Williams v. Illinois: Confronting Experts, Science, and the Constitution

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Williams v. Illinois: Confronting Experts, Science, and the Constitution

I. INTRODUCTION

DNA evidence has revolutionized forensic science, making it the "single greatest advance in the search for truth . . . since the advent of cross-examination." In Williams v. Illinois, the United States Supreme Court affirmed the Illinois Supreme Court's holding that there was no Confrontation Clause violation where experts based their testimony on another analyst's DNA report that was not admitted into evidence. The Court held an expert may assume the truth of certain facts—such as a DNA profile contained in a forensic report—to offer testimony based on those facts without testifying to the truth of the matter asserted. Until Williams, the expert that performed the forensic tests had to testify at trial to avoid violating the Confrontation

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3. Id. at 2227-28.
4. Id. at 2234-35.
Clause. With Williams, the Court attempted to reshape the constitutional lens of scientific confrontation.

II. FACTUAL BACKGROUND

The State of Illinois tried the petitioner, Sandy Williams, at a bench trial for the alleged rape of L.J. A Chicago police detective performed a rape kit on L.J., labeled the kit with an inventory number, and transported it to the Illinois State Police (ISP) lab for chemical testing. The ISP lab confirmed the presence of semen, prompting the lab to send a biological sample to Cellmark Diagnostics Laboratory (Cellmark) in Germantown, Maryland. Cellmark performed forensic testing and produced a report containing a male DNA profile.

A forensic specialist, Sandra Lambatos, conducted a computerized search that compared the Cellmark report's DNA profile with the Illinois DNA database. The Cellmark report matched a DNA profile from a blood sample taken from Williams after the police arrested him on an unrelated charge in August 2000. This DNA match from Lambatos's search implicated Williams, who was not previously under suspicion for L.J.'s rape. As a result of this match, the police conducted a physical lineup where L.J. picked Williams as her assailant.

The indictment charged Williams with aggravated criminal sexual assault, aggravated kidnapping, and aggravated robbery. Williams waived his right to a jury trial. In April 2006, L.J. identified Williams as her attacker during the bench trial, and the prosecutor produced three expert witnesses. First, Brian Hapack testified as the ISP forensic scientist who performed the rape kit and confirmed the presence of semen on L.J.'s vaginal swabs through an acid phosphatase test. Second, Karen Abbinanti testified as the state forensic analyst who

7. Id. Justice Kagan notes in her dissent that Cellmark had a contract with the Illinois State Police Department, finding it odd that no other Justices took notice of that fact. Id. at 2276 (Kagan, J., dissenting). See also Janet C. Hoeffel, The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant, 42 STAN. L. REV. 465, 471 (1990) (“Three commercial laboratories and the FBI currently perform the DNA profiling test to aid in identifying criminal suspects. Lifecodes Corporation, Cellmark Diagnostics, and the FBI”); Id. at n.30 (“Cellmark has the exclusive North American license to market [Dr. Alec] Jeffreys’s technique[,] [who is the man typically credited for linking forensic science to DNA analysis]. The company opened in 1987 and obtained the first death penalty conviction in the United States based on the [DNA] evidence.”).
8. Williams, 132 S. Ct. at 2229.
9. Id.
developed the DNA profile from Williams’s blood sample through Polymerase Chain Reaction (PCR) and Short Tandem Repeat (STR) techniques, which she entered into the Illinois DNA database. Third, Sandra Lambatos testified as the analyst who compared the Cellmark report with the DNA profiles from the Illinois DNA database.

Defense counsel objected during Lambatos’s testimony referencing the report generated by Cellmark, which was not admitted into evidence or evaluated by the judge as factfinder. Lambatos never quoted, read, or identified the report as the source of her expert opinion. Specifically, Lambatos testified that it is “commonly accepted” within the scientific community for “one DNA expert to rely on the records of another DNA expert.” After being shown the shipping manifest entered into evidence as business records, Lambatos testified those records indicated that the ISP lab sent L.J.’s sample to Cellmark, and Cellmark sent the sample back with a DNA profile. The prosecutor then asked Lambatos whether “a computer match” existed between “the male DNA profile found in the semen from the vaginal swabs of [L.J.]” and “[the] male DNA profile that had been identified.” Defense counsel objected for lack of foundation because no evidence of the Cellmark report had been admitted into evidence; however, the judge agreed with the prosecutor that Lambatos was not “getting at what another lab did,” but merely testifying about “her own testing based on [DNA] information.”

Defense counsel moved to exclude Lambatos’s testimony about Cellmark as a violation of the Confrontation Clause because no evidence existed to justify Lambatos’s testimony with respect to any work or analysis performed by Cellmark. Conversely, the prosecutor claimed

10. Id. at 2229-30. Lambatos testified to matters of forensic biology and DNA analysis, procedures of using PCR and STR techniques, and the comparisons between the two DNA profiles implicating Williams. Id.
11. Id.
12. Id. (internal quotation marks omitted).
13. Id. at 2230. Lambatos also testified that Cellmark was accredited, the analyst relied on sealed shipping containers and shipping manifests, and the ISP routinely used Cellmark to examine evidence sent via Federal Express to expedite scientific testing and reduce backlogs at the ISP lab. Id.
14. Id. (alterations in original).
15. Id. (alteration in original). Defense counsel objected to the form of the question when the prosecution asked, “Did you compare the semen that had been identified by Brian Hapack from the vaginal swabs of [L.J.] to the male DNA profile that had been identified by Karen [Abbinanti] from the blood of [petitioner]?” Id. (alterations in original). The judge overruled this objection. Defense counsel also objected when Lambatos answered “yes” to whether she could “call this a match to [petitioner]?” Id. (alteration in original). Again, the judge overruled this objection. Id.
16. Id. at 2231.
that the Confrontation Clause had been satisfied because Williams had the opportunity to cross-examine Lambatos who, pursuant to Illinois Rule of Evidence 703, merely testified to the match between DNA profiles. Again, the trial judge agreed with the prosecution.

The trial court found Williams guilty of all charges. The Illinois Court of Appeals affirmed because the Cellmark report was not entered into evidence to prove the truth of the matter asserted. The Illinois Supreme Court also affirmed, noting the Cellmark report was used for the basis of Lambatos's testimony. The United States Supreme Court granted certiorari.

III. LEGAL BACKGROUND

A. The Confrontation Clause: Rights, History, and Relationship with Evidence

The Confrontation Clause serves as a procedural guarantee for both federal and state criminal defendants. The foundation for the clause became rooted in the Constitution after notorious trials in England, namely that of Sir Walter Raleigh for treason, and after controversial


An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Id.

18. Williams, 132 S. Ct. at 2231.
19. Id.
20. Id. at 2231-32.
23. Id. at 44 ("The most notorious instance[] ... occurred in the great political trials of the 16th and 17th centuries. One such was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, Raleigh's alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh's trial, these were read to the jury. Raleigh argued that Cobham had lied to save himself: 'Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour.' 1 D. JARDINE, CRIMINAL TRIALS 435 (1832). Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that '[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face ...' 2 How. St. Tr., at 15-16. The judges refused, id., at 24, and, despite Raleigh's protestations that he was being tried 'by the Spanish Inquisition,' id., at 15, the jury...")
examination practices in the colonies left the Founders afraid of the government's ability to use ex parte communications against the defendant without face-to-face confrontation. In fact, the right to confront was deemed to be such a fundamental right at ratifying conventions for the Constitution that the First Congress responded by including the Confrontation Clause in the Sixth Amendment.

The Sixth Amendment of the Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In Crawford v. Washington, the Court articulated the modern Confrontation Clause standard when it held that out-of-court testimonial statements made by witnesses violate the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. Crawford was convicted of assault after attacking and stabbing a man who allegedly tried to rape his wife. At trial, the wife did not testify due to the spousal privilege, but the prosecution played a tape recording of her prior statement. The wife's tape-recorded statement corroborated Crawford's story except for his self-defense theory. Each level of the state courts in Crawford used different tests to indicate the reliability of evidence to find that the tape recording did not violate Crawford's Sixth Amendment rights. The Supreme Court reversed, dispensing with the reliability standard, and found that the wife's statements were testimonial and thus in violation of the Confrontation Clause.

convicted, and Raleigh was sentenced to death. One of Raleigh's trial judges later lamented that 'the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.' Jardine, supra, at 520.

25. Id. at 48-49. Abraham Holmes objected to the omission of the Confrontation Clause in a proposed version of the Constitution, stating the following:

The mode of trial is altogether indetermined; . . . whether [the defendant] is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told . . . . [W]e shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, . . . the Inquisition.

Id. (alterations in original); An Antifederalist writing under the pseudonym Federal Farmer stated: "Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question . . . . [W]ritten evidence . . . [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth." Id. at 49 (alterations in original).

26. U.S. Const. amend. VI.
28. Id. at 59, 68.
29. Id. at 38-42.
30. Id. at 68-69.
Crawford overruled the leading precedent of Ohio v. Roberts, which allowed out-of-court testimony if it fell within a "firmly rooted hearsay exception" and bore adequate "indicia of reliability." The Roberts standard allowed more evidence to be admitted into trial against defendants through hearsay exceptions and rules of evidence while also granting the judge discretion to determine reliability. However, the Court in Crawford explained that "[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" Instead, the Court explained that reliability is not determined by a judge's discretion, but instead by the Constitution's guarantee of "confrontation" and the "crucible of cross-examination."

Although the Court in Crawford failed to conclusively define testimony, it attempted to provide examples of what, at a minimum, qualified as testimony—such as police interrogations and testimony at preliminary hearings, grand jury proceedings, or former trials. The Court determined that testimony could not be admitted because the questioner, like the police in Crawford, served as a neutral party to not untruthfully change a witness's testimony.

Since Crawford, the Court has continued to determine the limits of testimony and when it is used to establish the truth of the matter asserted. In Davis v. Washington, the Court held a victim's statement in response to a 911 operator's interrogation was not testimonial and not subject to the Confrontation Clause when taken during a domestic violence disturbance. However, in Hammon v. Indiana, the Court

32. Id. at 66.
33. Crawford, 541 U.S. at 60-65.
34. Id. at 61.
35. Id. ("To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.").
36. Id. at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").
37. Id.
38. Id. at 66 ("The Framers would be astounded to learn that ex parte testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers.").
40. Id. at 822.
41. 547 U.S. 813 (2006). The Court addressed Davis and Hammon in the same opinion. Id. at 817.
held a domestic violence victim’s statement, given in an affidavit to a police officer when the victim was separated from the abuser, was testimonial under the Confrontation Clause. The Court wrote Davis and Hammon together in an attempt to explain the distinction between statements given during an emergency and statements given to implicate the accused of a crime. In Michigan v. Bryant, the Court further explained the meaning of testimonial, holding that a shooting victim’s statements to police were not testimony that implicated the Confrontation Clause when removed from the shooter and the emergency of the crime. Instead, the victim’s statements implicated the rules of evidence because the objective “primary purpose” was not to give testimony, but to end an ongoing emergency.

B. Expert Testimony About Forensic Reports and the Confrontation Clause

In Melendez-Diaz v. Massachusetts, the Court confronted the issue of whether affidavits reporting forensic evidence are “testimonial” and whether the affiants are “witnesses” under the Confrontation Clause. After police arrested Melendez-Diaz with two other men, an officer noticed the men making furtive movements in the police car. A subsequent search of the car revealed a plastic bag containing nineteen smaller bags hidden between the front and back seats. Chemical tests confirmed the bags contained cocaine, and Melendez-Diaz was charged with distributing and trafficking cocaine. At trial, the prosecution admitted certificates, sworn before a notary by analysts as required by law, to establish “[t]he substance was found to contain: Cocaine.” Melendez-Diaz objected, claiming the certificates violated his Sixth

42. Id. at 822.
43. Id. at 821-22.
44. 131 S. Ct. 1143 (2011).
45. Id. at 1150.
46. Id. (quoting Davis, 547 U.S. at 822). Justice Sotomayor delivered the majority opinion of the Court, joined by the concurrence of Justice Thomas, where she noted this was the first post-Crawford case that involved a gun that was a threat to the public, falling outside of a domestic violence case, and limiting the reach of Crawford. Id. at 1156. Justice Thomas remained consistent with his Confrontation Clause opinions, stating testimonial statements should be formal and have “solemnity.” Id. at 1167 (Thomas, J., concurring). Justice Scalia wrote a strongly-worded dissent accusing the majority of crafting tales to misconstrue the clear application of modern Confrontation Clause jurisprudence, leaving the Crawford rule in “shambles.” Id. at 1168 (Scalia, J., dissenting).
47. 557 U.S. 305 (2009).
48. Id. at 307.
49. Id. at 308.
50. Id.
Amendment rights under *Crawford* which required the analyst to testify in person.  

The Supreme Court held that these certificates qualified as affidavits, so the Confrontation Clause required the analyst to testify in person and face the "crucible of cross-examination." The Court stated that analysts did not avoid confrontation on the theory that they were not "accusatory" or "conventional" witnesses. Analysts were not excused because their testimony consisted of "neutral, scientific testing." Forensic testing also did not qualify as or resemble business records. The Court stated the Confrontation Clause burden was on the prosecution; thus, the defendant's ability to subpoena a forensic analyst did not eliminate the prosecution's obligation to produce the analyst for cross-examination.

In *Bullcoming v. New Mexico*, the Supreme Court addressed whether "the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification ... through [] in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." Bullcoming was arrested for driving under the influence of alcohol. At trial, the prosecution attempted to admit into evidence a "Report of Blood Alcohol Analysis" (RBAA). The expert who testified for the prosecution had not performed the tests, which defense counsel objected to at trial because it affected trial strategy and violated Bullcoming's Confrontation Clause rights.

The Supreme Court in *Bullcoming* held that the defendant had a right to confront the analyst who certified the RBAA. Its rationale rested on the notion that the obvious reliability of a testimonial statement does not escape the Confrontation Clause and cross-examination because "surrogate testimony" could not convey what the analyst who performed

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51. *Id.* at 309.
52. *Id.* at 310-11; see *Crawford*, 541 U.S. at 61.
53. 557 U.S. at 315-17.
54. *Id.* at 317.
55. *Id.* at 321-24.
56. *Id.* at 324-25.
57. 131 S. Ct. 2705 (2011).
58. *Id.* at 2710.
59. *Id.*
60. *Id.* at 2711-12. Curtis Caylor performed the testing and could not testify because he was recently "put on unpaid leave." *Id.*
61. *Id.* at 2712.
62. *Id.* at 2710.
the test knew or observed. Additionally, the Court held the report was testimonial under the Confrontation Clause because the analyst made a certified and formalized report in accordance with law to assist the police, which fell into the core class of testimonial statements recognized by the Confrontation Clause cases. Thus, the Court made clear through Melendez-Diaz and Bullcoming that prosecutors who admit forensic reports into evidence must produce the analyst who performed the forensic testing to avoid violating the Confrontation Clause.

IV. COURT'S RATIONALE

In Williams, a divided Supreme Court held that an expert's reliance on a DNA report prepared by another analyst did not violate the Confrontation Clause. Justice Alito, writing the plurality opinion, framed the issues as: 1) whether "Crawford bar[s] an expert from expressing an opinion based on facts . . . that have been made known to the expert[,] but about which the expert is not competent to testify;" and 2) "whether Crawford substantially impedes the ability of prosecutors to introduce DNA evidence."

A. Plurality

The Court in Williams held that an expert's testimony does not violate the Confrontation Clause where the testimony does not discuss the truthfulness of the relied-upon report. Justice Alito explained that it is historically accepted that experts may base their opinion on facts when the expert lacks first-hand knowledge. Modern rules of evidence permit expert testimony that relies on basis evidence where the expert lacks personal knowledge because "such reliance does not constitute admissible evidence of [the] underlying information." Given these accepted principles of evidence, Justice Alito explained that Lambatos did not testify to the truth of any matter asserted in

63. Id. at 2710, 2715-16. ("We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.").
64. Id. at 2717.
65. Id.
66. 132 S. Ct. at 2228.
67. Id. at 2227.
68. Id. at 2235.
69. Id. at 2233.
70. Id. at 2234 (discussing how the modern rules of evidence dispense with the need for the historical use of hypothetical questions while still allowing for opinions to be based upon facts about which the expert lacks personal knowledge). See also FED. R. EVID. 703.
Cellmark's DNA report.\textsuperscript{71} Lambatos neither vouched for the quality of the report nor the work done at Cellmark's lab, as Lambatos only referenced the Cellmark report to state that she compared the report to the Illinois DNA database.\textsuperscript{72}

The Court distinguished \textit{Williams} from \textit{Melendez-Diaz v. Massachusetts}\textsuperscript{73} and \textit{Bullcoming v. New Mexico},\textsuperscript{74} where the prosecution admitted forensic reports into evidence for the purpose of establishing the truth of the matter each report asserted to prove.\textsuperscript{75} Explaining this distinction, the plurality again noted that Lambatos merely used the Cellmark report for the purpose of DNA comparison, which was the substance of her testimony and subject to cross-examination, and would not open the door to a floodgate of abuses that diminish defendants' rights.\textsuperscript{76}

Further, Justice Alito distinguished Lambatos's expert testimony because the factfinder understood the limited purpose of the underlying basis evidence.\textsuperscript{77} This distinction treats expert testimony differently in jury and bench trials because it is presumed the judge will understand the limited use of the expert's opinion,\textsuperscript{78} whereas a jury may be influenced regardless of a limiting instruction for the report.\textsuperscript{79} Here, the Cellmark report was not admitted into evidence or submitted to the factfinder, and the factfinder was a judge who understood the limited use of basis evidence in the bench trial.\textsuperscript{80} As a result, the plurality determined that Lambatos merely relied on the Cellmark report, and the judge was not confused or misguided by her testimony.\textsuperscript{81}

Alternatively, Justice Alito stated that "[e]ven if the Cellmark report had been introduced for its truth, . . . there was no Confrontation Clause violation [because] [t]he Confrontation Clause refers to testimony by

\begin{itemize}
\item \textsuperscript{71} \textit{Williams}, 132 S. Ct. at 2235.
\item \textsuperscript{72} \textit{Id.} at 2235-36.
\item \textsuperscript{73} 557 U.S. 305 (2009).
\item \textsuperscript{74} 131 S. Ct. 2705 (2011).
\item \textsuperscript{75} \textit{Williams}, 132 S. Ct. at 2240. In \textit{Melendez-Diaz}, the certificates proved the substance in question was cocaine. \textit{Id.} In \textit{Bullcoming}, the report proved that the defendant's blood alcohol level exceeded the legal limit. \textit{Id.}
\item \textsuperscript{76} \textit{Id.} at 2240-41.
\item \textsuperscript{77} \textit{Id.} at 2231-32.
\item \textsuperscript{78} \textit{Id.} at 2235.
\item \textsuperscript{79} \textit{Id.} at n.2; see Tennessee v. Street, 471 U.S. 409, 417 (1985) (holding that jurors could hear accomplice's confession that was clearly testimonial for the "distinctive and limited purpose" of comparing to the defendant's confession to determine whether the two were identical).
\item \textsuperscript{80} \textit{Williams}, 132 S. Ct. at 2236-37.
\item \textsuperscript{81} \textit{Id.}
'witnesses against' an accused." Further, although the reports in Melendez-Diaz and Bullcoming implicated the Confrontation Clause, the Court has never held that all forensic reports fall into that category. Considering the objective primary purpose, Justice Alito explained that the primary purpose of the Cellmark DNA report was not to accuse or to create evidence against Williams, who was not in police custody or under suspicion, but rather to capture a dangerous rapist who posed a threat to the public. Since numerous lab technicians work on each DNA profile without any indication as to whether their work will incriminate or exonerate an individual, forensic DNA reports prepared by a modern, accredited laboratory do not resemble the historical practices associated with the Confrontation Clause. Thus, the plurality explained that if a statement, such as a DNA report, is not made for "the primary purpose of creating an out-of-court substitute for trial testimony," its admissibility 'is the concern of state and federal rules of evidence, not the Confrontation Clause.'

B. Concurrences

Justice Breyer, writing a concurring opinion, stated that the Court had not addressed a difficult and important question: "[h]ow does the Confrontation Clause apply to the panoply of crime laboratory reports and underlying technical statements written by (or otherwise made by) laboratory technicians? In [that] context, what, if any, are the outer limits of the 'testimonial statements' from Crawford?" Justice Breyer would have rescheduled the case for oral argument to address the broader issues, but believed DNA reports fall outside the scope of the Confrontation Clause and thus concurred with the plurality's opinion.

82. Id. at 2242. However, the Court has consistently declined to adopt the narrow view that "witnesses against" refers only to persons who testify in court. Id. In fact, Justice Alito noted two out-of-court abuses that prompted the Confrontation Clause's creation: 1) "out-of-court statements having the primary purpose of accusing" a person of criminal conduct; and 2) "formalized statements such as affidavits, depositions, prior testimony or confessions." Id.
83. Id. at 2243.
84. Id.
85. Id. at 2244.
86. Id. at 2243 (quoting Bryant, 131 S. Ct. at 1155); see also Hammon, 547 U.S. at 822 (holding that the Confrontation Clause does not apply when made "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.").
87. Williams, 132 S. Ct. at 2244-45 (Breyer, J., concurring).
88. Id. at 2245.
Justice Thomas, also writing a concurrence, joined the plurality's decision that there was no Confrontation Clause violation in result only because "Cellmark's statements lacked the requisite 'formality and solemnity' to be considered 'testimonial' for purposes of the Confrontation Clause."\(^9\) Despite joining the plurality, Justice Thomas disagreed with the plurality opinion's underlying premise, finding that the Cellmark report was used for the truth of the matter asserted.\(^9\) Specifically, the ability of the factfinder (the judge) to rely on other evidence when evaluating an expert opinion (Lambatos) does not change the conclusion that the basis testimony (Cellmark report) was used for its truth.\(^9\) Finding the primary purpose test unworkable,\(^9\) Justice Thomas wrote that testimonial statements must meet the formality requirement, which distinguished the DNA report in Williams from the testimony of certificates in Melendez-Diaz and the signed statement in Bullcoming.\(^9\)

C. Dissent

Justice Kagan—joined by Justices Scalia, Ginsburg, and Sotomayor—wrote the dissent under the premise that the Court had previously decided this issue in Melendez-Diaz and Bullcoming.\(^9\) Noting a previous case where Cellmark mistakenly identified a defendant but corrected the mistake on cross-examination,\(^5\) the dissent explained

89. Id. at 2255 (Thomas, J., concurring) (quoting Bryant, 131 S. Ct. at 1167).
90. Id. at 2256.
91. Id. at 2258.
92. Id. at 2262 ("The shortcomings of the original primary purpose test pale in comparison, however, to those plaguing the reformulated version that the plurality suggests today. The new primary purpose test asks whether an out-of-court statement has 'the primary purpose of accusing a targeted individual of engaging in criminal conduct.' That test lacks any grounding in constitutional text, in history, or in logic.") (citation omitted).
93. Id. at 2260-61.
94. Id. at 2264-66 (Kagan, J., dissenting) ("I call Justice [Alito]'s opinion 'the plurality,' because that is the conventional term for it. But in all except its disposition, his opinion is a dissent: Five Justices specifically reject every aspect of its reasoning and every paragraph of its explication . . . . That creates five votes to approve the admission of the Cellmark report, but not a single good explanation. The plurality's first rationale endorses a prosecutorial dodge; its second relies on distinguishing indistinguishable forensic reports. Justice [Thomas]'s concurrence, though positing an altogether different approach, suffers in the end from similar flaws. I would choose another path—to adhere to the simple rule established in our decisions, for the good reasons we have previously given. Because defendants like Williams have a constitutional right to confront the witnesses against them, I respectfully dissent from the Court's fractured decision.").
95. Id. at 2264 ("Some years ago, the State of California prosecuted a man named John Kocak for rape. At a preliminary hearing, the State presented testimony from an analyst
that numerous forensic mishaps and the Court's precedent established that *Crawford* reached forensic reports. According to the dissent, the Court also previously rejected the notion that scientific evidence was presumptively neutral, reliable, or immune to the risk of manipulation, so forensic reports must also face the "crucible of cross-examination" to comply with *Crawford*. Justice Kagan reiterated that "surrogate" witnesses, who testify in place of the analyst who performed and produced the report, do not satisfy the Confrontation Clause. Thus, Lambatos provided the equivalent of surrogate testimony because she could not testify to what the actual analyst performed in the Cellmark DNA report.

According to the dissent, unlike evidence that conforms to a limiting instruction, "the out-of-court statement in [a forensic] context has no purpose separate from its truth." The dissent found the plurality's reasoning—allowing the prosecution to dress testimony in scientific clothing and introduce it to the factfinder without cross-examination—prevented the defendant from confronting the witness who made the report and allowed the prosecution to circumvent the Confrontation Clause.

at the Cellmark Diagnostics Laboratory—the same facility used to generate DNA evidence in this case. The analyst had extracted DNA from a bloody sweatshirt found at the crime scene and then compared it to two control samples—one from Kocak and one from the victim. The analyst's report identified a single match: As she explained on direct examination, the DNA found on the sweatshirt belonged to Kocak. But after undergoing cross-examination, the analyst realized she had made a mortifying error. She took the stand again, but this time to admit that the report listed the victim's control sample as coming from Kocak, and Kocak's as coming from the victim. So the DNA on the sweatshirt matched not Kocak, but the victim herself. . . . Our Constitution contains a mechanism for catching such errors—the Sixth Amendment's Confrontation Clause.

96. *Id.* at 2264-65.
97. *Id.* at 2266 (quoting *Melendez-Diaz*, 557 U.S. at 305) (comparing to *Melendez-Diaz* where the testimonial statements functioned as affidavits).
98. *Id.* (comparing to *Bullcoming* where the prosecution produced the supervisor as a surrogate witness to testify regarding the BAC of defendant because the original analyst was on unpaid leave).
99. *Id.* at 2267.
100. *Id.* at 2269.
101. *Id.* Justice Kagan noted, "If the Confrontation Clause prevents the State from getting its evidence in through the front door, then the State could sneak it in through the back. What a neat trick—but really, what a way to run a criminal justice system. No wonder five Justices reject it." *Id.* at 2272. Justice Kagan explained this error: as nothing in Lambatos's testimony indicates she made an assumption, but instead made an affirmation without qualifications that the Cellmark report accurately showed a male DNA profile from L.J.'s vaginal swabs, it allowed the prosecution to avoid subjecting the witness to cross-examination. *Id.*
The dissent also chastised the plurality's distinction regarding the factfinder's identity. Justice Kagan stated that regardless of whether the jury or judge makes factual determinations, testimonial statements violate the Confrontation Clause when the defendant does not have the opportunity to cross-examine the witness. By not requiring the analyst who performed forensic tests to testify, defendants can no longer constitutionally test through confrontation the forensic report's reliability or the analyst's competence, which are important in cases like Williams, where forensic evidence largely contributed to the prosecution.

Further, Justice Kagan wrote that Cellmark did not create the report for the primary purpose of helping police with the ongoing emergency of finding a dangerous rapist. She stated that the primary purpose from trial testimony showed "all reports in this case were prepared for this criminal investigation ... and for the purpose of the eventual litigation." The timeline also disproved an emergency because the police did not send the sample for nine months after the rape and did not receive the DNA results for another four months.

V. IMPLICATIONS: WHO, WHAT, WHEN, WHERE, WHY, & HOW

A. Who Does This Affect? Defense, Prosecution, Courts—Everyone?

The divided decision in Williams illustrates the difficulties of applying the Confrontation Clause test from Crawford v. Washington to the realities of scientific expert testimony. Further, the Court's inability to author a consistent opinion or constitutional rule affects each party at the trial level.

102. Id. at 2271.
103. Id. ("[W]hether a factfinder is confused by an error is a separate question from whether an error has occurred.").
104. Id. at 2274-75 ("But surely the typical problem with laboratory analyses—and the typical focus of cross-examination—has to do with careless or incompetent work, rather than with personal vendettas. And as to that predominant concern, it makes not a whit of difference whether, at the time of the laboratory test, the police already have a suspect.").
105. Id. at 2274.
106. Id. (alteration in original).
107. Id. In addition, Justice Kagan also disagreed with the plurality's alternative holding that the Cellmark report was not testimonial and would not implicate the Confrontation Clause even if used for the truth of the matter asserted. Id. at 2273-75. The dissent stated, "the report [was], in every conceivable respect, a statement meant to serve as evidence in a potential criminal trial." Id. at 2275.
At the center, judges must decide which precedent controls an expert's testimony, making the procedural use of forensic evidence significant. Currently, the Williams opinion distinguishes itself on so many factors that courts may now have to consider: the type of report, laboratory accreditation, factfinder identity, and wording of examination questions. The format of questioning becomes a point of contention for trial counsel and judges at both trial and appellate levels to determine when forensic reports serve as basis evidence versus truth. Thus, while trial judges maintain judicial discretion and are typically in the best position to evaluate expert testimony, a consistent application of Williams is unlikely.

Prosecutors may also be hesitant or see no reason why forensic reports should be admitted into evidence because the content of those reports can reach the factfinder through the "back" door. Additionally problematic is the distinction between factfinders, forcing prosecutors to produce experts of basis evidence in jury trials or argue that the distinction in Williams is irrelevant since a jury could follow a limiting instruction. Considering the varying factors relied upon in Williams, prosecutors may actually have to call analysts for each DNA report to ensure their convictions are not reversed.

Williams also affects the defense at trial as it limits the defense counsel's ability to adequately prepare, cross-examine, and effectively counsel defendants. Williams treats DNA basis evidence as inherently reliable; without confrontation, the defense loses an adversarial tool.

109. Judges must now decide whether prosecutors submit expert testimony and forensic evidence under the Melendez-Diaz and Bullcoming line of reasoning, or whether it is submitted under the Williams line of reasoning.
110. 132 S. Ct. at 2235-40.
111. Now prosecutors and defense counsel may play word games in court when questioning experts. See id. at 2236.
114. Justice Kagan noted that the Court has never considered factfinder identity in any of its previous Confrontation Clause cases. Id. at 2271.
116. See Daubert, 509 U.S. at 596 (announcing the current standard for assessing scientific evidence, expressing confidence in "the capabilities of the jury and of the adversary system generally," and in "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" to protect defendants against faulty or fraudulent scientific evidence).
B. What Are the Costs—Economic or Constitutional?

State and forensic laboratories are already under budget strains that contribute to outdated equipment, testing backlog, and diminished staff.\(^\text{117}\) Despite budget constraints, operating forensic laboratories is an expensive endeavor for the government with average annual operating costs in the billions.\(^\text{118}\) Requiring the State to produce potentially dozens of analysts increases complexity and cost to a degree that would reduce laboratory DNA testing and force prosecutors to forego DNA testing by relying on less reliable forms of evidence.\(^\text{119}\)

These costs are not only economic but constitutional. Confrontation is a constitutional right that should not be influenced by "amorphous notions of 'reliability'" applied to science.\(^\text{120}\) Forensic scandals littered with perjured forensic testimony occur in many states, such as West Virginia, Oklahoma, Texas, Virginia, and recently Massachusetts.\(^\text{121}\) Conversely, DNA and forensic evidence have had extremely positive effects on our justice system when used correctly—including exonerating 184 alleged convicts by 2006 through DNA testing, and finding one of the perpetrators of the 1993 World Trade Center attack through DNA testing from saliva on a letter mailed to the *New York Times*.\(^\text{122}\) Thus, the constitutional cost of the *Williams* approach implicates notions of criminal justice that are difficult to measure.

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120. *Crawford*, 541 U.S. at 61. Further, this cornerstone of *Crawford* seemingly contradicts the plurality in *Williams*, which discusses the reliability of DNA evidence. *Williams*, 132 S. Ct. at 2228.

121. Giannelli, *supra* note 1, at 86.

122. *Id.* at 85-86; see also United States v. Salmeh, 152 F.3d 88, 129 (2d Cir. 1998).
C. When Is Testimony For Truth—When Must Experts Testify For Truth?

Although Crawford bars out-of-court testimony introduced to prove the truth of the matter asserted, establishing what is testimonial and what is the truth of the matter asserted is potentially difficult. Here, this difficult issue is central to whether base testimony can consist of forensic reports or whether the nature of forensic reports solely rests on its truth. Given the Supreme Court’s difficulty in determining this question of truth of the matter asserted, lower courts have no guidance for when forensic testimony requires confrontation. Thus, trial judges and counsel must discern the constitutional protections involving forensic reports.

D. Where Are Forensic Laboratories and DNA Evidence Today?

Unfortunately, the accreditation of forensic laboratories remains voluntary, increasing to 83% in 2009, and there is no national standard for expert qualifications. This results in various scandals,
such as the “Wes Phenomenon” and “Cinderella” evidence. Understanding these issues began when forensic evidence laboratories were created in the early 1920s, adopted by the FBI in the early 1930s, and gained acceptance through high-profile cases, such as the St. Valentine’s Day Massacre and the Lindbergh kidnapping. As a result of the forensic truth-seeking potential, laboratories developed around the nation on a state and federal level in subsequent decades without the benefit of national planning or discretion. Courts decided issues of admissibility and reliability of forensic evidence, but the admissibility wars “highlighted the need for a more scientific approach to forensic evidence” testing. Deficiencies in

renowned scientist, ‘clinical laboratories must meet higher standards to be allowed to diagnose strep threat than forensic labs must meet to put a defendant on death row.’”) (quoting Eric Lander, DNA Fingerprinting on Trial, 339 Nature 501, 505 (1989)).


129. Giannelli, supra note 1, at 61-62 (“August Vollmer, sometimes known as the ‘father’ of modern policing in America, crated the [first crime] laboratory during his brief tenure as Chief of Police in Los Angeles.”).

130. Id. at 63-64 (“J. Edgar Hoover began the Federal Bureau of Investigation (FBI) crime laboratory in 1932. . . . ‘During its first month of service, the FBI Laboratory examiners handled 20 cases. In its first full year of operation, the volume increased to a total of 963 examinations. By the next year that figure more than doubled.’ . . . Handwriting comparisons, the examination of various types of trace evidence (e.g., hairs, fibers, soils), and serological testing of blood and semen would be added later.”).

131. Id. at 62-63 (“Colonel Calvin Goddard, who maintained an independent firearms laboratory in New York . . . analyze[d] the crime scene bullets and cartridge cases. Goddard tested and excluded all police-issued Thompson submachine guns . . . seized from the home of Fred Burke, a suspect in the killings. It was later learned that a rival gang, headed by Al Capone, instigated the murders. A member of the coroner’s jury was so impressed with Goddard’s work that he offered to fund a crime lab.”).

132. Id. at 64-65 (“[T]he extensive use of handwriting comparison testimony at the Lindbergh kidnapping trial in 1935 solidified the role of the crime lab in the criminal justice system.”).


135. Giannelli, supra note 1, at 81.

[T]he court wrote: “In a piercing attack upon each molecule of evidence presented, the defense was successful in demonstrating to this court that the testing laboratory failed in its responsibility to perform the accepted scientific techniques and experiments.” . . . “[T]he DNA data in this case are not scientifically reliable enough to support the assertion that the samples . . . do or do not match. If this data were submitted to a peer reviewed journal in support of a conclusion, it would not be accepted. Further experimentation would be required.”

Id. at 79 (quoting Castro, 545 N.Y.S.2d at 996).
forensic reliability and laboratory budgets plagued the use of forensic evidence. Congress attempted to control the situation by passing the DNA Identification Act of 1994. The American Bar Association has also addressed deficiencies. Yet, after almost a century of using forensic evidence, the Court still attempts to define the use of DNA evidence in trials without discussing the issues facing forensic laboratories.

With respect to forensic reports and analysts, each forensic report involves layers of technical statements made by one analyst and relied upon by another. Multiple technicians and analysts that work on a single DNA test and some specialists may only have one job in the analytical process. While the Melendez-Diaz v. Massachusetts and Bullcoming v. New Mexico logic suggested that every forensic expert must testify, Williams narrows the rule by suggesting that lab reports involving multiple steps, such as the Cellmark report, are part of an internal work product that will generally not be classified as testimonial.

137. Id. at 67-68. President Lyndon B. Johnson instituted a Crime Commission on police that found local laboratories do not have the budget for personnel or equipment to ensure the proximity, timeliness and quality of laboratory service. Little has changed in modern laboratories since 1967. Id.
139. See ABA Criminal Justice Standard 3.1(a). The ABA Criminal Justice Standards were adopted in 2006. The standards regulate: the collection, preservation, and retention of biological evidence; pretrial disclosure; defense testing and retesting; the admissibility of DNA evidence; post-conviction testing; charting persons by DNA profile; and DNA databases. Id.
140. Peter J. Neufeld & Neville Colman, When Science Takes the Witness Stand, 262 Sc. AM. 5, 46, 48 (1990) (discussing how “[t]he ongoing debate over DNA testing underscores the need to deal more effectively with the difficulties that arise whenever complex scientific technology is introduced as evidence in a court of law”).
141. Williams, 132 S. Ct. at 2246 (Breyer, J., concurring).
144. 131 S. Ct. 2705 (2011).
E. Why Does Science Need to Be Confronted?

Idealistically, scientific testimony of expert witnesses should be confronted because the Constitution affords that right to each individual; however, there are practical concerns when confronting scientific testimony and using forensic evidence as basis evidence. People believe scientific expert testimony, which makes cross-examination of these witnesses a powerful tool for counsel and a necessary cross-examination target for defendants.4

Additionally, DNA testing is superior to the remaining forensic tests.147 In fact, a 2009 study of forensic evidence in wrongful convictions of individuals later exonerated by DNA evidence showed a systemic breakdown for other forms of forensic testimony, finding: 1) misstated or unsupported empirical data in 60% of cases where forensic analysts were used by the prosecution; 2) issues with 72 different forensic analysts and 52 different laboratories, practices, or hospitals; and 3) problems from 25 different states.148 However, Williams seems to treat all forensic reports as acceptable basis evidence, creating another snag to limit its holding.149

Relationships between laboratories and police departments may create potential prosecutorial biases of experts,150 expounding the need for cross-examination.151 Most laboratories only examine evidence submit-
ted by the prosecution and up to 83% of laboratories are publicly funded. Further, defense counsel may lack funds to hire an expert to dispute forensic evidence, which further distances the defense from forensic evidence; however, in instances where the defense attempts to undermine the reliability of this evidence, as in Williams, judges seldom exclude the forensic evidence. By limiting the procedural application of cross-examination, Williams may continue to distance indigent defendants from forensic evidence.

F. How Does Williams Change Expert Testimony About Forensic Evidence?

Given the speculation surrounding the Court’s grant of certiorari to Williams, many thought the Court would reverse its Confrontation Clause standard. Instead, the Court created a prosecution-friendly exception to the rule it created within the past three years. Williams limited defendants’ rights, but it failed to provide a single, majority rationale on how courts should handle the use of forensic evidence.

Reflecting on the Court’s acceptance of three cases within three years and the fractured opinion, a future case concerning expert forensic testimony will certainly pose another opportunity for the Court to

152. Durose et al., supra note 118, at 1.
154. See Neufeld & Colman, supra note 140, at 49 (“Often judges think—mistakenly, in our opinion—that justice is best served by admitting expert testimony into evidence and deferring to the jury for the determination of its weight.”).
155. Id. at 52-53 (discussing the difficulties facing defense counsel who attempted to find experts to rebut forensic evidence: lack of funds; lack of attorney knowledge and time to understand the complexity of science; and expert refusal out of fear their testimony will be misconstrued as an attack on the science).
156. Tom Goldstein, Argument Preview: Closer to the Margins of the Confrontation Clause, SCOTUSBLOG (Dec. 5, 2011, 3:42 pm) http://www.scotusblog.com/?p=133417 (noting the changing composition of the Court since it first decided Crawford and the following Confrontation Clause cases).
158. Adam Liptack, No Majority Rationale in Crime Lab Testimony Ruling, N.Y. TIMES (June 18, 2012), http://www.nytimes.com/2012/06/19/us/supreme-court-ruling-on-crime-lab-testimony-lacks-majority-rationale.html?_r=0 (discussing how the badly fractured opinion “seemed to retreat from a groundbreaking decision in 2009 that said crime lab reports may not be used in criminal trials unless the analysts responsible for creating them provide live testimony”).
provide a clear-cut rule or change its Confrontation Clause jurisprudence.

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