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Williams v. Illinois:

DNA Expert's Testimony that Relied upon Work Done at an Outsourced Lab did not Violate Confrontation Clause

The Supreme Court, in a 4-1-4 decision in which Justice Alito (joined by three other Justices, and Justice Thomas, who joined in the judgment only) held that when an expert testifies for the prosecution in a criminal case, and the defendant has the opportunity to cross-examine the expert about any statements that are offered for their truth, the out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests, are not offered for their truth and thus, fall outside the scope of the Confrontation Clause. *Williams v. Illinois*, No. 10–8505 (June 18, 2012).

The basic facts as follows: After a bench trial, the defendant was convicted of aggravated criminal sexual assault, aggravated kidnapping, and aggravated robbery. Sandra Lambatos, a forensic specialist at the Illinois State Police lab, testified that she matched a DNA profile produced by an outside laboratory, Cellmark, to a profile the state lab produced using a sample of defendant's blood. She testified that Cellmark was an accredited laboratory and that business records showed that vaginal swabs taken from the victim, L.J., were sent to Cellmark and returned. She offered no other statement for the purpose of identifying the sample used for Cellmark's profile or establishing how Cellmark handled or tested the sample. Nor did she vouch for the accuracy of Cellmark's profile. The defense moved to exclude, on Confrontation Clause grounds, Lambatos' testimony insofar as it implicated events at Cellmark. The prosecution contended that petitioner's confrontation rights were satisfied because he had the opportunity to cross-examine the expert who had testified as to the match. The prosecutor argued that Illinois Rule of Evidence 703 permitted an expert to disclose facts on which the expert's opinion is based even if the expert is not competent to testify to those underlying facts, and that any deficiency went to the weight of the evidence, not its admissibility. The trial court admitted the evidence and found the defendant guilty. Both the Illinois Court of Appeals and the State Supreme Court affirmed, concluding that Lambatos' testimony did not violate petitioner's confrontation rights because Cellmark's report was not offered into evidence to prove the truth of the matter asserted.

Eight of the Justices focused on the following critical portion of Lambatos' testimony, with the particular words that the dissent found objectionable italicized: Prosecutor's Question: "Was there a computer match generated of the male DNA profile *found in semen from the vaginal swabs of [L.J.]* to a male DNA profile that had been identified as having originated from [the defendant]?" Lambatos' Answer: "Yes, there was." According to the dissent, the italicized phrase violated petitioner's confrontation right because Lambatos lacked personal knowledge that the profile produced by Cellmark was based on the vaginal swabs taken from

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the victim, L.J. Justice Alito acknowledged that the phrasing of this question created a danger that a jury would take Lambatos' testimony as proof that the Cellmark profile was derived from the sample obtained from the victim's vaginal swabs. Absent an evaluation of the risk of juror confusion and careful jury instructions, the testimony could not have gone to the jury. But, Justice Alito said, since this was a *bench* trial, the Court must assume that the trial judge understood that the portion of Lambatos' testimony to which the dissent (and defense) objected was not admissible to prove the truth of the matter asserted.

The dissent agreed that that there would have been nothing wrong with Lambatos testifying that two DNA profiles matched each other as that was a straightforward application of her expertise. Thus, if her testimony had been slightly modified as follows, the dissent would see no problem: Question: "Was there a computer match generated of the male DNA profile **produced by Cellmark** found in semen from the vaginal swabs of [L.J.] to a male DNA profile that had been identified as having originated from [the defendant]?" Answer: "Yes, there was."

Justice Alito further opined that even if the Cellmark report had been introduced for its truth, the Court would nevertheless conclude that there was no Confrontation Clause violation. The abuses which prompted the adoption of the Confrontation Clause shared two characteristics: (a) they involved out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct and (b) they involved formalized statements such as affidavits, depositions, prior testimony, or confessions.
In addressing the first abuse, Justice Alito stated that the Cellmark report clearly was not prepared for the primary purpose of accusing a targeted individual. Here, the primary purpose of the Cellmark report, viewed objectively, was not to accuse petitioner or to create evidence for use at trial. When the crime lab sent the sample to Cellmark, its primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time. Similarly, no one at Cellmark could have possibly known that the profile that it produced would turn out to inculpate petitioner—or for that matter, anyone else whose DNA profile was in a law enforcement database. Under these circumstances, there was no "prospect of fabrication" and no incentive to produce anything other than a scientifically sound and reliable profile.

Moreover, the situation in which the Cellmark technicians found themselves was by no means unique. When lab technicians are asked to work on the production of a DNA profile, they often have no idea what the consequences of their work will be. In some cases, a DNA profile may provide powerful incriminating evidence against a person who is identified either before or after the profile is completed. But in others, the primary effect of the profile is to exonerate a suspect who has been charged or is under investigation. The technicians who prepare a DNA profile generally have no way of knowing whether it will turn out to be incriminating or exonerating—or both. Justice Alito further noted that it was significant that in many labs,

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numerous technicians work on each DNA profile. When the work of a lab is divided up in such a way, it is likely that the sole purpose of each technician is simply to perform his or her task in accordance with accepted procedures. In short, Justice Alito stated, "the use at trial of a DNA report prepared by a modern, accredited laboratory 'bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.'"

Justice Alito also distinguished the Cellmark report from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, which the Confrontation Clause was originally understood to reach. He noted that the report was produced before any suspect was identified. The report was sought not for the purpose of obtaining evidence to be used against the defendant, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose. And the profile that Cellmark provided was not inherently inculpatory. On the contrary, the Court stated that a DNA profile is evidence that tends to exculpate all but one of the more than 7 billion people in the world today. Further, if DNA profiles could not be introduced without calling the technicians who participated in the preparation of the profile, economic pressures would encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less reliable.

Consistent with *Williams v. Illinois*, the Georgia Supreme Court recently held that an expert's testimony regarding DNA testing did not violate the Confrontation Clause, where that expert was not the one who performed every step of the test. *Disharoon v. State*, S11G1880. S11G1881 (May 7, 2012). In so holding, the Georgia Supreme Court noted that the testifying witness completed every step of the test with the exception of only being present while another technician merely placed the 96 test samples and controls into the scientific instrument that was used to complete a single step of the testing. As in *Williams*, the Georgia Supreme Court distinguished *Bullcoming v. New Mexico*, __U.S.__,131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011) to the extent that the testifying expert in *Bullcoming*, while generally familiar with the laboratory's testing procedures, had not specifically participated in, observed, or reviewed the test on the defendant's blood sample. In *Disharoon*, the expert witness was the supervisor who drafted the report, and had a substantial personal connection to the scientific test at issue because she performed the vast majority of the testing herself. The United States Supreme Court has signaled that *Bullcoming* would not apply under such circumstances, and as Justice Alito noted in *Williams*, "in many labs, numerous technicians work on each DNA profile... When the work of a lab is divided up in such a way, it is likely that the sole purpose of each technician is simply to perform his or her task in accordance with accepted procedures..." Furthermore, as Justice Alito found in *Williams*, and as the Georgia Supreme Court found in *McIntyre,* the holding in *Bullcoming* was not be so broad as to make it applicable to "a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue." *Bullcoming*, at 131 S. Ct. 2722.