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CONFRONTATION’S MULTI-ANALYST PROBLEM

Paul F. Rothstein & Ronald J. Coleman

*ABSTRACT: The Confrontation Clause in the Sixth Amendment affords the “accused” in “criminal prosecutions” the right “to be confronted with the witnesses against” them. A particular challenge for courts over at least the last decade-plus has been the degree to which the Confrontation Clause applies to forensic reports, such as those presenting the results of a DNA, toxicology, or other CSI-type analysis. Should use of forensic reports entitle criminal defendants to confront purportedly “objective” analysts from the lab producing the report? If so, which analyst or analysts? For forensic processes which require multiple analysts, should the prosecution be required to produce each and every analyst involved in handling the sample, participating in the testing process, or making any type of even minor representation contained in the report? Although the Supreme Court has had several occasions to opine on the application of the Confrontation Clause to forensic reports, and although such precedent suggests criminal defendants enjoy at least some right to confront a forensic analyst, a great deal of uncertainty persists as to which analyst or analysts must be produced in cases involving multiple analysts. A certiorari petition considered by the Supreme Court in March 2021—*Chavis v. Delaware*—could have permitted the Court to address this multi-analyst problem. Even though the Court determined *Chavis* was not the appropriate vehicle for resolving the multi-analyst problem, this is an extremely important issue for labs, local stakeholders, and lower courts, and Justice Gorsuch even dissented from the Court’s denial of certiorari. The purpose of this Article is to identify and discuss six plausible approaches the Supreme Court could consider in resolving the multi-analyst problem.*

I. INTRODUCTION

Imagine Detective Harry Bosch of Hollywood Homicide has investigated the murder of a famous actress and her boyfriend. Bosch has identified who he believes to be the killer and the key piece of evidence linking that accused to the double murder is a DNA match between a swab taken from the accused and a DNA sample from the crime scene: the actress’s chateau in the Hollywood Hills. The DNA analysis was handled by a well-known private forensics lab outside of California. The District Attorney’s Office has just advised Bosch that, pursuant to the Confrontation Clause in the federal Constitution and relevant U.S. Supreme Court precedent, the accused will likely have the right to confront and cross-examine an analyst from the forensics lab. Even though Bosch has been working Hollywood Homicide for many years, he is now perplexed. He believes more than five analysts may have been involved in the forensic DNA analysis process, with some likely performing only very minor roles. Could this mean that, unless each and every one of those analysts appears to testify at the accused’s trial, the accused could walk?

The Confrontation Clause in the Sixth Amendment affords the “accused” in “criminal prosecutions” the right “to be confronted with the witnesses against” them.¹ The

¹ U.S. Const. amend. VI. The right to confront also applies to states pursuant to the Fourteenth Amendment. See *Pointer v. Texas*, 380 U.S. 400, 403 (1965); see also David L. Faigman et al.,

difficulty has come in determining when the Clause applies in a given case. Since *Crawford v. Washington*, the Supreme Court has held that the Confrontation Clause applies only in cases involving a certain subset of out-of-court statements which could be considered equivalent to “bear[ing] testimony” in court.² Such so-called “testimonial” statements of declarants not testifying at trial would only be admitted “where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”³ However, *Crawford* and its progeny have not fully defined which statements would be “testimonial.”⁴

A particular challenge for courts over at least the last decade-plus has been the degree to which the Confrontation Clause applies to forensic reports, such as those presenting the results of a DNA, toxicology, or other CSI-type analysis. Should use of forensic reports entitle criminal defendants to confront purportedly “objective” analysts from the lab producing the report? If so, which analyst or analysts? For forensic processes which require multiple analysts, should the prosecution be required to produce each and every analyst involved in handling the sample, participating in the testing process, or making any type of even minor representation contained in the report? Although the Supreme Court has had several occasions to opine on the application of the Confrontation Clause to forensic reports, and although such precedent suggests criminal defendants enjoy at least some right to confront a forensic analyst, a great deal of uncertainty persists as to which analyst or analysts must be produced in cases involving multiple analysts.⁵

A certiorari petition considered by the Supreme Court in March 2021—*Chavis v. Delaware*—could have permitted the Court to address this multi-analyst problem.⁶ In *Chavis*, the prosecution was permitted to offer the results of forensic DNA analysis—produced by a process involving multiple analysts—through the testimony of a single lab analyst.⁷ This testifying analyst’s report and testimony relied on her conclusion that other

Gatekeeping Science: Using the Structure of Scientific Research to Distinguish Between Admissibility and Weight in Expert Testimony, 110 NW. U. L. REV. 859, 876 n.73 (2016).

² *Crawford v. Washington*, 541 U.S. 36, 42-68 (2004).

³ See *Crawford*, 541 U.S. at 59.

⁴ See *infra*, Part II. Testimonial would seem to include “out-of-court written or oral statements meant or understood to provide some form of evidence for use at trial, especially if made solemnly and to a state actor or agent.” See Ronald J. Coleman & Paul F. Rothstein, *A Game of Katso and Mouse: Current Theories for Getting Forensic Analysis Evidence Past the Confrontation Clause*, 57 AM. CRIM. L. REV. 27, 27 (2020) [hereinafter *A Game of Katso and Mouse*].

⁵ See, e.g., *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *Williams v. Illinois*, 567 U.S. 50 (2012); see also *Stuart v. Alabama*, 139 S. Ct. 36, 36 (2018) (Mem) (Gorsuch J., dissenting) (emphasizing “confusion” in this area); Ronald J. Coleman & Paul F. Rothstein, *Grabbing the Bullcoming by the Horns: How the Supreme Court Could Have Used Bullcoming v. New Mexico to Clarify Confrontation Clause Requirements for CSI-Type Reports*, 90 NEB. L. REV. 502, 546 (2011) [hereinafter *Grabbing the Bullcoming*]; Ronald J. Coleman & Paul F. Rothstein, *Williams v. Illinois and the Confrontation Clause* (Dec. 6, 2011), <http://www.publicsquare.net/2011/12/williams-v-illinois-confrontation-clause/> [hereinafter *Williams and the Confrontation Clause*]; Paul F. Rothstein, *Unwrapping the Box the Supreme Court Justices Have Gotten Themselves Into: Internal Confrontations Over Confronting the Confrontation Clause*, 58 HOW. L.J. 479 (2015) [hereinafter *Unwrapping the Box*]; *A Game of Katso and Mouse*, *supra* note 4; Andrew Arons, *Who Must Testify?: The Limits of the Confrontation Clause When it is Applied to Forensic Laboratory Reports*, 46 LOY. L.A. L. REV. 721, 723-24 (2013).

⁶ See generally Petition for a Writ of Certiorari, *Chavis v. Delaware*, No. 20-317 (Sept. 4, 2020) [hereinafter *Chavis Cert Petition*].

⁷ *Chavis v. Delaware*, 227 A.3d 1079, 1080-82 (Del. 2020).

analysts at the lab had performed their work properly, but her conclusion was based on a review of such other analysts' entries in case files rather than on personal knowledge.⁸ The Delaware Supreme Court found that this did not violate the Confrontation Clause, and notwithstanding Justice Gorsuch's dissent, the U.S. Supreme Court denied certiorari.⁹ Was the Delaware Supreme Court's conclusion in *Chavis* correct, and how should courts handle the multi-analyst problem in future cases?

The purpose of this Article is to identify and discuss six plausible approaches the U.S. Supreme Court may consider in addressing the multi-analyst problem. The remainder of this Article proceeds as follows: Part II will provide relevant background on the Confrontation Clause, including the challenge posed by forensic reports; Part III will describe the *Chavis* case and petition; Part IV will present our six approaches for addressing the multi-analyst problem; and Part V will conclude.

II. CONFRONTATION CLAUSE BACKGROUND

Prior to *Crawford v. Washington*,¹⁰ Confrontation Clause cases had been analyzed under the regime established in *Ohio v. Roberts*.¹¹ Pursuant to *Roberts*, a hearsay statement by a non-testifying declarant could only be admitted against a criminal defendant if the declarant was unavailable and the statement bore "adequate indicia of reliability."¹² *Crawford* overruled *Roberts* and placed the focus on whether a given statement was "testimonial."¹³

A. The "New" Interpretation of the Confrontation Clause

In *Crawford*, Michael Crawford had been tried for attempted murder and assault, and the state attempted to use his wife's tape-recorded statements as evidence against him.¹⁴ The wife had made such statements during a police interrogation, but she did not testify at trial due to marital privilege rules in the state of Washington.¹⁵ Crawford argued that admission of her recorded statements violated his Confrontation Clause rights, but the wife's recorded statements were nevertheless admitted and played for the jury.¹⁶

⁸ *Id.* at 1081.

⁹ *Id.* at 1091 (emphasis added); *Chavis v. Delaware*, 592 U.S. ____ (2021) (Mem) (Gorsuch J., dissenting).

¹⁰ 541 U.S. 36.

¹¹ 448 U.S. 56 (1980); see also Paul F. Rothstein & Ronald J. Coleman, *Confronting Memory Loss*, 55 GA. L. REV. 95, 100 (2020) [hereinafter *Confronting Memory Loss*].

¹² *Roberts*, 448 U.S. at 66 (internal quotation marks omitted). Under *Roberts*, "[r]eliability [could] be inferred without more in a case where the evidence [fell] within a firmly rooted hearsay exception." *Id.*

¹³ See *Crawford*, 541 U.S. at 68; see also David L. Noll, *Constitutional Evasion and the Confrontation Puzzle*, 56 B.C. L. REV. 1899, 1910 (2015) ("*Crawford* rejected the *Roberts* framework root and branch."); *Confronting Memory Loss*, *supra* note 11, at 100 (noting "*Crawford* and its progeny altered the paradigm [.]"); Richard D. Friedman et al., *Crawford, Davis, & the Right of Confrontation: Where Do We Go From Here?*, 19 REGENT U. L. REV. 507, 515-16 (2007) (noting Richard D. Friedman stated "I don't think *Roberts* was working.").

¹⁴ 541 U.S. at 38-40.

¹⁵ *Id.* at 50.

¹⁶ *Id.* at 40.

Justice Scalia, writing for the Court, determined that admission of the recorded statements violated the Confrontation Clause.¹⁷ He considered the Sixth Amendment's text, lengthy history of confrontation rights, and prior Supreme Court precedent, and advanced two conclusions regarding the Confrontation Clause: (i) the Clause only applied to so-called "testimonial" statements; and (ii) use of these "testimonial" statements made by a declarant not appearing at trial was impermissible unless the declarant was "unavailable" and the defendant had had some prior opportunity to cross-examine the declarant.¹⁸

Justice Scalia reasoned that the primary evil at which the Clause was directed was the civil law style of criminal procedure, and in particular its using *ex parte* examinations against the accused.¹⁹ Such practices were exemplified by the "notorious" Sir Walter Raleigh treason trial, in which out-of-court evidence from Raleigh's alleged accomplice, Lord Cobham, was used against Raleigh at trial and the judges refused Raleigh's demand that Cobham appear.²⁰ The Clause's text, itself, also applied to "witnesses" meaning those who "bear testimony."²¹ Accordingly, the Confrontation Clause applied only to what Justice Scalia referred to as "testimonial" statements: a certain class of out-of-court statements which are the functional equivalent of in-court testimony.²² Justice Scalia left setting out a "comprehensive definition of 'testimonial'" for "another day [,]" but noted that whatever its definition, it applied to police interrogations, as well prior testimony at a former trial, before a grand jury, or at a preliminary hearing.²³ On the facts of the case, Justice Scalia found that admission of Crawford's wife's statements without the opportunity for cross-examination violated the Confrontation Clause.²⁴

¹⁷ *Id.* at 68-69.

¹⁸ *Id.* at 40-60.

¹⁹ *Id.* at 50.

²⁰ *Id.* at 44. Justice Scalia noted that "[t]hrough a series of statutory and judicial reforms, English law developed a right of confrontation that limited these abuses. For example, treason statutes required witnesses to confront the accused 'face to face' at his arraignment. . . . Courts, meanwhile, developed relatively strict rules of unavailability, admitting examinations only if the witness was demonstrably unable to testify in person. . . . Several authorities also stated that a suspect's confession could be admitted only against himself, and not against others he implicated." *Id.* at 44-45 (citations omitted).

²¹ *Id.* at 51; *see also* Jeffrey L. Fisher, *Crawford v. Washington: The Next Ten Years*, 113 MICH. L. REV. FIRST IMPRESSIONS 9, 10 (2014) ("The testimonial approach starts from the premise that the Confrontation Clause is not a rule of evidence but rather one of criminal procedure.").

²² *Crawford*, 541 U.S. at 50-60. The Court noted: "Various formulations of this core class of 'testimonial' statements exist: 'ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,'; 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,'; 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,' These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing." *Id.* at 51-52 (citations omitted).

²³ *Id.* at 68; *see also* Natasha Crawford, *Williams v. Illinois: Confronting Experts, Science, and the Constitution*, 64 MERCER L. REV. 805, 810 (2013). These, according to Justice Scalia, were the "modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Crawford*, 541 U.S. at 68.

²⁴ *Crawford*, 541 U.S. at 68-69.

Chief Justice Rehnquist, joined by Justice O'Connor, decried the Court's overruling of *Roberts* and "adoption of a new interpretation of the Confrontation Clause [which] is not backed by sufficiently persuasive reasoning to overrule long-established precedent."²⁵ He believed that the new interpretation was unnecessary for deciding the case and that the Court had "cast[] a mantle of uncertainty over future criminal trials [.]"²⁶ The Chief Justice noted that while the Court chose not to provide a comprehensive definition for "testimonial," state and federal prosecutors needed answers now—not months or even years from now—on what is covered by the term aside from the specific examples the Court had enumerated.²⁷

After *Crawford*, the Court would attempt to devise an approach for determining when a given statement would be testimonial.²⁸ That approach came to focus on the statement's objective primary purpose.

B. The Primary Purpose Test

The Court has come to rely on analyzing the objective primary purpose of a statement to determine whether such statement should be considered testimonial. The Court developed this test in *Davis v. Washington*²⁹ and *Michigan v. Bryant*,³⁰ and has since applied it in cases such as *Ohio v. Clark*.³¹

In *Davis*, the Court created an "emergency" exception to the class of testimonial statements.³² *Davis* called upon the Court to rule on two consolidated appeals: (i) *State v. Davis*,³³ which concerned the state seeking to admit statements made to a 911 operator before police arrived on the scene; and (ii) *Hammon v. State*,³⁴ which concerned the state seeking to admit statements made by an alleged victim after police arrived on the scene and the alleged perpetrator appeared under control.³⁵ Justice Scalia authored the Court's opinion and stated:

Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to

²⁵ *Id.* at 69, 74-76; see also Erwin Chemerinsky, *Assessing Chief Justice William Rehnquist*, 154 U. PA. L. REV. 1331, 1353 (2006) ("In *Crawford v. Washington*, the Court changed the law, overruled precedent, and provided more protections under the Confrontation Clause of the Sixth Amendment by limiting hearsay testimony that could be used against criminal defendants.").

²⁶ *Crawford*, 541 U.S. at 69, 74-76. The Chief Justice noted that, in his view, "[t]he Court's distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine." *Id.*

²⁷ *Id.* at 75.

²⁸ Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865, 1867 (2012) ("As ambitious as the case was, *Crawford* only mapped out the rough contours of the long-awaited Confrontation Clause revolution, leaving a number of important questions 'for another day.'") (certain internal quotation marks omitted).

²⁹ 547 U.S. 813 (2006).

³⁰ 562 U.S. 344 (2011).

³¹ 135 S. Ct. 2173 (2015).

³² See generally *Davis*, 547 U.S. 813.

³³ 111 P.3d 844 (Wash. 2005).

³⁴ 829 N.E.2d 444 (Ind. 2005); see also Frederick Schauer, *Constitutionalism and Coercion*, 54 B.C. L. REV. 1881, 1890-91 (discussing *Hammon*).

³⁵ *Davis*, 547 U.S. at 818-21.

police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: 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. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.³⁶

Applying this standard, the Court found that the statements to the 911 operator in *State v. Davis* were nontestimonial, since “the circumstances of [the declarant’s] interrogation objectively indicate[d] its primary purpose was to enable police assistance to meet an ongoing emergency” and the declarant was not simply “a weaker substitute for live testimony at trial [.]”³⁷ In contrast, the statements in *Hammon* were testimonial, since “the circumstances [indicated] that the interrogation was part of an investigation into possibly criminal past conduct [.]” no emergency was in progress, and the statements “were an obvious substitute for live testimony [.]”³⁸

Justice Thomas wrote an opinion concurring in part and dissenting in part, to criticize the Court’s adoption of the primary purpose test.³⁹ In addition to the test being hard for the courts to apply, Justice Thomas felt that it characterized as “testimonial,” and thus inadmissible, evidence that bore little resemblance the type of evidence the Court had previously determined was targeted by the Confrontation Clause.⁴⁰ Justice Thomas set out his formality and solemnity view, pursuant to which “statements regulated by the Confrontation Clause must include ‘extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.’”⁴¹ He also previewed the so-called “mixed motives” problem—which would be discussed further in *Bryant*—in stating:

In many, if not most, cases where police respond to a report of a crime, whether pursuant to a 911 call from the victim or otherwise, the purposes of an interrogation, viewed from the perspective of the police, are *both* to respond to the emergency situation *and* to gather evidence. . . . Assigning one of these two “largely unverifiable motives,” . . . primacy requires constructing a hierarchy of purpose that will rarely be present—and is not

³⁶ *Id.* at 822. For purposes of its decision, the Court considered the 911 operator in *State v. Davis* an agent of law enforcement. *See id.* at 823 n.2.

³⁷ *Id.* at 828-34 (internal question marks omitted). The Court noted that, in cases such as Sir Walter Raleigh’s and certain others, “the *ex parte* actors and the evidentiary products of the *ex parte* communication aligned perfectly with their courtroom analogues. [The *State v. Davis* declarant’s] emergency statement does not. No ‘witness’ goes into court to proclaim an emergency and seek help.” *Id.* at 828.

³⁸ *Id.* at 816-34.

³⁹ *Id.* at 834.

⁴⁰ *Id.*

⁴¹ *Id.* at 836 (citation omitted). Justice Thomas would come to repeat this formality and solemnity view in future cases, but it has, so far, not gained much traction with the other Justices.

reliably discernible. It will inevitably be, quite simply, an exercise in fiction.⁴²

In *Bryant*, the Court further developed its primary purpose approach and sought to address the mixed motives problem. *Bryant* concerned attempted use of statements made by an alleged victim to police who found the victim mortally wounded in the parking lot of a gas station.⁴³ The declarant-victim did not appear at trial, since he had passed away, but the police officers who had spoken to the victim on the scene testified as to what the victim had told them.⁴⁴ Justice Sotomayor, for the Court, built upon the principles the Court had set out in *Davis*:

When, as in *Davis*, the primary purpose of an interrogation is to respond to an “ongoing emergency,” its purpose is not to create a record for trial and thus is not within the scope of the [Confrontation] Clause. But 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. In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant. Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.⁴⁵

The Court also noted that the situation in *Bryant* was different from that in *Davis*, and thus required further clarification of the emergency exception from *Davis*:

We now face a new context: a nondomestic dispute, involving a victim found in a public location, suffering from a fatal gunshot wound, and a perpetrator whose location was unknown at the time the police located the victim. Thus, we confront for the first time circumstances in which the “ongoing emergency” discussed in *Davis* extends beyond an initial victim to a potential threat to the responding police and the public at large.⁴⁶

In making the determination of whether the primary purpose of a given interrogation would be to assist an ongoing emergency, the Court said it would “objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties.”⁴⁷ The Court recognized the mixed motives problem, pursuant to which interrogators might have more than one motivation in asking questions and declarants

⁴² *Id.* at 839 (citations omitted). As will be discussed further below, the mixed motives problem arises where, for instance, an interrogator has more than one motivation in asking questions and a declarant has more than one motivation in answering such questions or otherwise making statements. *Bryant*, 562 U.S. at 367-69.

⁴³ *Bryant*, 562 U.S. at 348.

⁴⁴ *Id.* at 348-50.

⁴⁵ *Id.* at 358-59.

⁴⁶ *Id.* at 359.

⁴⁷ *Id.*

might have more than one motive in making statements.⁴⁸ It stated that in many circumstances, the primary purpose would be best ascertained by looking at the contents of questions *and* answers.⁴⁹ By taking the combined approach, the Court reasoned, problems arising from looking only to one participant—such as the mixed motives problem—could be ameliorated.⁵⁰ On the facts of *Bryant*, the Court determined that the emergency exception applied and the victim’s statements were non-testimonial.⁵¹

Justice Thomas authored a concurring opinion, again relying on his formality and solemnity view. He determined that the statements lacked sufficient formality and so would not be testimonial.⁵²

Justice Scalia dissented, charging the Court with having reached a “patently incorrect conclusion on the facts” and having “distort[ed] our Confrontation Clause jurisprudence [.]”⁵³ He noted that *Crawford* and *Davis* had not addressed whose perspective was relevant for the primary purpose test: the interrogator’s, the defendant’s, or both.⁵⁴ He strongly disagreed with the Court’s combined approach, and instead believed it was the declarant’s intention which should count.⁵⁵ Justice Scalia proclaimed himself

⁴⁸ *Id.* at 367-69. The Court stated that “Police officers in our society function as both first responders and criminal investigators. Their dual responsibilities may mean that they act with different motives simultaneously or in quick succession. . . . Victims are also likely to have mixed motives when they make statements to the police. During an ongoing emergency, a victim is most likely to want the threat to her and to other potential victims to end, but that does not necessarily mean that the victim wants or envisions prosecution of the assailant. A victim may want the attacker to be incapacitated temporarily or rehabilitated. Alternatively, a severely injured victim may have no purpose at all in answering questions posed; the answers may be simply reflexive. The victim’s injuries could be so debilitating as to prevent her from thinking sufficiently clearly to understand whether her statements are for the purpose of addressing an ongoing emergency or for the purpose of future prosecution. Taking into account a victim’s injuries does not transform this objective inquiry into a subjective one. The inquiry is still objective because it focuses on the understanding and purpose of a reasonable victim in the circumstances of the actual victim—circumstances that prominently include the victim’s physical state.” *Id.*

⁴⁹ *Id.* at 367-68. The Court provided an “extreme” example: “if the police say to a victim, ‘Tell us who did this to you so that we can arrest and prosecute them,’ the victim’s response that ‘Rick did it,’ appears purely accusatory because by virtue of the phrasing of the question, the victim necessarily has prosecution in mind when she answers.” *Id.* at 368.

⁵⁰ *Id.* at 368.

⁵¹ *Id.* at 377-78. Justice Kagan did not take part in the consideration or decision in *Bryant*. *Id.* at 378.

⁵² *Id.* at 378. Justice Thomas also again criticized the Court’s primary purpose test. *Id.* at 379.

⁵³ *Id.* at 380; *see also* David Crump, *Overruling Crawford v. Washington: Why and How*, 88 NOTRE DAME L. REV. 115, 132-37 (2012) (discussing issues with the “primary purpose” test and arguing that *Bryant* “is a compelling illustration of the unworkability that is built into the *Crawford* rationale.”); Richard D. Friedman & Jeffrey L. Fisher, *The Frame of Reference and Other Problems*, 113 MICH. L. REV. FIRST IMPRESSIONS 43, 45 (2014) (“We agree that it is confusing to speak of an actor’s primary purpose ‘objectively considered.’ Purpose is a subjective matter. But this aspect of the problem would disappear if the Court spoke, as we believe it should, in terms of *reasonable anticipation*—rather than purpose—of prosecutorial use.”). Justice Ginsburg wrote a separate dissenting opinion, which agreed with portions of Justice Scalia’s dissent. *Bryant*, 562 U.S. at 395. She also emphasized that, had the issue been properly tendered in *Bryant*, she would have considered whether the dying declarations exception survived the Court’s recent Confrontation Clause jurisprudence. *Id.*

⁵⁴ *Bryant*, 562 U.S. at 381. Justice Scalia noted that in *Crawford* and *Davis*, the statements were testimonial when viewed from any perspective, and he believed the same was true in *Bryant*. *Id.*

⁵⁵ *Id.* According to Justice Scalia, “[f]or an out-of-court statement to qualify as testimonial, the declarant must intend the statement to be a solemn declaration rather than an unconsidered or offhand remark; 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. . . . That is what distinguishes a narrative told to a friend over dinner from a

“at a loss to know how” the Court’s approach would ameliorate the mixed motives problem, since adding the mixed motives of police officers to the mixed motives of declarants would only compound the problem.⁵⁶ He also, among other things, blasted the Court’s new “expansive exception to the Confrontation Clause for violent crimes”⁵⁷ and its “resurrected interest in reliability [.]”⁵⁸

More recently, in *Clark*, the Court considered the primary purpose approach in the child abuse context.⁵⁹ Darius Clark had sent his girlfriend out of town for the purposes of prostitution and said he would care for her children while she was away.⁶⁰ One day later, a teacher noticed, among other things, red marks on the girlfriend’s three year-old-son, and the son identified Clark as the abuser.⁶¹ The teacher alerted authorities by way of a child abuse hotline.⁶² At trial, the prosecution introduced the son’s statements to his teachers and Clark was found guilty on several counts of felonious assault.⁶³ The question for the Court was whether admission of the boy’s statements when he was unavailable to be cross-examined violated the Confrontation Clause.⁶⁴

Justice Alito, for the Court, determined that, since neither the teachers nor the boy had the primary purpose of assisting in the prosecution of Clark, the boy’s statements did

statement to the police. . . . The hidden purpose of an interrogator cannot substitute for the declarant’s intentional solemnity or his understanding of how his words may be used.” *Id.*

⁵⁶ *Id.* at 383. In this regard, Justice Scalia noted, “[n]ow courts will have to sort through two sets of mixed motives to determine the primary purpose of an interrogation. And the Court’s solution creates a mixed-motive problem where (under the proper theory) it does not exist—viz., where the police and the declarant each have one motive, but those motives conflict. The Court does not provide an answer to this glaringly obvious problem, probably because it does not have one.” *Id.*; see also Crump, *supra* note 53, at 132-33.

⁵⁷ *Bryant*, 562 U.S. at 388. Justice Scalia noted: “Because Bryant posed a continuing threat to public safety in the Court’s imagination, the emergency persisted for confrontation purposes at least until the police learned his ‘motive for and location after the shooting.’ . . . It may have persisted in this case until the police ‘secured the scene of the shooting’ two-and-a-half hours later. . . . (The relevance of securing the scene is unclear so long as the killer is still at large—especially if, as the Court speculates, he may be a spree-killer.) This is a dangerous definition of emergency. Many individuals who testify against a defendant at trial first offer their accounts to police in the hours after a violent act. If the police can plausibly claim that a ‘potential threat to . . . the public’ persisted through those first few hours, . . . (and if the claim is plausible here it is always plausible) a defendant will have no constitutionally protected right to exclude the uncross-examined testimony of such witnesses. His conviction could rest (as perhaps it did here) solely on the officers’ recollection at trial of the witnesses’ accusations.” *Id.* at 388-89.

⁵⁸ *Id.* at 388-92. In terms of reliability, Justice Scalia argued: “Reliability tells us *nothing* about whether a statement is testimonial. Testimonial and nontestimonial statements alike come in varying degrees of reliability. An eyewitness’s statements to the police after a fender-bender, for example, are both reliable and testimonial. Statements to the police from one driver attempting to blame the other would be similarly testimonial but rarely reliable.” *Id.* at 392.

⁵⁹ 135 S. Ct. 2173. For a discussion of ambiguous-purpose statements of abuse victims prior to *Clark*, see Paul F. Rothstein, *Ambiguous-Purpose Statements of Children and Other Victims of Abuse Under the Confrontation Clause*, 44 SW. L. REV. 508 (2015).

⁶⁰ *Clark*, 135 S. Ct. at 2177. Clark was also his girlfriend’s pimp. *Id.*

⁶¹ *Id.* at 2177-78. The son had apparently referred to Clark by his nickname of “Dee” in the identification. *Id.* Additional injuries were subsequently discovered. *Id.*

⁶² *Id.* at 2178.

⁶³ *Id.*

⁶⁴ *Id.* at 2177, 2181. The son did not testify because the trial court found him incompetent to testify. *Id.* at 2178. Pursuant to Ohio law, “children younger than 10 years old are incompetent to testify if they ‘appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.’” *Id.* (citation omitted).

not violate the Confrontation Clause and were admissible.⁶⁵ Justice Alito noted that, because at least certain statements to individuals other than law enforcement officers conceivably could raise Confrontation Clause concerns, the Court would refrain from adoption of a categorical rule excluding such statements from Confrontation Clause protection.⁶⁶ However, such statements, according to the Court, were “much less likely” to be found testimonial.⁶⁷ The Court considered the boy’s statements in *Clark* non-testimonial since: (i) they were made to his teachers not law enforcement; (ii) they occurred in connection with an ongoing emergency of suspected child abuse; (iii) there was no indication that the conversation’s primary purpose was to gather evidence to prosecute Clark; (iv) statements by very young children rarely (if ever) implicated the Confrontation Clause; and (v) there was “strong evidence” that statements made in similar circumstances to those in *Clark* would have been admissible at common law.⁶⁸ As to this last point, the Court noted that the primary purpose test was a necessary—but not sufficient—condition for Confrontation Clause exclusion, since the Clause did “not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the time of the founding.”⁶⁹

Justice Scalia authored a concurring opinion, which was joined by Justice Ginsburg.⁷⁰ He wrote separately to “protest the Court’s shoveling of fresh dirt upon the Sixth Amendment right of confrontation so recently rescued from the grave in [*Crawford*].”⁷¹ He took issue with, for instance, the Court’s characterization of *Crawford*, and with the suggestion that the primary purpose test was a necessary, but not sufficient, condition.⁷² Justice Scalia did emphasize his agreement with the Court’s refusal to determine two questions unnecessary to the Court’s holding:

[W]hat effect Ohio’s mandatory-reporting law has in transforming a private party into a state actor for Confrontation Clause purposes, and whether a more permissive Confrontation Clause test—one less likely to hold the statements testimonial—should apply to interrogations by private actors.⁷³

Still, Justice Scalia concluded that the statements in *Clark* would be non-testimonial pursuant to the normal test for police interrogations.⁷⁴

⁶⁵ *Id.* at 2177. The Court found Clark’s arguments to the contrary unavailing. *Id.* at 2182-83.

⁶⁶ *Id.* at 2181.

⁶⁷ *Id.*

⁶⁸ *Id.* at 2181-82.

⁶⁹ *Id.* (“Certainly, the statements in this case are nothing like the notorious use of *ex parte* examination in Sir Walter Raleigh’s trial for treason, which we have frequently identified as ‘the principal evil at which the Confrontation Clause was directed.’”) (citations omitted).

⁷⁰ *Id.* at 2183.

⁷¹ *Id.* at 2184.

⁷² *Id.* at 2184-85 (noting “[t]he opinion asserts that future defendants, and future Confrontation Clause majorities, must provide ‘evidence that the adoption of the Confrontation Clause was understood to require the exclusion of evidence that was regularly admitted in criminal cases at the time of the founding.’”) (citation omitted). Justice Scalia noted that the Court got the burden backwards, and in fact the burden is on the prosecution seeking to introduce the evidence. *Id.*

⁷³ *Id.* at 2183.

⁷⁴ *Id.* at 2183-84.

Justice Thomas also concurred, and stated he would not have applied the primary purpose test in *Clark*.⁷⁵ Instead, he would apply the same test for statements to law enforcement agents as he applies to private persons: “assessing whether those statements bear sufficient indicia of solemnity to qualify as testimonial.”⁷⁶ He concluded that the son’s statements did not bear the requisite indicia of solemnity and were non-testimonial.⁷⁷

Even following *Clark*, there remains a great deal of uncertainty in the application of the primary purpose test.⁷⁸ However, one of the most difficult issues the Supreme Court has had to face in the Confrontation Clause context is the challenge presented by forensic reports.

C. The Forensic Reports Challenge

The application of the Confrontation Clause to forensic reports has proved particularly divisive in the U.S. Supreme Court. The Court considered this issue in a series of three cases: (i) *Melendez-Diaz v. Massachusetts*⁷⁹; (ii) *Bullcoming v. New Mexico*⁸⁰; and (iii) *Williams v. Illinois*.⁸¹ We will refer to this series of cases as the “*Melendez-Diaz* Trilogy.”

In *Melendez-Diaz*, Luis Melendez–Diaz had been convicted on drug charges for selling cocaine.⁸² At trial, the state entered into evidence seized bags allegedly containing narcotics, along with three “certificates of analysis [.]” These certificates reflected the results of forensic analysis showing the substance in the bags contained cocaine, and they had been sworn before a notary public pursuant to state law.⁸³ Melendez–Diaz raised a Confrontation Clause objection, arguing that *Crawford* required the forensic analysts to testify at trial, but his objection was overruled.⁸⁴ After appeals, the Supreme Court agreed to hear the case.⁸⁵

Justice Scalia, for the Court, held that admitting the certificates was a violation of the Confrontation Clause.⁸⁶ For Justice Scalia, deciding the case required “little more”

⁷⁵ *Id.* at 2185.

⁷⁶ *Id.* at 2186 (citations omitted).

⁷⁷ *Id.*

⁷⁸ For instance, questions persist, such as: (i) what would make a purpose “primary” in the situation of mixed purposes; (ii) whose purpose should be considered more significant—a declarant or a questioner—if their purposes are materially different; (iii) what does it mean that the purpose should be determined “objectively” from the standpoint of a “reasonable person” under the same circumstances; (iv) could volunteered statements without interrogation constitute a Confrontation Clause violation; and (v) should a court break statements down into component parts so that each part may be separately scrutinized under the primary purpose test? See Paul F. Rothstein, *A Comment on the Supreme Court’s Decision in Ohio v. Clark* (June 19, 2015), <https://casetext.com/analysis/a-comment-on-the-supreme-courts-decision-in-ohio-v-clark> [hereinafter *Comment on Clark*]; see also *Clark*, 135 S. Ct. 2173.

⁷⁹ 557 U.S. 305.

⁸⁰ 564 U.S. 647.

⁸¹ 567 U.S. 50.

⁸² *Melendez-Diaz*, 557 U.S. at 307-09.

⁸³ *Id.* at 308.

⁸⁴ *Id.* at 309.

⁸⁵ *Id.*

⁸⁶ *Id.* at 309, 329

than applying the Court's holding in *Crawford*.⁸⁷ The Court determined that the certificates at issue were "quite plainly affidavits" and had "little doubt" they fell "within the 'core class of testimonial statements'" described in *Crawford*.⁸⁸ The Court also found that the analysts were "witnesses" for Confrontation Clause purposes and, absent unavailability and a prior opportunity for cross-examination, Melendez-Diaz had a right to confront them at trial.⁸⁹

Justice Thomas authored a concurring opinion, again reiterating his formality and solemnity view.⁹⁰ In the instant case, he agreed with the Court's opinion that the certificates were affidavits and that they were testimonial.⁹¹

Justice Kennedy was joined by Justices Roberts, Alito, and Breyer in the dissent.⁹² Justice Kennedy charged the Court with having "[swept] away" a long established rule pursuant to which scientific analysis could be admitted without the analyst who produced the analysis testifying.⁹³ Most concerning, according to Justice Kennedy, was the fact that the Court had made no attempt to acknowledge the differences between conventional witnesses and laboratory analysts performing scientific tests.⁹⁴ The dissent considered "ordinary" or conventional witnesses—such as those in *Crawford* and *Davis*—the targets of the Confrontation Clause.⁹⁵ It argued that the Court's ruling was "divorced from precedent, common sense, and the underlying purpose of the [Confrontation] Clause [,]" and had the "vast potential to disrupt criminal procedures that already give ample protections against the misuse of scientific evidence."⁹⁶

Importantly, the dissent also argued, among other things, that the Court's ruling did not make clear *which* among a string of analysts involved in a test would be required to testify.⁹⁷ The dissenters offered the example of a routine drug test involving four individuals: (i) an individual to prepare the sample, put it in a machine and retrieve the printout from the machine (often a graph); (ii) an individual to interpret the graph; (iii) an

⁸⁷ *Id.* at 329; see also Crump, *supra* note 53, at 137-38 ("After *Crawford*, the holding in *Melendez-Diaz* seemed unremarkable, even if its result was debatable.").

⁸⁸ *Melendez-Diaz*, 557 U.S. at 310-311. The Court noted that the certificates were "functionally identical to live, in-court testimony," and not only were they created under circumstances leading objective witness to reasonably believe they would be available to be used at trial, but their sole purpose under Massachusetts state law was to offer "prima facie evidence [,]" *Id.* The Court also assumed the analysts would have been aware of the certificates' evidentiary purpose, since it was reprinted on the certificates themselves. *Id.*

⁸⁹ *Id.* at 311.

⁹⁰ *Id.* at 329-30.

⁹¹ *Id.* at 330.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 330-31. Justice Kennedy noted that the word "analyst" does not appear in the Constitution, nor is there any accepted definition of it. *Id.* at 332; see also Andrew W. Eichner, *The Failures of Melendez-Diaz v. Massachusetts and the Unstable Confrontation Clause*, 38 AM. J. CRIM. L. 437, 454 (2011) ("Not only does the [Court's *Melendez-Diaz*] opinion fail to answer the critical question of how to comprehensively define 'testimonial,' as left open by *Crawford*, but the holding also declares that 'analysts' who submit scientific affidavits for the purposes of a trial are witnesses giving testimonial statements under the Sixth Amendment without actually defining the characterizing traits that dictate exactly who falls within that category."). Justice Scalia was unpersuaded that scientific analysts creating reports should be treated differently than conventional witnesses for confrontation purposes. *Melendez-Diaz*, 557 U.S. at 315-24.

⁹⁶ *Melendez-Diaz*, 557 U.S. at 331-32.

⁹⁷ *Id.* at 332.

individual to calibrate the machine and certify it is in working order; and (iv) an individual such as a director to certify that any subordinates followed procedures.⁹⁸ Requiring even one such analyst to testify would “disrupt if not end many prosecutions [,]” and if all were required to testify, the Court had, “for all practical purposes, forbidden the use of scientific tests in criminal trials.”⁹⁹

The majority opinion in the case responded to the dissent’s critique regarding the involvement of multiple analysts:

Contrary to the dissent’s suggestion, . . . we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution’s case. While the dissent is correct that “[i]t is the obligation of the prosecution to establish the chain of custody,” . . . *this does not mean that everyone who laid hands on the evidence must be called*. As stated in the dissent’s own quotation, . . . “gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.” It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live. Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.¹⁰⁰

This question of which analyst must testify would be partially addressed in the second case in the *Melendez-Diaz* Trilogy: *Bullcoming*.

In *Bullcoming*, Donald Bullcoming had been arrested for driving while intoxicated, and the prosecution sought to use a lab report at trial certifying that Bullcoming’s blood alcohol concentration (“BAC”) exceeded the relevant threshold.¹⁰¹ The BAC analysis underlying the lab report utilized a gas chromatograph machine, and operation of such machine required specialized knowledge and training.¹⁰² At trial, rather than calling the analyst who signed the certification as a witness, the prosecution instead offered testimony from a different analyst.¹⁰³ This testifying analyst had familiarity with testing procedures

⁹⁸ *Id.* at 332-33; see also Stephen Wills Murphy, *The Confrontation Clause and the Ongoing Fight to Limit Melendez-Diaz*, HARV. L. & POL’Y REV. (ONLINE) (2010) <https://harvardlpr.com/online-articles/the-confrontation-clause-and-the-ongoing-fight-to-limit-melendez-diaz/> (“While *Melendez-Diaz* stated that admission of a forensic report requires accompanying testimony by an analyst, the Court did not specify which analyst, or analysts, would be required to testify—although both the majority and the dissent noted the importance of this issue.”); *Grabbing the Bullcoming*, *supra* note 5, at 535-38 (providing example of typical toxicology test involving up to five individuals).

⁹⁹ *Melendez-Diaz*, 557 U.S. at 332-33; see also Casey Unwin, *No Longer the Right to Remain Silent: Cross-Examining Forensic Analyst Testimony*, 2010 B.Y.U. L. REV. 1025, 1042 (2010).

¹⁰⁰ *Melendez-Diaz*, 557 U.S. at 311 n.1 (emphasis added and citations omitted). Justice Scalia also responded to the dissent’s dire predictions by arguing that the Confrontation Clause could not be “disregard[ed] . . . at our convenience [,]” and by doubting those dire predictions. *Id.* at 325-26.

¹⁰¹ *Bullcoming*, 564 U.S. at 651.

¹⁰² *Id.* at 654. Several steps are also involved in the process, and human error may occur at each of these steps. *Id.*

¹⁰³ *Id.* at 651.

at the lab, but did not observe or participate in the actual test on Bullcoming's sample.¹⁰⁴ The New Mexico Supreme Court considered the BAC analysis testimonial in light of *Melendez-Diaz*, but determined that the testimony of the testifying analyst was sufficient for the Confrontation Clause.¹⁰⁵ First, the court reasoned that the analyst who certified the report was a "mere scrivener" who had simply transcribed results from the machine.¹⁰⁶ Second, the court found that the qualified expert witness who testified could serve as a "surrogate" witness for the analyst who certified the report.¹⁰⁷ The U.S. Supreme Court granted certiorari and reversed the New Mexico Supreme Court.¹⁰⁸

Justice Ginsburg, for the Court, determined that admission of the report was a violation of the Confrontation Clause.¹⁰⁹ It was impermissible, according to the Court, to admit a testimonial statement of one individual (the certifying analyst) through the trial testimony of a separate individual (the testifying analyst).¹¹⁰ The certifying analyst was more than a "mere scrivener [,]" since he made several representations regarding the sample not revealed in the machine-produced data.¹¹¹ Moreover, the "surrogate" testimony of the testifying analyst was insufficient, since it could not reveal what the certifying analyst observed or knew about the actual test or testing process employed.¹¹² Nor could the surrogate testimony uncover any "lapses or lies" by the certifying analyst.¹¹³ Finally, the Court considered the assertions in the BAC report testimonial, notwithstanding that such report was unsworn.¹¹⁴

The same four Justices who had dissented in *Melendez-Diaz* also dissented in *Bullcoming*.¹¹⁵ The dissent noted that some of its principal objections to the Court's underlying theory had been set out in its *Melendez-Diaz* dissent, so there was no need to repeat them.¹¹⁶ The dissent also felt that—whether or not one agreed with *Melendez-Diaz*—it was wrong to extend such holding to cover the situation in *Bullcoming*.¹¹⁷ The dissent charged that, prior to its *Bullcoming* opinion, the Court had never found that the Confrontation Clause would bar admission of scientific findings where an employee from

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 651-56.

¹⁰⁶ *Id.* at 657.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 657-58.

¹⁰⁹ *Id.* at 652-56. Justice Ginsburg's opinion did not constitute the Court's opinion as to Part IV (concerning the burden on the prosecution) or footnote 6 (concerning the "primary purpose" analysis). *Id.* at 650, 659 n.6, 665-58.

¹¹⁰ *Id.* at 657. Absent unavailability and a prior opportunity for cross-examination, of course. *Id.*

¹¹¹ *Id.* at 659-60.

¹¹² *Id.* at 661.

¹¹³ *Id.* at 661-62. The Court found it significant that the certifying analyst had been put on unpaid leave, and the testifying analyst lacked knowledge of the reasons for that. *Id.* at 662. The Court also emphasized that there was no assertion that the testifying analyst held any "independent opinion" as to Bullcoming's BAC. *Id.*

¹¹⁴ *Id.* at 664-65. In a portion of Justice Ginsburg's opinion not constituting the opinion of the Court, Justice Ginsburg also rejected arguments "that unbending application of the Confrontation Clause to forensic evidence would impose an undue burden on the prosecution." *Id.* at 665.

¹¹⁵ *Id.* at 674.

¹¹⁶ *Id.* at 674-75.

¹¹⁷ *Id.* (noting "because [the testifying analyst in *Bullcoming*] was not the analyst who filled out part of the form and transcribed onto it the test result from a machine printout, the Court finds a confrontation violation.").

the relevant lab authenticated the findings, testified on the lab's practices and methods, and was cross-examined at trial.¹¹⁸

The dissent also took time to emphasize that the information in the report resulted from a scientific process involving multiple participants' acts, including: (i) receipt of the sample; (ii) recording its receipt; (iii) storing the sample; (iv) placing it into the testing device; (v) transposing the test results' printout onto the report; and (vi) reviewing of the results.¹¹⁹ The record revealed, according to the dissent, that the role of the certifying analyst in *Bullcoming* was "no greater than that of anyone else in the chain of custody."¹²⁰ The dissent further charged:

It is not even clear which witnesses' testimony could render a scientific report admissible under the Court's approach. *Melendez-Diaz* stated an inflexible rule: Where "analysts' affidavits" included "testimonial statements," defendants were "entitled to be confronted with the analysts" themselves. . . . Now, the Court reveals, this rule is either less clear than it first appeared or too strict to be followed. A report is admissible, today's opinion states, if a "live witness competent to testify to the truth of the statements made in the report" appears. . . . Such witnesses include not just the certifying analyst, but also any "scientist who . . . perform[ed] or observe[d] the test reported in the certification."¹²¹

The dissent noted that the Court in *Melendez-Diaz* had insisted its opinion did not "require everyone in the chain of custody to testify" but had then "qualified that 'what testimony *is* introduced must . . . be introduced live.'"¹²² According to the dissent:

This could mean that a statement that evidence remained in law-enforcement custody is admissible if the statement's maker appears in court. If so, an intern at police headquarters could review the evidence log, declare that chain of custody was retained, and so testify. The rule could also be that [] the intern's statement—which draws on statements in the evidence log—is inadmissible unless every officer who signed the log appears at trial. That rule, if applied to [*Bullcoming*], would have conditioned admissibility of the report on the testimony of three or more identified witnesses. . . . In other instances, 7 or even 40 witnesses could be required. . . . The court has thus—in its fidelity to *Melendez-Diaz*—boxed itself into a choice of evils:

¹¹⁸ *Id.* at 675. The dissent also, among other things, criticized the Court for permitting certain principles—such as solemnity—to "weave[] in and out of the *Crawford* jurisprudence [,]" and for fashioning an approach pursuant to which it was "not even clear which witnesses' testimony could render a scientific report admissible [.]" *Id.* at 678-79.

¹¹⁹ *Id.* at 676.

¹²⁰ *Id.*

¹²¹ *Id.* at 678-79.

¹²² *Id.* at 679-80.

render the Confrontation Clause pro forma or construe it so that its dictates are unworkable.¹²³

Justice Sotomayor authored a concurrence, in which she, among other things, emphasized the limitations of the Court's opinion.¹²⁴ Specifically, Justice Sotomayor articulated four "factual circumstances" not presented in *Bullcoming*, which implied that she might theoretically have come out differently had any such circumstances been present.¹²⁵ First, *Bullcoming* was not a case in which the prosecution had suggested an alternative purpose for the BAC report.¹²⁶ Second, *Bullcoming* did not present the situation of a "supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test" taking the stand.¹²⁷ Third, *Bullcoming* was not a case in which the expert witness was asked to provide her independent opinion regarding underlying testimonial reports which were not, themselves, admitted.¹²⁸ Fourth, *Bullcoming* did not present a situation in which the prosecution sought to simply introduce machine-generated results, such as a gas chromatograph's printout.¹²⁹ Justice Sotomayor also emphasized that the Court's opinion did not mean that everyone noted on the report needed to testify.¹³⁰

In *Williams*—the final case in the *Melendez-Diaz* Trilogy—the Court was asked to consider a case quite similar to Justice Sotomayor's third hypothetical in *Bullcoming*: "an expert witness . . . asked for [an] independent opinion about [an] underlying testimonial report[]" not itself admitted."¹³¹ The defendant, Sandy Williams, had been convicted of rape by way of a bench trial.¹³² During the trial, the prosecution had called Sandra Lambatos, an expert, to testify that a DNA profile, which was produced by Cellmark, an outside laboratory, matched a DNA profile produced by the state's police laboratory using a sample of the defendant's blood.¹³³ The Cellmark report was never admitted, nor was it shown to the factfinder.¹³⁴ Lambatos did not read from, or quote, the Cellmark report, and she never identified it as the source of opinions she expressed.¹³⁵ Lambatos also provided an explanation of the notations on certain documents which were admitted as business records, testifying that, according to the records, swabs from the victim had been sent to, and received from, Cellmark.¹³⁶ Lambatos did not make any other statement offered for

¹²³ *Id.* at 680; see also John Rafael Peña Perez, *Confronting the Forensic Confirmation Bias*, 33 YALE L. & POL'Y REV. 457, 466 (2015) ("*Melendez-Diaz* and *Bullcoming* created line-drawing problems because anywhere from six to twelve analysts could be involved with the procedures of a single forensic test.>").

¹²⁴ *Bullcoming*, 564 U.S. at 668.

¹²⁵ *Id.* at 668, 672-74.

¹²⁶ *Id.* at 672. For instance, the prosecution had not argued the report was necessary for *Bullcoming*'s medical treatment. *Id.*

¹²⁷ *Id.* at 672-73.

¹²⁸ *Id.* at 673 (noting Federal Rule of Evidence 703 explains "that facts or data of a type upon which experts in the field would reasonably rely in forming an opinion need not be admissible in order for the expert's opinion based on the facts and data to be admitted [.]").

¹²⁹ *Id.* at 673-74. For a more detailed discussion of the state of the law before and after *Bullcoming*, see *Grabbing the Bullcoming*, *supra* note 5.

¹³⁰ *Bullcoming*, 564 U.S. at 670 n.2 (citing *Melendez-Diaz*, 557 U.S. at 311 n.1).

¹³¹ *Id.* at 673.

¹³² *Williams*, 567 U.S. at 56-57, 63.

¹³³ *Id.* at 56.

¹³⁴ *Id.* at 62.

¹³⁵ *Id.*

¹³⁶ *Id.* at 56.

the purposes of identification of the sample used to derive the profile or for purposes of establishing how Cellmark tested or used the sample.¹³⁷ Nor had Lambatos vouched for the accuracy of Cellmark's profile.¹³⁸ On cross-examination, Lambatos did admit that she had not conducted or observed the vaginal swab testing, and that she relied on the Cellmark DNA profile for her testimony.¹³⁹

Williams contended that the expert's testimony violated the Confrontation Clause.¹⁴⁰ According to the Court's plurality opinion, Williams's main argument was that "the expert went astray when she referred to the DNA profile provided by Cellmark as having been produced from semen found on the victim's vaginal swabs."¹⁴¹

Justice Alito authored the plurality opinion, joined by the other *Melendez-Diaz* dissenting Justices.¹⁴² The plurality found no Confrontation Clause violation in Lambatos testifying for two independent reasons.¹⁴³ First, out-of-court statements related by an expert solely for purposes of explaining assumptions on which the expert's opinion rested were not offered for their truth.¹⁴⁴ As Justice Alito stated:

[T]he Cellmark report was not introduced into evidence. An expert witness referred to the report not to prove the truth of the matter asserted in the report, *i.e.*, that the report contained an accurate profile of the perpetrator's DNA, but only to establish that the report contained a DNA profile that matched the DNA profile deduced from petitioner's blood. Thus, . . . the report was not to be considered for its truth but only for the "distinctive and limited purpose" of seeing whether it matched something else. . . . The relevance of the match was then established by independent circumstantial evidence showing that the Cellmark report was based on a forensic sample taken from the scene of the crime.¹⁴⁵

Second, even if the Cellmark report had been admitted, there would still be no Confrontation Clause violation, since such report "was not prepared for the primary purpose of accusing a targeted individual."¹⁴⁶ According to the plurality, the Cellmark report's primary purpose "was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time."¹⁴⁷ Indeed, the plurality noted that those at Cellmark could not possibly have known the profile would inculpate Williams or anyone else who had a DNA profile in the database.¹⁴⁸ Importantly, Justice Alito noted, among other things, that since multiple

¹³⁷ *Id.* at 56-57.

¹³⁸ *Id.* at 57.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 55-56.

¹⁴³ *Id.* at 57-58.

¹⁴⁴ *Id.* at 58.

¹⁴⁵ *Id.* at 79 (citations omitted).

¹⁴⁶ *Id.* at 84.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 84-85. Justice Alito pointed out that the position of the Cellmark technicians was not unique, and that laboratory technicians asked to work on DNA profiles often had no idea what the consequence of their work would be. *Id.* at 85.

technicians often work on each profile, it was likely that the sole purpose of each of these technicians was simply to perform her or his task in accordance with the accepted procedures.¹⁴⁹

Justice Thomas authored a concurring opinion.¹⁵⁰ Justice Thomas wrote separately to again emphasize his formality and solemnity view.¹⁵¹ He believed that the Cellmark statements had been offered for their truth, but that the report was insufficiently formal to be testimonial.¹⁵² Justice Thomas stated that he “share[d] the dissent’s view of the plurality’s flawed analysis.”

Justice Breyer also wrote separately to emphasize that he would have permitted additional briefing on a question not sufficiently treated by the plurality or the dissent: how the Confrontation Clause applied to the “panoply of crime laboratory reports and underlying technical statements written by (or otherwise made by) laboratory technicians?”¹⁵³ In that context, “what, if any, are the outer limits of the “testimonial statements” rule set forth in” *Crawford*.¹⁵⁴ He noted that pursuant to “well-established” evidence principles, an expert is entitled to rely on out-of-court, inadmissible, statements as a basis for the forming of her expert opinion if such statements are of a kind experts in the field would normally rely on, and the prosecution need not enter such out-of-court statements for their truth.¹⁵⁵ In speaking of how the dissent would abandon this “well-established rule [.]” Justice Breyer noted:

Once one abandons the traditional rule, there would seem often to be no logical stopping place between requiring the prosecution to call as a witness one of the laboratory experts who worked on the matter and requiring the prosecution to call *all* of the laboratory experts who did so. Experts—especially laboratory experts—regularly rely on the technical statements and results of other experts to form their own opinions. The reality of the matter is that the introduction of a laboratory report involves layer upon layer of technical statements (express or implied) made by one expert and relied upon by another. Hence my general question: How does the Confrontation Clause apply to crime laboratory reports and underlying technical statements made by laboratory technicians?¹⁵⁶

¹⁴⁹ *Id.* at 85. He also mentioned that “the knowledge that defects in a DNA profile may often be detected from the profile itself provides a further safeguard.” *Id.*

¹⁵⁰ *Id.* at 103-118.

¹⁵¹ *Id.* at 103.

¹⁵² *Id.* at 103-111. Justice Thomas concluded that “[t]he Cellmark report lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact. Nowhere does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained. . . . The report is signed by two “reviewers,” but they neither purport to have performed the DNA testing nor certify the accuracy of those who did. . . . And, although the report was produced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation.” *Id.* at 111.

¹⁵³ *Id.* at 86.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 88.

¹⁵⁶ *Id.* at 89.

He appended an outline of “the way that a typical modern forensic laboratory conducts DNA analysis” and discussed the following hypothetical example built upon an illustrative case raised by the dissent:¹⁵⁷

[A]ssume that the admissibility of the initial laboratory report into trial had been directly at issue. Who should the prosecution have had to call to testify? Only the analyst who signed the report noting the [DNA] match? What if the analyst who made the match knew nothing about either the laboratory’s underlying procedures or the specific tests run in the particular case? Should the prosecution then have had to call all potentially involved laboratory technicians to testify? Six to twelve or more technicians could have been involved. . . . Some or all of the words spoken or written by each technician out of court might well have constituted relevant statements offered for their truth and reasonably relied on by a supervisor or analyst writing the laboratory report. Indeed, petitioner’s *amici* argue that the technicians at each stage of the process should be subject to cross-examination.¹⁵⁸

Relatedly, Justice Breyer asked, “[t]o what extent might the ‘testimonial statements’ requirement embody one or more (or modified versions) of the[] traditional hearsay exceptions [?]”¹⁵⁹ He stated that prosecutors, defense attorneys, and judges needed to know what the Constitution required, and noted that treatise writers and lower courts offered a variety of solutions, some more “readily compatible” with *Crawford* than

¹⁵⁷ *Id.* at 99-102. According to Justice Breyer’s appendix: “As many as six technicians may be involved in deriving the [DNA] profile from the suspect’s sample; as many as six more technicians may be involved in deriving the profile from the crime-scene sample; and an additional expert may then be required for the comparative analysis, for a total of about a dozen different laboratory experts. Each expert may make technical statements (express or implied) during the DNA analysis process that are in turn relied upon by other experts. The *amici* dispute how many of these experts the Confrontation Clause requires to be subject to cross-examination.” *Id.* at 100. The appendix provides a sample process for a profile of a suspect’s sample and crime scene sample, each consisting of six steps: (i) evidence examination; (ii) extraction; (iii) quantification; (iv) amplification; (v) electrophoresis; and (vi) report. *Id.* at 100-102 (providing brief descriptions of each step). After the profile processes are complete, an analyst makes a comparison of the two electropherograms and profiles/reports and prepares her or his own report setting out her or his conclusions regarding the DNA match. *Id.*

¹⁵⁸ *Id.* at 89-90; see also Brandon L. Garrett, *The Crime Lab in the Age of the Genetic Panopticon*, 115 MICH. L. REV. 979, 990 n.57 (2017).

¹⁵⁹ *Williams*, 567 U.S. at 91.

others.¹⁶⁰ In the absence of any additional briefing, Justice Breyer sided with the dissenting views in *Melendez-Diaz* and *Bullcoming*, and joined the plurality opinion.¹⁶¹

Justice Kagan was joined by Justices Ginsburg, Scalia and Sotomayor in the dissent.¹⁶² Justice Kagan emphasized that prior Court precedent had held that if the prosecution wished to introduce results of forensic testing, it had to afford the defense an “opportunity to cross-examine an analyst responsible for the test.”¹⁶³ According to the dissent, cross-examining the analyst was particularly likely to reveal whether vials had been switched, tests incompetently run, samples contaminated, or results recorded inaccurately.¹⁶⁴ Under the Court’s Confrontation Clause precedent, the dissent considered *Williams* “an open-and-shut case” in which Williams was not afforded his confrontation rights.¹⁶⁵ The dissent also attacked the Court for its inability to settle on a rationale for finding no Confrontation Clause violation.¹⁶⁶ Justice Kagan pointed out that five Justices had specifically reject each aspect of the plurality’s reasoning, and that the result was “five votes to approve the admission of the Cellmark report, but not a single good explanation.”¹⁶⁷

Williams represents the Supreme Court’s last major opinion on forensic reports and the Confrontation Clause. Following *Williams*—which did not produce a usable majority and since which there has been a change in the makeup¹⁶⁸ of the Court—the current state

¹⁶⁰ *Id.* at 91-92. For instance, Justice Breyer noted that “The New Wigmore . . . lists several nonexclusive approaches to when testifying experts may rely on testing results or reports by nontestifying experts (*i.e.*, DNA technicians or analysts), including: (1) ‘the dominant approach,’ which is simply to determine the need to testify by looking [at] ‘the quality of the nontestifying expert’s report, the testifying expert’s involvement in the process, and the consequent ability of the testifying expert to use independent judgment and interpretive skill’; (2) permitting ‘a substitute expert to testify about forensic science results only when the first expert is unavailable’ (irrespective of the lack of opportunity to cross-examine the first expert, . . . ; (3) permitting ‘a substitute expert’ to testify if ‘the original test was documented in a thorough way that permits the substitute expert to evaluate, assess, and interpret it’; (4) permitting a DNA analyst to introduce DNA test results at trial without having ‘personally perform[ed] every specific aspect of each DNA test in question, provided the analyst was present during the critical stages of the test, is familiar with the process and the laboratory protocol involved, reviews the results in proximity to the test, and either initials or signs the final report outlining the results’; (5) permitting the introduction of a crime laboratory DNA report without the testimony of a technician where the ‘testing in its preliminary stages’ only ‘requires the technician simply to perform largely mechanical or ministerial tasks . . . absent some reason to believe there was error or falsification’; and (6) permitting introduction of the report without requiring the technicians to testify where there is a showing of ‘genuine unavailability.’” *Id.* (citations and certain internal quotation marks omitted).

¹⁶¹ *Id.* at 86.

¹⁶² *Id.* at 118.

¹⁶³ *Id.* at 119.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 119-20.

¹⁶⁶ *Id.* at 120.

¹⁶⁷ *Id.* The dissent argued that “[t]he plurality’s first rationale endorses a prosecutorial dodge; its second relies on distinguishing indistinguishable forensic reports.” *Id.* The dissent also noted that Justice Thomas’s approach suffered from “similar flaws.” *Id.* For further discussion of *Williams*, both before and after the Court’s opinion, see *Williams and the Confrontation Clause*, *supra* note 5 and *Unwrapping the Box*, *supra* note 5.

¹⁶⁸ Since *Williams* was decided, Justices Scalia, Kennedy, and Ginsburg have been replaced by Justices Gorsuch, Kavanaugh, and Barrett, but it is still not fully clear how the Court with these new Justices would rule on the forensic reports issue. See, e.g., *Confronting Memory Loss*, *supra* note 11, at 144. However, Justice Gorsuch’s dissenting opinion in *Stuart* may mean his views on the Confrontation Clause are similar

of the law in this area remains unclear.¹⁶⁹ In particular, in cases involving more than one forensic analyst, it has not been resolved which analyst or analysts must testify.¹⁷⁰ The *Chavis* petition currently pending before the Supreme Court could permit further clarification in this area.¹⁷¹

III. CHAVIS: THE RECENT MULTI-ANALYST PETITION

In *Chavis v. Delaware*, Dakai Chavis had been convicted of second degree burglary of a ground-floor apartment.¹⁷² During the investigation, police had concluded that the burglar had entered through a bedroom window.¹⁷³ The police had also obtained a DNA sample from the apartment window and had sent that sample to Bode Cellmark Forensics

to those of Justice Scalia. See, e.g., *id.*; *A Game of Katso and Mouse*, *supra* note 4, at 51; Richard D. Friedman, *First word from Justice Gorsuch on the Confrontation Clause*, The Confrontation Blog (Nov. 19, 2018), <http://confrontationright.blogspot.com/2018/11/first-word-from-justice-gorsuch-on.html> (“it appears, from the first evidence [Stuart], that the passing of Justice Scalia’s seat to him will not do the doctrine any harm. . . . Ultimately, I choose to look at the glass half full. Justice Gorsuch appears to be on the right side, and we didn’t know that before. Perhaps Justice Kavanaugh is on the wrong side, but [t]here’s no way of knowing for sure”); Laird Kirkpatrick, *The Admissibility of Forensic Reports in the Post-Justice Scalia Supreme Court*, U. CHI. L. REV. ONLINE (Aug. 27, 2019), <https://lawreviewblog.uchicago.edu/> (stating it would appear Justice Gorsuch would side with the dissent in *Williams* and support the result in *Bullcoming* and *Melendez-Diaz* just as Justice Scalia had, but noting it remained unclear what position Justice Kavanaugh would take).

¹⁶⁹ See, e.g., *supra* note 168; Edward K. Cheng & G. Alexander Nunn, *Beyond the Witness: Bringing a Process Perspective to Modern Evidence Law*, 97 TEX. L. REV. 1077, 1110 n.183 (2019) (“The *Melendez-Diaz* line of cases leaves exactly who needs to be called somewhat murky.”); Richard D. Friedman, *Confrontation and Forensic Laboratory Reports, Round Four*, 45 TEX. TECH L. REV. 51, 81 (2012) (“That the *Williams* Court was so splintered makes it difficult to determine what the holding was.”); Jennifer Mnookin & David Kaye, *Confronting Science: Expert Evidence and the Confrontation Clause*, 2012 SUP. CT. REV. 99, 100 (2012) (“In the most recently decided case, *Williams v. Illinois*, the court issued a bewildering array of opinions in which majority support for admitting the evidence at issue was awkwardly knitted together out of several incompatible doctrinal bases.”); Lauren McLane, *Confronting the Twenty-First-Century Marian Examination*, 82 ALB. L. REV. 949, 1002 (2019) (“Words like ‘muddled’ and ‘abyss’ have been used by the lower courts to describe the state of the Supreme Court’s confrontation clause doctrine in the forensic evidence context.”); George Fisher, *The Crawford Debacle*, 113 MICH. L. REV. FIRST IMPRESSIONS 17, 25 (2014) (“The result is a Court so badly splintered that when it came time for Justice Alito to summarize *Williams* from the bench on the day the Court ruled, he all but confessed his inability [.]”); Ronald J. Allen, *The Hearsay Rule as a Rule of Admission Revisited*, 84 FORDHAM L. REV. 1395, 1396 (2016) (noting “the Supreme Court has made a mess of confrontation jurisprudence [.]”) (certain internal quotation marks omitted); Erin Murphy, *The Mismatch Between Twenty-First-Century Forensic Evidence and Our Antiquated Criminal Justice System*, 87 S. CAL. L. REV. 633, 657 (2014) (referring to *Williams* as “a highly fractured opinion [.]”); Jules Epstein, *Continuing Crawford/Confrontation “Confusion”*, 34 CRIM. JUST. 67, 68 (2019) (referring to the “ongoing national ‘confusion’ regarding *Williams* [.]”); Marc D. Ginsberg, *The Confrontation Clause and Forensic Autopsy Reports—A “Testimonial”*, 74 LA. L. REV. 117, 135 (2013) (“State supreme court justices have not been shy in commenting on the uncertainty and ambiguity of Supreme Court opinions pertaining to forensic documents and the Confrontation Clause.”).

¹⁷⁰ See generally *supra* notes 168-69; Arons, *supra* note 5, at 723-24; see also *Grabbing the Bullcoming*, *supra* note 5, at 535-38.

¹⁷¹ See generally *Chavis* Cert Petition, *supra* note 6.

¹⁷² 227 A.3d at 1080-82.

¹⁷³ *Id.* at 1082.

(“Bode Cellmark”), an out-of-state lab, for analysis.¹⁷⁴ During a search of Chavis’s residence, his mouth was swabbed for DNA and that sample was also sent to Bode Cellmark.¹⁷⁵ At trial, Sarah Siddons, an analyst from Bode Cellmark, testified that the sample from the bedroom window at the scene of the burglary (referred to as the “crime scene” or “evidence” sample) matched the sample from Chavis (referred to as the “reference” or “known person” sample).¹⁷⁶

Several analysts from Bode Cellmark had handled both the “crime scene” and “known person” samples and performed steps in the process on them.¹⁷⁷ Siddons performed certain steps in the analysis process of both samples, but did not witness or participate in all of them.¹⁷⁸ Siddons, among other things, confirmed that the two samples matched and, since she was not involved in certain steps performed by other analysts, “reviewed the case files for both [] sample[s] . . . and confirmed that Standard Operating Procedures were followed.”¹⁷⁹ Satisfied that the other analysts had performed earlier steps in accordance with Bode Cellmark’s standard operating procedures, and competently, Siddons authored a report, which contained the expert opinion she offered at trial.¹⁸⁰

Prior to trial, the state had moved *in limine* to allow introduction of Bode Cellmark’s DNA-testing analysis through the testimony of only Siddons and without the need to produce other Bode Cellmark analysts.¹⁸¹ The state also argued that, pursuant to Delaware Rule of Evidence 703,¹⁸² as an expert, Siddons could “rely on facts and data provided by the other analysts in rendering her opinion.”¹⁸³ Chavis countered that, among other things, Siddons’s assurances that the other analysts performed their analyses competently was insufficient to meet the Confrontation Clause.¹⁸⁴ Notwithstanding Chavis’s opposition, the court determined that the only “testimonial statements” in Bode Cellmark’s DNA-analysis results were those by Siddons.¹⁸⁵ As such, Siddons was the only witness who testified in support of the results and conclusions of Bode Cellmark’s DNA testing at trial.¹⁸⁶

¹⁷⁴ *Id.* at 1081-2. Bode Cellmark was “a private laboratory in Lorton, Virginia that specializes in forensic DNA testing.” *Id.* at 1082. In collecting the sample, “an evidence-detection specialist used a DNA collection kit supplied by Bode to process the suspected point of entry (a window) at the crime scene, wiping the area of interest with both wet and dry swabs.” *Id.* at 1083. The sample was placed in a sealed envelope and, as far as the court knew, was delivered to the outside lab without incident. *Id.*

¹⁷⁵ *Id.* at 1081-82. The detective obtained Chavis’s DNA sample “using a collection method known as buccal swabbing, by scraping the inside of Chavis’s cheeks with a Q-tip-like swab to collect skin cells.” *Id.* at 1083. The sample was placed in a sealed envelope and, as far as the court knew, was delivered to the outside lab without incident. *Id.* It should be noted that the “manner in which the investigating officers collected the crime-scene DNA sample and Chavis’s reference sample and delivered those samples to Bode [Cellmark] [wa]s not at issue [].” *Id.*

¹⁷⁶ *Id.* at 1081-86.

¹⁷⁷ *Id.* at 1081.

¹⁷⁸ *Id.* at 1081-86 (describing process in respect of each sample and noting relevant analysts).

¹⁷⁹ *Id.* at 1086 (internal quotation marks omitted).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² This state rule is very similar to Federal Rule of Evidence 703.

¹⁸³ *Id.* at 1086.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 1087.

¹⁸⁶ *Id.* Chavis had no objection to Siddons being deemed an expert. *Id.*

At trial, Siddons testified in detail regarding the testing steps taken by non-testifying analysts, but did not recount any conclusions reached, or statements made, by any such analysts.¹⁸⁷ Siddons did explain:

[S]he was able to generate one DNA profile from the two evidence samples and a profile from the reference sample. . . . [and that] according to [her], “the male profile obtained from the evidence sample was a match to the male profile from [Chavis’s] reference sample”, matching at all fifteen loci. Siddons’s written report, which was admitted into evidence, noted that “[t]he probability of randomly selecting an unrelated individual with this DNA profile at 15 of 15 loci tested is approximately . . . 1 in 26 quintillion in the U.S. African American population.”¹⁸⁸

On appeal, Chavis argued, among other things, that the DNA evidence’s introduction violated his rights under the Confrontation Clause because the prosecution failed to present all analysts who had conducted the DNA analysis.¹⁸⁹ The Supreme Court of Delaware noted that the parties disagreed as to whether the entries the non-testifying analysts made in the case files regarding their work—upon which Siddons relied in generating her report and offering her testimony—were testimonial.¹⁹⁰ Chavis argued that Siddons made explicit and implicit testimonial statements which Siddons relied upon and relayed to the jury.¹⁹¹ The state countered that the non-testifying analysts’ work was not testimonial for several reasons, including: (i) “many of the processes for generating DNA profiles” were “automated[]”; (ii) “the DNA profiles” were “self-verifying because [t]he DNA profiles [themselves] would have reflected any errors” which were “committed during the DNA testing’s preliminary stages []”; (iii) the implicit statements by the non-testifying analysts, upon which Siddons relied in her testimonial affidavit, “were insufficiently formal to themselves qualify as testimonial statements []”; and (iv) Siddons was entitled to rely upon the entries of the non-testifying analysts in the case files because such entries were “facts or data . . . of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject” and they thus “need not be admissible in evidence in order for the opinion or inference to be admitted.”¹⁹²

After considering U.S. Supreme Court precedent, as well as precedent from lower courts, the Supreme Court of Delaware concluded that the entries in the case files from the non-testifying analysts were not testimonial, since such entries “did not take the form of statements” which were “designed to serve as a substitute for in-court testimony against Chavis.”¹⁹³ As such, there was no Confrontation Clause violation.¹⁹⁴ In connection with the U.S. Supreme Court precedent, the Delaware Supreme Court noted that none of the

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 1081.

¹⁹⁰ *Id.* at 1088.

¹⁹¹ *Id.*

¹⁹² *Id.* (certain internal quotation marks omitted).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1082.

Melendez-Diaz Trilogy were on point in resolving the present case.¹⁹⁵ The court stated, among other things:

Here, an expert, Siddons, testified to the results of a forensic analysis, but in doing so, relied upon information that experts in her field typically rely upon—case files by other testing analysts who manipulate the DNA samples in order to prepare them for the expert, but who do not themselves analyze the result. Because these other analysts are not testifying as to the *final result* of the forensic analysis, it is not clear whether their work is testimonial under *Melendez-Diaz*, which dealt with certificates attesting to the *results* of the forensic testing. Nor is Siddons a surrogate expert as in *Bullcoming*—she was herself involved in the preparation and analysis of the two DNA samples. And there is no testimony as to a hypothetical here [as in *Williams*]*—*Siddons worked on both DNA samples and testified as to the results of both.¹⁹⁶

However, the court found that *Bullcoming* and *Melendez-Diaz* pointed to an “indicator” as to when a statement will be testimonial: “*the purpose of the statement in proving an essential element of the crime.*”¹⁹⁷

The Delaware Supreme Court found its conclusion consistent with its own precedent and precedent from other states.¹⁹⁸ For instance, the court “tend[ed] to agree” with other states that have reached the conclusion “that analysts who only manipulate the DNA sample and who state that they have followed standard operating procedures in doing so are not making testimonial statements.”¹⁹⁹

The Delaware Supreme Court’s opinion continued that, in *Chavis*, it could not be said that the manipulation of the samples by the non-testifying analysts, or their case file entries, were testimonial.²⁰⁰ That the “primary purpose” of their entries was not to substitute for trial testimony or provide evidence “against” Chavis was demonstrated by the fact that they were not offered as trial evidence.²⁰¹ The court emphasized that, based on the available record, the court could not be sure what the statements even were.²⁰² It could infer such statements concerned whether the non-testifying analysts followed standard operating procedures, but such statements (i.e., that the analysts “examined and

¹⁹⁵ *Id.* at 1090-91.

¹⁹⁶ *Id.* The court noted that Siddons performed the quantification, amplification, and electrophoresis steps in connection with the “crime scene” and “known person” samples, in addition to confirming the match. *Id.* at 1085-86.

¹⁹⁷ *Id.* at 1091 (emphasis added). The court noted: “Regrettably, the case files produced by the nontestifying analysts, which Siddons relied upon and which Chavis seems to claim contain the nontestifying analysts’ out-of-court-statements, are absent from the record. But assuming that we could conjure up those statements despite their absence, we could not go so far as to presume that they include assertions of fact tending to prove an essential element of the crimes.” *Id.* The court found *Chavis* “falls somewhere between” *Williams* and *Bullcoming*; and, unlike in those cases, the testifying analyst in *Chavis*, was “involved in the testing of *both* DNA samples and [] certified the results.” *Id.* at 1092.

¹⁹⁸ *Id.* at 1091-94.

¹⁹⁹ *Id.* at 1093.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

manipulated the DNA swabs in a particular manner”) would not provide testimony “against” Chavis, as is required by the Confrontation Clause.²⁰³

Nor, according to the court, would the relevant entries have been offered in order to “show that Chavis committed an act that was an element of the crimes with which” he was charged.”²⁰⁴ Although the DNA profile—which was the “end result” of the combined work of all the analysts—was offered to prove the burglar’s identity, “the intermediary steps taken do not themselves prove—or aim to prove—anything.”²⁰⁵ Unable to identify any testimonial statements by the non-testifying analysts, the court determined that Chavis’s Confrontation Clause claim must fail.²⁰⁶

The court stated that this did not mean that the non-testifying analysts’ statements were irrelevant to the opinion Siddons offered.²⁰⁷ To the contrary:

Siddons acknowledged that the other analysts’ adherence to standard operating procedures and their entries in the case files to that effect were essential to her conclusion. But just because a declarant makes an out-of-court statement that may have some relevance to a fact at issue in a criminal trial does not make that declarant a “witness[] against” the defendant within the meaning of the Sixth Amendment.²⁰⁸

On September 4, 2020, Chavis filed a certiorari petition for U.S. Supreme Court review.²⁰⁹ The *Chavis* petition, among other things, purported to ask the same question Justice Breyer raised in *Williams*: “Which analysts must the prosecution call to testify when more than one analyst was involved in testing” the forensic evidence introduced at trial against the defendant?²¹⁰ It argued that, while an answer to the question presented has never been clear, *Williams* made the answer less clear and “cast doubt on the precedent” for state and federal courts.²¹¹ Chavis argued that, unlike in *Williams*, the DNA report and testimony in *Chavis* was entered for its truth and there was “no issue” of the report’s accusatory nature.²¹² According to Chavis, when the Delaware Supreme Court found no testimonial statements by the non-testifying analysts, it had ignored that Siddons’s report and testimony contained three testimonial statements—two of which were hearsay—on which she relied and which had been introduced to establish the element of identification.²¹³

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 1093-94 (noting “Chavis might have challenged Siddons’s opinion or testimony on the grounds that they lacked an adequate foundation because of her lack of personal involvement in the early stages of the testing process or that Siddons’s reliance on information by the nontestifying analysts was improper under D.R.E. 703 . . . [b]ut Chavis chose not to challenge Siddons’s report or testimony on these evidentiary grounds [.]”).

²⁰⁹ See generally *Chavis* Cert Petition, *supra* note 6.

²¹⁰ *Id.* at 15.

²¹¹ *Id.* at 15-16.

²¹² *Id.* at 24.

²¹³ *Id.*

In her lab report, Siddons asserts that the reference sample from which the one profile was generated came from the buccal swab of Chavis. She also asserts that the evidentiary sample from which the other profile was generated came from the crime scene window. Finally, she asserts that the two profiles matched . . . [and] [s]he testified similarly.²¹⁴

Chavis argued that, by the time Siddons retrieved the tubes which contained extracted DNA, she was accessing evidence which she could not identify as being provided by law enforcement.²¹⁵ Without the non-testifying analysts' representation, Siddons would not know the "identity" of the samples she used to generate profiles which she compared in the case.²¹⁶ Siddons, therefore, incorporated the testimonial statements of the non-testifying analysts as to the samples' identification, but then testified to the profiles' identification as a fact, certifying their truth in her report.²¹⁷ Accordingly, Chavis asserted that a "straightforward application" of *Bullcoming* required the Delaware Supreme Court to conclude that each analyst responsible for a testimonial statement in the report should have been produced.²¹⁸

On March 8, 2021, the U.S. Supreme Court denied certiorari.²¹⁹ Justice Gorsuch dissented from the denial of certiorari, noting he "dissent[ed] for the reasons set out in [his opinion dissenting from denial of certiorari in] *Stuart v. Alabama*."²²⁰ In his opinion dissenting from denial of certiorari in *Stuart*, Justice Gorsuch had referred to the "various opinions [in *Williams* as] hav[ing] sown confusion in courts across the country" and called for greater "clarity" in the law.²²¹

IV. ADDRESSING THE MULTI-ANALYST PROBLEM

Cases such as *Chavis* and Justice Breyer's statements in *Williams* make clear that, notwithstanding the *Melendez-Diaz* Trilogy, the multi-analyst problem has not yet been resolved. In this Part, we will set out six plausible approaches that the Court might consider in addressing this problem.

We note at the outset that our analysis here rests upon several important assumptions. First, we assume, unless and until the Court states otherwise, that *Crawford*

²¹⁴ *Id.* at 24-25.

²¹⁵ *Id.* at 25.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 26. The petition argues: "because of the confusion created by *Williams*, the court's focus veered toward Siddons' independent judgement and participation in the process rather than on the testimonial nature of the hearsay statements contained in her report and testimony that was introduced into evidence, who made those statements and whether Chavis was able to confront those individuals." *Id.* Chavis also argued that resolving the issue presented in *Chavis* was important to the administration of justice and that *Chavis* was a good vehicle to resolve it. *Id.* at 26-29 (arguing "[o]ne analyst's assurances at trial regarding the actions of the other analysts is insufficient to satisfy a defendant's right to confront and cross-examine those analysts.>").

²¹⁹ *Chavis v. Delaware*, 592 U.S. ____ (2021) (denying certiorari).

²²⁰ *Id.* (Gorsuch J., dissenting).

²²¹ *Stuart*, 139 S. Ct. at 36-37 (Gorsuch J., dissenting); see also *A Game of Katso and Mouse*, *supra* note 4, at 28.

and the *Melendez-Diaz* Trilogy remain binding precedent.²²² Second, and flowing from our first assumption, we assume that where testimonial statements are contained in a forensic report and that report is entered into evidence at trial, the accused will generally have the right to confront at least one forensic analyst. Third, we assume that the Court will find that not all analysts in a multi-analyst forensic process need to appear.²²³ Indeed, we believe that the Supreme Court—at least as constituted prior to Justices Gorsuch, Kavanaugh, and Barrett joining the Court—has been searching for a means of mitigating the impact of *Crawford* in forensic report cases, and would prefer to limit the number of analysts who must testify.²²⁴ Fourth, and finally, we assume that the Court would generally

²²² For instance, the Court could always decide to overrule *Crawford*, but that is beyond the scope of our discussion here. See *Confronting Memory Loss*, *supra* note 11, at 124 n.189 (noting possibility of overruling *Crawford*); Crump, *supra* note 53 at 115, 150 (discussing “overruling of *Crawford*”).

²²³ It would be highly difficult logistically to produce each and every analyst, and the Court’s opinion in *Melendez-Diaz* emphasized that not all analysts need to testify. See *Melendez-Diaz*, 557 U.S. at 311 n.1. Even late Justice Scalia, one of the great proponents of the right to confront, has noted in a different confrontation context that the “Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *U.S. v. Owens*, 484 U.S. 554, 559 (1988) (citation and internal quotation marks omitted). Although *Owens* pre-dates *Crawford*, we will assume *Owens* continues to have relevance. See *Confronting Memory Loss*, *supra* note 11, at 120.

²²⁴ See *Unwrapping the Box*, *supra* note 5, at 512-13; Crump, *supra* note 53 at 150 (“The Court’s most recent confrontation decision [*Williams*] shows, in operation, the coalition that can overrule *Crawford*—and arguably, this decision does, in fact, overrule it.”). The *Mendez-Diaz* dissenters (Justices Kennedy, Roberts, Breyer, and Alito) constituted the plurality in *Williams*, suggesting that, but for precedent, those four Justices may not even have believed a single analyst must testify in order to admit forensic reports consistent with the Confrontation Clause. See *Unwrapping the Box*, *supra* note 5, at 512-13; *Melendez-Diaz*, 557 U.S. at 330; *Williams*, 567 U.S. at 55. If the plurality had not been able to use its two theories for why the Confrontation Clause did not bar admission of the evidence—i.e., the “not-targeted-person” and “not-for-truth” theories—they might have suggested another theory, such as one based on reliability. See *Unwrapping the Box*, *supra* note 5, at 512-13 (noting reliability is also mentioned in *Bryant*). Indeed, the dissent in *Williams* seemed to suggest the plurality “desire[d] to limit *Melendez-Diaz* and *Bullcoming* in whatever way possible [.]” See *Williams*, 567 U.S. at 141; see also Arons, *supra* note 5, at 736. Evidence of the Court’s desire to reduce the impact of *Crawford* may also be drawn from the more recent case of *Clark*. Although not a forensic reports case, *Clark*’s majority opinion advances the relatively novel theory that the primary purpose test is not wholly determinative, noting for instance, that the Confrontation Clause does not bar statements which would have been admissible at the founding. See *Comment on Clark*, *supra* note 78; *Clark*, 135 S. Ct. at 2180 (“We have recognized that the Confrontation Clause does not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the time of the founding.”). This theory greatly expands upon the potential dying declaration exception mentioned in a footnote in *Crawford*, and might constitute a partial “escape hatch” from the primary purpose test in future cases. See *Comment on Clark*, *supra* note 78; *Clark*, 135 S. Ct. at 2180. In *Crawford*, the Court stated: “This is not to deny, . . . that [t]here were always exceptions to the general rule of exclusion’ of hearsay evidence. . . . Several had become well established by 1791. . . . But there is scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case.” *Crawford*, 541 U.S. at 56. However, in footnote 6, the *Crawford* Court recognized an exception for dying declarations. See *id.* at 56 n.6 (“The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. . . . Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. . . . We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.”).

favor a bright-line-type approach—which is easier for lower courts to apply—rather than some type of multi-factor balancing test.²²⁵

A. Interim Communications Not Testimonial Approach

One approach that the Court could adopt would be to find that express or implied statements by interim analysts in a forensic process chain are non-testimonial. We will refer to this as the “Interim Communications Not Testimonial Approach.”

Under this approach, for instance, the analyst asserting a match between the DNA of the accused and that which was found at the crime scene would normally need to testify. Similarly, the initial analyst or analysts in the chain—who, for instance, can more easily testify as to the source of the samples—would need to testify. In contrast, interim analysts merely making oral or written statements to a subsequent analyst in the forensic process chain would normally not be required to testify.

The rationale for not requiring interim analyst testimony would be that statements to a subsequent analyst in the chain—perhaps concerning what a given analyst has found or done when passing on a sample to the next analyst—would be considered non-testimonial. This approach would presume that these interim statements would normally not be made for the *primary* purpose of use as evidence at trial, and instead would primarily be for other purposes, such as producing a quality and accurate reading, reflecting what has been done or not done, providing helpful background information, ensuring chain of custody, or noting whether certain lab procedures have been followed. In some circumstances, an interim analyst may not even be aware of why a test is being done. For instance, in a given DNA test, the analysts working on the samples may not know if their work will be used for a murder investigation, paternity test, or to match remains in a mass grave from wartime. In other circumstance, interim analysts may be aware that their statements—or the forensic process of which they are a part—will be used as evidence or in an investigation. However, the individual oral or written statements of such interim analysts would likely still not be for a *primarily* testimonial purpose.²²⁶

The Interim Communications Not Testimonial Approach could also be adapted to fit different definitions of testimonial that the Court may ultimately prefer, in particular: (i) the standard definition: having the “primary purpose” of establishing or proving “past events potentially relevant to later criminal prosecution”;²²⁷ and (ii) Justice Alito’s enhanced definition in *Williams*, which seemingly required the statement to be specifically accusatory of the accused;²²⁸ and (iii) the definition of the Delaware Supreme Court in

²²⁵ See *Confronting Memory Loss*, *supra* note 11, at 121 n.181 (expressing belief that “the Court would prefer a bright-line approach [as to a different Confrontation Clause issue] due to [the Court’s] criticism of the subjectivity of the *Roberts* reliability approach” and due to criticism of the “primary purpose” test’s subjectivity).

²²⁶ Subsequent analysts in the forensic chain may assume the work of a prior analyst was accurate, but such subsequent analysts would not actually be asserting this. Such an approach may be seen as consistent with Federal Rule of Evidence 703 and related state analogues, as well as with *Williams*. In fact, the situation under the Interim Communications Not Testimonial Approach may be seen as easier for the Court than the situation in *Williams* in certain instances, since under the Interim Communications Not Testimonial Approach the interim statements themselves would generally be non-testimonial.

²²⁷ *Bryant*, 562 U.S. at 375; *Davis*, 547 U.S. at 822.

²²⁸ See *A Game of Katso and Mouse*, *supra* note 4, at 53; *Williams*, 567 U.S. at 58 (“The report was produced before any suspect was identified. The report was sought not for the purpose of obtaining

Chavis: “the purpose of the statement in proving an essential element of the crime.”²²⁹ Indeed, the court in *Chavis* seemingly suggested that statements by analysts relating to adherence to protocols or standard procedures—or to the absence of any irregularities—may be non-testimonial.²³⁰

Under the Interim Communications Not Testimonial Approach, it would be necessary to identify who is an interim witness not requiring production. We do not believe the Court would find it practical to require proof—perhaps by affidavit—of what each analyst’s primary purpose was in a given case.²³¹ Instead, we assume the Court would adopt a more structured approach for lower court’s to utilize. For instance, under an approach using the standard definition of testimonial, the Court could set a presumption that the final analyst in the chain—e.g., the ultimate analyst who asserts a match between the alleged killer’s DNA and the DNA from the crime scene—and the first person in the chain—e.g., the analyst responsible for checking the integrity of the packaging and origin of the sample(s)—would need to testify. The Court could then set a presumption that the statements of all other analysts—i.e., the interim analysts—would normally be non-testimonial. Finally, the Court could determine that, if the defense is able to show any

evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose. And the profile that Cellmark provided was not inherently inculpatory.”). Justice Alito’s approach would, in certain cases—such as when no perpetrator has been identified—require less analysts to testify. Indeed, in a case where no suspect is identified or even contemplated, perhaps the Court would simply find that no analyst need testify. *See A Game of Katso and Mouse*, *supra* note 4, at 53 (discussing *Williams* plurality opinion).

²²⁹ *Chavis*, 227 A.3d at 1091-92. In a separate part of the opinion, the Delaware Supreme Court alluded to a seemingly slightly different formulation, when it found that the non-testifying analysts were not testifying to the “final result” of the analysis, meaning it was unclear that their work was testimonial under *Melendez-Diaz*, a case the court noted concerned certificates which attested to the “result” of forensic analysis. *Id.* We will assume that this “final result” formulation was intended to be consistent with—rather than distinct from—the Delaware Supreme Court’s “essential element” formulation. Even if the “final result” formulation were distinct, a version of the Interim Communications Not Testimonial Approach could be fashioned to fit it. Under an Interim Communications Not Testimonial Approach adapted to either *Chavis* formulation, we anticipate less analysts would need to testify in certain cases than would need to under an approach fitted to the standard definition for testimoniality. We also note that either *Chavis* formulation goes too far in narrowing the confrontation right in non-forensics cases. For example, imagine police were investigating a murder case allegedly stemming from the defendant’s obsession with the victim. Suppose the prosecution sought to use a statement made by a declarant to police that the declarant saw the defendant’s car in the parking lot of the victim’s office several times. This statement would be used as a circumstantial step in the murder case—i.e., it would not be stating a “final result” or an “essential element”—and so this circumstantial link in the chain of evidence could be excluded from coverage.

²³⁰ *Id.* at 1091 (“Even *Chavis* only posits that the non-testifying analysts’ statements relate to their adherence to testing protocols and the absence of irregularities (following standard operating procedures and not seeing any evidence of taint or contamination)—he does not argue that those statements in and of themselves were used to prove his identity or any other element of the crimes he was charged with.”). Thus, the court noted, statements of analysts that they examined or manipulated DNA swabs in a certain manner would not be considered to have provided testimony “against” the defendant, as required by the Confrontation Clause. *Id.* at 1093. Under a *Chavis* approach, while a DNA profile may help prove the identity of an alleged criminal, intermediary steps in the process do not prove—or seek to prove—anything. *Id.*

²³¹ The primary purpose test is also an objective test, meaning the motivation of the speaker, listener, and/or solicitor of the statement may be relevant. Moreover, the problem of “mixed motives” may impose further difficulties in determining a statement’s primary purpose. *See supra* Part II.

statement from an interim analyst had a primary testimonial purpose, such interim analyst would then need to be produced.²³²

B. Hypothetical Assumption Approach

A second approach the Court could take would be to build upon Justice Alito's plurality opinion in *Williams* and find that a testifying expert is merely basing her opinion on the hypothetical assumption that statements of the non-testifying analysts are truthful. We will refer to this as the "Hypothetical Assumption Approach."

Under this approach the Court would find that a testifying analyst is not making any type of assertion that the statements of any other analysts are true. This way—consistent with *Williams* and Federal Rule of Evidence 703—there would be no need for the prosecution to produce any such other analysts. This approach would be best handled through use of a hypothetical question to the testifying expert.²³³

Consistent with this approach, the prosecution would still need to independently prove that the testifying expert's assumption is true in order for the fact finder to accept the expert's opinion at trial. For instance, to take an example based on *Chavis*, a testifying expert who handled a match between two DNA profiles might be assuming that one sample came from the crime scene and the other from the accused. It would fall to the prosecution to actually prove the source of these samples. Similarly, an expert testifying about a report finding a certain substance on accused's person was methamphetamine may be assuming that the sample of the substance came from the accused. The prosecution would still need to prove that such assumption was correct.

As a matter of evidence, however, the only way for the prosecution to prove such non-testifying analysts' statements are true may be calling each relevant analyst to testify. This would mean that, as a practical matter, in many cases the Hypothetical Assumption Approach may not appreciably reduce the number of analysts who actually must testify at trial. If it so chose, the Court could seek to help mitigate this by recognizing a routine practice-type argument—pursuant to Federal Rule of Evidence 406—to the effect that forensic reports out of a specific lab have always produced accurate results.²³⁴ More specifically, for instance, if it was assumed by a testifying analyst that an interim analyst had followed lab procedures in calibrating an apparatus, it might be possible to introduce evidence—perhaps through testimony and relevant business records—showing that such procedure was always followed by the lab or analyst in calibrating the apparatus.²³⁵

²³² In this connection, the Court could allow the defense discovery of all the interim papers so that the defense could investigate whether anyone in the chain had a primarily testimonial purpose.

²³³ See *Williams*, 567 U.S. at 57.

²³⁴ Rule 406 of the Federal Rules of Evidence states: "Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness."

²³⁵ In addition, Justice Alito in *Williams* suggested that circumstantial evidence—the fact a sample was sent to the lab in the circumstances in *Williams* and was later returned, and the fact that the lab's test results squared with the victim's identification of the culprit—apparently could solve the requirement of independent proof for both the source problem (i.e., where the sample came from) and the internal validity problem (i.e., the following of protocols). See *Williams*, 567 U.S. at 74-77.

C. More Than Surrogate Approach

A third approach could be for the Court to permit a single analyst—who is more than the “surrogate” witness discussed in *Bullcoming*—to testify. We will refer to this as the “More Than Surrogate Approach.”

We have previously argued that it may already be sufficient to offer the testimony of a single forensic analyst, so long as such analyst is considerably more than a “surrogate” witness and certainly not a mere “conduit” for admission of un-confronted hearsay.²³⁶ In determining whether a given analyst would meet the Confrontation Clause under this approach, we believe at least three factors may be relevant. First, it may be relevant how prominently the report was used at trial, that is, was it introduced or extensively mentioned?²³⁷ Second, it may be relevant to consider the degree to which the testifying expert is exercising her own judgment in constructing her opinion, including the thoroughness of her review of the statements of other analysts and her involvement in the specific process at issue, laboratory conducting the process, and other processes of like kind.²³⁸ Third, it may be relevant the degree to which the testifying analyst permits the accused to fully cross-examine the entire forensic analysis.²³⁹

The ideal testing analyst under the More Than Surrogate Approach might be extremely closely connected to the testing process and the lab at issue, be able to testify to extensive steps of internal validation and an intensive review and analysis of the other analysts’ work, and afford the accused a sufficient opportunity to cross-examine her regarding all the steps in the forensic process.²⁴⁰ The analyst should also offer an independent opinion based at least in part on her own analysis, and not simply act as a conduit for admitting hearsay.²⁴¹ Although qualifying as a testifying analyst under this approach may be difficult, if the Court were to set clear criteria on who would be a sufficient testifying analyst, labs could adjust accordingly. Once labs understood the criteria, they could begin to designate at the outset of a process who would be the testifying analyst—should one be needed—and ensure that such person meets relevant criteria. Clear criteria would also allow other local stakeholders to better prepare for trial.

D. Segment Representative Approach

A fourth approach the Court might consider would be to require production of at least one representative analyst for each identified segment of a forensic process. We will refer to this as the “Segment Representative Approach.”

We can imagine two versions of this approach: (i) a version based on “discrete phases” in a forensic process (with each phase being referred to as a “segment”); or (ii) a version based on a set “number of analysts” (with such set number of analysts being referred to as a “segment”). As to the version based on discrete phases, Justice Breyer’s explanation of a typical DNA analysis in the appendix to his *Williams* opinion may be

²³⁶ See *A Game of Katso and Mouse*, *supra* note 4, at 54-55 (discussing approach in *United States v. Katso*, 74 M.J. 273 (C.A.A.F. 2015)).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* It is unclear that the testifying expert in *Chavis* would sufficiently meet these criteria.

²⁴⁰ *Id.*

²⁴¹ *Id.*

illustrative. That analysis involved multiple steps in preparing the suspect's sample's profile, multiple steps in preparing the crime scene sample's profile, and then a step for comparison between the two profiles to reach a conclusion on whether they match.²⁴² The Court could identify work on the suspect's sample as one segment, work on the crime scene sample as a second segment, and work on the match as a third segment. Under the discrete phases version of the Segment Representative Approach, if the prosecution were seeking to utilize the results of the analysis in Justice Breyer's appendix against an accused, the prosecution would be required to produce at least one analyst associated with the suspect sample's segment of the analysis, at least one associated with the crime scene sample's segment of the analysis, and at least one analyst involved in conducting the analysis to check for a match between the two samples. One key challenge with this version—which might make the Court less likely to adopt it—would be enumerating sufficient guidance on what should constitute a segment, such that the guidance would work for the many variations of forensic processes.²⁴³ As to the number of analysts version of the Segment Representative Approach, the Court could, for instance, decide that a segment consisted of five forensic analysts. This would mean that, while it would be possible for one analyst to testify on behalf of herself and at most four other analysts, if six analysts were involved, then at least two analysts from the group of analysts would need to testify. The theory under this version of the approach being that, the greater the number of analysts a given analyst is representing, the greater the likelihood that the testifying analyst will be unable to afford an accused a sufficient opportunity to confront relevant evidence.

In some ways, this Segment Representative Approach—either version—would be a related approach to the More Than Surrogate Approach, since each representative analyst would be a type of “more than surrogate” for her or his segment. Also, as in the More Than Surrogate Approach, each representative would still need to satisfy Court-adopted criteria to be a sufficient representative. We assume such criteria would be similar to those we discussed in connection with the More Than Surrogate Approach. However, the Segment Representative Approach is still distinct from the More Than Surrogate Approach. Under the discrete phases version of this approach, for instance, an analyst who merely conducted the comparison between two DNA profiles—without being involved in preparing either profile—could not, alone, meet the Confrontation Clause, even if she otherwise met the criteria set out in our discussion of the More Than Surrogate Approach. Similarly, under the number of analysts version of this approach, an analyst who met all the criteria, but who was only one of ten analysts involved in the analysis—assuming the Court set a limit of five analysts for a segment—could not meet the Confrontation Clause.

In practice, under either version of this approach, it is still possible that a single individual could be a sufficient representative, and that such expert's testimony alone could be sufficient. For instance, under the discrete phases version, the expert in *Chavis* seems to have been involved in each segment of the relevant DNA analysis—assuming the Court defined the segments as suspect's sample, crime scene sample, and match. If such expert

²⁴² *Williams*, 567 U.S. at 99-102.

²⁴³ Connected to this, the Court may find it challenging to determine how granularly it wants to define a segment. In principle, many intermediate steps—such as checking in a sample, preparing the sample, and interpreting relevant data—could be considered segments. If the Court did adopt a discrete phases version of this approach, we assume the Court would seek to define segments very broadly, such that the number of analysts who must testify would be limited.

could have fully satisfied the other Court-adopted criteria—which it is not clear to us she could—her testimony alone might have been sufficient. Under the number of analysts version, if there were only four total individuals involved in an analysis—and assuming the Court had set a limit of five analysts for a segment and all other criteria were met—one analyst alone could be sufficient.

Consistent with our recommendation under the More Than Surrogate Approach, the best way to make this approach workable would be for the Court to set out clear criteria as to what would constitute a relevant segment—either discrete phases of a process or a set number of analysts—and also as to who will be a sufficient testifying representative. Labs could use the criteria to pre-designate segment representatives and other local stakeholders could likewise use it to better prepare.

E. Important Analyst Approach

A fifth approach the Court might consider would be to require production of only the most important analyst or analysts. We will refer to this as the “Important Analyst Approach.”

We believe that there are at least two ways that importance could be judged. First, the Court could seek to set out in the abstract what roles in a forensic process would be deemed important. Under this version of the approach, we suspect that the Court would assign importance based on the general significance of individual roles in forensic analysis. We assume, for instance, that the most likely candidates for general importance would be the first and last analysts in a forensic chain. The last analyst in a chain—like the testifying analyst in *Chavis*—may be the most obvious example of an important witness, since she is the one actually responsible for the match between the profiles from the accused and the crime scene.²⁴⁴ Without her match, the analysis of the other analysts would not have much value in a case. Interim analyst, in contrast, would likely not be deemed important, in that they may generally be involved with mere chain of custody or other intermediate processes. However, chain of custody is still important to a case, in that if the two samples are not from the crime scene and the accused, respectively, the conclusion presented by the ultimate analyst as to any match is meaningless. As such, we suspect that the Court would also deem the first analyst in a chain important. Perhaps the Court could set a presumption that the first and last analysts in a chain are important, and then afford the defendant the right to demonstrate that other analysts in the specific process involved were also important.

Under a second version of the Important Analyst Approach, the Court could decide that, rather than setting out a presumption as to which analysts would be important in the abstract, a specific determination should be made in each individual case based on the specific process and facts involved. This might entail looking at various factors in the specific case, such as which analysts’ statements feature prominently or which statements are more central to the specific case. We assume that the Court might disfavor such a case-by-case approach, however.

For any of this approach, it would be extremely helpful if the Supreme Court could offer clear guidance on which analyst or analysts will be deemed important. Clear guidance is especially helpful in the context of this approach, since “important” may be seen as an

²⁴⁴ *Chavis*, 227 A.3d at 1083-86.

even more subjective concept than those described in connection with certain other of our approaches.

F. Actual Evidence Approach

A sixth approach the Court might consider is to determine what is the actual evidence at issue in a given case: the testifying expert or the work of other analysts who are not produced. We will refer to this as the “Actual Evidence Approach.”

Under this approach, a court would need to determine what the evidence *really* is, such as by asking who is *predominantly* speaking in the case. In making this determination, the Court would likely need to adopt a set of factors to consider, some of which may be similar to those suggested in connection with the More Than Surrogate Approach. First, the Court might consider how much independent judgment the testifying expert put into her or his opinion. Second, the Court might consider how much actual participation the expert witness had in the forensic process. Third, the Court could consider whether the report itself is being offered, or if not, whether material from the report that the testifying expert would not personally know will be extensively mentioned. Fourth, the Court might consider the degree to which the offered testimony—or final argument—rests upon material in the report not personally known by the testifying expert. Fifth, and finally, the Court could consider how much independent evidence the prosecution offers on the material from the report that the testifying expert does not personally know.²⁴⁵

The prime downside to this approach is that a case-by-case, balancing, determination is all but assured, and it would be rather indeterminate and somewhat unpredictable how a court would come out, but perhaps criteria would evolve.

V. CONCLUSION

The purpose of this Article is to identify and discuss six plausible approaches the U.S. Supreme Court may consider in addressing the multi-analyst problem. Since we assume the Supreme Court would prefer not to have all analysts testify—and indeed, would prefer to minimize the number of analysts required—we suspect that the approaches we have suggested in this Article are the most plausible. If we had to speculate which of these six approaches the Court would be most likely to prefer, we believe some form of the Interim Communications Not Testimonial Approach would be favored.

Requiring any forensic analyst to testify may be burdensome for labs and law enforcement, and increasing the number of analysts required for testimony would correspondingly compound the difficulty.²⁴⁶ Nevertheless, the degree of confrontation afforded defendants by the Constitution cannot necessarily turn upon cost or convenience. Courts and commenters have suggested means of mitigating the burden on law

²⁴⁵ For instance, a testifying expert—such as the one in *Chavis*—might not have personal knowledge of the source of the original samples from the accused and the crime scene. If the prosecution does not offer much independent evidence of such items in the report, then the prosecution would be seen as relying primarily upon the report (i.e., the non-testifying analysts’ statements) to prove them (i.e., for their truth), rather than as mere assumptions of the testifying expert (i.e., mere hypotheticals) in illuminating the testifying expert’s own independent opinion.

²⁴⁶ See, e.g., *Melendez-Diaz*, 557 U.S. at 332-33; *Grabbing the Bullcoming*, *supra* note 5, at 552-56; *A Game of Katso and Mouse*, *supra* note 4, at 35-36.

enforcement when forensic analysts must appear, such as use of notice-and-demand statutes, retesting, or even video testimony.²⁴⁷ We believe that one of the most important things the Supreme Court could do would be to set some guidance on which analyst within the multi-analyst chain must testify. If courts, labs, and local stakeholders know an approach in advance of trial, this should help reduce costs and uncertainty, or at least allow relevant stakeholders to be better prepared. As Justice Gorsuch has expressed more generally about confrontation rights in forensics cases post-*Williams*, the Court “owe[s] lower courts struggling to abide our holdings more clarity than we have afforded them [.]”²⁴⁸

²⁴⁷ See generally Eli Scott, *Confrontation Compromise: How Modern State Rules of Evidence Could Ensure Transparent Forensic Reports*, 56 CRIM. LAW BULLETIN 2 (2020); see also *A Game of Katso and Mouse*, *supra* note 4, at 37 n.97 (discussing notice-and-demand statutes and retesting); *Bullcoming*, 564 U.S. at 665-67 (same); *Melendez-Diaz*, 557 U.S. at 326-27 (discussing notice-and-demand statutes); Arons, *supra* note 5, at 733-36 (discussing, among other things, notice-and-demand statutes and video recording).

²⁴⁸ *Stuart*, 139 S. Ct. at 37 (Gorsuch J., dissenting).