



# Confrontation Clause Update: *Williams v. Illinois* and What It Means for Forensic Reports

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## Introduction

In 2004, the United States Supreme Court decided *Crawford v. Washington*,<sup>1</sup> a blockbuster decision that overruled the *Ohio v. Roberts*<sup>2</sup> reliability test that formerly applied to the Sixth Amendment's Confrontation Clause and adopted an entirely new analysis. Simply put, under the new *Crawford* analysis, a testimonial hearsay statement by a person who does not testify at trial is inadmissible unless the prosecution establishes unavailability and a prior opportunity to cross-examine.<sup>3</sup> *Crawford*'s dramatic impact on the criminal justice system cannot be questioned. Ample statistics back up this claim, among them, this: Westlaw reports that since 2004 a jaw-dropping 32,700 citing references have been made to the *Crawford* decision.

Also since 2004, the Court has issued numerous follow-up decisions. Each answered some questions about the new analysis but also generated new areas of confusion. No case, however, aside from *Crawford*, has created quite as much confusion as the Court's latest, *Williams v.*

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1. 541 U.S. 36 (2004).

2. 448 U.S. 56 (1980).

3. Elsewhere I have written in greater detail about the new *Crawford* test and the exceptions to it. See JESSICA SMITH, *CRAWFORD V. WASHINGTON: CONFRONTATION ONE YEAR LATER* (UNC School of Government, Apr. 2005), <http://shopping.netsuite.com/s.nl/c.433425/it.A/id.4164/f>; JESSICA SMITH, *EMERGING ISSUES IN CONFRONTATION LITIGATION: A SUPPLEMENT TO CRAWFORD V. WASHINGTON: CONFRONTATION ONE YEAR LATER* (UNC School of Government, Mar. 2007), <http://shopping.netsuite.com/s.nl/c.433425/it.A/id.4165/f>; Jessica Smith, *Crawford Primer: The New Confrontation Clause Analysis*, in *THE SURVIVAL GUIDE: SUPERIOR COURT JUDGES' BENCHBOOK* (Sept. 2009), [www.sog.unc.edu/node/2197](http://www.sog.unc.edu/node/2197); Jessica Smith, *Understanding the New Confrontation Clause Analysis: Crawford, Davis, and Melendez-Diaz*, ADMIN. JUST. BULL. 2010/02 (Apr. 2010), <http://sogpubs.unc.edu/electronicversions/pdfs/aojb1002.pdf> [hereinafter Smith, *Understanding the New Confrontation Analysis*]. My blog posts addressing case-specific updates and related legislation can be found at the North Carolina Criminal Law, UNC School of Government Blog, <http://nccriminallaw.sog.unc.edu>; enter "Crawford" in the search box.

Illinois.<sup>4</sup> Like *Melendez-Diaz v. Massachusetts*<sup>5</sup> and *Bullcoming v. New Mexico*<sup>6</sup> before it, *Williams* dealt with the status of forensic reports under the Confrontation Clause. *Williams* held that the defendant's Confrontation Clause rights were not violated when the State's DNA expert testified to an opinion based on a report done by a non-testifying analyst. The case is important because neither *Melendez-Diaz* nor *Bullcoming* addressed the issue of whether a forensic expert could testify at trial to an independent opinion based on reports prepared by other analysts who did not themselves testify.<sup>7</sup> But because *Williams* is a fractured decision in which no one line of reasoning garnered a five-vote majority, it has resulted in confusion and uncertainty. This bulletin discusses *Williams* and addresses its implications on criminal cases in North Carolina.

## Overview of *Williams*

### The Facts

In *Williams*, the defendant Sandy Williams was charged with, among things, sexual assault of victim L.J. After the incident in question, L.J. was taken to the emergency room, where a doctor performed a vaginal exam and took vaginal swabs. The swabs and other evidence were sent to the Illinois State Police (ISP) Crime Lab for testing and analysis. An ISP forensic scientist, Brian Hapack, confirmed the presence of semen in the swabs. About six months later, the defendant was arrested on unrelated charges and a blood sample was drawn from him pursuant to a court order. State forensic analyst Karen Abbinanti extracted a DNA profile from the sample and entered it into the ISP Crime Lab database. Meanwhile, L.J.'s swabs from the earlier incident were sent to Cellmark Diagnostic Laboratory for DNA analysis. Cellmark returned the swabs to the ISP Crime Lab, having derived a DNA profile for the person whose semen was recovered from L.J. Sandra Lambatos, a forensic specialist at the ISP lab, conducted a computer search to see if the Cellmark profile matched any of the entries in the state DNA database. The computer showed a match to the profile produced by Abbinanti from the defendant's blood sample. The police then conducted a lineup, and L.J. identified the defendant as her assailant. The defendant was charged and in lieu of a jury trial chose to be tried before a state judge, as apparently was permissible in that jurisdiction.

### The Trial

At the defendant's bench trial, the State offered three expert forensic witnesses. First, Hapack testified that through an acid phosphatase test he confirmed the presence of semen on the vaginal swabs taken from L.J. He then resealed the evidence and left it in a secure ISP lab freezer. Second, Abbinanti testified that she used Polymerase Chain Reaction (PCR) and Short Tandem Repeat (STR) techniques to develop a DNA profile from the blood sample that was drawn from the defendant after his arrest, which she then entered into the state forensic database.

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4. 567 U.S. \_\_\_, 132 S. Ct. 610 (2012).

5. 557 U.S. 305 (2009).

6. 564 U.S. \_\_\_, 131 S. Ct. 2705 (2011).

7. *Bullcoming*, 564 U.S. \_\_\_, 131 S. Ct. 2705 (Sotomayor, J., concurring) (noting: "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").

Third, Lambatos testified as an expert for the State. On direct examination Lambatos explained how PCR and STR techniques are used to generate DNA profiles from forensic samples, such as blood and semen, and how DNA profiles could be matched to an individual based on the person's unique genetic code. Lambatos stated that when comparing DNA profiles it is a "commonly accepted" practice within the scientific community for one DNA expert to rely on another DNA expert's records. Lambatos testified that Cellmark was an accredited lab and that the ISP lab routinely sent evidence samples to Cellmark for DNA testing by Federal Express to expedite the process and reduce lab backlog. To keep track of evidence samples and preserve the chain of custody, analysts relied on sealed shipping containers and labeled shipping manifests. Lambatos added that experts in her field regularly rely on such protocols. When Lambatos was shown shipping manifests that were admitted into evidence as business records, she explained that they showed that the ISP lab had sent L.J.'s vaginal swabs to Cellmark and that Cellmark returned them, along with a determined male DNA profile. The prosecutor then asked Lambatos, "Did you compare the semen that had been identified by Brian Hapack from the vaginal swabs of [L.J.] to the male DNA profile that had been identified by Karen [Abbinanti] from the blood of [the defendant]?" Lambatos answered "Yes." She testified that, based on her own comparison of the two profiles, she "concluded that [the defendant] cannot be excluded as a possible source of the semen identified in the vaginal swabs" and that the probability of the profile appearing in the general population was "1 in 8.7 quadrillion black, 1 in 390 quadrillion white, or 1 in 109 quadrillion Hispanic unrelated individuals." Asked whether she would "call this a match to [the defendant]," Lambatos answered affirmatively. The Cellmark report itself was neither admitted into evidence nor shown to the trial judge. Lambatos did not quote or read from the report, nor did she identify it as the source of any of the opinions she expressed.

On cross-examination, Lambatos confirmed that she did not conduct or observe the testing on the vaginal swabs and that her testimony relied on the DNA profile produced by Cellmark. She stated that she trusted Cellmark to do reliable work because it was an accredited lab but admitted that she had not seen Cellmark's calibrations or work in connection with the analysis at issue. Asked about potential degradation of the DNA sample, Lambatos indicated that while technically possible, she strongly doubted degradation had occurred for two reasons. First, the ISP lab likely would have noticed the degradation before sending the evidence to Cellmark. Second, Lambatos noted that the data making up the DNA profile would exhibit certain telltale signs if the sample had been degraded: the visual representation of the DNA sequence would exhibit "specific patterns" of degradation, which she "didn't see any evidence" of from looking at the profile that Cellmark produced.

When Lambatos finished testifying, the defense moved to exclude her testimony regarding the Cellmark testing, arguing that it violated the Confrontation Clause. The objection was overruled, and the defendant was convicted.

### **Direct Appeal**

On appeal to the Illinois Supreme Court the defendant again argued that Lambatos's testimony violated his Confrontation Clause rights. The Illinois court disagreed, reasoning that because the Cellmark report supplied a basis for Lambatos's opinion it was not admitted for the truth of the matter asserted. The United States Supreme Court granted certiorari.

## The U.S. Supreme Court's Decision in *Williams*

The United States Supreme Court affirmed the judgment below. Justice Alito wrote the plurality opinion, which was joined by Chief Justice Roberts and Justices Kennedy and Breyer. The plurality determined that no Confrontation Clause violation occurred for two reasons. First, the Cellmark report fell outside of the scope of the Confrontation Clause because it was not used for the truth of the matter asserted. Second, no Confrontation Clause violation occurred because the report was non-testimonial. Justice Thomas concurred in judgment only. He agreed that the report was non-testimonial, though he reached this conclusion through different reasoning. Thomas disagreed with the plurality's conclusion that the report was not used for the truth for the matter asserted. Justices Kagan, Scalia, Ginsburg, and Sotomayor dissented. The sections below explore the opinions in more detail.

### The Plurality

The plurality first determined that the Cellmark report fell outside of the scope of the Confrontation Clause because it was not used for the truth of the matter asserted. The plurality noted that for more than two hundred years evidence law has allowed testimony like that at issue in the case before it:

Under settled evidence law, an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true. It is then up to the party who calls the expert to introduce other evidence establishing the facts assumed by the expert. While it was once the practice for an expert who based an opinion on assumed facts to testify in the form of an answer to a hypothetical question, modern practice does not demand this formality and, in appropriate cases, permits an expert to explain the facts on which his or her opinion is based without testifying to the truth of those facts. That is precisely what occurred in this case, and we should not lightly sweep away an accepted rule governing the admission of scientific evidence.<sup>8</sup>

Concluding that this type of expert testimony does not violate the Confrontation Clause, the plurality explained that the clause “has no application to out-of-court statements that are not offered to prove the truth of the matter asserted.”<sup>9</sup>

The plurality distinguished the Court's prior decisions in *Bullcoming* and *Melendez-Diaz*, characterizing them as involving forensic reports that were introduced for the truth of the matter asserted: in *Bullcoming*, that the defendant's blood alcohol level exceeded the legal limit; in *Melendez-Diaz*, that the substance in question was cocaine.<sup>10</sup> Here, however, the plurality explained, “An expert witness referred to the report not to prove the truth of the matter asserted in the report, *i.e.*, that the report contained an accurate profile of the perpetrator's DNA, but only to establish that the report contained a DNA profile that matched the DNA profile deduced from petitioner's blood.”<sup>11</sup>

As a second independent basis for its decision, the plurality concluded that even if the report had been used for the truth of the matter asserted, no Confrontation Clause violation occurred

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8. *Williams*, 567 U.S. \_\_\_, 132 S. Ct. 610, slip op at 2–3 (citation and quotation omitted).

9. *Id.* at 3.

10. *Id.* at 25.

11. *Id.* at 26.

because the report was non-testimonial. The plurality determined that the Confrontation Clause was aimed at addressing two abuses: (1) out-of-court statements that have a primary purpose of accusing a targeted individual of criminal conduct and (2) formalized statements, such as affidavits and confessions.<sup>12</sup> The plurality noted that in *Melendez-Diaz* and *Bullcoming* the forensic reports at issue violated the Confrontation Clause on both grounds: they were affidavits made for the purpose of proving the guilt of an arrested defendant and were done when no emergency was ongoing.<sup>13</sup> It found the Cellmark report distinguishable on both points. The plurality reasoned that the Cellmark report was produced before a suspect was identified, was not sought to obtain evidence against the defendant (who was not even under suspicion at the time) but rather to catch a rapist who was on the loose, and was not inherently inculpatory.<sup>14</sup> The plurality explained:

[T]he primary purpose of the Cellmark report . . . was not to accuse [the defendant] 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 [the defendant], who was neither in custody nor under suspicion at that time. Similarly, no one at Cellmark could have possibly known that the profile that it produced would turn out to inculpate [the defendant]—or for that matter, anyone else whose DNA profile was in a law enforcement database. Under these circumstances, there was no “prospect of fabrication” and no incentive to produce anything other than a scientifically sound and reliable profile.<sup>15</sup>

The plurality continued, noting that DNA profiles have the ability to incriminate and exonerate and that the analysts preparing them “generally have no way of knowing whether it will turn out to be incriminating or exonerating—or both.”<sup>16</sup> The plurality went on to note that “the knowledge that defects in a DNA profile may often be detected from the profile itself provides a further safeguard.”<sup>17</sup> The plurality noted that Lambatos testified that she would have been able to determine whether the Cellmark sample had been degraded. Moreover, it concluded, there was no real chance that sample contamination, switching, mislabeling, or fraud could have occurred in the Cellmark analysis. The plurality explained:

At the time of the testing, [the defendant] had not yet been identified as a suspect, and there is no suggestion that anyone at Cellmark had a sample of his DNA to swap in by malice or mistake. And given the complexity of the DNA molecule, it is inconceivable that shoddy work could somehow produce a DNA profile that just so happened to have the precise genetic makeup of [the defendant], who just so happened to be picked out of a lineup by the victim. The prospect is beyond fanciful.<sup>18</sup>

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12. *Id.* at 29.

13. *Id.* at 30–31.

14. Slip op. at 3.

15. *Id.* at 31.

16. *Id.* at 32.

17. *Id.*

18. *Id.* at 32–33.

Finally, the plurality noted that if these types of reports could not be admitted without calling the analysts who prepared them, economic pressures would force prosecutors to build their cases on less reliable forms of evidence, such as eyewitness testimony.<sup>19</sup>

### Thomas's Concurrence

Justice Thomas concurred in the judgment only. He disagreed with that portion of the plurality opinion concluding that the report was not used for the truth for the matter asserted, stating, "There is no meaningful distinction between disclosing an out-of-court statement so that a factfinder may evaluate the expert's opinion and disclosing that statement for its truth."<sup>20</sup> However, Thomas agreed with the plurality that the report was non-testimonial, though he reached this conclusion through different reasoning. According to Thomas, the report was non-testimonial because it lacked the requisite "formality and solemnity." He noted:

Nowhere does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained. The report is signed by two "reviewers," but they neither purport to have performed the DNA testing nor certify the accuracy of those who did. And, although the report was produced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation.<sup>21</sup>

Thomas distinguished *Melendez-Diaz*, noting that the report there was sworn before a notary by the preparing analyst.<sup>22</sup> As to the report in *Bullcoming*, he noted that though it was unsworn, it included a "Certificate of Analysis" signed by the analyst who performed the testing.<sup>23</sup> By contrast, he noted, the Cellmark report "certifies nothing."<sup>24</sup> He continued: "That distinction is constitutionally significant because the scope of the confrontation right is properly limited to extrajudicial statements similar in solemnity to the Marian examination practices that the Confrontation Clause was designed to prevent."<sup>25</sup> Finally, lest a clever declarant think that he or she can evade the Constitution under Thomas's theory by making his or her report less formal, Thomas precluded that option, stating that "informal statements" are also testimonial when made to "evade the formalized process" previously used to generate them.<sup>26</sup> No other Justice adopted Thomas's test for testimonial evidence.

### Breyer's Concurrence

Justice Breyer joined the plurality opinion but wrote a separate concurring opinion, arguing for additional briefing and reargument on grounds that neither the plurality nor the dissent adequately addresses how the Confrontation Clause applies to forensic reports. He explained:

This case raises a question that I believe neither the plurality nor the dissent answers adequately: How does the Confrontation Clause apply to the panoply

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19. *Id.* at 4.

20. Slip op., Thomas, J., concurring at 3.

21. *Id.* at 9 (citations omitted).

22. *Id.*

23. *Id.*

24. *Id.* at 10.

25. Slip op., Thomas, J., concurring at 10.

26. *Id.* at 9 n.5.

of crime laboratory reports and underlying technical statements written by (or otherwise made by) laboratory technicians? In this context, what, if any, are the outer limits of the “testimonial statements” rule set forth in *Crawford v. Washington*, 541 U.S. 36 (2004)?<sup>27</sup>

Allowing that the plurality’s rule was “artificial,” Breyer determined that the dissent did not offer a viable alternative.<sup>28</sup> He noted that if the traditional “basis of opinion” rule were abandoned, “there would seem often to be no logical stopping place between requiring the prosecution to call as a witness one of the laboratory experts who worked on the matter and requiring the prosecution to call *all* of the laboratory experts who did so.”<sup>29</sup> He noted that laboratory experts regularly rely on technical statements and other experts’ results to form their own opinions and that, in reality, “the introduction of a laboratory report involves layer upon layer of technical statements (express or implied) made by one expert and relied upon by another.”<sup>30</sup> In an appendix, Breyer laid out typical lab procedures, suggesting that anywhere from six to twelve or more technicians might be involved in a single DNA report. Breyer found that neither the plurality nor the dissent adequately explained how *Crawford* applies to such forensic reports and the underlying technical statements made by laboratory technicians. He further noted the pressing nature of the question:

Answering . . . [this] question . . . , and doing so soon, is important. Trial judges in both federal and state courts apply and interpret hearsay rules as part of their daily trial work. The trial of criminal cases makes up a large portion of that work. And laboratory reports frequently constitute a portion of the evidence in ordinary criminal trials. Obviously, judges, prosecutors, and defense lawyers have to know, in as definitive a form as possible, what the Constitution requires so that they can try their cases accordingly.<sup>31</sup>

For these reasons, Breyer argued for additional briefing and reargument.

### The Dissent

Justice Kagan wrote the dissenting opinion and, as noted above, was joined by Justices Scalia, Ginsburg, and Sotomayor. The dissent found the case indistinguishable from *Bullcoming* and *Melendez-Diaz*. The specific aspect of Lambatos’s testimony that troubled the dissent was the fact that Lambatos, not a Cellmark employee, informed the fact finder that the testing of L.J.’s vaginal swabs had produced a male DNA profile implicating the defendant.<sup>32</sup> Kagan explained:

Have we not already decided this case? Lambatos’s testimony is functionally identical to the “surrogate testimony” that New Mexico proffered in *Bullcoming*, which did nothing to cure the problem identified in *Melendez-Diaz* (which, for its part, straightforwardly applied our decision in *Crawford*). Like the surrogate witness in *Bullcoming*, Lambatos could not convey what [the actual analyst]

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27. Slip op., Breyer, J., concurring at 1.

28. *Id.* at 3.

29. *Id.*

30. *Id.* at 4.

31. *Id.* at 7.

32. Slip op., Kagan, J., dissenting at 7.

knew or observed about the events . . . , *i.e.*, the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the testing analyst's part. Like the lawyers in *Melendez-Diaz* and *Bullcoming*, Williams's attorney could not ask questions about that analyst's proficiency, the care he took in performing his work, and his veracity. He could not probe whether the analyst had tested the wrong vial, inverted the labels on the samples, committed some more technical error, or simply made up the results. Indeed, Williams's lawyer was even more hamstrung than Bullcoming's. At least the surrogate witness in *Bullcoming* worked at the relevant laboratory and was familiar with its procedures. That is not true of Lambatos: She had no knowledge at all of Cellmark's operations. Indeed, for all the record discloses, she may never have set foot in Cellmark's laboratory.<sup>33</sup>

Kagan scoffed at the plurality's "not for the truth" rationale, reasoning that the use of the Cellmark report was "bound up with its truth."<sup>34</sup> In Kagan's view, Lambatos did not merely assume that the Cellmark DNA profile came from L.J.'s vaginal swabs but, rather, "affirmed, without qualification, that the Cellmark report showed 'a male DNA profile found in semen from the vaginal swabs of [L.J.]'"<sup>35</sup> Significantly, Kagan continued:

Had she done otherwise, this case would be different. There was nothing wrong with Lambatos's testifying that two DNA profiles—the one shown in the Cellmark report and the one derived from Williams's blood—matched each other; that was a straightforward application of Lambatos's expertise. Similarly, Lambatos could have added that *if* the Cellmark report resulted from scientifically sound testing of L.J.'s vaginal swab, *then* it would link Williams to the assault. What Lambatos could not do was what she did: indicate that the Cellmark report *was* produced in this way by saying that L.J.'s vaginal swab contained DNA matching Williams's. By testifying in that manner, Lambatos became just like the surrogate witness in *Bullcoming*—a person knowing nothing about "the particular test and testing process," but vouching for them regardless. We have held that the Confrontation Clause requires something more.<sup>36</sup>

As to the plurality's rationale that the report was non-testimonial because it was not prepared for the primary purpose of accusing a targeted individual, Kagan derided, "Where that test comes from is anyone's guess."<sup>37</sup> Kagan also rejected the plurality's suggestion that the report was prepared to respond to an ongoing emergency and that it was inherently reliable. Finally, Kagan rejected Thomas's proposed approach.

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33. *Id.* at 7–8 (citations and quotations omitted).

34. *Id.* at 12.

35. *Id.*

36. *Id.* at 12–13 (footnote and citation omitted).

37. *Id.* at 18.

## ***Williams's* Implications for North Carolina Criminal Cases**

### **What's the Law?**

As indicated above, *Williams* was a plurality opinion with Thomas concurring in judgment only. In this scenario, the narrowest rationale supporting the holding of the case prevails.<sup>38</sup> Considering *Williams*, however, it is not clear which rationale supporting the holding is the narrowest. Recall that the four-Justice plurality found that no confrontation violation occurred for two reasons: that the report was not used for the truth of the matter asserted and that it was non-testimonial. Assuming that the “not for the truth” rationale could even qualify as the narrowest ground supporting the holding given that it was expressly rejected by Thomas, it is broader than the non-testimonial approach. The “not for the truth” rationale would allow in all forensic reports used as the basis of a testifying expert’s opinion. The non-testimonial approach would allow in only those reports that qualify as non-testimonial. Recall, also, that the plurality and Thomas did not agree as to why the Cellmark report was non-testimonial. The plurality concluded that the report was non-testimonial because it was not accusatory, was produced when the perpetrator was at large and before the defendant was under suspicion, and was not inherently incriminatory. Thomas, on the other hand, concluded that the report was non-testimonial because it lacked sufficient formality and solemnity. Although these rationales overlapped in this particular case, it is not clear that one is broader than the other. Thus, *Williams* might present a situation where rather than having broader and narrower opinions, the opinions are just different. If that is the case, the decision will not stand for a lot more than as the resolution of this particular dispute and possibly others involving very similar facts. Specifically, that no Confrontation Clause violation occurs when (1) a testifying expert states that she found a match between two DNA profiles and that one of the profiles was produced from certain evidence, (2) the testifying expert was not involved in producing the profile, (3) the profile was produced before the defendant was identified as a suspect, and (4) the analyst who did the testing did not have a matching profile for comparison. Amplifying the uncertainty of the case’s impact is the obvious philosophical schism at the high Court regarding the parameters of the new *Crawford* rule. With *Williams*, the four dissenters in *Melendez-Diaz* and *Bullcoming* are now in the plurality, able to capture Thomas’s fifth vote as to the holding but without support to overrule or clearly limit those decisions. With no reason to suspect that this conflict will be soon resolved, more uncertainty is the only certainty.

### **What about Existing N.C. Appellate Cases?**

In North Carolina, a host of post-*Crawford* appellate cases hold that no confrontation violation occurs when a substitute analyst relies on forensic reports done by non-testifying analysts.<sup>39</sup> These cases rely on the rationale that the reports were not admitted for their truth but, rather, as the basis of the testifying expert’s opinion. This rationale, however, was rejected by five members of the Court in *Williams*, and thus these cases, while not technically overruled, stand on very shaky ground. That does not mean that the cases will necessarily come out differently—after

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38. *Marks v. United States*, 430 U.S. 188, 193 (1977) (when no single rationale supporting the result gets five votes, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds” (quotation omitted)).

39. Smith, *Understanding the New Confrontation Clause Analysis*, *supra* note 3, at 18 & n.89 (discussing these cases).

all, *Williams* involved this exact type of testimony and no confrontation violation was found. The point is that the rationale of the existing North Carolina cases is likely to be held invalid. It would thus be a strategic blunder for the State to rely on this ground for admissibility and for the defense to fail to contest reliance on this authority.

### **Does the Fact that *Williams* Was a Bench Trial Matter?**

In the context of discussing the “not for the truth” rationale—a rationale that did not find support from five Justices—the *Williams* plurality emphasized the ability of the trial judge as fact finder to parse out which portions of Lambatos’s testimony were offered for the truth versus as a basis of her opinion. However, the plurality went on to clarify: “We do not suggest that the Confrontation Clause applies differently depending on the identity of the factfinder.”<sup>40</sup> Thus, the fact that *Williams* was a bench trial would seem to have no significance in the confrontation analysis.

### **Are N.C.’s Notice and Demand Statutes Affected by *Williams*?**

No. Under those statutes, the State can procure a waiver of the defendant’s confrontation rights by properly serving the defendant with notice of its intent to introduce into evidence a forensic report without the presence of the preparer. If the defendant fails to object within a specified period of time, the defendant is deemed to have waived his or her confrontation rights. However, if the defendant lodges a timely objection, no waiver occurs. No such statute was at issue in *Williams*, and none of the opinions mentioned them. *Williams* thus has no impact of the validity of these statutes.<sup>41</sup>

### **Does *Williams* Affect *Melendez-Diaz* and *Bullcoming*?**

No clear reasoning emerged from *Williams*, and it is not certain what if any precedential value the case will have. *Melendez-Diaz* and *Bullcoming* are still valid, but *Williams* seems to have limited them in some way. As Justice Kagan put it in her dissent, *Melendez-Diaz* and *Bullcoming* “apparently no longer mean all that they say. Yet no one can tell in what way or to what extent they are altered because no proposed limitation commands the support of a majority.”<sup>42</sup> At a minimum, *Williams* seems to have carved out an exception to those cases that would apply to situations that track *Williams*’s particular fact pattern: while testifying that she found a match between two DNA profiles, an expert states that one of the profiles was produced from certain evidence; the testifying expert was not involved in producing that profile; it was produced before the defendant was identified as a suspect, and the analyst who did the testing did not have a matching profile for comparison.

### **What Does *Williams* Mean for “Multi-Analyst” Cases?**

*Williams* was a multi-analyst case in which no less than four analysts were involved in the testing (the Cellmark analyst, Hapack, Abbinanti, and Lambatos). Thomas’s opinion suggests that in fact two Cellmark analysts were involved.<sup>43</sup> In his concurring opinion, Justice Breyer posits that

40. Slip op. at 19 n.4.

41. For more information about North Carolina’s notice and demand statutes, see Smith, *Understanding the New Confrontation Analysis*, *supra* note 3, at pp. 21–26.

42. Slip op., Kagan, J., dissenting at 25.

43. Slip op., Thomas, J., concurring at 9 (noting that the report was signed by two “reviewers”).

in the typical case involving DNA analysis as many as twelve analysts may be involved.<sup>44</sup> Given the fractured nature of the case and its questionable value as precedent, how should multi-analyst cases be litigated? This section explores the possibilities.

### ***The Gold Standard: The Prosecution Calls All of the Analysts***

In *Williams*, one analyst (Hapack) determined that the swabs contained semen. A second analyst (a Cellmark employee) produced a DNA profile from the semen. A third analyst (Abbinanti) produced a DNA profile from the defendant's blood sample. And a fourth analyst (Lambatos) compared the two profiles. The confrontation issue arose in *Williams* because although the prosecution called analysts one, three, and four, it did not call analyst two. Had analyst two been called, a confrontation issue would not have arisen. Thus, the gold standard for the State in a multi-analyst case is to call as witnesses all of the analysts involved in the testing.

### ***For Risk Takers: Rely on Williams***

In *Williams*, the State did not follow the gold standard approach and the conviction was upheld. Given the fractured nature of the decision and its questionable value as precedent, a risk-averse prosecutor will not be willing to rely on *Williams* in an important case. But even if the prosecutor is a risk taker, it is not clear how many analysts the prosecution can do without.<sup>45</sup> In *Williams*, only one analyst was missing. It is not clear that *Williams* would have come out the same way if, for example, Lambatos had been the only analyst to testify.

### ***When One of the Analysts Is Unavailable***

Situations will arise in which it will not be possible for the prosecutor to call all of the analysts, even if he or she wants to do so. This could occur, for example, if one of the original analysts is deceased or serving National Guard duty abroad. In such a situation, the prosecution has a few possible alternatives. A discussion of each follows.

**Retesting.** The best option for the State when an analyst is unavailable is to have the evidence retested and to call the analyst who does the retesting to testify at trial. If that option can be taken, there will be no conflict with the Confrontation Clause.

**Substitute Analysts.** In situations where the relevant lab lacks capacity to retest or the evidence has been consumed or degraded such that retesting is not possible, the prosecution has little choice other than to call a substitute analyst. As has been noted, because of the fractured nature of the opinion and its questionable value as precedent, *Williams* did not advance our understanding of the permissible scope of substitute analyst testimony. As also noted, some risk-taking prosecutors may choose to present their case, as was done in *Williams*, and hope for the best. A modification to that approach, however, is worth examining.

The dissent objected to that portion of Lambatos's testimony affirmatively stating that Cellmark generated the DNA profile from the semen on L.J.'s swab. But even the dissenters would have approved of Lambatos's testimony if she had merely opined that the DNA profile produced by Cellmark matched that produced by the ISP lab but had not commented on the source of the

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44. Slip op., Breyer, J., concurring at 5 & App. A.

45. Slip op., Breyer, J., concurring at 4 (writing separately to emphasize that neither the plurality opinion nor Thomas's concurring opinion gives adequate guidance on how to deal with multi-analyst cases); slip op., Kagan, J., dissenting at 18 n.4 (noting that none of the Court's cases addresses the issue of how many analysts must be called to testify regarding a particular report).

DNA (from L.J.'s vaginal swabs). Thus, a majority of the Court would appear to approve of the following testimony:

Q: Did you develop a match between the DNA profile provided by the Cellmark analyst and DNA profile provided by Ms. Abbinanti?

A: Yes, I did.<sup>46</sup>

Furthermore, Kagan stated that “Lambatos could have added that *if* the Cellmark report resulted from scientifically sound testing of L.J.'s vaginal swab, *then* it would link Williams to the assault.”<sup>47</sup> This could be read as suggesting that careful direct-examination may render the testimony consistent with the Confrontation Clause. But such a statement should be qualified in the strongest possible way: it is not the holding of the case; it is a proposition gleaned from a fractured, confusing decision of questionable precedential value.

Even if this testimony is admissible, there remains the issue of authentication, which is necessary to establish its relevance.<sup>48</sup> Absent the missing analyst, the prosecution could possibly authenticate the DNA profile through careful chain of custody evidence.<sup>49</sup> Chain of custody information, of course, is itself testimonial and therefore requires a live witness.<sup>50</sup>

Even if chain of custody is established, evidence Rule 403 might bar admissibility.<sup>51</sup> In addition, as a practical matter the defense may be able to severely undercut the value of the evidence through skillful cross-examination that undermines key assumptions supporting the expert's opinion (such as the provenance of the sample and the quality of the testing).

**Forgoing the Forensic Evidence.** The option of forgoing forensic evidence was foreshadowed in the opinions of the plurality and Justice Breyer.<sup>52</sup> Clearly there will be no Confrontation Clause issue if the State abandons the forensic evidence.

### What Does *Williams* Mean for “Single-Analyst” Cases?

Some forensic tests typically involve only one analyst.<sup>53</sup> The gold standard for these cases is the same as for multi-analyst cases: for the prosecution to call the original analyst. When that is not possible, retesting is the next best option, as it is for multi-analyst cases. Where the State does not wish to forgo using the evidence and neither calling the original analyst nor retesting is feasible, the question becomes: can a substitute analyst testify? Assuming that *Williams* ends up

46. Slip op. at 17–18; slip op., Kagan, J., dissenting at 12 (“There was nothing wrong with Lambatos’s testifying that two DNA profiles—the one shown in the Cellmark report and the one derived from Williams’s blood—matched each other.”).

47. Slip op., Kagan, J., dissenting at 12.

48. Slip op. at 24 (“Of course, Lambatos’ opinion would have lacked probative value if the prosecution had not introduced other evidence to establish the provenance of the [DNA] profiles . . .”).

49. In *Williams*, the plurality thought this occurred. Slip op. at 20 n.6 & 22–23 (noting that in *Williams* the foundational fact that one of the profiles came from the defendant and that the other came from the semen on the swabs was established by chain of custody information).

50. Smith, *Understanding the New Confrontation Analysis*, *supra* note 3 at 17.

51. *See, e.g.*, State v. King, No. 385A11 (N.C. filed June 14, 2012) (trial court did not abuse its discretion by excluding the State’s expert testimony regarding repressed memory under Rule 403).

52. Slip op. at 4; slip op., Breyer, J., concurring at 13.

53. Slip op. at 31 (noting that drug tests and tests to determine blood-alcohol level are generally performed by a single analyst).

having some small value in the multi-analyst case, its value is likely to be even more attenuated in the single-analyst scenario. *Williams* involved a scenario in which three of the four analysts involved actually testified at trial. If a single analyst is unavailable in a single-analyst case, procuring even one witness who was actually involved in the testing will be impossible, and thus this scenario is significantly different from that in *Williams*. Nevertheless, some may rely on the language noted above from Justice Kagan's dissent to suggest a possible path for admissibility: "Lambatos could have added that *if* the Cellmark report resulted from scientifically sound testing of L.J.'s vaginal swab, *then* it would link Williams to the assault."<sup>54</sup> Suppose, for example, that the original analyst in a drug case (Analyst A) is unavailable and the evidence was consumed in testing. Suppose further that the State offers an evidence custodian from the lab who establishes chain of custody of the tested sample and that this evidence is deemed sufficient to establish the provenance of the test results.<sup>55</sup> The judge then qualifies Analyst B as an expert substitute analyst. Analyst B works in the same lab that did the testing. Analyst B testifies that lab protocol requires that five specific tests must be done to determine whether a substance is cocaine. Analyst B then describes those tests and their implications. Analyst B then testifies:

A: If Analyst A in fact performed the tests as indicated, if they were performed according to lab protocol and in a scientifically sound manner, and if Analyst A properly recorded the results of the tests that were done, I would conclude, based on these results reported, that the substance was cocaine.

Because even the *Williams* dissenters would appear to approve of this testimony, the argument would seem to have legs. But the qualifier noted above as to the related argument in the multi-analyst discussion applies here as well: this is not the holding of the case; it is a proposition gleaned from a fractured, confusing decision of limited procedural value. Of course, even if this testimony were permissible under the Confrontation Clause, the trial judge might exclude it under Rule 403.<sup>56</sup> And even if it is not excluded under the evidence rules, the defense would have a field day on cross-examination, with questioning along these lines:

Q: Can you personally verify that the five required tests were done?

A: No.

Q: Can you personally verify that the tests were done according to lab protocol?

A: No.

Q: Can you personally verify that Analyst A properly recorded the tests?

A: No.

Thus, even if the testimony is permissible—and that is a big *if*—it is not clear that it would ultimately aid the prosecution.

54. Slip op., Kagan, J., dissenting at 12.

55. See slip op. at 20 n.6 & 22–23 (noting that in *Williams* the foundational fact that one of the profiles came from the defendant and that the other came from the semen on the swabs was established by chain of custody information).

56. See, e.g., *King*, No. 385A11 (trial court did not abuse its discretion by excluding the State's expert testimony regarding repressed memory under Rule 403).

### Does *Williams* Affect Other “Not for the Truth” Decisions?

*Crawford* noted that the use of testimonial statements for purposes other than establishing the truth of the matter asserted does not violate the Confrontation Clause.<sup>57</sup> Since *Crawford*, courts have found that when evidence is admitted for a purpose other than the truth of the matter asserted, it falls outside of the scope of the *Crawford* rule. Such purposes have included

- basis of an expert’s opinion,
- impeachment, and
- corroboration.<sup>58</sup>

The basis of an expert’s opinion exception was at the heart of *Williams*, and this first rationale offered by the plurality failed to secure at least five votes. It thus is of questionable viability. However, all of the Justices appear to agree that evidence offered for impeachment purposes still falls outside of the Confrontation Clause.<sup>59</sup> It is not clear whether they will come to the same conclusion regarding corroborative evidence.

### What’s on the Horizon?

First, more litigation. We still do not have clear direction from the high Court on how to deal with substitute analysts. Thus, there will be more litigation as the lower courts try to sort out the law. Second, more fractured opinions from the high Court. *Crawford* was decided in 2004. Since then the Court’s composition has changed, and Justice Scalia’s “stronghold” on Confrontation Clause doctrine has eroded, evidenced by, among other things, his now repeated position in the dissent. Furthermore, some members of the Court are open to reconsidering the issues.<sup>60</sup> All of this suggests that the conflict among the Justices will not soon be resolved.

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57. *Crawford*, 541 U.S. at 59–60 n.9.

58. Smith, *Understanding the New Confrontation Analysis*, *supra* note 3 at 18–20.

59. Slip op. at 2–3; slip op., Thomas, J., concurring at 3 (calling this a “legitimate nonhearsay purpose”); slip op., Kagan, J., dissenting at 9–10.

60. Slip op. at 29 n.13 (“Experience might yet show that the holdings in those cases should be reconsidered for the reasons, among others, expressed in the dissents the decisions produced.”); slip op., Breyer, J., concurring at 7–8 (advocating for reargument so that the Court can consider any “necessary modification of statements” in earlier *Crawford* cases).

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