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## CONFRONTING THE BACKDOOR ADMISSION OF TESTIMONIAL STATEMENTS AGAINST AN ACCUSED: THE DANGER OF EXPERT RELIANCE ON INADMISSIBLE INFORMATION

Sarah E. Stout\*

### I. INTRODUCTION

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him."<sup>1</sup> In order to conform to the requirements of the Confrontation Clause prior to 2004, a prosecutor intending to offer a hearsay statement from an unavailable witness had to show that the statement either fell under a "firmly rooted hearsay exception" or that the statement bore "particularized guarantees of trustworthiness."<sup>2</sup> This changed, however, when, in *Crawford v. Washington*, the Supreme Court adopted an interpretation of a defendant's confrontation right based on its understanding and application of the Framers' intent at the adoption of the Sixth Amendment.<sup>3</sup> Under *Crawford*, the admission of a "testimonial" hearsay statement violates the Confrontation Clause unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the witness.<sup>4</sup> Although this seems relatively straightforward, the *Crawford* Court declined to provide an explicit definition of "testimonial" in its opinion.<sup>5</sup>

In the years following the *Crawford* decision, the Court has provided some illumination on the types of statements it considers "testimonial." However, the Court has continually declined to adopt an all-encompassing definition and, instead, it has determined whether a statement is testimonial hearsay on a case-by-case basis.<sup>6</sup> Because of this, the application of the Confrontation Clause doctrine by the lower federal courts has been unsystematic. In many cases, this has resulted in the use of judicial creativity to circumvent the confrontation requirement, in favor of greater judicial economy. Unfortunately for defendants, this has also resulted in a lack of judicial enforcement of proper confrontation protections.

The admission of expert testimony is one area where the lower courts have consistently struggled to apply the *Crawford* requirement. Specifically, under Federal Rule of Evidence 703, an expert may rely on inadmissible data in forming his or her opinion, if it is "of a type reasonably relied upon by experts in the particular field."<sup>7</sup> Prior to *Crawford*, the admission of this type of evidence was justified because the judicial system viewed these statements as sufficiently trustworthy, because other experts in the same field generally rely on the information.<sup>8</sup> Further, where an expert had been properly qualified under Rule 702, courts were comfortable assuming the expert would effectively evaluate the probative value of the hearsay statement in reaching

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

<sup>2</sup> *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

<sup>3</sup> *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

<sup>4</sup> *Id.* at 53-54.

<sup>5</sup> *Id.* at 68.

<sup>6</sup> See *Michigan v. Bryant*, 131 S. Ct. 1143, 1150 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Davis v. Washington*, 547 U.S. 813, 829 (2006).

<sup>7</sup> FED. R. EVID. 703.

<sup>8</sup> CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE: PRACTICE UNDER THE RULES* 738 (3d. ed. 2009).

his or her opinion.<sup>9</sup> This type of evidence met the pro-admissibility, reliability confrontation standard set out in *Ohio v. Roberts*<sup>10</sup> but, as this paper will explore, is not a sufficient basis to justify admission without confrontation under the *Crawford* requirement.<sup>11</sup> The Court has been dealing with the issue of expert testimony since first deciding *Crawford*, through the decisions of *Melendez-Diaz v. Massachusetts*<sup>12</sup> and *Bullcoming v. New Mexico*,<sup>13</sup> and will continue to wrestle with the topic in the pending case *Williams v. Illinois*,<sup>14</sup> which was argued before the Court on December 6, 2011.

This paper will examine the interplay between the Confrontation Clause and Rule 703, and ultimately advocate for how the Court should rule in the pending *Williams* case to best preserve the confrontation right for defendants as established in *Crawford* and its progeny. Part II of this paper will provide a brief explanation of the problem that currently exists in reconciling the Confrontation Clause and Rule 703. Part III will provide the necessary background of the Confrontation Clause doctrine, beginning with *Crawford*. Part IV will discuss the history of Rule 703. Part V will detail the disconnect between the Confrontation Clause and Rule 703 by analyzing the current treatment of this issue in the lower federal courts. Part VI will explore and analyze the pending *Williams* case. Finally, Part VII will conclude the paper by looking at the stakes involved for defendants when courts fail to hold the government to the *Crawford* requirement, by exploring the importance of the judicial system properly protecting an accused's confrontation right at trial, and by opining on the appropriate route that the Court should follow in *Williams*.

## II. DESCRIPTION OF THE PROBLEM

Rule 703 allows experts to rely on inadmissible evidence if it is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."<sup>15</sup> If the prosecution offers this type of expert testimony against a defendant, the Confrontation Clause may be implicated if the defendant does not have the opportunity to cross-examine the declarant on the statements the expert uses as a basis for his or her opinion.<sup>16</sup> In general, courts have treated the possible confrontation issues implicated when an expert relies on or discloses testimonial hearsay statements at trial as inconsequential.<sup>17</sup> This leads many courts to largely ignore true analysis of the confrontation issue, even if the opinion acknowledges the underlying importance of the defendant's confrontation right.<sup>18</sup>

Professors Christopher Mueller and Laird Kirkpatrick suggest that one possible reason for the dismissive treatment of this issue in court opinions is quite simple, namely that many times the basis of the expert's testimony is not "testimonial" and therefore the Confrontation Clause is not implicated.<sup>19</sup> For example, imagine there is an expert on gang structure, whose testimony at trial relies on information gathered from interviews with former gang members over time. If the statements from the former gang members that form the basis of the expert's opinion were not

<sup>9</sup> DAVID H. KAYE, DAVID E. BERNSTEIN & JENNIFER L. MNOOKIN, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EXPERT EVIDENCE* 190 (2d ed. 2011).

<sup>10</sup> *Roberts*, 448 U.S. at 66.

<sup>11</sup> *Crawford*, 541 U.S. at 60-63.

<sup>12</sup> 557 U.S. 305.

<sup>13</sup> 131 S. Ct. 2705 (2011).

<sup>14</sup> No. 10-8505 (U.S. argued Dec. 6, 2011).

<sup>15</sup> FED. R. EVID. 703.

<sup>16</sup> MUELLER & KIRKPATRICK, *supra* note 8, § 738.

<sup>17</sup> KAYE ET AL., *supra* note 9, § 190.

<sup>18</sup> MUELLER & KIRKPATRICK, *supra* note 8, § 739.

<sup>19</sup> *Id.*

specifically related to the current case on which the expert is opining, those statements would not be considered "testimonial" as they apply to the current defendant.<sup>20</sup> In contrast, if the gang expert relied on statements from a co-conspirator during police interrogation relating to the present case in forming his or her opinion, the statements would be testimonial, triggering confrontation protections for the defendant.<sup>21</sup>

As the previous example illustrates, in the arena of expert testimony, what statements the courts classify as testimonial becomes very important. Although experts are generally permitted to rely on inadmissible facts and data in reaching their expert opinions under Rule 703, experts should not be permitted to transmit or rely on testimonial statements that the defendant has not had the prior opportunity to cross-examine. It is important to note that this paper limits its evaluation of expert reliance on inadmissible data under Rule 703 to focus only on *testimonial* statements on which the expert relies. This paper does not attempt to argue that courts should no longer permit an expert witness to rely on other types of information or data that might nonetheless be inadmissible under other evidentiary rules, so long as that information and data are *nontestimonial*.

### III. THE CONFRONTATION REQUIREMENT

The Supreme Court shaped the modern interpretation of the Confrontation Clause in the 2004 decision *Crawford v. Washington*.<sup>22</sup> A jury convicted Michael Crawford of stabbing a man, who allegedly attempted to rape his wife, Sylvia Crawford.<sup>23</sup> At trial, the government introduced a recorded police statement from Mrs. Crawford regarding the incident, which was made during an interview at the police station.<sup>24</sup> She did not testify at trial, based on a marital privilege statute in the state of Washington.<sup>25</sup> On appeal, Crawford maintained that the admission of the recorded statement violated his rights under the Confrontation Clause, because he did not have the opportunity to cross-examine his wife's statements.<sup>26</sup>

Justice Scalia penned the majority opinion, and he openly admitted that "the Constitution's text does not alone resolve this case."<sup>27</sup> The opinion began with a lengthy historical discussion, which highlighted the fact that, under the common law, the admissibility of an unavailable witness's statement largely depended on whether the defendant in the case had the opportunity to cross-examine the witness.<sup>28</sup> This historical backdrop supported "two inferences about the meaning of the Sixth Amendment."<sup>29</sup> First, the Framers designed the Confrontation Clause to "eliminate the use of *ex parte* examinations against the accused."<sup>30</sup> Second, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination."<sup>31</sup> This second inference became the analytical framework that currently shapes all Confrontation Clause cases.

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<sup>20</sup> KAYE ET AL., *supra* note 9, § 192.

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

<sup>22</sup> 541 U.S. 36 (2004).

<sup>23</sup> *Id.* at 38.

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

<sup>25</sup> *Id.* at 40.

<sup>26</sup> *Id.* at 38.

<sup>27</sup> *Id.* at 42.

<sup>28</sup> *Id.* at 45.

<sup>29</sup> *Id.* at 50.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 53-54.

Justice Scalia expanded on the second inference by stating that, according to the text of the Sixth Amendment, the Confrontation Clause applies to "'witnesses' against the accused – in other words, those who 'bear testimony.'"<sup>32</sup> "Testimony" was further defined as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact."<sup>33</sup> The Court then explicitly included several types of statements as always being testimonial, such as "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."<sup>34</sup> The Court concluded that in the present case, the statement played for the jury was testimonial because police officers recorded Mrs. Crawford's statement in the course of an interrogation.<sup>35</sup>

Justice Scalia stressed that although the goal of the Confrontation Clause "is to ensure the reliability of evidence . . . it is a procedural rather than a substantive guarantee. It commands . . . that reliability be assessed in a particular manner: by testing it in the crucible of cross-examination."<sup>36</sup> On one hand, if the statement at issue is nontestimonial hearsay, "it is wholly consistent with the Framers' design to afford the States flexibility" in determining the admissibility of the statement pursuant to regular hearsay rules.<sup>37</sup> However, there is no such flexibility when the out-of-court statement is testimonial because quite simply, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."<sup>38</sup>

The Court expanded the new interpretation of the Confrontation Clause in the combined 2006 cases of *Davis v. Washington* and *Hammon v. Indiana*, both of which involved domestic violence situations.<sup>39</sup> In *Davis*, the issue was whether the statements made in the course of a 911 call were testimonial.<sup>40</sup> Justice Scalia, writing for the majority, began by stating that there are differing types of police interrogations, distinguishable based on whether the declarant was telling the police "events as they were actually happening, [or] describing past events."<sup>41</sup> The Court concluded that it would not consider a 911 caller a witness providing testimony because the primary purpose of a 911 interrogation is to resolve a presently occurring emergency.<sup>42</sup>

In *Davis*'s companion case, *Hammon v. Indiana*, the issue was whether a victim's statements from a battery affidavit were admissible when the victim did not testify at trial.<sup>43</sup> The Court found this type of interrogation to be testimonial based largely on the status of the questioning as a part of an investigation into a possible crime.<sup>44</sup> Essentially, the Court held that police interrogations or questioning are "testimonial when the circumstances objectively indicate that there is no . . . emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."<sup>45</sup> Thus, the

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<sup>32</sup> *Id.* at 51 (citing WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

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

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

<sup>35</sup> *Id.* at 52.

<sup>36</sup> *Id.* at 61.

<sup>37</sup> *Id.* at 68.

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

<sup>39</sup> *Davis v. Washington*, 547 U.S. 813, 818-19 (2006).

<sup>40</sup> *Id.* at 826.

<sup>41</sup> *Id.* at 827.

<sup>42</sup> *Id.* at 828.

<sup>43</sup> *Id.* at 820.

<sup>44</sup> *Id.* at 829.

<sup>45</sup> *Id.* at 822.

"primary-purpose" test was born as a primary means of determining what out-of-court statements are testimonial.

The Court once again examined whether to classify out-of-court statements as testimonial or nontestimonial for Confrontation Clause purposes in 2011, in *Michigan v. Bryant*.<sup>46</sup> In *Bryant*, the Court offered further insight into what types of out-of-court statements it deems to be testimonial.<sup>47</sup> Unfortunately, the majority opinion in many ways provides a less clear-cut analysis than was already in place under *Davis*. Justice Sotomayor authored the majority opinion, and for the first time in a confrontation case since *Crawford*, Justice Scalia filed a dissenting opinion.<sup>48</sup> In this case, the Court expanded on the principles set forth in *Davis*, holding that statements made to police officers by a mortally wounded shooting victim were admissible.<sup>49</sup> According to the majority, the statements, which identified the defendant as the shooter and described the location of the shooting, were not testimonial because the "primary purpose . . . [was] to enable police assistance to meet an ongoing emergency."<sup>50</sup>

In fact, the Court determined that "whether an emergency exists and is ongoing is a highly context-dependent inquiry" and includes consideration of the type of weapon used and the severity of the victim's injuries.<sup>51</sup> According to the Court, one of the primary rationales for admitting statements made to police officers in the course of an emergency is that the declarant is not likely to fabricate statements under such circumstances.<sup>52</sup> In fact, Justice Sotomayor writes that because "the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination."<sup>53</sup> However, the Court is also careful to point out that whether there is an ongoing emergency is simply one factor to consider when determining the "primary purpose" of the interrogation.<sup>54</sup>

In a scathing dissent, Justice Scalia claimed the decision "distorts [the Court's] Confrontation Clause jurisprudence and leaves it in shambles."<sup>55</sup> Justice Scalia reinforced his previous understanding of the circumstances rendering an out-of-court statement testimonial and maintained, "the declarant must intend the statement to be a solemn declaration . . . and he must make the statement with the understanding that it may be used to invoke the coercive machinery of the State against the accused."<sup>56</sup> Justice Scalia argued that the Framers adopted the Confrontation Clause in order to prevent the admission of weaker, substitute evidence at trial in place of live testimony, and that the Court in this decision allowed exactly that.<sup>57</sup> Finally, Justice Scalia expressed his fears that the Court's decision would lead to a return to the pre-*Crawford* reliability standard for determining whether a statement is testimonial.<sup>58</sup> He strongly declared, "reliability tells [the Court] *nothing* about whether a statement is testimonial [because] testimonial and nontestimonial statements alike come in varying degrees of reliability."<sup>59</sup>

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<sup>46</sup> *Michigan v. Bryant*, 131 S. Ct. 1143, 1150 (2011).

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

<sup>48</sup> *Id.* at 1168 (Scalia, J., dissenting).

<sup>49</sup> *Id.* at 1165, 1167.

<sup>50</sup> *Id.* at 1150 (citing *Davis*, 547 U.S. at 822).

<sup>51</sup> *Id.* at 1158-59.

<sup>52</sup> *Id.* at 1157 (citing *Davis*, 547 U.S. at 828-30; *Crawford*, 541 U.S. at 65).

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

<sup>54</sup> *Id.* at 1160.

<sup>55</sup> *Id.* at 1168 (Scalia, J. dissenting).

<sup>56</sup> *Id.* at 1168-69.

<sup>57</sup> *Id.* at 1171.

<sup>58</sup> *Id.* at 1175.

<sup>59</sup> *Id.*

The previous cases explain the steps that the Court has taken to define the contours of testimonial statements for confrontation purposes; the following cases delve into the issue that principally concerns this paper, namely the admission of testimonial statements through the use of an expert witness. In *Melendez-Diaz v. Massachusetts*, police arrested Luis Melendez-Diaz after discovering "a plastic bag containing 19 smaller plastic bags" on his person.<sup>60</sup> At trial, the government submitted into evidence "certificates of analysis" from the chemical testing of the substance, which stated that "the substance was found to contain: Cocaine," without in-court testimony from the analyst who conducted the tests.<sup>61</sup> Subsequently, a jury convicted Melendez-Diaz of distributing and trafficking cocaine.<sup>62</sup> On appeal, Melendez-Diaz maintained that his right to confrontation was violated when the certificates were admitted into evidence, as he had had no opportunity to confront and cross-examine the analyst who prepared them.<sup>63</sup>

The Court held that the "certificates" were plainly "affidavits" and therefore fell under the protection of the Confrontation Clause because affidavits are testimonial.<sup>64</sup> Not only did the analyst swear to the certificates before an "officer authorized to administer oaths,"<sup>65</sup> but the analyst created the certificates under conditions which would "lead an objective witness to reasonably believe that the statement would be available for later use at trial."<sup>66</sup> Justice Scalia's majority opinion explained that this was a straightforward application of the main principles laid out in *Crawford*.<sup>67</sup> In order for the testimonial hearsay statements from the certificates to be admitted, the analyst must be unavailable to testify at trial, and Melendez-Diaz must have the opportunity for prior cross-examination.<sup>68</sup>

Importantly, the majority opinion then disposes of the various legal arguments presented by the respondent and the dissenting opinion, three of which are particularly relevant to this paper. First, the dissent suggested there is no need for the defendant to confront a neutral "laboratory professional" whose scientific work is inherently reliable.<sup>69</sup> The majority scoffs at this statement because it suggests a return to pre-*Crawford* analysis where reliability alone was sufficient to protect the defendant's constitutional right to confrontation.<sup>70</sup> The Court thus reaffirms a major holding of *Crawford*, stating that the Confrontation Clause does not require any specific level of reliability for evidence, but rather "that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."<sup>71</sup> Second, the dissent suggests the certificates should be admissible, without confrontation, under the business records exception to hearsay.<sup>72</sup> Justice Scalia again scolds the dissent, stating that the affidavits do not even qualify as business records.<sup>73</sup> However, even if they did, the certificates would still be subject to confrontation because the "regularly conducted business activity is the production of evidence for use at trial."<sup>74</sup> The declarant-analyst understood the prosecutorial intent behind the creation

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<sup>60</sup> 129 S. Ct. 2527, 2530 (2009).

<sup>61</sup> *Id.* at 2531.

<sup>62</sup> *Id.* at 2530-31.

<sup>63</sup> *Id.* at 2531.

<sup>64</sup> *Id.* at 2532.

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

<sup>66</sup> *Id.* (citing *Crawford*, 541 U.S. at 52).

<sup>67</sup> *Id.* at 2533.

<sup>68</sup> *Id.* at 2531.

<sup>69</sup> *Id.* at 2536.

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

<sup>71</sup> *Id.* (quoting *Crawford*, 541 U.S. at 61).

<sup>72</sup> *Id.* at 2538.

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

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

of the affidavits.<sup>75</sup> Finally, in addressing the respondent's concern that the criminal justice system could not accommodate the result of requiring confrontation for these types of affidavits, Justice Scalia asserted that "the Confrontation Clause may make the prosecution of criminals more burdensome, but . . . [it] is binding, and we may not disregard it at our convenience."<sup>76</sup>

Two years later, in June of 2011, the Court decided *Bullcoming v. New Mexico*, with Justice Ginsberg authoring the majority opinion.<sup>77</sup> Donald Bullcoming was arrested on charges of driving while intoxicated.<sup>78</sup> The main evidence against him was a "certificate of analyst" which stated that his blood alcohol content was above the legal limit at the time he was in an accident.<sup>79</sup> The certificate was completed and signed by Curtis Caylor, and the certificate required Caylor to affirm that "[t]he seal of th[e] sample was received intact . . . 'the statements in [the analyst's block of the report] are correct,' and that he 'followed the procedures set out on the reverse of th[e] report.'"<sup>80</sup> At Bullcoming's trial, the state did not call Caylor to testify because he had recently been placed on unpaid leave and was no longer working for the lab.<sup>81</sup> In his place, the state called another analyst, who had not observed Caylor's analysis, to admit the report as a business record.<sup>82</sup>

While Bullcoming's case was pending before the New Mexico Supreme Court, the United States Supreme Court decided *Melendez-Diaz*.<sup>83</sup> In light of that decision, the New Mexico Supreme Court held that the reports were in fact testimonial statements, but still refused to uphold Bullcoming's confrontation right.<sup>84</sup> The court explained several rationales for holding that the admission of the certificate did not violate the confrontation clause. First, the court held that Caylor was "a mere scrivener, who simply transcribed the results generated by the gas chromatograph machine."<sup>85</sup> Second, the court held that because Razatos, the testifying analyst, was a qualified expert witness, he "was available for cross-examination regarding . . . the operation of the machine, the results of [Bullcoming's] BAC test, and . . . established laboratory procedures."<sup>86</sup> Essentially, the court determined that Razatos was acceptable as a "surrogate witness" for Caylor, and because he was a qualified expert, Bullcoming's cross-examination would be meaningful and sufficient to protect his right to confront the witness against him.<sup>87</sup>

The majority opinion from the United States Supreme Court correctly treats *Bullcoming* as a straightforward extension of the *Melendez-Diaz* holding. First, the Court made clear that Caylor was certifying more than just the number from a machine and that the report he generated was clearly testimonial.<sup>88</sup> Further, the Court held that the reports at issue in this case resemble closely the ones from *Melendez-Diaz*, and that the formalities surrounding the creation of the blood analysis report were more than adequate to qualify the report as testimonial.<sup>89</sup> Therefore, based

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<sup>75</sup> *Id.* at 2539.

<sup>76</sup> *Id.* at 2540.

<sup>77</sup> *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011).

<sup>78</sup> *Id.* at 2709.

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

<sup>80</sup> *Id.* at 2710.

<sup>81</sup> *Id.* at 2711.

<sup>82</sup> *Id.* at 2712.

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

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 2713.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 2715.

<sup>89</sup> *Id.* at 2717.



on *Crawford*, the actual analyst who completes the reports must appear at trial, regardless of any apparent underlying reliability of the report.<sup>90</sup>

Next, the Court rejected the notion that Razatos was permitted to testify as a "surrogate analyst."<sup>91</sup> Justice Ginsburg points out that it is clear that Razatos was not able to testify to "what Caylor knew or observed about his certification," and the surrogate testimony would not be effective at revealing any lies or lapses in Caylor's reporting.<sup>92</sup> The Court stresses that Razatos did not even know why Caylor had been placed on unpaid leave.<sup>93</sup> Justice Ginsburg then mentions that "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by courts."<sup>94</sup> Importantly, she emphasizes that this is a more fundamental issue than if the state had asserted that Razatos had an "independent opinion regarding Bullcoming's BAC."<sup>95</sup>

Justice Sotomayor filed a separate opinion concurring in part with the majority. She wrote separately to explain that she would have held that the report was testimonial because its "primary purpose" was evidentiary, following in line with her *Bryant* opinion.<sup>96</sup> Interestingly, she also covered in her concurrence a set of circumstances in which the Court's opinion in *Bullcoming* would *not* apply.<sup>97</sup> Most importantly for this paper, she explained that this 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>98</sup> This scenario is precisely the one raised in the most recent Confrontation Clause case to be heard by the Court, *Williams v. Illinois*, which will be discussed in detail in Part VI of this paper.<sup>99</sup>

Although this line of cases provides some insight into how the Court defines the contours of what are included as "testimonial" statements that require confrontation, the issue remains largely open for interpretation by the lower federal courts.

#### IV. THE HISTORY OF EXPERT OPINION TESTIMONY IN LIGHT OF FEDERAL RULE OF EVIDENCE 703

Under the common law, courts did not permit experts to rely on inadmissible evidence in reaching their conclusions and opinions.<sup>100</sup> However, Rule 703 has greatly expanded the types of information on which the courts permit an expert to rely in forming their expert opinion. Specifically, an expert may currently rely on inadmissible evidence in developing their expert opinion.<sup>101</sup> Scholars have defended Rule 703 on the basis that courts should be able to rely on "the reasonable judgment of the expert that the information source is sufficiently reliable to form the basis for an opinion."<sup>102</sup> Note that the main thrust of this argument is that the information is *reliable*.

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<sup>90</sup> *Id.* at 2715.

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

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

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 2716 (citing *Crawford*, 541 U.S. at 54).

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

<sup>96</sup> *Id.* at 2719-20 (Sotomayor, J., concurring in part).

<sup>97</sup> *Id.* at 2722.

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

<sup>99</sup> *People v. Williams*, 238 Ill. 2d 125 (2010), *cert. granted*, *Williams v. Illinois*, 131 S. Ct. 3090 (June 28, 2011) (No. 10-8505).

<sup>100</sup> KAYE ET AL., *supra* note 9, § 4.5.

<sup>101</sup> FED. R. EVID. 703.

<sup>102</sup> KAYE ET AL., *supra* note 9, § 4.6.

The passage of Rule 703 in 1975 presented a large expansion of what had been the current practices in many states to limit expert testimony. As the committee note to Rule 703 explained, part of the rationale for the rule was to bring "judicial practice into line with the practice of the experts themselves when not in court."<sup>103</sup> For example, a medical doctor would typically base his or her diagnosis of a patient on information from many different sources, including descriptions from the patient, statements from nurses, technicians and other doctors, and the patient's past medical records, to name a few.<sup>104</sup> The committee note explained that the large majority of these sources would be admissible into evidence, but "only with the expenditure of substantial time in producing and examining various authenticating witnesses."<sup>105</sup> Essentially, because the physician makes life-and-death decisions in reliance upon these types of statements, "[h]is validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes."<sup>106</sup>

In 2000, Rule 703 was amended by the addition of a slight restriction in regards to the inadmissible data that an expert can rely on:

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 expert's opinion substantially outweighs their prejudicial effect.<sup>107</sup>

The advisory committee note on the 2000 amendment explained this language was added to "emphasize that . . . the underlying information is not admissible simply because the opinion or inference is admitted."<sup>108</sup> In other words, inadmissible facts or data are to be considered by the jury only as a means to test the opinion of the expert, and not as substantive evidence.<sup>109</sup> The comment stressed that the amendment was not intended to prevent the expert from relying on inadmissible evidence in the first place and that the Rule is not intended to restrict an adverse party from presenting the underlying facts or data.<sup>110</sup> Further, the amendment was intended to "provide a presumption against disclosure to the jury of information used as the basis of an expert's opinion . . . when that information is offered by the proponent of the expert."<sup>111</sup> Under the current Rule 703, whenever the proponent of the expert testimony can establish that the "reasonably relied upon" test is satisfied, expert opinion testimony may be based on facts or data that "would be excluded under certain other provisions of the Evidence Rules."<sup>112</sup>

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<sup>103</sup> FED. R. EVID. 703 advisory committee's note.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Daniel W. Edwards, *The Man Behind the Curtain: Confronting Expert Testimony*, 1 U. DENV. CRIM. L. REV. 1, 9 (2011), available at <http://www.law.du.edu/documents/criminal-law-review/issues/v01-1/Edwards-Denv-U-Crim-L-Rev-Spring-2011.pdf>.

<sup>110</sup> FED. R. EVID. 703 advisory committee's note.

<sup>111</sup> *Id.*

<sup>112</sup> CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 6273 (1st ed. 2011).

## V. THE CURRENT TREATMENT OF RULE 703 IN THE CIRCUIT COURTS FAILS TO MEET THE CONSTITUTIONAL REQUIREMENT OF CONFRONTATION

As we have seen, *Crawford* and its progeny have significantly altered the analysis a trial court must complete in regards to the admission of statements that are testimonial hearsay. In the past seven years since the Supreme Court decided *Crawford*, the circuit courts have struggled in applying this new version of Confrontation Clause analysis to expert testimony, particularly to an expert's reliance on inadmissible testimonial hearsay statements under Rule 703. In fact, nearly all of the lower court opinions on point have included varying degrees of judicial gymnastics to avoid classifying the underlying information relied on by an expert as testimonial statements subject to the defendant's confrontation right.

The analytical frameworks employed by the circuit courts can be narrowed into three main types: (1) holding that Rule 703 allows an expert to side-step the confrontation issue based on policy concerns; (2) distinguishing the facts of the instant case from *Melendez-Diaz* by not admitting the underlying information on which the expert relied; and (3) finding that cross-examination of the expert suffices to safeguard the defendant's confrontation right because the expert has exercised his or her independent judgment on the information. In the following sections, each of these analytical frameworks will be explained through the use of an illustrating case, and then the circuit court method will be compared to what post-*Crawford* Confrontation Clause doctrine actually requires, in order to demonstrate the shortcomings of these approaches.

### A. RULE 703 ALLOWS AN EXPERT TO SIDE-STEP THE CONFRONTATION CLAUSE BASED ON POLICY CONCERNS

In *United States v. Williams*, the defendant was charged with murder.<sup>113</sup> Williams objected to the government's introduction of the alleged victim's autopsy report, as well as the testimony regarding the autopsy report from a Dr. Tops at trial.<sup>114</sup> Although Dr. Tops did not complete the autopsy or the report, the government used his testimony to introduce the report into evidence.<sup>115</sup> Further, the government questioned Dr. Tops extensively on the details of the injuries listed on the report.<sup>116</sup> Dr. Tops ultimately opined as to how the injuries would have combined to lead to the death of the victim.<sup>117</sup> The doctor who actually conducted the autopsy, Dr. Ingwersen, was unavailable to testify at trial because she had retired.<sup>118</sup> The court stated in its opinion that the autopsy report "fit squarely within the definition of testimonial hearsay,"<sup>119</sup> as expressed in *Melendez-Diaz*, based primarily on the fact that the doctor who completed the autopsy, Dr. Ingwersen, was aware that the report would be available for later use at trial.<sup>120</sup> Further bolstering the conclusion that the autopsy report was testimonial, the court stated that the report was marked with the formal characteristics of a document that would be submitted at court in a criminal prosecution.<sup>121</sup> The court then explicitly commented that the report "contain[s] testimonial statements that may not be admitted into evidence unless the

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<sup>113</sup> 740 F. Supp. 2d 4 (D.D.C. 2010).

<sup>114</sup> *Id.* at 6.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

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

<sup>119</sup> *Id.* at 7.

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

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

defendant has the opportunity to cross-examine Dr. Ingerwersen at trial, or has had that opportunity in the past."<sup>122</sup>

However, the *Williams* court went on to make a dramatic claim, asserting that "while the Supreme Court in *Crawford* altered Confrontation Clause precedent, it said nothing about the Clause's relation to the Federal Rule of Evidence 703."<sup>123</sup> The court concluded that so long as Dr. Tops had a sound basis for his conclusions, regardless of the fact that the basis included testimonial statements, his testimony would not violate the Confrontation Clause.<sup>124</sup> Although the *Williams* court provided very little explanation for its expansive holding, in *United States v. Johnson*, the Fourth Circuit provided some insight when it reached a similar conclusion.<sup>125</sup> There, the court justified this analytical framework based on policy concerns, stating that while "some of the information experts typically consider surely qualifies as testimonial under *Crawford* . . . . [W]ere we to push *Crawford* [too] far . . . we would disqualify broad swaths of expert testimony, depriving juries of valuable assistance in a great many cases."<sup>126</sup>

This is in blatant contradiction to the stringent test applied in *Crawford* in regards to what the Confrontation Clause requires when a statement is testimonial. As Justice Scalia wrote in the *Melendez-Diaz* majority, "the Confrontation Clause is binding, and we may not disregard it at our convenience."<sup>127</sup> The only acceptable way for testimonial hearsay statements to be admitted is when the declarant is unavailable and the defendant had the prior opportunity to cross-examine him or her.<sup>128</sup> The Court explained in *Crawford* that the reasoning behind this requirement is to ensure the reliability of the statement in the *only* way that the Constitution deems sufficient: through confrontation.<sup>129</sup> Even in *Bryant*, the Court made efforts to define the declarant's statements regarding the shooter as nontestimonial in order to justify admission without meeting the requirements of the Confrontation Clause.<sup>130</sup> Therefore, even in a case that arguably stretches the outer boundaries of *Crawford*, the Court has been unwilling to admit un-confronted evidence that it has classified as testimonial. The policy concerns of a jury's access to expert testimony are not sufficient to overpower a right offered to protect an accused's liberty interest as guaranteed in the Constitution.

## B. NOT ALLOWING THE UNDERLYING INFORMATION ON WHICH THE EXPERT RELIED INTO EVIDENCE

In *United States v. Pablo*,<sup>131</sup> the Tenth Circuit considered an appeal arising out of the rape conviction of the defendant, who appealed the admission of both a DNA report and a serology report, each of which was prepared by a different lab analyst.<sup>132</sup> At trial, neither of the preparing lab analysts were called to testify, but the government nonetheless introduced the reports through a third lab analyst, who was qualified as an expert to testify as to their contents.<sup>133</sup> Pablo based his appeal on the then recent *Melendez-Diaz* holding that a forensic analyst's statements contained in an affidavit were testimonial statements, requiring

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<sup>122</sup> *Id.* at 8.

<sup>123</sup> *Id.* at 9 (quoting *United States v. Henry*, 472 F.3d 910, 914 (D.C. Cir. 2007)).

<sup>124</sup> *Id.* at 9-10.

<sup>125</sup> *United States v. Johnson*, 587 F.3d 625 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 2128 (2010).

<sup>126</sup> *Id.* at 635.

<sup>127</sup> 129 S. Ct. at 2540.

<sup>128</sup> *Id.* at 2531.

<sup>129</sup> *Crawford*, 541 U.S. at 68-69.

<sup>130</sup> *Bryant*, 131 S. Ct. at 1167.

<sup>131</sup> 625 F.3d 1285 (10th Cir. 2010), *petition for cert. filed* (U.S. Mar 31, 2011) (No. 09-2091).

<sup>132</sup> *Id.* at 1290.

<sup>133</sup> *Id.*

confrontation.<sup>134</sup> The government argued that Rule 703 permitted the expert to testify as to the content of the reports despite the holding of *Melendez-Diaz*.<sup>135</sup>

The *Pablo* court concluded that *Melendez-Diaz* was not necessarily dispositive in the instant case.<sup>136</sup> The court distinguished the facts because here, the government never attempted to move the actual reports into evidence, unlike in *Melendez-Diaz* where the affidavits were admitted.<sup>137</sup> The court goes on to state that "the degree to which an expert may merely rely upon . . . the out-of-court testimonial conclusions of another person not called as a witness is a nuanced legal issue without clearly established bright line parameters."<sup>138</sup> Importantly, the court did admit that the reports themselves contained testimonial statements.<sup>139</sup> Ultimately, the court held that because the reports themselves were never entered into evidence, the integrity of the Confrontation Clause was upheld.<sup>140</sup> In justifying this holding, the court explained that under Rule 703, an expert is permitted to rest his or her opinion on inadmissible facts or data, "which may at times include out-of-court testimonial statements."<sup>141</sup> In the court's estimation, the protections built into Rule 703 regarding the disclosure of the underlying inadmissible facts or data, including testimonial statements, ensure that such facts would never be admitted for substantive purposes, but rather only as a means for the jury to evaluate the expert's opinion.<sup>142</sup> Because of this limited purpose, the court concluded that "the admission of those testimonial statements under Rule 703 will not implicate a defendant's confrontation rights because the statements are not admitted for their substantive truth."<sup>143</sup>

Again, this pattern of analysis is plainly at odds with post-*Crawford* Confrontation Clause doctrine, particularly in light of the policy concerns expressed by the Court in *Melendez-Diaz* and *Bullcoming*.<sup>144</sup> The reports, which the court readily admits were full of out-of-court testimonial statements, were the sole basis for the expert's ultimate opinion in the case.<sup>145</sup> Although the court attempted to distinguish *Pablo* from *Melendez-Diaz* because the government did not introduce the full report into evidence, the underlying reasoning of the Supreme Court in *Melendez-Diaz* is still applicable. In *Melendez-Diaz*, the Court stated, "confrontation is designed to weed out . . . the incompetent analyst."<sup>146</sup> However, in *Pablo* there was no way for the defendant to test the accuracy of the underlying reports, which constituted the sole basis for the expert's conclusions. There could have been countless errors in the completion of both the DNA and serology report, and there could have been additional errors in the recording of the results by the original analyst. None of these errors would be adequately exposed to the jury through the cross-examination of the testifying expert alone. In fact, *Bullcoming* would seem to be dispositive on the *Pablo* facts and prevent the introduction of any type of forensic laboratory report through the testimony of an analyst or expert witness who did not have at least some hand in completing the testing.<sup>147</sup> However, because the *Pablo* court rested the reasoning for

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<sup>134</sup> *Id.* at 1290-91.

<sup>135</sup> *Id.* at 1291.

<sup>136</sup> *Id.* at 1294-95.

<sup>137</sup> *Id.* at 1294.

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

<sup>139</sup> *Id.* at 1291.

<sup>140</sup> *Id.* at 1292.

<sup>141</sup> *Id.* (citing FED. R. EVID. 703).

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

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

<sup>144</sup> *Bullcoming*, 131 S. Ct. 2705; *Melendez-Diaz*, 129 S. Ct. at 2537.

<sup>145</sup> *Pablo*, 625 F.3d at 1291.

<sup>146</sup> *Melendez-Diaz*, 129 S. Ct. at 2537.

<sup>147</sup> *Bullcoming*, 131 S. Ct. at 2710.

the admission of the testimony squarely on Rule 703's shoulders, it could still fall into the gray area that Justice Sotomayor discusses in her concurrence to *Bulcoming*.<sup>148</sup> This is precisely the issue that the Court will resolve in *Williams v. Illinois*.

Whenever an expert relies on testimonial sources in forming his or her opinion, it is logical to conclude that the expert accepts the truth of the out-of-court statements.<sup>149</sup> In fact, the jury may even view the testimony as a "validation, expertly performed," of the out-of-court, testimonial statements.<sup>150</sup> It is unlikely that in forming his or her opinion, the expert is relying on the falsity of the testimonial statements or on the mere fact that they exist.<sup>151</sup> Therefore, the jury will likely also accept the underlying data or facts as true, even if they do not consciously realize that they are doing so.<sup>152</sup> This is especially true since the testimonial statements, although undisclosed, have been "validated" by an expert in the field, who is presumably knowledgeable about what source materials are reliable.<sup>153</sup> This demonstrates that the protections of Rule 703, while perhaps acceptable in regards to nontestimonial information, are not sufficient to safeguard a defendant's confrontation right when testimonial statements are at issue.

### C. CROSS-EXAMINATION OF THE EXPERT IS SUFFICIENT BECAUSE THE EXPERT HAS EXERCISED HIS OR HER INDEPENDENT JUDGMENT ON THE INFORMATION

The most common analytical framework employed by the circuit courts is demonstrated in the case of *United States v. Ayala*.<sup>154</sup> A jury convicted the defendant, a member of the violent street gang La Mara Salvatrucha ("MS-13"), of conspiracy to commit murder, conspiracy to participate in racketeering activities, and carrying a firearm in relation to a crime of violence.<sup>155</sup> A combined federal and state task force arrested the defendant at the close of an investigation that was "aided substantially by an informant . . . Noe Cruz."<sup>156</sup> Cruz was a member of the MS-13 clique led by Ayala, the defendant.<sup>157</sup> At the trial, the government called three experts who testified on the history and structure of the MS-13 gang.<sup>158</sup> Each of these experts based their opinions on interviews with former gang members, gang member families, and victims of the gang, as well as the information gained in the current investigation.<sup>159</sup>

The *Ayala* court created a test to use when applying *Crawford* to expert testimony, namely "whether the expert is, in essence, giving an independent judgment, or merely acting as a transmitter of testimonial hearsay."<sup>160</sup> Several circuit courts have adopted this standard since this decision.<sup>161</sup> The court opined that so long as the expert reached an independent conclusion in the case, it is immaterial whether the expert relied on inadmissible, testimonial statements.<sup>162</sup>

<sup>148</sup> *Id.* at 2721-23; *Pablo*, 625 F.3d at 1292.

<sup>149</sup> John C. O'Brien, *The Hearsay Within Confrontation*, 29 ST. LOUIS U. PUB. L. REV. 501, 528 (2010).

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

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

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

<sup>153</sup> *Id.*

<sup>154</sup> *United States v. Ayala*, 601 F.3d 256 (4th Cir. 2010), *cert. denied*, 131 S. Ct. 262 (2010).

<sup>155</sup> *Id.* at 261, 264.

<sup>156</sup> *Id.* at 261.

<sup>157</sup> *Id.* at 261-62.

<sup>158</sup> *Id.* at 274.

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

<sup>160</sup> *Id.* at 275.

<sup>161</sup> See, e.g., *United States v. Turcios-Lazo*, 378 Fed. Appx. 341, 342 (4th Cir. 2010); *United States v. Turner*, 591 F.3d 928, 932-33 (7th Cir. 2010); *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009).

<sup>162</sup> *Ayala*, 601 F.3d at 275.

The rationale behind this analytical structure is that the defendant's cross-examination of the expert on the stand regarding the expert's independent conclusion is sufficient to safeguard the defendant's confrontation right.<sup>163</sup> If the expert's opinion is the result of the reliance on several pieces of information and the expert had to exercise a degree of interpretation and independent decision-making, the expert reliance is permissible, even if some of the underlying basis of the opinion might be unopposed testimonial statements.<sup>164</sup>

However, once again, this strategy from the circuit courts fails to meet the high standards required under current Confrontation Clause doctrine. The primary purpose of the Confrontation Clause is to allow the defendant the opportunity to actually *be confronted* with each witness against him and to test the witness's testimony through the "crucible of cross-examination."<sup>165</sup> Testing the expert's ultimate conclusion in cross-examination can do nothing to satisfy the defendant as to the reliability of the underlying information on which the expert bases his or her opinion. Cross-examination of the expert on whether the information is reliable will not be effective as the expert is already required, under Rule 703, to find the information reliable, or at least to be of the type "reasonably relied upon" in his or her field.<sup>166</sup>

The shortcomings of this approach are further illuminated when considering that "even if the underlying report is rich in detail, there are ways in which the testifying expert must assume its accuracy in reaching his own decisions."<sup>167</sup> If the report transmits anything other than raw data, such as interpretations of that data, and the testifying expert accepts these interpretations as true, he is accepting and partially transmitting testimonial statements and information from the report.<sup>168</sup> However, there is an inherent difficulty in this approach which is not present in the other analytical structures. Namely, it is possible that some of the underlying information on which the expert relies in these types of cases is appropriate. For example, in *Ayala*, the experts relied both on information and data acceptable under the Confrontation Clause and on information that would be barred by the Confrontation Clause.<sup>169</sup> The information the experts gained in previous interviews, not specifically related to *Ayala's* activities in the gang, likely are permissible sources for the expert to rely on. However, it is equally likely that the information gained from Cruz was testimonial and directly implicated *Ayala*. Although it would be difficult for a court to ferret out what types of information are acceptable for the expert to rely on, and therefore the extent of the conclusions the expert can make, courts must engage in this type of analysis. This is what the Constitution requires, and courts may not dispose of it in the interest of judicial efficiency.

## VI. WILLIAMS V. ILLINOIS

On December 6, 2011, the United States Supreme Court heard oral arguments in *Williams v. Illinois*, which may prove to be the culmination of the Confrontation Clause's battle with expert testimony.<sup>170</sup> After a bench trial, Sandy Williams was convicted of two counts of aggravated sexual assault, aggravated kidnapping, and aggravated robbery.<sup>171</sup> Dr. Nancy Schubert took vaginal swabs from the victim immediately after the assault, which were sent to the Illinois State Police ("ISP") Crime Lab for testing.<sup>172</sup> ISP tested the swabs, which tested positive for semen.<sup>173</sup>

<sup>163</sup> KAYE ET AL., *supra* note 9, § 201.

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

<sup>165</sup> *Crawford*, 541 U.S. at 61.

<sup>166</sup> FED. R. EVID. 703.

<sup>167</sup> KAYE ET AL., *supra* note 9, § 203.

<sup>168</sup> *Id.*

<sup>169</sup> *Ayala*, 601 F.3d at 274-75.

<sup>170</sup> 131 S. Ct. 3090 (2011).

<sup>171</sup> *People v. Williams*, 238 Ill. 2d 125, 128 (2010).

<sup>172</sup> *Id.* at 129.

The defendant was given a blood test several months later when he was picked up on an unrelated incident.<sup>174</sup> The DNA analysis of his blood sample was completed by a forensic scientist, Karen Kooi, who made a DNA profile at the ISP Crime Lab.<sup>175</sup> Meanwhile, the vaginal swab from the victim in the sexual assault case was sent to an out-of-state lab, Cellmark, for DNA analysis on the semen.<sup>176</sup> The two profiles were determined to be a match, and Williams was arrested.<sup>177</sup>

At trial, Sandra Lambatos was qualified as an expert in "forensic biology and forensic DNA analysis."<sup>178</sup> Among other things, she testified that the two DNA profiles were a match and that Cellmark, as an accredited laboratory, was required "to meet certain guidelines to perform DNA analysis."<sup>179</sup> She further testified that those guidelines and controls would have been in place for the defendant's particular sample.<sup>180</sup> The trial court judge stated "the DNA expert that testified, was in my view the best DNA witness I have ever heard . . . she was an outstanding witness in every respect."<sup>181</sup> The Illinois Supreme Court held that the issues surrounding her reliance on the Cellmark report went to the weight of her testimony and not its admissibility.<sup>182</sup> This was both because Lambatos used her own expertise to evaluate the two DNA profiles and because the court determined that the burden is on the adverse party to elicit the facts underlying the expert opinion on cross-examination.<sup>183</sup>

The court then addressed whether the Confrontation Clause was implicated in the case. The court asserted that the Confrontation Clause is only implicated if the testimonial statements are offered for the truth of the matter asserted.<sup>184</sup> The state maintained that the only statements offered for the truth of the matter asserted were the opinions of the expert witness.<sup>185</sup> The testimony about the Cellmark tests was offered for the sole purpose of explaining how she developed her own independent opinion, not for its truth.<sup>186</sup> The court then explained that it has "long held that prohibitions against the admission of hearsay do not apply when an expert testifies to underlying facts and data, not admitted into evidence . . ."<sup>187</sup> The evidence offered against Williams was the testimony of the expert and not the report.<sup>188</sup> Finally, the court explained how *Melendez-Diaz* did not alter its determination of the issue.<sup>189</sup> In *Melendez-Diaz*, the evidence at issue was a "bare-bones statement" that the substance was cocaine.<sup>190</sup> The court went on to explain that Lambatos used her own expertise to interpret the raw DNA data,

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<sup>173</sup> *Id.* at 130.

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

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

<sup>176</sup> *Id.* at 271.

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

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

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

<sup>180</sup> *Id.* at 271-72.

<sup>181</sup> *Id.* at 276.

<sup>182</sup> *Id.* at 277.

<sup>183</sup> *Id.* at 276.

<sup>184</sup> *Id.* at 277.

<sup>185</sup> *Id.* at 278.

<sup>186</sup> *Id.*

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

<sup>188</sup> *Id.* at 279.

<sup>189</sup> *Id.* at 281.

<sup>190</sup> *Id.*



and that the evidence at issue here was merely used to inform her opinion.<sup>191</sup> Therefore, there was no Confrontation Clause violation.<sup>192</sup>

The *Williams* case falls squarely within the second approach from the lower federal courts. It is nonsensical to believe that Lambatos did not accept the truth of the DNA reports as she was examining them. Saying that the reports are not offered for their truth would make them entirely irrelevant because if they were not a "true" representation, she would not be making a true match of the DNA. As mentioned earlier, there is a distinct risk that the judge or jury may even view the testimony as a "validation, expertly performed," of the out-of-court, testimonial statements.<sup>193</sup> In this case in particular, the trial court judge, who was serving as the trier of fact, commented that Lambatos was the best witness he had ever seen discussing DNA.<sup>194</sup> It is naïve to think that this would not affect his decision at least to some degree. It is very likely that an untrained jury, faced with such a prepared and practiced witness, would accept her underlying data for the truth of the matter asserted. Moreover, if they did not, her entire testimony would be unfounded.

## VII. CONCLUSION

The spirit of the Confrontation Clause as interpreted in *Crawford*, *Melendez-Diaz*, and *Bullcoming* would be "better protected through the testimony of the expert who wrote the report rather than a surrogate . . . ."<sup>195</sup> This applies equally to an expert who relies on the testimonial statements of others. The Federal Rules' departure from the common law in allowing an expert to rely on inadmissible facts, data, and statements is contrary to the Framers' intent at the adoption of the Confrontation Clause.<sup>196</sup>

In *Derr v. State*, the Maryland Court of Appeals was faced with an issue very similar to that presented in *Williams*.<sup>197</sup> In *Derr*, the defendant was convicted of several sexual offenses.<sup>198</sup> Physical evidence from the victim was taken to an FBI crime lab for serological testing by a lab technician, who created a serology report.<sup>199</sup> The case was not solved, and seventeen years later the physical evidence was submitted to the FBI lab again and an FBI analyst created a DNA report, which was entered into the Combined DNA Identification System ("CODIS") and led to *Derr*.<sup>200</sup> Dr. Jennifer Luttman was involved in supervising a group of biologists who re-tested a sample of *Derr*'s blood, but she was not involved in the serological testing or the actual DNA testing that led to the match.<sup>201</sup> Predictably, the state attempted to admit all of the forensic data through the "surrogate testimony" of Dr. Luttman.<sup>202</sup> At trial, she was permitted to testify to procedures used to create a serology report, a DNA profile, the testing procedures of both the

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<sup>191</sup> *Id.* at 281-82.

<sup>192</sup> *Id.* at 282.

<sup>193</sup> O'Brien, *supra* note 149, at 528.

<sup>194</sup> *Williams*, 939 N.E.2d at 276.

<sup>195</sup> KAYE ET AL., *supra* note 9, § 203.

<sup>196</sup> Ross Andrew Oliver, *Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After Crawford v. Washington*, 55 HASTINGS L.J. 1539, 1540 (2004).

<sup>197</sup> *Derr v. State*, 29 A.3d 533, 537 (Md. 2011); *Williams*, 939 N.E.2d at 270.

<sup>198</sup> *Derr*, 29 A.3d at 536.

<sup>199</sup> *Id.* at 537.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 538.

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

serology report and the first DNA test, and her ultimate opinion that Derr's DNA profile matched the suspect.<sup>203</sup>

On review, the Court of Appeals held that DNA profiling is essentially a statement that the DNA being tested is the DNA of a particular person, and if that profile is used to match a person to a crime in CODIS, then the analyst who created it must appear to be cross-examined.<sup>204</sup> Further, the court directly addressed the interplay of Maryland Rule of Evidence 703, stating that "to the extent that Md. Rule 703 offends the Confrontation Clause, such testimony will not be admissible."<sup>205</sup> The court continued, asserting that "if the inadmissible evidence sought to be introduced is comprised of the conclusions of other analysts, then the Confrontation Clause prohibits the admission of such testimonial statements through the testimony of an expert who did not observe or participate in the testing."<sup>206</sup> This case is demonstrative of how the Court in *Williams* should rule, in order to protect defendant's confrontation right and stay true to the line of cases following *Crawford*.

The cost to defendants when courts allow experts to rely on testimonial statements is great. Under current circuit court approaches to Rule 703, the defendant is free to test the basis of the expert's opinion through cross-examination, but if he does, he will be unable to object to the disclosure of the statements to the jury.<sup>207</sup> The alternative is to leave the basis of the expert's opinion entirely unexamined.<sup>208</sup> Defendants are therefore left in a precarious position, and an undue burden is being placed on the exercise of an accused's constitutional guarantee. Defendants are forced into the position of deciding if it is a better tactical decision to risk disclosure of the expert's underlying information to uncover any possible Confrontation violation or, on the other hand, if it is better to keep that information from the jury for fear that the jury will misapply the information as substantive proof. Thus, the criminal defendant is placed in a no-win position, forced to choose between Constitutional guarantees and trial strategy.

In order to safeguard a defendant's Constitutional right to confront *all* witnesses against him or her at trial, the Supreme Court should follow the lead of the Maryland Court of Appeals in *Derr*. The Supreme Court must uphold Constitutional guarantees for criminal defendants, regardless of the difficulties they may entail. The reason for this is simple, and no one has said it better than Justice Scalia: "the Confrontation Clause . . . is binding, and we may not disregard it at our convenience."<sup>209</sup>

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<sup>203</sup> *Id.* at 539.

<sup>204</sup> *Id.* at 549.

<sup>205</sup> *Id.* at 553.

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

<sup>207</sup> Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 GEO. L.J. 827, 829 (2008).

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

<sup>209</sup> *Melendez-Diaz*, 129 S. Ct. at 2540.