The Admissibility of Laboratory Reports: The *Melendez-Diaz*, *Bullcoming*, and *Williams* Cases

Facts and Issues Summarized

Melendez-Diaz v. Massachusetts[a]

In 2001, after setting up surveillance of a suspected drug transaction, police officers in Boston, MA, seized four plastic bags containing a substance believed to be cocaine from a suspected drug buyer. The police arrested the suspected drug buyer and sellers, including Luis Melendez-Diaz, and placed them in a police car for transport to the police station. After the suspects were taken into the station, the officers found 19 plastic bags containing a similar substance in the partition between the front and back seats of the police car. All 23 plastic bags were submitted to the state crime laboratory for analysis of the substance. The police charged Luis Melendez-Diaz in Massachusetts state court with distributing cocaine, in connection with the four bags seized from the suspected drug buyer, and with trafficking an amount of cocaine within a specific weight range, in connection with the 19 plastic bags recovered from the partition in the police car.

At the trial, the prosecution introduced the laboratory reports of the state forensic analysts that identified the substance in the 23 plastic bags seized by the Boston police as cocaine and reported the total weight of the evidence. Consistent with Massachusetts law, the reports were in the form of an affidavit, signed by the forensic laboratory analysts before a notary public. The prosecution did not call the analysts to testify and relied on the forensic reports to prove that the substance was cocaine of a certain weight. The defense objected, arguing that the analysts were required to testify in person and that the admission of the forensic reports without the testimony of the analysts violated Melendez-Diaz's right to confrontation guaranteed by the Sixth Amendment to the US Constitution. The trial court overruled the objection and admitted the forensic reports in accordance with state law as "prima facie evidence of the composition … and net weight" of the analyzed substance. Melendez-Diaz was convicted of the charges and appealed his convictions.

The Massachusetts Court of Appeals affirmed the convictions, relying on a prior state court decision holding that the Sixth Amendment did not require the in-court testimony of the analysts for the admission of the forensic reports. The Massachusetts Supreme Court denied review in the case and Melendez-Diaz appealed to the US Supreme Court.

The US Supreme Court reversed the convictions, holding that the admission of the forensic reports violated Melendez-Diaz's Sixth Amendment right to confront the witnesses against him. Writing for the majority, Justice Scalia determined that the case involved a straightforward application of the Court's holding in *Crawford v. Washington* [1]. Because the forensic reports fell within the "core class of testimonial statements," the analysts were "witnesses" for purposes of the Sixth Amendment, entitling the defendant to "be confronted with" them at the trial [2]. The admission of the forensic reports without the in-court testimony of the analysts violated Melendez-Diaz's Sixth Amendment right to confrontation. The judgment of the state court was reversed, and the case was remanded for further proceedings consistent with the Supreme Court's opinion. On remand, the Court of Appeals of Massachusetts reversed the convictions, holding that the violation of Melendez-Diaz's right to confrontation was not a harmless error because "the only material evidence that the substances were cocaine, and that they weighed specific amounts, was contained in the (forensic reports)," which had been improperly admitted [3].

Bullcoming v. New Mexico[b]

In 2005, Donald Bullcoming was the driver of a vehicle involved in a traffic accident. Officers arrested Bullcoming for driving under the influence and a blood test was administered to determine blood alcohol content (BAC). The blood sample was delivered to the New Mexico Department of Health, Scientific Laboratory Division (SLD) and Curtis Caylor analyzed the sample using gas chromatography and completed a "certificate of analyst" with the recorded 0.21 BAC. The BAC certificate contained additional

statements concerning chain of custody, procedural compliance, the analyst's qualifications, and an assertion of validity of the statements in the certificate [4].

At trial, the prosecution did not call Caylor to testify, and over defense objection, the trial court admitted the BAC certificate as a "business record" through the testimony of another SLD analyst (Razatos) who had neither observed nor reviewed Caylor's analysis of Bullcoming's sample. The jury convicted Bullcoming of aggravated DWI based on the BAC finding.

The New Mexico Courts of Appeals affirmed the conviction, finding that "the blood alcohol report in the present case was non-testimonial and prepared routinely with guarantees of trustworthiness" [5].

While Bullcoming's appeal to the New Mexico Supreme Court was pending, the *Melendez-Diaz* decision was handed down. The New Mexico Supreme Court recognized that the Court of Appeals decision that the BAC certificate was "non-testimonial" was clearly erroneous in light of *Melendez-Diaz*, but upheld the admission of the certificate on different grounds. The New Mexico court found that the certificate merely represented the "scrivener's report" of the gas chromatograph machine results. Because the state called a *surrogate analyst* who could be cross-examined regarding the operation of the machine in general, the defendant had an opportunity to cross-examine a witness on those issues, and therefore, the defendant's confrontation rights were sufficiently preserved [6].

The US Supreme Court reversed the conviction in a 5-4 decision, holding that testimonial laboratory reports cannot be admitted through the testimony of a "surrogate" analyst or supervisor in place of the analyst who authored the laboratory report. The Court dismissed the description of the BAC certificate as "scrivener's report," because the certificate contained more than "a machine-generated number," but emphasized that testimonial reports "drawn from machine-produced data" are not exempt from the Sixth Amendment right of confrontation [7]. The use of a surrogate witness, even an expert witness capable of discussing the scientific procedures generally, did not fulfill the defendant's Sixth Amendment right to confrontation, because the surrogate "could not convey what Caylor knew or observed about the events his certification concerned, i.e., the particular test and testing he employed … [n]or … expose any lapses or lies on the certifying analyst's part" [8]. The Court noted that Razatos had no "independent opinion" concerning the BAC level and emphasized that the constitution "does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination" [9].

Williams v. Illinois[c]

In February, 2000, a woman was raped in Chicago, IL, by an unknown male. Sexual assault kit samples were taken and submitted to a private laboratory (Cellmark Diagnostics) under contract with the Illinois State Police (ISP) to perform DNA analysis. Analysts at Cellmark sent the ISP a report containing a DNA profile produced from the semen detected in the sexual assault kit. Sandra Lambatos did a database search of the state DNA database against the DNA profile contained in the Cellmark report. The database search produced a hit to Sandy Williams's profile. After Williams's arrest, a DNA profile was developed from a sample of his blood by a second ISP analyst, Karen Abbinanti.

At trial, the prosecution called Abbinanti and Lambatos to testify. Abbinanti testified as to her work developing a DNA profile from the sample of Williams's blood after arrest. Lambatos testified that she compared Williams's DNA profile developed by Abbinanti and the evidence DNA profile developed from the sexual assault kit by Cellmark and "concluded that [Williams] cannot be excluded as a possible source of the semen identified in the vaginal swabs [contained in the sexual assault kit submitted to Cellmark]" [10]. She also testified that the relative frequency of the profile in the general population is <1 in 8.7 quadrillion [11].

No one from Cellmark testified and the Cellmark report was not introduced into evidence. Over defense objection, the trial court admitted Lambatos testimony as to the DNA profile developed by Cellmark as "based on her own independent testing of the data received from [Cellmark]" [12]. The Illinois Appellate Court and Supreme Court affirmed the conviction, but on the grounds that Lambatos's testimony did not violate Williams's confrontation rights because the "Cellmar[k] report was not offered for the truth of the matter asserted; rather, it was offered to provide a basis for Lambatos' opinion" [13].

In a fractured opinion, the US Supreme Court affirmed the conviction, although no majority agreed on the rationale for upholding the admission of the expert testimony. Justice Thomas concurred in the result, creating a majority for affirming the conviction, but expressly rejected the plurality's rationale, and no other justice endorsed Thomas's rationale.

The plurality, in an opinion by Justice Alito, determined that Williams's confrontation rights were not violated on two grounds: the Cellmark report was not used for the truth of the matter asserted and the report was non-testimonial [14]. Justice Thomas disagreed with the first ground, but agreed that the report was non-testimonial, although for different reasons [15]. The dissent found the case indistinguishable from *Melendez-Diaz* and *Bullcoming*, rejecting both grounds asserted by the plurality and the reasoning asserted by Justice Thomas [16].

Discussion

The Sixth Amendment of the US Constitution provides seven basic rights to the accused in criminal prosecutions,[d] including the right "to be confronted with the witnesses against him".[e] This right is referred to as the *right to confrontation*, and the provision is known as *the Confrontation Clause*. In 2004, the decision of the US Supreme Court in *Crawford v. Washington* [17] heralded a fundamental shift in the interpretation of the Confrontation Clause [18].[f] For decades, courts had equated the constitutional right to confrontation with a rule of evidence, generally holding that the underlying purpose of the constitutional guarantee of confrontation was to ensure that reliable evidence was presented in the court. Therefore, if the evidence was deemed "trustworthy" through a showing of reliability, the constitutional protection of confrontation was satisfied without the in-court questioning of the witness who was the source of the evidence. This effectively merged the Confrontation Clause with the rules of evidence concerning hearsay; and with limited exceptions, if out-of-court statements were deemed admissible under the rules of evidence governing hearsay, the Confrontation Clause did not require the in-court testimony of the declarant. This now-rejected theory of the purpose of the right to confrontation and the approach to determining the application of the Confrontation Clause was explained by the Supreme Court's decision in *Ohio v. Roberts*:

> [A non-testifying witness's] statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness [19].

State and federal courts easily applied the *Roberts* test using the hearsay exceptions provided by rules of evidence and other hearsay exceptions recognized by case law.

In *Crawford*, the Court revisited the Confrontation Clause, discerning a purpose consistent with the procedural nature of the rights provided in the Sixth Amendment. The right to confrontation was not satisfied merely by considering the "reliability" of the statements to be presented; the right to confrontation required the reliability of the statements to be assessed by a particular procedure – by the in-court presentation of witness testimony subjected to the rigors of cross-examination [20]. The prosecution must present the live testimony of its witnesses in-court and the witnesses must be subject to cross-examination. For out-of-court statements, the Court effectively discarded the *Roberts* test[g] and adopted a new standard: the prosecution is barred by the Confrontation Clause from introducing "testimonial" evidence against the defendant unless the witness is unavailable and the defendant had a prior opportunity for cross-examination – the core requirement of confrontation [21]. Although *Crawford* applied a very clear procedure (in-court presentation of the witness' testimony or, for unavailable witnesses, a prior opportunity for cross-examination), the Supreme Court did not comprehensively define "testimonial" evidence,[h] and the determination of the exact parameters of the term was left to the lower courts.[i]

In *Melendez-Diaz*, the Supreme Court resolved conflicting lower court decisions concerning forensic laboratory reports and whether such reports were "testimonial" evidence subject to the protections of the Confrontation Clause. In a straightforward and brief discussion, the majority opinion identified the laboratory reports as "testimonial statements" based on their form as affidavits and their purpose under state law of providing "prima facie evidence of the composition, quality, and net weight" of the

substance analyzed, rendering the reports "functionally identical" to live, in-court testimony, doing "precisely what a witness does on direct examination" [22]. Therefore, the Sixth Amendment guarantee to a criminal defendant of the right to confront the witnesses against him rendered the laboratory reports inadmissible unless the analyst appeared at trial, or, if the analyst was unavailable, the defendant had a prior opportunity for cross-examination. In the remainder of the majority opinion, Justice Scalia addressed the arguments of the prosecution and the dissent, disputing the assertions that the holding would have a cataclysmic effect on the criminal justice system by altering "90 years of settled jurisprudence" [23]. The holding, he countered, was the result of the faithful application of the Court's decision in *Crawford* and it was the dissent that was seeking to overrule this controlling precedent to resurrect the inherently unpredictable *Roberts* standard.[j]).

The Court's opinion in *Melendez-Diaz* firmly rejected the notion that forensic laboratory analysts, or expert witnesses of any kind, were exempt from the protections of the Confrontation Clause. The Court refuted the classification of forensic analysts as "nonaccusatory" witnesses, finding no support for such a distinction in the Sixth Amendment itself or in prior case law [24]. Similarly, the Confrontation Clause did not contain a distinction for "ordinary" or "conventional" witnesses that would exclude expert witnesses from its reach [25]. The Court found the argument concerning the purported nature of the testimony – neutral, scientific testing – to be an effort to restore the *Roberts* "reliability" approach abandoned in *Crawford* [26]. Although not necessary to the holding,[k] Justice Scalia did dispute that forensic reports were as neutral or as reliable as the prosecution had asserted, discussing both the findings of systemic bias pressures contained in the report of the National Research Council of the National Academy of Science, *Strengthening Forensic Science in the United States: A Path Forward* [27] and the serious deficiencies found in the forensic evidence used in criminal trials as reported by several law review studies [28]. Given the exercise of judgment and the risk of error inherent in analyzing substances, the Court concluded that "there is little reason to believe that confrontation will be useless in testing the analysts' honesty, proficiency, and methodology – the features that are commonly the focus in the cross-examination of experts" [29].

The Court also rejected the assertion that forensic reports qualify as "business records" and held that even if the reports did qualify as business records, the analysts would still be subject to confrontation. The "business record" distinction is found in rules of evidence and case law as an exception to the general rule barring out-of-court statements (hearsay). The exception permits the introduction of documents kept in the regular course of business if these were not produced for use at trial. Since the forensic reports in this case were created on a request of law enforcement, specifically for use in a criminal prosecution, these would not qualify for admission under the rules of evidence. However, the Court stressed that the rules of evidence are separate from the Confrontation Clause and that admission under the rules of evidence does not exempt testimonial evidence from the reach of the Confrontation Clause. The forensic reports in this case were testimonial – the statements of the analysts that were contained in the report "would serve as substantive evidence against the defendant whose guilt depended on the [nature of the substance tested by the analyst]" [30] – and the Sixth Amendment required that they be subject to confrontation [31].

In addition, the Court countered the argument that the right to confrontation was satisfied by the defendant's ability to subpoena the analyst by noting that the subpoena power is necessary for the "right to compulsory process" applicable to witnesses for the defense and not a substitute for the separate "right to confrontation" applicable to the prosecution's witnesses [32]. The dissent's assertion of this argument was particularly weak, given the extensive discussion within the dissenting opinion of the possible difficulties in securing the attendance of analysts ("erratic, all-too-frequent instances when a particular laboratory technician ... simply does not or cannot appear"), while simultaneously asserting that "the laboratory analysts are not difficult ... to compel" [33].

In disputing the notion that its holding would have widespread, deleterious effects on criminal prosecutions nationwide, the Court noted that the notice-and-demand statutes in effect in several states were workable, constitutional schemes for implementing the defendant's right to confrontation with respect to forensic analysis. "[N]otice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence

at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial" [34].

Justice Scalia's prediction that criminal prosecutions would not be widely hampered by the *Melendez-Diaz* ruling proved correct, as prosecutors rapidly adapted to the requirement of calling live witnesses to support the admission of laboratory reports. However, Justice Kennedy's prediction that the lower courts would experience confusion over the proper application of the ruling also proved true. Over the next three years, the Court issued two more decisions addressing the issue of the admissibility of laboratory reports in *Bullcoming v. New Mexico* and *Williams v. Illinois*.

The issue and holding in *Bullcoming* were fairly straightforward and closely followed the reasoning of *Melendez-Diaz*. In *Bullcoming*, the five-justice majority clearly held that when the prosecution wishes to introduce a certified forensic report, the author of the report must be called; a supervisor or substitute analyst will not suffice.

The issue and holding in *Williams*, however, proved to be far more complex and muddled. In *Williams*, the Court addressed the issue left open by *Bullcoming*, whether a forensic report – or the substance of the report – could be introduced through a separate expert witness who relied on the report as a basis of the expert's opinion. The plurality, applying much of the same reasoning expressed in the dissenting opinions in *Melendez-Diaz* and *Bullcoming*, found that the Confrontation Clause was not implicated because the report was not "offered for the truth of the matter asserted," but even if it was, the report was non-testimonial and did not require a live witness for admission. Because five Justices disagreed with the assertion that the report was not offered for the truth of the matter asserted [35], whether the report was testimonial was the decisive issue [36].

The plurality concluded that the report was non-testimonial emphasizing that the Cellmark report did not accuse a targeted individual (at that time, Williams was not a suspect in the crime), and that the report appeared reliable [37]. Justice Alito relied on the "primary purpose" test for determining whether a statement is testimonial: a statement is testimonial if it "had the primary purpose of accusing a targeted individual" [38].

Justice Thomas joined the plurality opinion in affirming the conviction because he found that the report was "non-testimonial," although for different reasons than the plurality. Justice Thomas relied on his unique (among the justices) view that the Confrontation Clause "regulates only the use of statements bearing 'indicia of solemnity.'" [39] The report in *Williams* was distinguishable from the reports in *Melendez-Diaz* and *Bullcoming*, according to Justice Thomas, because the *Melendez-Diaz* report was sworn to before a notary [40] and the *Bullcoming* report included a signed statement asserting the correctness of the results and the adherence to laboratory procedures [41]. On the other hand, "Cellmark's report, in substance, certifies nothing" [42]. In the view of Justice Thomas, the Cellmark report lacked the solemnity to be "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination" [43].

Apart from disagreeing with the plurality's reasoning and Justice Thomas's "solemnity" test, the dissent asserted that the fractured decisions did not give any binding guidance to the lower courts. Justice Kagan concluded that the trial courts remain bound by *Melendez-Diaz* and *Bullcoming* in all cases but those with the specific facts of *Williams* [44].

Conclusion

Melendez-Diaz v. Massachusetts ultimately involved the straightforward application of the Supreme Court's prior decision in *Crawford v. Washington*. It held that the admission of forensic reports, without the accompanying live testimony of the analyst, violated the defendant's Sixth Amendment right to confront the witnesses against him. It settled the question of whether forensic analysts (and other expert witnesses) were a category of witnesses beyond the meaning and purpose of the Confrontation Clause. The Court rejected the notion that expert witnesses are "nonaccusatory," "unconventional," not "ordinary," or exempt from the crucible of cross-examination because of the nature of their work. In a commentary that should have surprised no forensic analyst or legal practitioner, the Court emphasized that forensic evidence is not uniquely immune from the influences that affect any witness testimony: bias, dishonesty, mistake, and fraud. Therefore, it could not be immune from the

process mandated by the Sixth Amendment to ensure reliability: confrontation.

The clear holding in *Bullcoming* and the fractured opinion in *Williams* provided some additional guidance for the admission of laboratory reports. The most commonly encountered laboratory reports, the formal laboratory reports typically generated for drug, BAC, fingerprint, and other conventional forensic testing that are completed by a single analyst and are incriminating on their face, will require the live testimony of the actual author of the report for admission. Internal work product or subsidiary reports used to generate final reports will probably not be considered testimonial and will not implicate the Confrontation Clause requirements for admission. The exact parameters of the distinction between formal laboratory reports and subsidiary reports, however, will continue to be fine-tuned through the lower courts [45].

End Notes

[a] The facts and procedural history of the case are discussed in the Court's decision. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 307–309, 129 S.Ct. 2527, 2530–2531 (2009).

[b] Bullcoming v. New Mexico, 564 U.S. ___, 131 S.Ct. 2705, 2710–2713 (2011).

[c] *Williams v. Illinois*, 567 U.S. ___, 132 S.Ct. 2221, 2227–2228 (2012).

[d] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense." U.S. Const. amend. VI.

[e] The Confrontation Clause of the Sixth Amendment provides "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him ...." The right to confrontation includes the right to be present when the witness testifies (*Kentucky v. Stincer*, 482 U.S. 730, 739–740 (1987)); the rights to see, to hear, and to be seen by the witness (*Maryland v. Craig*, 497 U.S. 836, 846–847 (1990)); and an adequate opportunity to cross-examine the witness (*Davis v. Alaska*, 415 U.S. 308, 316–318 (1974)).

[f] An excellent explanation of this shift in interpretation is provided in the following article, authored by the attorney who served as counsel before the Supreme Court for both Mr. Crawford and Mr. Melendez-Diaz. Fisher, J.L. Preface: reclaiming criminal procedures, *Georgetown Law Journal Annual Review of Criminal Procedure* **38**, iii–xvii.

[g] The *Crawford* decision did not expressly overrule Roberts, but the Supreme Court's subsequent decision in *Davis v. Washington*, 547 U.S. 813, 825 n. 4 (2006), made it clear that *Roberts* had been overruled.

[h] The Court did note that the term "applies at a" minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police "interrogations." 541 U.S. at 68.

[i] The Court acknowledged the uncertainty that would result from its refusal to provide a comprehensive definition for "testimonial." 541 U.S. at 68 n. 10, but countered that "the *Roberts* test is *inherently*, and therefore *permanently*, unpredictable."

[j] 557 U.S. at 313, 129 S.Ct. at 2533.

[k] 129 S.Ct. at 2537 n. 6 (noting the same constitutional right to confrontation would apply to a witness with "the scientific acumen of Mme. Curie and the veracity of Mother Teresa").

References

[1] 541 U.S. 36 (2004).
[2] *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310, 129 S.Ct. 2527, 2532 (2009).
[3] *Commonwealth v. Melendez-Diaz*, 76 Mass. App. Ct. 229, 231, 921 N.E.2d 108, 111 (2010).
[4] *Bullcoming v. New Mexico*, ___ U.S. ___, ___, 131 S.Ct. 2705, 2710–2711 (2011).
[5] 131 S.Ct. at 2712.
[6] 131 S.Ct. at 2713.
[7] 131 S.Ct. at 2714–2715.
[8] 131 S.Ct. at 2715.
[9] 131 S.Ct at 2716.
[10] *Williams v. Illinois*, 567 U.S. ___, ___, 132 S.Ct. 2221, 2230 (2012).
[11] Id.
[12] 132 S.Ct at 2231.
[13] Id. (citing *People v. Williams*, 385 Ill. App. 3d 359, 369, 895 N.E.2d 961, 969–970 (2008)); see also People v. Williams, 238 Ill.2d 125, 939 N.E.2d 268 (2010).
[14] 132 S.Ct. at 2228.
[15] 132 S.Ct. at 2255–2264.
[16] 132 S.Ct. at 2264–2277.

[17] 541 U.S. 36 (2004).
[18] Fisher, J.L. Preface: reclaiming criminal procedure, *Georgetown Law Journal Annual Review of Criminal Procedures* **38**, iii–xvii.
[19] 448 U.S. 56, 66 (1980).
[20] 541 U.S. at 68.
[21] Id.
[22] 557 U.S. 305, 311, 129 S.Ct. 2527, 2532 (*quoting Davis v. Washington*, 547 U.S. 813, 830 (2006)).
[23] 557 U.S. at 312, 129 S.Ct. at 2533.
[24] 557 U.S. at 313–314, 129 S.Ct. at 2533–2534.
[25] 557 U.S. at 315–316, 129 S.Ct at 2534–2535.
[26] 557 U.S. at 317–318, 129 S.Ct. at 2536.
[27] National Research Council of the National Academies, Committee on identifying the needs of the forensic science community (2009). *Strengthening Forensic Science in the United States: A Path Forward*, The National Academies Press, Washington, DC.
[28] 557 U.S. at 319, 129 S.Ct. at 2536–2537.
[29] 557 U.S. at 321, 129 S.Ct. at 2538.
[30] 557 U.S. at 323, 129 S.Ct. at 2539.
[31] 557 U.S. at 324, 129 S.Ct. at 2540.
[32] Id.
[33] 557 U.S. at 337, 340,,129 S.Ct. at 2547, 2549.
[34] 557 U.S. at 326, 129 S.Ct. at 2541.
[35] Many courts, however, have treated this aspect of the plurality opinion as controlling (even though Justice Thomas and the four dissenting justices disagreed with it) and have held that there is no confrontation clause violation if the report is not admitted into evidence and the expert claims to have reached an independent conclusion. *See* People v. Leach, 980 N.E.2d 570 (Ill. 2012); People v. Westmoreland, 213 Cal. App. 4th 602, 153 Cal. Rptr. 3d 267 (Cal. Ct. App.), modified and reh'g denied, 2013 Cal. App. LEXIS 160 (Cal. Ct. App. 2013); State v. Bass, 2013 N.J. Super. Unpub. LEXIS 1000 (NJ Sup. Ct. 2013); People v. Brown, 2013 Mich. App. LEXIS 688 (Mich. Ct. App. 2013); State v. Ortiz-Zape, 743 S.E.2d 156 (NC 2013).
[36] Justice Thomas agreed with the four dissenters, explaining that "[t]here 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." 132 S.Ct. at 2257.
[37] "[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." 132 S.Ct. at 2243–2244.
[38] 132 S.Ct. at 2243.
[39] 132 S.Ct. at 2259, citing Davis v. Washington, 547 U.S. 813, 836–837, 840 (2006) (Thomas, J., concurring in judgment in part and dissenting in part).
[40] 132 S.Ct. at 2260 (quoting Melendez-Diaz, 556 U.S. at 308).
[41] 132 S.Ct. at 2260 (quoting Bullcoming, 131 S.Ct. at 2710).
[42] Id.
[43] 132 S.Ct. at 2261 (quoting Melendez-Diaz, 557 U.S. at 310–311).
[44] 132 S.Ct. at 2276 (Kagan, J., dissenting) ("And until a majority of this Court reverses or confines those decisions, I would understand them as continuing to govern, in every particular, the admission of forensic evidence.").
[45] A recent survey by the reporter to the Advisory Committee on Evidence Rules concludes that most courts have applied the rationale of Justice Alito's opinion in Williams as controlling and use the working definition of "testimonial" as "whether the statement was made for the primary motive that it be used against a targeted individual." *See* Capra, Daniel, *Memorandum To: Advisory Committee on Evidence Rules; Re: Federal Case Law Development After Crawford v. Washington – and After the Confusion of Williams v. Illinois* (April 1, 2013).

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