Note

Confrontation at the Supreme Court

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I. INTRODUCTION

Since 2004, the Supreme Court's docket has seen a great influx of cases relating to the Confrontation Clause, which provides: "[I]n all criminal prosecutions, the accused shall enjoy the right . . . to be

confronted with the witnesses against him."[1] Opening the door with the new test put forth in *Crawford v. Washington*,[2] the Court began with great consensus, but has since fragmented to the point of creating a muddle that is anything but predictable and clear. As the members of the Court change over time, it is natural that some old arguments fall away and new courses are plotted. But while the Court should seek to get constitutional questions "right," it must also endeavor to provide stability to the legal system. The great upheaval in the area of Confrontation Clause jurisprudence is problematic for the criminal justice system because the rules are unclear. Time and money are spent trying and retrying cases when errors are made, and each time the Court shifts its view of what is required by the Sixth Amendment it gets harder to determine what might be reversible error.

The decision in *Crawford* was a great shift in Confrontation Clause jurisprudence. The Court interpreted the confrontation right more expansively and allowed less room for out of court statements to go unconfronted.[3] Testimonial statements required an opportunity for cross-examination either at trial or before if the witness was unavailable at trial.[4] But in *Davis v. Washington*,[5] the attempt to create a test for police interrogations went awry. Allowing statements made primarily to address an "ongoing emergency"[6] to go unconfronted presented an unnecessary means of evading the Confrontation Clause's requirements. In *Michigan v. Bryant*, that is precisely what happened.[7] The primary purpose test was stretched by the *Bryant* Court.[8] Suddenly, statements that would have been inadmissible under *Crawford*'s straightforward test,in which statements made during police interrogations are testimonial, were not subject to the confrontation right and therefore admissible.

Even more concerning is the evolution of the Court's analysis in the area of forensic reports. While the Court started out viewing lab reports as a form of written testimony, by 2012 the Justices were split so dramatically that a majority opinion was impossible in *Williams v. Illinois*.[9] Indeed, the Court is teetering on the edge of allowing lab reports, including sworn statements written with full awareness that they would be available for subsequent prosecutions, to be admitted without the defendant having an opportunity to cross-examine the analyst who produced the report. The argument of the plurality in *Williams* was that lab reports are different and require a different set of rules.[10]

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[1] U.S. CONST. amend. VI.
[2] 541 U.S. 36 (2004).
[3] *Id.* at 67–68
[4] *Id.* 68–69.
[5] 547 U.S. 813 (2006).
[6] *Id.* at 822.
[7] 562 U.S. 344 (2011).
[8] *Id.* at 358–59.
[9] 132 S. Ct. 2221 (2012).
[10] *Id.* at 2227–28.

The Court is distancing itself from *Crawford* with each new case. This is unfortunate because *Crawford* provides the best baseline framework for analyzing the Confrontation Clause. *Crawford* provides the greatest degree of historically justifiable protection of the confrontation right based on the history that inspired the adoption of the Sixth Amendment and limited to the exceptions that were recognized at the time of its passage. The Court should apply the Confrontation Clause to any testimonial statement that is made under circumstances reasonably indicating that the statement will be available for use at a later trial.

II. *CRAWFORD*: TOUCHSTONE OF THE MODERN CONFRONTATION CLAUSE (OR BACK WHEN WE ALL AGREED)

The Supreme Court's decision in *Crawford v. Washington*[11] sets the table for any discussion of modern Confrontation Clause jurisprudence. This is true for three reasons. First, and most importantly, the Court's decision delves deeply into the history of the confrontation right[12] and explicitly bases its interpretation of the Sixth Amendment text on that history.[13] Second, the Court abrogates the *Ohio v. Roberts*[14] rule that allowed trial judges to admit, upon a finding of reliability, unconfronted hearsay that is subject to the Confrontation Clause.[15] Third, and significantly for the purposes of this Note, the decision reflects the view of every Justice who still sits on the Court today.[16] We begin where the Court began its analysis—the history of the confrontation right. Then, we turn to the Court's holding and the two inferences underlying its analysis.

A. Sir Walter Raleigh and the History of Confrontation

The Court looked to the legal practices that led to the adoption of the Sixth Amendment in order to determine who should be considered "witnesses against" a defendant according to the meaning of the Amendment's text.[17] Justice Scalia focused his review of history on the

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[11] 541 U.S. 36 (2004).

[12] *See id.* at 42–50 (describing how the confrontation right developed from the ancient Roman era, to English Common Law, to nineteenth-century American law).

[13] *Id.* at 50.

[14] 448 U.S. 56 (1980). The decision in *Crawford*, while highly critical of the *Roberts* rule, did not explicitly overrule it. *See id.* at 60. It was not until *Washington v. Davis* that Justice Scalia explicitly stated that *Crawford* overruled *Roberts*. 547 U.S. 813, 834 (2006).

[15] *See Crawford*, 541 U.S. at 60–69 (reasoning that *Roberts* did not provide an adequate basis for deciding the case at hand); *see also* Ohio v. Roberts, 448 U.S. 56 (1980) (describing the state of the confrontation clause before Crawford).

[16] Justice Scalia, who was joined by Justices Kennedy, Thomas, Ginsburg, and Breyer, authored the opinion. *Crawford*,.541 U.S. at 37.

[17] *Id.* at 42–43.

English legal traditions that most immediately informed the Founders' experiences and views.[18] English criminal law generally observed common-law procedures requiring live testimony subject to adversarial examination.[19] However, in some circumstances and during some periods of history, the English implemented civil-law practices for criminal trials.[20] Civil-law procedure allowed justices of the peace and other officials to conduct pretrial examinations of accused defendants and witnesses and then present the official's written records of those examinations as evidence at trial.[21] Application of civil-law process was condoned in the sixteenth century by the passage of two statutes—the "Marian statutes," which were so named because they were passed during Queen Mary's reign.[22] Even at this early date, defendants commonly demanded, albeit unsuccessfully, the right to face their accusers.[23]

According to the Court, "[t]he most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries."[24] Sir Walter Raleigh's trial in 1603 is a prime example that is repeatedly invoked in the Justices' opinions, both in *Crawford* and subsequent cases.[25] Indeed, Raleigh's trial is the "paradigmatic confrontation violation" the Sixth Amendment was meant to guard against.[26]

Raleigh was accused of treason; the charge was supported in part by statements made by Lord Cobham, Raleigh's purported accomplice.[27] Cobham made two statements that were introduced against Raleigh: one in a proceeding before another tribunal and the other in a letter.[28] The defense argued that Cobham implicated Raleigh to save himself from the death penalty.[29] The defense demanded that Cobham be called as a witness to make his accusation in person.[30] The judges applied the civil-law procedures of the time and refused to call Cobham but admitted his statements.[31] Raleigh was convicted and sentenced to death.[32] After the trial, one of Raleigh's judges regretted the proceeding as "degrad[ing]

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[18] *Id.* at 43.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 43.
[22] *See id.* at 43–44 (discussing the Marian bail and committal statutes which required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court).
[23] *Id.* at 43.
[24] *Id.* at 44.
[25] *Id.* at 44, 50, 52; Williams v. Illinois, 132 S. Ct. 2221, 2249 (2012); Bullcoming v. New Mexico, 564 U.S. 647, 680 (2011); and Michigan v. Bryant, 562 U.S. 344, 358 (2011).
[26] *Crawford*, 541 U.S. at 52.
[27] *Id.* at 44.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*

and injur[ing]" justice in England.[33]

To prevent similar abuses, English law was reformed during the seventeenth century, and the confrontation right of criminal defendants was recognized.[34] As part of these reforms, courts began requiring that witnesses be demonstrably unavailable to testify at trial before out of court statements could be admitted in evidence.[35] By 1696, this common-law requirement was augmented by the additional requirement that the defendant must have had a prior opportunity to cross-examine the witness before his out of court statement could be used at trial.[36] It was initially unclear whether the Marian statutes created an exception to the opportunity for cross-examination requirement in felony cases.[37] By the time Americans passed the Sixth Amendment, however, English courts were routinely implementing the cross-examination requirement in felony cases.[38]

American colonists meanwhile also endured the application of civil-law process in some criminal trials and protested against the denial of their confrontation rights.[39] During the American Revolution, eight states recognized the confrontation right in their declarations of rights,[40] but the Constitution did not.[41] The *Crawford* Court noted that both ratifiers of the Constitution and Antifederalists decried this omission as leaving open the possibility of allowing civil-law procedure in criminal trials and failing to reflect the importance of cross-examination in determining the truth at trial.[42] To address these and other concerns, the First Congress passed the Bill of Rights, which included the Confrontation Clause in the Sixth Amendment.[43] The Court places the Confrontation Clause in the context of the common law right as it existed in the nineteenth century by citing state court decisions recognizing that the confrontation right requires that the defendant have an opportunity to cross-examine any witness who provides evidence against him.[44] The Court also indicated that a minority of state courts would never admit prior testimony, even where the defendant had a prior opportunity to

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[33] *Id.* (quoting 1 D. JARDINE, CRIMINAL TRIALS 435, 520 (1832)).

[34] *See id.* at 44–45 (discussing how treason statures were developed that required witnesses to confront the accused "face to face" at his arraignment).

[35] *Id.* at 45.

[36] *Id.* at 45–46 (citing King v. Paine, 5 Mod. 163 (1696)).

[37] *Id.* at 46.

[38] *See id.* The English amended their statutes in 1848 to reflect the cross-examination requirement. English courts described the statutory amendment as reflecting what courts already construed the law to equitably require. *Id.* at 47.

[39] *See id.* at 47–48 (describing civil-law procedure in Stamp Act prosecutions and no less a revolutionary than John Adams decrying the use of civil-law examinations in a prominent admiralty case).

[40] *Id.* at 48.

[41] *Id.*

[42] *Id.* at 48–49.

[43] *Id.* at 49.

[44] *See id.* at 49–50 (noting that most state courts rejected the view that prior testimony is inadmissible in criminal cases even if the defendant had a prior opportunity for cross-examination).

cross-examine the witness.[45]

B. The Rule

The holding in *Crawford* effectively overruled *Roberts*.[46] The rule in *Roberts* allowed trial courts to determine whether an out of court statement was reliable, and if it was, to bypass the cross-examination requirement.[47] The Court acknowledged that "the Clause's ultimate goal is to ensure reliability of evidence,"[48] but described it as a procedural right.[49] That is to say, the Confrontation Clause provides a constitutionally prescribed method for determining the reliability of evidence "by testing in the crucible of cross-examination."[50] Because the *Roberts* rule allowed some ex parte statements to be admitted without requiring the witness to testify at trial,[51] the *Crawford* Court established a new test.[52] The Court determined that not all hearsay implicates the Confrontation Clause[53] but held that testimonial out of court statements trigger the confrontation right, and therefore require witness unavailability and a prior opportunity for cross-examination.[54] The Court stated that the testimonial label applies at least to statements from "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations," but clearly reserved the right to add to this class of statements.[55] The Court firmly rooted its analysis and holding in the history of the confrontation right and made two inferences on the basis of that history.[56]

C. The Two Inferences of the *Crawford* Court

The Court inferred that (1) the Confrontation Clause was intended to prevent the use of civil-law practices in criminal trials, particularly ex parte examinations; and (2) that at the time it was passed, the

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[45] *Id.* at 50.

[46] *Id.* at 68–69.

[47] *See id.* at 60–61. (noting that ex parte testimony can be admitted upon a finding of reliability).

[48] *Id.* at 61.

[49] *Id.*

[50] *Id.*

[51] *See id.* at 63–64 ("The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.")

[52] *Id.* at 69 (Rehnquist, J., concurring in the judgment).

[53] *See id.* at 51 ("Not all hearsay implicates the Sixth Amendment's core concerns.").

[54] *See id.* at 68 (explaining that unavailability and a prior opportunity for prior cross-examination are required for admissibility under both the Sixth Amendment and common law).

[55] *Id.*

[56] *Id.* at 50.

confrontation right was understood to bar admission of testimonial statements by a witness who did not appear at trial unless he was both unavailable and the defendant had a prior opportunity to cross-examine him.[57] The first inference is important for two reasons. First, the Court stated that the Clause applies to both in court and out of court testimony—meaning hearsay rules do not automatically trump the Confrontation Clause.[58] However, the Court also made clear as described above that not all hearsay statements trigger a "core concern" of the Clause.[59] These core concerns lead to the second important conclusion drawn from this inference. Because the Clause was enacted to prevent civil-law abuses of the kind seen in Raleigh's trial, the Court concluded that it is only effective against those core concerns, and therefore, a "specific type of out-of-court statement."[60] Looking to the text to determine the scope of the Clause's effect, the Court used dictionaries to determine who is a "witness" and what kind of statements a witness makes.[61] Witnesses "bear testimony," and testimony is usually "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[62]

This foundational definition of "testimonial" is at the heart of the *Crawford* decision.[63] It determines the scope of the Confrontation Clause and which out of court statements may be admitted.[64] If a statement is testimonial, it is subject to the Confrontation Clause; an out of court statement that is not testimonial does not require confrontation.[65] However, the Court did not decide that only testimonial statements are subject to the Confrontation Clause, and it did not provide an exhaustive list of which statements are testimonial because it was not necessary to decide the case.[66] In this way, *Crawford* is the first of a series of cases that must be read together to determine what the Confrontation Clause requires. *Crawford* provided the baseline: prior testimony at a preliminary hearing, grand jury, or former trial, and statements made

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[57] *Id.* at 50, 53–54.

[58] *See id.* at 50–51 ("We once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon the law of Evidence for the time being." (internal quotations omitted)).

[59] *Id.* at 51.

[60] *See id.* (noting the difference between an accuser making a formal statement to the police and a person making a casual remark to an acquaintance).

[61] *Id.*

[62] *Id.* (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 749 (1828)).

[63] *See id.* at 51–52 (discussing the meaning of "testimonial").

[64] *See id.* at 51–52 ("These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it."); *see also id.* at 68–69 ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.").

[65] *See id.* at 68. (noting that the admission of a testimonial statement alone is sufficient to violate the Sixth Amendment).

[66] *See id.* ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'") It was not until *Davis v. Washington*, that the Court held that only testimonial statements are subject to the confrontation right. 547 U.S. 813, 823–26 (2006).

during police interrogations are all testimonial.[67] The Court elaborated that testimonial statements are those that a person would "reasonably expect to be used prosecutorially" or are made in circumstances that would objectively indicate "that the statement would be available for use at a later trial."[68] The statement may be formalized as an affidavit or deposition, but "the absence of oath [is] not dispositive."[69] The Court cited Cobham's examinations used in Raleigh's trial as a "paradigmatic" example of an unsworn statement that is clearly testimonial.[70] This is the framework the *Crawford* Court provided for the scope of which testimonial statements implicate the Confrontation Clause.

The second inference regarded exceptions to the confrontation right. The Court held that an out of court statement may be admitted at trial only when the witness is unavailable and the defendant had a prior opportunity for cross-examination.[71] These requirements are rooted in the common law understanding of the confrontation right that existed in 1791 when the Amendment was passed.[72] The Court described the Sixth Amendment as without "any open-ended exceptions from the confrontation requirement."[73] The only way a court could admit testimonial hearsay without violating the Confrontation Clause was to have an unavailable witness with a prior opportunity to cross-examine that witness.[74] Moving to the next section, it is important to remember that *Crawford* reflects the views of every current Justice of the Court who was on the Court when it was decided: Justices Kennedy, Thomas, Ginsburg, and Breyer.[75]

III. POLICE INTERROGATIONS AND TESTIMONIAL STATEMENTS

Given that *Crawford* did not fully explain which statements are testimonial, it is unsurprising that a case soon arose in which the Justices were forced to clarify the new rule. In 2006, the Court heard two cases involving statements made during interactions with police officials.[76] Significantly, Justice Thomas splintered from the other Justices, five of whom continue to serve on the Court today,[77] on the grounds that a

[67] *Crawford*, 541 U.S. at 68.

[68] *See id.* at 51–52 (differentiating testimonial from nontestimonial statements).

[69] *Id.* at 52 (noting that statements can be testimonial even without taking the oath prior to the statement).

[70] *Id.*

[71] *Id.* at 54.

[72] *Id.* at 49–50, 53–54.

[73] *Id.* at 54.

[74] *Id.* at 54 (noting that the early state courts required unavailability of the witness and a prior opportunity for the defendant to cross-examine the witness).

[75] *Id.* at 37.

[76] Both cases were decided under "*Davis v. Washington*." 547 U.S. 813 (2006).

[77] Justice Scalia again wrote for the Court and was joined by Chief Justice Roberts, and Justices Kennedy, Ginsburg, Breyer, and Alito.

statement must meet a certain level of formality or solemnity to be considered testimonial for Confrontation Clause purposes.[78] This unique and solitary view of the requirements for a testimonial statement has significant ramifications of Confrontation Clause jurisprudence as discussed in later sections.[79] By 2011 when the Court revisited the Confrontation Clause in the context of interactions with police officers and also decided a case in the forensics area, the split was wider and much more convoluted. *Michigan v. Bryant*[80] exposes weaknesses in the *Davis* primary purpose test and may also indicate that Justice Sotomayor's view of the Confrontation Clause's scope differs based upon the context in which it is applied.[81]

A. A Significant Splintering-Off

Davis solidified what the Court only had implied in *Crawford*—the Confrontation Clause applies only to testimonial hearsay.[82] In deciding the case, the Justices developed the primary purpose test to distinguish which types of interactions with police officials[83] create testimonial statements and which do not.[84] Under the test, a statement is nontestimonial "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[85] If no ongoing emergency is objectively indicated by the circumstances, any statements made are testimonial based on the assumption that "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[86]

In *Davis*, a woman called 911 to report that a man was assaulting her in her home.[87] The 911 operator asked questions regarding the location of the attack, the perpetrator's name, and whether he was armed or intoxicated.[88] The companion case, *Hammon*, involved statements made by a woman who had recently been assaulted by her husband, but who was sitting alone and looking upset on her front porch when police

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[78] *See Davis*, 547 U.S. at 836 (Thomas, J., concurring in the judgment in part and dissenting in part).
[79] *Infra*, III-A, III-B, and IV-C.
[80] 562 U.S. 344 (2011).
[81] *See infra*, III-B (showing that statements are nontestimonial when the primary purpose is to address an ongoing emergency).
[82] *Davis*, 547 U.S. at 823.
[83] The Court included 911 operators in its use of the term "police," without holding that the operators are legally police officials. This paper follows that custom. *Id.* at 817–18, 819, 827.
[84] *See id.* at 822 ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.").
[85] *Id.*
[86] *Id.*
[87] *Id.* at 817–18.
[88] *Id.*

arrived.[89] The statements at issue in *Hammon* also described an assault, but were made while the woman was in a room alone with a police officer while another officer kept her husband at bay in another part of the home.[90]

The Court held that the primary purpose of the statements in *Davis* was to aid the police in responding to an ongoing emergency.[91] Therefore, the statements were nontestimonial and not subject to the Confrontation Clause.[92] The Court described four reasons why there was an ongoing emergency: the statements (1) described events as they were occurring, (2) were made while the perpetrator was still in the woman's home and a "bona fide physical threat" to her, (3) conveyed information that was necessary for police to resolve a present emergency as opposed to indicating what happened in the past, and (4) lacked the formal, calm, and safe environment that tends to mark testimonial statements.[93]

On the other hand, the statements in *Hammon* were held to have the primary purpose of helping police gather information about past events.[94] The Court found the circumstances of these statements bore a "striking resemblance" to the ex parte examinations allowed by civil-law procedures that are barred by the Sixth Amendment.[95] That is to say, the statements "do precisely *what a witness does* on direct examination" and are therefore testimonial.[96] The statements in *Hammon* responded to questions about what happened before officers arrived and bore a measure of formality because the interrogation was in a separate room, away from the perpetrator of the assault.[97]

Justice Thomas viewed both statements as insufficiently formal or solemn to be considered testimonial.[98] According to Justice Thomas's view, the Confrontation Clause reaches statements "in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[99] Justice Thomas explained that only when a police interrogation is formalized in some manner do the interrogations resemble the types of Marian proceedings the Clause was meant to prohibit.[100] The obvious concern raised by this reasoning is that officials may attempt to keep pretrial statements informal to preserve their admissibility. Justice Thomas would not apply the Confrontation Clause

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[89] *Id.* at 819–20.

[90] *Id.*

[91] *Id.* at 828.

[92] *Id.* at 828–29 (distinguishing English cases in which the statements were not made in an ongoing emergency). The Court noted, however, that there are situations where "a conversation which begins as an interrogation to determine the need for emergency assistance" . . . can "evolve into testimonial statements." *Id.* at 828.

[93] *Id.* at 827.

[94] *Id.* at 829–30.

[95] *Id.* at 830.

[96] *Id.* (emphasis in original).

[97] *Id.*

[98] *Id.* at 840 (Thomas, J., concurring in the judgment in part and dissenting in part).

[99] *Id.* at 836 (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (opinion of Thomas, J.)).

[100] *Id.* at 837.

to such statements;[101] however, he did not describe any method for determining when a statement is kept purposely informal in order to evade the Clause as opposed to just being informal without any evasion.[102] Justice Thomas also cast doubt on the primary purpose test because, in his view, police often operate at the same time to both address an emergency situation *and* gather information for a possible prosecution.[103]

No other Justice signed onto Thomas's absolute requirement of formality.[104] But the fact that some statements in subsequent cases are clearly formal while others are not so clearly formal means that formality continues to be an important issue. This is particularly true in the forensic report cases.[105]

B. 2011, Take I: Justice Sotomayor Reconsiders Reliability?

Before we turn to the forensic reports, there is one more case in the area of police interrogations to discuss. In 2011, the first year Justice Sotomayor was on the Court to hear a Confrontation Clause case, two major cases were handed down: *Michigan v. Bryant*[106] and *Bullcoming v. New Mexico*.[107] In *Bryant*, the Court split 6–2, showing yet more signs of division.[108] Justice Sotomayor's effect on the Court's view of confrontation is particularly interesting. She created a new majority coalition with Chief Justice Roberts and Justices Kennedy, Breyer, and Alito.[109] Justice Thomas concurred in the judgment on the basis that the interrogation lacked sufficient formality to create testimonial statements.[110] Suddenly, Justice Scalia, heretofore the Court's author in chief on questions of the Confrontation Clause, was relegated to writing a dissent that no one joined,[111] although Justice Ginsburg wrote a separate dissent and agreed with his substantive points.[112]

The question in *Bryant* was whether the Confrontation Clause

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[101] *Id.* at 838.

[102] *Id.*

[103] *Id.* at 838–39.

[104] *Id.* at 834.

[105] *See* Williams v. Illinois, 132 S. Ct. 2221 (2012) (holding primary purpose of report from swab was not to accuse petitioner or create evidence, but rather to catch a dangerous rapist); Bullcoming v. New Mexico, 564 U.S. 647 (2011) (holding blood-alcohol analysis introduced at trial by an analyst who had not performed certification was testimonial); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) (holding certificates of analysis that were sworn by analysts at state laboratory were not removed from Confrontation Clause).

[106] 562 U.S. 344 (2011).

[107] 564 U.S. 647 (2011). *Bullcoming* relates to forensic reports and is discussed, *infra*, IV-B.

[108] *Bryant*, 562 U.S. 344.

[109] *Id.* at 347.

[110] *Id.* at 378 (Thomas, J., concurring in the judgment).

[111] *Id.* at 379 (Scalia, J., dissenting).

[112] *See id.* at 395 (Ginsburg, J., dissenting) (noting that it is the declarant's intent that counts in Confrontation Clause analysis).

barred admission of statements made by a mortally wounded man to police in which he identified his assailant.[113] The Court applied the primary purpose test to the facts and found that the statements were made to address an ongoing emergency and were therefore nontestimonial.[114] The police in *Bryant* responded to a report that a man had been shot and discovered the declarant lying on the ground outside his car at a gas station with a gunshot wound to his abdomen.[115] In total, five officers asked the declarant what had happened, who had shot him, and where the shooting had occurred.[116] The Court judged the primary purpose of the questioning to be an effort to contain an emergency situation; that is, a man had been shot, so whoever shot him might still have been in the area and a continuing danger to the public.[117] However, the Court also emphasized that whether there is an emergency is not the key question—whether the primary purpose of the interrogation is to enable the police to address an ongoing emergency.[118] Indeed, "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony."[119]

In assessing the primary purpose, the Court brought the hearsay rules back into play by calling them "relevant" to the determination.[120] Elaborating on this idea, the Court imputed to *Davis* the idea that statements given for the primary purpose of enabling police response to an emergency are less likely to be fabricated. [121] Justice Sotomayor then explicitly likened this to the rationale behind the excited utterance exception to hearsay.[122] Additionally, the Court viewed the determination of whether an emergency exists as a "highly context-dependent inquiry" that "may depend in part on the type of weapon employed."[123] Finally, the Court determined that the primary purpose test should be applied to both the questioner and the declarant because both sides of the interrogation provide evidence of the interrogation's purpose.[124]

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[113] *Id.* at 348 (majority opinion).

[114] *Id.*

[115] *Id.* at 349.

[116] *Id.* at 372.

[117] *Id.* at 375–78.

[118] *Id.* at 374.

[119] *Id.* at 358 (emphasis in original).

[120] *Id.* at 358–59.

[121] *Id.* at 361. Justice Scalia viewed this as a return to *Roberts*-type reliability analysis and reiterated that *Davis* (which he authored) was not asking whether the statements were reliable, but whether the declarant was acting as a witness. *See id.* at 390 (Scalia, J., dissenting).

[122] *Id.*at 361 (majority opinion).

[123] *Id.* at 363. Justice Scalia objected to this as well as the type of open-ended exception the Court in *Crawford* said was not allowed by the Sixth Amendment text. *See id.* at 392–93 (Scalia, J., dissenting).

[124] *Id.* at 367 (majority opinion). Justice Scalia also objected to this and anticipated that there will inevitably be conflicts between the purpose of the questioner and the declarant. He sardonically noted that the majority does not provide for this circumstance. He believed it is the declarant's purpose that matters because "[t]he hidden purpose of an interrogator cannot substitute for the declarant's intentional solemnity or his understanding of how his words may be used." *See id.* at 381

How much of a change *Bryant* actually brings to Confrontation Clause jurisprudence is yet to be seen. But, the newly emerging majority does have a very different view on how far the confrontation right extends. If the Court continues to move in the direction set by *Bryant*, it appears there will be much more room for finding a way to bypass the Confrontation Clause, such as: a context-dependent analysis that is required to determine when an emergency exists, a conflict between the purpose of the interrogator and the declarant, or the resurgent role of reliability *per se* as a factor in the analysis.

C. Comments on the Police Interrogation Cases

The most significant concern *Bryant* presents is opening the door for reliability to be used as an end run around the Confrontation Clause. While the Justices may disagree about which modern circumstances most resemble the civil-law abuses leading to the passage of the Sixth Amendment,[125] the history described in *Crawford* is uncontroverted. The Confrontation Clause was enacted so that a witness's out of court statements could only be introduced at trial if the witness testified and was subject to cross-examination or was unavailable to testify and the defense had a prior opportunity for cross-examination.[126] Reliability was not the issue—the inability to confront one's accuser was the abuse being corrected.[127] *Crawford* created a framework based on witnesses providing testimonial statements that required confrontation. This is the framework the Court should continue to use as the foundation for subsequent Confrontation Clause jurisprudence.

The primary purpose test put forward in *Davis* clouded the determination of which statements are testimonial by introducing the ongoing emergency consideration.[128] It is exceedingly difficult for a court to determine whether a police officer is seeking information to address an emergency or for use in a prosecution. Indeed, the most common circumstance is that an officer will seek information to address an emergency, such as apprehending a suspect, and then use that same information to support prosecuting that suspect, as Justice Thomas suggested in *Davis*.[129]

(Scalia, J., dissenting). Justice Ginsburg shared this view. *See id.* at 395 (Ginsburg, J., dissenting).

[125] *Compare* Crawford v. Washington, 541 U.S. 36, 42–56 (2004) (describing the history preceding the adoption of the Confrontation Clause), *with id.* at 69 (Rehnquist, C.J., concurring in judgment) ("I believe the Court's adoption of a new interpretation of the Confrontation Clause is not backed by sufficicently persuasive reasoning to overrule long-established precedent. . . . The Court's distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine.").

[126] *Id.* at 53–54 (majority opinion).

[127] *Id.* at 61.

[128] Davis v. Washington, 547 U.S. 813, 834 (2006) (Thomas, J., concurring in the judgment in part and dissenting in part).

[129] *Id.* at 839.

Unfortunately, the ongoing emergency condition was exploited to its fullest in *Bryant*, with a new majority coalition stretching emergency police interrogation to cover five officers' independent interviews with a dying man.[130] One would think the primary purpose of the first interview might be to gather emergency information, which presumably would be shared with other officers responding to the scene. However, subsequent interrogation was aimed at making sure the victim's story did not change and that he had shared all pertinent information with police.[131] This is especially likely to be true given that all five officers asked very similar questions.[132] The *Bryant* Court held that the statements were not subject to the Confrontation Clause and were therefore admissible.[133] But this is precisely the type of Marian procedure the Clause was meant to bar—the practice of justices of the peace, precursors to our professional police, examining a witness and then reporting the witness's statements at trial without the witness testifying.[134]

A more faithful application of the Confrontation Clause in the context of police interrogation would be to focus on the *Crawford* baseline for testimonial statements and the declarant's objective purpose in making the statements. The hybrid approach suggested by *Bryant*—to examine both the declarant's and the questioner's purposes—is unworkable and overly complicated.[135] It also leaves Justice Scalia's question of what to do in case of differing purposes unanswered.[136] The better approach is to consider the declarant's objective purpose. By considering the circumstances surrounding the statements, judges can determine whether the declarant's purpose was to provide a statement that could be used at a later trial. If so, the statement must be subject to confrontation.

Under this approach, the consolidated *Davis* cases would still come out the same way, but the statements in *Bryant* would be inadmissible. The more challenging question is what to do about statements made by young children. Some children are incapable of demonstrating objective intent to provide a testimonial statement.[137] The suggested test would always admit those types of statements. But this does not present the same danger to a criminal defendant as the Marian abuses in which officials presented out of court testimony the defense could not confront.

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[130] Michigan v. Bryant, 562 U.S. 344, 379–80 (2011) (Scalia, J., dissenting).

[131] *Id.* at 387.

[132] *Id.* at 384.

[133] *Id.* at 378 (majority opinion).

[134] *Id.* at 394 (Scalia, J., dissenting) ("It was judges' open-ended determination of what was reliable that violated the trial rights of Englishmen in the political trials of the 16th and 17th centuries. . . . 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.").

[135] *Id.* at 381–82 ("A declarant-focused inquiry is also the only inquiry that would work in every fact pattern implicating the Confrontation Clause.").

[136] *Id.* at 383.

[137] Myrna Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 379–80 (2005).

Young children are a known quantity for judges and juries, and their statements are not likely to be seen as universally and unquestionably true because children are susceptible to pressure and coaching from authority figures before making a statement.[138] The defense can present evidence that the child was coached or has changed her story when speaking to other questioners. The very reason the statements do not require confrontation, the fact that they were made by children, also provides a basis for the defense to argue that the statements are unreliable.[139] Jury instructions—written in plain English—should supplement an oral explanation by the judge that the statements are admitted because the child could not be expected to know that his statements would be used at trial. In circumstances where a judge determines that the child did know his statements could be used at trial, the statements must be subject to cross-examination.

IV. CONFRONTING FORENSIC REPORTS

Perhaps one reason to be concerned about what may come next in Confrontation Clause jurisprudence regarding police interrogations is what has already happened to Confrontation Clause jurisprudence regarding forensic reports. The Court decided three cases in this area in the last six years.[140] Rather like the police interrogation cases, the first two were of a piece with very similar lines of reasoning.[141] The last case in the series, *Williams v. Illinois*, however, resulted in a new plurality and a very different view of the confrontation right.[142] Given that the result in *Williams* is a 4–1–4 split, it is unclear what direction this area of law is taking.[143] We will proceed chronologically through the cases.

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[138] *Id.* at 375.

[139] Crawford v. Washington, 541 U.S. 36, 53–54.

[140] Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Bullcoming v. New Mexico, 564 U.S. 647 (2011); Williams v. Illinois, 132 S. Ct. 2221 (2012).

[141] *See Melendez-Diaz*, 557 U.S. at 310–11, 329 (2009) (holding that "certificates of analysis" reflecting lab testing of evidence are testimonial statements that cannot be introduced at trial without calling the analysts who performed the testing to testify or showing the analyst is unavailable and that defendant had a prior opportunity to cross-examine the analyst); *Bullcoming*, 564 U.S. at 652 (2011) (holding that the analyst who must be called to testify regarding a forensic report is the analyst who actually performed, participated in, or observed the testing unless it can be shown that such an analyst is unavailable and defendant had a prior opportunity to cross-examine).

[142] *See Williams*, 132 S. Ct. at 2227–28 (2012) (Chief Justice Roberts joined Justices Kennedy, Breyer, and Alito, who authored the opinion; Justice Thomas concurred in the judgment but "shared the dissent's view of the plurality's flawed analysis" (*Id.* at 2255 (Thomas, J., concurring in judgment)).

[143] *See id.* at 2227.

A. Holding the *Crawford* Line, but the Dissenting Chorus Grows

Massachusetts's law required that analysts who performed forensic testing on evidence fill out "certificates of analysis" and then swear to those results in front of a notary public.[144] In *Melendez-Diaz*, the state court admitted a set of these certificates, over the defense's objections, in a drug trafficking case as prima facie evidence of the contents of plastic bags left by the defendant in a police car after his arrest.[145] The state did not call the analysts who performed the lab tests.[146] The question on appeal to the Supreme Court was whether the certificates were testimonial statements, making the analysts, therefore, witnesses.

In a fairly direct application of *Crawford*, the Court held that certificates are affidavits that fall within the core class of testimonial statements the Confrontation Clause regulates.[147] Furthermore, the certificates were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'"[148] The certificates were completed not just in circumstances that reasonably indicated they would be available for a later trial, but under a state law that required they be made for that very reason.[149] The Court fielded and rejected a handful of arguments made by Massachusetts intended to show that confrontation does not apply in this case: (1) the analysts were not "witnesses against" the defendant;[150] (2) the analysts were not witnesses in the mold of Cobham and so not the target of Sixth Amendment concerns;[151] (3) this was "neutral, scientific testing" and not susceptible to distortion or manipulation like other types of testimony;[152] (4) the certificates were like business records;[153] (5) the defendant could have subpoenaed the analysts;[154] and (6) pragmatic concerns about trial practice require an exception.[155]

The dissenters,[156] foreshadowing the holding in *Williams*, would have cabined off forensic reports as a special case, not subject to confrontation.[157] Justice Kennedy was also concerned about the number

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[144] *Melendez-Diaz*, 557 U.S. at 308.
[145] *Id.* at 308–09.
[146] *Id.*
[147] *Id.* at 310.
[148] *Id.* at 310–11 (quoting *Davis*, 547 U.S. at 830).
[149] *See id.* at 311 (invoking the reasoning of *Crawford*, 541 U.S. at 52).
[150] *Id.* at 313–14.
[151] *Id.* at 315–17.
[152] *Id.* at 317–18.
[153] *Id.* at 321–24.
[154] *Id.* at 324–25.
[155] *Id.* at 325–28.
[156] Justice Kennedy wrote the dissent, and was joined by Chief Justice Roberts and Justices Breyer and Alito. *Id.* at 330 (Kennedy, J. dissenting).
[157] *See id.* at 331 ("Because *Crawford* and *Davis* concerned typical witnesses, the Court should have done the sensible thing and limited its holding to witnesses as so defined").

of witnesses that may need to be called to testify since multiple analysts frequently participate in various aspects of the testing process.[158] However, there is a curious line in the dissent that seems to miss the rationale that underlies the Court's opinion in *Crawford*, *Davis*, and the instant case: "The Confrontation Clause is not designed, and does not serve, to detect errors in scientific tests."[159] But, surely, Justices Scalia and Ginsburg would be quick to point out that that is precisely what confrontation is about—through cross-examination, defense counsel can probe the reliability of the test, the analyst, and the lab's reputation and record of accuracy.[160] In fact, Justice Kennedy himself acknowledged that analysts are not infallible and that there are potential issues in establishing chain of custody.[161] It appears that, on this point at least, the Justices are not so much disagreeing as talking past each other.

Essentially, the dissent voiced a fundamental disagreement with the *Crawford* line of reasoning—because "testimonial" does not appear in the text of the Confrontation Clause, the dissenters viewed it as of little help in determining the proper reach of the Clause.[162] This is strange, however, because both Justices Kennedy (the author of this dissent) and Breyer were in the majority in *Crawford* (which suggested the testimonial category) and *Davis* (which solidified the testimonial-nontestimonial divide).[163] As the dissent elaborated on the shortcomings of the Court's approach in *Melendez-Diaz*, it suggested that the focus should remain on the type of witness making the statement.[164] Indeed, the dissent would go back to the paradigmatic case and focus on "conventional" witnesses of the type used against Raleigh—and exclude all others from the confrontation right.[165]

B. 2011, Take II: Justice Sotomayor Back in the Fold, but Pushing *Bryant* and Boundaries

Bullcoming is the sister case to *Melendez-Diaz* and a logical extension of its reasoning.[166] The *Bullcoming* Court held that the analyst who must be called to testify with regard to a forensic laboratory report,

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[158] *See id.* at 332–35 (explaining the challenges of calling multiple analysts at trial).

[159] *Id.* at 337.

[160] *Id.* at 320–21 (majority opinion).

[161] *Id.* at 339 (Kennedy, J., dissenting).

[162] *See id.* at 343–47 ("The Court goes dangerously wrong when it bases its constitutional interpretation upon historical guesswork").

[163] *See id.* at 346 (explaining this apparent logical disconnect by describing the testimonial phrasing as a means to avoid awkward phrasing and pointing out that the testimonial framework was not part of the holding in either case).

[164] *See id.* at 344–45 ("The Framers were concerned with a typical witness—one who perceived an event that gave rise to a personal belief in some aspect of the defendant's guilt").

[165] *Id.*

[166] *Bullcoming* was in the appellate process when the Court decided *Melendez-Diaz*. 564 U.S. 647, 656 (2011).

as required by *Melendez-Diaz*, must be the analyst who actually conducted the testing reflected in the report or who participated in or observed that testing.[167] Since *Melendez-Diaz* identified forensic reports of this type as testimonial and the writers or affiants of those reports as witnesses,[168] it follows logically that the Sixth Amendment would require that the defendant be confronted with the actual witness who made the statement being used against him.[169] Justice Ginsburg's analysis on behalf of the Court elaborated on precisely why it is crucial that the analyst whose statements are reflected in the report must be the one to testify.[170]

When an analyst performs a forensic analysis on a piece of evidence, he does more than merely record a machine readout.[171] As Justice Ginsburg described, the analyst must ensure that the evidence is properly sealed and preserved before testing, the machines are properly calibrated, he observes the protocol required for the test, and he accurately records all data.[172] Calling a surrogate analyst who was not involved in the actual testing does not allow for effective cross-examination into the process used to test the evidence in question, which is the core purpose of the Confrontation Clause.[173] As Justice Ginsburg wrote, "when the State elected to introduce [the testing analyst's] certification, [the analyst] became a witness Bullcoming had the right to confront."[174]

Justice Sotomayor concurred in part and wrote separately to "highlight" that she viewed the report as testimonial based on its primary purpose and to "emphasize the limited reach of the Court's opinion."[175] Citing extensively to *Bryant* for her primary purpose analysis,[176] she concluded that the report is testimonial because its purpose was to create an extrajudicial substitute for testimony at trial.[177] She describes *Bullcoming* as "materially indistinguishable from" *Melendez-Diaz*.[178] In attempting to limit the holding, she named four fact patterns not decided in *Bullcoming*.[179] First, New Mexico did not present any alternative purpose for the report; Justice Sotomayor suggested some reports might

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[167] *Id.* at 652.

[168] *Melendez-Diaz*, 557 U.S. at 307, 310–11.

[169] *Bullcoming*, 564 U.S. at 652, 659–64.

[170] *See id.* at 652 (concluding that the analyst must be the one to testify).

[171] *See id.* at 660 (detailing the analysts considerable duties in performing the analysis).

[172] *Id.*

[173] *See id.* at 661 (explaining no level of an analyst's trustworthiness or responsibility will dispense with the Confrontation Clause's requirement). An interesting side note in this particular case is that the testing analyst was never declared unavailable by the state and had been put on unpaid leave for reasons unknown. The surrogate analyst who was called to testify did not have any information regarding the reasons for the testing analyst's placement on leave. *Id.* at 662.

[174] *Id.* at 663.

[175] *Id.* at 668 (Sotomayor, J., concurring in part).

[176] *See id.* at 669–72 (using *Bryant* as foundation for her primary-purpose analysis).

[177] *Id.* at 670

[178] *Id.* at 672.

[179] *Id.* at 672–74.

be generated for other reasons, including for medical treatment.[180] Second, the proposed surrogate witness was not a "supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue."[181] Third, *Bullcoming* did not implicate an expert witness's ability to testify regarding underlying facts from reports not introduced into evidence.[182] Fourth, the results in the report at issue were more than a mere machine readout.[183]

The dissent, authored by Justice Kennedy, described this case as a "new and serious misstep" and did not concede its similarity to *Melendez-Diaz*.[184] In brief, Justice Kennedy's view is that calling the testing analyst is a "hollow formality"[185] and that forensic reports of this type are "impartial" and therefore should not be subject to confrontation.[186]

C. The *Williams* Muddle

Justice Thomas provided the crucial fifth vote in *Melendez-Diaz* and *Bullcoming*.[187] But in *Williams*, Justice Thomas took center stage—right in the middle of a 4–1–4 vote.[188] The question is, as Justice Kagan implied, just which side is Justice Thomas on?[189] Justice Thomas concurred in the judgment of Justice Alito's plurality opinion but explicitly rejected the analysis, stating at the beginning of his opinion, "I share the dissent's view of the plurality's flawed analysis."[190]

The question in *Williams* is whether *Crawford* prevents an expert from basing her testimony on facts not introduced into evidence.[191] Specifically, the state lab, where the expert worked, had a regular practice of sending evidence to an outside lab for DNA testing.[192] In this case, vaginal swabs from a sexual assault kit were sent out and returned to the state lab along with a DNA profile the outside lab represented as

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[180] *Id.* at 672. This is another example of Justice Sotomayor bringing the rules of evidence into play in Confrontation Clause jurisprudence; perhaps this is the type of application she intended when she wrote in *Bryant* that hearsay rules would be "relevant." 562 U.S. 344, 348–49 (2011).

[181] *Bullcoming*, 564 U.S. at 672–73 (Sotomayor, J., concurring in part).

[182] *Id.* at 673.

[183] *Id.* at 673–74.

[184] *Id.* at 674 (Kennedy, J., dissenting).

[185] *Id.* at 677.

[186] *Id.* at 681.

[187] *See id.* at 649 (majority opinion) (Thomas, J., concurred to all but Part IV and Footnote 6); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) (in which Justice Thomas both joined the opinion of the Court and filed a concurrence).

[188] Williams v. Illinois, 132 S. Ct. 2221, 2255 (2012) (Thomas, J., concurring in the judgment).

[189] *See id.* at 2265 (Kagan, J., dissenting) (calling the plurality opinion a dissent "in all except its disposition" and citing Justice Thomas's opinion concurring in the judgment but disavowing the entire analysis of the plurality's opinion).

[190] *Id.* at 2255 (Thomas, J., concurring in the judgment).

[191] *Id.* at 2227 (Alito, J., plurality opinion).

[192] *Id.* at 2229.

coming from semen found on the vaginal swabs.[193] As usual, the person reviewing the case at the state lab did not participate or observe the outside lab's work.[194] Separately, and years before, a DNA profile was created from a blood sample obtained from the defendant on a wholly unrelated matter; this profile was stored in the state crime lab computer system.[195] The expert witness ran a search on the state lab computer system, looking for a match for the outside lab's DNA profile.[196] The DNA profile from the defendant's blood sample matched the DNA profile created by the outside lab ostensibly from semen found on the vaginal swabs.[197] Based on this information, the police conducted a lineup including the defendant, and the sexual assault victim identified the defendant as her attacker.[198] The defendant was indicted and chose to have a bench trial.[199]

At trial, the expert testified to the types of testing used to create a DNA profile, handling procedures, and other matters.[200] Then the prosecutor asked her, "[w]as there a computer match generated of the male DNA *found in semen from the vaginal swabs of [the victim]* to a male DNA profile that had been identified as having originated from [the defendant]?" to which the expert answered affirmatively.[201] The italicized portion of the question is the crucial part because if the prosecutor were introducing evidence of the outside lab's report without calling the analyst who did the testing and wrote that report, she would be violating the Confrontation Clause. The expert witness could not testify to the DNA profile that is purportedly from semen found on the vaginal swabs because she had no personal knowledge of the testing as required by *Bullcoming*.[202] However, as an expert, she could testify to her opinion regarding underlying facts not introduced as evidence;[203] the outside lab report was never admitted as evidence, but served as "underlying" information for the expert's testimony according to the plurality.[204]

The plurality concluded that the prosecutor's question merely presented a premise, that an outside lab had produced a DNA profile, which was not offered for its independent truth, and was accepted as true by the witness in her answer.[205] The plurality also emphasized that this

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[193] *Id.*
[194] *Id.* at 2229–30 (describing the general state process of outsourcing DNA lab work).
[195] *Id.* at 2229.
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *Id.* at 2229–30.
[201] *Id.* at 2236 (emphasis in original).
[202] *See id.* (reiterating that this would violate the Confrontation Clause because this would function as a lack of personal knowledge of the source of the DNA profile).
[203] *Id.* at 2228.
[204] *Id.* at 2240.
[205] *Id.* at 2236.

was a bench trial and that the judge was unlikely to be confused as to what was offered for its truth—the expert's opinion testimony—and what was not—the underlying outside lab report.[206] What application this decision has to a jury trial is left unaddressed.

As a second and independent basis for the plurality's view, Justice Alito wrote that, even if the outside lab report had been admitted into evidence, there would be no Confrontation Clause violation because it is wholly unlike the statements produced in the Marian examinations.[207] Furthermore, the plurality pointed out that the report was created before the suspect was identified and was "sought not for the purpose of obtaining evidence to be used against [the defendant] . . . but for the purpose of finding a rapist who was on the loose."[208] Finally, the plurality decided that the *Crawford* requirements are an impediment to prosecutors' ability to introduce DNA evidence because many analysts participate in DNA testing and may be required to testify under *Crawford*.[209]

Justice Breyer authored a concurring opinion to set forth his view about how the Confrontation Clause should apply to forensic reports generally.[210] Addressing the expert testimony question, Breyer cited the "well-established rule" allowing experts to rely on out of court statements that are not otherwise admissible to form their opinions.[211] Breyer described forensic reports as essentially "layer upon layer of technical statements . . . made by one expert and relied upon by another" and expressed concern that "[o]nce one abandons the traditional rule, there would seem to be no logical stopping point between requiring the prosecution to call" one analyst and every analyst who worked on the report.[212] Indeed, since the Confrontation Clause is meant to allow cross-examination to expose potential weaknesses in evidence against the defendant, Breyer was particularly concerned that applying the Clause to forensic reports would be overly burdensome and require calling every analyst involved in the testing process since an error could occur at any stage of the analysis.[213]

Accordingly, Breyer would hold forensic reports to be presumptively outside the Confrontation Clause's scope.[214] He described accredited analysts as "operating at a remove," and said that forensic work occurred "behind a veil of ignorance."[215] His conclusion, of course, is that analysts are essentially neutral scientists so "the need for cross-

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[206] *Id.* at 2237.

[207] *Id.* at 2228.

[208] *Id.* These justifications are very similar to those considered and rejected by the Court in *Melendez-Diaz* and *Bullcoming*. *See, supra*, IV-A and IV-B.

[209] *Williams*, 132 S. Ct. at 2228.

[210] *Id.* at 2244 (Breyer, J., concurring).

[211] *Id.* at 2246.

[212] *Id.*

[213] *Id.* at 2246–47.

[214] *Id.* at 2248, 2251.

[215] *Id.* at 2249–50.

examination is considerably diminished."[216]

As before, Justice Thomas's vote was based solely on whether the statements are sufficiently formal to be considered testimonial.[217] Here, the forensic report at issue was not sufficiently formal to implicate the Confrontation Clause.[218] However, as part of disagreeing with the plurality's "flawed analysis,"[219] Justice Thomas pushed back on the idea that the outside report was not introduced for its truth.[220] As he explains, even if the report was introduced solely so the fact finder can evaluate the expert's testimony, the fact finder must make a judgment about whether the underlying information is true before evaluating the expert's testimony.[221] He concludes "[t]here was no plausible reason for the introduction of [the outside lab's] statements other than to establish their truth."[222]

D. Comments on the Forensic Reports Cases

The direction of the Court's reasoning in *Williams* is especially troubling. Certainly, it is a far cry from the *Crawford* baseline established just eight years before *Williams* was decided. The plurality's reasoning apparently rests on the notion that forensic reports are just different from other types of evidence. Justice Breyer in particular believes forensic reports require special treatment.[223] But the Confrontation Clause does not allow special treatment of different classes of witnesses. Forensic analysts may operate "at a remove" from investigators as Breyer suggests,[224] but then so do innocent bystanders who provide testimonial statements to police about a mugging they witnessed. The bystander on the corner may want nothing to do with the police and may have no connection to the victim or the suspect, but when he provides testimonial statements that the prosecution wishes to use against the defendant, he must be available for cross-examination. Forensic analysts are certainly more involved in the investigation than many such witnesses—they work for the state or have a contract with the state to provide evidence that will be used in criminal trials.[225] What is

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[216] *Id.*at 2249.

[217] *Id.* at 2255 (Thomas, J., concurring in the judgment).

[218] *Id.*

[219] *Id.*

[220] *See id.* at 2257 ("There is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing the statement for its truth.").

[221] *Id.*

[222] *Id.* at 2256.

[223] *Id.* at 2249–50. (Breyer, J., concurring).

[224] *Id.* at 2249.

[225] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, Forensic Science Technicians, http://www.bls.gov/ooh/life-physical-and-social-science/forensic-science-technicians.htm#tab-3, <https://perma.cc/ZTU2-WDWW>.

most important is that when they write a lab report detailing their findings, they are providing testimonial evidence against a defendant. This is at the heart of the Confrontation Clause.

While it may be true that several forensic analysts work to produce a report that is used at trial, this does not necessarily have to be overly burdensome to prosecutors. First, the lab can adapt its procedures to reduce the number of analysts who work on a given set of evidence. Second, *Bullcoming* allows for an analyst to testify regarding testing he observed or participated in.[226] That is, if three people work on a DNA profile and all three participated in the testing process then *Bullcoming* suggests only one of those analysts needs to be produced for cross-examination.[227] What is more, the confrontation right is a significant and important protection against prosecutorial abuses and should not be pushed aside because it creates a surmountable burden for prosecutors. The Marian procedures likely provided great economy of use in their time. But where a person's liberty and perhaps their life is at stake, it is reasonable to strictly adhere to the protections the Constitution grants criminal defendants to prevent prosecutorial abuses and wrongful convictions.

Indeed, the proposed implementation of the *Crawford* framework makes these forensic report cases fairly easy to decide. *Melendez-Diaz* and *Bullcoming* would come out the same way, but the outside lab report in *Williams* would be excluded. The report is testimonial because its objectively determined purpose was to serve as evidence that (1) there was semen on the vaginal swabs and (2) that semen corresponded to the reported DNA profile. Although the outside lab report is framed as mere underlying facts for an expert's testimony, the report should be excluded under the proposed application of *Crawford*. As Justices Kagan and Thomas agreed, there is no reason to introduce the lab report except for its truth,[228] and the phrasing of the question posed by the prosecutor assumes the validity of the outside lab report.

Williams is a good example of the fallacy of the overly burdensome argument: if the prosecutor had called the outside analyst who conducted the testing and wrote the outside lab report, there would have been no Confrontation issue. The burden here would be to call one more analyst. The outside lab analyst works in a different state, but the state crime lab chose to contract with that lab. The *Williams* plurality would say it is enough that the defendant could subpoena the outside analyst, but describes calling that same analyst as overly burdensome for the

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[226] *See* Bullcoming v. New Mexico, 564 U.S. 647, 673 (2011) (Sotomayor, J., concurring in part) ("It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results. We need not address what degree of involvement is sufficient . . .")

[227] *See id.* (suggesting the sufficiency of allowing a supervisor to testify regarding an analyst's test).

[228] *See Williams*, 132 S. Ct. at 2268 (Kagan, J., dissenting) (citing *id.* at 2256–59 (Thomas, J., concurrence) and noting agreement).

prosecution.[229] That logic does not withstand scrutiny. It is a bedrock principle of our criminal justice system that the prosecution bears the burden of proof, and the defendant does not have to put forward any evidence to avoid conviction. The plurality's view erodes that foundation by allowing prosecutors to skirt the Confrontation Clause with forensic evidence.

Moreover, forensic evidence is on the opposite end of the spectrum from a child's accusations. While children are generally known to be susceptible to pressure from adults and others to create a false story and are therefore potentially unreliable,[230] forensic reports are generally viewed as highly reliable evidence. Yet a forensic report is only as reliable as the analyst who performs the test and creates the report. Without cross-examination of the analyst, the defendant never has an opportunity to expose weaknesses or flaws in the evidence. Particularly when the evidence is likely to weigh heavily in the mind of the fact finder, the Confrontation Clause is an essential protection for criminal defendants.

V. CONCLUSION

Precisely where the Court stands on the Confrontation Clause is unclear. The *Williams* decision in particular is an enigma. Studying the major Confrontation Clause cases in this Note demonstrates that most of the Justices are entrenched in their own view and are not shifting to create a new and predictable consensus. Indeed, it appears that Justices Breyer and Sotomayor are the only two who are developing new ideas and avenues of potential agreement. Justice Kagan's time on the Court hass been relatively short, and her voice has not yet registered in all aspects of Confrontation Clause jurisprudence, so she may yet provide a way forward. As Justice Breyer notes in *Williams*, there are pressing questions, particularly in the area of forensic evidence,[231] and those questions must be answered soon. If the Justices cannot find a way to a new majority view of the Confrontation Clause, the criminal justice system will suffer great damage. Uncertainty may beget miscarriages of justice and the costs—both economic and temporal—of lengthy appeals serves no one's interests.

Perhaps one of the simplest ways for the Court to reestablish clarity in this area is to return to *Crawford*. By applying the Confrontation Clause to any testimonial statement that is made under circumstances reasonably indicating that the statement will be available for use at a later trial, the Court would refocus its analysis on the historically significant

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[229] *Id.* at 2228 (Alito, J., plurality opinion).

[230] Raeder, *supra* note 137, at 375.

[231] *Williams*, 132 S. Ct. at 2244–45

concerns the Clause was meant to address—statements like those of Lord Cobham and the Marian procedural abuses. The proposed test is relatively easy to apply, even to the facts of cases that have divided the Justices so drastically. It also avoids the pitfall of the formality requirement becoming all-consuming and leaves the reliability of the statement completely out of the analysis. The test also applies equally well to statements made to police and in forensic reports. The test focuses on the witness's statement—just as *Crawford* initially proposed.[232] Given that the Confrontation Clause applies to "witnesses against" a defendant,[233] it follows that a textually faithful test would analyze whether the statement was (1) made by a "witness" (i.e., a testimonial statement) and (2) intended to be used "against" a defendant (i.e., made under circumstances reasonably indicating that the statement will be available for use at a later trial).

The suggested application of the *Crawford* baseline framework provides clarity, ease of application, and predictability of results while also protecting the core interests the framers hoped to safeguard. Sir Walter Raleigh would have been well served by such a test, and so would today's criminal justice system.

[232] Crawford v. Washington, 541 U.S. 36, 59 (2004).
[233] U.S. CONST. amend. VI.