No. 10-8505

In the Supreme Court of the United States

SANDY WILLIAMS, PETITIONER

v.

STATE OF ILLINOIS

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Confrontation Clause of the Sixth Amendment is satisfied when an expert witness provides opinion evidence based in part on laboratory data produced by analysts who did not testify at trial and the data underlying the expert's opinion are admitted not as substantive evidence but only to assist in evaluating her opinion.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution and rules:

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INTEREST OF THE UNITED STATES

Federal prosecutors may often present scientific opinion evidence through experts who may rely on data from non-testifying analysts, in accordance with Rules 702, 703, and 705 of the Federal Rules of Evidence. The United States therefore has a significant interest in the Court's resolution of the question presented.

STATEMENT

1. On the night of February 10, 2000, in Chicago, Illinois, petitioner abducted L.J., forced her into his car, and vaginally penetrated her and contacted her anus with his penis. After the sexual assault, petitioner pushed L.J. out of his car. L.J. ran home partially clothed, and her mother called the police. Officers re-

sponded and L.J. was transported to a hospital. J.A. 144-145.

At the hospital, Dr. Nancy Schubert conducted a vaginal exam of L.J. J.A. 145. Dr. Schubert observed whitish secretions, collected them with vaginal swabs, sealed the swabs in containers, and placed the containers in a sexual-assault-evidence kit along with a sealed blood sample collected from L.J. Trial Tr. (Tr.) III-54 to III-55. The evidence kit went into a locked box in the emergency room, from which Detective Michael Baker retrieved it. Tr. III-62 to III-63. Detective Baker labeled the kit with inventory number 2276053 and sent it to the Illinois State Police (ISP) Crime Lab for testing. Tr. III-73 to III-74. ISP forensic biologist Brian Hapack received the sealed evidence kit, which the lab labeled with case number C00007770. J.A. 30. Hapack confirmed the presence of semen in the vaginal swabs. J.A. 31-32. He then sealed them in envelopes, sealed the stain card with L.J.'s blood-sample standard in another envelope, labeled each with the case number and subexhibit numbers, and placed the kit in a secure freezer. J.A. 34-35.

On August 3, 2000, the police arrested petitioner for a separate crime. J.A. 146; cf. J.A. 98-99. On August 21, 2000, pursuant to a court order, a phlebotomist in the Cook County jail system drew petitioner's blood to obtain his DNA profile for an ISP database. Tr. JJJ-6. Investigator John Duffy observed the procedure and sealed petitioner's blood sample in an envelope, which he labeled with inventory number 2391661 and delivered to ISP. Tr. JJJ-15. In September 2000, ISP forensic scientist Karen Kooi Abbinanti analyzed the sample, determined petitioner's DNA profile, and added that profile to the ISP database. J.A. 13-15.

On November 28, 2000, the ISP Crime Lab sent the semen and blood samples from L.J.'s sexual-assault-evidence kit to Cellmark Diagnostic Laboratory in Germantown, Maryland, for DNA analysis. J.A. 51-53, 146-147. On April 3, 2001, Cellmark returned the vaginal swabs and blood samples to the ISP Crime Lab by Federal Express with a deduced male DNA profile. J.A. 54-55, 147.

Sandra Lambatos, an ISP forensic scientist, ran a data bank search using the male DNA profile provided by Cellmark. J.A. 56, 61. The computer generated a match with petitioner's DNA profile. *Ibid.* Lambatos then independently compared the DNA profile data from Cellmark to the DNA profile that ISP obtained from petitioner's blood. J.A. 56-57. She concluded that the two profiles matched. J.A. 57-58.

On April 17, 2001, L.J. identified petitioner as her assailant during a line up. J.A. 147.

2. The State indicted petitioner on 17 counts of aggravated criminal sexual assault, aggravated kidnapping, and aggravated robbery. J.A. 144. Petitioner elected a bench trial. *Ibid.* During trial, the state offered Lambatos as an expert witness in forensic biology and forensic DNA analysis. J.A. 42-90.

a. On direct examination, Lambatos testified that a technique known as polymerase chain reaction (PCR) testing is generally accepted in the scientific community as one of the most modern types of DNA testing. J.A. 47. A forensic sample, Lambatos explained, typically contains only a small amount of DNA; the PCR process "amplifie[s]" that DNA to create a sufficient amount for scientific examination. J.A. 48. Specific areas of interest on the DNA are then tagged with florescent markers, the sample is processed through a "genetic ana-

lyzer," and a DNA profile is generated. *Ibid.* Lambatos explained that this process can be used to identify a male DNA profile from semen, which can then be matched against the profile developed from a suspect's blood. *Ibid.*

Lambatos testified that Cellmark was an "accredited crime lab" and that, during her tenure at the ISP Crime Lab, ISP had a practice of sending evidence samples to Cellmark for DNA testing to expedite their processing and reduce ISP's backlog. J.A. 49-50. She explained that ISP sent sealed samples to Cellmark via Federal Express, that Cellmark would return the evidence in a sealed condition via Federal Express, and that this manner of transporting evidence for DNA analysis was generally accepted in the scientific community. J.A. 50-51.

Lambatos testified that ISP retained shipping manifests for the deliveries to and from Cellmark in the ordinary course of business and used those manifests to maintain a record of the chain of custody associated with the evidence. J.A. 50, 54. She also explained that ISP Crime Lab analysts regularly relied upon the manifests in performing their work. J.A. 50. Lambatos testified that it is a "commonly accepted" practice within the scientific community for "one DNA expert to rely on the records of another DNA expert" in order to complete a DNA analysis. J.A. 51.

Turning to the facts of this case, Lambatos testified about two shipping manifests. The first indicated that ISP sent the vaginal swabs and blood samples for case number C00007770 to Cellmark on November 28, 2000. J.A. 53. The second indicated that Cellmark returned samples for case number C00007770 to ISP on April 3, 2001. J.A. 54. The trial court subsequently admitted both manifests into evidence. Tr. JJJ-119 to JJJ-120.

Lambatos testified that she was assigned to work on case number C00007770. J.A. 55.

The State asked Lambatos whether an ISP computer indicated that "the male DNA profile found in semen from the vaginal swabs" matched petitioner's profile. J.A. 55. Petitioner objected, arguing that no "foundation" had been laid for the question because there was "no evidence with regard to any testing" done on the vaginal swabs sent to Cellmark "to generate a DNA profile." *Ibid.* The court said "[w]e will see" and allowed Lambatos to answer. J.A. 56. Lambatos confirmed the computer match. *Ibid.*

Lambatos then testified that she used the method of analysis previously discussed to "compare the semen that had been identified by [ISP forensic biologist] Hapack * * * to the male DNA profile that had been identified by [ISP forensic scientist] Kooi." J.A. 56-57; cf. J.A. 68-69. Petitioner again objected, but only to "the form of the question." J.A. 56. Lambatos thereafter testified that the probability of the DNA profile occurring in unrelated individuals was 1 in 8.7 quadrillion, 390 quadrillion, and 109 quadrillion in the black, white, and Hispanic populations, respectively. J.A. 57. Finally, over petitioner's objection, Lambatos testified that, in her "expert opinion," she would call this a "match to [petitioner]." J.A. 58.

b. On cross-examination (J.A. 58-86), Lambatos acknowledged that she "did not perform testing" on the vaginal swabs and, instead, based her expert conclusion on Cellmark's testing. J.A. 59, 68-69. Lambatos stated that she did not personally observe any of that testing, did not know how the samples were processed by Cellmark, and did not know if their instruments had been calibrated. J.A. 59-60, 73-74. She explained, how-

ever, that Cellmark was "an accredited laboratory so [it] would have to meet certain guidelines to perform DNA analysis" and, for that reason, "all those calibrations and internal proficiencies and controls would have had to have been in place." J.A. 59-60; see J.A. 74 (explaining that certain guidelines must be met to receive accreditation).

Lambatos also testified on cross-examination that she received a report from Cellmark that included an allele chart reflecting the results of Cellmark's testing. J.A. 61. She explained that the chart contained "data that [she] used to run [the] data bank search" that generated a computer match. J.A. 61, 65.

In addition to reviewing that data, Lambatos explained that she developed her "own opinion" by reviewing the materials she received, including an electropherogram associated with vaginal swab E2. J.A. 62, 66. Lambatos acknowledged that she did not review any other electropherograms, including controls that would have been run during DNA testing. J.A. 62-63. She also testified that Cellmark's results indicated a mixed DNA profile reflecting the DNA of only two people. J.A. 68, 70. Lambatos responded to detailed questioning about the methodology for deducing a male profile from the mixture and, in response to petitioner's questions, discussed specific data obtained from Cellmark. J.A. 68-73, 77-82, 84-85.

c. On redirect (J.A. 86-89), Lambatos testified that she had developed proficiency tests to be administered to the analysts at Cellmark and that, in her opinion, Cellmark's methods were generally accepted in the scientific community. J.A. 86-87. She further explained that she "routinely" relied on Cellmark's results in performing her work at the ISP Crime Lab. J.A. 87. And

she indicated that "the only two people in this mixture are [petitioner] and [L.J.]." J.A. 86. Lambatos explained that she "reviewed the data and made [her] own determination" and that, in her "expert opinion, the DNA [on] the vaginal swabs * * * came from [L.J.] and [petitioner]." J.A. 87-89.

d. At the conclusion of Lambatos's testimony, petitioner moved to exclude "that evidence with regards to testing done by [Cellmark]" on Confrontation Clause grounds. J.A. 90 (brackets in original). The trial court denied the motion to strike Lambatos's "testimony * * * or opinions based on her own independent testing of the data received from [Cellmark]." J.A. 94-95 (brackets in original). The court explained that it agreed with the State's argument that the "opinion as an expert" was admissible because petitioner had the opportunity to cross-examine Lambatos and because Lambatos's reliance on data from Cellmark ultimately "goes to the weight of the testimony." J.A. 91, 94.

e. The State presented testimony from the victim, Dr. Schubert, Detective Baker, Hapack, Duffy, and Kooi, among others. J.A. 84, 110-112. The trial court found petitioner guilty on two counts of aggravated criminal sexual assault, one count of aggravated kidnaping, and one count of aggravated robbery. J.A. 98, 106-108. It later denied petitioner's motion for a new trial, which renewed the objections to Lambatos's testimony, J.A. 98-103, based on its prior rulings. J.A. 105.

3. The state court of appeals affirmed in relevant part. J.A. 109-141. The court concluded that Lambatos's testimony about Cellmark's testing and analysis did not violate petitioner's Confrontation Clause rights. J.A. 123-127. The court reasoned that the Cellmark results were not offered into evidence for their truth but

instead to explain the "basis for Lambatos' opinion" based on "her own evaluation of the data" from Kooi, Hapack, and Cellmark. J.A. 125. The court further explained that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted," J.A. 124 (quoting *Crawford* v. *Washington*, 541 U.S. 36, 60 n.9 (2004)), and that the weight to give Lambatos's testimony was properly reserved to the fact-finder to determine in light of petitioner's "vigorous[] cross-examina[tion]." J.A. 126. In so holding, the court parenthetically noted that "a trial judge is presumed to consider only competent evidence unless the record affirmatively demonstrates otherwise." *Ibid.*[1]

One member of the court of appeals did not address the Confrontation Clause issue and instead dissented on the ground that Lambatos's opinion lacked a sufficient foundation. J.A. 130-141.

4. The Illinois Supreme Court affirmed the trial court in all respects. J.A. 143-185.

The state supreme court reasoned that the Confrontation Clause bars only the use of "testimonial hearsay" and thus does not prohibit the "admission of testimonial statements * * * for purposes other than proving the truth of the matter asserted." J.A. 161-162 (citing *Crawford*, 541 U.S. at 53, 59 n.9). The court noted that Cellmark's "report was not admitted into evidence," J.A. 165; see J.A. 150, and held that, under state law, Lambatos's testimony about information from that report would have been admissible only "for the limited purpose of explaining the basis for [her expert opinion],"

[1] The court of appeals reversed in part on a sentencing issue not relevant here, J.A. 127-129, but the Illinois Supreme Court later reinstated the original sentence. J.A. 173.

not for showing "the truth of the matter asserted." J.A. 164 (quoting *People* v. *Lovejoy*, 919 N.E.2d 843, 868 (Ill. 2009), which quotes *People* v. *Pasch*, 604 N.E.2d 294, 311 (Ill. 1992)). The court further held that, in this case, Lambatos's testimony about that information was in fact admitted only "to show the underlying facts and data Lambatos used before rendering an expert opinion" and not to establish that the information was true. J.A. 165, 172. Based on "the record" in this case, the court concluded that "gaps in the chain of custody went to the 'weight of the evidence rather than its admissibility'" and that "Lambatos' conclusion was tested 'in the crucible of cross-examination.'" J.A. 172 (quoting *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527, 2532 n.1 (2009), and *Crawford*, 541 U.S. at 61).

The state supreme court rejected petitioner's argument that Lambatos had served as a mere "conduit" for the Cellmark report. J.A. 167. The court reasoned that Lambatos "did not simply read to the judge, sitting as a fact finder, from Cellmark's report"; she instead "used her own expertise" to compare "the DNA profile in the ISP database with the [Cellmark] DNA profile." J.A. 167, 171. Unlike in *Melendez-Diaz*, the court explained, Lambatos independently "made her own visual and interpretive comparisons of the peaks on the electropherogram and the table of alleles." *Ibid.* The Cellmark report, the court noted, "did not include any comparative analysis," "was not introduced into evidence," was used only to support Lambatos's opinion "that the profiles matched," and was disclosed only "for the limited purpose of explaining the basis for [Lambatos's] opinion." J.A. 171-172.[2]

[2] Two justices filed opinions on other issues. J.A. 174-184, 184-185.

SUMMARY OF ARGUMENT

A scientific expert may testify to her opinion based in part on laboratory data produced by non-testifying analysts. When that underlying information is admitted at trial not as substantive evidence but only to assist in evaluating the expert's opinion, the testimony does not violate the Confrontation Clause.

I. A. Expert testimony applies specialized knowledge to a particular set of facts. Under standard rules of evidence, the expert may rely on inadmissible evidence, including testimonial evidence, in forming her opinion. Experts typically are not permitted to disclose to a jury such underlying inadmissible information unless a court determines that the risk of misuse for a substantive purpose is substantially outweighed by the probative value of the information in evaluating the expert's opinion. If a court permits the proponent of the opinion to elicit the otherwise-inadmissible data, it must instruct the jury that the data cannot be used to prove the truth of the matter asserted.

The Confrontation Clause applies only to testimonial statements used to prove the truth of the matter asserted. It therefore "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford* v. *Washington*, 541 U.S. 36, 60 n.9 (2004). When an expert testifies about underlying testimonial information to explain her opinion, and the court restricts the information's use to that purpose, the testimony complies with the Confrontation Clause.

B. Expert testimony must be linked to the facts of a case to provide assistance to the fact-finder. But the link need not come from admissible evidence from the expert herself. When the proponent of the evidence fails

to introduce admissible evidence sufficient to tie the expert's opinion reliably to the case at hand, the opinion evidence may have little probative force. The admission of evidence does not violate the Confrontation Clause merely because the evidence lacks probative value.

Petitioner argues that when a fact-finder relies on an expert's opinion as having probative value, the fact-finder necessarily must credit the underlying premises, because if those premises were false, the opinion would not be persuasive. But the jury can rely on other evidence, apart from the expert's own testimony about the bases for her opinion, to link the expert's opinion to the case. And once the jury has done so, it need not accept for its truth the otherwise-inadmissible testimonial evidence that the expert considered.

C. The standard rules of evidence work to prevent the misuse of inadmissible testimonial statements that support an expert's testimony. Limiting instructions, gatekeeping, prejudice-avoiding determinations, and cross-examination help prevent the fact-finder from treating the underlying data the expert describes as substantive evidence.

II. The expert testimony in this case complied with the Confrontation Clause. The State's DNA expert opined that the DNA profile from petitioner's blood matched the male DNA profile provided by Cellmark. From independent circumstantial proof, a fact-finder could infer that Cellmark's DNA results were derived from samples taken from the victim. And under state law, the expert's testimony about Cellmark's work did not come in for its truth, but only for evaluating her opinion. Because petitioner had a full opportunity to cross-examine the expert on that opinion, the Confrontation Clause was satisfied.

ARGUMENT

I. THE CONFRONTATION CLAUSE PERMITS AN EXPERT TO TESTIFY TO HER OWN OPINION BASED IN PART ON INADMISSIBLE TESTIMONIAL DATA WHEN THOSE DATA ARE NOT ADMITTED AS SUBSTANTIVE EVIDENCE

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const. Amend. VI. In *Crawford* v. *Washington*, 541 U.S. 36 (2004), the Court held that the Confrontation Clause bars the introduction into evidence at a criminal trial of "testimonial statements of a witness who did not appear at trial" unless the witness is unavailable to testify and the defendant has had a prior opportunity for cross-examination. *Id.* at 51, 53-54, 68. That prohibition "applies only to testimonial hearsay." *Davis* v. *Washington*, 547 U.S. 813, 823-824 (2006). Hearsay involves "[o]ut-of-court statements * * * offered in evidence to prove the truth of the matter asserted." *Anderson* v. *United States*, 417 U.S. 211, 219 (1974); Fed. R. Evid. 801(c). The Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 U.S. at 60 n.9 (citing *Tennessee* v. *Street*, 471 U.S. 409, 414 (1985)).

In *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527, 2532 (2009), the Court held that affidavits reporting the results of forensic drug testing that had been created "sole[ly]" as evidence for criminal proceedings were "testimonial" and could not be admitted as substantive evidence under the Confrontation Clause, unless the State produced a live witness at trial competent to tes-

tify to the truth of the statements in the affidavits. In *Bullcoming* v. *New Mexico*, 131 S. Ct. 2705, 2710, 2715-2716 (2011), the Court applied *Melendez-Diaz* to hold that the Confrontation Clause did not allow the admission of an analyst's signed, forensic report certifying the results of a blood-alcohol test when offered through the testimony of another scientist who "did not sign the certification or perform or observe the test" and who had no "independent opinion" about its results. Such "surrogate testimony," the Court stated, "does not meet the constitutional requirement." *Id.* at 2710.

This case presents a different scenario from *Melendez-Diaz* and *Bullcoming*. In this case, an expert in forensic DNA analysis testified live at trial about her independent expert opinion that she developed based on data that were not admitted as substantive evidence. The Confrontation Clause did not forbid her opinion testimony because the defendant had the opportunity to cross-examine the expert and challenge her conclusions and the underlying assumptions. Unlike in *Melendez-Diaz* and *Bullcoming*, no testimonial report authored by an absent witness was admitted into evidence to prove the truth of the matters asserted in the report. Cf. *Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring in part) (noting that the Court had not addressed "the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence"). Instead, the State in this case presented the expert's opinion concerning a DNA match between two profiles, as well as circumstantial evidence that one of the profiles was obtained from the semen recovered from the victim. The expert's testimony complied with the Confrontation Clause.

A. Live Expert Testimony That Discusses Facts Or Data Underlying The Expert's Opinion Does Not Violate The Confrontation Clause If The Facts Or Data Are Not Introduced To Establish Their Truth

1. The value of expert testimony at trial lies in the specialized knowledge that experts bring to bear in forming opinions and drawing inferences relevant to factual questions in dispute. Such expert opinions aid the truth-seeking process because, by their very nature, they can provide a perspective that "rest[s] 'upon an experience confessedly foreign in kind to [the jury's] own.'" *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 149 (1999) (brackets in original; citation omitted).

In federal court, "[t]he subject of an expert's testimony must be 'scientific [or other specialized] knowledge,'" *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589-590 (1993) (quoting Fed. R. Evid. 702), and a central criterion for admissibility is whether that knowledge would assist laypersons. Illinois similarly follows that principle and admits expert-opinion testimony as evidence if it is based on "knowledge that is not common to laypersons, and where such testimony will aid the fact finder in reaching its conclusion." *People* v. *Mertz*, 842 N.E.2d 618, 657 (Ill. 2005), cert. denied, 549 U.S. 828 (2006); see Ill. R. Evid. 702 (effective Jan. 1, 2011).[3]

An "expert's testimony is a syllogism: The major premise is the validity of the [expert's] general theory or technique" based on specialized knowledge, "the minor premise is the case specific data," and "the application

[3] In 2010, the Illinois Supreme Court adopted the Illinois Rules of Evidence, which became effective on January 1, 2011. Those rules, with two exceptions not relevant here, codified the pre-existing Illinois law on evidence. See Ill. R. Evid. comm. comment. at 1, http://www.state.il.us/court/SupremeCourt/Evidence/Evidence.pdf.

of major to minor yields a conclusion relevant to the merits of the case." 1 Kenneth S. Broun, *McCormick on Evidence* § 13, at 72 (6th ed. 2006) (*McCormick*); see Edward J. Imwinkelried, *The "Bases" of Expert Testimony: A Syllogistic Structure of Scientific Testimony*, 67 N.C. L. Rev. 1, 2-3 (1988). Like any witness, an expert can testify to facts within her personal knowledge. See Fed. R. Evid. 702 (an expert may testify "in the form of an opinion or otherwise"). But expert-opinion testimony often applies specialized knowledge to the specific circumstances of a case about which the expert has no direct personal knowledge. An expert witness is therefore quite "[u]nlike an ordinary witness" because the "expert is permitted wide latitude to offer opinions, including those that are *not* based on firsthand knowledge or observation." *Daubert*, 509 U.S. at 592 (emphasis added; citation omitted). But "when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise." *United States* v. *Williams*, 447 F.2d 1285, 1290 (5th Cir. 1971) (en banc), cert. denied, 405 U.S. 954 (1972).

2. Both federal and Illinois law expressly permit an expert to testify to an expert opinion based on "facts or data in [a] particular case * * * made known to the expert at or before the hearing." Fed. R. Evid. 703; *Wilson* v. *Clark*, 417 N.E.2d 1322, 1326-1327 (Ill.) (adopting the "procedures embodied in Federal Rules 703 and 705"), cert. denied, 454 U.S. 836 (1981). Consistent with the understanding that expert opinion can be based on factual matters about which the expert has no direct personal knowledge, both federal and Illinois law permit

experts to base their opinions on "otherwise inadmissible hearsay," so long as "the facts or data are 'of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.'" *Daubert*, 509 U.S. at 595 (quoting Fed. R. Evid. 703); *Wilson*, 417 N.E.2d at 1326.[4]

Under the Federal Rules, the proponent of an expert opinion cannot "disclose to the jury" the "[f]acts or data" that form the premise for the opinion if the information would otherwise be inadmissible, unless the trial court first determines that their probative value "in assisting the jury to evaluate the expert's opinion" substantially outweighs their prejudicial effect. Fed. R. Evid. 703; cf. Fed. R. Evid. 705 (expert may be required on cross-examination to "disclose the underlying facts or data"). And if a federal court permits such underlying facts or data to be admitted, it "must give a limiting instruction upon request, informing the jury that the underlying information must *not* be used for substantive purposes." Fed. R. Evid. 703 advisory comm. note (2000 amendment) (emphasis added); see also Fed. R. Evid. 105 (When evidence is admissible for one purpose but not

[4] Professor Friedman correctly observes (Amicus Br. 24 & n.13) that experts were not traditionally permitted to base opinions on inadmissible hearsay. At common law, experts could give opinions based on (1) personally known facts or (2) hypothetical facts that the expert would assume as true and that a litigant would separately support with admissible evidence presented to the jury. 1 *McCormick* § 14, at 86-88. The rationale for that practice, however, was not rooted in Confrontation Clause concerns. It was based simply on the view that, "as a matter of *logic*, the jury could not accept the opinion based on the facts if the only evidence of the facts is inadmissible." *Id.* § 15, at 91 (emphasis added). The repudiation of that view does not trigger Confrontation Clause concerns so long as the inadmissible data are either nontestimonial, not admitted for the truth, or both.

another, "the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."). Accordingly, any otherwise inadmissible facts or data that might serve as a premise for the expert's opinion will be "admissible only for the purpose of assisting the jury in evaluating [that] opinion," Fed. R. Evid. 703 advisory comm. note (2000 amendment), not for proving that the facts or data are themselves true. The federal courts of appeals and the Illinois courts have long recognized that rule. See, *e.g.*, *United States* v. *Pablo*, 625 F.3d 1285, 1292 (10th Cir. 2010), petition for cert. pending, No. 10-9789 (filed Mar. 31, 2011); *United States* v. *Dukagjini*, 326 F.3d 45, 58 (2d Cir. 2003), cert. denied, 541 U.S. 1092 (2004); *Trepel* v. *Roadway Express, Inc.*, 194 F.3d 708, 717 (6th Cir. 1999); *United States* v. *Wright*, 783 F.2d 1091, 1100-1101 (D.C. Cir. 1986); *Paddack* v. *Dave Christensen, Inc.*, 745 F.2d 1254, 1262 (9th Cir. 1984); *People* v. *Pasch*, 604 N.E.2d 294, 311 (Ill. 1992) ("[A]n expert may disclose the underlying facts and conclusions" in non-testifying experts' reports "for the limited purpose of explaining the basis for his opinion" but not "for the truth of the matter asserted.") (emphasis omitted); J.A. 162-164.

The distinction between an expert's opinion and the case-specific factual premises on which it rests was recognized long ago at common law. In *Beckwith* v. *Sydebotham*, 170 Eng. Rep. 897, 897 (K.B. 1807), the defendant sought to prove that a ship (the *Earl of Wycombe*) was unseaworthy by calling as witnesses "several eminent surveyors of ships who had never seen the 'Earl of Wycombe.'" Lord Chief Justice Ellenborough held the expert testimony to be admissible. *Ibid.* He reasoned, however, that the experts' "opinion [ultimately] might not go for much" because "the truth of the

facts stated to [the experts] was not certainly known." *Ibid.* The surveyors, Lord Ellenborough emphasized, could be asked on "cross-examination * * * what they should think upon the statement of facts contended for on the other side," thus exposing the possibility that their opinions had been based on factual predicates "which might be false." *Ibid.*

3. As *Beckwith* illustrates, an expert's opinion need not be understood as proving the underlying factual premises on which it relies. The expert provides her opinion; other facts may be crucial to its probative value. But those facts need not be admissible in evidence in order for the opinion to survive Confrontation Clause scrutiny. For example, an expert might testify that she compared the data associated with DNA profile A to that associated with DNA profile B and determined that those profiles matched. So long as the expert is then subject to cross-examination about her independent opinion, both with respect to her own scientific analysis and with respect to the case-specific facts on which she based the opinion, such expert-opinion testimony can be consistent with the Sixth Amendment's right to confrontation.

The "witness[] against" the defendant when an expert testifies to her opinion is the expert. The Confrontation Clause "is a procedural * * * guarantee" that commands that testimonial evidence must be available for "testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. A defendant's opportunity to cross-examine an expert who testifies about her independent opinion allows the defendant to test the reliability of that opinion by probing the expert's method of analysis and her conclusions as applied to the case. It also permits the defendant to elicit the case-specific data

or facts that the expert used for the foundation for her opinion. If the data and facts that underlie the expert's opinion are not themselves admissible as substantive evidence, then cross-examination, like the cross-examination in *Beckwith*, can demonstrate to the finder of fact that the expert's opinion rests on her assumption of case-specific matters that the expert cannot confirm are correct. Such cross-examination can substantially diminish the force of such testimony and may convince the fact-finder that the opinion should be disregarded as unreliable.

The admission of the facts and data underlying an expert's opinion for the limited purpose of "assessing [its] value," J.A. 172, does not violate the Confrontation Clause. If such information is otherwise inadmissible, it can be used in federal and Illinois courts only for the limited purpose of explaining the bases for the opinion, not for establishing that the facts or data are true. Because the Confrontation Clause does not "bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted," *Crawford*, 541 U.S. at 60 n.9 (citing *Street*, 471 U. S. at 414); accord *Michigan* v. *Bryant*, 131 S. Ct. 1143, 1161 n.11 (2011), consideration of the inadmissible data for the limited purpose of assessing the expert's testimony does not infringe confrontation rights.

4. *Bullcoming* establishes that an expert witness cannot serve as a conduit for out-of-court testimonial statements by non-testifying analysts. But allowing such statements to be considered by the trier of fact in evaluating the expert's opinion does not end run that principle. When a jury is properly instructed not to accept such statements for their truth, "the almost invariable assumption of the law [is] that jurors follow their

instructions." *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987). In only one instance has this Court found that assumption overcome: in cases involving certain "'powerfully incriminating extrajudicial statements of a codefendant'—those naming another defendant"—the Court has determined that the statements, "considered as a class, are so prejudicial that limiting instructions cannot work." *Gray* v. *Maryland*, 523 U.S. 185, 192 (1998) (discussing *Bruton* v. *United States*, 391 U.S. 123 (1968)). The expert-witness context is not analogous to that "narrow exception." *Richardson*, 481 U.S. at 207. As in *Richardson*, because the expert's testimony is "not incriminating on its face," but must be "linked with [other] evidence" to infer guilt, no "overwhelming probability" exists that juries will be unable to follow a proper limiting instruction. *Id.* at 208.

When, as in this case, the fact-finder is a judge, rather than a jury, the presumption that evidence will be considered only for its proper, limited purpose is even stronger. "In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions." *Harris* v. *Rivera*, 454 U.S. 339, 346 (1981) (per curiam). A "well-established presumption" posits "that the judge [has] adhered to basic rules of procedure" and has followed appropriate jury instructions when the judge is "acting as [a] factfinder[]." *Id.* at 346-347; see also *United States* v. *Foley*, 871 F.2d 235, 240 (1st Cir. 1989) (explaining that this "presumption of judicial regularity is basic to bench trials" and is followed in the courts of appeals). For that reason, even *Bruton*'s narrow exception to the general rule—that a jury is presumed to follow its instructions—is inapplicable in bench trials. *Johnson* v. *Tennis*, 549 F.3d 296, 300 (3d Cir. 2008) (joining "myriad" courts so holding; stat-

ing that "[n]othing in *Bruton* suggests that a judge is incapable of applying the law of limited admissibility which he has himself announced") (citation omitted), cert. denied, 129 S. Ct. 2774 (2009).

B. An Expert Opinion Must Be Linked To The Facts Of The Case By Admissible Direct Or Circumstantial Evidence, But The Failure To Establish That Link Raises No Confrontation Clause Concerns

When an expert's opinion rests on case-specific facts or data that are not admitted into evidence, the proponent of that testimony must provide a sufficient link through admissible evidence to permit a reasonable fact-finder to conclude that the expert's opinion is relevant to the case. That link can be established by either direct or circumstantial evidence. But the proponent's failure to provide a sufficient evidentiary link between the opinion and the facts of a case—like the failure to provide sufficient evidence to establish the chain of custody of any piece of evidence that is the subject of live testimony—is merely a failure of proof, not a violation of the Confrontation Clause.

1. In order to be admissible, evidence must be relevant, that is, it must have at least some "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401, 402. When an expert provides an opinion that is based on case-specific facts or data of which the expert has no personal knowledge, the proponent must provide a basis for the fact-finder to determine that the underlying case-specific facts or data are related to the case in order to justify reliance on the opinion.

That relationship can be proved circumstantially. For instance, the prosecution may present evidence that a forensic sample was collected at a crime scene and made its way through a chain of custody to a forensic laboratory. Testimony can establish that the lab is properly accredited and therefore employs approved scientific techniques and appropriate controls to process forensic samples. Testimony can also establish that the lab returned a report with the sample to the originating law-enforcement agency. Such testimony can provide a basis for the fact-finder to infer circumstantially that the analytical data the lab produced are connected to the case. It can also allow the jury to assess the expert's opinion based on that data.

The prosecution, of course, might well have a stronger case if it could provide direct evidence of such testing through the live testimony of analysts who participated in the testing. The resulting data could then be admissible as substantive evidence. But nothing in the Confrontation Clause "alters the type of evidence (including circumstantial evidence) sufficient to sustain a conviction," *Melendez-Diaz*, 129 S. Ct. at 2542 n.14, and this Court has "never questioned the sufficiency of circumstantial evidence" to sustain a criminal conviction. *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 100 (2003). "Circumstantial evidence in this respect is intrinsically no different from testimonial evidence": "[i]n both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference." *Holland* v. *United States*, 348 U.S. 121, 140 (1954). The reliability of such evidence, however, reflects garden-variety questions of evidentiary sufficiency that are not the concern

of the Confrontation Clause. *Crawford*, 541 U.S. at 61; see *Melendez-Diaz*, 129 S. Ct. at 2536.

2. Petitioner argues (Br. 20-24) that the inadmissible case-specific facts or data that an expert identifies as forming the basis for his or her opinion are in fact being relied upon for their truth—and hence violate the Confrontation Clause—because the jury cannot fully accept the expert's opinion without also concluding that the underlying premises are themselves true. Petitioner's Confrontation Clause analysis is incorrect. A jury that finds an expert's opinion reliable need not infer *from her testimony* that the underlying facts and data are also reliable.

The probative value of testimony may often depend on other proof. For instance, a chain of custody may be necessary to establish that the evidence tested scientifically pertains to the defendant. If the government presents only one officer to testify about the chain of custody, without presenting others in the chain, the government's case that the evidence was received by a lab in pristine condition may be weak. But that goes to the weight of the evidence. Similarly, testimony by an analyst who conveys the results of a test can have less weight if the testing instrument was not calibrated properly. Nevertheless, this Court has emphasized that "it is not the case" that "anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." *Melendez-Diaz*, 129 S. Ct. at 2532 n.1; see *Bullcoming*, 131 S. Ct. 2712 n.2; *id.* at 2721 n.2 (Sotomayor, J., concurring in part). As the Court has explained, such "gaps * * * normally go to the weight of the evidence rather

than its admissibility." *Melendez-Diaz*, 129 S. Ct. at 2532 n.1.

The same is true for the factual basis for an expert's opinion. A jury can distinguish between the expert's knowledge of a specialized field that enables her to synthesize data and provide an opinion, and the expert's lack of personal knowledge of the underlying facts. An expert may, for example, compare two sets of fingerprints—one taken from the defendant and one from the crime scene—and persuasively opine that they are a match, even though the expert may not have personal knowledge of the circumstances of the crime scene. The expert may also describe her understanding of the crime scene in order to explain her opinion on the quality of one of the prints. It is then up to the prosecution to introduce admissible evidence to corroborate that understanding. And in some cases, the prosecution may fail to do so. But a jury that credits the expert's testimony about a fingerprint match will not necessarily credit all of the facts that supported the opinion.

The possibility that an expert's opinion may lack much probative value because of unreliability in the underlying facts or data does not raise any concerns addressed by the Confrontation Clause. This Court has interpreted the Clause *not* as a "substantive guarantee" that "commands * * * that evidence be reliable." *Crawford*, 541 U.S. at 61. The Confrontation Clause is instead a procedural protection that ensures that the reliability of testimonial evidence "be assessed in a particular manner: by testing in the crucible of cross-examination." *Ibid.* Live expert-opinion testimony can be subjected to cross-examination, which can lay bare the expert's analysis and assumptions. With such cross-examination, "the factfinder and the adver-

sary system" can be presumed "competent to uncover, recognize, and take due account of [any] shortcomings" in that testimony. *Barefoot* v. *Estelle*, 463 U.S. 880, 899 (1983).

3. Petitioner cites (Br. 21) *People* v. *Goldstein*, 843 N.E.2d 727, 732-733 (N.Y. 2005), cert. denied, 547 U.S. 1159 (2006), for the proposition that the "distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context." But the context of *Goldstein* is entirely different from the context of this case.

Goldstein involved a forensic psychiatrist who testified as a prosecution witness to rebut a murder defendant's insanity defense. The expert rested her opinion—that the defendant used his mental illness as an excuse—in part on her interviews of six individuals whose statements she relayed to the jury. 843 N.E.2d at 729. The expert testified, for instance, that one individual recounted that the defendant said "I'm schizophrenic" after assaulting a different woman and that another individual described a woman who had "frustrated him sexually," who, the psychiatrist said, closely resembled the murder victim. *Id.* at 729-730. The individuals did not testify, *id.* at 730, and, as the defendant pointed out to the New York Court of Appeals, no limiting instruction told jurors not to use their statements for the truth. See Def. Reply Br. at 4, *Goldstein*, *supra* (filed Oct. 2005). The Confrontation Clause concerns in that setting are obvious.

In addition, the statements in *Goldstein* constituted narrative reports of lay witnesses, offered by a state-hired psychiatrist who assumed the prototypical law-enforcement role of investigating a crime by seeking out and interviewing witnesses who knew the defendant.

The statements required no interpretation by an expert before the jury could use them against the defendant. Cf. *Davis*, 547 U.S. at 826 (indicating that the Confrontation Clause cannot be "evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition") (emphasis omitted). And the psychiatrist explained to the jury that her purpose in securing the statements was "to get to the truth." 843 N.E.2d at 732. A case in which, "in the guise of an expert opinion," the witness delivers direct narrative statements that need no "expertise" to interpret, *United States* v. *Mejia*, 545 F.3d 179, 199 (2d Cir. 2008) (citations omitted), may raise distinct issues either under the Confrontation Clause, see *ibid.* (finding Confrontation Clause violation when law-enforcement expert "simply summariz[ed] an investigation by others"), or other legal rules. In contrast, when an expert supplies her own expert opinion relying in part on the analytical work of or information from others, courts have correctly concluded that the expert's reliance on such hearsay information (if not admitted for its truth) does not violate the Confrontation Clause.[5]

C. Safeguards In The Criminal Process Protect Against Misuse Of Expert Testimony

In addition to the protection of limiting instructions, which the jury is presumed to follow, see pp. 19-20, *su-*

[5] See, *e.g.*, *United States* v. *Turner*, 591 F.3d 928, 932-933 (7th Cir. 2010), petition for cert. pending, No. 09-10231 (filed Apr. 12, 2010); *United States* v. *Johnson*, 587 F.3d 625, 635-636 (4th Cir. 2009), cert. denied, 130 S. Ct. 2128 (2010); *Smith* v. *State*, 28 So. 3d 838, 854-855 (Fla. 2009), cert. denied, 131 S. Ct. 3087 (2011); *State* v. *Tucker*, 160 P.3d 177, 194 (Az.), cert. denied, 552 U.S. 923 (2007). But see *Derr* v. *State*, No. 2010-6, 2011 WL 4483937, at *12-*15 (Md. Sept. 29, 2011).

pra, a variety of other provisions guard against "the risk of prejudice resulting from the jury's potential misuse" of the basis of the expert's testimony "for substantive purposes." Fed. R. Evid. 703 advisory comm. note (2000 amendment). Those rules help alleviate Confrontation Clause concerns that a jury might improperly rely on otherwise-inadmissible testimonial data on which an expert relied in forming her opinion.

First, federal and state evidentiary rules create gatekeeping hurdles to the admission of expert-opinion testimony. The federal rules, for instance, require that expert "testimony [must] 'assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Daubert*, 509 U.S. at 591 (quoting Fed. R. Evid. 702). Because that standard requires "a valid scientific connection *to the pertinent inquiry* [in the case] as a precondition to admissibility," *id.* at 591-592 (emphasis added), a court's "gatekeeping inquiry must be 'tied to the facts.'" *Kumho Tire Co.*, 526 U.S. at 150, 158 (quoting *Daubert*, 509 U.S. at 591). "[T]he trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts." Fed. R. Evid. 702 advisory comm. note (2000 amendment). Illinois law similarly requires that expert testimony "assist the trier of fact to understand the evidence or to determine a fact in issue," Ill. R. Evid. 702. Under those rules, the expert should not clear the gate if the expert opinion is not reliably connected to the facts of the case.

Second, Federal Rule 703 precludes the proponent of the expert opinion from disclosing inadmissible facts or data on which the expert relied "unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs

their prejudicial effect." The court must thus guard against the risk of prejudice from the use of the facts or data as "substantive" evidence. Fed. R. Evid. 703 advisory comm. note (2000 amendment).

Third, "[t]he expert may in any event be required to disclose the underlying facts or data on cross-examination." Fed. R. Evid. 705. Cross-examination allows the defendant to highlight the expert's ignorance about the data on which he relied and to remind the trier of fact of the limited purposes for which such second-hand information is being disclosed. And mandatory discovery equips the defendant to expose weaknesses in the expert's reliance on such data. Fed. R. Crim. P. 16(a)(1)(G) (written summary must describe not only the expert's opinions but "the bases and reasons for those opinions"); see also Ill. Sup. Ct. R. 417(b) (detailed disclosure requirements for DNA evidence).

"If a particular guarantee of the Sixth Amendment is violated, no substitute procedure can cure the violation." *Bullcoming*, 131 S. Ct. at 2716 (internal quotation marks omitted); *ibid.* (finding "the opportunity to confront a substitute witness" inadequate). But the procedures that surround expert testimony—gatekeeping, limitations on the admission of prejudicial testimony, cross-examination, and limiting instructions—help prevent misuse of the basis of expert testimony in the first place.

II. THE EXPERT-OPINION TESTIMONY IN THIS CASE DID NOT VIOLATE THE CONFRONTATION CLAUSE

A. The Only Testimony Lambatos Offered For Its Truth Was Her Expert Opinion

Lambatos's expert-opinion testimony did not violate the Confrontation Clause because she offered her own

opinion that the Cellmark DNA profile matched the ISP's DNA profile of petitioner's blood. Her description of the underlying data obtained from Cellmark was admitted simply to aid the judge in understanding the basis for her opinion, not for the truth of the data. As the Illinois Supreme Court explained, state law has long specified that such underlying data if otherwise inadmissible will be considered only "for the limited purpose of explaining the basis for [her expert opinion]," not for showing "the truth of the matter asserted." J.A. 164 (citation omitted); see, *e.g.*, *Pasch*, 604 N.E.2d at 311. The trial judge is therefore presumed to have considered that testimony only as the law permitted. See pp. 20-21, *supra*; see also *Lambrix* v. *Singletary*, 520 U.S. 518, 532 n.4 (1997) (state trial judges are "presumed to know the law and to apply it in making their decisions," including decisional law developed by a state supreme court) (citation omitted). As the Illinois Supreme Court held, the trial judge properly considered and weighed the fact that Lambatos "didn't do the actual test." J.A. 159-160 (quoting trial verdict at Tr. JJJ-151). Because the Cellmark data was not considered for the truth, the Confrontation Clause does not apply. *Crawford*, 541 U.S. at 60 n.9.

B. Circumstantial Evidence Linked Lambatos's Opinion To This Case

While Lambatos's opinion did have to be linked to petitioner to have probative force, circumstantial evidence provided that link. The State presented chain-of-custody evidence establishing that the vaginal swabs moved from the victim to Cellmark and back to ISP. See

pp. 2-3, *supra*.[6] Lambatos also testified that ISP routinely sent forensic samples to Cellmark for DNA testing and that Cellmark was an accredited lab and therefore would have to satisfy guidelines for performing DNA analysis including those to ensure proper instrument calibration and controlled testing. J.A. 49, 59-60, 73-74. That unrebutted circumstantial showing was sufficient to permit the trial judge to conclude that Lambatos's expert opinion (based in part on data she received from Cellmark) pertained to the semen recovered from the victim.

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[6] To the extent that petitioner now challenges that evidence (Br. 18), he failed to preserve that constitutional claim at trial and did not raise it either in the Illinois Supreme Court or in his petition for a writ of certiorari. Illinois law requires a "contemporaneous objection when the evidence [i]s offered," *People* v. *Cortes*, 692 N.E.2d 1129, 1146-1147 (Ill.), cert. denied, 525 U.S. 882 (1998), and a renewal of that objection in a written post-trial motion. *People* v. *Simpson*, 665 N.E.2d 1228, 1243 (Ill.), cert. denied, 519 U.S. 982 (1996); *People* v. *Enoch*, 522 N.E.2d 1124, 1130 (Ill.), cert. denied, 488 U.S. 917 (1988). Petitioner's contemporaneous and post-trial objections to the evidence were that it was "hearsay." J.A. 51, 100 (¶ 10). The trial court ruled that the records were "kept in the normal course of business" and rejected petitioner's claim that the records were kept for the purpose of litigation and as part of a criminal investigation, finding instead that the records are maintained by ISP to track evidence, much of which would never be used in litigation. Tr. JJJ-119 to JJJ-120. Petitioner unsuccessfully argued on appeal that the State's chain-of-custody evidence was insufficient because, *inter alia*, ISP's shipping manifests for this case were not admissible under the hearsay exception for business records. See J.A. 103, 122. Petitioner's brief on appeal did not rely on the Confrontation Clause for this objection, see Pet. Ill. App. Ct. Br. 13, the intermediate appellate court did not address a constitutional claim in this context, J.A. 122, and petitioner thereafter failed to reassert his state-law contention. See Pet. 9-22; Pet. Ill. Sup. Ct. Br. 1-32.

C. Lambatos's Testimony, Taken As A Whole, Did Not Convey Statements Of Cellmark

Petitioner argues (Br. 18-19) that portions of Lambatos's direct testimony (J.A. 55-58) violated the Confrontation Clause. He asserts that Lambatos "conveyed the substance of testimonial assertions made by Cellmark" by indicating that "Cellmark deduced a male DNA profile from the vaginal swabs" and that, "[a]fter receiving the results of Cellmark's analysis, [she] conducted a statistical comparison" using that profile and the one obtained from petitioner's blood and found a match. Pet. Br. 18-19.[7] While Lambatos did refer to the DNA found in the semen from the victim's vaginal swaps, J.A. 56-57, when her testimony is read as a whole and in light of Illinois evidentiary law, petitioner's view that Lambatos was relaying statements from Cellmark is unfounded.

Petitioner implicitly acknowledges (Br. 15-18) that Lambatos's direct testimony did not repeat anything Cellmark said, but he attributes to her testimony implied statements from Cellmark that it "performed DNA

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[7] On cross-examination, petitioner elicited from Lambatos a significant amount of detail about the DNA testing information that Cellmark provided to ISP. See J.A. 58-86. Petitioner does not challenge that testimony, and for good reason. A litigant cannot properly challenge the admission of evidence that he has affirmatively elicited. See, *e.g.*, *Ohler* v. *United States*, 529 U.S. 753, 755-758 (2000); *McGillin* v. *Bennett*, 132 U.S. 445, 452-453 (1889); *Avendano* v. *Gay*, 75 U.S. (8 Wall.) 376, 377 (1869). Defendants thus cannot assert a Confrontation Clause claim based on "evidence admitted during * * * cross-examination" because the court's error, if any, was an "error[] that [the defendant] himself invited or provoked." *United States* v. *Cromer*, 389 F.3d 662, 678 n.11 (6th Cir. 2004); see *United States* v. *Lopez-Medina*, 596 F.3d 716, 733 n.10 (10th Cir. 2010); *United States* v. *Acosta*, 475 F.3d 677, 679 (5th Cir. 2007).

analysis on the vaginal swabs and successfully deduced a male DNA profile from the swabs" (Br. 19). But as petitioner acknowledges (Br. 18), Lambatos's testimony on cross-examination revealed that she had no personal knowledge of how Cellmark developed the particular DNA profile she received. J.A. 59-60. Expert testimony should be understood as a whole. Cf. *McDaniel* v. *Brown*, 130 S. Ct. 665, 671 (2010) (per curiam) (interpreting expert testimony "as a whole"); *Anderson* v. *Charles*, 447 U.S. 404, 408-409 (1980) (analyzing cross-examination "taken as a whole").[8] Given Lambatos's disclaimer of personal knowledge, the trial court would not have taken her testimony as implying what Cellmark actually did. Rather, the court would have accepted Lambatos's testimony that she used the profile from Cellmark in finding a match, but would have filtered out any implied statements by Cellmark. "[T]he State did not offer Lambatos' testimony regarding the Cellmark report for the truth of the matter asserted." J.A. 172. And, in light of state law that admitted information from Cellmark underlying the expert's opinion only for the limited purpose of assessing her opinion, the state appellate courts concluded that the trial court followed that approach, J.A. 124-127, 160-165, 172, and used the information only "in assessing the value of Lambatos' opinion," J.A. 172. Given that conclusion as a matter of state law, Lambatos's testimony did not relay any testimonial

[8] Cf. also, *e.g.*, *United States* v. *Farmer*, 543 F.3d 363, 371-372 (7th Cir. 2008) (finding cross-examination sufficiently diminished risk that jury would confuse expert's "direct observations with his expert knowledge"); *Mendes-Silva* v. *United States*, 980 F.2d 1482, 1487-1488 (D.C. Cir. 1993) (interpreting expert's statement "in its proper context" by considering his "entire" testimony).

hearsay and thus did not violate the Confrontation Clause.

CONCLUSION

The judgment of the Illinois Supreme Court should be affirmed.

Respectfully submitted.

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