

CONFRONTING THE “CRUCIBLE OF CROSS-EXAMINATION”:  
RECONCILING THE SUPREME COURT’S RECENT EDICTS ON THE SIXTH  
AMENDMENT’S CONFRONTATION CLAUSE

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## I. INTRODUCTION

The guarantees of the Sixth Amendment have been part of the bedrock of American freedom since the beginning of the Republic. It is a veritable fortress against prosecutorial excesses. The Sixth Amendment itself is elegant in its simplicity and directness. Pertinent to this Article is the following passage from its text: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>1</sup> Commonly referred to as the Confrontation Clause, this provision of the Sixth Amendment is one of the key assurances of liberty woven into the rich tapestry of that segment of the Bill of Rights.<sup>2</sup>

It is surely by design, not accident, that the right to confront the witnesses against oneself is of a piece with the interrelated rights to a speedy and public trial, to be tried by an impartial jury, to be informed beforehand of the charges being brought, to enjoy the power to subpoena witnesses, and the right to have counsel.<sup>3</sup> The inestimable logic and sensibility of the Founders in conjoining these basic freedoms is, frankly, a thing of beauty, legally speaking of course.

As indicated, the titular subject of the instant Article is the Confrontation Clause, as quoted above, and its rapid evolution within the last ten years by virtue of new Supreme Court pronouncements. Indeed, it is

<sup>1</sup>U.S. CONST. amend. VI.

<sup>2</sup>It is axiomatic that the Confrontation Clause is made applicable to the States via the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

<sup>3</sup>U.S. CONST. amend. VI.

our overarching intention here to demonstrate, by use of the precedents discussed hereinafter, that this portion of the Sixth Amendment is dynamic, not static, in its application. In order to do so, we must be keenly aware of the fundamental tool used to enforce this constitutional mandate. And that device for confrontation is, of course, cross-examination, exalted by the Supreme Court as “the greatest legal engine ever invented for the discovery of truth.”<sup>4</sup>

As is oft said, the Confrontation Clause protects us all by mandating that testimony against the accused is subjected to “the crucible of cross-examination.”<sup>5</sup> And “crucible” is the appropriate term here, since the Confrontation Clause is tested and re-tested nearly annually in the crucible that is the United States Supreme Court.<sup>6</sup>

It is for that august tribunal to constantly reaffirm the Sixth Amendment’s essential protections of our cherished liberty. Just as surely, year in and year out, the high Court continues to adapt the contours of the Confrontation Clause to present day situations and modern realities.<sup>7</sup> With our brethren at the bar and on the bench, we look forward to these annual refinements of this precious right.

As such, in the summer of 2011, we welcomed the high Court’s then-latest postulation of the right of confrontation in *Bullcoming v. New Mexico*,<sup>8</sup> wherein the Justices decreed that the live testimony of the lab technician who actually conducted a scientific test was still *de riguer* to ensure Confrontation Clause protections.<sup>9</sup> Moreover, that precedent marked the completion of a vital trilogy of Sixth Amendment jurisprudence destined to guide the Nation’s courts in the opening days of the twenty-first century.

Finding *Bullcoming* most worthy of further analysis, your authors were determined to make it the centerpiece of their next writing, and took the first tentative steps toward doing so. Yet time marches on, especially before the Supreme Court. Thus, lo and behold, the high Court’s bestowal of

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<sup>4</sup>California v. Green, 399 U.S. 149, 158 (1970) (internal quotation marks omitted), *quoted in* White v. Illinois, 502 U.S. 346, 356 (1992).

<sup>5</sup>Crawford v. Washington, 541 U.S. 36, 61 (2004).

<sup>6</sup>See, e.g., Williams v. Illinois, 132 S. Ct. 2221 (2012) (plurality opinion); *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011); *Melendez-Diaz v. Massachusetts* 557 U.S. 305 (2009); *Crawford*, 399 U.S. at 149.

<sup>7</sup>See, e.g., *Bullcoming*, 131 S. Ct. at 2710.

<sup>8</sup>*Id.* at 2705.

<sup>9</sup>See *id.* at 2710.

its latest gift to Confrontation Clause jurisprudence, *Williams v. Illinois*.<sup>10</sup> While quite distinct as to both the underlying factual predicates and the questions of law presented, the essential precepts of the reach of the Confrontation Clause ring true in both new decisions. Yet this most recent landmark opens new and controversial avenues for the future of the confrontation guarantee.

Notwithstanding some evident conflict, *Bullcoming*<sup>11</sup> and *Williams*<sup>12</sup> of this most recent vintage build further upon other fairly modern landmarks, specifically *Crawford v. Washington*<sup>13</sup> and *Melendez-Diaz v. Massachusetts*,<sup>14</sup> the first two legs of the current triad of Confrontation Clause jurisprudence. It thus occurred to your authors to take these four most sturdy pillars and build upon them a platform for Confrontation Clause analysis as we enter the second decade of the twenty-first century.

Parts II through V of this Article trace the modern development of Confrontation Clause jurisprudence, commencing with the seminal holding in *Crawford*, the evolution of the reigning triad, and then the high Court's latest iteration in *Williams*. Part VI provides the authors' discussion and analysis of the current state of the guarantee of confrontation, with a special emphasis upon the dynamics of the Supreme Court in crafting the precedents in force today. The Article then concludes in Part VII with our closing thoughts as to what the future holds for the Confrontation Clause and the vital liberty it preserves.

Certainly, a comprehensive history of all the Supreme Court's Confrontation Clause cases, even for, let us say, the last twenty years, would be both too exhaustive and too exhausting for you as readers and we as authors. Nevertheless, we believe this selective analysis will still serve, and serve well, to illuminate the present day contours of one of our most valuable freedoms. All that said, let us proceed.

## II. CRAWFORD: THE FIRST LANDMARK FOR THE NEW CENTURY

The American Constitution is such a monolithic structure, such unyielding bedrock for our freedoms (as well it should be!), that we tend to characterize its infrequent changes as tectonic shifts in the foundation of our

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<sup>10</sup> 132 S. Ct. at 2221.

<sup>11</sup> 131 S. Ct. at 2708.

<sup>12</sup> 132 S. Ct. at 2221.

<sup>13</sup> 541 U.S. 36 (2004).

<sup>14</sup> 557 U.S. 305 (2009).

constitutional liberties. And so it was when the Supreme Court ushered in the twenty-first century with one of its rare revisions to one of the great pillars of our freedoms, the Confrontation Clause of the Sixth Amendment.

That first new landmark for the new century was denominated as *Crawford v. Washington*.<sup>15</sup> Its somewhat tawdry facts can be distilled, as follows. Michael Crawford believed one Kenneth Lee had attempted to molest Crawford's wife, Sylvia.<sup>16</sup> When the Crawfords went to Lee's apartment to jointly confront him, a fight ensued.<sup>17</sup> Michael Crawford stabbed Lee, and he was later arrested.<sup>18</sup>

What followed were some disjointed and inconsistent accounts of the events of that night, as garnered from the separate police interrogations of the two Crawfords.<sup>19</sup> At trial, Sylvia was constrained by the marital privilege, pursuant to state law, and could not testify against her husband.<sup>20</sup> The prosecutor then decided to introduce Mrs. Crawford's tape recorded retelling of the altercation to disprove Mr. Crawford's claim of self-defense.<sup>21</sup> Michael Crawford was convicted of assault, and Washington's highest state court upheld that conviction.<sup>22</sup> High Court review followed.<sup>23</sup>

Justice Antonin Scalia wrote the opinion for what was fundamentally a unified Supreme Court.<sup>24</sup> However, in order to fully appreciate *Crawford* and its progeny, it is imperative to note the constituency he wrote for. Justice Scalia was joined unequivocally by Justices Stevens, Kennedy, Souter, Thomas, Ginsburg and Breyer.<sup>25</sup> Chief Justice Rehnquist concurred in the judgment, but filed his own opinion, to which Justice O'Connor attached herself.<sup>26</sup>

The paramount issue was as follows: did the prosecution's employment

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<sup>15</sup> 541 U.S. 36.

<sup>16</sup> *Id.* at 38.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 39–40. In the main, Sylvia gave an inconsistent account as to whether Lee was armed or not and whether her husband appeared to intentionally stab him without provocation or was he defending himself from Lee's attack. *Id.* As one could readily surmise, any of this would severely impact Michael Crawford's defense strategy.

<sup>20</sup> *Id.* at 40.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 41.

<sup>23</sup> *Id.* at 42.

<sup>24</sup> *Id.* at 37.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

of Mrs. Crawford's taped statement, given Mr. Crawford's inability to cross-examine (either the statement or his spouse) violate his Confrontation Clause right?<sup>27</sup> As that was the pertinent question, Justice Scalia commenced with a concise review of that provision of the Sixth Amendment.<sup>28</sup>

From the outset, the majority proclaimed that the text alone of the Constitution was insufficient to resolve this vital question.<sup>29</sup> This is so because a plausible reading of the Confrontation Clause would delimit its application to literal witnesses "who actually testify at trial," witnesses whose statements are offered at trial or something else altogether.<sup>30</sup> Because of these alternatives, the history of the Confrontation Clause takes on great significance according to the high Court.<sup>31</sup>

Reflecting his keen sense of history, Justice Scalia noted the right of confrontation dates back over two thousand years to the days of the Roman Republic.<sup>32</sup> Notwithstanding this antecedent, the American Republic's founders had their own notion of the right to confront one's accusers rooted in their own common law traditions.<sup>33</sup> To be certain, the common law of our English forebears was distinct from the European civil law norms that condoned private examinations by judicial officers.<sup>34</sup>

Justice Scalia then pointed out the exceptions to the English practice, when pretrial examinations "became routine . . . during the reign of Queen Mary in the sixteenth century."<sup>35</sup> Here we see the introduction of the Marian nomenclature to modern Supreme Court jurisprudence, as the majority explicated the laws of old England that permitted justices of the peace to conduct and later submit pretrial testimonial statements to the courts, without benefit of confrontation.<sup>36</sup>

"The most notorious instances" of this practice occurred in the great political prosecutions of the sixteenth and seventeenth centuries, principally

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<sup>27</sup> See *id.* at 42.

<sup>28</sup> See *id.* at 42–47.

<sup>29</sup> *Id.* at 42.

<sup>30</sup> *Id.* at 42–43.

<sup>31</sup> *Id.* at 43.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See *id.* at 44.

that of Sir Walter Raleigh for alleged treason against the English crown.<sup>37</sup> After a brief dissertation on the mockery of Sir Walter's trial, Justice Scalia emphasized how at least one of the Raleigh's judges subsequently lamented that great deprecation of justice.<sup>38</sup>

This was no mere history lesson, as the majority demonstrated those injustices were the catalyst in a young America for once and for all enshrining the rights of free men to confront the witnesses against them.<sup>39</sup>

In keeping with Justice Scalia's now well-structured constitutional theory of original intent, the majority explicitly notes that by the time of the Sixth Amendment's ratification in 1791, the right to cross-examination, and the concomitant exclusion of testimony not subjected to its rigors, dominated the courtrooms of the new Republic.<sup>40</sup>

To further buttress the legitimacy of the above history, the majority took time to explore early American practices as well.<sup>41</sup> Admittedly, in colonial times the right to cross-examination was not consistently upheld.<sup>42</sup> This was none more infamous that the enforcement of King George's Stamp Act policies, which the tyrant committed to the courts of admiralty, of all things, precisely to exploit its civil law procedures and to the expulsion of common law rights.<sup>43</sup>

Here, Justice Scalia imparts a vital lesson in American history and, specifically, the Sixth Amendment. At about the time of the Revolution, the

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *See id.* at 47 n.2. Notable is Justice Scalia's summation of "the infamous proceedings against Sir John Fenwick," whose sham of a trial might not be as well known to history buffs as that of Sir Walter, but nonetheless "must have burned into the general consciousness the vital importance of the rule securing the right of cross-examination." *Id.* at 45–46 (internal quotations omitted).

<sup>40</sup> *See id.* at 46–47. *Accord* District of Columbia v. Heller, 554 U.S. 570, 592 (2008) (Scalia, J.) "[T]he Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right." *Id.* In all likelihood, Justice Scalia is applying the same logic to the Confrontation Clause, elaborating upon its vast history to demonstrate the Sixth Amendment set in constitutional stone a guarantee of liberty that predated the Founding Document.

<sup>41</sup> *Crawford*, 541 U.S. at 47–50.

<sup>42</sup> *Id.* at 47.

<sup>43</sup> *See id.* at 47–48. Justice Scalia references John Adams, as a private attorney in these pre-Revolutionary times, as decrying these procedures as abhorrent to a free people. *Id.* at 48. Proof once again that any American interested in the development of our freedoms and the federal Constitution should read up on our second President. *See, e.g.*, DAVID MCCULLOUGH, JOHN ADAMS (2001).

majority of the nascent states “guaranteed a right of confrontation.”<sup>44</sup> Strangely enough, the early draft of the federal Constitution did not enshrine the right of confrontation, but that of course was swiftly rectified with the adoption of the Bill of Rights, and within it the Sixth Amendment.<sup>45</sup>

The consensus among the new States was highly favorable to the right to confront any testimonial statement, essentially an uninterrupted continuation of the common law precept gathered from the English tradition.<sup>46</sup> Fairly stated, Justice Scalia’s analysis amply demonstrated that the collective early history of the Republic confirmed the right of confrontation, and, conversely, in its absence, the exclusion of testimony not so tested.<sup>47</sup>

From history, the majority drew two key inferences.<sup>48</sup> First, the Confrontation Clause’s paramount objective was to bar testimony untested by cross-examination.<sup>49</sup> Purposed to stamp out the infamies perpetrated against Sir Walter Raleigh, the injustices of the Marian statutes, and their ilk, the Sixth Amendment could only be rightfully interpreted in that light concluded Justice Scalia.<sup>50</sup>

Thus informed, the *Crawford* Court reached its first significant conclusion. The Confrontation Clause “applies of its own force” to both live and ex parte testimony.<sup>51</sup> Indeed, the Court flat out rejected the notion that the admissibility of the latter depended upon nominal rules of evidence.<sup>52</sup> To hold otherwise would render the Confrontation Clause “powerless to prevent even the most flagrant inquisitorial practices.”<sup>53</sup>

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<sup>44</sup> *Crawford*, 541 U.S. at 48 (cataloging the colonial/state declarations of rights of Virginia, Pennsylvania, Delaware, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire).

<sup>45</sup> *Id.* at 48–49. In relation thereto, note Article XII of the Massachusetts state Constitution, which proclaims “every subject shall have a right . . . to meet the witnesses against him to face to face.” MASS. CONST. art. XII pt. I. Not a surprising discovery, since Mr. Adams is widely accepted as the primary draftsman of the Commonwealth’s founding document. MCCULLOUGH, *supra* note 43, at 221–22.

<sup>46</sup> *Crawford*, 541 U.S. at 48–50.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 50.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 50–51.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* As an aside, Justice Scalia commented that such focus suggests not all hearsay might



As always a gilt-edged priority for Justice Scalia, he returned to the constitutional text. To bear “testimony,” in whatever form, brings one under the bright spotlight of the Confrontation Clause, pursuant to its very words.<sup>54</sup>

This is particularly so for solemn statements made outside of a courtroom to government officials.<sup>55</sup> And here the high Court published its catalogue of testimonial statements, most prominent on that listing affidavits, depositions, custodial examinations, prior testimony given without the safeguard of cross-examination, and confessions.<sup>56</sup>

Significant to the Court was the fact that “[t]hese formulations all share a common nucleus,” presumably solemnity and the failure of an opportunity to cross-examine as part thereof.<sup>57</sup> And here we see a key early reference to the importance of “solemnity” as a component of Confrontation Clause analysis in this century.<sup>58</sup>

In turn, the members of this “core class” of testimonial statements do indeed fall along a spectrum of Confrontation Clause analysis, implying their treatment might not be uniform.<sup>59</sup> In sum, opined Justice Scalia, while

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come under Confrontation Clause scrutiny. *Id.* at 51. Some hearsay “bears little resemblance” to the outrages the Confrontation Clause was designed to outlaw. *Id.* Then again, some out-of-court testimony that might squeeze by a hearsay analysis should be stopped cold by the Sixth Amendment, in accord with the Founders’ intentions. *Id.*

<sup>54</sup>*Id.* Accord *Davis v. Washington*, 547 U.S. 813, 824 (2006) (The precision of the Sixth Amendment in using the words “witness” and “testimony” is a textual limitation that “must fairly be said to mark out not merely [the Confrontation Clause’s] ‘core,’ but its perimeter.”).

<sup>55</sup>*Crawford*, 541 U.S. at 51.

<sup>56</sup>*Id.* at 51–52. The full description bears repetition:

Various formulations of this core class of “testimonial” statements exist: “*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;” “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;” “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”

*Id.* at 51–52 (citations omitted).

<sup>57</sup>*See id.* at 52.

<sup>58</sup>*See id.* at 49.

<sup>59</sup>*See id.* at 51–52.

the Confrontation Clause is primarily concerned with testimonial statements, those are not its sole concern.<sup>60</sup>

For the second inference the majority draws from the Confrontation Clause's rich history. Justice Scalia declared that the Founders certainly would have barred testimony from a witness, unless it could be demonstrated that she was unavailable for trial *and* the accused had a prior opportunity for cross-examination.<sup>61</sup> But far more important, this led the majority to expound that the text of the Confrontation Clause does not invite judicial experimentation with its boundaries.<sup>62</sup> The very words of the Sixth Amendment per force do not admit to "any open-ended exceptions from the confrontation requirement" to come into being via judicial tinkering.<sup>63</sup>

Supreme Court precedent "has been largely consistent with these two principles."<sup>64</sup> And here the *Crawford* Court proceeded to the tectonic shift we alluded to above.

Hewing closely to this traditional line, found Justice Scalia, was the fairly recent precedent set by *Ohio v. Roberts*,<sup>65</sup> where the defendant's cross-examination of a witness at a preliminary hearing cleared the path for the testimony's admission at his subsequent trial.<sup>66</sup> Next, distinguishable,

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<sup>60</sup> *Id.* at 53.

<sup>61</sup> *Id.* at 54–55.

<sup>62</sup> *Id.* at 54.

<sup>63</sup> *Id.* Justice Scalia noted that the history of the Confrontation Clause reflected a practice of exclusion, not one inclined to admit testimonial statements, even via exceptions to hearsay and similar rules. *Id.* at 55–56.

<sup>64</sup> *Id.* at 58. Justice Scalia noted a few prime examples, *id.* at 57, including *Mattox v. United States*, 156 U.S. 237, 240–44 (1895) (admitting prior trial testimony of deceased witness because subject to earlier cross-examination); *Pointer v. Texas*, 380 U.S. 400, 406 (1965); and *Kirby v. United States*, 174 U.S. 47, 55–56 (1899) (finding guilty pleas and jury conviction of others inadmissible to show receipt of stolen goods). *See also* *Reynolds v. United States*, 98 U.S. 145, 158 (1879) (holding that although testimony at prior trial was subject to the Confrontation Clause, defendant forfeited that right by procuring the witness's absence); *Motes v. United States*, 178 U.S. 458, 467, 470–71 (1900) (stating that where affiant unavailable for cross-examination, written deposition inadmissible); *Dowdell v. United States*, 221 U.S. 325, 330–31 (1911) (finding judicial certification of facts regarding conduct of prior trial unrelated to defendants' guilt or innocence, and thus not statements of witnesses subject to guarantee of confrontation).

<sup>65</sup> 448 U.S. 56, 67–70 (1980), *abrogated by Crawford*, 541 U.S. 36.

<sup>66</sup> *Crawford*, 541 U.S. at 58. Because *Roberts* is no longer binding precedent, we see no need here to dwell upon its now discarded theorems. However, a brief statement of the *Roberts* formulation bears utility in understanding what *Crawford* replaced. In *Roberts*, the high Court set forth a far more permissive view favoring the admission of out-of-court statements, provided such

but not contrary, was *Lee v. Illinois*,<sup>67</sup> where an accomplice's confession in a double murder case was barred precisely because it "was presumptively unreliable" and did not possess sufficient indicia of reliability.<sup>68</sup> In this manner, declared the Court, "[o]ur cases have thus remained faithful" to the design of the Founders, that being to exclude testimonial statements of witnesses absent for trial unless their unavailability could be demonstrated and a prior opportunity to cross-examine be shown.<sup>69</sup>

Here now we come to the crux of *Crawford*, which the majority summed up as results versus rationale.<sup>70</sup> While Justice Scalia opined as to the general faithfulness of the Court's holdings to the original intent of the Confrontation Clause, the reasoning to achieve those laudable outcomes has exhibited significant shortcomings.<sup>71</sup>

The test promulgated in *Roberts*, for example, "departs from the historical principles" because it is simultaneously too broad and too narrow.<sup>72</sup> This paradox must be brought to an end, declared Justice Scalia, because such malleability in the standards of the Confrontation Clause is undesirable, and often leads to abuse of the very constitutional right that it guarantees.<sup>73</sup>

Pointing out the aforementioned dichotomy of *Roberts* was important to the Court's analysis, for its next step would be to resolve it, at least in part,

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evidence had adequate indicia of reliability. *Roberts*, 448 U.S. at 66. Per force, "reliability" would be demonstrated by, *inter alia*, strong roots in established hearsay exceptions or other "particularized guarantees of trustworthiness." *Id.* This trait of "reliability" took paramouncy then, according to *Roberts*, as it could be measured by things falling outside the Sixth Amendment. *Id.* At bottom, the salient point of *Roberts* was it allowed proffered evidence to escape testing by the Confrontation Clause if it met judicially created nostrums of reliability. And such reliance upon judicially crafted artifices ultimately proved to be the undoing of *Roberts*, as we shall soon see.

<sup>67</sup> 476 U.S. 530 (1986).

<sup>68</sup> *Crawford*, 541 U.S. at 58–59; *Lee*, 476 U.S. at 539.

<sup>69</sup> *Crawford*, 541 U.S. at 59.

<sup>70</sup> *Id.* at 60.

<sup>71</sup> *See id.* *See also* *White v. Illinois*, 502 U.S. 346, 358 (1992) (Thomas, J., concurring). Over a decade before *Crawford* was decided, Justice Thomas, as joined by Justice Scalia, "suggest[ed] that our Confrontation Clause jurisprudence has evolved in a manner that is perhaps inconsistent with the text and history of the Clause itself." *Id.*

<sup>72</sup> *Crawford*, 541 U.S. at 60. Parenthetically, we provide Justice Scalia's exemplars of these polar opposite malformations. The fault of "too broad" is embodied by *Roberts* applying the identical analysis to hearsay "whether or not the hearsay consists of *ex parte* testimony." *Id.* Simultaneously, the formulation is defective as "too narrow" because it bestows admissibility upon statements "that *do* consist of *ex parte* testimony upon a mere finding of reliability." *Id.*

<sup>73</sup> *Id.*

in *Crawford*. The over expansiveness of the *Roberts* formulation could be eliminated by applying the Confrontation Clause solely to testimonial statements, and committing the admissibility of all other evidence to ordinary standards of the rules of hearsay.<sup>74</sup>

The countervailing flaw in *Roberts*, that of “excessive narrowness,” could be overcome by imposing an absolute bar to the admission of testimonial statements, absent a prior opportunity to cross-examine.<sup>75</sup> Driven by the irrefutable fact that Mrs. Crawford’s statement was testimonial “under any definition,” it was the second pathway to closure that the Court found “squarely implicate[d].”<sup>76</sup>

The *Crawford* Court here proclaimed its steadfast belief that the Founders could not have intended to permit the Sixth Amendment’s protections to be diminished by “the vagaries of the rules of evidence” in the matter of testimonial statements.<sup>77</sup> More so, the nebulous conceptions of reliability promoted by *Roberts* would never have been condoned by the Framers as a restriction upon the right of confrontation.<sup>78</sup>

The majority then declares the penultimate finding of *Crawford*, the one that was destined to resonate in the cases to follow. The “ultimate goal” of the Confrontation Clause is to assure the “reliability” of evidence.<sup>79</sup> To be quite certain, this is a substantive, not a procedural, constitutional guarantee.<sup>80</sup>

Its commandment is not that evidence be reliable (the essential tenet of the *Roberts* holding) but rather that the reliability of particular evidence be assessed in a specific manner.<sup>81</sup> And that methodology the high Court now

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<sup>74</sup> *Id.* at 61.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* Regarding the first problem, that of overbreadth, Justice Scalia essentially sidestepped it by declaring it previously rejected in *White v. Illinois*, 502 U.S. 346, 352 (1992) (majority opinion) (rejecting a narrow reading of the Confrontation Clause “which would virtually eliminate its role in restricting the admission of hearsay testimony”), and, in any event, superfluous, for the aforesaid reason that here Mrs. Crawford’s statement was indisputably testimonial in nature. *Crawford*, 541 U.S. at 61.

<sup>77</sup> *Crawford*, 541 U.S. at 61.

<sup>78</sup> *Id.* Justice Scalia admonished that none of the weighty authorities already discussed contemplated the undercutting of the Confrontation Clause by a judge-made test of reliability, a concept “fundamentally at odds with the right of confrontation.” *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

christened as “testing in *the crucible of cross-examination*.”<sup>82</sup>

Now exposing the fallacy of *Roberts*, Justice Scalia points out its failings: it allows a jury to hear evidence, untested by the adversarial process, based merely upon a judicial determination of reliability.<sup>83</sup> It does violence to the guarantee of the right of confrontation because it ousts the “constitutionally prescribed method” of adjudging reliability in favor of “a wholly foreign one.”<sup>84</sup>

In further words, the *Crawford* Court gave the *raison d’etre* for its ruling this day with this powerful analogy: “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”<sup>85</sup>

Continuing, Justice Scalia found *Roberts* has proven unworkable in the courts, which, in turn, vindicated the Founders’ original wisdom in not imbedding a general reliability exception within the text of the Sixth Amendment.<sup>86</sup> The unpredictability of this framework is an initial shortcoming. More problematic—and hence dangerous—is that the *Roberts* theorem of reliability is amorphous and hugely subjective.<sup>87</sup> Put another way, how could justice ever be achieved with such ill-defined and elusive standards, asked the high Court?<sup>88</sup>

But surely the fatal flaw in *Roberts*, proclaimed Justice Scalia, was its undeniable capacity to admit into evidence the “core testimonial statements” which the Confrontation Clause plainly meant to expunge.<sup>89</sup> On too many occasions, courts have applied the *Roberts* norms to admit testimonial statements that escaped the rigors of an opportunity to cross-examine.<sup>90</sup>

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<sup>82</sup> *Id.* (emphasis added). Justice Scalia further expounded that this selection reflected the Founders’ judgment of what they intended the Confrontation Clause to be, based upon their experience and expectations. *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 62. Here the majority expresses its apprehension that *Roberts* authorized the “very sorts of reliability determinations” history condemned in the Raleigh trials. *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> See also *Michigan v. Bryant*, 131 S. Ct. 1143, 1174 (2011) (Scalia, J., dissenting) (*Roberts* was discarded because it presented “an unworkable standard unmoored from the text and the historical roots of the Confrontation Clause.”).

<sup>87</sup> See *Crawford*, 541 U.S. at 62–63.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 63.

<sup>90</sup> *Id.* at 64. Here Justice Scalia gives an extensive catalogue of such misguided cases, a list

Justice Scalia was further aghast to find that some courts had admitted into evidence untested testimonial statements precisely because the parameters of *Roberts* gave those statements a mistaken aura of reliability.<sup>91</sup> He tartly pointed out that glossing over a statement because it was given in a testimonial setting does not obviate the need for confrontation; very much to the contrary, it triggers the operation of the Confrontation Clause as a gilt-edged necessity.<sup>92</sup> To do otherwise “add[s] insult to injury,” opined Justice Scalia.<sup>93</sup>

Turning to the case at bar, the majority found it a ripe example of *Roberts*’s defects.<sup>94</sup> Mrs. Crawford made her statement while in police custody, at a time when she herself was potentially under suspicion for committing a crime.<sup>95</sup> Her description of events not only implicated her husband, it undermined his defense.<sup>96</sup> Yet somehow the application of the *Roberts* reliability credo permitted the admission of her tape recorded statement into evidence, a result Justice Scalia was sure the Founders would have found abhorrent, given their fidelity to the guarantee of confrontation they wove into the very fabric of the Sixth Amendment.<sup>97</sup>

The *Crawford* court next revealed why it was so moved to action. While conceding it could resolve the instant case by reconfiguring the contours of *Roberts*, the Justices deemed that halfhearted at best.<sup>98</sup> Such was the magnitude of the constitutional misinterpretation done by *Roberts*, this Court found sterner measures had to be taken to assure the Confrontation Clause was honored in its application, and not misaligned.<sup>99</sup>

In other words, opined the majority, the Confrontation Clause is an intentional check upon judicial discretion.<sup>100</sup> Therefore, the misconceived

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damning for its length alone. *See id.* at 64–65.

<sup>91</sup> *Id.* at 65.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* *See also* Michigan v. Bryant, 131 S. Ct. 1143, 1173 (2011) (Scalia, J., dissenting) (“The Framers could not have envisioned such a hollow constitutional guarantee.”).

<sup>94</sup> *Crawford*, 541 U.S. at 65.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 65–66.

<sup>98</sup> *Id.* at 67.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* Some years later, Justice Scalia staunchly defended what he had fashioned in *Crawford* as a rightful bulwark against judicial activism that degrades the guarantee of confrontation. *See* Michigan v. Bryant, 131 S. Ct. 1143, 1175 (Scalia, J., dissenting). Opposing insidious undermining of *Crawford*’s expressed opposition to judicial tinkering, he declared:

reliability analysis of *Roberts*, even if retooled, would perpetuate the very wrong the Sixth Amendment condemned.<sup>101</sup> Indeed, in a monumental example of judicial restraint, the high Court declared itself, not to mention the state courts, utterly devoid of authority to fashion their own test to replace the “procedure for determining the reliability of testimony” which the Constitution’s own text prescribes.<sup>102</sup>

Offering a few words of consolation, the high Court expressed its sincere belief that the courts below were acting in good faith when assessing reliability in this case (and implicitly elsewhere across the land).<sup>103</sup> Nevertheless, the Founders would not have been content “to leave too much discretion in judicial hands.”<sup>104</sup>

It does violence to the Constitution, declared Justice Scalia, to replace its absolute guarantees with judicially crafted tests.<sup>105</sup> Justice Scalia’s unmistakable declaration for his preferred mode of constitutional analysis does much to explain his approach here, and his wholesale rejection of the dissent’s preference to engage in balancing inquiries.

“Vague standards are manipulable,” he warned, and while that might not be a commonplace concern in the more ordinary case, the Founders

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[D]oes [the Court] intend, by following today’s illogical roadmap, to resurrect *Roberts* by a thousand unprincipled distinctions without ever explicitly overruling *Crawford*? After all, honestly overruling *Crawford* would destroy the illusion of judicial minimalism and restraint and it would force the Court to explain how the Justices’ preference comports with the meaning of the Confrontation Clause that the People adopted—or to confess that only the Justices’ preference really matters.

*Id.*

<sup>101</sup> *Crawford*, 541 U.S. at 67.

<sup>102</sup> *Id.* The axiom of judicial restraint has many parents. One oft-cited example from the very genesis of the Republic that we find quite apropos here is this: “The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.” THE FEDERALIST NO. 78, at 526 (Alexander Hamilton) (Cooke ed., 1975). If need be, substitute “the Constitution” for legislative will, and the salient point is even more obvious.

<sup>103</sup> *Crawford*, 541 U.S. at 67.

<sup>104</sup> *Id.* *Accord* *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008) (“Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.”).

<sup>105</sup> *Crawford*, 541 U.S. at 67–68. *See also* *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3058 (2010) (Scalia, J., concurring) (The superiority of a textual, historical, and tradition-based approach to analyzing the scope of constitutional rights over a more prosaic balancing test is that the former “is much less subjective, and intrudes much less upon the democratic process.”).

seemingly had an eye toward the more politically charged trials where the impartiality of even the highest members of the judiciary might not be so clear.<sup>106</sup> Here, Justice Scalia dispensed the death blow to *Roberts*, finding that its malleable analysis would provide little, if any, constitutional protection in a more contentious trial atmosphere.<sup>107</sup>

For its coda, the *Crawford* Court commenced with a brief caution: hearsay law, as developed by the States, still applies to nontestimonial hearsay, without fear of running afoul of constitutional guarantees.<sup>108</sup> But the Constitution brooks no variation from its guaranteed protections where testimonial statements are at play.<sup>109</sup>

The maxim declared was as follows: “Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”<sup>110</sup> And, as we shall witness later on herein, that promise of further refinement has been at least partially fulfilled by *Crawford*’s descendants.

Notwithstanding the aforementioned postponement, the majority did make clear for today that “testimonial statements,” at a bare minimum, comprise prior testimony at various judicial or quasi-judicial venues and police interrogations.<sup>111</sup>

And so, given the above, the inability of Mr. Crawford to cross-examine his wife’s taped out-of-court statement made its admission at trial a

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<sup>106</sup> *Crawford*, 541 U.S. at 68–69. More recently, Justice Scalia made an even more impassioned exposition of this point as follows:

The Framers placed the Confrontation Clause in the Bill of Rights to ensure that those abuses (and the abuses by the Admiralty courts in colonial America) would not be repeated in this country. Not even the least dangerous branch can be trusted to assess the reliability of uncross-examined testimony in politically charged trials or trials implicating threats to national security.

Michigan v. Bryant, 131 S. Ct. 1143, 1176 (2011) (Scalia, J., dissenting).

<sup>107</sup> *Crawford*, 541 U.S. at 68. See also *Bryant*, 131 S. Ct. at 1170 (Scalia, J., dissenting) (stating a “malleable approach” to the guarantee of confrontation extinguishes it).

<sup>108</sup> *Crawford*, 541 U.S. at 68.

<sup>109</sup> *Id.* at 68–69.

<sup>110</sup> *Id.* at 68.

<sup>111</sup> *Id.* These were the modern practices that Justice Scalia deemed were the closest analogues to the abuses the Confrontation Clause was intended to outlaw. *Id.*



violation of his Confrontation Clause right.<sup>112</sup> Nothing else need be said, and the Court respectfully declined to redeem Mrs. Crawford's testimonial statement with a reliability analysis.<sup>113</sup> Moreover, in doing so the high Court found its *Roberts* formulation equally beyond redemption, and so discarded it.<sup>114</sup>

Justice Scalia's closing words on the constitutionally appropriate method to test testimonial statements summed it all up. "[T]he only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: *confrontation*."<sup>115</sup> With that, *Crawford* was set in stone. It was soon time for the next part of the triad to join it.

### III. *MELLENDEZ-DIAZ*: THE TRILOGY TAKES SHAPE

The second leg of the great Confrontation Clause trilogy was *Melendez-Diaz v. Massachusetts*,<sup>116</sup> where, just five years after the seminal case of *Crawford* was decided, the high Court subjected the new landmark to its first major test.

The facts of *Melendez-Diaz* sound like the opening act of a one hour television crime drama. Boston police were tipped off that one Wright, a Kmart employee, was acting suspiciously, repeatedly taking phone calls at work, disappearing, and then reappearing.<sup>117</sup> The police set up surveillance and, having observed Wright returning to the store after one such sequence, detained him.<sup>118</sup> Wright had four bags of what appeared to be cocaine on his person.<sup>119</sup> Wright had been dropped off at this Kmart location by another man and one Luis Melendez-Diaz, the petitioner-to-be.<sup>120</sup> All three were arrested, and driven to the precinct in the backseat of a police cruiser.<sup>121</sup>

The arresting officers had their suspicions aroused when the three detainees wouldn't stop fidgeting and moving around the back of the police

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 68–69.

<sup>114</sup> *Id.* at 68.

<sup>115</sup> *Id.* at 69 (emphasis added).

<sup>116</sup> 557 U.S. 305 (2009).

<sup>117</sup> *Id.* at 307–08.

<sup>118</sup> *Id.* at 308.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

car.<sup>122</sup> After bringing the suspects inside, the officers searched their own squad car, and lo and behold, hidden between the seats was a large plastic bag holding nearly twenty smaller bags, containing what was believed to be cocaine.<sup>123</sup> This collection of baggies was submitted to the Massachusetts state lab, which after testing declared the illicit substance within to be cocaine.<sup>124</sup> And so, Melendez-Diaz was thereafter charged with cocaine distribution and trafficking.<sup>125</sup>

Leaving TV cop show scripts for the realities of the law, the prosecution placed the bags of coke into evidence, accompanied by three “certificates of analysis” from the lab declaring the contraband to be cocaine.<sup>126</sup> And as required by local law, each certificate was sworn to by the relevant analyst.<sup>127</sup>

Melendez-Diaz objected to the admission into evidence of each of the lab certificates, as violative of his Confrontation Clause rights.<sup>128</sup> The state courts of Massachusetts uniformly rejected his claim, and his conviction was thereby upheld. Certiorari followed.<sup>129</sup>

Writing for the Court, Justice Scalia opened with a pithy reminder that the Confrontation Clause guarantees the accused the right to confront those who bear testimony against him, a right made applicable to the States via the Fourteenth Amendment.<sup>130</sup> And what items “bear testimony” against a defendant?

Justice Scalia again provides a detailed categorization, including, but not limited to, affidavits, custodial examinations, depositions, prior testimony, and confessions.<sup>131</sup> In other words, statements made under circumstances which would leave an objective observer to reasonably believe that the statement would be used at a later trial.<sup>132</sup>

As is his wont, Justice Scalia did not mince words. “There is little

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.* At no time did anyone contend the white powder belonged to the good gendarmes.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 309.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* (citing *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (Sixth Amendment applies to state prosecutions)).

<sup>131</sup> *Id.* at 309–10 (quoting *Crawford*, 541 U.S. at 51–52).

<sup>132</sup> *Id.* at 310.

doubt” that the lab certificates herein fell within the fundamental core of testimonial statements which a defendant must be allowed to confront.<sup>133</sup> The relevant state law that prescribed the form of these lab reports irrefutably rendered them affidavits, substantively as well as procedurally.<sup>134</sup>

Most telling to Justice Scalia was their characteristic of solemnity, “incontrovertibly” bringing them into the class of testimonial statements subject to confrontation.<sup>135</sup> In short, and pursuant to *Crawford*, the lab reports were testimonial, the analysts were witnesses, and the right of Melendez-Diaz to confront both was undeniable.<sup>136</sup>

As concise as the majority’s core holding was, Justice Scalia was circumspect enough to deflate the arguments made in opposition. First and foremost, today’s decision was not radical, he noted.<sup>137</sup> Rather, it was a faithful and straightforward application of *Crawford* and its edicts.<sup>138</sup>

Continuing in this vein, the majority clarifies that the Sixth Amendment textually cements the accuser’s right to confront the witnesses against him.<sup>139</sup> Classifying a witness as not inculpatory provides no escape from the strictures of the Confrontation Clause.<sup>140</sup> Moreover in this case, certifying that the substance found in Melendez-Diaz’s possession was cocaine was undeniably “testimony *against* [him], proving one fact necessary for his conviction.”<sup>141</sup>

The majority’s reasoning was confirmed, stated Justice Scalia, by contrasting the Confrontation Clause with the text of its closest neighbor, the Compulsory Process Clause.<sup>142</sup> The latter guarantees a defendant the

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<sup>133</sup> *Id.* Parenthetically, Justice Scalia emphasized that affidavits, which he implicitly deemed the lab certificates to be, are mentioned twice in the two respective subcategories of testimonial statements which he had just described. *Id.* See also *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring) (stating that an affidavit is a formalized testimonial document that unfailingly invokes the Confrontation Clause).

<sup>134</sup> *Melendez-Diaz*, 557 U.S. at 310.

<sup>135</sup> *Id.* Additionally, the lab certificates are functional equivalents to live testimony, a point brought home by the Massachusetts law declaring those papers to constitute prima facie evidence of the contraband so analyzed. See *id.* at 310–11.

<sup>136</sup> *Id.* at 311.

<sup>137</sup> See *id.* at 325.

<sup>138</sup> *Id.* at 311.

<sup>139</sup> *Id.* at 313.

<sup>140</sup> See *id.* at 313–14.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 313.

right to call the witnesses in his favor, purposely dovetailing with the right to confront the witnesses aligned against him.<sup>143</sup>

Per force, these complementary guarantees of liberty create “two classes of witnesses—those against . . . and those in . . . favor” of the accused.<sup>144</sup> To the majority in *Melendez-Diaz*, the symmetry was unmistakable.<sup>145</sup> And, by textual exclusion,<sup>146</sup> found Justice Scalia, “there is [no] . . . third category of witnesses” beyond the reach of the Confrontation Clause.<sup>147</sup>

Furthermore, Justice Scalia put to the side the counterargument that, given the analysts had not actually observed the alleged crime in person, they constituted unconventional witnesses, unconventional enough to escape Confrontation Clause scrutiny.<sup>148</sup> Justice Scalia decreed that viewpoint as lacking any textual authority whatsoever within the Sixth Amendment.<sup>149</sup>

Finally, Justice Scalia made short shrift of the notion that the analysts were nontraditional witnesses because their testimony was not given in response to formal interrogation.<sup>150</sup> No matter, declared Justice Scalia.<sup>151</sup> In promulgating the Sixth Amendment, the Framers made no distinction between testimony compelled and testimony volunteered.<sup>152</sup> In an almost tart rebuke, Justice Scalia held that a voluntary witness is no less a witness against the accused for purposes of Confrontation Clause scrutiny.<sup>153</sup>

Next, the majority turned to analyze the prosecution’s attempt to

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 313–14.

<sup>146</sup> While not the precise doctrine cited here in *Melendez-Diaz*, there can be no mistake that Justice Scalia is alluding to the doctrine of *expressio unius est exclusio alterius*, the “[e]xpression of the one is exclusion of the other.” ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 25 (Amy Gutmann ed., 1997).

<sup>147</sup> *Melendez-Diaz*, 557 U.S. at 314. Similarly, the majority rejected any assertion that the lab analysts herein were somehow immunized from confrontation because they were not conventional witnesses which the Sixth Amendment demanded be confronted. Justice Scalia opined that the historical foundation of the Sixth Amendment “identifies the core of the right to confrontation, not its limits.” *Id.* at 315.

<sup>148</sup> *Id.* at 315.

<sup>149</sup> *See id.* at 315–16.

<sup>150</sup> *Id.* at 316.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* The point is moot here anyway, said Justice Scalia, since the lab reports were created at the express request of the police. *Id.* at 316–17.

distinguish testimony recounting past events in contrast to testimony, such as at issue here, rooted in supposedly neutral, scientific testing.<sup>154</sup> As before, Justice Scalia scoffed at this proposition, ridiculing it as “little more than an invitation to return” to the discredited and now-discarded theorem of *Roberts* for the purpose of exalting the supposed reliability of scientific evidence and placing it beyond the Confrontation Clause.<sup>155</sup> The Supreme Court would have none of it.<sup>156</sup>

Adhering to the rightful focal point already established in *Crawford*, the majority reminds that the “ultimate goal” of the Confrontation Clause is to ensure the reliability of evidence by a procedural process, not by its own sake.<sup>157</sup> Once more, there is no adequate substitute for the “crucible of cross-examination” when it comes to the guarantees of the Sixth Amendment.<sup>158</sup>

The view of the *Melendez-Diaz* Court can be summed up as follows: while there may be alternative pathways to challenging forensic evidence, the Constitution recognizes only one—confrontation.<sup>159</sup> What immediately followed was this typical “Scaliaism”: “We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available.”<sup>160</sup>

In furtherance of this line of reasoning, the majority ventured that so-called neutral scientific testing is not always as neutral as the prosecution here assumes.<sup>161</sup> Forensic evidence may be scientific, but, in short order: (a) it is not “uniquely immune” from the risk of manipulation; (b) analysts can still feel pressure or, conversely, incentive from the police or prosecutors; and (c) an incompetent or sloppy analysis can taint results just as surely as a fraudulent one.<sup>162</sup> It is the tempestuous storm of confrontation that assures veracity, said Justice Scalia.<sup>163</sup>

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<sup>154</sup> *Id.* at 317.

<sup>155</sup> *See id.*

<sup>156</sup> *Id.* at 318.

<sup>157</sup> *Id.* at 317.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 318.

<sup>160</sup> *See id.*

<sup>161</sup> *Id.*

<sup>162</sup> *See id.* at 318–19. Was Justice Scalia prescient here? A contemporary news report tells us that this same Massachusetts state crime lab was recently shut down by the Commonwealth for “sloppiness and in some cases . . . deliberately mishandling” drug sample tests in over 50,000 cases. *Massachusetts Crime-Lab Scandal Grows*, USA TODAY, Sept. 6, 2012, at A3. Admittedly separated by at least three years, this is more than high irony. It convincingly demonstrates Justice Scalia’s wisdom that confrontation is an absolute necessity to establish the accuracy of even

Next was the prosecutor's argument that the analysts' affidavits herein were akin to business records, and therefore beyond the scope of Confrontation Clause inquiry.<sup>164</sup> The majority now turned to dispose of that assertion, and dispose of it they did.<sup>165</sup> First, Justice Scalia was eminently fair in conceding that documents kept in the regular course of business were normally admitted into evidence under the tried and true exceptions to the hearsay rule.<sup>166</sup>

Yet, just as fairly, and just as quickly, Justice Scalia declared that "if the regularly conducted business activity is the production of evidence for use at trial," the recordations of such are inapposite to customary business records, and the hearsay exceptions do not apply.<sup>167</sup> The lab certificates here, like police reports elsewhere, are simply not ordinary business records, and the majority would not let them evade Confrontation Clause scrutiny on that basis.<sup>168</sup>

Continuing, Justice Scalia criticized the prosecution here for misconstruing the interaction between the hearsay exceptions for business records and the guarantee of the Confrontation Clause.<sup>169</sup> "Business and public records are generally admissible . . . because . . . they are not testimonial."<sup>170</sup> Put another way, such papers do not evade the Sixth Amendment; rather, they fall in a place well outside it.<sup>171</sup> It is beyond peradventure here that the analysts' certifications were "prepared specifically for use at [Melendez-Diaz's] trial" and, just as inarguably, he

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supposedly reliable scientific evidence.

<sup>163</sup> See *Melendez-Diaz*, 557 U.S. at 319.

<sup>164</sup> *Id.* at 321.

<sup>165</sup> See *id.*

<sup>166</sup> *Id.* See FED. R. EVID. 803(6). In pertinent part, the "business records" exception of Rule 803 makes admissible the following: "A record of an act, event, condition, opinion, or diagnosis . . . made at or near the time by—or from information transmitted by—someone with knowledge . . . [if] kept in the course of a regularly conducted [business] activity . . ." *Id.*

<sup>167</sup> *Melendez-Diaz*, 557 U.S. at 321 (citing *Palmer v. Hoffman*, 318 U.S. 109, 113–14 (1943) (finding records created to produce evidence for court not exempted as ordinary business records)).

<sup>168</sup> *Id.* at 321–22. See also FED. R. EVID. 803(8) (excluding reports of law enforcement personnel). Parenthetically, Justice Scalia swiftly discarded the prosecution's comparison here to the long-acknowledged admissibility of a coroner's report, noting that was a feature of English, not American, common law. *Melendez-Diaz*, 557 U.S. at 322.

<sup>169</sup> *Melendez-Diaz*, 557 U.S. at 324.

<sup>170</sup> *Id.*

<sup>171</sup> See *id.*

had a right to confront the authors of those testimonial documents.<sup>172</sup>

In a similar view, Justice Scalia made short shrift of the allegation that Melendez-Diaz's power to subpoena the relevant lab technicians sufficed to remove any Confrontation Clause obstacles.<sup>173</sup> Not so, ruled the majority.<sup>174</sup>

The power to subpoena witnesses cannot ever be equated with the right to confront them; nor can the former replace the latter.<sup>175</sup> Such a theory, if allowed to be carried out, would drastically and unconstitutionally shift the burden from the prosecution presenting witnesses to be confronted to confining defendants to picking and choosing which adverse witnesses to subpoena.<sup>176</sup>

Then, in a closing *coup de grâce*, Justice Scalia flatly rejected the prosecution's prayer that the Confrontation Clause be somehow "relax[ed]" to accommodate the necessities of trial.<sup>177</sup> We are not at liberty to bypass the Confrontation Clause, rebuked the eminent Justice, any more than the Court has the textual authority to set aside the rights to trial by jury or the right to refrain from self-incrimination.<sup>178</sup>

And in a classic retort to the prosecution's "dire predictions" about burdening the Nation's trial courts, the majority boldly predicted "that the sky will not fall after today's decision."<sup>179</sup> After all, "it has not done so already," after two centuries of enduring whatever burdens the Confrontation Clause imposes upon the adversarial process.<sup>180</sup>

As concisely as he began, Justice Scalia concluded the same way for the *Melendez-Diaz* majority: the instant case was little more than a straightforward application of *Crawford*, with the exact same results.<sup>181</sup> The Sixth Amendment prohibits prosecution by affidavits and similar

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 325.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *See id.* at 325–26. Nearly as an aside, Justice Scalia alluded to commonplace practices that avoid overburdening the courts in the first place, including, but not limited to, prosecutors and defense attorneys stipulating to the identity of contraband, such as the substance brought into evidence in the instant case, and thereby rendering superfluous any lab report at all. *Id.* at 327–28. As Justice Scalia so coyly put it, the predicted parade of horrors is not on the schedule. *Id.* at 328.

<sup>181</sup> *Id.* at 329.

testimonial statements where confrontation is absent.<sup>182</sup> Melendez-Diaz's conviction was reversed, but, far more important, the Confrontation Clause remained as robust as ever.<sup>183</sup>

For the moment, we touch briefly upon the dissent, as written by Justice Kennedy.<sup>184</sup> The focus of the dissenters' ire was its claim that the majority was sweeping away accepted practices governing the admission of scientific evidence without the explicit need for the testimony of the technicians behind it.<sup>185</sup> The primary concerns voiced by the dissenters coalesced around the following four themes.

First, the right to confront the responsible analyst would quickly descend into a veritable morass of who was the proper analyst to be confronted.<sup>186</sup>

Second, today's ruling would spread far beyond the instant context of the Confrontation Clause versus scientific analysis, disrupting chain of custody and document authentication inquires as well with its new approach.<sup>187</sup>

Third, "[f]or the sake of negligible benefits" the tenor of forensic investigation would be thrown into disarray on a nationwide scale.<sup>188</sup>

Last, but not least, Justice Kennedy opined this was all so unnecessary because the Confrontation Clause's own words do not necessitate this result.<sup>189</sup> The clear text of the Sixth Amendment guarantees the right of the accused to confront witnesses, and, in the view of the dissent, neither a lab analyst nor her report constituted a conventional witness.<sup>190</sup>

Indeed, by choosing to conclude his dissent with the fourth and final objection, Justice Kennedy and his fellow Justices claimed paternity for this theory: "[l]aboratory analysts who conduct routine scientific tests are not . . . conventional witness to whom the Confrontation Clause refers."<sup>191</sup>

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 330–57 (Kennedy, J., dissenting). Joining in the dissent were Chief Justice Roberts, Justice Breyer, and Justice Alito. *Id.* Please note this is a cohort we will see again in short order in this Article.

<sup>185</sup> *Id.* at 330.

<sup>186</sup> *Id.* at 332–35.

<sup>187</sup> *Id.* at 335.

<sup>188</sup> *Id.* at 340–343.

<sup>189</sup> *Id.* at 343.

<sup>190</sup> *Id.* at 343–44.

<sup>191</sup> *Id.* at 357.



Thus endeth the *Melendez-Diaz* dissent, and the Court's first endeavor at refining its *Crawford* maxims.

#### IV. THE TRILOGY FULFILLED: *BULLCOMING* AND THE PROMISE OF CONFRONTATION

It was only a short time ago that the Supreme Court set into place the third leg of its triad of current Sixth Amendment jurisprudence. That last set piece of the Confrontation Clause trilogy was *Bullcoming v. New Mexico*,<sup>192</sup> to which we now draw your attention.

The initiating set of facts was prosaic enough, and once again gave evidence that some of the greatest legal landmarks come from the most banal of situations. One August night in 2005, Donald Bullcoming drove his vehicle into the rear end of a pick-up truck.<sup>193</sup> The pick-up's driver, smelling alcohol on Bullcoming's breath, called the police.<sup>194</sup>

For whatever reason, Bullcoming left the accident scene and was later detained by the police, who then administered various field sobriety tests.<sup>195</sup> Bullcoming failed the tests, and was arrested for "DWI"—driving while intoxicated.<sup>196</sup>

Subsequently, Bullcoming refused to take a breath test, as was his right, so the police then obtained a warrant to test his blood—as was their right.<sup>197</sup> Briefly recounted here, the blood was drawn, the blood was tested, and, unfortunately for him, Bullcoming's blood alcohol content ("BAC") was found to be at "an inordinately high level" per the lab report.<sup>198</sup>

The substantive part of the lab report was the certificate signed by one Curtis Caylor, the police lab's forensic analyst, who had actually subjected Bullcoming's blood sample to the test.<sup>199</sup> Caylor attested to not only Bullcoming's BAC, but the procedures he had followed in testing the blood sample.<sup>200</sup> A principal representation by the analyst was that nothing had

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<sup>192</sup> 131 S. Ct. 2705 (2011).

<sup>193</sup> *Id.* at 2710.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *See id.*

<sup>198</sup> *Id.* Delving into just a bit of detail here, the lab report disclosed the time, date, and reason for detaining Bullcoming, and set forth various certifications by the nurse who drew his blood and the lab's intake clerk. *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 2710–11. For instance, Caylor confirmed he received the sample intact, broke its seal

transpired which might have affected the integrity of the blood sample or otherwise marred the testing process.<sup>201</sup>

Here, the *Bullcoming* opinion paused to make a crucial point. The lab here (and, impliedly, elsewhere in the field of forensic analysis) employed gas chromatograph machines to determine BAC levels.<sup>202</sup> To use such a device correctly “requires specialized knowledge and training” exercised over multiple steps in the testing process.<sup>203</sup> Indeed, while the Court reduced the following to a footnote discussion, we think it significant enough to note in our text here that the prosecution contended that the operation of a gas chromatograph involves nothing more than looking at a gauge and writing down the results.<sup>204</sup> As we will see shortly, that explanation took on great significance for the *Bullcoming* Court.

As aforesaid, those opening facts set the stage. The real excitement, if you will, took place at Bullcoming’s trial for aggravated DWI, a much more serious charge leveled at him plainly because his BAC level was well in excess of the statutory prohibitions.<sup>205</sup> Notably, the timing of the trial was significant; it took place post-*Crawford* but before the decision in *Melendez-Diaz* was handed down by the Supreme Court.<sup>206</sup>

From the outset, the trial had a major surprise. The trial court was informed that the lab analyst Caylor was on an unpaid leave, but the reason for his ostensibly forced absence was not revealed.<sup>207</sup> Therefore, the prosecution would not be calling him to the stand.<sup>208</sup>

Rather, the prosecution would seek the introduction of Caylor’s lab certification into evidence as a “business record” via the testimony of one

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only in the laboratory, followed all relevant procedures, and that the analytical statements set forth in the body of the report were correct. *Id.* at 2710.

<sup>201</sup> *Id.* at 2710–11. It was also certified elsewhere, by another lab employee, that Caylor was qualified to conduct the BAC test in the first instance, and that all established protocols had been followed. *Id.* at 2711.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* To be certain, even Supreme Court opinions have their lighter moments. In a footnote, the majority quotes the appendix, wherein Bullcoming’s trial judge reminisces that, in his days of private practice, breath and blood tests for DWI cases did not exist. *Id.* at 2712 n.3 “They just brought in the cop, and the cop said, ‘Yeah, he was drunk.’” *Id.* (internal quotations marks omitted). A fitting riposte to anyone who claims judges lack a sense of humor.

<sup>204</sup> *Id.* at 2711 n.1.

<sup>205</sup> *Id.* at 2711.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 2711–12.

<sup>208</sup> *Id.* at 2711.

Gerasimos Razatos, a fellow lab scientist, but one “who had neither observed nor reviewed” his predecessor’s analysis.<sup>209</sup> Objections to both procedures were overruled, and the report and testimony were allowed.<sup>210</sup> Bullcoming’s conviction followed.<sup>211</sup>

Bullcoming took an appeal,<sup>212</sup> and again his timing was significant. By now, *Melendez-Diaz* was the law of the land.<sup>213</sup> Yet that made little difference to the New Mexico Supreme Court, for, while it acknowledged the lab report was indeed testimonial in light of *Melendez-Diaz*, it was nevertheless admissible.<sup>214</sup> New Mexico’s highest state court declared that technician Caylor “was a mere scrivener, who simply transcribed the results generated by the gas chromatograph machine.”<sup>215</sup>

As a second justification for its decision below, the state tribunal declared that, notwithstanding his nonparticipation in Caylor’s actual lab work, Razatos qualified as an expert witness as to the operation of the gas chromatograph machine in conducting BAC tests.<sup>216</sup> And since Razatos was unquestionably a live witness available for cross-examination, Bullcoming’s confrontation right was thereby satisfied.<sup>217</sup> Put another way, New Mexico’s highest state court found that Razatos was an acceptable surrogate for the absent Caylor.<sup>218</sup> On these facts, the stage was set for Supreme Court review, and to that we now proceed.

Now writing for the high Court, Justice Ginsburg posed the precise question before the Justices in *Bullcoming*: does the Confrontation Clause condone the introduction into evidence of a testimonial certification via the testimony of a witness who did not perform or observe the underlying laboratory test nor execute the certification integrated into that same lab report?<sup>219</sup>

Justice Ginsburg held no one in suspense. Controlling Supreme Court

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<sup>209</sup> *Id.* at 2712.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 2713 (internal quotations marks omitted). *See also* State v. Bullcoming, 226 P.3d 1, 8–9 (N.M. 2010), *rev’d*, 131 S. Ct. 2705.

<sup>216</sup> *Bullcoming*, 131 S. Ct. at 2712.

<sup>217</sup> *Id.*

<sup>218</sup> *See id.* at 2713.

<sup>219</sup> *Id.* at 2709, 2713.

precedent, she declared, demands but one result.<sup>220</sup> “As a rule,” out-of-court testimonial statements, offered to prove facts, must be excluded at trial, unless the witness is unavailable and the defendant had a prior opportunity for the confrontation of that witness.<sup>221</sup>

Coining the phrase “surrogate testimony,”<sup>222</sup> the Court declared that both the lab report and Razatos’ testimony failed this basic test, and therefore should never have been allowed into evidence.<sup>223</sup> Accordingly, Bullcoming’s conviction had to be reversed.<sup>224</sup> Significantly, Justice Ginsburg commenced her analysis by classifying the *Crawford* decision as path-marking in this realm of Sixth Amendment development, largely due to its rejection of *Roberts* now-discarded vagaries of “reliability.”<sup>225</sup>

Next, the majority relates how *Crawford* was the progenitor of *Melendez-Diaz*, and today we witness its further progeny in *Bullcoming*.<sup>226</sup> Among other things, Justice Ginsburg alludes to how this trilogy outlines “the compass of the Confrontation Clause,” including, most certainly, the refusal in *Melendez-Diaz* to fashion some kind of forensic evidence exception to the Sixth Amendment’s guarantees.<sup>227</sup>

Turning to the case at bar, Justice Ginsburg apparently took umbrage of the prosecution’s failure to make full disclosure regarding Caylor’s unexplained absence.<sup>228</sup> Combined with the defendant’s lack of opportunity to cross-examine the AWOL analyst, the holdings of *Crawford* and *Melendez-Diaz* “weighed heavily in Bullcoming’s favor.”<sup>229</sup>

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<sup>220</sup> *Id.* at 2713.

<sup>221</sup> *Id.* at 2710, 2713.

<sup>222</sup> *See id.* at 2710, 2714.

<sup>223</sup> *Id.* at 2715–17.

<sup>224</sup> *See id.* at 2710, 2719. We duly note, but find of no moment, that Justices Sotomayor, Kagan, and Thomas joined the majority in all but the latter parts of the opinion. *Id.* at 2709. Such mild divergence does not, in our estimation, damage the overall cohesiveness of the majority of the Justices in rendering this decision.

<sup>225</sup> *See id.* at 2713. *See also* *Davis v. Washington*, 547 U.S. 813, 825 n.4 (2006) (*Crawford* overruled *Roberts* “by restoring the unavailability and cross-examination requirements.”).

<sup>226</sup> *See Bullcoming*, 131 S. Ct. at 2713–14.

<sup>227</sup> *Id.* The majority parenthetically qualifies the dissent herein as aimed less at the instant case than at the supposed faults of its forebears *Crawford* and *Melendez-Diaz*. *Id.* at 2713–14 n.5. *See also* *Giles v. California*, 554 U.S. 353, 374 (2008) (Scalia, J.) (“[T]he dissent issues a thinly veiled invitation to overrule *Crawford* and adopt an approach not much different from the regime of *Ohio v. Roberts* . . .”).

<sup>228</sup> *Bullcoming*, 131 S. Ct. at 2715–16.

<sup>229</sup> *Id.* at 2714.

The majority then posits two paramount reasons why the surrogate testimony proffered here could not pass muster under the Confrontation Clause.<sup>230</sup> First, the high Court takes up the state court's determination that the lab tech Caylor was a mere scrivener, and that Bullcoming's true accuser was not a man but a machine—in this instance, the gas chromatograph machine.<sup>231</sup>

Wholly dissatisfied with the state tribunal's conclusion, Justice Ginsburg countered that Caylor did much more than simply write down a machine-generated number.<sup>232</sup> Contrary to the lower court's assertion that the analyst made no interpretation nor exercised independent judgment, the majority catalogued a number of steps Caylor took in administering the BAC test.<sup>233</sup> Caylor's certifications, most especially his representations as to the integrity and validity of the testing process, were *human*, not mechanical, actions, and therefore ripe for cross-examination.<sup>234</sup>

More to the point, Justice Ginsburg expressed great concern that the New Mexico court's rationalizations “raise[d] red flags.”<sup>235</sup> The esteemed Justice made the common sense observation that most fact witnesses testify to events such as time, date or traffic conditions.<sup>236</sup>

The majority posed this plain and simple argument: could a police officer other than the actual witness testify as to the house number of where she found the “smoking gun” or the like?<sup>237</sup> “As our precedent makes

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<sup>230</sup> *Id.*

<sup>231</sup> *Id.* Fans of *Star Trek: The Original Series* (Paramount Pictures 1966) will find this reminiscent of the episode “Court Martial” (season one, episode twenty), wherein the trial of Captain Kirk for dereliction of duty causing the death of a crewmember focused upon his actual accuser—the *Enterprise*'s computer log. *Star Trek: Court Martial* (CBS television broadcast Feb. 2, 1967). Hence, the “man v. machine” cinematic device that ironically appears to be replicated here in real life.

<sup>232</sup> *Bullcoming*, 131 S. Ct. at 2715. In cementing the need for the confrontation of the lab analyst here, Justice Ginsburg earlier in her opinion had a lengthy discussion of the more scientific aspects of the gas chromatograph machine, pointedly declaring that “[n]or is the risk of human error so remote as to be negligible” in its use. *Id.* at 2711 n.1.

<sup>233</sup> *Id.* at 2714. Among other things listed by Justice Ginsburg, Caylor certified he received the blood sample intact, he verified its authenticity, and he followed prescribed protocols in carrying out the test. *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 2715.

<sup>236</sup> *Id.* at 2714.

<sup>237</sup> *See id.* at 2714–15.

plain,” asserted Justice Ginsburg, “the answer is emphatically ‘No.’”<sup>238</sup>

Given such, the prosecution’s evidence in the instant case suffered from the same debilitation. “Caylor certified to more than a machine-generated number,” said the Court, implicitly (some might even say explicitly) rejecting the state court’s misguided notion that Caylor was but an automaton, lacking judgment or interpretative skills.<sup>239</sup>

Reaffirming the core holding of *Crawford*, the *Bullcoming* Court found the former made it well-settled that the supposedly obvious reliability of a testimonial statement “does not dispense with the Confrontation Clause.”<sup>240</sup> As precedent already makes indisputable, purported reliability falls before the absolute requirement that reliability be assessed, and specifically assessed in the now-legendary “crucible of cross-examination.”<sup>241</sup>

Accordingly, the Court held the analyst that writes the lab report must be the one who testifies as to that lab report, and without substitution.<sup>242</sup> Since the evidence here failed that overriding litmus test, it had no place at *Bullcoming*’s trial.<sup>243</sup>

In this same vein, the Justices now turned to review the validity of deeming Razatos as acceptable in the distinguishable role of an expert witness.<sup>244</sup> Once again, Justice Ginsburg found unavailing the scientist’s overarching expertise as a rationale for making him an acceptable surrogate for his absent comrade.<sup>245</sup> Razatos’ main failing was that he “could not convey” the crucial events that only the missing Caylor personally witnessed or participated in.<sup>246</sup>

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<sup>238</sup> *Id.* at 2715. See *Davis v. Washington*, 547 U.S. 813, 826 (2006) (Scalia, J.) (“[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant . . .”).

<sup>239</sup> *Bullcoming*, 131 S. Ct. at 2715. Parenthetically, the majority notes that the “comparative reliability” of a machine-based lab report is still insufficient to trump the defendant’s confrontation prerogatives. *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* (internal quotation marks omitted). See also *Perry v. New Hampshire*, 132 S. Ct. 716, 723 (2012) (Ginsburg, J.) (“The Constitution . . . protects a defendant from conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit.”).

<sup>242</sup> *Bullcoming*, 131 S. Ct. at 2715.

<sup>243</sup> *Id.* at 2716.

<sup>244</sup> *Id.* at 2715.

<sup>245</sup> *Id.* at 2715–16.

<sup>246</sup> *Id.* at 2715.

More importantly, testimony by a surrogate could not expose deficiencies or outright lies in Caylor's certifications.<sup>247</sup> If Caylor had testified live, opined the majority, he would have been subject to an open season of cross-examination, including questions as to his competency, veracity, or lack thereof.<sup>248</sup>

Not to be misread, Justice Ginsburg was not throwing gratuitous aspersions upon the absent Caylor; she was merely outlining the potential questions cross-examination might have raised, but could not due to Caylor's unexplained absence.<sup>249</sup>

At the end of the day, Justice Ginsberg intoned, Caylor's testimony would have been well beyond a mere formality.<sup>250</sup> Indeed, in a sharply placed footnote, Justice Ginsburg pointed to Razatos's trial testimony wherein he admitted as much, specifically that one cannot really attest to a lab analysis in which one did not personally participate.<sup>251</sup>

This disassembly of the surrogate testimony was not yet complete, however.<sup>252</sup> It was here the Justice Ginsburg possibly made her greatest contribution to the constitutional theorems relevant to this point.<sup>253</sup>

Most essential to understanding this fundamental guarantee, opined Justice Ginsburg, is that the text of the Sixth Amendment is bereft of exceptions to the confrontation requirement.<sup>254</sup> *Crawford* stressed that maxim, she noted. Concomitantly, and in a marvelously understated (and

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<sup>247</sup> *Id.* Justice Ginsburg found it "[s]ignificant" that Razatos had no knowledge of the reasons behind Caylor's unpaid leave of absence. *Id.* at 2715–16.

<sup>248</sup> *Id.* at 2716.

<sup>249</sup> *See id.* at 2715–16. Parenthetically, the majority realistically supposed that Caylor, in all likelihood, would not have a specific recollection of a single test, since undoubtedly he performed many such BAC analyses. *Id.* at 2715 n.7. But that was not the point, offered Justice Ginsburg. The true point is that, with Caylor on the stand and under oath, Bullcoming's attorney could have raised any number of questions pertaining to Caylor's proficiency, the steps he took in making the test, and so on. *Id.* Particularly biting was Justice Ginsburg's suggestion that the defense would have quite likely asked Caylor why he was put on leave, but, of course, it could not, because he did not appear to testify in person. *See id.*

<sup>250</sup> *Id.* at 2716.

<sup>251</sup> *Id.* at 2715 n.8.

<sup>252</sup> *See id.* at 2716.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* *See also* *Perry v. New Hampshire*, 132 S. Ct. 716, 723 (2011) (Ginsburg, J.) ("Constitutional safeguards available to defendants to counter the State's evidence include the Sixth Amendment rights to . . . confrontation plus cross-examination of witnesses." (citations omitted)).

likely underappreciated) exercise of judicial restraint, the sage Justice denies the right of the courts to extrapolate the words of the Confrontation Clause itself, and then selectively enforce the right of confrontation to suit the judiciary's view as to what that liberty should encompass in its application.<sup>255</sup>

In a masterful exposition of the essence of this constitutional guarantee, Justice Ginsburg vigorously declared that the Confrontation Clause “does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another’s testimonial statements provides a fair enough opportunity for cross-examination.”<sup>256</sup> In sum, “fair enough” is precisely not fair at all.<sup>257</sup>

In closing this portion of the majority’s reasoning, Justice Ginsburg was as brief as she was unyielding in defense of the Confrontation Clause. “In short,” once the prosecution sought to admit into evidence Caylor’s certification, Bullcoming had an absolute right to confront the analyst who actually conducted the BAC test.<sup>258</sup> “Our precedent cannot sensibly be read any other way.”<sup>259</sup>

This done, it was now finally time for the Justices to turn to the second crux of the prosecution’s argument, that the BAC test was “nontestimonial” in character, and therefore exempt from Confrontation Clause scrutiny.<sup>260</sup>

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<sup>255</sup> *Bullcoming*, 131 S. Ct. at 2716.

<sup>256</sup> *Id.*

<sup>257</sup> *See id.*, where the Court held that the violation of a particular guarantee of the Sixth Amendment could not be redeemed by some substituted procedure, no matter how evenhanded the proceeding is otherwise. *Accord* *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145 (2006). Furthermore, once the Amendment’s constitutional guarantee is violated, nothing else need be added, for example, a showing of prejudice, to place the violation completely beyond salvage. *Id.* at 145–46. Linking that earlier precept to the instant case, Justice Ginsburg declared that if the promise of the Sixth Amendment is left unfulfilled by substitute counsel, then confrontation of a substitute witness is identically unredeeming of the Confrontation Clause guarantee. *Bullcoming*, 131 S. Ct. at 2716.

<sup>258</sup> *Bullcoming*, 131 S. Ct. at 2716.

<sup>259</sup> *Id.* Referencing the related issue of establishing chain of custody, Justice Ginsburg recalled the Court’s decision in *Melendez-Diaz* that, while it is the prosecution’s choice as to what steps are crucial to establish the custodial chain of evidence, and therefore what witnesses to call in that regard, it does not alter one iota the defendant’s guarantee of confrontation once that testimony is introduced live. *Id.* at 2712 n.2. (citation omitted).

<sup>260</sup> *Id.* at 2716. It is well established that a statement is “testimonial” if its primary purpose is to establish or prove past events potentially relevant to a subsequent criminal prosecution. *Id.* at 2714 n.6 (citing *Davis v. Washington*, 547 U.S. 813, 822 (2006)). *Davis* crafted the so-called “police emergency exception” to the strictures of the Confrontation Clause. *Davis*, 547 U.S. at



Expressing in words what might be deemed implicit surprise (and possibly dismay), the majority found “inescapable” the conclusion that *Melendez-Diaz* precluded that very argument.<sup>261</sup>

Justice Ginsburg immediately set to the task of dismembering the prosecution’s contentions that, in some way, Caylor’s lab report was neither adversarial nor inquisitorial.<sup>262</sup> If the prosecution was to be believed, she pondered, the analyst’s writings were the mere observations of a disinterested scientist, undertaken pursuant to some neutral duty as a public servant.<sup>263</sup>

Most assuredly, Justice Ginsburg made short shrift of all that. The foregoing argument “fares no better here than it did in *Melendez-Diaz*,” she declared.<sup>264</sup> As *Melendez-Diaz* made explicit, any document created specifically for an evidentiary purpose must be classified as testimonial for purposes of the Confrontation Clause.<sup>265</sup> The foregoing Court precedent permits no divergent reading.<sup>266</sup>

Adjusting its tactics, the prosecution then emphasized that Caylor’s report was an unsworn declaration.<sup>267</sup> What of it, opined Justice Ginsburg? Swiftly disposing of this alternative argument, the Court reminded that the absence of an oath is not dispositive in determining if a statement is testimonial in nature.<sup>268</sup>

In a further remonstrance, Justice Ginsburg stated again the Court had already “rejected as untenable” any interpretation of the Confrontation

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814. There Justice Scalia quoted the tape of the 911 call to the police, made while the declarant/victim was literally being attacked by the accused as she telephoned the police. *Id.* at 817–18. The Court ruled that a 911 call is not testimonial, and is thus exempt from the guarantee of confrontation, because such a declaration is not primarily designed to establish a past fact, as is conventional testimony, but rather is intended to “describe current circumstances requiring police assistance.” *Id.* at 827. Therefore, Justice Scalia opined, it is not a violation of the right of confrontation to admit a 911 call or similar statement made during emergent circumstances because the testimony’s “primary purpose [is] to enable police assistance to meet an ongoing emergency.” *Id.* at 828. And so the “police emergency exception” to the Sixth Amendment was born.

<sup>261</sup> *Bullcoming*, 131 S. Ct. at 2716.

<sup>262</sup> *Id.* at 2717.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *See id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* *See Crawford v. Washington* 541 U.S. 36, 52 (2004).

Clause that would let an unsworn declaration slip by untested, while delimiting the right to confrontation solely to documents executed under oath.<sup>269</sup> Such an “implausible” reading would fly in the face of the text of the Sixth Amendment and the precedents regarding the same.<sup>270</sup> To be sure, this Court would not condone such a view, as it would render the Confrontation Clause “easily erasable.”<sup>271</sup>

As an aside, the Court found a distinct similarity between the lab report in the instant case and the substance analysis at the heart of *Melendez-Diaz*.<sup>272</sup> In both cases, physical evidence seized by police officers went to a forensic laboratory for analysis.<sup>273</sup> Technicians performed tests and certified the results.<sup>274</sup> The lab techs then formalized their reports by virtue of their signatures in both instances.<sup>275</sup>

In conclusion, Justice Ginsburg deemed these “formalities . . . more than adequate” in substance to characterize Caylor’s report here as a testimonial document.<sup>276</sup> And, to be quite certain, the lack of a trivial notarization of Caylor’s signature was not enough to transmogrify his certification into a non-testimonial document beyond the reach of the Confrontation Clause.<sup>277</sup>

Nearly done with that day’s work in *Bullcoming*, Justice Ginsburg then turned to dispose of the prosecution’s broad policy argument, to wit, that an “unbending application” of the Confrontation Clause would unduly burden prosecutors across the land.<sup>278</sup> As before, this “refrain [already] rehearsed and rejected” in *Melendez-Diaz* was rejected once again.<sup>279</sup>

The strictures of the Confrontation Clause are not mere conveniences, indicated Justice Ginsburg.<sup>280</sup> They are constitutional guarantees that, “we reiterate,” must be honored and cannot be disregarded lightly, if at all.<sup>281</sup>

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<sup>269</sup> *Bullcoming*, 131 S. Ct. at 2717. See *Crawford*, 541 U.S. at 52–53 n.3.

<sup>270</sup> *Bullcoming*, 131 S. Ct. at 2717.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* This is the section of the opinion that Justices Sotomayor, Kagan, and Thomas declined to join.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 2718.

<sup>281</sup> See *id.*

And once more, the Justices were “dubious” about “the predictions of dire consequences” decried by the prosecution here.<sup>282</sup>

Here the high Court teaches us a simple lesson. As always, the burden of proof lies with the prosecution.<sup>283</sup> Ergo, the Confrontation Clause cannot be interpreted in such a way as to shift that burden to the accused.<sup>284</sup>

Put in the light of the instant case, it was not Bullcoming’s burden to demand a retesting of his blood due to Caylor’s unexpected unavailability for trial.<sup>285</sup> Rather, that burden remained where it should, with the prosecution, here in the shape of a fresh BAC test conducted by Razatos as Caylor’s surrogate.<sup>286</sup>

To further defuse these policy arguments, Justice Ginsburg called upon well-known realities. It was beyond peradventure, she noted, that, even before *Crawford* was handed down, prosecutors routinely called the relevant forensic analyst to the stand.<sup>287</sup> Implicitly, prosecutors therefore know well in advance of trial the need to have handy the analyst who actually performed the test, and not a surrogate.<sup>288</sup> Justice Ginsburg inferred from judicial history the conventional wisdom that prosecutors know full well which analyst is needed for which trial, and thus generally do not waste time and effort with substitutes.<sup>289</sup>

In sum, in this aspect Justice Ginsburg rejected the prosecution’s cry that the sky would fall if Caylor’s lab report, and others like it across the Nation, were excluded on Confrontation Clause grounds.<sup>290</sup> Not a surprising conclusion, since the Madame Justice was essentially reiterating

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<sup>282</sup> *Id.* In a light rebuke, Justice Ginsburg rightly pointed out how the prosecution could have avoided this entire conflagration by the simple expedient of having had Razatos retest the still-viable sample of Bullcoming’s blood prior to his testimony. *Id.*

<sup>283</sup> *See id.*

<sup>284</sup> *See id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *See id.*

<sup>289</sup> *See id.* The Justice emoted the highlights of the equally conventional wisdom that: (a) so few cases actually go to trial in the Nation’s courts, the vast majority being resolved by plea bargain; (b) the defense and the prosecution routinely stipulate to the admission of lab reports, as such matters are usually beyond good faith dispute; and (c) forensic analysts in reality testify in only a very few cases, because the defense is better served by avoiding the live appearance of a witness whose testimony will, in all likelihood, solidify the case against the defendant. *Id.* at 2718–19.

<sup>290</sup> *See id.* at 2719.

the “Chicken Little” metaphor previously employed by her colleague, Justice Scalia, in *Melendez-Diaz*.<sup>291</sup> To be sure, it was no less true here in this New Mexico DWI case than it was for the drug bust in Massachusetts.<sup>292</sup>

For all these good and sundry reasons, the Supreme Court spoke in *Bullcoming*, and overturned the defendant’s conviction for reason of the denial of his Confrontation Clause right to confront the lab analyst whose report accused him.<sup>293</sup>

In the final analysis, *Bullcoming* demonstrated the Supreme Court’s unrelenting adherence to the strictures of the Confrontation Clause, even when dealing with arguably machine-made forensic evidence.<sup>294</sup> As in *Melendez-Diaz*, the high Court would not condone its exemption from the “crucible of cross-examination,” nor undermine the guarantee of confrontation over concerns for the expediciencies of the adversarial process.<sup>295</sup> And so *Bullcoming* was added to the pantheon of Confrontation Clause jurisprudence.

Far more important, the great modern trilogy of Confrontation Clause jurisprudence was complete. And it would take only one short year for the newly completed triumvirate to receive its first major test.

Before completely departing *Bullcoming*, however, we must acknowledge the prescience of Justice Sotomayor in her concurrence.<sup>296</sup> While joining her fellows in finding the BAC report here to be testimonial, and confrontation to therefore be mandatory, Justice Sotomayor first imparted her own wisdom on the linchpin of formality in Sixth Amendment analysis.<sup>297</sup>

The learned Justice, while conceding that formality is not the “sole touchstone” of Confrontation Clause inquiry, nonetheless stressed its importance is shedding light on whether or not a particular statement is aimed at providing trial testimony.<sup>298</sup> Indeed, Justice Sotomayor made the

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<sup>291</sup> See *id.*; *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325 (2009).

<sup>292</sup> Here the Court catalogued all the things prosecutors do, i.e., schedule trials, adjourn trials, et cetera, to ensure the analyst who conducted a particular test is available to give in-person testimony and, concomitantly, be confronted by the accused. See *Bullcoming*, 131 S. Ct. at 2719.

<sup>293</sup> *Id.*

<sup>294</sup> See *id.* at 2718–19.

<sup>295</sup> *Id.* at 2719 n.11.

<sup>296</sup> *Id.* at 2719 (Sotomayor, J., concurring).

<sup>297</sup> See *id.* at 2719–21.

<sup>298</sup> *Id.* at 2721 (internal quotations marks omitted).

shrewd observation that while the formality of a statement is a valid primary indicator of testimonial intent, it cannot be the sole indicator “because it is too easily evaded.”<sup>299</sup>

But the true merit of Justice Sotomayor’s concurrence is found in the foresight it exhibited. Cataloguing what distinguished the instant case from its immediate predecessor, *Melendez-Diaz*, Justice Sotomayor vigorously pointed out that *Bullcoming* was “not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not . . . [in] evidence.”<sup>300</sup>

The Court “would face a different question” when such a scenario was presented to it for judgment noted the eminent jurist.<sup>301</sup> In this fashion, Justice Sotomayor presaged the exact case for Confrontation Clause analysis to be decided a mere one year later, which brings us to the following.

#### V. WILLIAMS: THE TRILOGY REFINED—OR DENIED?

We now come to the penultimate case in our analysis of the current Confrontation Clause jurisprudence of the Supreme Court, *Williams v. Illinois*.<sup>302</sup> Yet as our readers know full well, nowhere is the old adage “past is prologue” more apt than for the teachings of the high Court. Its

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<sup>299</sup> *Id.* at 2721 n.3. See also *Davis v. Washington*, 547 U.S. 813, 838 (2006) (Thomas, J., concurring in part and dissenting in part).

<sup>300</sup> 131 S. Ct. at 2722 (Sotomayor, J., concurring) (citing FED. R. EVID. 703 (2000) (amended Dec. 1, 2011)). In its entirety, Federal Rule of Evidence 703 provided at the time:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.

FED. R. EVID. 703 (2000) (amended Dec. 1, 2011) (“Bases of Opinion Testimony by Experts”). See also FED. R. EVID. 705 (1993) (amended Dec. 1, 2011), which states: “The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.”

<sup>301</sup> *Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring).

<sup>302</sup> 132 S. Ct. 2221 (2012) (plurality opinion).

precedents are forever in forward motion, so today's last word in *Williams* will very soon become but an intermediate development along the judicial timeline, and, some day, a dusty old landmark.

For now, the road is fresh and newly paved, so our journey will end once we are done here. Yet *Williams* brings with it the promise of new developments, new interactions upon the scope of the Confrontation Clause. Therefore, we enter this phase of our analysis with a view, not only toward how the law was propelled towards *Williams*, but, just as significantly, the fresh trails *Williams* shall lead up to or, concomitantly, foreclose.

The foundational facts of *Williams* can be disposed of briefly. *Williams* was accused of the abduction and rape of L.J. in Chicago, Illinois.<sup>303</sup> He was tried without a jury.<sup>304</sup> Vaginal swabs of L.J. taken after the heinous attack produced a DNA profile that subsequently proved to match *Williams* from a DNA test conducted when he was later arrested on totally unrelated charges.<sup>305</sup> The DNA work-up of both the swabs and *Williams*'s independent DNA profile were conducted by Cellmark, a well-known forensic lab.<sup>306</sup>

The nexus of the Supreme Court's analysis in this case centered upon the following portion of trial testimony relating to the admission of this DNA evidence.<sup>307</sup> The prosecution called to the stand one Sandra Lambatos, an expert in forensic biology and forensic DNA analysis.<sup>308</sup> Lambatos first testified in this sequence: that it was an accepted practice for one DNA expert to rely upon the records of another DNA expert; that Cellmark was an accredited crime lab which routinely processed samples from the police; that DNA analysts such as herself regularly relied upon sealed shipping containers and labeling to maintain the chain of custody for trial evidence; and she also explained that various shipping manifests pertinent here were ordinary business records documenting the transfer and return of L.J.'s swabs to Cellmark for DNA testing.<sup>309</sup>

Next came the heart of Lambatos's expert testimony. She stated that the DNA recovered from L.J.'s swabs matched the DNA profile of *Williams*

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<sup>303</sup> *Id.* at 2229.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *See id.*

<sup>307</sup> *See id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 2229–30.

already on file.<sup>310</sup> Said testimony was admitted over defense objections.<sup>311</sup>

To be very sure, the Cellmark report upon which Lambatos formed her expert opinion was never admitted into evidence nor shown to the fact finder.<sup>312</sup> Lambatos never quoted or read from the report, nor did she identify it as the source of her expert opinion.<sup>313</sup>

At the conclusion of Lambatos's testimony, the defense moved to exclude it on Confrontation Clause grounds, essentially arguing that foundation was lacking for any testimony regarding the lab's analysis.<sup>314</sup> The trial judge agreed with the prosecution's retort that, fundamentally, Lambatos had only given her expert opinion as to the DNA match, and, as a matter of law, she did not have to be competent to testify as to the underlying facts regarding the compilation of the DNA profiles.<sup>315</sup> As held by the trial court, the issue was one of the weight to be given Lambatos's expert testimony, not its total exclusion.<sup>316</sup>

To be certain, the expert testimony of Lambatos was not the only evidence.<sup>317</sup> Of paramount import, at the trial L.J. took the stand and identified the defendant as her attacker.<sup>318</sup>

Upon this evidence, Williams was convicted.<sup>319</sup> The conviction was upheld on appeal,<sup>320</sup> and certiorari followed.<sup>321</sup>

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<sup>310</sup> *Id.* at 2230.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* On cross-examination, Lambatos confirmed that she herself did not conduct nor observe any DNA testing; rather, she "trusted Cellmark to do reliable work." *Id.* Furthermore, she expressed strong doubts that the DNA samples here had been degraded or compromised. *Id.* at 2230–31.

<sup>314</sup> *Id.* at 2231.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *See id.* at 2229.

<sup>318</sup> *Id.* L.J. had previously picked Williams out of a police lineup as her assailant. *Id.*

<sup>319</sup> *Id.* at 2231.

<sup>320</sup> *Id.* at 2231. The Illinois state court of appeals affirmed, in relevant part finding the Confrontation Clause was not violated because the Cellmark report was not offered into evidence to prove the truth of the matters asserted therein. *Id.* *See* *People v. Williams*, 895 N.E.2d 961, 969–70 (Ill. App. Ct. 2008), *aff'd in part, rev'd in part*, 939 N.E.2d 268 (Ill. 2010), *aff'd* 132 S. Ct. 2221. Likewise, the Illinois Supreme Court also affirmed on fundamentally the same ground. *Williams*, 132 S. Ct. at 2231–32; *see* *People v. Williams*, 939 N.E.2d 268, 282 (Ill. 2010), *aff'd* 132 S. Ct. 2221.

<sup>321</sup> *Williams*, 132 S. Ct. at 2232.

Above are the facts most pertinent to the high Court's newest landmark of Confrontation Clause jurisprudence. We will shortly turn to the plurality's substantive analysis, but, before doing so, we deem it advantageous to exposit the perspective the Court viewed this case from.

Writing for the plurality, Justice Alito announced the instant case would answer the question of whether *Crawford* precludes an expert witness from testifying in a fashion "that has long been allowed" pursuant to established norms of evidence law.<sup>322</sup> To be precise, may an expert witness express an opinion based upon facts known to the expert, but which nevertheless the expert is not competent to testify?<sup>323</sup>

The plurality declared that the sort of testimony Lambatos gave has been permitted for over two centuries by the laws of evidence.<sup>324</sup> To be sure, the once-prevalent practice of asking an expert hypothetical questions based upon assumed facts has been replaced by the modern norms of eschewing such trite formalities.<sup>325</sup> Going to the heart of the matter at bar, Justice Alito found "[t]hat is precisely what occurred in this case," and further cautioned that today's result should not lightly dispose of such accepted rules.<sup>326</sup>

Neither keeping anyone in suspense nor willing to risk premature misapprehension of its ultimate holding,<sup>327</sup> the plurality expressed in this preface its firm conclusion that the expert's testimony here did not violate the Confrontation Clause, in the main because established Sixth Amendment precedent did not reach out-of-court statements not offered for their own truth, but rather relied upon as a predicate for expert testimony.<sup>328</sup>

As so neatly postulated by Justice Alito, "[o]ut-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which the opinion rests are not offered for their truth."<sup>329</sup>

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<sup>322</sup> *Id.* at 2227.

<sup>323</sup> *Id.* Secondarily, Justice Alito posited that the Court would decide whether *Crawford* "substantially impedes" a prosecutor's ability to introduce DNA evidence, "effectively relegate[ing]" the prosecution to employing "older, less reliable forms of proof." *Id.*

<sup>324</sup> *Id.* at 2228.

<sup>325</sup> *Id.* (citing FED. R. EVID. 703); see also FED. R. EVID. 703 advisory committee's note.

<sup>326</sup> *Williams*, 132 S. Ct. at 2228 (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 330 (2009) (Kennedy, J., dissenting)).

<sup>327</sup> See generally *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) and the turmoil that flowed from the media's misunderstanding that the opening reasoning of Chief Justice Roberts was indeed not the Court's final decision.

<sup>328</sup> *Williams*, 132 S. Ct. at 2228.

<sup>329</sup> *Id.*



Thus characterized, they fall outside the purview of the Confrontation Clause.<sup>330</sup> Hence, Lambatos's testimony, being precisely that here, was held not to violate Williams's right to confront the witnesses against him.<sup>331</sup>

But there was more. Aside from the foregoing declaration, the plurality also put in place "a second independent basis" for its ruling.<sup>332</sup> Justice Alito summarized that the DNA report in controversy here was so markedly distinct from the ordinary type of extrajudicial statements excluded by the Confrontation Clause (i.e., affidavits, depositions, confessions, and the like) that the Sixth Amendment was not violated in this case.<sup>333</sup>

Moreover, opined the plurality, to act to exclude the expert testimony reflecting DNA analysis here would launch a parade of horrors for the future use of such scientific evidence, an outcome both unnecessary and, more so, undesirable under proper Confrontation Clause analysis.<sup>334</sup>

Now turning to pen the substantive part of the plurality opinion, Justice Alito first put *Williams* in historical perspective, noting that, traditionally, out-of-court statements were not barred by the Confrontation Clause if the statement "fell within a firmly rooted exception to the hearsay rule."<sup>335</sup> But in modern times *Crawford* changed that by "adopt[ing] a fundamentally new interpretation . . . result[ing] in a steady stream of new cases" seeking high Court review on Confrontation Clause grounds.<sup>336</sup>

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<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.* Categorizing various facets of the expert's testimony, which the opinion would later amplify, this preface listed: the report predated a suspect's identification; the report was not purposed at obtaining evidence against Williams specifically, "who was not even under suspicion" at the time of the report's preparation; and the DNA report itself was not "inherently inculpatory." *Id.*

<sup>334</sup> *Id.* Again, in a point to be reverted to in the substantive analysis to follow, one such horrible would be the foregoing of DNA evidence entirely (ostensibly because of the cost of calling to the stand every technician involved in propagating the DNA test), and prosecutors resorting to older and less reliable modes of evidence, such as eyewitness identification. *Id.*; see generally *Perry v. New Hampshire*, 132 S. Ct. 716, 721 (2012) (Ginsburg, J.) (alluding to the reliability problems associated with eyewitnesses identification in deciding a case of allegedly improper or suggestive conduct by police in conducting lineup or photo array identification for eyewitnesses).

<sup>335</sup> *Williams*, 132 S. Ct. at 2232 (citing *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004)).

<sup>336</sup> *Id.* (citing *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009)); see also *Giles v. California*, 554 U.S. 353, 359 (2008) (addressing the theory of forfeiture, i.e., a defendant forfeits the guarantee of confrontation, when,

Justice Alito followed with a brief dissertation on both *Melendez-Diaz* and *Bullcoming*.<sup>337</sup> Notably, the plurality opinion distinguished those two precedents as focusing upon the Confrontation Clause vis-à-vis “scientific reports.”<sup>338</sup>

In a precursor of what was yet to come for *Williams*, Justice Alito emphasized that “[c]ritically, the report [in *Bullcoming*] was introduced at trial for the substantive purpose of proving the truth” of its contents.<sup>339</sup> This highlighting was buttressed further by reference to Justice Sotomayor’s concurrence, which in its own turn placed great stock in the fact that *Bullcoming* was not a case of an expert witness being asked for her independent opinion, but, rather, a case of admitting the subject forensic report into evidence for the purpose of proving the truth of the matter asserted therein.<sup>340</sup>

The Sotomayor concurrence in *Bullcoming* held one other thing of great moment for the *Williams* court. In *Bullcoming*, the concurring opinion postulated that the Court “would face a different question” if it were asked to consider the constitutionality of permitting an expert to discuss the testimonial statements of others when those statements were not admitted into evidence.<sup>341</sup>

“We now confront that question,” wrote Justice Alito.<sup>342</sup> He commenced by reviewing the longstanding practice of allowing the admission of expert opinion based upon facts, even where the expert lacked personal knowledge of these same points.<sup>343</sup>

This tradition grew from common law practices, the first of which was to have experts opine upon facts already in the record.<sup>344</sup> The second took the form of the “hypothetical question.”<sup>345</sup>

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by design, he procures the absence from trial of the witness to be confronted); *see generally* Davis v. Washington, 547 U.S. 813 (2006).

<sup>337</sup> *See Williams*, 132 S. Ct. at 2232–33.

<sup>338</sup> *Id.* at 2232.

<sup>339</sup> *Id.* at 2233.

<sup>340</sup> *Id.* (citing *Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring)).

<sup>341</sup> *Id.* (citing *Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring)).

<sup>342</sup> *Id.*

<sup>343</sup> *See id.*

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* Justice Alito then devoted significant exposition to the seminal case of *Beckwith v. Sydebotham*, a two-century-old admiralty case, an early and instructive example of the practice. *Id.* at 2234 (citing *Beckwith v. Sydebotham*, (1807) 170 Eng. Rep. 897 (K.B.); 1 Camp. 116).

Hypothetical questions have long enjoyed the approbation of the high Court, commented Justice Alito.<sup>346</sup> “Modern rules of evidence continue to permit experts to express opinions based on facts about which they lack personal knowledge,” albeit, noted the Court, with the current modification to dispense with the question in the form of a hypothetical in the first place.<sup>347</sup>

Pertinent here, both Illinois and federal law do, however, forbid the expert from disclosing inadmissible evidence when testifying.<sup>348</sup> Yet that prohibition generally applies to matters tried by a jury; when the trier of fact is a judge, such as the case was in *Williams*, the bar is of no moment.<sup>349</sup> This is grounded upon the conventional wisdom that judges presiding over bench trials routinely hear inadmissible evidence, and there is a strong presumption that they know enough to ignore such distractions.<sup>350</sup>

This is significant, opined Justice Alito, because, notwithstanding *Crawford’s* departure from existing Confrontation Clause precedent, that very same decision “took pains to reaffirm” that the Clause’s strictures still did not prohibit the use of testimonial statements for purposes other than establishing the truth of the matters asserted.<sup>351</sup>

At this juncture, Justice Alito thought it helpful to catalogue “exactly” what the expert Lambatos testified to as to Cellmark, the DNA laboratory, and the DNA profiles it had created.<sup>352</sup> Your authors quite agree, and thus

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<sup>346</sup> *Id.* at 2233 (citing *Forsyth v. Doolittle*, 120 U.S. 73, 77 (1887)).

<sup>347</sup> *Id.* at 2234; *see also* ILL. R. EVID. 703; FED. R. EVID. 703.

<sup>348</sup> *See Williams*, 132 S. Ct. at 2234.

<sup>349</sup> *Id.* at 2234–35.

<sup>350</sup> *Id.* at 2235 (citing *Harris v. Rivera*, 454 U.S. 339, 346 (1981) (per curiam) (“In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions. It is equally routine for them to instruct juries [as to inadmissibility] . . . ; surely we must presume that they follow their own instructions when they are acting as fact finders.”)).

<sup>351</sup> *Id.* (citing *Crawford v. Washington*, 541 U.S. 36, 59–60 (2004)); *see Tennessee v. Street*, 471 U.S. 409, 417 (1985). In *Street*, the prosecution was allowed to use an accomplice’s out-of-court statement to rebut the defendant’s claim that his confession to a particularly grisly homicide had been coerced by the police. *Street*, 471 U.S. at 409. The prosecution sought to disprove, by means of the accomplice’s dissimilar confession, that the defendant had been forced to adopt that unconfronted statement as his own. *Id.* at 411–12. The Supreme Court held that “[t]he state introduced [the accomplice’s] confession for the legitimate, non-hearsay purpose of rebutting [Street’s] testimony that his own confession was . . . coerced.” *Id.* at 417. Given that the trial judge was meticulous in focusing the jury upon “this distinctive and limited purpose” of introducing the accomplice’s testimony without having the accomplice testify and be subject to cross-examination, the Confrontation Clause was not offended. *Id.*

<sup>352</sup> *Williams*, 132 S. Ct. at 2235.

encapsulate the expert's testimony as comprising: Cellmark's accreditation and frequent employment as a DNA tester; the transshipment of the victim's swabs in the instant case; and that the DNA profile taken from L.J.'s swabs matched an independent DNA profile of the defendant already in the Cellmark database.<sup>353</sup>

Here, the plurality opinion did not equivocate. "Lambatos had personal knowledge of all of these matters, and therefore none of [her] testimony infringed [Williams's] confrontation right."<sup>354</sup> And the entirety of the following passage is most telling as to what the *Williams* Court found determinative in arriving at this landmark.<sup>355</sup>

The expert testimony which the plurality and the dissent battle over cannot be summarized with any degree of clarity. So as to avoid confusion over the root of this internecine conflict in *Williams*, we quote in its entirety Justice Alito's description of the controversial words spoken by Lambatos:

In the view of the dissent, the following is the critical portion of Lambatos' testimony, with the particular words that the dissent finds objectionable italicized:

"Q 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 Sandy Williams?"

"A Yes, there was."

According to the dissent, the italicized phrase violated [Williams'] confrontation right because Lambatos lacked personal knowledge that the profile produced by Cellmark was based on the vaginal swabs taken from the victim, L.J. As the dissent acknowledges, there would have been "nothing wrong with Lambatos's testifying that two DNA profiles—the one shown in the Cellmark report and the one derived from Williams's blood—matched each other; that was a straightforward application of Lambatos's expertise." Thus, if Lambatos' testimony had been slightly modified as follows, the dissent would see no problem:

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<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

<sup>355</sup> *Id.* at 2236.

“Q Was there a computer match generated of the male DNA profile *produced by Cellmark* to a male DNA profile that had been identified as having originated from Sandy Williams?

“A Yes, there was.”<sup>356</sup>

Following the foregoing postulation of how the Confrontation Clause was not violated in this case, Justice Alito set out to address the defendant’s main argument as to why his Sixth Amendment rights had not been respected by the courts below.<sup>357</sup> The defendant’s assertion pivoted upon the admission into evidence of the expert’s testimony as to both DNA profiles, despite her undisputed lack of personal knowledge that one DNA profile was in fact based upon swabs taken from the victim, while the other arose from Williams’s arrest on unrelated charges.<sup>358</sup>

As observed by the plurality, even the dissent acknowledged that there would have been no impropriety in the expert testifying that the two DNA profiles matched, since such a testimonial statement would have certainly fallen within the sphere of Lambatos’s expertise.<sup>359</sup> If that is so, Justice Alito posited, then but a small change in the expert’s phrasing would have rendered her testimony acceptable to the dissenting Justices.<sup>360</sup> And that is insufficient to violate the Sixth Amendment guarantee, held the plurality.<sup>361</sup>

The plurality declared the dissent’s conceptualization was flawed, for reason that the law (here Illinois, but also federal) makes it clear that the supposedly offensive segment of Lambatos’s testimony would not have been admissible for the purpose of proving the truth of the matter asserted.<sup>362</sup> But quite to the contrary, those few words in dispute constituted but a mere premise of the question posed to the expert by the prosecutors, and the former, in turn, simply assumed the purported underlying facts to be

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<sup>356</sup> *Id.* (citations and footnote omitted). Read fairly, the plurality is not being trivial about the dissent’s preferred language for what the latter deemed Lambatos’s testimony should be. Rather, looking to the future, the Court found the dissent’s objection too narrow to have a practical effect in future cases. *Id.* at 2236 n.3.

<sup>357</sup> *Id.* at 2235–36. The plurality relied heavily upon the dissenting opinion for this portion of its discussion, acknowledging that Justice Kagan’s dissent fully developed that argument. *Id.* at 2236.

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

<sup>361</sup> *Id.* at 2240.

<sup>362</sup> *Id.* at 2236.

true.<sup>363</sup> Given same, Justice Alito found “no reason to think that the trier of fact took Lambatos’s answer as substantive evidence.”<sup>364</sup>

Drawing a most telling distinction, Justice Alito granted that the dissent’s point would have been compelling if the proceeding below had been a jury trial.<sup>365</sup> The *Williams* plurality contended that the nominal concern that a jury will disregard a limiting instruction to ignore hearsay “plainly has no application in a case like this one, in which a judge sits as the trier of fact.”<sup>366</sup>

The plurality had no doubt that the trial judge here did not rely upon any testimonial hearsay in order to find Lambatos’s testimony on the DNA match to be adequately supported and probative, while simultaneously admitting the possibility of the danger of a jury interpreting the expert’s testimony as concrete proof, as opposed to a mere premise for her expert opinion.<sup>367</sup> Justice Alito left no doubt that if it had been otherwise such testimony “could not have gone to the jury.”<sup>368</sup>

Yet the reality here, reminds Justice Alito, is that Williams received a bench trial.<sup>369</sup> The plurality refused to give traction to the dissent’s allegation that the trial judge was confused by the wording of the expert’s

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<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*; cf. *Tennessee v. Street*, 471 U.S. 409, 415 n.6 (1985) (“The assumption that jurors are able to follow the court’s instructions fully applies when rights guaranteed by the Confrontation Clause are at issue.”).

<sup>366</sup> *Williams*, 132 S. Ct. at 2241 n.11. The *Williams* plurality reveals a stunning lack of confidence in the ability of jurors to follow instructions designed to safeguard Confrontation Clause protections at trial. These misgivings are contradictory to the high Court’s usual respect for the jury’s intelligence. See, e.g., *Frazier v. Cupp*, 394 U.S. 731, 735 (1969) (finding that unless a jury is “asked to perform . . . mental gymnastics,” appropriate limiting instructions as to disregarding inadmissible testimony is nominally sufficient to preserve a defendant’s Confrontation Clause rights).

<sup>367</sup> See *Williams*, 132 S. Ct. at 2236–37.

<sup>368</sup> *Id.* at 2236. The Supreme Court’s care, here and elsewhere, in demarcating what is proper for a jury to hear is but a resonance from the penultimate regard American law holds for the right to a trial by jury. Even before there was a Republic, Alexander Hamilton observed that the “[f]riends and adversaries” of the proposed new Constitution “if they agree in nothing else, concur” in the irreplaceable value they set upon the trial by jury: “the former regard it was a valuable safeguard to liberty; the latter represent it as the very palladium of free government.” THE FEDERALIST NO. 83, at 521–22 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961). Even the great Hamilton, sometimes frowned upon for his strong pro-federalist views, declared he personally held the right to jury trial in criminal and civil cases “in high estimation.” *Id.* at 522.

<sup>369</sup> *Williams*, 132 S. Ct. at 2236.

testimony.<sup>370</sup> Justice Alito chided any concern as “reflect[ing] a profound lack of respect for the acumen of the trial judge.”<sup>371</sup>

Moreover, the uncontroversial evidence duly admitted at the trial gave no suggestion, and left even less room for argument, that the swab evidence had somehow been confused, contaminated or switched.<sup>372</sup> And the fact that the victim identified Williams first in a police lineup and then later at trial was enough of a “striking confirmation” for the plurality to reject any concern to the contrary.<sup>373</sup> Finally, “[i]t is fanciful to suggest,” concluded Justice Alito, “that the trial judge took Lambatos’s testimony as providing critical chain-of-custody evidence,” as opposed to expert opinion.<sup>374</sup>

For the next phase of its analysis, the plurality addressed the dissent’s suggestion that the prosecution somehow placed the substance of the Cellmark report into evidence, essentially “sneak[ing] [it] in.”<sup>375</sup> Since nothing other than the much-discussed portion of Lambatos’s testimony referring to that lab’s DNA profile had been identified as allegedly violating the Confrontation Clause, the plurality clearly wished to address it, and did so swiftly.<sup>376</sup>

First, Justice Alito opined that the question was legally irrelevant.<sup>377</sup>

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<sup>370</sup> *Id.* at 2237. Parenthetically, but no less clearly, the plurality is adamant that the identity of the factfinder does not alter proper Confrontation Clause analysis. The point, says Justice Alito, is that the factfinder’s identity “makes a big difference” in evaluating the likelihood that a decision was based upon inadmissible evidence. *Id.* at 2237 n.4. Put another way, a judge as factfinder runs less risk of having decided based upon evidence that does not belong in the record.

<sup>371</sup> *Id.* at 2237. The plurality gave three grounds for its rejection of the dissent’s mistrust of the trial judge. One, this notion was wholly unsupported by the trial record, something the two Illinois appellate courts had already concluded. *Id.* Two, “it is extraordinarily unlikely that any trial judge would be confused in [that] way . . .” *Id.* Justice Alito found no one could honestly dispute the parameters of what Lambatos was testifying to. *Id.* Third, “there is simply no plausible explanation for how Cellmark could have produced a DNA profile that matched Williams’ if Cellmark had tested any sample other than the one taken from the victim.” *Id.* at 2237–38.

<sup>372</sup> *Id.* at 2238.

<sup>373</sup> *Id.*

<sup>374</sup> *Id.* The footnote discussion clarifies this a bit, as it states the foundational facts were established by basic chain-of-custody evidence, separate and apart from Lambatos’s expert testimony that she found a DNA match. *Id.* at 2237 n.6.

<sup>375</sup> *Id.* at 2238. The plurality often grapples with the dissent’s accusation that Lambatos’s testimony provided the “missing link” between the DNA and Williams. The plurality does not bite; it steadfastly maintains there is no reason to infer that the trier of fact viewed the expert’s testimony in that way. *Id.* at 2237 n.7.

<sup>376</sup> *See id.* at 2238.

<sup>377</sup> *See id.*

The case at bar was about whether Williams's Sixth Amendment rights had been violated, not whether the prosecution had offered sufficient foundational evidence.<sup>378</sup> The Confrontation Clause excludes testimonial statement by declarants who are not subject to cross-examination, not the admission of irrelevant evidence.<sup>379</sup>

Second, to say the record below lacked admissible evidence as to the source of the DNA so tested would be erroneous, said the Court.<sup>380</sup> To be sure, the prosecution offered rather prosaic chain-of-custody evidence.<sup>381</sup> Moreover, noted Justice Alito, the match between the independent DNA profiles "was itself telling confirmation" that the Cellmark profile was indeed generated from the swabs taken from the victim.<sup>382</sup>

Accordingly, Justice Alito deemed much of the dissent's counterarguments to rest upon clearly erroneous grounds.<sup>383</sup> When properly viewed, the expert's testimony "was not dependent on the truth of any predicate facts."<sup>384</sup> Her testimony took the form of an expert opinion "that two DNA profiles matched . . . which the defense was able to test on cross-examination."<sup>385</sup>

Once again, the plurality draws a most telling distinction: while Lambatos's expert opinion would have lacked probative value if the record was bereft of separate evidence to establish the provenance of the DNA profiles, "that has nothing to do with the truth of her testimony" as given.<sup>386</sup>

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<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> *Id.* at 2239.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.* This was strong circumstantial evidence of the reliability of the DNA profile, found the plurality. *Id.* Justice Alito was openly skeptical that shoddy or dishonest lab work would produce a DNA profile that "just so happened" to match that of the accused here. *Id.* Continuing, he asked if sloppy technical work in the lab could transform one profile into a DNA match for Williams? *Id.* Could a dishonest lab technician have substituted DNA, without access to the DNA of Williams, who the plurality reminds was not even under suspicion at the time? *Id.* Given said circumstances, said the Court, it was well permissible for the trier of fact here to dismiss such concerns as improbably low. *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> *Id.* In addition, Justice Alito noted that the expert's testimony "was not in any way dependent" upon the origin of the sample. *Id.*

<sup>386</sup> *Id.* Justice Alito also pointed out a similar mistake in the dissent's reasoning, to wit, that the Cellmark report was so-called "basis evidence" offered for its own truth. *Id.* That view does not comport with the current Federal Rule of Evidence 703, which holds that "basis evidence" that is inadmissible for its own truth may nevertheless be disclosed in a jury trial under appropriate



In a final rebuke, the plurality contends the dissent “cannot seriously dispute the legitimate nonhearsay purpose of illuminating the expert’s thought process.”<sup>387</sup> The dissent’s last-ditch argument, that the admission of such statements, even if put aside later by the judge, violated the Confrontation Clause, simply does not hold water.<sup>388</sup>

It is not necessary, wrote Justice Alito, for the judge in a bench trial to formally announce the limited reason for which testimony is accepted.<sup>389</sup> The fact that the trier of fact did not consider Lambatos’s testimony for its own truth is what matters.<sup>390</sup> In this way, neither the Confrontation Clause nor the edicts of *Crawford* are violated.<sup>391</sup>

And so the *Williams* Court concluded that the petitioner’s Confrontation

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circumstances. FED. R. EVID. 703; *see also* FED. R. EVID. 703 2000 advisory committee’s note. In relevant part, the 2000 advisory committee’s note prescribes the following procedure governing admissibility:

When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert’s opinion, a trial court applying this Rule must consider the information’s probative value in assisting the jury to weigh the expert’s opinion on the one hand, and the risk of prejudice resulting from the jury’s potential misuse of the information for substantive purposes on the other. The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert’s opinion substantially outweighs its prejudicial effect. If the otherwise inadmissible information is admitted under this balancing text, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes. *See* Rule 105. In determining the appropriate course, the trial court should consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances.

The amendment governs only the disclosure to the jury of information that is reasonably relied on by an expert, when that information is not admissible for substantive purposes. It is not intended to affect the admissibility of an expert’s testimony. Nor does the amendment prevent an expert from relying on information that is inadmissible for substantive purposes.

FED. R. EVID. 703 2000 advisory committee’s note. Again, Judge Alito positions any infirmities as to this evidence going to the distinct issue of weight, but not admissibility. *Williams*, 132 S. Ct. at 2240.

<sup>387</sup> *Williams*, 132 S. Ct. at 2240.

<sup>388</sup> *See id.*

<sup>389</sup> *Id.*

<sup>390</sup> *See id.*

<sup>391</sup> *See id.* (citing *Crawford v. Washington*, 541 U.S. 36, 59–60 n.9 (2004)).

Clause rights were not offended.<sup>392</sup> But to be very sure, the high Court moved on to explain why its holding today was “entirely consistent” with its most recent Sixth Amendment landmarks.<sup>393</sup>

Justice Alito explained thusly. In *Bullcoming* and *Melendez-Diaz*, there was no question the forensic reports were introduced into evidence to prove the truth of their own contents.<sup>394</sup> *Bullcoming* featured the report of the defendant’s blood alcohol level; in *Melendez-Diaz*, the lab analysis was offered to prove that the defendant possessed cocaine.<sup>395</sup>

“Nothing comparable happened here,” declared Justice Alito.<sup>396</sup> In *Williams*, the Cellmark report was never part of the admitted evidence, and the expert witness referred to that report solely to establish the basis of her opinion as to the matching DNA, not to prove the truth of the matters asserted in the lab report.<sup>397</sup> In contradistinction, in the instant case “independent circumstantial evidence” demonstrated the source of the forensic sample.<sup>398</sup>

The plurality disabused the warnings of potential harm raised by the dissent, claiming that at least four safeguards were in place.<sup>399</sup> One, trial courts could screen out experts who might be “mere conduits” of hearsay.<sup>400</sup> Two, experts are generally prohibited from introducing

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<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> *Id.*

<sup>395</sup> *Id.*

<sup>396</sup> *Id.*

<sup>397</sup> *Id.* (citing *Tennessee v. Street*, 471 U.S. 409, 417 (1985) (report not considered for its truth, but only for the “distinctive and limited purpose” of establishing a match)).

<sup>398</sup> *Id.* at 2240–41.

<sup>399</sup> *Id.* at 2241.

<sup>400</sup> *Id.* (citing FED. R. EVID. 702(a), which requires experts to display “scientific, technical, or other specialized knowledge [that] will help the trier of fact to understand the evidence or to determine a fact in issue”). The Federal Rules of Evidence have defined hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. FED. R. EVID. 801(c). According to Federal Rule of Evidence 801, and as relevant here, a prior statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is: (A) inconsistent with the declarant’s testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declaring of recent fabrication or improper influence or motive. FED. R. EVID. 801(d)(1). Hearsay “is not admissible” except as provided for elsewhere within the Federal Rules or by statute. FED. R. EVID. 802.

inadmissible evidence before a jury.<sup>401</sup> Three, trial judges can always instruct juries to disregard any inadmissible evidence that manages to slip through, and furthermore “that an expert’s opinion is only as good as the independent evidence” underlying it.<sup>402</sup> Fourth and last, in the event a prosecutor cannot garner sufficient freestanding admissible evidence to prove the essential foundational facts needed by the expert, then the expert’s opinion shall carry no weight.<sup>403</sup>

Nearing the end of its rationale, the plurality concluded that the Confrontation Clause would nevertheless not have been violated even if the Cellmark report had been introduced for its own sake.<sup>404</sup> To explain, Justice Alito noted the view of the eminent scholars who, in years gone by, had interpreted the Confrontation Clause in “a strictly literal sense.”<sup>405</sup> In sharp contrast, the Court has refused to adopt “this narrow view.”<sup>406</sup>

Instead, while the Supreme Court has applied the Confrontation Clause as prohibiting any modern-day practices equivalent to historical injustices (such as taking pretrial examinations of suspects and witnesses, and reading them in court in lieu of live testimony), the Court has maintained that “any further expansion would strain the constitutional text.”<sup>407</sup>

Justice Alito found that the Confrontation Clause was adopted to prevent prosecutorial abuses, abuses which shared two central characteristics.<sup>408</sup> The first entailed the admission into evidence of out-of-court statements having the primary purpose of accusing a defendant of criminality, while the second attribute was the impropriety of the introduction at trial of “formalized statements such as affidavits, depositions,” and the like, sans confrontation.<sup>409</sup> Essentially all of the Court’s present day cases involved scenarios where both of the offending characteristics were present, particularly that the statement at issue had the

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<sup>401</sup> *Williams*, 132 S. Ct. at 2241.

<sup>402</sup> *Id.*; see also FED. R. EVID. 105, 703. In its entirety, Federal Rule of Evidence 105 provides as follows: “If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.” FED. R. EVID. 105.

<sup>403</sup> *Williams*, 132 S. Ct. at 2241.

<sup>404</sup> *Id.* at 2242.

<sup>405</sup> *Id.*

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*

<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

primary purpose of accusing a targeted individual.<sup>410</sup>

Here the plurality reminds of its exceptions to Confrontation Clause review, such as where the police elicit statements to meet an ongoing emergency,<sup>411</sup> circumstances where the likelihood of fabrication is significantly reduced and thus reliability can be presumed.<sup>412</sup> The proper inquiry, noted Justice Alito, is to ask if the primary purpose for making the statement is to create an out-of-court substitute for trial testimony.<sup>413</sup> If not, its admissibility is to be governed by ordinary rules of evidence, and not the Confrontation Clause.<sup>414</sup>

Drawing a comparison, the plurality notes that in *Melendez-Diaz* and *Bullcoming* the high Court held those particular forensic reports therein qualified as testimonial statements “because they were the equivalent of affidavits made for the purpose of proving the guilt of a particular criminal defendant at trial.”<sup>415</sup> But not every forensic report falls into that category, and now the plurality used that distinction to segue to the case at bar.<sup>416</sup>

In sharp contradistinction, Justice Alito pointed out the differing motivations and purposes behind the Cellmark report here in *Williams*.<sup>417</sup> “It plainly was not prepared for the primary purpose of accusing a targeted individual,” a conclusion the plurality reached by the application of the objective test the Court had pioneered previously.<sup>418</sup>

The Court now held that a reasonable person, viewing the Cellmark

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<sup>410</sup> *Id.* at 2242–43.

<sup>411</sup> *Id.* at 2243 (citing *Davis v. Washington*, 547 U.S. 813, 829–32 (2006) (Where “the [police] interrogation was part of an investigation into possibly criminal past conduct,” the admission of the unfronted statements so obtained violated the Confrontation Clause as the exception for allowing testimony obtained while meeting an ongoing policy emergency was not met.)); *see also* *Michigan v. Bryant*, 131 S. Ct. 1143, 1166–67 (2011) (holding that a declarant making a statement to police to resolve an ongoing emergency is not acting like a trial witness because the speaker has no intention of making solemn testimony for use at trial).

<sup>412</sup> *Williams*, 132 S. Ct. at 2243.

<sup>413</sup> *Id.*

<sup>414</sup> *Id.* (citing *Bryant*, 131 S. Ct. at 1155).

<sup>415</sup> *Williams*, 132 S. Ct. at 2243. Justice Alito categorized the salient distinctions of the forensic reports in *Melendez-Diaz* and *Bullcoming*: (a) the reports bore no relation to an ongoing emergency; (b) the suspects were already in custody; (c) the tests performed were simple and capable of being performed by a single analyst; and (d) the technicians in each case had to have realized their reports “would be incriminating.” *Id.*

<sup>416</sup> *Id.*

<sup>417</sup> *Id.*

<sup>418</sup> *Id.*

report objectively, would conclude that the DNA profile was neither accusatory nor created to be evidence at a trial.<sup>419</sup> To be sure, the lab report was to be used to catch a dangerous assailant, but not to obtain evidence against Williams specifically, who was not in custody or even under suspicion at the time.<sup>420</sup>

Just as surely, no one at the Cellmark lab could have possibly known their lab work would eventually implicate this defendant for a crime “or for that matter, anyone else whose DNA profile was in a law enforcement database.”<sup>421</sup> Viewed yet another way, this separation in time and place removed any motivation to falsify the report, leaving the lab technician with only a pure desire for scientific accuracy.<sup>422</sup>

A situation such as the above, opined the plurality, is not unique for forensic analysts.<sup>423</sup> The norm is that they have no notion of who their work might incriminate.<sup>424</sup> Equally so, observed Justice Alito, the lab techs have no idea of who their work might exonerate.<sup>425</sup> They simply have no way to tell, a most influential point to the Court’s way of thinking.<sup>426</sup>

In a final notation, the plurality points out that defects in a DNA profile may often be detected from the profile itself, offering yet another safeguard.<sup>427</sup> Indeed, stated the Court, the complexity of the DNA molecule itself makes it “inconceivable that shoddy lab work would somehow produce a DNA profile that just so happened to have the precise genetic makeup of [the] petitioner.”<sup>428</sup> Reminding that the victim also picked out Williams from a police lineup, at the end of the day the plurality found “[t]he prospect is beyond fanciful.”<sup>429</sup>

Concisely summarizing the heart of the Court’s new landmark, Justice Alito declared that the use at trial of a DNA report prepared in a modern

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<sup>419</sup> *Id.*

<sup>420</sup> *Id.*

<sup>421</sup> *Id.* at 2243–44.

<sup>422</sup> *Id.* at 2244.

<sup>423</sup> *Id.*

<sup>424</sup> *Id.*

<sup>425</sup> *Id.*

<sup>426</sup> *Id.*

<sup>427</sup> *Id.* To be sure, the Court regurgitated its earlier points that contamination, switching, or fraud was unlikely here, given that Williams had not yet even been identified as a suspect, and there was no suggestion of a swap, accidental or malicious, at the lab. *Id.*

<sup>428</sup> *Id.*

<sup>429</sup> *Id.*

laboratory is not the kind of historical abuse the Confrontation Clause was enacted to eliminate.<sup>430</sup> For all these grounds above, the Court decreed there was no Confrontation Clause violation in this case, and thereby added *Williams* to its pantheon of current Sixth Amendment jurisprudence.<sup>431</sup> But, not surprisingly, *Williams* does not stop at the plurality.<sup>432</sup>

While Justice Thomas concurred in the judgment,<sup>433</sup> his rationale was significantly different to merit some discussion here. Although, to be sure, it was the historical prism through which he viewed the Confrontation Clause that one finds most notable.

Justice Thomas did not mince words; he shared the dissent's take upon what he agreed was the plurality's flawed analysis.<sup>434</sup> His conclusion matched those of the controlling opinion only because, in his view, the Cellmark report lacked the necessary solemnity to rise to the level of a testimonial statement.<sup>435</sup>

Justice Thomas posited his belief that the true question was whether the DNA report was hearsay.<sup>436</sup> He rejected the prosecution's assertion that an expert's opinion can be based upon alleged facts not considered for their own truth, declaring that rules of evidence "should [not] so easily trump a defendant's confrontation right."<sup>437</sup> While not going so far as sweeping away established state or federal evidence law, Justice Thomas urged that these are "ultimately matters of federal constitutional law" not subordinate to the rules of evidence.<sup>438</sup>

Obviously seeking a guiding principle, Justice Thomas complained that "[t]here is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion" as distinguished from disclosing that statement for its own truth.<sup>439</sup> This, to the

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<sup>430</sup> *Id.*

<sup>431</sup> *Id.*

<sup>432</sup> *See, e.g., id.* at 2255 (Thomas, J., concurring). The plurality was most circumspect in footnoting a comment that various of the post-*Crawford* era cases might have to be revisited at some future time, and largely for the reasons in the dissents attendant thereto. *Id.* at 2242 n.13. But not upsetting the apple cart for now, the Court was satisfied with merely distinguishing on the facts its decision today from those earlier and still binding precedents. *Id.*

<sup>433</sup> *Id.* at 2255.

<sup>434</sup> *Id.*

<sup>435</sup> *Id.*

<sup>436</sup> *Id.* at 2256.

<sup>437</sup> *Id.*

<sup>438</sup> *Id.*

<sup>439</sup> *Id.* at 2257.

learned Justice, was a “commonsense conclusion” not undermined by any accepted historical practice of exempting expert basis testimony from the crucible of Confrontation Clause analysis.<sup>440</sup>

*Williams* raises those very Sixth Amendment concerns regarding the expert’s disclosure of those out-of-court facts.<sup>441</sup> Justice Thomas found the plurality overlooked that the value of Lambatos’s testimony rested upon the truth of her own assumptions, as made upon the lab reports.<sup>442</sup> Thus, he concluded that the Cellmark report was, in fact, introduced for its own truth.<sup>443</sup>

Justice Thomas then proceeded to express his misgivings about the future application of *Williams*.<sup>444</sup> He observed that the plurality’s rationale here may “seem of little consequence” to those confident of the reliability of DNA profiling and related forms of hard science forensics.<sup>445</sup> Yet it was beyond that realm that he found worrisome, opining that “[t]oday’s holding, however, will reach beyond scientific evidence to ordinary out-of-court statements.”<sup>446</sup>

Justice Thomas derided as simplistic the notion that safeguards built into the rules of evidence would prevent the abuse of basis testimony.<sup>447</sup> After reviewing some of the available protections, he nonetheless found any such balancing tests to be “no substitute for a constitutional provision that has already struck the balance in favor of the accused.”<sup>448</sup>

Justice Thomas continued his analysis in the following manner: having concluded that Lambatos’s testimony had, in fact, been introduced for sake of its own truth, he now asked if her statements were “testimonial” in nature.<sup>449</sup> Crucial here was the learned Justice’s characterization that

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<sup>440</sup> *Id.*

<sup>441</sup> *See id.* at 2257.

<sup>442</sup> *Id.* at 2258.

<sup>443</sup> *Id.* at 2258–59.

<sup>444</sup> *See id.* at 2259.

<sup>445</sup> *Id.*

<sup>446</sup> *Id.* For instance, Justice Thomas noted that “it is not uncommon” for experts to rely upon information gathered from third parties, said third parties presumably unavailable for trial. *Id.*

<sup>447</sup> *Id.*

<sup>448</sup> *Id.*; *see also* Crawford v. Washington, 541 U.S. 36, 61 (2004) (stating that the Confrontation Clause commands the reliability of evidence be tested in the “crucible of cross-examination”); *cf.* White v. Illinois, 502 U.S. 346, 358 (1991) (Thomas, J., concurring) (The Supreme Court’s cases as of that date had “unnecessarily . . . complicated and confused the relationship between the constitutional right of confrontation and the hearsay rules of evidence.”).

<sup>449</sup> *See Williams*, 132 S. Ct. at 2259 (Thomas, J., concurring).

“testimony” is a solemn declaration made for the purpose of proving some fact.<sup>450</sup>

In turn, the solemnity of an utterance is determined largely by the form which it takes.<sup>451</sup> For these reasons, Justice Thomas concluded that testimonial statements falling within the purview of the Confrontation Clause include depositions, affidavits, dialogue from custodial interrogation, and similar vehicles for testimony.<sup>452</sup> Viewed in this light, Justice Thomas decreed that the DNA profile here was not an affidavit, deposition, nor sworn declaration, as it lacked the degree of solemnity he deemed essential for Sixth Amendment scrutiny.<sup>453</sup>

To be quite certain, Justice Thomas had no difficulty squaring the lesser stature he assigned the lab report here in *Williams* with the testimonial label affixed by the Court to the respective lab reports in *Melendez-Diaz* and *Bullcoming*.<sup>454</sup> The latter did indeed have the indicia of solemnity Justice Thomas declared was vital to initiate Confrontation Clause analysis.<sup>455</sup>

Yet Justice Thomas could not abide by the dissent equating the BAC report present in *Bullcoming* with the *Williams* DNA profile, and therefore purportedly enjoying equal degrees of solemnity.<sup>456</sup> “To the contrary,” the latter report certified nothing, a distinction which struck Justice Thomas as having constitutional implications.<sup>457</sup>

In sharp counterpoise, both certifications and certificates employed in the respective manner found in *Bullcoming* and *Melendez-Diaz* brought into evidence extrajudicial testimony without benefit of cross-examination, precisely the abuse the Confrontation Clause was enacted to prevent.<sup>458</sup> Put another way, Justice Thomas condemned the certified reports in *Melendez-Diaz* and *Bullcoming* for their attributes of solemnity. The very lack of

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<sup>450</sup> *Id.*

<sup>451</sup> See *Michigan v. Bryant*, 131 S. Ct. 1143, 1167 (2011) (Thomas, J., concurring) (finding the Confrontation Clause not violated where questioning by police of a gunshot victim “lacked sufficient formality and solemnity . . . to be considered testimonial”).

<sup>452</sup> *Williams*, 132 S. Ct. at 2260 (Thomas, J., concurring). Justice Thomas linked these indicia of solemnity to the practices the Confrontation Clause was designed to eliminate, specifically the archaic English practices of *ex parte* examinations. *Id.*

<sup>453</sup> *Id.*

<sup>454</sup> *Id.* at 2260–61.

<sup>455</sup> *Id.* at 2261. Justice Thomas pointed out that the lab report in *Melendez-Diaz* was sworn to, while its counterpart in *Bullcoming* was certified by the analyst. *Id.* at 2260.

<sup>456</sup> See *id.* at 2260.

<sup>457</sup> *Id.*

<sup>458</sup> *Id.*



same in the *Williams* DNA profile rescued it from expulsion.<sup>459</sup>

Moreover, Justice Thomas disabused the dissent's fears that his mode of analysis would encourage prosecutorial abuse, by opening the gates wide to "informal extrajudicial statements," which, by virtue of failing his solemnity test, would "evade" confrontation.<sup>460</sup> Such evasion comes at a price, as Justice Thomas ticked off the risks associated with such ploys, including the exclusion of such out-of-court statements, for reason of bad faith, their diminished reliability due to inherent informality, and the general non-persuasiveness of not solemn testimony.<sup>461</sup>

Justice Thomas was wholly unpersuaded that any "upswing" in the use of informal statements would gut the Confrontation Clause.<sup>462</sup> This constitutional proviso does not require that evidence be reliable.<sup>463</sup> Rather, once again the heart of the Confrontation Clause is that it tests the reliability of evidence in the crucible of cross-examination.<sup>464</sup>

Concluding his concurrence with the plurality judgment, Justice Thomas proposed his solution, a plain and simple one indeed. The learned Justice argued strongly for reading the Confrontation Clause in a manner respectful of "its historically limited application to a narrow class of statements bearing indicia of solemnity."<sup>465</sup>

To do otherwise would reduce the protections afforded by the Confrontation Clause in situations where experts convey the contents of formal statements or reports, supposedly to explain the grounds of their opinions.<sup>466</sup> In the estimation of Justice Thomas, "[t]hese are the very

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<sup>459</sup> *Id.* at 2260–61. We pause to note that Justice Thomas's reasoning here very much raises the prospect of whether or not a "certification," "attestation," or similar, in form or substance (or in some portion both, equal or not) of proffered evidence shall render it testimonial or nontestimonial, pursuant to the eminent Justice's litmus test of solemnity. Even as we continue here to analyze the instant case, we can only view this as a harbinger of more cases to come—many more.

<sup>460</sup> *Id.* at 2261.

<sup>461</sup> *Id.*

<sup>462</sup> *Id.*

<sup>463</sup> *Id.*

<sup>464</sup> *Id.* In a similar view, Justice Thomas's concurrence criticized the plurality's preference for a "primary purpose" test, decrying it as unmanageable in the real world because it is "divorced from solemnity." *Id.* In contradistinction, a principled standard based upon the solemnity of a testimonial statement is "true to the text and history of the Confrontation Clause [and] goes a long way toward resolving [any] practical difficulty." *Id.*

<sup>465</sup> *Id.* at 2264.

<sup>466</sup> *Id.*

cases” in which the accused most needs the right to confront the witnesses against her.<sup>467</sup> So spoke Justice Thomas.

While concurring to form a key part of the plurality, Justice Breyer’s writing deserves a brief mention.<sup>468</sup> Notwithstanding his accord, Justice Breyer had his own concerns, the paramount one being his assertion that both the plurality and the dissent failed to adequately address what he deemed to be the central question, to wit, how does the Court apply the Confrontation Clause to the current “panoply of crime laboratory reports” presumably created by an equally multitudinous number of laboratory technicians?<sup>469</sup> Indeed, Justice Breyer was so convinced of the gravity of this unresolved query, he voiced a strong preference to schedule the instant case for reargument.<sup>470</sup>

Tacitly acknowledging that re-argument here would not be forthcoming, Justice Breyer retreated to the perspective that the DNA report here was not testimonial, and therefore not prohibited by the Confrontation Clause, pursuant to established precedents.<sup>471</sup> Essentially, Justice Breyer was expressing his own accord with the plurality’s second foundation for its decision.

Among other things, Justice Breyer could not side with the dissent because the minority would abandon the established evidentiary rules of permitting experts to testify while relying upon inadmissible out-of-court statements.<sup>472</sup> Yet the dissenters, in his estimation, failed to offer up a palatable alternative.<sup>473</sup> Possibly presaging Confrontation Clause cases yet to come, Justice Breyer stressed the importance of answering this central question, and soon, because it is so ubiquitous in trial courts every day.<sup>474</sup>

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<sup>467</sup> *Id.* Almost as an aside, Justice Thomas again demeaned the plurality’s primary purpose test, because it posed the danger of promulgating a third category of witnesses to a proceeding, some dangerous mutation between the traditional roles of witnesses against a defendant or for her. *Id.* at 2263.

<sup>468</sup> *See id.* at 2244 (Breyer, J., concurring).

<sup>469</sup> *Id.*

<sup>470</sup> *Id.* at 2245 “I believe the question difficult, important, and not squarely addressed” yet, emoted Justice Breyer. *Id.*

<sup>471</sup> *Id.* (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 343344 (2009) (Kennedy, J., dissenting); *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2723 (2011) (Kennedy, J., dissenting)).

<sup>472</sup> *Id.* at 2246.

<sup>473</sup> *Id.*

<sup>474</sup> *Id.* at 2248. Parenthetically, we find this ample reason to be convinced that the high Court shall and must address the Confrontation Clause again—and soon—to delimit the right to confront scientific evidence, and less significantly, the parameters of the giving of expert testimony and

Ascribing to *Crawford* a picturesque characterization as “a constitutional heartland,” in conjunction with “outer limits” upon that which the Confrontation Clause captures for scrutiny, Justice Breyer suggested a solution that properly defers to the courts of the several States the right to balance expert testimony rules with the boundaries of hearsay nostrums.<sup>475</sup> The above and similar statements in his concurring opinion reflect Justice Breyer’s general acceptance of the plurality’s theory that the reach of the Confrontation Clause is not without limits.<sup>476</sup>

To summarize, Justice Breyer espoused his belief that DNA reports, such as the ones before the Court here, are assumed “to lie outside the perimeter” of the Sixth Amendment’s guarantee of the right of confrontation.<sup>477</sup> Yet, given that Justice Breyer deemed the plurality opinion “is basically consistent” with his own conclusion, he joined his brethren with few reservations.<sup>478</sup>

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disclosing its underlying grounds. In this regard, Justice Breyer in *Williams* replicates the role played by Justice Sotomayor in *Bullcoming* in prognosticating as to the next appearance of the right of confrontation before the Supreme Court. *See Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring).

<sup>475</sup> *Williams*, 132 S. Ct. at 2248. Continuing, Justice Breyer recommends the States presumptively allow the admission of DNA reports from “accredited crime laboratories.” *Id.* To be sure, we find great danger in Justice Breyer’s notion that present professional lab work, let alone that to be undertaken some day in “preapproved” forensic facilities, in accord with his preference, constitutes records of “regularly conducted activity” already admissible pursuant to the current rules of hearsay. *Id.* at 2249 (citing FED. R. EVID. 803(6) (Records of Regularly Conducted Activity)). Respectfully, this is not so, because such scientific analysis is indeed accusatory, as found by Justice Scalia in *Melendez-Diaz*. *See* 129 S. Ct. at 2533. This supposition by Justice Breyer in his concurrence in *Williams* does violence to the point so clearly articulated in *Melendez-Diaz*, that records of activity purposed to produce evidence for use at trial do not fall within the exceptions for admitting hearsay found within the federal rules. *Id.* at 2533. *See also Michigan v. Bryant* for Justice Scalia’s scathing criticism of the notion that the business records exception somehow validates law enforcement records as inherently reliable, and thus frees them from the burden of confrontation. 131 S. Ct. 1143, 1175 (2011) (Scalia, J., dissenting). Note well that dissent’s passionate declaration that “[t]he Confrontation Clause is not so forgiving,” and thus business records prepared specifically for use at a criminal trial are testimonial and require confrontation. *See id.* We do not foresee Justice Scalia nor his adherents on the high Court ever retreating from such a position so long and strongly held. Given this head-on collision with Justice Scalia’s findings in *Melendez-Diaz* and *Bryant*, this Breyer conceptualization cannot survive.

<sup>476</sup> *See Williams*, 132 S. Ct. at 2248–49.

<sup>477</sup> *Id.* at 2251. Moreover, such a view does not diminish at all the accuser’s right to establish doubt about the reliability of a scientific report or its preparer’s competence in any particular case. *Id.* at 2251–52.

<sup>478</sup> *Id.* at 2552.

Our analysis would not be complete without some reference to the dissent, to be sure. Yet as the gravamen of the dissent's objections have already been alluded to in the plurality holding, we need only amplify such portions of it that make a fair presentation of the dissenters' rationale.

Writing for the dissent, Justice Kagan<sup>479</sup> declares early on that "this is an open-and-shut case" under the high Court's Confrontation Clause precedents.<sup>480</sup> The dissent's certitude was based upon the allegation that at his trial Williams was denied a chance to cross-examine the lab analyst who created the DNA report used against him.<sup>481</sup>

After first neatly summarizing the Court's modern triumvirate of Confrontation Clause landmarks—*Crawford*, *Melendez-Diaz*, and *Bullcoming*,<sup>482</sup> to be certain—the dissent finds the instant case to be "of a piece" with its forebears.<sup>483</sup> The DNA analysis here was no different, said the dissent, from the scientific reports found in two of the trilogy cases.<sup>484</sup> This led the dissent to the expectation that the substance of the report would therefore have been subject to fulsome cross-examination in *Williams*.<sup>485</sup>

"But that is not what happened," exclaimed Justice Kagan.<sup>486</sup> Quite to the contrary, a scientist who had not directly participated in the sequence of testing—Lambatos—testified as to her expert opinion regarding the DNA match.<sup>487</sup> As characterized by the dissent, Lambatos "suppl[ied] the missing link" between DNA tests in which she did not partake.<sup>488</sup>

Justice Kagan was struck by the identity between the testimony here and that disallowed in *Bullcoming*, remonstrating "[h]ave we not already decided this case?"<sup>489</sup> Existing landmarks are "sufficient to resolve this case" the same way, the dissent insisted.<sup>490</sup> To do otherwise, Justice Kagan

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<sup>479</sup>Justices Scalia, Ginsburg, and Sotomayor joined in the dissent. *Id.* at 2264 (Kagan, J., dissenting).

<sup>480</sup>*Id.* at 2265.

<sup>481</sup>*Id.* at 2264.

<sup>482</sup>*See id.* at 2265–66.

<sup>483</sup>*Id.* at 2266.

<sup>484</sup>*Id.*

<sup>485</sup>*Id.* at 2267.

<sup>486</sup>*Id.*

<sup>487</sup>*Id.*

<sup>488</sup>*Id.*

<sup>489</sup>*Id.*

<sup>490</sup>*Id.* at 2268.

implied, would fly in the face of those recently inaugurated precedents.<sup>491</sup>

Primarily, the minority of Justices deplored the plurality's conclusion that the assumptions Lambatos relied upon were not offered for their own truth, and, by virtue of that presumption, the Court allowed them to escape Confrontation Clause scrutiny.<sup>492</sup> The dissenters steadfastly believed that Lambatos's expert testimony was wholly dependent (or nearly so) upon the truthfulness of the facts underlying her expert opinion.<sup>493</sup>

Justice Kagan found it unavoidable for the fact finder to assess the truth of the assumptions undergirding Lambatos's statements when contemplating the accuracy of her expert testimony.<sup>494</sup> And since those very assumptions evidently relied upon by Lambatos were insufficiently tested (if tested at all) in the crucible of cross-examination, then in the instant case the prosecution had executed an "end-run" around the Sixth Amendment, making "a parody" of the Confrontation Clause's strictures.<sup>495</sup>

Nor was the dissent satisfied with the plurality's distinction that *Williams* was a bench, not a jury trial.<sup>496</sup> While gladly acknowledging that "a judge typically will do better than a jury in excluding such inadmissible evidence" as statements not offered for their own truth,<sup>497</sup> Justice Kagan found an enormous difference between the question of an error confusing a finder of fact, as contrasted to the distinct and more basic inquiry of whether a constitutional violation did in fact occur in this case.<sup>498</sup>

Among the dangers of the instant decision, as catalogued by dissent, was an "abdication to state-law labels" of evidence, in essence the wrong of exalting form over substance.<sup>499</sup> This would encourage the even more horrific wrongs of ambitious prosecutors employing "subterfuge and indirection" to evade a defendant's right to confront the witnesses against her.<sup>500</sup>

Above all else, the dissent concluded on the following harsh note. Before *Williams*, two landmarks issued by the high Court within the last

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<sup>491</sup> *See id.*

<sup>492</sup> *Id.*

<sup>493</sup> *Id.*

<sup>494</sup> *Id.*

<sup>495</sup> *Id.* at 2269.

<sup>496</sup> *Id.* at 2270–71.

<sup>497</sup> *Id.* at 2271.

<sup>498</sup> *Id.*

<sup>499</sup> *Id.* at 2272.

<sup>500</sup> *Id.*

three years demanded that the prosecution bring forth the lab technician who created the forensic report, if that scientific analysis was to be deemed admissible.<sup>501</sup> “But that clear rule is clear no longer,” lamented Justice Kagan.<sup>502</sup>

Not only is the result wrong for the case at bar, it leaves “significant confusion in [its] wake” for cases yet to come.<sup>503</sup> By failing to remain true to its own Confrontation Clause precedents of recent vintage, the plurality has only sown seeds of uncertainty today, complained Justice Kagan.<sup>504</sup>

So closed the dissent. Which leaves us to open our analysis of all that has come before.

## VI. DISCUSSION AND ANALYSIS

### A. Preface

In our prior scholarly articles on various topics,<sup>505</sup> we have followed the customary approach of analyzing the relevant decisions individually, and then drawing appropriate comparisons and conclusions as to the state of the law.<sup>506</sup> Have no fear, we will hew to the conventional tack in due course.

However, the far more crucial aspects of these modern Confrontation Clause cases are, in our humble estimation, the dynamics of the Justices themselves in forming competing schools of thought on the constitutional guarantee, and the resultant alliances and factions so created. Possibly because these interactions are so greatly magnified by the constitutional import of the landmarks herein, we find said dynamics so fascinating that we shall deal with them first. To the extent that anything of value is left for the more arid traditional analysis, we shall address that seriatim thereafter.

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<sup>501</sup> *Id.* at 2277 (referring to the Court’s decisions in *Bullcoming* and *Melendez-Diaz*).

<sup>502</sup> *Id.*

<sup>503</sup> *Id.*

<sup>504</sup> *Id.*

<sup>505</sup> See *Publications*, SABINO & SABINO, <http://sabinolaw.com/publications.html> (last visited Feb. 18, 2013).

<sup>506</sup> See, e.g., Anthony Michael Sabino & Michael A. Sabino, *From Chiarella to Cuban: The Continuing Evolution of the Law of Insider Trading*, 16 *FORDHAM J. OF CORP. & FIN. L.* 673, 674–75 (2011).

*B. The Dynamics of Crawford and its Descendants Within the High Court*

In overviewing the relevant trilogy and its most severe test to date, that of course being *Williams*, one aspect we find fascinating is their revelations as to the evolving dynamic between the sitting Justices, both as to their traditional stances and shifting allegiances. While no firm predictor of the Court's future jurisprudence on the Confrontation Clause, an analysis made today is, at the least, informative and might well portend what the future holds for the Sixth Amendment in these early decades of the twenty-first century.

1. Scalia: Master Builder of *Crawford* and *Melendez-Diaz*

We take Justice Scalia first, and rightly so. He is the principal architect of the first two legs of the trilogy<sup>507</sup> and its ardent defender (by his joinder) against what he undoubtedly viewed as the trilogy's usurpation in *Williams*.<sup>508</sup>

We proceed from the given of Justice Scalia's well-entrenched reputation as an originalist with regard to constitutional interpretation, and as a strict constructionist of the Founding Document.<sup>509</sup> It therefore comes as no surprise when his known proclivities find expression in both cases comprising the first two components of the triad, first taking form in *Crawford* as an unshakeable demand that the defendant there could not be convicted (at least in part) by means of a testimonial statement he was utterly incapable of confronting in the courtroom.<sup>510</sup> Equally unrelenting was the eminent Justice in guiding the Court to conclude in *Melendez-Diaz* that the accused in that case had the absolute right to confront the lab technician who provided testimony (albeit in declaratory form) that the substance found on the defendant's person was an illegal narcotic.<sup>511</sup>

Here we see exhibited the main facets of Justice Scalia's approach to constitutional law, principal among them: strict adherence to the text of the

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<sup>507</sup> Justice Scalia authored the majority's opinions in both *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>508</sup> See *Williams*, 132 S. Ct. at 2264 (Kagan, J., with whom Justices Scalia, Sotomayor, and Ginsburg join, dissenting).

<sup>509</sup> See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

<sup>510</sup> *Crawford*, 541 U.S. at 59.

<sup>511</sup> *Melendez-Diaz*, 557 U.S. at 311.

Sixth Amendment;<sup>512</sup> a straightforward interpretation of its plain words and their concomitant plain meaning;<sup>513</sup> and, possibly most important of all, a refusal to bend that unyielding text to alleged pragmatism and policy concerns.<sup>514</sup> This is in addition to the admixture of historical context and original intent provided as a vital context to ascertaining the true boundaries of the Confrontation Clause.<sup>515</sup>

While Justice Scalia was the main builder of the opinions of *Crawford* and *Melendez-Diaz*, little wonder he joined his esteemed colleague, Justice Ginsburg, when she took a similar tact in *Bullcoming*.<sup>516</sup> Although not the author of that third arm of the triumvirate, Justice Scalia's earlier pioneering resonates within that 2011 landmark.

And make no mistake, that takes nothing away from Justice Ginsburg's own erudite analysis in *Bullcoming*. While placing her own immutable stamp upon Confrontation Clause interpretation in that decision, the eminent Justice Ginsburg simultaneously adds to her own illumination by reflecting her colleague Justice Scalia's prior articulations of the history and rightful meaning of the Sixth Amendment.<sup>517</sup>

Little wonder then, they sided with the present day dissenters in *Williams*.<sup>518</sup> By implication, Justice Scalia's joinder in that dissent exemplifies his dissatisfaction with *Williams*'s openness towards allowing testimony, even by an expert upon "scientific" matters, grounded upon allegations not tested in the now-famous "crucible of cross-examination."<sup>519</sup> While Justice Kagan pursued her own line of similar, yet independent, reasoning therein, it should be clear to all that Justice Scalia was most likely motivated in his selection of sides by what he undoubtedly viewed as a transgression against the Confrontation Clause done by *Williams*, both as to the constitutional guarantee's plain text and its original intent.

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<sup>512</sup> See *id.* at 313.

<sup>513</sup> See *id.*

<sup>514</sup> See *id.* at 318 ("[T]here are other ways—and in some cases better ways—to challenge or verify the results of a forensic test. But the Constitution guarantees one way: confrontation. We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available." (footnote omitted)).

<sup>515</sup> See, e.g., *Crawford*, 541 U.S. at 43–50 (detailing the history of the Confrontation Clause).

<sup>516</sup> See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2709 (2011).

<sup>517</sup> *Id.* at 2716.

<sup>518</sup> See *Williams v. Illinois*, 132 S. Ct. 2221, 2264 (2012) (Kagan, J., dissenting with Justices Ginsburg, Scalia, and Sotomayor).

<sup>519</sup> *Id.* at 2266.



Above all else, Justice Scalia is the arch-proponent of the unyielding preeminence of “the crucible of cross-examination” in Confrontation Clause jurisprudence.<sup>520</sup> His opinions to date show unceasing devotion to that precept. Can anyone seriously believe that his steadfastness to principle will change in the Confrontation Clause cases yet to come?

## 2. Justice Thomas as the Historical Voice

Next we look to Justice Thomas, who, at first blush, might seem to be on the periphery because of the overly technical characterizations of his opinions as concurring or dissenting, wholly or sometimes in part.<sup>521</sup> Yet, upon closer examination, we find Justice Thomas’s contribution to current Confrontation Clause jurisprudence to be much more substantial than as a mere outlier. To be sure, his invocation of the sad history of Anglo-American law before the right of confrontation was fully integrated therein provides a solid building block to the reigning trilogy, and—someday—to its progeny.<sup>522</sup>

Much like his colleagues who constitute the (so-called) conservative wing of the Supreme Court, Justice Thomas here and again exposit his penchant for cultivating the fertile soil of history for guidance in constructing his constitutional theorems.<sup>523</sup> To be sure, both Justices Scalia and Ginsburg rely upon the various English antecedents, particularly the abomination of a trial inflicted upon Sir Walter Raleigh as the primary catalyst, as fomenting the creation of the right of confrontation that later

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<sup>520</sup> See *Crawford*, 541 U.S. at 61 (“[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”). Justice Scalia’s characterization of cross-examination as a “crucible” is marvelously apropos, for it has been said that “[a] courtroom is a crucible. In it we burn away irrelevancies, until we are left with . . . the truth.” *Star Trek: The Next Generation: The Measure of A Man* (Paramount television broadcast Feb. 13, 1989) (Season Two, Episode Nine) (Patrick Stewart as Captain Jean-Luc Picard).

<sup>521</sup> See, e.g., *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 329 (2009) (Thomas, J., concurring).

<sup>522</sup> See, e.g., *Giles v. California*, 554 U.S. 353, 377–78 (2008) (Thomas, J., concurring).

<sup>523</sup> As one illustration, we point out his marvelously in-depth historical recounting of the birth of the Fourteenth Amendment (equal protection) in relation to the Second Amendment (the right to keep and bear arms) in *McDonald v. City of Chicago*, 561 S. Ct. 3025, 3058–62 (2010) (Thomas, J., concurring). There are, of course, many other examples, but we find this comparison particularly striking because each situation, be it the Sixth or Fourteenth Amendment, concerns a fundamental freedom memorialized in the Bill of Rights or subsequently appended thereto, analyzed against the richly textured background of their respective formative histories.

crossed the Atlantic Ocean and became a fundamental liberty embodied in the Sixth Amendment.<sup>524</sup> Yet their respective citations of those key turning points in our jurisprudential history presage Justice Thomas's own contribution.

For it is Justice Thomas, by echoing Justice Scalia's comprehensive and insightful retelling of the Sixth Amendment's rich history in *Crawford*,<sup>525</sup> who painstakingly points out in *Williams* the injustices of the Marian laws of old England.<sup>526</sup> He describes in detail how our English forebears stridently moved away from those injustices, and how later our own Founders, even more repulsed by those affronts to liberty, made sure such mechanisms never became part of the new Republic's laws.<sup>527</sup>

The great and notable perspective that the erudite Justice Thomas provides is his dissection of the Marian laws for their own sake, and the fatal flaws that condemned them to their ultimate (and rightful) ejection from the American legal system.<sup>528</sup> With great care and commensurate attention to detail, Justice Thomas sets forth the dangerous powers the Marian laws invested in interrogators and prosecutors, and the equal measure of harm thereby done to the individual freedom of the accused in those dark times.<sup>529</sup>

The learned Justice then expositis the labors of not only the Founders in banning such infringements upon our liberty, but the efforts of the Court continuing to the present day to keep the courtroom doors closed to such atrocities.<sup>530</sup> We are reminded of the sage notion that "past is prologue."

In this instance, we find Justice Thomas's retelling of the past to be most informative as to the present and, indeed, future shaping of the Confrontation Clause. When the next case regarding the right to confrontation reaches the Supreme Court's docket, reviewing Justice Thomas's thoughts on Marian law in contradistinction to the Confrontation Clause is required reading.

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<sup>524</sup> See *Crawford*, 541 U.S. at 44 (2004).

<sup>525</sup> *Id.* at 44–45.

<sup>526</sup> *Williams v. Illinois*, 132 S. Ct. 2221, 2263 (2012) (Thomas, J., concurring).

<sup>527</sup> See *id.* at 2262.

<sup>528</sup> *Id.* at 2262–63.

<sup>529</sup> *Id.* at 2263. Nor is this new territory for Justice Thomas. He likewise invoked the injustices of the Marian laws in *Davis v. Washington*, 547 U.S. 813, 835–36 (2006) (Thomas, J., dissenting), and *White v. Illinois*, 502 U.S. 346, 361 (1992) (Thomas, J., dissenting).

<sup>530</sup> *Williams*, 132 S. Ct. at 2263 (Thomas, J., concurring) (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 (2009)).

Of course, in truth we cannot deny (nor should we) that Justice Scalia was the pathfinder in expositing the rich and relevant history of the Marian laws and the scurrilous trial of Sir Walter Raleigh, among others, as the tapestry against which the Founders devised the Confrontation Clause.<sup>531</sup> As always, the senior Justice's complete grasp of history is most insightful. Still, we find Justice Thomas a capable ally in building upon what his colleague started in *Crawford* and then later in *Melendez-Diaz*, and subsequently adding his own strong voice in *Williams* when retelling the underlying history of the Confrontation Clause.<sup>532</sup>

### C. *The Invocation of the Confrontation Clause: The Paramouncy of Solemnity and Formality*

As all the foregoing illuminates so clearly, the “solemnity” of purportedly testimonial statements is often decisive in the appropriate application of the Sixth Amendment.<sup>533</sup> Once a certain threshold is passed, the right to confront the now-solemn statement is triggered.<sup>534</sup> Below that

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<sup>531</sup> See *Crawford v. Washington*, 541 U.S. 36, 44 (2004).

<sup>532</sup> See *id.*; *Melendez-Diaz*, 557 U.S. at 311; *Williams*, 132 S. Ct. at 2262–63 (Thomas, J., concurring). Before proceeding further, it would be grossly unfair not to mention the contributions made to the modern Confrontation Clause cases by the Court's two newest Justices. In *Williams*, Justice Kagan is the standard bearer for fidelity to the trilogy. 132 S. Ct. at 2264–77 (Kagan, J., dissenting). While, in truth, she continues the good work of the more senior Justices Scalia and Ginsburg in initially erecting the ruling triad, she must be credited with adding her own voice, particularly in underscoring the various and sundry ways the plurality in *Williams* unnecessarily veers away from the solid rationales of its rightful ancestors. *Id.* at 2265–66. With regard to Justice Sotomayor, likewise we find her concurrence in *Bullcoming* to be particularly commendable, as part of the trilogy. See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2719 (2011) (Sotomayor, J., concurring). Her most significant contribution, in our humble estimation, is her laser-like focus on the role “formality” plays in adducing the testimonial nature of a specific piece of evidence. See *id.* at 2721. Shrewdly, Justice Sotomayor does not take “formality” as a mere descriptive term. She properly explores in *Bullcoming* the nuances of the term in light of its substantive importance to the Sixth Amendment. See *id.* We are not at all surprised by this approach, given that, among the current Justices, Justice Sotomayor has some of the lengthier and more practical credentials of a former litigator. And finally with regard to Justice Sotomayor, we have already noted, ante, her most significant contribution, that of declaring the nature of the questions unanswered in *Bullcoming*, which would later be resolved (at least for now) in *Williams*. *Id.* at 2722 (“[T]his is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence.”).

<sup>533</sup> See *Bullcoming*, 131 S. Ct. at 2725 (Kennedy, J., dissenting) (“Solemnity has sometimes been dispositive, and sometimes not.” (citations omitted)).

<sup>534</sup> See *Melendez-Diaz*, 557 U.S. at 329 (Thomas, J., concurring) (“[T]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized

same threshold, where the formality of the statement is found lacking, the Confrontation Clause need not be applied.<sup>535</sup>

We have chosen to frame the point of the solemnity of testimonial statements with regard to the Sixth Amendment as best expressed in the most recent concurrence of Justice Thomas in *Williams*, albeit with his telling references therein back to the majority in *Melendez-Diaz*.<sup>536</sup> We find his reasoning on that aspect of the instant controversy to be most enlightening.

Before doing so, however, we preface our discussion of Justice Thomas's contribution by first paying a most respectful homage to Justice Scalia's august writings on the matter, in particular as found in the first two legs of the triad.<sup>537</sup> It must be remembered, and remembered well indeed, that Justice Scalia initially cataloged "solemn" testimonial statements in *Crawford* with his extensive listing of depositions, confessions, affidavits, prior testimony, and the like.<sup>538</sup>

Soon thereafter, as the majority author in *Melendez-Diaz*, Justice Scalia reaffirmed the vitality of the portfolio he first announced in *Crawford*.<sup>539</sup> In this fashion, the senior jurist set in place a powerful foundation for the further analysis of testimonial statements and their inherent degrees of solemnity.

But the veteran jurist was not merely content to publish catalogues of what statements comprised the subset of "solemnity." We applaud, as well we should, Justice Scalia's masterful and irrefutable deployment of the plain dictionary meaning of words to explain "solemnity" in the context of the Sixth Amendment.<sup>540</sup>

Thus, we recognize Justice Scalia's erudite contribution to the critical role of solemnity in determining the application of the Confrontation Clause to testimonial statements. Yet there is still one more Justice we must pay our respects to before turning to Justice Thomas's cumulative efforts in *Williams*.

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testimonial materials." (internal quotation marks omitted)).

<sup>535</sup> See *Davis v. Washington*, 547 U.S. 813, 836 (2006) (Thomas, J., concurring).

<sup>536</sup> *Williams*, 132 S. Ct. at 2260 (Thomas, J., concurring).

<sup>537</sup> Justice Scalia authored the majority's opinions in both *Melendez-Diaz*, 557 U.S. 305 and *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>538</sup> See *Crawford*, 541 U.S. at 51.

<sup>539</sup> See *Melendez-Diaz*, 557 U.S. at 310.

<sup>540</sup> See *Davis*, 547 U.S. at 823–24 (citing *Crawford*, 541 U.S. at 51).

That is, of course, Justice Ginsburg for her efforts in *Bullcoming*.<sup>541</sup> Among other things, in crafting the majority opinion in that case, she established its significant duality with Justice Scalia's predecessor work in *Melendez-Diaz*.<sup>542</sup>

More to the point, in *Bullcoming*, the eminent jurist neatly parsed the forensic analysis therein, elegantly disposing of the "hard science" of such things as the operation of the gas chromatograph machine on the one hand,<sup>543</sup> while on the other not losing sight of the fundamental legal points arising from the creation and certification of that same scientific analysis.<sup>544</sup>

As to the latter, Justice Ginsburg demonstrated great clarity of vision in discerning the necessary indicia of solemnity, as found in the BAC report in *Bullcoming*.<sup>545</sup> Not taken in by mere labels or un-notarized signatures, Justice Ginsburg had no trouble recognizing that the attestation of the lab technician therein bestowed the requisite solemnity upon the subject report.<sup>546</sup> It was beyond cavil, found the eminent Justice, that the certified results of the BAC test were intended to be and were in fact solemn enough to be classified as testimonial in nature, and thereby very much in need of testing in "the crucible of cross-examination."<sup>547</sup>

We find of inestimable value Justice Ginsburg's declaration that, in every material respect, the forensic analysis in *Bullcoming* was formal, testimonial, and had to be confronted by the defendant therein.<sup>548</sup> The happenstance of a lack of a notary's stamp did not detract from its formalism one bit for Sixth Amendment purposes.<sup>549</sup> Justice Ginsburg's forthrightness in reaching these conclusions cannot be undervalued.

All this now being said, Justice Scalia and Justice Ginsburg built the foundation for Justice Thomas's follow-on in *Williams*.<sup>550</sup> We find of great moment the paragon of consistency linking *Crawford*, *Melendez-Diaz*, and

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<sup>541</sup> See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2709 (2011).

<sup>542</sup> *Id.* at 2716–17.

<sup>543</sup> *Id.* at 2715 ("In any event, the comparative reliability of an analyst's testimonial report drawn from [gas chromatograph] machine-produced data does not overcome the Sixth Amendment bar.").

<sup>544</sup> *Id.* at 2715–16.

<sup>545</sup> *Id.* at 2717.

<sup>546</sup> *Id.*

<sup>547</sup> *Id.* at 2715 (citing *Crawford v. Washington*, 541 U.S. 36, 61 (2004)).

<sup>548</sup> *Id.* at 2717.

<sup>549</sup> *Id.*

<sup>550</sup> See *Williams v. Illinois*, 132 S. Ct. 2221, 2255 (2012) (Thomas, J., concurring).

*Bullcoming*, first to each other to comprise the great triad,<sup>551</sup> and then their undeniable connection to Justice Thomas's construct in the *Williams* concurrence.<sup>552</sup> And please be assured Justice Thomas did not merely embellish.

Indeed, he grafted a noble structure upon what was already there, the first course of bricks being his references to the artifices of Marian law, so abused in the pre-American era.<sup>553</sup> Delving further into the specific attributes of Justice Scalia's listed items, Justice Thomas demonstrated great insight into not only the characteristics of these suspect affidavits and noxious ex parte confessions, but the historical context of how they were employed to deny a free people the fundamental right of confrontation.<sup>554</sup>

More precisely, Justice Thomas then examined the creation of solemnity itself, by means of swearing an oath to an affidavit's contents, providing sworn testimony to a magister (albeit outside the accuser's presence), and by sundry other devices.<sup>555</sup> To be sure, the veteran Justice carefully exposed how declarations, attestations, and certifications are no less intended to foment solemnity than any other of the aforementioned traditional modes of affirmation.<sup>556</sup>

In *Williams*, Justice Thomas cogently broke down what distinguished Lambatos's testimony in the Court's newest declaration of the Confrontation Clause's bounds: Lambatos employed facts only to explain the basis of her expert opinion; Lambatos gave no testimony as to predicate events; and she gave her expert opinion only.<sup>557</sup> Solemnity was clearly lacking here, concluded Justice Thomas, except as to the final item listed, and that of course was subject to immediate cross-examination when Lambatos testified as an expert.<sup>558</sup>

Justice Thomas then coalesced this wonderful admixture of history, prevailing law, and the facts at bar to conclude that this expert's opinion testimony did not surpass the threshold of solemnity necessary to invoke the right of confrontation.<sup>559</sup> Rather, its distinctive lack of solemnity placed it

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<sup>551</sup> See *id.* at 2260–61.

<sup>552</sup> See *id.*

<sup>553</sup> *Id.* at 2257–58 & n.2, 2260.

<sup>554</sup> *Id.* at 2260, 2263.

<sup>555</sup> *Id.* at 2260.

<sup>556</sup> See *id.*

<sup>557</sup> *Id.*

<sup>558</sup> *Id.* at 2261.

<sup>559</sup> *Id.*

beyond the ambit of the Sixth Amendment, which, as we now know, led Justice Thomas to join the result but posit a different rationale for his decision.<sup>560</sup>

It is here in the *Williams* concurrence that we find Justice Thomas truly coming into his own in Confrontation Clause jurisprudence, with the indisputable correctness of his instructions on the creation and recognition of the solemnity necessary to invoke the guarantee of confrontation.<sup>561</sup> Indeed, by the apt demonstration of the solemnity lacking in *Williams*,<sup>562</sup> Justice Thomas's teachings garner irrefutable force when contrasted with what the majorities in *Melendez-Diaz* and *Bullcoming* found constituted the requisite formalities necessary to impose the guarantee of the Sixth Amendment.<sup>563</sup>

Notably, by pulling together both what is and is not solemn, Justice Thomas puts his own indelible stamp upon what statements are sufficiently formal—and thus testimonial—to be subject to “the crucible of cross-examination.”

#### D. Dissecting *Williams* and the *Alito* Views

Undoubtedly, intellectual honesty demands that, in exploring the dynamics of the Justices who created the trilogy, we provide equal (or nearly so) coverage to the architects of *Williams*, who more often than not constitute the opposing viewpoint in the triumvirate of earlier cases. This is also sensible, since the voice of the plurality in *Williams* first made its presence known in the minority reports of the *Crawford*,<sup>564</sup> *Melendez-Diaz*,<sup>565</sup> and *Bullcoming*<sup>566</sup> triad.

In this part of our analysis, we find it behooves us to work backwards in time. Thus, we commence with *Williams*, and the eminent Justice Alito's formulation of the view which prevailed in that most recent ruling.<sup>567</sup> And,

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<sup>560</sup> *Id.*

<sup>561</sup> *See id.*

<sup>562</sup> *Id.*

<sup>563</sup> *Williams*, 132 S. Ct. at 2260 (Thomas, J., concurring) (comparing the testimonial laboratory reports in *Melendez-Diaz* and *Bullcoming*).

<sup>564</sup> 541 U.S. 36, 69 (2004) (Rehnquist, C.J., concurring).

<sup>565</sup> 557 U.S. at 330 (Kennedy, J., dissenting) (joined by Chief Justice Roberts and Justices Breyer and Alito).

<sup>566</sup> 131 S. Ct. at 2723 (Kennedy, J., dissenting) (joined by Chief Justice Roberts and Justices Breyer and Alito).

<sup>567</sup> 132 S. Ct. at 2221.

while we ultimately may not agree with the plurality's rationale therein, one can still see why Justice Alito's reasoning makes eminent sense, at least to some degree.

### 1. The *Williams* Plurality

We posit the key to reconciling *Williams* to the Confrontation Clause trilogy is that Justice Alito and his allies distinguish, in great degree, the core of facts underlying the former holding.<sup>568</sup> This newest landmark is clearly focused upon the admissibility of an expert opinion, when said opinion is based upon information not in evidence for its own truth—and precious little else.<sup>569</sup> In critical counterpoint, *Williams* did not involve: an out-of-court statement made to police;<sup>570</sup> a lab test for narcotics;<sup>571</sup> nor a lab test for blood alcohol content.<sup>572</sup> The difference is exquisite, we think.

Credit *Williams* for the elegance it displays. It steers away from the out-of-court, unreachable testimony allowed pursuant to the Marian laws, and therefore so repugnant under the Sixth Amendment's guarantee.<sup>573</sup> It gives a wide berth to formal, testimonial statements—such as lab reports, scientific analysis, et al.—that cannot be tested in the “crucible of cross-examination” so dear to our Confrontation Clause jurisprudence.<sup>574</sup>

Therefore, we can see why Justice Alito led the plurality here in denominating how the expert testimony in *Williams* was so radically different from what the high Court condemned in the trilogy for violating the Confrontation Clause.<sup>575</sup> Indeed, he distinguishes the suspect trial evidence found in *Williams*, and ultimately brings it home to the safe harbor of non-testimonial “facts,” none of which were introduced or offered to prove their own truth, but merely formed a predicate for an opinion offered by an expert, who in fact was present and quite available to be tested via

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<sup>568</sup> *Id.*

<sup>569</sup> *Id.* at 2228.

<sup>570</sup> See *Crawford v. Washington*, 541 U.S. 36, 38 (2004) (holding that an out-of-court recorded statement made to police is testimonial and subject to the Sixth Amendment).

<sup>571</sup> See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009) (holding that affidavits reporting the results of a lab test for narcotics are testimonial statements and subject to the Sixth Amendment).

<sup>572</sup> See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011) (holding that a blood-alcohol analysis is a testimonial statement and subject to the Sixth Amendment).

<sup>573</sup> See, e.g., *Crawford*, 541 U.S. at 43–46.

<sup>574</sup> *Williams*, 132 S. Ct. at 2232–33 (quoting *Crawford*, 541 U.S. at 61).

<sup>575</sup> *Id.* at 2232–33.



cross-examination.<sup>576</sup> In this manner, Justice Alito showed what made *Williams* so segregable from the arc of *Crawford*, *Melendez-Diaz*, and *Bullcoming*.<sup>577</sup>

Justice Alito has often been characterized (fairly or not) as a strict constructionist, a proponent of original meaning in constitutional interpretation, and a conservative-minded fellow to boot.<sup>578</sup> This often places him on the same side (if not necessarily explicitly allied) with Justice Scalia, and, to a somewhat lesser extent, Justice Thomas.<sup>579</sup>

Yet we believe it is precisely these similarities that impelled Justice Alito to write the plurality he did, a postulation very much consistent with the apparent attributes of his constitutional theories. A fortiori that Justice Alito's strict adherence to the text of the Constitution led him to ultimately conclude what was offered in *Williams* was not testimony that evaded cross-examination, as adverse testimony is so regarded by the Confrontation Clause.<sup>580</sup>

The eminent Justice did not disregard, but rather stayed quite faithful to his reputation as an adherent to original meaning, because he found the expert opinion offered in *Williams* to be beyond the scope intended by the Founders in formulating the Confrontation Clause.<sup>581</sup> And, true to his generally conservative world view, he would not countenance an unwarranted application of the Confrontation Clause's strictures to the situation at hand in *Williams*, and thereby exclude the long-established norms, particularly those of the several States, as to the admissibility of such evidence pursuant to the bounds of the Sixth Amendment's guarantees.<sup>582</sup>

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<sup>576</sup> *Id.* at 2240–41.

<sup>577</sup> *Id.*

<sup>578</sup> *See, e.g.*, Jeffrey Rosen, *Alito vs. Roberts, Word by Word*, N.Y. TIMES (Jan. 15, 2006), <http://www.nytimes.com/2006/01/15/weekinreview/15rosen.ready.html> (“[I]t’s clear that Judge Alito is a conservative . . . [and] Judge Alito seemed to endorse originalism.”).

<sup>579</sup> *See id.* (comparing Justice Alito’s conservatism with Justice Scalia, and his originalist approach with Justices Scalia and Thomas).

<sup>580</sup> *See Williams*, 132 S. Ct. at 2244 (“[T]he 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.’”) (quoting *Michigan v. Bryant*, 131 S. Ct. 1143, 1167 (2011) (Thomas, J., concurring)).

<sup>581</sup> *Id.*

<sup>582</sup> *See id.* at 2242. An interesting counterpoint, we think, and thus worthy of mention in this context, is Justice Alito’s vigorous dissent in *Snyder v. Phelps*, the famous—if not infamous—case where the Supreme Court ruled that a fervent religious group protesting in the vicinity of the

As to the dynamics here, this was a mode of thinking embraced by Justice Alito, implicitly if not explicitly, during the construction of the trilogy. It took *Williams* to permit his thinking to come to light and thereafter flourish.

In doing so, Justice Alito also paved the way for the joinder of his colleague most often regarded as the pivot of moderation on the current Supreme Court.<sup>583</sup> We refer, of course, to Justice Kennedy, and now turn to the important role he has played in the evolution of these Sixth Amendment landmarks.

## 2. *Williams* and the Road to Danger

Immediately above, we have commended the *Williams* plurality for its components that we find praiseworthy, when viewed in a certain light. That is not to say, however, that we find the reasoning of *Williams* flawless, nor without certain dangers.

Precisely because of these weighty concerns, we are compelled to point out what we view as certain of *Williams*'s shortcomings that might ultimately lead to further misapprehension on a constitutional scale. We enumerate these latent difficulties as follows.

We first take issue with the plurality's reversion to the aspects of the "primary purpose"<sup>584</sup> of evidence that tend to influence its solemnity and testimonial nature, and how this in turn triggers testing in "the crucible of cross-examination."<sup>585</sup> *Roberts* did more than imply that divining the purpose behind proffering evidence, be it explicit or implicit, is oft times a measurement of its indicia of reliability.<sup>586</sup> We are reminded of the

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funeral of a U.S. Marine killed in Iraq was engaged in an exercise of political speech, and thus protected by the First Amendment. 131 S. Ct. 1207, 1213, 1220 (2011). Justice Alito passionately dissented, and argued that the tort suit brought by the deceased's family for, *inter alia*, emotional harm, should be allowed to go to trial, because the vitriolic speech of the protesters was designed to injure, and thereby fell outside the ambit of First Amendment protection. *Id.* at 1222 (Alito, J., dissenting). From our perspective, we see a striking parallel in analysis insofar as Justice Alito in both instances finds the action at issue to fall outside the bounds of the relevant constitutional guarantees, free speech in one case and the right of confrontation in the other.

<sup>583</sup> See generally Louis D. Bilionis, *Grand Centrism and the Centrist Judicial Personam*, 83 N.C. L. REV. 1353 (2005).

<sup>584</sup> *Williams*, 132 S. Ct. at 2243 ("[T]he primary purpose of the Cellmark report, viewed objectively, was not to accuse petitioner or to create evidence for use at trial. . . . [I]ts primary purpose was to catch a dangerous rapist . . . .").

<sup>585</sup> See *id.* at 2232–33 (quoting *Crawford v. Washington*, 541 U.S. 36, 61 (2004)).

<sup>586</sup> See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *abrogated by Crawford v. Washington*, 541

controversy this has caused in the past with regard to foregoing the right of confrontation when evidence is supposedly “reliable.”<sup>587</sup>

Yet imbedded in Justice Alito’s opining on the role of “primary purpose” in deciding the admissibility of evidence are shades of the flaws fatal to the now-rejected formulation of *Roberts*.<sup>588</sup> To the extent that the *Williams* plurality justifies the allowance of evidence without the absolute need for confrontation is a return to the inadequacies of *Roberts*.

This perspective supposes that the “reliability” of evidence, in this aspect said reliability measured by the key motivations behind its offer into the trial record, is an adequate ground to place such testimony at a remove from the Sixth Amendment.<sup>589</sup> In that regard, such a mode of analysis is “reliability redeux,” and antithetical to *Crawford*’s explicit ouster of *Roberts* and the latter’s now-discredited theorems.<sup>590</sup> The *Williams* plurality accordingly suffers from this unfortunate (and avoidable) reversion.

We find problematic, at best, the plurality’s urging of a modified primary purpose inquest, as adopted from *Bryant* and elsewhere.<sup>591</sup> Certainly, we understand, and to some small extent applaud, Justice Alito’s fidelity to the axiom that “reliability is a salient characteristic of a statement that falls outside the reach of the Confrontation Clause.”<sup>592</sup>

We acknowledge, as we must, but also gladly, that this led to the creation of a Supreme Court doctrine which firmly deposits quasi-testimonial statements made in the course of an ongoing emergency beyond the reach of the right of confrontation, because of this supposed reliability.<sup>593</sup> Nevertheless, those landmarks were put into place to address very specific circumstances, none of which obtain in the trilogy or in *Williams*. Thus, our deep concern is that this advocacy of the primary purpose test, to be applied pursuant to the objective parameters set forth in *Bryant*, opens the way to a substitution of the discarded “reliability”

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U.S. 36, 61 (2004).

<sup>587</sup> See *Crawford*, 541 U.S. at 63 (“Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts.”).

<sup>588</sup> See *Williams*, 132 S. Ct. at 2240.

<sup>589</sup> *Id.* at 2243.

<sup>590</sup> See *Crawford*, 541 U.S. 36.

<sup>591</sup> *Williams*, 132 S. Ct. at 2243 (citing *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011); *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

<sup>592</sup> *Id.*

<sup>593</sup> See *Bryant*, 131 S. Ct. at 1155; *Davis*, 547 U.S. at 822.

nostrum for “the crucible of cross-examination.”<sup>594</sup> Surely that was not the high Court’s intent when it crafted this exceptional doctrine for the rarity of quasi-testimonial statements offered up in an emergency setting.<sup>595</sup> In short, let us not confuse “emergencies” with accusations for Sixth Amendment purposes.

While the foregoing represents our humble opinions regarding the fallacy of a resurrected “primary purpose” inquiry, we are not alone. Our boldness takes inspiration from the undoubtedly similar criticisms made by none other than Justice Thomas, even as he concurred in the result in *Williams*.<sup>596</sup>

Justice Thomas is one and the same incisive and insightful where he proclaims, “[A] primary purpose inquiry divorced from solemnity is unworkable in practice . . . [It] gives courts no principled way to assign primacy to one of those purposes.”<sup>597</sup> The eminent Justice’s concurrence squarely lambasts the primary purpose attribute found in *Williams* because this “reformulated version” is far worse than the original.<sup>598</sup> The latest iteration, complains Justice Thomas, is wholly unmoored “in constitutional text, in history, or in logic.”<sup>599</sup>

Looked at another way, the fatal flaw of this line of inquiry is that it results in unprincipled decision-making, certainly anathema in matters of constitutional import. And this sad result is inevitable, because the entire concept lacks a solid grounding in any of the Sixth Amendment’s text, formation or logical application.

Justice Thomas in his concurring opinion is wholly in the right for also pointing out that the very words of the Confrontation Clause utterly fail to constrain the time one may become a witness.<sup>600</sup> Therefore, if the text of the guarantee of confrontation permits a witness to come into being at any time, then the restructured primary purpose inquiry is irredeemably flawed and unjust because of its loyalty to such a false restriction as a finite time for the “creation” of accusatory witnesses and their testimonial statements.<sup>601</sup>

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<sup>594</sup> Compare *Bryant*, 131 S. Ct. at 1155, with *Crawford*, 541 U.S. at 61.

<sup>595</sup> See, e.g., *Bryant*, 131 S. Ct. at 1155.

<sup>596</sup> 132 S. Ct. at 2255 (Thomas, J., concurring).

<sup>597</sup> *Id.* at 2261 (referring to the dual purposes of resolving an ongoing emergency and establishing facts about a crime for potential prosecution).

<sup>598</sup> *Id.* at 2262.

<sup>599</sup> *Id.*

<sup>600</sup> *Id.*

<sup>601</sup> *Id.* (citing *Crawford v. Washington*, 541 U.S. 36, 50–51 (2004)).

Finally on this point, heed well Justice Thomas's riposte that the "[h]istorical practice" of our system of justice irrefutably confirms that one can be an accuser even when the putative wrongdoer is unknown or a fugitive.<sup>602</sup> This serves as further proof that superimposing a temporal litmus test upon testimonial statements prior to subjecting such declarations to the rigors of "the crucible of cross-examination"<sup>603</sup> is to misapprehend and offend the guarantee of confrontation.<sup>604</sup>

We share in full measure Justice Thomas's misgivings on this point. Moreover, we take comfort that his wisdom will forestall any resurgence of the flawed notions of *Roberts* or its ilk.

Next, we address the potential for danger in the "second, independent basis" for the plurality's holding in *Williams*, to wit, that the DNA profiles there were very different from the testimonial statements the Sixth Amendment was intended to reach.<sup>605</sup> Specifically, we take great note of Justice Alito opining that the scientific analysis of DNA present in *Williams* exculpated "all but one of the more than 7 billion people in the world today."<sup>606</sup>

True as that pungent observation might be, insofar that DNA profiling tends to free from guilt literally billions, is not the countervailing proposition equally true—that this mode of scientific analysis does inculcate one individual? We are concerned that this secondary ground offered up by the *Williams* plurality is more dangerous, for reason it glosses over the accusatory power of such forensic evidence, and thereby creates a loophole by which such out-of-court testimonial statements might evade rightful confrontation.

Respectfully, we find Justice Alito's perspective flawed, as it misses the point that the DNA profiling at issue in *Williams*, like practically all forensic analysis, still accuses at least one person. And if scientific evidence accuses, then must it not be confronted as guaranteed by the Confrontation Clause?

Third, we recollect the declaration of the *Williams* plurality that its findings that day were "entirely consistent" with its ancestors *Melendez-Diaz* and *Bullcoming*.<sup>607</sup> But is that contention absolutely true? As

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<sup>602</sup> *Williams*, 132 S. Ct. at 2262 (Thomas, J., concurring).

<sup>603</sup> *Crawford*, 541 U.S. at 61.

<sup>604</sup> See *Williams*, 132 S. Ct. at 2262 (Thomas, J., concurring).

<sup>605</sup> *Id.* at 2228.

<sup>606</sup> *Id.*

<sup>607</sup> *Id.* at 2240.

aforementioned, does the *Williams* rationale carve out exceptions to the broad holding of those two legs of the triad? *Melendez-Diaz*<sup>608</sup> and *Bullcoming*<sup>609</sup> unequivocally found scientific analysis sufficiently accusatory (when sufficiently solemn, of course) to implicate the guarantee of confrontation.

Notwithstanding, *Williams* might be viewed as making an exception for forensic analysis, particularly when formality is apparently lacking. Again, we must respectfully ask: is this consistency or divergence? Is it true to the general percept or does it craft an exception? For all the reasons evidenced above, this concerns us.

A fourth but lesser concern is *Williams*'s refuge in the capability left to the defense to subpoena witnesses who conducted scientific tests, should the accused feel the overwhelming need to confront the forensic analysts.<sup>610</sup> To be certain, is this not the very evil of shifting the burden from the prosecution to the defense, as decried in *Melendez-Diaz* by Justice Scalia?<sup>611</sup> We think so, and thus this segment of the reasoning of *Williams* likewise gives us pause.

### 3. Dissent to Plurality: The Travels of Justice Kennedy

A substantial part of our take on Justice Alito's theories in these proceedings also neatly explains the joinder to and interaction of Justice Kennedy in these matters.<sup>612</sup> Like his junior colleague, Justice Kennedy was heard from in the trilogy's timeline to voice his beliefs, paramount among them the companion axioms that: (a) not everything is testimonial at trial and thus subject to the Confrontation Clause;<sup>613</sup> and (b) existing standards of evidence law already provide a capable filter for such non-testimonial offerings.<sup>614</sup> And as to the latter, the lower federal courts and the States should be left to continue to apply and refine that which has already been

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<sup>608</sup> 557 U.S. 305, 311 (2009).

<sup>609</sup> 131 S. Ct. 2705, 2713 (2011).

<sup>610</sup> *Williams*, 132 S. Ct. at 2228.

<sup>611</sup> *Melendez-Diaz*, 557 U.S. at 324 ("More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.").

<sup>612</sup> See *Williams*, 132 S. Ct. at 2227 (Justice Alito, joined by Chief Justice Roberts and Justices Kennedy and Breyer, in writing the plurality's opinion.).

<sup>613</sup> *Melendez-Diaz*, 557 U.S. at 330–31 (Kennedy, J., dissenting).

<sup>614</sup> *Id.* at 331–32.

well committed to their good offices, in the senior Justice's view.<sup>615</sup>

Little wonder then that we see Justice Kennedy, accurately described (more or less) as the voice of moderation on the modern Court, aligning himself with Justice Alito.<sup>616</sup> It can be noted that Justice Kennedy does not diverge from the trilogy, but rather acts to post its rightful boundaries on such things that can be distinguished, such as found in *Williams*, as falling outside the sphere of the Confrontation Clause.

Indubitably, *Williams* is the coming to fruition of what had hereto before been the minority position, as expressed in *Melendez-Diaz* and *Bullcoming*, in the main by the same rough grouping of Justices. As we continue to regress in time from *Williams* back through the trilogy, we see taking shape the underpinnings of the plurality in the Court's most recent landmark.

In *Bullcoming*, we witnessed Justice Kennedy taking the lead, as joined by Justice Alito,<sup>617</sup> roles they were to subsequently reverse in *Williams*.<sup>618</sup> One does not necessarily have to agree with Justice Kennedy to plainly see that his counterpoint is animated, in large part, by his pragmatic concerns for the future of forensic testimony, specifically, and later, more generally, for the proper allocation of power among the state and federal trial courts,<sup>619</sup> on the one hand, and the exigencies of the Constitution,<sup>620</sup> on the other. To be sure, as to the last most aspect, it is likewise clear that Justice Kennedy does not agree that the Sixth Amendment guarantee is always implicated in these matters.<sup>621</sup>

Justice Kennedy very much exhibited his practical side in his criticisms of the *Bullcoming* ruling.<sup>622</sup> He ardently voiced his concerns over the efficient administration of justice should *Bullcoming*'s holding take root:

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<sup>615</sup> *Id.*

<sup>616</sup> See Bilionis, *supra* note 583, at 1353.

<sup>617</sup> 131 S. Ct. 2705, 2723 (2011) (Kennedy, J., dissenting). Chief Justice Roberts and Justice Breyer also joined in the *Bullcoming* dissent. *Id.*

<sup>618</sup> 132 S. Ct. 2221, 2221 (2012) (Alito, J., joined by Chief Justice Roberts and Justices Kennedy and Breyer, in writing the plurality's opinion.).

<sup>619</sup> See *Bullcoming*, 131 S. Ct. at 2725 (Kennedy, J., dissenting) ("The States, furthermore, can assess the progress of scientific testing and enact or adopt statutes and rules to ensure that only reliable evidence is admitted.").

<sup>620</sup> *Id.* ("The protections in the Confrontation Clause, and indeed the Sixth Amendment in general, are designed to ensure a fair trial with reliable evidence. But the *Crawford v. Washington* line of cases has treated the reliability of evidence as a reason to exclude it." (citation omitted)).

<sup>621</sup> See *id.* at 2726 (illustrating "the persistent ambiguities" latent in the majority's approach, particularly with "[p]rocedures involving multiple participants").

<sup>622</sup> See *id.*

“Scarce state resources could be committed to other urgent needs in the criminal justice system.”<sup>623</sup> Clearly, the sensibilities of the veteran jurist were offended by what he saw as an unnecessary and unwanted burden upon law enforcement everywhere, but especially at the local level, should *Bullcoming’s* edicts compel a paralyzing need to call an army of forensic analysts to the stand in every trial involving forensic evidence.<sup>624</sup>

Appropos to his pragmatism, Justice Kennedy later warned that the legacy of *Bullcoming* would be to require prosecutors to call to the stand lab technicians who simply filled out forms and recorded test results.<sup>625</sup> Decrying this as “a hollow formality,” the eminent Justice obviously found this formalism superfluous, while not advancing one iota the constitutional right of confrontation.<sup>626</sup> It can be fairly concluded that Justice Kennedy, perceiving no affront here to the Sixth Amendment, therefore placed greater emphasis on fostering the efficacy of scientific testimony.

Likewise reflected in Justice Kennedy’s dissent in *Bullcoming* is his high degree of faith in the accuracy and impartiality of scientific analysis as trial evidence.<sup>627</sup> It can be gainsaid that Justice Kennedy enjoys a fair degree of comfort with the current state of scientific testing, and thus its reliability as evidence in the Nation’s trial courts.

How his confidence evolves and to what degree it shapes future high Court decisions shaping the Confrontation Clause remains to be seen. Yet, as aforementioned, Justice Kennedy’s precise views of the sturdiness of forensic evidence in turn influence his more general concerns about the development of the law on this realm.

In his *Bullcoming* dissent, we see Justice Kennedy expressing grave concerns as to how the majority’s teachings in the trilogy cases may impair the proper workings of the lower courts, especially those of the States in developing their own trial procedures and rules of evidence.<sup>628</sup> We have his statement that the current arc of Confrontation Clause jurisprudence curtails the States in their own good faith efforts to “assess the progress of scientific

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<sup>623</sup> *Id.* at 2728 (providing an elaborate explanation of how lab analysts might be unavailable for trial, effectively paralyzing state prosecutors).

<sup>624</sup> *Id.* at 2724.

<sup>625</sup> *Id.*

<sup>626</sup> *Id.*

<sup>627</sup> *Id.* at 2726 (“A rule that bars testimony of that sort, however, provides neither cause or necessity to impose a constitutional bar on the admission of impartial lab reports . . . prepared by experienced technician in laboratories that follow professional norms and scientific protocols.”).

<sup>628</sup> *Id.* at 2725.



testing and enact or adopt statutes and rules to ensure that only reliable evidence is admitted.”<sup>629</sup>

Allowed full rein, he fears, the trilogy could bring about an “ongoing, continued, and systemic displacement” of state evidentiary rules.<sup>630</sup> Agree or not, that is a worthy concern the eminent Justice posits.

Justice Kennedy’s dire warnings of the infirmities of the prevailing triad came to a head in *Bullcoming*, as the last leg of the trilogy, and before the tables were turned in *Williams*. The faults the eminent Justice found were manifold, but they apparently centered upon his paramount concern that the triumvirate had left the Court’s Confrontation Clause reasoning adrift in perilous waters.<sup>631</sup>

As bemoaned by Justice Kennedy, “the wake of *Crawford*” left behind turbulent sailing for the Confrontation Clause.<sup>632</sup> In his view, as a precedent that case lacks clarity of vision, and is instead debilitated by unsettled meaning.<sup>633</sup> Lastly, the holding leaves too much room for guesswork by the Nation’s many trial judges, be they local, state or federal, in applying the Sixth Amendment.<sup>634</sup>

Justice Kennedy then faulted the high Court’s “fidelity to *Melendez-Diaz*” for reason that it forces “a choice of evils: render the Confrontation Clause pro forma or construe it so that its dictates are unworkable.”<sup>635</sup> Clearly, in his view such draconian outcomes were completely unnecessary, and could be largely avoided by a return to a more stable mooring for the right of confrontation.<sup>636</sup> And so Justice Kennedy expressed his dismay at what he perceived were the shortcomings of the high Court’s decision.<sup>637</sup>

At the end of the day, while we may respect the sincere concerns raised by the eminent Justice in his contribution to *Bullcoming*, we cannot agree.

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<sup>629</sup> *Id.*

<sup>630</sup> *Id.* at 2727.

<sup>631</sup> *Id.* at 2728 (“This Court’s missteps have produced an interpretation of the word ‘witness’ at odds with its meaning elsewhere in the Constitution, including elsewhere in the Sixth Amendment, and at odds with the sound administration of justice. It is time to return to solid ground.” (citation omitted)).

<sup>632</sup> *Id.* at 2726.

<sup>633</sup> *Id.*

<sup>634</sup> *Id.*

<sup>635</sup> *Id.*

<sup>636</sup> *Id.* at 2728 (criticizing *Crawford*’s holding as “not preordained,” and calling for a “return to solid ground” in the form of a “reliable, commonsense evidentiary framework” for prosecutors to follow).

<sup>637</sup> *Id.*

For one, we cannot square his concern for the exigencies of public policy when placed in contradistinction with the pure text of the Confrontation Clause.<sup>638</sup> The former, by its very nature, is subjective, malleable, and therefore elusive. The latter is adamant and unyielding, just as a guarantee of liberty should be.

Similarly, we commend his respect for the proper allocation between federal power and state laws of evidence, particularly as to the rights of the sovereign states to craft the latter without undue and unnecessary oppression.<sup>639</sup> But once again, we have in counterpoise a constitutional right versus lesser rules centered upon the admissibility of evidence. The first is granite, the other far less substantial. The necessary outcome cannot be denied.

Finally, Justice Kennedy's views, as expressed in *Bullcoming*, would ultimately usurp the Confrontation Clause in favor of the supposed reliability of forensic evidence. In our humble view, one is a thing; the other is a protector of liberty. The rightful victor should be obvious, and has already been decided by the high Court. And so we find ourselves at odds with the Kennedy theorems as espoused in *Bullcoming*.

Continuing our regressive mode of analysis, we now turn back the clock to *Melendez-Diaz*, where Justice Kennedy penned the dissent for the same cohort.<sup>640</sup> As can be expected, we see the budding criticisms that fully flowered within the *Williams* plurality.

Immediately, the *Melendez-Diaz* dissent expressed deep regret that the high Court, in one sweeping blow, now eradicates "an accepted rule governing the admission of scientific evidence" without the testimony of the analyst who produced it.<sup>641</sup> Justice Kennedy decries the wasteful discard of a precept he contends held sway over the majority of States and the federal appellate tribunals for nearly a century.<sup>642</sup> Even more regrettable, in his estimation, is that the *Melendez-Diaz* majority did so based upon a prior Confrontation Clause landmark having nothing to do with forensic analysis,

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<sup>638</sup> U.S. CONST. amend. VI ("In all criminal prosecutions, . . . the right . . . to be confronted with the witnesses against him.").

<sup>639</sup> *Williams v. Illinois*, 132 S. Ct. 2221, 2727 (2012) (plurality opinion).

<sup>640</sup> 557 U.S. 305, 330 (2009). (Kennedy, J., dissenting). Chief Justice Roberts, Justice Breyer, and Justice Alito joined Justice Kennedy to form their core group for the first time on this issue. *Id.*

<sup>641</sup> *Id.*

<sup>642</sup> *Id.* ("This rule has been established for at least 90 years. It extends across at least 35 States and six Federal Courts of Appeals.").

that of course being *Crawford*.<sup>643</sup>

It is not without a touch of chagrin that Justice Kennedy finds it so “remarkable” that the majority “confidently disregards” such longstanding practices.<sup>644</sup> And in what is unmistakable sarcasm, the normally moderate Justice is flabbergasted to learn that for the first two centuries of the Republic the Confrontation Clause has been woefully misinterpreted, an all the more remarkable revelation because that proviso of the Sixth Amendment is “hardly . . . arcane or seldom-used.”<sup>645</sup>

Justice Kennedy then anxiously describes how the several States may now confront the “onerous burden” of new, yet-to-be defined rules of evidence to replace the now-gone precedents, and his concomitant fear that “formalistic and wooden rules, divorced from precedent, common sense, and the underlying purpose of the [Confrontation Clause]” shall take their place.<sup>646</sup> And once more the pragmatist, Justice Kennedy takes up the public-policy concern of disrupting criminal laws and procedures that “already give ample protections against the misuse of scientific evidence.”<sup>647</sup>

With his feet still firmly planted in the realm of practicality, Justice Kennedy cogently pointed out a number of difficulties that *Melendez-Diaz* now offered up. Key among them, how does one define the term “analyst” for purposes of the Sixth Amendment, as “it appears nowhere in the Confrontation Clause?”<sup>648</sup>

Even once defined, which individual in the chain of forensic analysis is the analyst, he asks?<sup>649</sup> After all, the majority in *Melendez-Diaz* “offer[ed] no principles or historical precedent” to make that determination, he complains.<sup>650</sup> And today’s decision rendered that no small question, opined Justice Kennedy, because of the constitutional magnitude now attached to

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<sup>643</sup> *Id.* To be certain, Justice Kennedy also cites *Davis v. Washington* in the same vein, as a precedent wholly unrelated to the admissibility of scientific evidence, yet relied upon by the Court here in determining the admissibility of the substance test at issue in *Melendez-Diaz*. *Id.* at 330–31.

<sup>644</sup> *Id.*

<sup>645</sup> *Id.*

<sup>646</sup> *Id.* at 331.

<sup>647</sup> *Id.* at 331–32.

<sup>648</sup> *Id.* at 332.

<sup>649</sup> *Id.*

<sup>650</sup> *Id.* at 334.

that individual's role in the presentation of evidence at trial.<sup>651</sup>

Justice Kennedy catalogued some of the difficulties inherent in making that determination, correctly pointing out that each person typically participating in a single forensic analysis “is equally remote from the scene, has no personal stake in the outcome, does not even know the accused, and is concerned only with the performance of his or her role in conducting the test.”<sup>652</sup> As we have seen, each of these points became pillars of Justice Kennedy's subsequent dissent in *Bullcoming*, and even later served as building blocks for the plurality in *Williams*.<sup>653</sup>

Yet, when all is said and done, Justice Kennedy's thoughtful dissent in *Melendez-Diaz* consistently returns to its roots of practicality. He places in exquisite counterpoise what he deems to be the “negligible benefits” of the majority's decision against a forecast of “threat[s] to disrupt forensic investigations across the country and to put prosecutions nationwide at risk” when analysts, for whatever reason, are unavailable for the now-inescapable confrontation at trial.<sup>654</sup> And all so needless, in Justice Kennedy's view, because the plain—and pragmatic—reading of the Confrontation Clause refers to a conventional witness, nominally one of contemporaneous fact, as distinguished from one testifying as to scientific analysis conducted after the deed in question.<sup>655</sup>

Here is probably the gravamen of the learned Justice's dissent, insofar as it is one of constitutional interpretation. Decrying the majority's “fundamental mistake,” Justice Kennedy remonstrates that the text of the Confrontation Clause does not require the mandate given that day.<sup>656</sup> The Sixth Amendment's very words, declared Justice Kennedy, do not textually refer to testimonial statements; as point in fact, the guarantee of confrontation does not refer to “statements” at all.<sup>657</sup>

The entire point, urges Justice Kennedy, is that the Confrontation

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<sup>651</sup> *Id.* at 334–35.

<sup>652</sup> *Id.* at 334.

<sup>653</sup> Justice Kennedy also outlined at length the problems he foresaw beyond forensic evidence, expressing his belief that *Melendez-Diaz*, by extension, could bring unforetold problems to establishing the chain of custody of evidence, and, separately, authenticating documents. *Id.* at 335–38.

<sup>654</sup> *Id.* at 340–41.

<sup>655</sup> *Id.* at 343–44.

<sup>656</sup> *Id.* at 343.

<sup>657</sup> *Id.*

Clause refers to witnesses or, put another way, people who were there.<sup>658</sup> And in a touch of his own brand of originalism, Justice Kennedy insists that the scientific analysts of the present day are not witnesses against the accused as that was understood at the time of the Sixth Amendment's creation.<sup>659</sup> In sum, the Constitution's own text and the Founding Document's original intent cannot be used to justify the majority's conclusion here today.<sup>660</sup>

In toto, Justice Kennedy's dissent in *Melendez-Diaz* is, in the main, compelled by the force of pragmatism. There is most especially his concern for the continuation of established norms of the law of evidence and procedure, and leaving undisturbed prevailing methods of forensic analysis and the bringing of same into court.<sup>661</sup> Justice Kennedy deems these to be matters of public policy when imposing new and heretofore unknown burdens upon the state and federal criminal justice systems, and evidences proper concern for respecting the dividing line between state and local power.<sup>662</sup>

But it was in his final, and comparatively understated, argument of plain text and original intent that Justice Kennedy possibly made his most powerful and far-reaching argument: that the Confrontation Clause itself did not require the result reached in *Melendez-Diaz*.<sup>663</sup> And that was to resonate a scant three years later in *Williams*, when he found his theorem to sufficiently coincide with the plurality's view in that most recent case.<sup>664</sup>

#### 4. *Williams* and Its Roots in *Crawford*

To complete our reverse chronology, we now return to the trilogy's beginnings in *Crawford*.<sup>665</sup> We can be brief here, because the changes in the high Court's constituent members in the little less than the decade which elapsed between the seminal *Crawford* and the Court's latest pronouncement in *Williams* provide a different shading for the grouping

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<sup>658</sup> *Id.* at 343–44.

<sup>659</sup> *Id.* at 344.

<sup>660</sup> *Id.*

<sup>661</sup> *Id.* at 330.

<sup>662</sup> *Id.* at 331.

<sup>663</sup> *Id.* at 344.

<sup>664</sup> *See generally* *Williams v. Illinois*, 132 S. Ct. 2221 (2012) (plurality opinion).

<sup>665</sup> 541 U.S. 36 (2004).

reflected in the plurality of the newest case.<sup>666</sup> Yet our purpose remains the same: to backtrack the members of the *Williams* plurality to their conceptual roots in *Crawford*.

As is so often the case in the last few years, Justice Kennedy is the pivot upon which the Supreme Court turns. Indisputably, Justice Kennedy was but an acquiescing member of the majority that supported Justice Scalia's opinion in *Crawford*.<sup>667</sup> But what was implied by Justice Kennedy then became explicit in *Melendez-Diaz*,<sup>668</sup> as discussed above, and became deafening in his joinder to Justice Alito in *Williams*.<sup>669</sup>

We imply from *Crawford* that Justice Kennedy's reasoning followed these central themes: that Mrs. Crawford indisputably made a testimonial statement,<sup>670</sup> and to law enforcement officers to boot;<sup>671</sup> that while it was beyond peradventure that she had a right to avoid testifying against her husband by invoking the marital privilege,<sup>672</sup> said entitlement did not somehow relieve the necessities of the Confrontation Clause;<sup>673</sup> and, finally, and most powerfully, it was the accuser's utter inability to confront either his wife or de facto cross-examine the damning testimonial statement made against him that irretrievably violated his Sixth Amendment right to confront the witnesses against him.<sup>674</sup>

We refer the reader to the foregoing discussion of how Justice Kennedy extrapolated in *Melendez-Diaz* views distinguishing two cases so relatively close in time, a point of view he was consistent in expounding as part of his joinder to the dissent in *Bullcoming*.<sup>675</sup> And, finally, Justice Kennedy makes so clear in the latest case of *Williams* that he participated in the plurality there because of the world of difference—constitutional difference, to be sure—between live witnesses and these out-of-court testimonial statements (*Crawford*<sup>676</sup> and *Williams*<sup>677</sup>) as compared to mere reporters of forensic

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<sup>666</sup> As is obvious, but still in need of pointing out, Justices Alito, Sotomayor, Kagan and Chief Justice Roberts were not yet on the bench when *Crawford* was decided.

<sup>667</sup> See *Crawford*, 541 U.S. at 36.

<sup>668</sup> See 557 U.S. at 330 (Kennedy, J., dissenting).

<sup>669</sup> See 132 S. Ct. 2221, 2221 (2012) (plurality opinion).

<sup>670</sup> 541 U.S. at 52.

<sup>671</sup> *Id.* at 38.

<sup>672</sup> *Id.* at 40.

<sup>673</sup> *Id.* at 68–69.

<sup>674</sup> *Id.*

<sup>675</sup> See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2723 (2011) (Kennedy, J., dissenting).

<sup>676</sup> 541 U.S. at 38.

analyses (*Melendez-Diaz*<sup>678</sup> and *Bullcoming*<sup>679</sup>).<sup>680</sup> According to Justice Kennedy, we see here they comprise two very distinct forms of evidence, which the right of confrontation, as guaranteed by the Sixth Amendment, treats quite differently.<sup>681</sup>

We would respectfully suggest, therefore, that one examine what underlies Justice Kennedy's seeming quiescence in *Crawford*<sup>682</sup> with what animated him so vigorously in *Williams*,<sup>683</sup> and hold all that in sharp contradistinction to his loyal opposition in *Melendez-Diaz*<sup>684</sup> and then *Bullcoming*.<sup>685</sup> If, in the years to come, Justice Kennedy serves as the linchpin of Confrontation Clause jurisprudence, the explicit alignment of his contrasting views in the combined trilogy and *Williams* provides ample evidence of his Sixth Amendment thinking in particular, and his modes of constitutional analysis generally.

#### E. The Demise of the Roberts "Reliability" Test

It is well-known that it is rare indeed for the Supreme Court to make a sea change in its jurisprudence, especially for landmarks implicating a constitutional guarantee as important as the one found in the Confrontation Clause. But there it is, the wholesale rejection of the *Roberts* paradigm,<sup>686</sup> and its utter replacement by the teachings of *Crawford* and its progeny.<sup>687</sup>

The reasons are clear, however. To be sure, *Roberts* was not wholly unworkable; Justice Scalia implicitly said so, and this coming from that holding's harshest critic.<sup>688</sup> Yet the workaday application of *Roberts* in the

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<sup>677</sup> 132 S. Ct. 2221, 2227 (2012) (plurality opinion).

<sup>678</sup> 557 U.S. 305, 307 (2009).

<sup>679</sup> 131 S. Ct. at 2709.

<sup>680</sup> *Williams*, 132 S. Ct. at 2228 (citing *Melendez-Diaz*, 557 U.S. at 330 (Kennedy, J., dissenting)).

<sup>681</sup> *Id.*

<sup>682</sup> See *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>683</sup> See *Williams*, 132 S. Ct. at 2221 (Justice Kennedy joined Chief Justice Roberts and Justices Alito and Breyer in the majority).

<sup>684</sup> See *Melendez-Diaz*, 557 U.S. at 330 (Kennedy, J., dissenting).

<sup>685</sup> See *Bullcoming*, 131 S. Ct. at 2723 (Kennedy, J., dissenting).

<sup>686</sup> See *Ohio v. Roberts*, 448 U.S. 56 (1980), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>687</sup> *Crawford*, 541 U.S. at 67–68 (“By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design.”).

<sup>688</sup> See *id.* at 68 (“Vague standards are manipulable, and, while that might be a small concern

Nation's trial courts highlighted the most cogent reasons for its ouster: inconsistency and unpredictability, characterized by Justice Scalia as too broad and too narrow, all at the same time.<sup>689</sup> Disheartening, to say the least, and flaws so inimical that this precedent represented a clear and present danger to principled decision making with regard to the preservation of Sixth Amendment freedoms.<sup>690</sup>

Indeed, the fact that *Roberts* survived as a guidepost for over two decades, yet its fruit was voluminous contradictions and differentiations in lower court decisions,<sup>691</sup> is a stunning indictment of its impracticality. Enough time had elapsed to prove these were no mere growing pains.

To be sure, it was Justice Scalia in *Crawford* who first succinctly debunked *Roberts* and its ilk for, inter alia, their errant loyalty to the "primary purpose" behind a testimonial statement as determining the declaration's susceptibility to Confrontation Clause analysis.<sup>692</sup> The subsequent two-thirds of the triad, *Melendez-Diaz*<sup>693</sup> and *Bullcoming*,<sup>694</sup> buried *Roberts* even more deeply. But it was Justice Thomas in *Williams* who delivers the final word in favor of eradicating this misbegotten notion.<sup>695</sup>

At the end of the day, *Roberts* had proven beyond a doubt that its precepts were unworkable, and it had to be replaced. Indeed, the stark need to eradicate the flawed rationale of *Roberts* and replace it with the unequivocal guarantee of the right of confrontation, as assured by the ruling triad, is resounding proof that firm adherence to the latter is a priority for

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in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like Raleigh's—great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear.”).

<sup>689</sup> *Id.* at 60.

<sup>690</sup> *Id.* at 63.

<sup>691</sup> *See id.* (noting the “amorphous” nature of the *Roberts* balancing test by recognizing that “[s]ome courts wind up attaching the same significance to opposite facts.”).

<sup>692</sup> *Id.*; *see also* *Williams v. Illinois*, 132 S. Ct. 2221, 2243 (2012) (plurality opinion) (“[T]he primary purpose of the Cellmark report, viewed objectively, was not to accuse petitioner or to create evidence for use at trial . . . [I]ts primary purpose was to catch a dangerous rapist . . .”).

<sup>693</sup> 557 U.S. 305, 311 (2009) (“[T]he sole purpose of the affidavits was to provide ‘prima facie evidence of the composition, quality, and the net weight’ of the analyzed substance.”).

<sup>694</sup> 131 S. Ct. 2705, 2716 (2012) (“The ‘certificates of analysis prepared by the analysts in *Melendez-Diaz*, this Court held, were ‘incontrovertibly . . . affirmation[s] made for the purpose of establishing or proving some fact’ in a criminal proceeding. The same purpose was served by the certificate in question here.” (quoting *Melendez-Diaz*, 557 U.S. at 310)).

<sup>695</sup> 132 S. Ct. at 2255 (Thomas, J., concurring).



Sixth Amendment jurisprudence, now and in the future.

*F. Is “Scientific Evidence” Nonaccusatory?*

At the juncture of our analysis, it is apropos to devote a few words to the “analysis” that is so often at the core of this line of cases—forensic analysis.<sup>696</sup> To be sure, however, we first need to address aspects of these matters that we shall not be analyzing herein.

We candidly admit that we are not scientists; therefore, we lack the scientific acumen to competently discuss the highly technical matters of the current state of forensic science, such as the reliability of its procedures and results. Likewise, we lack the scientific knowledge to exposit the current capabilities of scientific testing, its inherent limitations, and where in the future its trustworthiness shall increase or remain static.

Rather, we gladly commend to you the large, existing body of literature providing intricate and thoughtful analysis and commentary on present-day forensic testing, be it substance testing, blood alcohol levels or cutting-edge DNA matching.<sup>697</sup> Indeed, the Supreme Court cases analyzed herein include a bountiful harvest of citations to precisely such works.

But the important point here is that an in-depth examination of the science of forensic testing was never our intention here. The instant analysis is unmoored by the per se science of these tests. Much to the contrary, it is devoted to the constitutional law aspects of the use of such evidence within the boundaries of the Confrontation Clause. Science we don’t know, and don’t pretend to know. Notwithstanding, that is not an obstacle to discussing the law, of which we have some modest working knowledge. And to that we proceed.

A significant linchpin of the *Williams* plurality (and its precursors in the form of the dissents in *Melendez-Diaz* and *Bullcoming*) is that so-called “scientific evidence,” is, by its very essence, not so accusatory in nature as to be subject to the Confrontation Clause.<sup>698</sup> Put another way, to the

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<sup>696</sup> See, e.g., *Bullcoming*, 131 S. Ct. at 2716.

<sup>697</sup> See *id.*

<sup>698</sup> See *Williams*, 132 S. Ct. at 2228 (“And the profile that Cellmark provided was not inherently inculpatory. On the contrary, a DNA profile is evidence that tends to exculpate all but one of more than 7 billion people in the world today.”); *Bullcoming*, 131 S. Ct. at 2726 (Kennedy, J., dissenting) (arguing that there is “neither cause nor necessity to impose a constitutional bar on the admission of impartial lab reports like the instant one, reports prepared by experienced technicians in laboratories that follow professional norms and scientific protocols.”); *Melendez-Diaz*, 557 U.S. at 330 (Kennedy, J., dissenting) (arguing that the majority did not recognize “the

proponents of the view espoused in the *Williams* plurality and its predecessor minority opinions, forensic analysis is so different in character from true “testimonial statements” that it not only escapes “the crucible of cross-examination,” it never belonged there in the first place.<sup>699</sup>

First, we analyze the extent to which this contention makes sense, for, in a real way, it does, at least to some degree. For our initial step, let us examine the practices generally followed in the preparation of forensic analysis, insofar as it was categorized in, inter alia, the plurality in *Williams*.<sup>700</sup>

Lab technicians often work with anonymous or coded samples of suspected contraband, blood, DNA, and so forth, nominally unaware of the identity of the individual connected to the items.<sup>701</sup> Forensic analysis is often undertaken at a time when suspects are lacking, let alone an accused person has already been clearly established.<sup>702</sup>

Scientific evidence is tested pursuant to rigorous controls and strict protocols, so *Williams* tells us, the former to foolproof the chain of custody of potential trial evidence, and the latter to assure scientifically valid and irrefutable results.<sup>703</sup> A failure of either inescapably renders the testing worthless. Put another way, why bother with forensic analysis at all if linkage to a future defendant cannot be assured or the results are rendered meaningless by sloppy test procedures?<sup>704</sup>

Justice Alito aptly pointed all this out in *Williams*, following the example set by Justice Kennedy in *Bullcoming*.<sup>705</sup> But most of all, he made this searing point: lab techs normally have no idea if the results of their test will inculpate or exculpate some individual from guilt.<sup>706</sup>

And without such insight beforehand, how can a forensic analysis be truly said to bear testimony against an individual sufficient to trigger the

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real differences between laboratory analysts who perform scientific tests and other, more conventional witnesses . . .”).

<sup>699</sup> See *Williams*, 132 S. Ct. at 2228; *Bullcoming*, 131 S. Ct. at 2726 (Kennedy, J., dissenting); *Melendez-Diaz*, 557 U.S. at 330 (Kennedy, J., dissenting).

<sup>700</sup> See *Williams*, 132 S. Ct. at 2243–44.

<sup>701</sup> *Id.*

<sup>702</sup> See *id.* at 2243.

<sup>703</sup> *Id.* at 2239.

<sup>704</sup> *Id.*

<sup>705</sup> See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2724 (Kennedy, J., dissenting).

<sup>706</sup> *Williams*, 132 S. Ct. at 2244 (“[T]echnicians . . . generally have no way of knowing whether [forensic reports] will turn out to be incriminating or exonerating—or both.”).

guarantee of confrontation?<sup>707</sup> We acknowledge this is a most telling point, as made in the *Williams* plurality and elsewhere within the trilogy.<sup>708</sup>

The next juncture in the travels of scientific evidence takes us to its employment in the trial phase. From one perspective, forensic analysis tells a neutral story. For instance, the scientific test in *Melendez-Diaz* tells us the substance recovered was cocaine.<sup>709</sup> Left at that and taken in strict isolation, that might be said to be a neutral report of *what* was found, not *who* possessed the contraband. But that is too facile an allegation.

Truth be told, this is where the *Williams* theorem loses steam. There, the DNA profile already in the database might be neutral—as long as it sat there unused.<sup>710</sup> But once it was pulled for comparison, it started to take on the aspects of an accusatory, and therefore testimonial, instrument.

So too the BAC test in *Bullcoming*—once Bullcoming's own blood was drawn and tested, it was transformed from a life sustaining fluid to a thing testifying against him.<sup>711</sup> The powders received in *Melendez-Diaz* were not scientific curiosities; the proof of their existence as illegal narcotics gave testimony adverse to the defendant there, just as surely as a living, breathing human being could.<sup>712</sup>

Justice Alito in *Williams*<sup>713</sup> and Justice Kennedy in *Bullcoming*<sup>714</sup> devote a great deal of enlightened discussion as to what is scientific evidence, how it is created, and, to a lesser extent, how it is used. But, respectfully in our considered opinion, that school of thought on forensic analysis in comparison to the Confrontation Clause misses the point entirely.

Then what is the point of scientific evidence for purposes of the Sixth Amendment? We humbly propose it is never the *what* of forensic analysis, it is the *why*. Why is scientific evidence pursued, and, if found to be of value, used?

Scientific evidence is used to accuse. Forensic analysis is unmistakably a species of testimony against a defendant. And please remember real people, as in real, flesh and blood lab techs, test, analyze, and report

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<sup>707</sup> See *id.*

<sup>708</sup> See, e.g., *Bullcoming*, 131 S. Ct. at 2726 (Kennedy, J., dissenting).

<sup>709</sup> 557 U.S. 305, 307 (2009).

<sup>710</sup> See *Williams*, 132 S. Ct. at 2227.

<sup>711</sup> See *Bullcoming*, 131 S. Ct. at 2709.

<sup>712</sup> See *Melendez-Diaz*, 557 U.S. at 307.

<sup>713</sup> See *Williams*, 132 S. Ct. at 2239.

<sup>714</sup> See *Bullcoming*, 131 S. Ct. at 2724 (Kennedy, J., dissenting).

scientific evidence.

When they come to court to present their forensic analyses, it is not the cocaine, the BAC test or the DNA profiles bearing witness; it is the true to life laboratory analysts who testify as to what they have found.

They give testimony, not whatever manifestations of physical evidence they have analyzed, not the machine printouts they have transcribed. At the end of the day, scientific evidence is created by individuals, not merely by nature and certainly not by soulless machines.

It is the men and women of forensic science who bear witness. What they bring to the courtroom is unavoidably testimony, in whatever form. As such, the Sixth Amendment demands that their testimony be confronted, as the Confrontation Clause guarantees, and tested in “the crucible of cross-examination.”<sup>715</sup> Nothing less will do.

Even before *Williams* was decided, Justice Ginsburg debunked all this in *Bullcoming*.<sup>716</sup> Her aim was unerring. The defendant was not being accused by a gas chromatograph machine; Bullcoming was being accused by Caylor, the now-absent lab tech that operated the machine.<sup>717</sup> The gas chromatograph had no intelligence, took no initiative, could not even turn itself on and off.

Justice Ginsburg perceived the essential truth of the scientific evidence at issue in *Bullcoming*.<sup>718</sup> A person brought into being that forensic analysis. Thus, a person was bearing witness against the defendant.

Finally, it was that person, and only him and not a surrogate, who could come into court and testify, for the explicit purpose of placing that person squarely in the arena of cross-examination, and allowing the accused to vigorously confront his accuser.<sup>719</sup>

We are justified in according great respect to Justice Ginsburg’s pithy conclusions in *Bullcoming* that the original BAC report was inescapably testimonial, and, contrary to the prosecution’s allegations, it was quite adversarial, inquisitorial, and purposely made for supplying evidence at the

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<sup>715</sup> *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

<sup>716</sup> *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2715 (2011).

<sup>717</sup> *Id.* at 2710–12.

<sup>718</sup> *Id.* at 2715 (“[T]he analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess ‘the scientific acumen of Mme. Curie and the veracity of Mother Theresa.’”) (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319–20 n.6)).

<sup>719</sup> *Id.*

defendant's trial.<sup>720</sup>

The esteemed Madame Justice gave no credence to the state's claim that the BAC test was nothing more than a pure exercise in scientific research, conducted in an antiseptic environment, free of legal ramifications.<sup>721</sup> This zeroing in on the motivation behind the genesis of the lab report went hand in hand with *Bullcoming*'s stern pronouncement that forensic analysts are far more than "mere scribes."<sup>722</sup>

We began this subsection with a question: is scientific evidence nonaccusatory? The answer is undeniably no, it is not. Scientific evidence accuses, plain and simple. Thus, when it possesses the requisite elements of solemnity and formality, it must be subjected to "the crucible of cross-examination."<sup>723</sup> The Confrontation Clause and its august jurisprudence demands nothing less.

### G. Public Policy v. the Confrontation Clause: An Argument Doomed to Fail

In the interest of completeness, we address the primary arguments of public policy raised in the trilogy, and, to a lesser extent, *Williams*. We need only do so briefly.

It is a simple thing, really—public policy rarely, if ever, overcomes the Constitution, nor should it. Nothing else need be said on that account. Thus, as a subset of the Founding Document, the Confrontation Clause does not yield to policy concerns. And it cannot and should not, emoted Justice Scalia in *Crawford*<sup>724</sup> and *Melendez-Diaz*,<sup>725</sup> and Justice Ginsburg in *Bullcoming*.<sup>726</sup>

Truly, we need go no further, but just to be comprehensive, consider the lesser but still eminently practical notions threaded throughout the trilogy. Scheduling or rescheduling court dates around the availability of forensic witnesses is commonplace.<sup>727</sup> History proves that vastly more criminal cases are pled out without trial in this country, thereby obviating the need

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<sup>720</sup> *Id.* at 2717.

<sup>721</sup> *Id.*

<sup>722</sup> *See id.* at 2713.

<sup>723</sup> *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

<sup>724</sup> *Id.* at 55.

<sup>725</sup> 557 U.S. 305, 318 (2009).

<sup>726</sup> 131 S. Ct. at 2718.

<sup>727</sup> *Id.* at 2719.

for anyone to leave the crime lab.<sup>728</sup>

Forensic analysis can be the most damning evidence against a defendant, and incapable of sensible refutation. Then why bring attention to it? Hence, the phenomenon of the discrete stipulation to its uncontested admission into evidence in the great majority of cases, once again disposing of the need for “the crucible of cross-examination.” All of this was amply demonstrated in *Melendez-Diaz* and *Bullcoming*.<sup>729</sup>

Continuing, what if the relevant analyst is deceased, out sick, left town, on vacation or just plain AWOL?<sup>730</sup> In colloquial terms, “deal with it” is the Supreme Court’s admonishment to prosecutors across the land. Such a tart response is not unjust, because the foregoing is: (a) rare; (b) solvable (see adjournments above); and (c) *never* a reason to suspend the rights guaranteed by the Confrontation Clause.

The calm and collected wisdom of Justice Ginsburg in *Bullcoming* probably says it best. There, when the prosecution realized the lab tech Caylor would be “unavailable,” why didn’t the state have the obviously available and experienced fellow analyst Razatos retest the blood sample already in its custody, and then call Razatos to testify as to the test he personally conducted?<sup>731</sup> Evidence once again that, in American jurisprudence, seemingly insignificant missteps often times lead to monuments of constitutional law.

Taken as a whole, all the public policy arguments strung throughout these Confrontation Clause cases are, legally, and practically, of no moment. In yet another one of her classic turns of phrase, Justice Ginsburg put it best: the sky is not falling (and it never will) while we strenuously uphold the guaranteed right of confrontation.<sup>732</sup>

#### *H. Reconciling Williams as the Narrowest View*

In assessing the high Court’s progression from the vaunted trilogy to its most recent pronouncement in *Williams*, there is of course the temptation to view the latter as a surprising and significant divergence from the teachings of the former. While not necessarily inaccurate, such a leap in judgment might be too hasty.

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<sup>728</sup> *Id.* at 2718.

<sup>729</sup> *Id.*; *Melendez-Diaz*, 557 U.S. at 318.

<sup>730</sup> *See, e.g., Bullcoming*, 131 S. Ct. at 2711–12.

<sup>731</sup> *See id.* at 2715.

<sup>732</sup> *Id.* at 2719.

Moreover, it would upset the apple cart of Sixth Amendment jurisprudence already crafted with such great care in the prevailing triad. Thus, there should be more thoughtful regard for *Williams* than lambasting it as a supposed rejection of the trilogy's thinking.

We believe conciliation can be reached here with a more measured approach. First, we need to examine how the trilogy itself openly predicted the coming of *Williams*.

The precision by which the majorities in *Melendez-Diaz* and *Bullcoming* defined the questions they were answering clearly implied the existence of issues left for another day. Far more to the point, Justice Sotomayor's concurrence in *Bullcoming* explicitly posed that the question of Confrontation Clause scrutiny of expert testimony was held in abeyance.<sup>733</sup>

The Justices as a group, but with Justice Sotomayor clearly in the forefront, forecast the coming of *Williams* with great accuracy. That is the first point to demonstrate *Williams* is not some unexpected deviation.

Viewed thusly, one can truthfully say that the triumvirate of *Crawford*, *Melendez-Diaz*, and *Bullcoming* answered the paramount question of the absolute need for testimonial statements of any stripe to endure "the crucible of cross-examination" in order to fulfill the Confrontation Clause guarantee. In contradistinction, *Williams*, as foretold, responds to a subsidiary question deliberately left open by the trilogy: what are the proper bounds of the Sixth Amendment's application to the substance of expert testimony?

Put another way, the trilogy created the trunk of the great oak of the right of confrontation, while the issue proffered by *Williams* is but a branch. And whether that branch is pruned back or allowed to grow does not affect the vitality of the magnificent tree it sprouts from.

Next, it is worthwhile, if not imperative, to examine the very scope of *Williams* and the point it resolved. Viewed in its own light, the exact controversy is actually quite narrow. We admit that this is prone to being overlooked, but we attribute that to the fulsomeness of Justice Alito's plurality opinion, as amplified by Justice Kennedy's supportive exposition, and further increased in volume by the strenuous dissent.

But we need to step back from all that. The heart and soul of *Williams* was more a well-aimed stipulation of how expert testimony is received in court under various rules of evidence and other norms of trial practice. And it is fair to say *Williams*'s holding is no more, no less.

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<sup>733</sup> *Id.* at 2722 (Sotomayor, J., concurring).

In truth, *Williams* is more of a ruling defining the purview of evidentiary rules of hearsay, and how expert testimony and the basis therefore falls within its ambit. This is all exemplified, and exemplified well, to be sure, by Justice Alito's rigorous adherence to the underlying factual predicates, such as: (a) dealing solely with the expert witness, Lambatos; (b) exclusively addressing her proffered expert opinion only (as contrasted to the facts of the event itself); (c) to the extent applicable, the purported "facts" she relied upon in formulating her expert opinion; and, most striking of all, (d) these factoids were *never* offered to prove their own truth by Lambatos and were never admitted into evidence (at least via her individual testimony).<sup>734</sup>

This is why the plurality brooked no nonsense the day the high Court decided *Williams*; it delimited itself to the matters of the testimony of an expert, regarding her expert opinion, and its basis, while barring her from introducing into evidence things not offered for their own truth.<sup>735</sup> These were the salient points Justice Alito returned to again and again, and any analysis cannot lose sight of his single-mindedness in that endeavor.

The plurality's fixation on those underlying circumstances dictated, in turn, the circumscribed scope of its legal analysis. *Williams* was far less a question of the right of confrontation than a case of refining the boundaries of long accepted precepts of hearsay, and the concurrent limitations upon the use of evidence not directed at proving its own truth. A fortiori then that Justice Alito grounded the plurality's points of law upon such things as the nature of expert opinion testimony, the Federal Rules of Evidence and parallel state evidentiary restrictions, and the constraints placed upon hearsay in this context.<sup>736</sup>

In short order, *Williams* found little need for the invocation of the Sixth Amendment. Rather than implicate the broad constitutional guarantee of the Confrontation Clause, and thereafter the need to impose "the crucible of cross-examination" upon the basis of Lambatos's expert opinion when her predicate facts were not offered by her for their own truth, Justice Alito cabined the plurality's holding in such a way as to largely avoid the Sixth Amendment question.<sup>737</sup> Put another way, narrow facts lead to narrow law which leads to a narrow precedent.

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<sup>734</sup>*Williams v. Illinois*, 132 S. Ct. 2221, 2240–41 (2012) (plurality opinion).

<sup>735</sup>*Id.* at 2241.

<sup>736</sup>*Id.*

<sup>737</sup>*Id.*



In sum, *Williams*, when exposed to its core, diverged from the more momentous constitutional aspects of the Confrontation Clause, as decided already by the ruling triumvirate. Such a detour placed it within the more prosaic realm of expert opinion testimony and its basis, hearsay, and the like.

Thus, saved from being forced to strictly rule upon Sixth Amendment grounds, we contend that *Williams* therefore is not contrary to the now established trilogy, but lies somewhere outside the triad's general bounds. Connected, yes, but contrary, no. If such a view prevails, then we can harmonize all these landmarks of the last decade, to the greater good of the Confrontation Clause and its rightful application.

## VII. CONCLUSION

Conclusions should be brief, even for issues as monumental as the present state of the Sixth Amendment's guarantee of the right of confrontation. As succinctly as possible, the Sixth Amendment was born out of a history of depredations against the fundamental right to confront the witnesses against oneself. This liberty remained unshaken into the first decade of the twenty-first century, and still stands unbowed and unbroken.

Yet it continues to evolve. While *Crawford*, as the first leg of the modern trilogy, is cast against the prosaic case of an out-of-court testimonial statement,<sup>738</sup> it is nonetheless the necessary first building block of the modern interpretation of the Confrontation Clause.

This indefatigable cornerstone is then tested against the present era of forensic analysis, and resoundingly demonstrates, not once, but twice, in *Melendez-Diaz* and *Bullcoming*, that the accuser's right to confront witnesses does not stop when said witnesses are the instruments of science or the humans (even if they are "mere scribes") who report what the bloodless machines tell them.<sup>739</sup> Metal or flesh and blood, all must be immersed in "the crucible of cross-examination."

The latest iteration, *Williams*, is just that; a variation upon the central theme of the right to confront an adversary who offers her expert opinion against the defendant. To be certain, there is great danger that *Williams*, if taken beyond the permissible norms of the expert opining upon matters not in evidence for their own truth, exceeds those rightful boundaries.

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<sup>738</sup> 541 U.S. 36 (2004).

<sup>739</sup> See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2716 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009).

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Similarly, *Williams* must be forbidden from precipitating the resurgence of the misbegotten *Roberts* formulation that the triad replaced, and for good cause.

While seemingly in the right (at least from one perspective), our concern is that the restrained *Williams* might one day escape its bonds as the exception to the rule, and become *the* rule. What a dark day that would be indeed for the Confrontation Clause, and, in fact, all our freedoms.

But until then, we can only wait and see, and trust it never comes to such a calamity. And that is both our coda and our warning. The pantheon of constitutional law is never complete, no less so for the Sixth Amendment and its right of confrontation. We are always building, building, building.

For today, the guarantee of the Confrontation Clause remains sacrosanct—and rightly so. It is unshaken by twenty-first century science, and remains steadfast to its original intent and the constitutional text. Yet the process of all constitutional law is evolutionary, and so it is for the Confrontation Clause.

There is no doubt that what we say here is mere prologue to the future of the Sixth Amendment. But, we likewise harbor no fear that this essential liberty will remain anything less than intractable for generations to come.