ___ F.3d ___, 2010 WL 4609188 (10th Cir. Nov. 16, 2010) (expert may testify to the data and information produced by non-testifying analyst, but not the analyst's ultimate conclusions); *State v. Lui*, 221 P.3d 948 (Wash. App. 2009), *rev. granted*, 228 P.3d 17 (Wash. Mar. 30, 2010); *State v. Tucker*, 160 P.3d 177 (Ariz. 2007), *cert. denied*, 552 U.S. 923 (2007). This reasoning has also been applied by state

appellate courts. *E.g., People v. Rutterschmidt*, 98 Cal. Rptr. 3d 390 (Cal. Ct. App. 2009), *rev. granted*, 220 P.3d 239 (Cal. Dec. 2, 2009).

In addition, a number of state high courts have held that a defendant's ability to confront an expert who reviewed the testimonial statements of a non-testifying analyst is sufficient to satisfy the Confrontation Clause. *State v. Mitchell*, 4 A.3d 478 (Me. 2010) (expert could testify to substance of autopsy report prepared by non-testifying); *Rector v. State*, 681 S.E.2d 157 (Ga. 2009) (expert could testify to substance of toxicology report prepared by non-testifying analyst).

This Court should use this case to resolve this conflict among the various courts.

III. This issue implicates the proper administration of criminal justice.

This Court has recognized that because forensic evidence is not immune from distortion and manipulation, it is critical for a defendant to be given the opportunity to test the analysts's "honesty, proficiency, and methodology" through confrontation. *Melendez-Diaz*, 129 S. Ct. at 2536–38. In *Melendez-Diaz*, this Court noted that "because forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency. A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution." *Id.* at 2536 (internal quotes and edits omitted). This

Court further explained that "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well," noting that "an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination." *Id.* at 2537.

The history of forensic labs, including Cellmark, providing faulty results demonstrates that the opportunity to test the honesty, proficiency, and methodology of the actual forensic analyst through cross-examination is critical. *See* William C. Thompson*, Tarnish on the 'Gold Standard:' Understanding Recent Problems In Forensic DNA Testing*, 30 Champion 10, 11–12 (February 2006) (noting numerous instances of DNA labs, including Cellmark, producing faulty results due both to the failure to follow proper guidelines and to analysts manipulating data to cover up mistakes); Laura Cadiz, *Maryland-Based DNA Lab Fires Analyst Over Falsified Tests*, Balt. Sun, Nov. 18, 2004, at 1A (reporting that Cellmark fired an analyst for falsifying test data); Adam Liptak & Ralph Blumenthal, *New Doubt Cast on Crime Testing in Houston Cases*, N.Y. Times, Aug. 5, 2004, at A19 (reporting that a police DNA lab was shut down after it was discovered that analysts misinterpreted data, were poorly trained and kept shoddy records). The ability to cross-examine an expert who relied on the results of forensic testing but who took no part in the analysis, and thus has no personal knowledge of the procedures and methodologies used, does nothing to protect against fraudulent or faulty analysis.

Allowing the prosecution to present the findings of non-testifying forensic analysts via expert testimony allows the prosecution to perform an end run around the Confrontation Clause by depriving the defendant of the opportunity to test the reliability of the findings through cross-examination. This concern is not merely hypothetical. In a California case, a medical examiner explained that he was called to present the finding of another examiner because that examiner's questionable background made the prosecutors "feel it [was] too awkward to make them easily try their cases." *Dungo*, 98 Cal. Rptr. 3d 702, 708 (Cal. Ct. App. 2009). In finding a *Crawford* violation, the California Court of Appeals noted that the prosecution availed itself of the rule of evidence allowing it to use a surrogate expert witness with the specific intent of preventing the defense from testing the "honesty, proficiency, and methodology" of the examiner who conducted the autopsy through cross-examination. *Id.* at 714.

The practice condoned by the Illinois Supreme Court in this case—presenting forensic reports through the testimony of experts who took no part in the analysis—greatly inhibits a defendant's ability to expose fraudulent or faulty analysis by depriving him of the opportunity to cross-examine the actual analyst, undermining this Court's holdings in *Crawford* and *Melendez-Diaz*.

In sum, the Illinois Supreme Court's decision that an expert witness may present the DNA test results of non-testifying analysts to explain the basis of her opinion is both illogical and inconsistent with this Court's holdings in *Crawford* and

Melendez-Diaz. In addition, federal and state courts are deeply divided over this question. Because this issue is of critical importance for the administration of criminal justice, this Court should use this case to resolve the conflict among the courts.

CONCLUSION

For the foregoing reasons, petitioner, Sandy Williams, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Supreme Court.

Respectfully submitted,

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