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UNWRAPPING THE BOX THE SUPREME COURT JUSTICES
HAVE GOTTEN THEMSELVES INTO:
INTERNAL CONFRONTATIONS OVER CONFRONTING THE CONFRONTATION CLAUSE

by

Paul F. Rothstein¹

“The Court has . . . boxed itself into a choice of evils: render the Confrontation Clause pro-forma or construe it so that its dictates are unworkable.”

--- Justice Anthony Kennedy,
vehemently dissenting in *Bullcoming v. New Mexico* (2011)

Introduction

*Williams v. Illinois*², handed down in 2012, is the latest in a new and revolutionary line of U.S. Supreme Court cases beginning with the 2004 decision of *Crawford v. Washington*³ which radically altered the Court's former approach to the Constitutional Confrontation Clause. That clause generally requires persons who make written or oral statements outside the trial, that may constitute evidence against a criminal defendant, to take the witness stand for cross-examination rather than those statements

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This paper was prepared for the conference honoring the great Evidence scholar and professor, Andrew Taslitz, held at Howard University Law School on September 19, 2014. The U.S. Supreme Court's decisions in *Melendez-Diaz*, *Bullcoming*, and *Williams*, treated infra, dealing with expert evidence under the U.S. Constitutional Confrontation Clause, are a central focus of this paper. They are particularly appropriate to this conference in view of Professor Taslitz's abiding interest in and superb contributions to legal scholarship concerning expert testimony and the Confrontation Clause. See, e.g., Taslitz, *Catharsis, The Confrontation Clause, and Expert Testimony*, 22 Cap. U. L. Rev. 103 (1993).

The previous writings of many scholars, especially a number who are participants in this conference and symposium, have contributed enormously to my thinking about the Confrontation Clause. I wish to express my supreme gratitude to them and especially to Profs. Taslitz and Myrna Raeder who are here in spirit only. Of course any errors in this article are my own.

² 130 S. Ct. 2221 (2012).

³ 541 U.S. 36 (2004).

being presented at the trial only by the writing or by another person who heard the statement.

Previous to *Crawford*, under *Ohio v. Roberts*,⁴ decided in 1980, the Court did not apply the requirement to statements made outside the trial if they were considered reliable. They were considered reliable only if they fit a traditional “firmly rooted” hearsay exception or were otherwise deemed reliable on the facts. But *Crawford* overruled *Roberts*. *Crawford* held that reliability is too subjective and flexible a concept, and that the Confrontation Clause by its terms does not command merely that evidence be reliable, but that reliability be determined in a particular way--by live cross examination. Thus *Crawford* decreed that henceforth, oral or written statements made outside of the trial that are “testimonial” cannot be admitted into evidence against the criminal defendant unless defendant has an opportunity to cross examine the maker at the trial or (if the maker is unavailable then) there was a sufficient earlier opportunity for cross examination. “Testimonial” generally speaking seemed to mean statements intended or understood to potentially supply evidence (perhaps only if the statement is acquired by agents of the state in a somewhat formal or solemn setting).

In *Williams*, the latest case, it has become apparent that many of the Justices on the Supreme Court are unwilling to continue embracing the logical consequences of *Crawford*, at least insofar as those consequences require the attendance at trial of laboratory analysts who performed forensic tests and wrote reports embodying the test results. Requiring their attendance essentially would outlaw the tradition of allowing the reports alone to stand as evidence in cases where they report, for example, DNA profiles or the concentration of narcotics or alcohol in a blood or other sample. These Justices apparently feel that applying the plain meaning of *Crawford* to this kind of case would entail undue expense and administrative dislocation in a large variety of forensic situations--virtually everything the "CSI" labs do--especially if analysts from every step of every process might have to come to court.

The *Williams* decision, therefore, invokes several subterfuges to escape that result. Most problematically, it suggests that a surrogate witness, in the form of an independent expert who had nothing to do with the test, could satisfy the requirement of on-the-stand testimony. Under this stratagem, personnel who performed the test and/or wrote the report would be excused from testifying. But in order to reach this result without overruling the new Confrontation jurisprudence spawned by *Crawford*, these Justices in *Williams* had to engage in enormous feats of doctrinal legerdemain. In fact, the Justices in *Williams* could not agree on any single rationale, and there was no majority on any line of reasoning or any theory of the Confrontation Clause.

One is led to suspect that a majority of Justices on the Court may be looking for a way--any way at all, whether sensible or not--to escape what they regard as the rigid box the Court has gotten itself into with *Crawford*. It may even be that *Crawford* will eventually face overruling either directly or sub silentio.

⁴ 448 U.S. 56 (1980).

Crawford* Overrules *Roberts

*Ohio v. Roberts*⁵ governed Confrontation Clause jurisprudence for twenty-four years, between 1980 and 2004, when *Crawford v. Washington*⁶ was handed down.

Roberts involved evidence offered at a defendant's state criminal trial for forgery and stolen credit card possession. That evidence consisted of a transcript of the preliminary hearing testimony of a witness who did not appear at the trial. For our purposes, the significant holding of *Roberts*, as perfected by its progeny⁷, was that, to be admissible under the Confrontation Clause, hearsay statements—as this evidence was—must fit within a “firmly rooted” hearsay exception or be otherwise deemed reliable on the facts, unless the maker of the statement appears for cross examination. The actual result in *Roberts* was that the evidence used against defendant was held violative of his Confrontation right, and his conviction was reversed.

Twenty-four years later, *Crawford* came along. In *Crawford*, Mrs. Crawford was questioned and tape recorded by police in an inquiry into a stabbing of a third party her husband was being charged with. She had been present before, during, and after the stabbing. Her taped statement inferentially undercut somewhat the husband's defense of self defense. Marital privilege kept her off the stand at her husband's state criminal trial for the stabbing, so the prosecution introduced the tape-recording which was unprivileged under state law. The hearsay rule was surmounted because this out-of-court statement of hers was offered and received as a declaration against penal interest since it also somewhat implicated her. The husband was convicted. The U.S. Supreme Court reversed and remanded the conviction on grounds that the admittance of the wife's statement violated his Confrontation Clause rights. In the course of so doing, the Court gave birth to a radically new approach to the Confrontation Clause.

In an opinion for the Court written by Justice Scalia, *Crawford* overruled *Roberts*, drastically altering the application of the Confrontation Clause to out-of-court hearsay statements offered against the criminal defendant where the declarant does not testify and the statement is offered for its truth, as here. The Confrontation Clause under *Crawford* no longer parallels the hearsay rule and its exceptions (nor allows hearsay just because it is found reliable) as was the approach under *Roberts*. Instead, the Court in *Crawford* identifies a class of “testimonial” out-of-court statements that (according to Scalia) were specially suspect historically in England in the days leading up to the adoption of the U.S. Confrontation Clause. This suspect class included the un-confronted statements taken, and later used at trial, by prosecutors in the Sir Walter Raleigh case.⁸

⁵ 448 U.S. 56 (1980).

⁶ 541 U.S. 36 (2004).

⁷ E.g., *Idaho v. Wright*, 497 U.S. 805 (1990); *White v. Illinois*, 502 U.S. 346 (1992).

⁸ Raleigh was convicted of treason against the King based on an out-of-court affidavit by Lord Cobham given to authorities, implicating Raleigh. Cobham later said he would have repudiated it had he been called as a witness. This is the evidence the Supreme Court in

That suspect class would ordinarily contain (according to *Crawford*) officially garnered statements like grand jury statements, affidavits, recorded testimony at other trials or proceedings, and statements taken by police in investigations, among others. The Court's holding in *Crawford* is that even if these testimonial statements come within a hearsay exception or are otherwise deemed reliable, they are inadmissible unless the declarant can currently be cross examined, or is unavailable and there has been an earlier opportunity to cross-examine her.⁹

The Court in *Crawford* leaves somewhat fuzzy exactly what “testimonial” means in the Confrontation context, expressly postponing a more complete definition to another day. But there is some language in the opinion shedding a modicum of light on the concept. “Testimonial” as *Crawford* intended it seems to have something to do with whether government was involved in obtaining the statement—to what extent and with exactly what subjective or objective purpose was not completely specified—and/or with whether the declarant or questioner would, should, or did know at the time of the statement that it could be usable in a trial or official investigation. The challenged evidence in *Crawford* itself had a variety of both characteristics — it was garnered from the wife by police questioning and she knew that the information was related to an investigation into her husband's killing of another, which she witnessed, though perhaps she did not realize that her statement would be evidence *against* her husband. (It turned out that circumstantially it undercut somewhat her husband's defense of self-defense.) Because of these characteristics, it was pretty clearly “testimonial,” on almost any notion of the concept suggested by *Crawford*. The court hints without clearly holding, that statements made under a formal police procedure like this may be testimonial *per se*, perhaps in a special class comprised of this and other formalized material like affidavits and depositions. In this special category, there might be no necessity to inquire into intention or knowledge as may be necessary with other out-of-court statements.

Crawford refers to. The Court fails to include in its analysis, another piece of hearsay used against Raleigh than Lord Cobham's government garnered statement. This other piece was a vague out-of-court statement, perhaps based on nothing but blatant opinion and speculation, which statement was made by a random boatman in Spain to an private English traveler, who also little connection with the events other than to be called as a witness against Raleigh to recount the boatman's statement. The boatman's statement was that the boatman thought the English King would never be crowned if Raleigh had anything to do with it. Would the reforms that ultimately led to the confrontation clause be concerned with this evidence, too, as well a Lord Cobham's government garnered statement against Raleigh that is mentioned as fundamental to those concerns in *Crawford*? This rank hearsay of the boatman would not seem to fit into the outlawed “testimonial” category outlined in *Crawford*, let alone any hearsay exception.

⁹ As case-law develops under *Crawford*, issues will surface concerning what kind of former opportunity to cross-examine is sufficient for these purposes. Will there be a “similar motive” requirement as there is under Fed. R. Evid. 804(b)(1) (the former testimony hearsay exception) and will it be defined the same way? Will there be a same-party or similar-party requirement?

In summary, the factors significant to determining the testimoniality of a statement under *Crawford* arguably *may* be (1) intent/knowledge/purpose (subjective or objective?¹⁰ by maker? receiver? both?¹¹), (2) perhaps government involvement, (3) perhaps a degree of formality/solemnity/structure to the proceeding,¹² and (4) perhaps that the statement was made under some form of questioning or interrogation.¹³ Mrs. Crawford's statement qualified under all of them.¹⁴

According to *Crawford*, even statements falling within firmly rooted hearsay exceptions are no longer free from a Confrontation Clause challenge just because they fit the exception. Rather, they, like all out-of-court statements, must be analyzed individually on the particular facts of the case to determine whether they are testimonial. While certain language in the opinion suggests that some categories of hearsay *ordinarily* are not testimonial, e.g., business records and coconspirator statements, even those categories may sometimes contain testimonial statements, depending on the particular facts. That would be the case if, for example, statements within those exceptions were made to police or other government agents for evidentiary or investigative purposes. Forensic lab test reports offered as business records *ordinarily* would seem to fit this description.

¹⁰ Justice Sotomayor's opinion for five members of the Court subsequently in *Bryant* (infra), interpreting *Crawford*, says the factor is objective, meaning determined based on reasonable appearances. But "objective" and "reasonable appearances" are vague terms. Reasonable appearances to whom? From what perspective? Who is the objective observer? With what experiences and sophistication? And it is doubtful that *Bryant* means that if objectively viewed a statement does not appear to be for a prosecutorial, accusatory, incriminatory, evidential purpose, but secretly in fact is intended for that purpose, that this would not be testimonial.

¹¹ Sotomayor's opinion for five members of the Court subsequently in *Bryant* (infra) interpreting *Crawford*, says both must be considered, which sidesteps the question, What if they differ? Later in the opinion she seems to retract, saying the reason to look at the interrogator's purpose is to determine the purpose of the maker of the statement. Justice Scalia in dissent reads the Sotomayor opinion as placing primary emphasis on the interrogator's purpose. Justice Scalia, who wrote *Crawford*'s majority opinion, in dissent in *Bryant* states that the significant purpose under *Crawford* is that of the declarant, although he admits *Crawford* did not have to specifically decide this point.

Sotomayor counts a lack of ability to form any purpose, as perhaps in the case of the seriously injured declarant in that case, counts as a non-testimonial purpose.

This factor we have labeled (1) seems from the decisions to be a focus of most of the attention in these cases in the Supreme Court.

¹² Sotomayor's opinion for five members of the Court subsequently in *Bryant* (infra) interpreting *Crawford*, says this factor is only significant as one of the circumstances indicating that the purpose was probably to provide evidence (a testimonial purpose).

¹³ The Court in the subsequent *Davis* case, infra, interpreting *Crawford*, says "volunteered testimony" can still be subject to the Confrontation Clause.

¹⁴ This of course sets us up for future uncertainty when a case arises that on its facts satisfies some but not all of the factors. There is also the question of what exactly do each of the factors mean. And all of them are attended by ambiguity as to degree.

An exception to this general principle may be Dying Declarations, that is, the hearsay exception for statements made by declarants in contemplation of their own imminent death. A footnote in the opinion notes that dying declarations seem to have been admitted at common law even when they were testimonial. The Court concluded the footnote by cautioning “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*.”¹⁵

It can be seen from all this, that *Crawford* has a dimension that is unfriendly to the prosecution, as well as one that is prosecution-friendly. On the anti-prosecution side, *Crawford* almost completely restricts “testimonial” hearsay statements offered against the criminal defendant. They can no longer be rendered admissible by showing they are within a firmly rooted hearsay exception or are otherwise reliable. But, on the other hand, all confrontation-clause scrutiny is removed by *Crawford* from non-testimonial hearsay statements, which is a *pro*-prosecution effect, since formerly, pursuant to *Roberts*, even non-testimonial hearsay statements were subjected to confrontation-clause scrutiny.

Crawford excoriated *Roberts* for being too subjective: *Roberts* had many undefined and subjective terms like “firmly rooted” and “reliable.” Exactly how reliable is reliable? But the *Crawford* idea of “testimonial” has also proved somewhat difficult and subjective to define: What statements are “testimonial”? Can the purpose of a statement really be ascertained? What if police have a different purpose in questioning than the declarant has in answering? What about a statement where there is a mixed purpose say both to resolve an ongoing emergency or obtain medical treatment *and* to get or supply evidence for a trial, as, for example in the case of statements to rape treatment nurses specially trained by law enforcement?¹⁶ Or statements made by a declarant to a friend with the purpose to incriminate or accuse another (perhaps even hoping it will get to authorities although that may not be necessary)? What about statements made before any crime has been committed that subsequently prove useful in a prosecution? What about a statement made after a crime but before there is a particular suspect? What about a statement made where police are gathering evidence against a particular suspect but the declarant is unaware he is being questioned by a police or government agent, who is undercover? What about volunteered statements, where there is no official questioning? What about statements overheard by police or eavesdropped upon by them? What about a statement made under excitement without direct thought of investigatory or prosecutorial use such as some 911 calls? What about statements made for purposes of helping police in an emergency--say to stop a further assault, or to obtain immediately needed medical help after an assault, or to help catch a criminal at large who may pose a threat to the public? What about statements with mixed motives, such as to a rape treatment nurse

¹⁵ Developing case law will eventually tell us whether there is such a constitutional exception and whether it has the same contours as the dying declarations hearsay exception in Rule 804 (b)(2) of the Federal Rules of Evidence, which made some changes in the exception from the common law.

¹⁶ A subsequent Supreme Court case, *Davis*, made relatively clear that the inquiry is into what is the *primary* purpose, at least in the ongoing emergency situation. *Davis* is treated *infra*.

who is both gathering evidence and providing treatment? Can children have the knowledge and intent to make testimonial statements? Are statements to doctors or nurses who may have been selected by police, but are not police, testimonial? Subsequent cases¹⁷ have shed some light, but not a lot, on some of these questions, but many remain unanswered.

One question that *Crawford* would seem to answer by fairly clear implication is whether forensic laboratory reports prepared at the behest of the police or prosecution for a particular criminal case are testimonial. The logic of *Crawford* would seem plainly to indicate that if these reports are prepared for law enforcement or prosecution with the knowledge that they might be used against a criminal defendant, they are testimonial. They meet every reasonable test of testimoniality that seems to arise from *Crawford*.¹⁸ Whether the test involves intention or knowledge on the part of the police, or of the declarant, or both, that the report will be used prosecutorially, it seems to be satisfied, regardless of whether the test is subjective or objective in focus. The primary purpose -- indeed the only purpose -- is law enforcement. Where the test is commissioned by law enforcement or the prosecution, in connection with a particular case, there would seem to be no doubt. A report of such a lab test done on defendant that tends to indicate his guilt, offered against the criminal defendant, is testimonial and cannot be introduced against him unless at least someone involved in its preparation appears for cross examination (or if unavailable, previously appeared for cross examination).

Yet a number of the Supreme Court Justices, including some who signed onto the decision in *Crawford*, seem reluctant to countenance this result.¹⁹ While this may be because of practical concerns peculiar to the area of forensic reports, it may be a sign of something broader. At least some members of the Court may be starting to feel that they have painted themselves into a corner in *Crawford*, and may be looking for an escape. The Justices on each side of the divide are using increasingly harsh rhetoric criticizing those on the opposite side.

The case of *Melendez-Diaz v. Massachusetts*²⁰ first clearly surfaced this fault-line among the Justices.²¹

¹⁷ E.g., *Davis* and *Bryant*, *infra*.

¹⁸ Recall the factors that *may* be significant under *Crawford* enumerated above: (1) primary purpose/intent/knowledge (subjective or objective? by maker? receiver? both?) , (2) perhaps government involvement, (3) perhaps a degree of formality/solemnity/structure to the proceeding, and (4) perhaps whether or not the statement was made under some form of questioning or interrogation. Any reasonable version of all of them seems to be satisfied in the case of these reports. While Justice Thomas suggests (see *infra*) that the forensic report in *Williams* was not formal or solemn enough to be testimonial, apparently because not sworn, that seems out of keeping with the degree of formality or solemnity that has been required in the other cases discussed herein and would result in an anomaly: that sworn statements (presumably somewhat reliable) would be less well received than unsworn ones (presumably less reliable), and that admissibility could be assured merely by refraining from swearing.

¹⁹ See concluding section of this paper.

²⁰ 557 U.S. 305 (2009).

²¹ The decision was 5-4. Justice Scalia wrote the opinion for the Court strongly enforcing the *Crawford* principle and requiring the analyst behind a forensic report to testify. He was joined by

Melendez-Diaz was convicted in state court of drug possession. The prosecution introduced a state lab analyst's certificate to the effect that material seized by police and connected to petitioner was cocaine. Pursuant to state law, the certificate had been sworn before a notary public which action licensed the certificate's use as prima facie evidence of the truth of what it asserted—that the material was cocaine. The U.S. Supreme Court ruled the certificate “testimonial”, with the result that its admission violated the defendant's right to confront the witnesses against him under *Crawford*: The chemist (“analyst”) himself should have been called by the prosecution to testify, unless he was unavailable and there had been a previous opportunity to cross examine him (none of which was the case here).

Consequently, Mr. Melendez-Diaz's conviction was overturned and the case sent back for re-trial (this time without the evidence), where he was acquitted. According to unofficial reports, the result was not based on issues like those involved in the Supreme Court, but on doubts about whether in fact the drugs were his.²²

The decision presumably affects a whole range of expert and non-expert government and CSI-type reports, not just reports involving chemists in drug tests. Prosecutors became immediately concerned that cases would be dismissed unless costly measures were taken to augment the number of analysts employed so there would be enough of them to handle the lab caseload and take time away from the lab to testify.

The decision was 5-4, with Justice Scalia writing for the majority which included him and Justices Souter, Stevens, Ginsburg and, on a somewhat different rationale (the formality of the report), Thomas. Dissenting were Justices Kennedy, Roberts, Alito, and Breyer.

Justice Kennedy's vituperative dissent (joined by Chief Justice Roberts, and Justices Breyer and Alito) complained quite vehemently that the word “testimonial” does not appear in the constitution; rather, the phrase is “witness against.” In his opinion, this applies to ordinary witnesses not “neutral experts.”

Justice Scalia spent most of the majority opinion trying to rebut in strong almost beligerant terms the views of the dissenters. The dissenters argued that declarant, as an expert, was not a conventional witness who observed facts of a crime being committed, nor was he a witness directly accusing defendant. The information was accusatory only

Souter, Stevens, Ginsburg and, on a somewhat different rationale (the formality of the report), Thomas. Dissenting were Kennedy, Roberts, Alito, and Breyer.

The only significant Confrontation Clause case in the Court between *Crawford* and *Melendez-Diaz* was *Davis v. Washington*, 547 U.S. 813 (2006). There was remarkable agreement among the Justices there supporting *Crawford* except that in a partial concurrence and partial dissent, Justice Thomas focused on the formality/informality notion. While an argument can be made that *that* case was already a retreat from *Crawford* because it created the emergency exception to it, that exception is arguably fairly consistent with the rationale of *Crawford*.

²² The drugs had been found in a car in which he and others, including another person who was more clearly involved with drugs, were riding.

when taken together with other evidence linking defendant to the drugs. Declarant, the dissent argued, was an impartial scientific expert, reporting neutral science, not prone to the kinds of errors that infect fact witnesses. Declarant was not recounting historical events.

Justice Scalia for the majority replied that there is no rational principle and no authority limiting the Confrontation Clause to the kinds of conventional accusatory historical-event witnesses the dissent mentions. Further, Scalia noted, scientific tests can involve mistakes, errors, uncertainties of basis, unclarity or incompleteness of meaning, and fabrication, that require cross examination as much as lay evidence does.²³ He cited recent National Academy of Sciences findings in support:

Nor is it evident that what respondent calls “neutral scientific testing” is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of the National Academy of Sciences, “[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency.” National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (Prepublication Copy Feb. 2009) (hereinafter National Academy Report). And “[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.” A forensic analyst responding to a request from a law enforcement official may feel pressure -- or have an incentive -- to alter the evidence in a manner favorable to the prosecution....

Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials....

This case is illustrative. The affidavits submitted by the analysts contained only the bare-bones statement that “[t]he substance was found to contain: Cocaine.” At the time of trial, petitioner did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed....

²³ The problem Justice Scalia foresees if report writers did not need to take the stand is even worse with non-scientific expert reports and the “soft” sciences. See, for example, *Dunlap v. Idaho*, petition for cert. filed Aug. 7, 2014, wherein a local jail psychologist’s report was allowed into evidence without the psychologist appearing, that in an interview he found the demeanor of the murder defendant to be uncaring, callous, and smiling, when relating the crime, and therefore the crime was committed with the depraved mind required as an aggravating factor to allow the death penalty. The question upon which cert. is being sought is whether the Confrontation Clause applies to the penalty phase in a capital case, a matter on which there appears to be a split of authority.

“[T]here is wide variability across forensic science disciplines with regard to techniques, methodologies, reliability, types and numbers of potential errors, research, general acceptability, and published material.” National Academy Report (also discussing problems of subjectivity, bias, and unreliability of common forensic tests such as latent fingerprint analysis, pattern/impression analysis, and toolmark and firearms analysis).

To the dissent’s claim that interrogation is required for a statement to be testimonial, Scalia replies “[t]he Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation.”

To the dissent’s assertion that it is sufficient that the defense could call the analyst to the stand under the Constitution’s Compulsory Process Clause, Scalia says “The [defendant’s] ability to subpoena the analysts pursuant to state law or the Compulsory Process Clause is no substitute for the right of confrontation. Unlike the Confrontation Clause, those provisions are of no use to the defendant when the witness is unavailable or simply refuses to appear....More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.”

The dissent also argued that the report here was like common law business records or official records. Scalia responds that it does not qualify as a traditional official or business record, and even if it did, the author would be subject to confrontation nonetheless because it was prepared for use at trial. “[A]nalysts’ certificates -- like police reports generated by law enforcement officials -- do not qualify as business or public records for precisely [this] reason. See [Federal Evidence] Rule 803(8) (defining public records as ‘excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel’).”

Perhaps the most troublesome points made by the dissent are those related to the burden the majority position places on prosecutors and law enforcement. The fear is that supplying the testimony required by the majority will be expensive and will disrupt laboratory work, in view of the large number of cases involved across the country, and in view of the large number of analysts that may be involved even in one individual report.²⁴To this, Justice Scalia replies that the Confrontation Clause cannot be ignored to accommodate the necessities of trial and the adversary process:

Perhaps the best indication that the sky will not fall after today’s decision is that it has not done so already. Many States have already adopted the

²⁴ On just these practical grounds of “unworkability,” especially if all the analysts who worked on a particular analysis and report had to testify, the New Jersey Supreme Court has just refused to require any underlying witnesses and has allowed the report to be evidenced through a supervisor who had reviewed the report. *State v. Michaels*, ___N.J. ____ (8/7/2014). Cf. Justice Kennedy’s reference to “unworkability” in the quotation opening this article.

constitutional rule we announce today, while many others permit the defendant to assert (or forfeit by silence) his Confrontation Clause right after receiving notice of the prosecution's intent to use a forensic analyst's report. Despite these widespread practices, there is no evidence that the criminal justice system has ground to a halt in the States that, one way or another, empower a defendant to insist upon the analyst's appearance at trial.

Scalia notes here that states can ease the burden and facilitate case management by adopting notice-and-demand statutes. These statutes require advance notice by the prosecution of proposed use at trial of a forensic report and require defendants to promptly thereafter request the appearance of the analyst if that is what they want. Failure of defendant to so request waives the confrontation objection to the report.²⁵ In justification Scalia notes that defendants always must raise their Confrontation Clause objections. Notice-and-demand procedures merely prescribe the time within which he must do so. States are allowed to adopt reasonable procedural rules regulating objections, he says. Some such statutes require good cause before the defendant's request will be granted, but the Court expressed no opinion on that.

Further easing the burden on prosecutors and law enforcement, in Scalia's view, is the fact that the defense will frequently offer to stipulate to the nature of the substance in the ordinary drug case. "It is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis. Nor will defense attorneys want to antagonize the judge or jury by wasting their time with the appearance of a witness whose testimony defense counsel does not intend to rebut in any fashion."

Closely allied to the burden on law enforcement is the question of which persons must testify where a scientific test that is reported involved multiple analysts, perhaps each doing a separate phase of the work or the reporting. The *Melendez-Diaz* decision seems to proceed on the basis that there was a single analyst--the analyst who analyzed the substance—and that he or she is also the person who wrote the report. That is the person who must testify. The decision did not specify who must testify when more than one person is involved in the analysis and/or report. Yet there could different tasks performed by different people in the analysis and reporting process. There may be different people obtaining, preparing, and analyzing the evidence, separate from the report writer. In many types of scientific testing there may be more than one person involved in the analysis itself. There may be a series of successive steps, each building on the last, and each performed by a separate technician. There may be a separate supervisor signing off on the process, or on the report. Who would be a sufficient witness?

The majority indicates that the absence of some of these witnesses from the

²⁵ Because of this indication by the Supreme Court, the Federal Rules of Evidence have been amended, effective Dec. 1, 2013, to incorporate a notice-and-demand provision into Rule 803(10) (hearsay exception allowing a certificate to establish the absence of a public record without the certifier taking the stand). See Rothstein, *FEDERAL RULES OF EVIDENCE* at Rule 803(10) (3d Ed. 2014-15, West).

witness stand may affect only the weight of the evidence, which the fact finder assesses, and not admissibility. But the decision leaves it unclear how this is to be determined.

Other related practical concerns also arise under the *Melendez-Diaz* rule. What is to be done, for example, when the analyst is no longer employed by the department, moves away, or has died before there has been any occasion to confront? Can someone else interpret the report on the witness stand, or must the analysis be redone by a new analyst who *can* appear? But what if the evidence is no longer available for testing?

Such scenarios are not rare. There frequently are “cold hits” years after a crime: a culprit is finally identified based on comparison of his DNA with a DNA analysis made at the time of the crime. Another scenario where the problem of the unavailable un-cross-examinable analyst might arise is where there is a retrial a year or so after an original trial and the original forensic analyst who was not subject to cross-examination at the original trial (because under older law, *that* was not required) is now irretrievably gone. Or suppose an original autopsy was performed on a body some time ago by a medical examiner who is now dead or cannot be found and the body cannot be autopsied again because it has deteriorated. Though there is normally no statute of limitations on murder, this may as a practical matter impose one.

It is concerns like these that may be driving some of the members of the Court to feel they rushed to readily into the *Crawford* approach, and may be driving some of them into a kind of retrenchment.

The next case in the U.S. Supreme Court concerning forensic reports provided an opportunity for such retrenchment, but it didn’t quite garner enough votes to do so. It posed the question, What if the witness offered to justify offering the report in evidence is, say, an expert co-worker in the lab, say even a supervisor, who can testify to the procedures of the lab, but had nothing to do with the particular analysis of this sample itself, but rather is testifying about the report compiled by the real analyst, who is not offered and who is not shown to be unavailable? Would this surrogate witness be sufficient to satisfy the Confrontation Clause? That would solve some of these problems, but seems inconsistent with what *Crawford* appears to demand. The case was *Bullcoming v. New Mexico*.²⁶

Mr. Bullcoming was tried and convicted in state court of driving while intoxicated. Principal evidence used against him was a forensic laboratory report certifying that his blood alcohol concentration was a number well above the threshold for Aggravated Driving While Intoxicated. The prosecution did not call the analyst who did the test and signed the certification (Caylor) but instead called another analyst (Razatos) from the lab, who was familiar with the lab’s testing procedures but had neither

²⁶ 131 S. Ct. 2705 (2011). Concerning what *Bullcoming* decided and didn’t decide, see Coleman & Rothstein, *Grabbing the Bullcoming by the Horns*, 90 Neb. L. Rev. 502 (2011).

participated in nor observed the test on Mr. Bullcoming's blood sample.²⁷

In a decision written by Justice Ginsburg, the Court held that using Razatos to testify was not sufficient under the Confrontation Clause. Caylor needed to be called. The majority saw this as demanded by the whole philosophy of *Melendez-Diaz*, perceiving no significant difference between that case and this. In other words, Justice Ginsburg's opinion gives full sway to the logical implications of *Crawford*.²⁸

Justice Kennedy wrote a blistering dissent in which Chief Justice Roberts and Justices Breyer and Alito joined, advocating a significant retrenchment of *Crawford*, at least in the forensic report context.

Justice Sotomayor's concurrence in *Bullcoming* suggested that even though *this* expert witness was not the way out of the box some of the Justices were beginning to feel *Crawford* had put them in, another expert, properly grounded concerning the particular test administered, might be. She did this by stating what *Bullcoming* was *not* holding—that is, doors to admissibility *Bullcoming* was not necessarily foreclosing:

First, this is not a case in which the State suggested an alternate purpose, much less an alternate primary purpose, for the [Blood Alcohol Content] report. For example, the State has not claimed that the report was necessary to provide Bullcoming with medical treatment.

Second, this is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue. The court ... recognized [the witness'] total lack of connection to the test at issue.

²⁷ Caylor was on administrative leave for some mysterious reason which Razatos could not illuminate, but was not shown to be unavailable. The certification, which was, arguably, formal, attested not only to a technical number, but to several other matters such as proper calibration of the equipment and handling of the sample, etc., facts which seemed to preclude one of the state court's rationales for admitting the evidence, that Caylor was a mere "scrivener." The Court sidesteps the question whether that would make him a mere scrivener and whether there is such an exception to Confrontation, by noting merely that more than a mere scrivener or copying of the blood alcohol concentration number was contained in this certification.

²⁸ In *Bullcoming*, Justices Thomas and Kagan concurred in the result and in Ginsburg's opinion in part. Justice Thomas disagreed with that part of Ginsburg's opinion stressing the primary purpose test of testimoniality rather than his test of formality/informality; but because the report was in the form of a certification (i.e. was, arguably, formal), he concurred in the result that Caylor had to take the witness stand. Justice Kagan disagreed with a portion of the Ginsburg opinion that depreciated the law enforcement burdens that would ensue from requiring the analyst to testify. Justice Sotomayor similarly concurred in the result and with the Ginsburg opinion (except for that same part) in a separate opinion pointing out what the case did not decide, leaving open some indirect routes for the admission of forensic report information that she suggested might not require the presence of the analyst (although later in *Williams* she did not apply this).

Third, this is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence. See Fed. Rule Evid. 703 (explaining 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). We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence.

Finally, this is not a case in which the State introduced only machine-generated results, such as a printout from a gas chromatograph. The State here introduced [the analyst's] statements, which included his transcription of a blood alcohol concentration, apparently copied from a gas chromatograph printout, along with other statements about the procedures used in handling the blood sample.

The dissenters in *Bullcoming* were concerned with the burden on law enforcement, especially but not only if multiple analysts are involved in a test and have to be called to the stand. They pointed to a 71% increase in the number of subpoenas for New Mexico analysts' testimony in impaired-driving cases between 2008 and 2010, as well as experiences in other states. The dissent portrayed the certifying analyst's role as "no greater than that of anyone else in the chain of custody." An implicit theme of the dissenters, found in the other cases as well, particularly *Williams*, the DNA case, is that making it difficult to introduce scientific reports will promote reliance on other less reliable evidence such as eye-witnesses.

Justice Kennedy in the dissent in *Bullcoming* very forcefully advocates confining *Melendez-Diaz* to its facts or perhaps overruling it, and obliquely suggests reconsidering *Crawford* as a whole.

Bullcoming had little to say clarifying how it is to be determined who must testify if there is a chain of participants in the analysis and report. Must they all? If not, Why not? Which one(s) must? Justice Ginsburg for the majority speaks only of "the analyst who signed the certification" and seems to ignore the possibility that there might be others involved in the collecting, testing, analyzing, or reporting process too. There may be several people doing different steps of the analysis. Caylor in fact seems to have done most of the analysis as well as signing the certification. Caylor is who Ginsburg says should have testified in this case. But the opinion's logic might also require others where several are involved.

Justice Sotomayor's second (and perhaps third) undecided scenario, above, hints at the possibility that in proper circumstances, a single surrogate witness might do the trick even for a group.

The next forensic report case in the Supreme Court, *Williams v. Illinois*,²⁹ adopts a version of one of Justice Sotomayor’s “hints”—that a properly grounded expert may get the report before the fact-finder. But oddly, she dissents in *Williams*.

But more broadly, *Williams* demonstrates graphically that a substantial number of Justices are now prone to some very extreme measures to get around *Crawford* in this area, if not its outright overruling.

What Happened in *Williams v. Illinois*?

In *Williams*, basically, a sample of the semen from the rapist was taken from the victim and sent by the Illinois state police technicians to Cellmark Diagnostics, a pre-eminent Maryland company specializing in DNA analysis. An analysis and report from Cellmark isolated and reported back to the police technicians a DNA profile with certain features. In the meantime, Mr. Williams became a suspect in the rape. A sample of Mr. Williams’ blood was obtained and analyzed for DNA by the Illinois state police lab, and an expert witness from the Illinois state police lab testified at Williams’ trial for rape that the two profiles matched. No one from Cellmark testified. The victim identified Williams. Williams was convicted in a bench trial, and ultimately appealed to the Supreme Court on grounds that the use made of the Cellmark report without the state putting any Cellmark analyst on the stand violated his Confrontation Clause rights.³⁰

Justice Alito announced the judgment of the court that the analyst’s testimony was not required and delivered an opinion (called a “plurality opinion” because while not a majority owing to its somewhat controversial rationale applying but limiting *Crawford*, it got the most votes). Justices Roberts, Kennedy, and Breyer joined that opinion. Breyer filed a concurring opinion as well suggesting it might be time for a re-examination of *Crawford*, at least in this area. Justice Thomas filed an opinion concurring in the judgment on a different ground, peculiar to himself. Justice Kagan filed a strong dissent supporting a fulsome reading of *Crawford*, requiring the analyst to testify, in which Scalia, Ginsburg, and Sotomayor joined. The tone of several of the opinions, compared with what is usual at the Court, suggests the Justices are almost at each other’s throats.

The Plurality Opinion That the Confrontation Clause was Not Violated

A. The Cellmark Report Was Not Admitted For the Truth of the Matter Asserted in it.

²⁹130 S. Ct. 2221 (2012).

³⁰ For a debate on the issues raised by *Williams* published just prior to the decision, see Coleman & Rothstein, *Williams v. Illinois and the Confrontation Clause: Does Testimony by a Surrogate Witness Violate the Confrontation Clause?*, appearing at <http://publicsquare.net/williams-v-illinois-and-the-confrontation-clause-part-1>, and at Georgetown Scholarly Commons, Georgetown Law Faculty Publications and Other Works, Paper 740 (2011).]

In the first part of his opinion for the plurality, Justice Alito tacitly assumes that the Cellmark report was testimonial and thus if it had been put forth to the fact-finder (here, the judge) for the purpose of establishing its truth—that the DNA it examined in truth had the features it reported—it could not be used in that capacity without the state presenting the Cellmark personnel. But he further holds that *that was not* the purpose for which it was used and understood at the trial. He holds that the report of the outside laboratory (Cellmark) as used in the *Williams* trial can be equated to a hypothetical set of facts put to the on-the-stand expert.

In other words, the testifying witness in essence answered “Yes” to the prosecutor’s question on direct examination which question Alito treated (and assumed the trier-of-fact, the judge in this case also treated) as the equivalent of this question: “Assuming that the profile Cellmark sent back to you at the police lab was an accurate representation of the DNA profile of a sample of the semen that had been deposited in the person of the victim, does it match the one that your state lab took from the defendant?”

Even though the question and answer did not strictly adhere in form to this format, nevertheless the net effect was the same, Alito argues: the net effect was that the witness’s answer was intended and understood by all to be conditional on the assumption that the facts in the report were true. The essential point for Alito is that the answer did not claim they were true.

Justice Alito states that, since this was a bench trial without the jury, the judge can be presumed to understand all this—i.e., that the facts in the report were not being put forth as true, but merely as hypothetical assumptions only.

Understood this way, the testimony conforms, Justice Alito says, to the well-established common law practice, codified in Federal Rule of Evidence 703, that expressly allows experts to base their testimony on an unproven assumed hypothetical state of facts, which may not be taken as proven by the fact-finder until there is independent evidence of their truth.³¹ Such facts, offered this way, through the testimony of the expert, are not offered to prove the truth of those facts, but merely as a basis for the expert’s testimony. Since they are not offered for their truth, the statement in the Cellmark report as used in *Williams* cannot be testimonial under *Crawford*. Justice Alito points to a supported footnote in *Crawford* that the Confrontation Clause only applies to statements offered for their truth.³² The on-the-stand expert has not said anything about whether the assumed facts are true, which is what would invoke the Confrontation Clause being applied to require the Cellmark analyst(s) live testimony. The report is not being used for the truth of the matter asserted in it.

³¹ However a close examination of Rule 703 reveals the matter is not quite that simple. 703 requires that such underlying facts be “reasonably” relied upon by the testifying expert, and, even then, allows the judge discretion to exclude mention of them if they would be too prejudicial. Arguably when the underlying material itself would be constitutionally inadmissible, as here, 703 would probably result in exclusion.

³² Footnote 9 in *Crawford*, citing *Tennessee v. Street*, 471 U.S. 409 (1985).

But, even if Justice Alito is correct in all this--that the report embodies hypothetical facts only not offered for their truth--it would then be up to the fact-finder to decide whether the assumed hypothetical facts are true before they could utilize the testifying expert's opinion as evidence of guilt. If there is no other evidence to support the hypothetical facts on which the testifying expert's opinion depends, the trier-of-fact may not credit the on-the-stand expert's opinion that there is a match between the DNA on the swab taken off the person of the victim, and the DNA in the defendant's blood, since that opinion is based on hypothetical facts that have not been proven. There may not have been the same verdict without the expert's testimony of a match. It is clear that the trier-of-fact (here, the judge) did indeed consider the match testimony in arriving at the verdict of guilt.

The question then comes down to this: Was there other evidence supporting what was reported in the Cellmark report---that the DNA in the sample they examined had a certain set of features? If not, under standard evidentiary law, the expert's testimony should have been stricken or disregarded and could not be considered to help establish guilt.

On this point, Alito says there was indeed "other" evidence to support the hypothetical facts. That "other" evidence was the circumstantial evidence that the police sent a sample swabbed from the victim to Cellmark, a DNA profile came back from Cellmark, and it exactly matched the defendant's, the person the victim testifies raped her.

But the trouble with this is that this circumstantial evidence itself depends on the truth of Cellmark's implied statement that the profile they sent back to the police came from the same sample the police had sent to Cellmark (or at least from some sample). Cellmark conceivably could have just made up the profile. This is unlikely, especially since it matched Williams's and he was not yet a suspect in the rape. But the unlikelihood is only significant because it confirms reliability and the Confrontation Clause according to the *Crawford* no longer hinges on reliability.³³

Perhaps the "knowledge-of-extraordinary-features" principle (best illustrated by the notorious *Bridges* case³⁴) might rescue Judge Alito here. None of the opinions in *Williams*, Justice Alito's, specifically mention this *Bridges* principle, but it might be something he was getting at without realizing it.

In *Bridges*, a little girl, the victim of a child molestation, showed awareness of some highly distinctive features of defendant's apartment (which features were proved another way—say by photographs). This was offered to prove that she was at his apartment, which was then offered as part of the case against defendant for the

³³ But cf. some indications to the contrary in *Bryant*. See footnote 49, *infra* about certain possible implications of *Bryant* concerning a re-birth of the reliability factor.

³⁴ Notorious amongst Evidence scholars, anyway. The case is *Bridges v. State*, 247 Wisc. 35019 N.W. 2d 529 (1945).

molestation. Her statement of the distinctive features was not considered hearsay because her awareness of them—their presence in her consciousness—did not depend upon her credibility or the truth of the matter asserted by her: The evidence would have been just as good had she spontaneously mentioned the features and said she imagined them and had never been at a place with those features. The awareness was beyond her control. And it would just be too coincidental to be able to make up those distinctive features spontaneously.

That principle if applied to the *Williams* case, might make the Cellmark report admissible *not* on a theory that it was offered for its truth (which is what would invoke the Confrontation Clause). It would just be too coincidental that Cellmark would be able to provide features of DNA that exactly matched Williams' if they were not from his DNA, regardless of Cellmark's honesty.

If this theory is correct, the Cellmark report would not be being offered for what we mean in the law by "truth of the matter it asserts". The Cellmark report, then, would be admissible both under the Hearsay Rule and the Confrontation Clause.

But should this definition of "truth of the matter asserted" be accepted for Confrontation Clause purposes, even if accepted for hearsay purposes? I have my doubts. There are a number of things confrontation and cross examination could reveal even in these "awareness of features" cases which would justify requiring that the declarant appear in court.

For example, the little girl in *Bridges* may have been coached by police or her parents (even though there was evidence this was not the case; such evidence could be disbelieved). Similarly, Cellmark could have been tipped off by police as to what features to report in the DNA (although unlikely since it appears Williams was not yet a suspect—but the evidence that he was not might itself not be true). Anyway, under *Crawford*, *reliability is not supposed to be the touchstone*.³⁵

A different though not very satisfying answer to the point that the hypothetical facts were never proven would be *not* that the circumstantial evidence supports the truth of the hypothetical facts, but that the question whether the hypothetical facts could be found true by the trier-of-fact was not before the Supreme Court.³⁶ This is perhaps obliquely suggested in other portions of Justice Alito's opinion.

³⁵ But cf. footnote 49, *infra* about certain possible implications of *Bryant* concerning a re-birth of the reliability factor.

³⁶ Normally the Supreme Court leaves it to the state court to decide the sufficiency of evidence. To put that question before the Court would probably require a specific claim of Due Process violation pinpointing the lack of evidence supporting the expert opinion. And even if that argument were made, there was enough *other* evidence of guilt in *Williams* to convict—e.g., the victim's testimony identifying Williams as the rapist—aside from this questioned evidence about the expert testimony and the Cellmark report. (It is not clear, though, that the overall sufficiency of other evidence of guilt—here, the victim's testimony, and a little else--would be an answer to a

B. Mr. Williams Was Not A Target at the Time of the Cellmark Report.

In the second part of his opinion for the plurality, Justice Alito advances a second, independent reason why the Confrontation Clause was not violated by the Cellmark evidence in the *Williams* case. Relying on the confrontation clause's phrase "witness against the accused", Alito holds that since there was no rape suspect at the time Cellmark did its test and composed its report, the report itself is not testimonial, because it was not specifically against the accused, but rather was to find a rapist.³⁷

This would be like a case in which a robbery has occurred adjacent to a certain parking lot at a certain time, and police, before they have a suspect, ask a citizen on the street (who observed the parking lot just before the crime), "What kind of cars were in the parking lot". Later the description given in that interview becomes significant when the police catch a suspect for the robbery, who has a car matching one of the cars described as being in the parking lot. At the time of the on-the-street interview, the information about the cars had no specific significance, but attained significance later. Under this second theory of Justice Alito, the statement identifying cars in the parking lot would not be testimonial. Justice Alito puts the "target" theory this way:

The [Confrontation] Clause refers to testimony by witnesses against an accused, prohibiting modern-day practices that are tantamount to the abuses that gave rise to the confrontation right, namely, (a) out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct, and (b) formalized statements such as affidavits, depositions, prior testimony, or confessions.

His part (a) is the "target" theory and seems relatively new to these cases. It adds a wrinkle to the primary purpose test, which had seemed only to require contemplation of use proecutorily or in a legal proceeding, not necessarily against any particular individual. Applying the new wrinkle here, the plurality holds that the report was not testimonial because Williams was not a suspect in the rape at the time it was compiled:

Due Process claim that important evidence of guilt like the police lab expert's testimony relying on the Cellmark report, was allowed at trial when it shouldn't have been.)

³⁷ This has echoes of, and perhaps expands, the notion of emergency in *Bryant*. Alito also notes here that DNA tests in these circumstances have the potential of exculpating perhaps more than inculpating, a theory that may have expansive consequences. Under Alito's "non-target" rationale for the decision, the report would be admissible independently, without having to be part of the testifying expert witness' testimony. This is also like the non-adversarial or routine record doctrine that provides for an exception to the law enforcement records exclusion in the hearsay exception for public records in Federal Rule of Evidence 803(8). See *U.S. v. Grady*, 544 F.2d 598 (2d Cir. 1976); *U.S. v. Brown*, 9 F.3d 907 (11th Cir. 1993), *U.S. v. Orozco*, 590 F.2d 789 (9th Cir. 1979); *U.S. v. Quezada*, 754 F.2d 1190 (5th Cir. 1984).

The primary purpose of the Cellmark report, viewed objectively, was not to accuse petitioner or to create evidence for use at trial. When the ISP lab sent the sample to Cellmark, its 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.³⁸

Under this “target” theory, what state of affairs at the time of the testing and report would make a report non-testimonial? Not actually having a suspect? Defendant not yet a suspect? Defendant not suspected yet in ANY crime? Not telling the lab there is a suspect? (Would that only work if the laboratory was independent?) No crime yet committed when the test is done or the report is compiled?

An example of this last kind of report might be routine factory-production-point recordations made of bullet lead compositions, gun barrel striations, or genetic markers of bio-agents, all for purposes of customer identification in case the product was ever used in a crime. Another more doubtful example might be routinely made and kept DNA profiles or fingerprints of members of the prison population, for later use for potential I.D. when other crimes occur after the prisoner’s release.

Is There a Theory in *Williams* that Commands a Majority?

Five of the nine votes on the Supreme Court are needed for a majority. Was there a majority behind any of the theories mentioned by various Justices in *Williams* as their own particular *ratio decidendi*?

Theory One: When a Report is Used With an Expert as in Williams, It is Not Offered for the Truth of the Matter Asserted for Confrontation Purposes and is Thus Not Offered in a Testimonial Capacity: Only Four Votes.

Although the conviction was affirmed, only the 4 Justices in the plurality subscribed to the theory that the Cellmark report was not used for the truth of the matters asserted in it (Justices Alito, Roberts, Kennedy and Breyer) as their reason for that decision. There were 5 votes finding exactly the contrary: that the report *was indeed* used for the truth of the matter asserted in it even though the report was not itself technically introduced into evidence (the four dissenters, Justices Kagan, Scalia, Ginsburg, and Sotomayor plus Justice Thomas who concurred on a different ground). The four votes in the plurality, who believed the report was not used for the truth and thus was not testimonial, were unable to garner a fifth vote (to get a majority) for *that* theory supporting admissibility. But they picked up Justice Thomas’ vote as a fifth vote supporting admissibility which Thomas cast on a different theory, that the report was not testimonial because of its informality, which none of the other eight Justices subscribed to.

³⁸ This is slightly reminiscent of the expansion of the emergency theory of *Davis* as expanded by *Bryant* and is an even further extension of the "criminal at large" notion of emergency. Hence, I have said this theory of Justice Alito's is "*relatively new*." See discussion of these cases, *infra*.

Theory Two: When a Report Is Done Without a Targeted Individual it is Not Testimonial: Only Four Votes.

This was the alternate theory of the 4-member plurality. Both Justices Thomas (concurring in the result) and Kagan dissenting (and the three other dissenters for whom Kagan wrote, Scalia, Ginsburg and Sotomayor) expressly rejected the “targeted individual” requirement for testimoniality. This “targeted individual” addition to the test for testimoniality currently lacks a fifth vote, and so it, too, has no majority behind it.

Theory Three: A “Formal”(“Solemn”) Report is Testimonial; an “Informal” One is Not: Only One Vote, But a Critical One.

Only Justice Thomas subscribed to this theory. All the other Justices vigorously rejected it. But because this theory produced constitutional admissibility here, it produced the same result as the plurality’s theories, and thus provided the necessary fifth vote for admittance of the evidence. In consequence, Justice Thomas and his theory may be the swing vote in many future cases, determining the outcome even though it is rejected by every other Justice.

Justice Thomas’ “Formality” or “Solemnity” theory drew a distinction between the report in *Williams*, on the one hand, where Justice Thomas voted against admissibility, and, on the other hand, the reports in *Melendez-Diaz* and *Bullcoming* (both discussed supra), in which Thomas voted in favor of admissibility. In *Melendez-Diaz*, the report was in the form of a sworn affidavit, and Justice Thomas voted that the report was formal/solemn and therefore was testimonial. While the report in *Bullcoming* was not sworn, it was in the form of “certifying”—the report said the signatory affirmed the truth of what was reported. Justice Thomas felt this was still formal and solemn enough to make the report testimonial. In *Williams*, the report language somehow was deemed by Justice Thomas as less formal and solemn—that it did not say it certified or affirmed anything, and so it was insufficiently formal to qualify as testimonial. Contributing to this conclusion would also be the fact that state law established the procedures in *Melendez-Diaz* and *Bullcoming*, providing for the reports’ evidentiary use if in the proper form, which was apparently not the case in *Williams*. Maybe also contributing to the characterization of the reports as formal/solemn or not was the fact that in *Williams*, as opposed to *Melendez-Diaz* and *Bullcoming*, the reporting laboratory was a private lab, not an arm of the state.

The other Justices in *Williams* were quite vehement about the fact that the formality/solemnity theory produces anomalous results, and draws distinctions without a difference. (See, for example, Justice Kennedy’s disparaging reference to the “pro-forma” option opening this article.) The anomalous results they point to are that efforts to make the report more reliable, like swearing to its content, makes the report more likely to be rejected, under the formality/solemnity theory, and that rejection can be avoided simply by carefully not swearing to the report. As to distinctions without a difference, the other Justices have said that the distinction the theory draws between *Bullcoming* and *Williams*, mentioned just above, is a distinction of no substance.

Theory Four: Full-blown Crawford and Melendez-Diaz—The Uncompromising View that Providers of Adverse Information Must Come Forward: Only Four Votes.

Justice Kagan wrote a blistering dissent in *Williams*, joined by Justices Scalia, Ginsburg, and Sotomayor. These dissenters rejected the reasons given by the plurality and the reasons given by Justice Thomas, sticking to a pure *Melendez-Diaz* view requiring the appearance of the analyst responsible for a report whose contents gets before the factfinder regardless of how the contents of the report came before the factfinder (as the basis of an expert's opinion or more directly) and regardless of whether the report targets an individual or not.

In sum, as Supreme Court disagreements go, there is, as the title to this article suggests, a vigorous, if not nasty, confrontation going on among the Justices, about how to confront the box they have gotten into concerning the Confrontation Clause. Justice Alito's plurality opinion including its two-branch reasoning was joined only by the Chief Justice, Justice Kennedy, and Justice Breyer.³⁹ Justice Thomas concurred in their conclusion that the evidence was constitutionally admissible and thus concurred in the judgment which upheld *Williams*' conviction. But he had a different reason for the admissibility--the informality of the report--than the plurality, rejecting all the reasons given by the plurality (as well as rejecting the dissenters theory). Justice Kagan blistering dissent, joined by Justices Scalia, Ginsburg, and Sotomayor, rejected the plurality's theories and Justice Thomas's, staunchly defending pure *Melendez-Diaz* and requiring the appearance of the analyst. Thomas's approach, relying on formality/informality, rejects in no uncertain terms the dissenters entire approach. *So there is no constitutional theory achieving five votes, though there was a cobbling together of disparate theories commanding five votes for constitutional admissibility (Thomas' informality theory and the plurality's).* For this reason, a number of commentators say there is no "holding" of the case.

What Should Prosecutors Do Now in Light of *Williams*?

Let us imagine you are a prosecutor who wants to make use in court of the results of a laboratory test that police commissioned in connection with a case against a particular suspect they had in custody.

Imagine you have a results-report from the lab. You would *prefer* not to call to the stand anyone from the lab, because they have a heavy workload. You may be able to recruit an expert who did not actually participate in this particular testing and report done on the defendant.

As a result of *Williams*, you may want to consider doing the following, at least if the case arises *now*, before any further developments in the Confrontation law:

³⁹ Justice Breyer, in addition to concurring with the plurality, also wrote a separate concurrence suggesting that the case should be set for reargument to consider how the Confrontation Clause applies more generally to crime laboratory reports and technicians statements in them.

If the trial is a jury trial, make sure the facts found in the report are presented clearly⁴⁰ at trial in the form of a hypothetical question to the testifying expert (“...if facts A, B, and C are true, what would be your opinion...”). Be sure careful to have some *other* admissible evidence that those facts are indeed true.

While that *other* evidence may be nothing more than showing that the sample was sent to the lab and the lab sent back a report showing a certain profile that fits with the case, it would be risky to go that route, owing to the uncertainty surrounding whether the *Bridges* principle applies.

Ask the judge to instruct the jury that the particular facts you have used from the report are purely hypothetical and not at this point offered for their truth. It should explain they serve merely as a basis for the expert’s opinion, and that they are assumptions the testifying expert has made which that expert feels if true lead to the opinion she is giving. The instruction should go so far as to say that if the jury finds these facts are not proven up by other evidence, the opinion should be disregarded.⁴¹ The trial judge in ruling on admissibility will understand this would pick up four votes (the plurality) if the case got to the Supreme Court.

But you need a fifth vote because there are nine Justices on the Supreme Court. To get a fifth vote, you will *also* have to make sure the report is not in some form that would be regarded as “formal” by Justice Thomas, because you would want to pick up Justice Thomas’ vote as a fifth vote for admissibility. It is the only fifth vote you could get, because the other Justices who might be candidates for that fifth vote (i.e., the dissenters in *Williams*) are staunchly against you. Be sure there is no evidence that you did something special to make a report that normally is formal, informal, since Justice Thomas will be alert to whether the informality is in “bad faith”. It is unclear what kind of showing might demonstrate “bad faith”.

If the trial is a judge-trial rather than a jury trial, the same principles apply but it need not be made so clear that the facts in the report are hypothetical only—the expert can frankly base his opinion on the report, and the judge will understand that the facts in the report are in the nature of a hypothetical that need to be proved. This is basically the *Williams* case. Your trial judge will realize you have garnered the four plurality votes but that you will still need to establish the informality of the report to pick up Justice Thomas’ vote.

⁴⁰ As discussed above, the plurality in *Williams* indicated that if *Williams* had been tried to a jury the Justices would be less inclined to have applied the “not-for-truth” theory because a jury might not understand that theory unless it were made clearer.

⁴¹ If you have a report that was made in circumstances where the defendant was not at the time a “targeted individual,” none of the above may be necessary if the report is regarded as “informal”. In such a situation, the report itself would be directly admissible, whether or not a testifying expert witness used to convey it to the fact-finder.

In all events, it is likely the expert witness must not be a mere conduit for the hearsay findings of those doing the test and making the report. This means that in addition to being qualified, the expert witness must have done some independent analysis or work of her own contributing to her opinion, as in *Williams*, although the Supreme Court did not expressly say this. And it may increase your chances of success if your expert witness is the lab supervisor who had something to do with the testing and report. (See Justice Sotomayor's second case scenario in *Bullcoming* supra.)

If the report is at the same time both informal (so Justice Thomas would vote for admissibility) and does not target an individual (so the four plurality Justices would vote for admissibility), the expert-witness route to admissibility of the report's contents is not necessary and the report can come in directly because five Justices would vote that the report itself is non-testimonial in the first place (though for different reasons), and therefore the prosecutor does not have to resort to showing that a non-testimonial use is being made of it, i.e., a use that involves illuminating an expert witness's basis rather than establishing the report's truth.

If the report is formal (so Justice Thomas would vote for inadmissibility), Thomas would join the four *Williams* dissenters (who felt the *report information is always inadmissible based on a pure reading of Melendez-Diaz* regardless of formality/informality, and regardless of whether the report is the basis of expert testimony, and regardless of whether it targets an individual, all of which tests they thought were completely bogus). In that case there is nothing you as prosecutor can do to get the evidence in (short of arguing the Supreme Court will change its views). The expert route will not get it in (because Justice Thomas and the four dissenters felt that route is entirely bogus) nor will arguing that it does not target an individual get it in either (even if it truly does not target an individual) because Justice Thomas and the four dissenters feel that the "targeting" test is also a bogus approach and that targeting makes no difference—the evidence is inadmissible regardless of targeting.

Thus, if the report is formal, the evidence will be constitutionally inadmissible, regardless of any of these other things. So, in that particular instance (where the report is formal), Justice Thomas's vote (Justice Thomas' formality/informality test) is absolutely controlling.

If the report is informal (as in the actual *Williams* case) so that Justice Thomas would say it is constitutionally admissible, his vote is not entirely controlling: you must pick up four more votes for admissibility. The four *Williams* dissenters in no event will vote for admissibility (since they take a pure *Melendez-Diaz* approach). So only hope to accomplish constitutional admissibility in this situation is to pick up (with Thomas) the four in the *Williams* plurality.

But if (unlike in *Williams*) the report *does* target an individual and the expert route has not been used properly in the trial court (so that neither of the conditions is present that made the evidence in *Williams* admissible in the eyes of the plurality), the four plurality votes for admissibility drop away, Thomas stands alone for admissibility, and the evidence is constitutionally inadmissible.

This is all assuming there is no change in the Justices thinking after *Williams*, which may or may not be a good assumption, as the next section herein demonstrates.

Was the Plurality in *Williams* Just Looking For a Way to Overrule *Melendez-Diaz* Without Actually Doing it?

Notice that the plurality in *Williams* are the dissenters in *Melendez-Diaz* (Justices Roberts, Alito, Kennedy, and Breyer). So in actuality, despite what they say in *Williams*, they don't think these forensic reports violate the Confrontation Clause, even if introduced directly without any testifying expert, whether or not they target an individual.

Suppose in *Williams* the facts were slightly different so that the plurality could invoke neither of its two rationales, i.e., the “not-for-truth” rationale and the “not-targeted-person” rationale. It is possible the Justices in the plurality would have come up with yet another theory why the report did not violate the Confrontation Clause—for example, that Cellmark was an independent lab and was quite reliable; and/or that on the facts there was no realistic possibility the DNA profile that came back to the police was faked, mistaken, switched, or obtained from some other sample or source of *Williams*'s DNA.

In a portion of *Williams* these factors are mentioned by the plurality in passing as a kind of practical support for but not necessarily a rationale for the admissibility result reached. Reliability is mentioned in part of the reasoning in *Bryant* as well.⁴²

This would mean that in a future case, even where the two rationales for admissibility given by the plurality in *Williams* would not apply, if the report is informal (thus satisfying Justice Thomas's requirement for admissibility), and reliable in the fashions just mentioned, the report itself (whether targeting an individual or not) would be constitutionally admissible even without an expert (there being five votes for admissibility, four on reliability grounds, and one on the informality grounds).

Where do the Justices Currently Stand on *Crawford* in General?

Confidence in the *Crawford* principle seems to be in decline on the U.S. Supreme Court since *Crawford* itself. The decline seems most evident in the forensic reports cases, as detailed above.

It may be that special law enforcement and prosecution needs in the forensic area mean the decline is confined to cases in that area.

But I sense the decline is broader than that. I sense there is a general perception by a number of Justices--who may have been initially inclined to agree with *Crawford*--that *Crawford*'s strenuous and uncompromising application would be counter-productive across the board, depriving prosecutors in court and police in the field of too many useful

⁴² Shades of the old *Roberts* approach.

statements and options, as well as imposing undue expense and administrative burdens in a wide variety of areas of law enforcement.

Whether *Crawford* will be doomed to overruling in the future,⁴³ or eaten away at, is hard to say. But it probably will never be what it promised to be.

The Justices currently on the Court who joined the majority opinion by Justice Scalia in *Crawford* are Kennedy, Breyer, Thomas, and Ginsburg.⁴⁴ Justices Kennedy and Breyer who signed on to *Crawford* when it was handed down, now display hostility to the fairly clear implications of *Crawford* that the author of forensic reports must appear, which hostility they expressed in *Melendez-Diaz*, *Bullcoming*, and *Williams*, all *supra*.

Current Justices Roberts and Alito, who were not on the Court at the time of *Crawford*, expressed similar hostility in *Melendez-Diaz*, *Bullcoming* and *Williams*.

These four Justices expressed this hostility even though they previously appeared to endorse *Crawford* by signing on to *Davis v. Washington*, 547 U.S. 813 (2006) and to *Michigan v. Bryant*, 131 S.Ct. 1148 (2011), which seemed to accept, and were purported interpretations of, *Crawford*.

However, those two cases, *Davis* and *Bryant*, arguably themselves were retrenchments from *Crawford*, or at least *Bryant* may have been. *Davis* in 2006, only two years after *Crawford*, created an emergency exception to *Crawford*.⁴⁵ *Bryant* in 2011 extended that emergency concept to include less immediate emergencies.⁴⁶ Justice Scalia,

⁴³ See Crump, *Overruling Crawford v. Washington: Why and How*, 88 Notre Dame L. Rev. 115 (2012).

⁴⁴ They were joined several Justices no longer on the court by the time of the forensic report cases, Justices Souter and Stevens. Justices Rehnquist and O'Connor, also no longer on the court for any of the cases after *Crawford*, concurred in the result in *Crawford* but did not subscribe to the new "testimonial" theory, voting to continue the *Roberts* approach but finding that it produced the same result--inadmissibility--on the facts of *Crawford*. The bottom-line result of inadmissibility in *Crawford* was 9-0 but the vote adopting its new rationale was 7-2.

⁴⁵ In *Davis*, a 911 call by a victim involved in a currently occurring domestic-violence attack was held non-testimonial; but a statement made to police on the scene by a victim after such an attack was held testimonial, where the attack was over and the perpetrator was isolated in the next room. Justices Scalia (delivered the opinion of the Court, in which Justices Roberts, Stevens, Kennedy, Souter, Ginsburg and Alito joined. Justice Thomas filed an opinion concurring in the judgment in part and dissenting in part.

⁴⁶ *Bryant* was a case in which a bullet-wounded citizen bleeding on the street made a statement to police. The Court extended *Davis'* emergency exception to include as an emergency, the need to apprehend the assailant because he was at large with a gun and hypothetically presented a possible continuing danger to the public (although by all indicators the shooting was the result of a particular grievance against this particular victim only). Justice Sotomayor wrote the opinion for the court in which Justices Roberts, Kennedy, Breyer and Alito joined. Justices Ginsburg and Scalia dissented. Justice Thomas filed a concurrence. Justice Kagan recused herself.

Cf. U.S. v. Liera-Morales, ___F.3d___(9th Cir. July 21 2014)(No. 12-10548) extending

who had written the Court's opinion in *Crawford*, bitterly and witheringly dissented from the extension of the emergency exception in *Bryant*, even though he had voted for the exception in *Davis*, where he viewed the exception not as an exception to *Crawford*, but merely a refinement of *Crawford's* testimonial purpose requirement--that where the purpose is to resolve an on-going emergency, the purpose is not to gather evidence for a prosecution. But in *Bryant* he argued that the extension of this principle to a broader kind of emergency gutted *Crawford* and the meaning of emergency because almost any criminal situation can then be regarded as involving some kind of emergency if the suspected criminal is still at large. Thus, at least *Bryant*, if not *Davis*, may be seen as a retreat from full *Crawford*.

Arguably the emergency doctrine, or at least its extension, was born of a post-*Crawford* disaffection (by at least some of the Justices) with unrestrained *Crawford* logic which they began to feel would unduly harm law enforcement by handicapping police operations in the field and by depriving prosecutors at trial of too many useful statements of crime witnesses and victims.

Justice Thomas who signed on to the majority opinion in *Crawford* with no express caveats also seems to be falling away from *Crawford's* obvious implications, but he had indicated even before *Crawford* that he was not enthusiastic for the kind of theory *Crawford* ultimately adopted. Although he did not say so in *Crawford*, he had earlier indicated that he could subscribe only to the part that seemed to place importance on the formality or informality of the statement. After *Crawford*, his disagreement came to the fore in his separate partial-concurrence-partial-dissent in *Davis*. His version of the confrontation right is very narrow indeed.⁴⁷ I believe his position is also attributable to practical law enforcement and prosecution concerns, like those which are causing other Justices to fall away from a fulsome reading of *Crawford*.

Justices Souter and Stevens, who signed on to the majority opinion in *Crawford*, have since retired and been replaced by Justices Sotomayor and Kagan, who presently occupy their seats on the Court. Sotomayor and Kagan are arguably staunchly behind the full logic of *Crawford*, in favor of strongly applying it to require the appearance of the analysts in forensic reports cases, judging by these Justices' combined strongly worded dissenting opinion in *Williams*, *supra*.

But on the other hand, Sotomayor authored the opinion in *Bryant*, the non-forensic case extending the emergency doctrine, which may be seen as weakening *Crawford*.⁴⁸ Furthermore, Justice Sotomayor took pains to note the limits of the application of *Crawford* in her concurrence in *Bullcoming* as detailed *supra*. And she refused to subscribe (as did Justice Kagan) to a portion of the majority opinion in *Bullcoming* written by Justice Ginsburg, which portion seemed to denigrate the law

the emergency exception to a statement of a mother to the kidnappers of her son over the telephone which she arranged for the police to hear. The phone call was made for the purpose of obtaining her son's safe release.

⁴⁷ See *supra*.

⁴⁸ Justice Kagan recused herself from *Bryant*. She was not yet on the Court for *Davis*.

enforcement concerns behind the opposition to *Crawford*. All this may reflect some lack of sympathy with *Crawford*. But, on the other side of the coin, Justice Sotomayor voted to robustly apply *Crawford* in the subsequent *Williams* case (which vote she lost) and joined Justice Kagan's very strong dissenting opinion in that case vigorously defending the full sweep of *Crawford*, as detailed *supra*.

So, are there any Justices today who appear relatively uncompromisingly committed to *Crawford's* strongly stated right to confront? Yes. A dwindling few. Justice Scalia, the author of the *Crawford* decision, and Justice Ginsburg, who joined that opinion, remain today staunchly committed to strongly enforcing the full implications of *Crawford*, voting for requiring the declarant to take the stand in all the cases discussed in this article, i.e., all the significant U.S. Supreme Court Confrontation cases since and including *Crawford* (except, quite consistently with the implications of *Crawford*, in the case of the 911 call in *Davis*). Justice Kagan sat only on the last two cases to arise, *Bullcoming* and *Williams*, two of the three forensic reports cases, but she seems from her position in these, to stand with Scalia and Ginsburg as strong enforcers of *Crawford's* fullest implications. However, as said, she has not voted on all the cases and she rejected the law-enforcement-downplaying part of the Ginsburg opinion for the Court in *Bullcoming*, so we cannot be *absolutely* sure about Justice Kagan's commitment to a fully expansive scope for *Crawford*.

With the caveat noted just above in this section, Justice Sotomayor's views and voting record appear to be somewhat similar to Justice Scalia and Ginsburg who strongly support full *Crawford*, except that, being relatively new to the Court, Sotomayor only voted on the last three cases (*Bryant*, *Bullcoming*, and *Williams*) and she wrote the opinion of the Court in *Bryant* extending the emergency exception, all of which makes her complete devotion to *Crawford's* fullest implications a little more difficult to call. However, she strongly voted to require the analyst's testimony in the two forensic cases that she voted on (*Bullcoming* and *Williams*), joining the strong biting opinion of Justice Kagan defending *Crawford's* full implications in *Williams*.

Bottom line, we currently have 2 Justices, Scalia and Ginsburg (3 if you count Kagan and 4 if you count Sotomayor) out of 9 for vigorous, full application of *Crawford*, whereas at the time of *Crawford*, 7 out of 9 voted for the *Crawford* revolution, which was phrased in rather ringing, strong, broad language. Admittedly the Court then was not comprised of all the same Justices as now.⁴⁹

⁴⁹ But at least the *general* profile of each replacement Justice has been similar to the profile of the Justice they replaced. Roberts replaced Rehnquist, who voted against the rationale of *Crawford*, which rationale Roberts seems to be trying to get around in *Williams*, *Bryant*, *Bullcoming* and *Melendez-Diaz*; Sotomayor replaced Souter who voted for *Crawford*, and Sotomayor seems roughly similar; Kagan replaced Stevens, who voted for *Crawford* and Kagan seems to be following suit; and Alito replaced O'Connor, who voted against the rationale of *Crawford*, which rationale Alito seems to be trying to get around in *Williams*, *Bryant*, *Bullcoming* and *Melendez-Diaz*.

Among the current Justices, that leaves Kennedy, Roberts, Alito, Breyer, and Thomas who all might vote to overrule or give a cramped reading to *Crawford*.

Justices Kagan and Sotomayor are in an in between camp, but leaning toward considerable support for giving *Crawford* an expansive reading, with Kagan slightly more inclined in that direction than Sotomayor. Sotomayor was formerly a prosecutor and may be a bit more sympathetic to law enforcement needs.

Where Might the Justices Go From Here?

The Relationship of the Factors of Purpose, Government Involvement, Formality, and Interrogation.

Recall again the factors which *Crawford* pointed to as possibly having potential significance in the “testimonial” computation: (1) primary purpose/intent/knowledge concerning potential legal use, (2) government involvement, (3) a degree of formality/solemnity/structured proceeding, and (4) maybe that the statement was made under some form of questioning or interrogation.⁵⁰

It is at least arguable that all the cases discussed herein in the Supreme Court that deal with applying *Crawford*, including *Crawford* itself, are consistent with the following pattern: *If all four of these testimoniality factors are present on the facts, the statement is testimonial (and therefore ordinarily inadmissible without the maker).*⁵¹ *If any one or more of the factors is not present, the statement is not testimonial (and therefore is admissible insofar as the Confrontation Clause is concerned).*⁵²

⁵⁰ Justice Sotomayor's opinion for the Court in *Bryant*, supra, has some language suggesting a fifth factor: a return in some measure to considering *reliability* as a factor (like in the former *Roberts* confrontation jurisprudence) but it was only in aid of describing the purpose factor and the difference under that factor between statements for the purpose of resolving an emergency and of memorializing evidence.

⁵¹ The four cases in which the statements were found testimonial and therefore constitutionally inadmissible are *Crawford*; the field investigation part of *Davis*; and two of the forensic reports cases, *Melendez-Diaz* and *Bullcoming*. (These cases are discussed supra.) In *Crawford* (involving the wife's statement taken and tape-recorded by police), all four factors of testimoniality were clearly present. In *Davis* (as to the statement in the field investigation after the domestic violence was over) all four factors were arguably present, at least in some form. In *Melendez-Diaz* and *Bullcoming* the forensic tests and formalized reports, embodied in an affidavit or formal certification, were requested by law enforcement in connection with a case pending against a particular defendant. Thus they clearly satisfied the government involvement, prosecutorial purpose, and formality factors, and, since they were requested, arguably fulfilled the questioning factor.

⁵² The three cases (all discussed supra) in which the evidence has been deemed constitutionally admissible because non-testimonial are the 911 emergency call in *Davis* (arguably the only factor indicating testimoniality that was missing was the primary intent/knowledge-of-potential-prosecutorial-use factor because the purpose was to resolve an emergency; and possibly also the

These italics suggest one potential escape from the “box” or “corner” into which Kennedy and other Justices believe the Court has put or painted itself—as referenced by Kennedy in the quotation at the very opening of this article. The escape is this: The Court could adopt *as a decisional rule*, the principle stated in those italics. This would considerably narrow the reach of *Crawford*, without overruling *Crawford*. It would lessen its restriction on what Kennedy and other of the Justices feel is “good” evidence, and would ease the burdens on law enforcement that are their main concerns. It thus might satisfy Justice Kennedy’s yearning for a “workable” theory of the Confrontation Clause that is not merely “pro-forma,” to use his words from the quotation. In fact, if one pays attention merely to the results of the cases, the italic “rule” is entirely consistent with what the Court is in fact doing.

There are also other ways the Justices could choose to limit the reach of *Crawford* without overruling it. For example, the purpose factor could be interpreted to mean that only if the *sole* purpose was a prosecutorial/evidentiary purpose, would a statement be regarded as testimonial. This would exclude from the concept of testimonial, a wide variety of statements, such as, among others, 911 calls with a mixed emergency and evidentiary or incriminatory purpose; statements about sexual or physical abuse to medical personnel who may or may not be nominated by police but where there is both a treatment motive and an accusatory or evidentiary motive, on the part of either the patient or the medical person; and statements describing the assailant made on the scene to police by someone seriously injured in a shooting while the gunman has escaped but is still at

interrogation/questioning factor); *Bryant*, the case involving the bleeding victim on the street where the statement was deemed necessary to handle the extended emergency of finding an armed criminal on the loose (where the absent factor or factors were the primary prosecutorial intent/knowledge/purpose factor, and *arguably* the formality/solemnity/structured factor); and the lab test report in *Williams* (where the four Justices in the plurality felt the intent/knowledge/purpose factor was not present, adopting the “target” version of that factor, and where Justice Thomas, the fifth vote, felt, somewhat strainedly, that the formality/solemnity/structured factor was not present). The questioning/interrogation factor probably would be deemed present where a report is asked for by enforcement authorities as in *Williams* and the other forensic reports cases so far.

The four factors indicating testimoniality (prosecutorial purpose, government involvement, formality, and questioning) will normally go together. An officially sponsored session will normally mean there is some degree of formality, the government is involved, the purpose is evidently a law purpose, and there will be some questioning. But not inevitably so, as this footnote and the preceding one show. A test case of our italicized “rule” would be how the Supreme Court would treat a statement by one friend to another over the back fence or in the workplace hallway or at the water cooler, or on the street, where the intention is purposely to incriminate a third party, the criminal defendant—perhaps in the thought that it might get to authorities. There would be no government involvement in the obtaining of the statement at the time, no formal, structured, solemn proceeding of any kind, and no questioning. The only one of the four factors of testimoniality present, would be that of purpose/intention. Under our proposed “rule”, the statement should not be regarded as testimonial. Yet there is a substantial chance it might be because the intention/purpose factor has loomed large in the cases.

large, that have *both* a resolving-emergency aspect (a health need-for-treatment emergency on the part of the victim, or a danger-to-public emergency because a gunman is still at large).

Another way to limit the potential reach of the concept of testimonial would be to confine the purpose factor to the purpose of the declarant, which actually makes a great deal of sense in view of the wording, history and purpose of the Confrontation clause. There are other ways that *Crawford* could be restricted without overruling it.

Conclusion

It is not certain any of these “adjustments” to *Crawford* will be adopted as the way out of the perceived “box.” There may be other or more drastic measures taken. Even outright overruling.

While it is too early to tell with exactitude where the cases will go from here, it seems clear that there has been a retrenchment of sorts since the ringing rhetoric of *Crawford* and its strong promise of a relatively unqualified right to confrontation. The thirst for retrenchment is most evident in the forensic reports area, with the result that there will very likely be more retrenchment in that area, and perhaps beyond, in the near future.

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