

April 2012

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Recommended Citation

Bernheim, Lucie (2012) "Getting Back to Our 'Roots': Why the Use of Cutting Edge Forensic Technology in the Courtroom Should (and Can) Still be Constrained by the Plain Language of the Confrontation Clause," *Seattle Journal for Social Justice*: Vol. 10: Iss. 2, Article 8.

Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol10/iss2/8>

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Getting Back to Our ‘Roots’: Why the Use of Cutting Edge Forensic Technology in the Courtroom Should (and Can) Still be Constrained by the Plain Language of the Confrontation Clause

Lucie Bernheim

INTRODUCTION

The use of scientific evidence such as DNA tests in court . . . brings into collaboration two institutions with significantly different aims and normative commitments. . . . Lawmakers’ expectations of science to simply step in and cure the law’s deficiencies, without taking into account the disparate dynamics of the two institutions, are exaggerated, . . . and, at the limit, lead to questionable justice.¹

In 2001, Elaina Boussiacos’s body was found in the trunk of her car near her home in Woodinville, Washington.² Sione Lui, an ex-boyfriend of the decedent, was considered a suspect.³ Nine identifiable fingerprints, a small bloodstain, and a trace of DNA on the steering wheel were found at the scene, none of which matched those of Mr. Lui’s or Ms. Boussiacos’s.⁴ A small number of sperm cells that matched Mr. Lui were found on the decedent’s underwear and vaginal swab. It was unclear how long the cells had been present; indeed, it was conceded that they could have been there for a “long time.”⁵ A private DNA testing company, Orchid Cell Mart, tested the DNA.⁶

¹ Sheila Jasanoff, *Just Evidence: The Limits of Science in the Legal Process*, 34 J.L. MED. & ETHICS 328, 329 (2006).

² Corrected Appellant’s Opening Brief at 2, *State v. Lui*, 221 P.3d 948 (Wash. Ct. App. 2009), *petition for cert. granted*, 228 P.3d 17 (Wash. 2010) (No. 84045-8).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *State v. Lui*, 221 P.3d 948, 951 (Wash. Ct. App. 2009), *petition for cert. granted*, 228 P.3d 17 (Wash.).

The state did not initially charge Mr. Lui, and the case remained “unsolved” until 2007.⁷ In 2007, detectives spoke with Mr. Lui again.⁸ During this meeting, Mr. Lui made statements inconsistent with those he had made in 2001, but did not confess to anything.⁹ Based on both the evidence gathered just after the crime in 2001 and his inconsistent statements, Mr. Lui was charged with the murder six years after Ms. Boussiacos was killed.¹⁰

At trial, the report showing a DNA profile from the crime scene that matched that of Mr. Lui was not admitted into evidence, and the lab analyst that produced it did not testify.¹¹ Instead, the results of the DNA report were introduced through the testimony of Gina Pineda, an associate director at Orchid Cell Mart, as an expert witness.¹² Ms. Pineda gave testimony that included her opinions and conclusions based on the reports, even though she had not been involved with the testing process.¹³ Mr. Lui objected to this practice, arguing that his Sixth Amendment right to confront witnesses against him had been violated because he had not had the opportunity to cross-examine the DNA lab analyst who had produced the report; cross-examining Ms. Pineda was no substitute.¹⁴ The trial court disagreed, and Mr. Lui was convicted of second-degree murder.¹⁵

The Court of Appeals of Washington, Division I, affirmed, stating that Mr. Lui’s confrontation rights were not violated because “the evidence against Lui was [Ms. Pineda’s] opinion—not [the] underlying data.”¹⁶ Since Mr. Lui had the opportunity to cross-examine Ms. Pineda regarding her opinion, the court

⁷ Appellant’s Reply Brief at 1, *State v. Lui*, 221 P.3d 948 (Wash. Ct. App. 2009), *petition for cert. granted*, 228 P.3d 17 (Wash. 2010) (No. 84045-8).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Lui*, 221 P.3d at 955 .

¹² *Id.* at 951.

¹³ *Id.* at 955.

¹⁴ *Id.* at 953.

¹⁵ *Id.* at 949.

¹⁶ *Id.* at 955.

reasoned, the confrontation clause was satisfied.¹⁷ The Washington State Supreme Court granted certiorari, and it heard the case on September 14, 2010.¹⁸ The court has not issued an opinion, but the outcome will likely depend on how the Supreme Court of the United States decides *Williams v. Illinois*, which is currently pending.¹⁹ Mr. Lui's predicament, therefore, is an example of the latest question that the US Supreme Court has had the opportunity to answer in a relatively new line of confrontation clause cases—*who* is required to testify to satisfy the confrontation clause?²⁰

The confrontation clause of the Sixth Amendment to the US Constitution provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”²¹ This right is unique in that it is only afforded to the accused in criminal cases.²² The defendant's right to confront witnesses against him, or to cross-examine witnesses, is commonly recognized as an invaluable tool for exposing witness incompetency or dishonesty.²³

Despite the amendment's seemingly clear language (“*shall* enjoy the right”),²⁴ until 2004, the confrontation of a witness with adverse testimony was not required if the witness was unavailable and the trial judge decided that the

¹⁷ *Id.* at 956.

¹⁸ Washington State Supreme Court: *State v. Liu* (TVW television broadcast, Sept. 14, 2010, 1:30 PM), *available at* <http://www.tvw.org/media/mediaplayer.cfm?evid=2010090059C&TYPE=V&CFID=754579&CFTOKEN=79754641&bhcp=1>.

¹⁹ *Williams v. United States*, 131 S. Ct. 3090 (7th Cir. 2011), cert. *granted*, 80 BNW U.S.L.W. 3003 (U.S. June 28, 2011) (No. 10-8505). Oral argument occurred on December 6, 2011. See *Williams v. Illinois*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/williams-v-illinois/> (last visited Apr. 30, 2012).

²⁰ *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

²¹ U.S. CONST. amend. VI.

²² *Id.*

²³ *Crawford v. Washington*, 541 U.S. 36, 57 (2004) (“The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of cross-examination.”).

²⁴ U.S. CONST. amend. VI.

testimony was reliable.²⁵ *Ohio v. Roberts* provided that testimony could be deemed reliable if it either fell within a hearsay exception or showed “particularized guarantees of trustworthiness.”²⁶ The US Supreme Court reasoned that if the right to confrontation operated to ensure reliability of out-of-court statements, then the constitutional requirement could be disposed of when a judge had already determined that the evidence was reliable.²⁷

In 2004, the United States Supreme Court overturned *Ohio v. Roberts* in *Crawford v. Washington*. The Court held that the admission of “testimonial hearsay” is clearly prohibited by the confrontation clause unless the witness is both unavailable and the defendant had a prior opportunity for cross-examination.²⁸ Six years after *Crawford*, *Melendez-Diaz v. Massachusetts* elaborated on whether “forensic certificates of analysis” qualify as testimonial.²⁹ Determining whether forensic evidence is “testimonial hearsay,” which governs when a defendant can invoke her right to confront, is particularly important because of the perceived infallibility of forensic evidence—especially DNA test results.³⁰

In a case like that of Mr. Lui, exposing lab analyst incompetency, inexperience, bias, or dishonesty through cross-examination is one of the

²⁵ *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). The Court noted, however, that a showing of unavailability is not always required. An earlier case, *Dutton v. Evans*, 400 U.S. 74 (1970), had “found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness.” *Id.* at 65 n.7.

²⁶ *Id.* at 63–64, 66.

²⁷ *Id.*

²⁸ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Davis v. Washington*, 547 U.S. 813 (2006); *Crawford*, 541 U.S. at 68.

²⁹ The “certificates of analysis” were sworn certificates of state laboratory analysts stating that material seized by police was cocaine of a certain quality. *Melendez-Diaz*, 557 U.S. at 321–22.

³⁰ See Jasonoff, *supra* note 1, at 328 (noting that modern society believes that “science can deliver failsafe, and therefore just, legal outcomes where the law, acting on its own, might fall short”). Jasonoff suggests that one reason for the perceived infallibility of science is the notion that science establishes truth through non-human instruments, such as a lie detector or an identification technique. *Id.* at 331–32. Unfortunately, the risk of human error can never actually be removed, since such non-human instruments are made “to speak” only with the aid of trained professionals. *Id.* at 330.

defendant's few tools for undermining such damning evidence. While DNA evidence can be extremely accurate, it is not immune from human error. Erroneous results are not uncommon due to risks like cross contamination, the DNA analyst's subjective and often inaccurate interpretation of the test results, or completely fabricated results ("cooking the data").³¹ Ironically, as DNA testing technology becomes more sensitive and can pick up smaller traces of cells, the risk of contamination from lab equipment, technicians, or other samples is more likely.³² While there is a widespread belief "that science can deliver failsafe [sic], and therefore just, legal outcomes where the law, acting on its own, might fall short,"³³ a more realistic expectation for science's role in legal proceedings is that forensic tests and results are simply pieces of evidence. Results of a DNA test are no different from any other evidence. "It is the product of human beings, with the same potential prejudices and inconsistencies inherent in any human expression."³⁴ Just as an eyewitness may be impeached at trial, so a forensic result should be prodded and poked by the defense on cross-examination of the lab analyst who performed the test to uncover, for example, the analyst's biases or inadequacies. Without adequate cross-examination, jurors are likely to view forensic evidence as much more probative than it actually is.

While the forensic community has recently received negative attention for a range of serious problems, most notably in a 2009 report by the National Academy of Sciences,³⁵ the use of forensic testing in the criminal justice

³¹ SHELDON KRIMSKY & TANIA SIMONCELLI, GENETIC JUSTICE: DNA DATA BANKS, CRIMINAL INVESTIGATIONS, AND CIVIL LIBERTIES 298 (2011).

³² *Id.* at 278.

³³ Jasanoff, *supra* note 1, at 328.

³⁴ KRIMSKY & SIMONCELLI, *supra* note 31, at 7–8.

³⁵ COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. COMTY., NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> (noting that forensic testing systems around the country are lacking in standards and certification programs).

system is continuing to increase dramatically.³⁶ In the past fifteen years, DNA-based identification has come to be heavily relied upon by law enforcement.³⁷ For example, the Combined DNA Index System (CODIS), a computer DNA data bank overseen by the Federal Bureau of Investigation, connects DNA databases of all fifty states.³⁸ Originally, the data banks were meant to hold the DNA profiles of only violent felons and recidivist sex offenders.³⁹ Since CODIS's inception in 1990, however, state DNA data bank development has increased significantly. There is a growing emphasis on the inclusion of profiles of juvenile offenders, misdemeanants, and individuals who are arrested but never convicted. Besides the stigmatizing impact of being present in CODIS, an individual whose profile is on CODIS is more likely to be considered a suspect in a crime (because of the likelihood of a "match") than an individual whose profile is not in the database. While this article only explores the use of DNA at trial, it is relevant to note that DNA is increasingly being used as a surveillance tool through data banks.

Finally, because of the nature of cases where DNA evidence is usually used, the stakes are likely to be extremely high for the defendant. Since DNA residue is found in blood, hair, skin cells, saliva, and semen, DNA testing is often used in rape and murder trials after such materials are left behind. Consequently, the defendant's punishment, if convicted, is likely to be severe. Moreover, the American judicial system's emphasis on the principle of finality makes it increasingly difficult to reopen a conviction.⁴⁰ "While state authorities have fully embraced the use of DNA to place individuals behind bars, some have been far more reluctant to open the door to post-conviction DNA testing."⁴¹

³⁶ See *Id.* at 41. This article groups DNA analysis with other methods of forensic testing even though DNA analysis is "considered the most reliable forensic tool available today." *Id.* at 47. Though reliable, it is not foolproof, and laboratories testing DNA can still make errors "such as mislabeling samples, losing samples, or misinterpreting data." *Id.*

³⁷ KRIMSKY & SIMONCELLI, *supra* note 31, at xvi.

³⁸ *Id.* at 29.

³⁹ *Id.* at 28.

⁴⁰ *Id.* at 329.

⁴¹ *Id.*

With such high stakes, and with the importance of seriously questioning the accuracy of the DNA evidence *before* the conviction, confrontation of the DNA analyst who performed the test is essential.

Citing efficiency and economic concerns, as well as the neutral and infallible nature of forensic evidence, however, some states have been extremely hesitant to fully comply with *Crawford* and *Melendez-Diaz* in the forensic context. For the various reasons discussed below, the analyst who prepared the forensic report, like in *State v. Lui*, is not always required to appear in court and be subject to cross-examination. On the other hand, several cities have required the analyst who conducted the test to appear in court in all or most cases, demonstrating that other states' concerns about overwhelming cost and inefficiency may be largely unfounded.⁴² Any increase in the burden on states to require the analyst to appear in every case, however, is a constitutionally required cost.⁴³ The more that non-complying states are able to evade the Supreme Court's newly articulated constitutional requirements regarding confrontation and forensic testing, the more defendants are subjected to unconstitutional practices.

This article argues that the defendant has the right to confront the analyst who conducted the forensic test; in-court testimony from an analyst's supervisor or an expert witness who was not directly involved is insufficient. Further, in order to answer the question of *who* is required to testify regarding the results of a forensic test under the confrontation clause (a question currently before both the Washington State Supreme Court in *State v. Lui* and the Supreme Court of the United States in *Williams v. Illinois*), courts should

⁴² Examples of cities that already have a practice of calling the analysts who examined the evidence, drew the conclusion, or wrote the report are: Baltimore, Maryland; Denver, Colorado; San Francisco, California; Oakland, California; Seattle, Washington; Chicago, Illinois; and Anchorage, Alaska.

⁴³ Brief for Public Defender Service for the District of Columbia et al. as Amici Curiae Supporting Petitioner, *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) (No. 09-10876) [hereinafter *Bullcoming* Amici Curiae Brief by defender organizations].

look to the plain language of the confrontation clause⁴⁴ and the basic principles underlying the recent *Crawford*, *Davis*, and *Melendez-Diaz* decisions regarding *what* is testimonial hearsay. Based on the principles contained in those decisions, the defendant has the right to confront the analyst who conducted the test. In-court testimony from an analyst's supervisor or an expert witness who was not involved in the testing is insufficient because it shields the analyst who actually performed the test from cross-examination, while still allowing the analyst's testimony to threaten a defendant's liberty. Confronting a witness may not be a perfect science, but forensic test results should not replace it.

Part I provides a brief history of the confrontation clause up to *Davis v. Washington* and sets out principles the Court should continue to apply in *Williams v. Illinois*.⁴⁵ Part II addresses the intersection of new confrontation requirements and forensic evidence, focusing on both the majority and dissenting opinions in *Melendez-Diaz* to emphasize that changes in how we think of scientific evidence and in the forensic testing structure itself are necessary to ensure that criminal defendants have a meaningful right to confront witnesses against them. Part III examines *Bullcoming v. New Mexico*⁴⁶ and *Williams v. Illinois*⁴⁷ to illustrate how some states are evading the *Crawford* and *Melendez-Diaz* requirements when determining *who* is required to testify under the confrontation clause. Finally, Part IV describes the systems in states that have successfully complied with the principles of *Crawford* and *Melendez-Diaz*—"the sky has not fallen," as noted by the majority in the *Bullcoming* opinion.⁴⁸ Part IV also recommends changes in non-complying

⁴⁴ U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

⁴⁵ *Davis v. Washington*, 547 U.S. 813 (2006).

⁴⁶ *Bullcoming*, 131 S. Ct. 2705 (2011).

⁴⁷ *Williams v. United States*, 131 S. Ct. 3090 (2011).

⁴⁸ *Bullcoming*, 131 S. Ct. at 2719. Though costs and inefficiency are irrelevant once a constitutional right has been recognized, the issue has affected how courts have dealt with lab analyst testimony requirements, and so it should be addressed.

states' forensic structures and procedures that could make compliance easier while decreasing the risk of inadvertent error.

I. A HISTORY OF SIGNIFICANT CONFRONTATION PRECEDENT

A. Why Cross-Examination Is Important: The Treason Trial of Sir Walter Raleigh to the Cross-Examination Skills of Perry Mason

In reaction to a case involving Sir Walter Raleigh in 1603 and others like it, English laws developed practices that limited *ex parte* abuses by ensuring the right of the accused to confront every adverse witness, face to face.⁴⁹ Raleigh was accused of conspiring to kill James I.⁵⁰ Raleigh's alleged accomplice, Lord Cobham, had implicated him without notice to or argument from the defense—a record of Cobham's statements was simply read to the jury during Raleigh's trial.⁵¹ Raleigh demanded that the judges call Cobham to appear, suspecting he would recant, stating that “[t]he proof of the common law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face.”⁵² Raleigh's request was denied; the jury convicted him of treason and he was sentenced to death without ever having the opportunity to confront Cobham.⁵³

Looking to this English precedent, the confrontation clause was included in the proposal that became the Sixth Amendment to the United States Constitution.⁵⁴ The Supreme Court first spoke to cross-examination in a criminal case as a core component of the confrontation right in *Mattox v. United States*: “[t]he substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to

⁴⁹ Crawford v. Washington, 541 U.S. 36, 44–45 (2004).

⁵⁰ *Id.* at 44.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 49.

face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall *under no circumstances* be deprived of.”⁵⁵

More recently, Earle Stanley Gardner popularized cross-examination through the Perry Mason mystery novels. Perry Mason represented, for the most part, defendants charged with crimes that they in fact did not commit. While exceptionally idealized, Perry Mason’s character represents the long-held faith that the legal system has in the impact of cross-examination in revealing witness dishonesty, incompetence, and incredibility—cross-examination is as much about testing the witness’s perceptions and memory as it is about testing his or her sincerity.⁵⁶

B. Pointer v. Texas, the Federal Rules of Evidence, and Ohio v. Roberts—the Confrontation Clause’s Relation to Hearsay, and Emphasis on Reliability

Despite its history and lofty depictions in the media, the confrontation clause was relatively underdeveloped until recently.⁵⁷ Previously, courts depended on the common law of hearsay to determine whether evidence could be admitted without a testifying witness.⁵⁸ “Hearsay” is defined as an out-of-court statement offered for the truth of the matter asserted⁵⁹ and is inadmissible unless it falls within an exception.⁶⁰ Rules governing admissibility of out-of-court statements are subject to exceptions based upon principles of reliability.⁶¹

⁵⁵ Jules Epstein, *Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and ‘At Risk’*, 14 WIDENER L. REV. 427, 432 (2009) (emphasis added).

⁵⁶ Frederick Schauer, *Can Bad Science Be Good Evidence? Neuroscience, Lie Detection, and Beyond*, 95 CORNELL L. REV. 1191, 1195 (2010); Fred O. Smith, Jr., *Crawford’s Aftershock: Aligning the Regulation of Nontestimonial Hearsay with the History and Purposes of the Confrontation Clause*, 60 STAN. L. REV. 1497, 1518 (2008).

⁵⁷ Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1014 (1998).

⁵⁸ *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

⁵⁹ FED. R. EVID. 801(c).

⁶⁰ FED. R. EVID. 802.

⁶¹ FED. R. EVID. 803 advisory committee’s note.

The common law of hearsay was furthered by the adoption of Federal Rules of Evidence in 1975, which was subsequently adopted by most states.⁶²

In *Pointer v. Texas*, the Supreme Court finally held that the confrontation clause is applicable to the states.⁶³ Not much changed, however; as one scholar pointed out, “shortly after *Pointer* the Court tended to emphasize the extent to which the confrontation clause and hearsay doctrines are distinct[,] . . . [after *Ohio v. Roberts* in 1980,] the Court . . . emphasized the extent to which they are similar.”⁶⁴

Indeed, in *Ohio v. Roberts*, the scope of the law of hearsay and the confrontation clause were completely integrated.⁶⁵ The Supreme Court held that an admission at trial of an absent witness’s preliminary hearing testimony did not violate a defendant’s confrontation right when the witness was unavailable and the statement bore adequate “indicia of reliability.”⁶⁶ Herschel Roberts, the defendant in that case, was charged with forgery of a check and possession of stolen credit cards.⁶⁷ At the preliminary hearing, the witness in question testified that she knew the respondent, but did not allow Mr. Roberts to use the checks and credit cards in question.⁶⁸ The witness was unavailable for the trial, but the trial court admitted the transcript of her preliminary testimony anyway over Mr. Roberts’s confrontation objections.⁶⁹ Ultimately, he was convicted on all counts.⁷⁰

Deeming the admission of the statement proper, the *Roberts* Court reasoned that the point of the confrontation clause was to ensure accuracy in criminal proceedings. As long as a court only admitted reliable hearsay, there was no

⁶² Friedman, *supra* note 57, at 1020.

⁶³ *Pointer v. Texas*, 380 U.S. 400, 407–08 (1965).

⁶⁴ Richard D. Friedman, *Crawford, Davis, and Way Beyond*, 15 J.L. & POL’Y 553, 555 (2007).

⁶⁵ *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

⁶⁶ *Id.*

⁶⁷ *Id.* at 58.

⁶⁸ *Id.*

⁶⁹ *Id.* at 60.

⁷⁰ *Id.*

need for cross-examination. Reliability was to be determined either by looking to the hearsay exceptions in the Federal Rules of Evidence or by allowing the judge to subjectively determine whether the evidence displayed “particularized guarantees of trustworthiness.”⁷¹ According to the Court, because “hearsay rules and the Confrontation Clause are generally designed to protect similar values,” it could rely on hearsay to determine what was reliable.⁷²

Despite the Constitution’s clear preference for assessing reliability through confrontation, *Roberts* attempted to arrive at the desired result of reliability through a different framework. After *Roberts* and until 2004, the admission of hearsay against a defendant hinged only upon the rules of hearsay and a judge’s subjective assessment of the reliability of the evidence, in spite of the Constitution’s clear language to the contrary. This subjective test proved to be too much for the Court and came to a head in *Crawford v. Washington*.

C. Crawford v. Washington and Davis v. Washington—a Shift from a Focus on Reliability to a New Focus on the Definition of “Testimonial”

In *Crawford v. Washington*, the Court held that the confrontation clause bars the admission of any testimonial hearsay when the witness does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity for cross-examination.⁷³ Completely replacing the *Roberts* subjective reliability test, the admissibility of unconflicted evidence now hinges on what the Court considers “testimonial” hearsay. In *Crawford*, Michael Crawford had stabbed a man who he claimed attempted to rape his wife, Sylvia Crawford.⁷⁴ While in police custody, Ms. Crawford gave a tape-recorded statement to the police; the State used the recording at trial, and Mr. Crawford did not cross-examine his wife.⁷⁵

⁷¹ *Id.* at 66.

⁷² *Id.*

⁷³ *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

⁷⁴ *Id.* at 38.

⁷⁵ *Id.* at 40, 65.

At trial, the court admitted the statement because it found it trustworthy under the *Roberts* standard and convicted Mr. Crawford.⁷⁶ The Washington Court of Appeals reversed, applying a nine-factor test to assess reliability and determining that Ms. Crawford's statements were *not* reliable.⁷⁷ The Washington Supreme Court reversed again, concluding that the statements were reliable under *Roberts*.⁷⁸ The United States Supreme Court reversed yet again, abrogating the *Roberts* test and stating that the lower courts' decisions in *Crawford* were "a self-contained demonstration of *Roberts*' unpredictable and inconsistent application."⁷⁹

The Court criticized the *Roberts* test for its unpredictability and for collapsing the hearsay doctrine and the confrontation requirements together.⁸⁰ The *Roberts* reliability test was overly broad in that it applied whether or not the statement or declaration in question was testimonial hearsay—thus subjecting to constitutional scrutiny statements that are "far removed" from the concerns of confrontation such as offhand, informal statements not made in anticipation of litigation.⁸¹ In addition, the test was too narrow in that it allowed unopposed testimony to be admitted if it was found reliable because it fell under an established hearsay exception or was deemed trustworthy by the judge.⁸² The clause's ultimate goal, according to the *Crawford* court, was not only to ensure reliability, but to guarantee a defendant the right to ensure the reliability of testimonial evidence against him through a specific process: confrontation.⁸³ Therefore, if a piece of evidence is testimonial, whether it falls

⁷⁶ *Id.* at 40.

⁷⁷ *Id.* at 41.

⁷⁸ *Id.* at 41; *State v. Crawford*, 54 P.3d 656, 664 (Wash. 2002), *rev'd*, 541 U.S. 36 (2004).

⁷⁹ *Crawford*, 541 U.S. at 66, 68.

⁸⁰ *Id.* at 63.

⁸¹ *Id.* at 60.

⁸² *Id.*

⁸³ *Id.* at 61.

into a state or federal hearsay exception is irrelevant for purposes of the confrontation clause.⁸⁴

Most criticism of *Crawford* is directed at its less-than-complete definition of what courts should consider testimonial⁸⁵—some have even argued that *Crawford* simply replaced one subjective test with another.⁸⁶ However, the Court did provide some preliminary guidelines regarding what should be considered testimonial, which “share a common nucleus and then define the Clause’s coverage at various levels of abstraction around it.”⁸⁷ Specifically, the Court cited three testimonial categories: “ex parte in-court testimony or its functional equivalent,” which includes affidavits, custodial examinations, prior testimony, or “statements that declarants would reasonably expect to be used prosecutorially”;⁸⁸ “extrajudicial statements contained in formalized materials, such as affidavits, depositions, prior testimony, or confessions”;⁸⁹ and “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”⁹⁰

The Court’s somewhat nebulous definition of “testimonial” has been defended on the grounds that the rule is extremely new, and it cannot be expected that all significant questions be resolved right away.⁹¹ The Court recognized that its non-exhaustive list may cause uncertainty, but it excused its

⁸⁴ John H. Blume & Emily C. Paavola, *Crime Labs and Prison Guards: A Comment on Melendez-Diaz and Its Potential Impact on Capital Sentencing Proceedings*, 3 CHARLESTON L. REV. 205, 212 (2009).

⁸⁵ See, e.g., Aviva Orenstein, *Sex, Threats, and Absent Victims: The Lessons of Regina v. Bedingfield for Modern Confrontation and Domestic Violence Cases*, 79 FORDHAM L. REV. 115, 135 (2010); Henry F. Fradella, *Unraveling Crawford in Abuse Cases*, 42 No. 1 Crim. Law Bulletin ART 6 (2006).

⁸⁶ Michael D. Cicchini, *Judicial (In)discretion: How Courts Circumvent the Confrontation Clause under Crawford and Davis*, 75 TENN. L. REV. 753, 778 (2008).

⁸⁷ *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004).

⁸⁸ *Id.* at 51.

⁸⁹ *Id.* at 51–52.

⁹⁰ *Id.* at 52.

⁹¹ Friedman, *supra* note 64, at 555.

own shortcoming because the result could "hardly be worse than [*Roberts*]." ⁹² Indeed, the Court may have been more ambiguous than necessary in order to avoid the pigeonholing of testimonial categories and to encourage lower courts to consider the motivation behind *Crawford*—that the truth-seeking purpose of a criminal trial is undermined by admitting incriminating evidence without first providing an opportunity for cross-examination of the witness that produced it—and apply its rule, even if the evidence is not specifically listed as with a testimonial category. ⁹³ Still, the ambiguity of the decision has the potential to confuse trial and appellate courts trying to distinguish between testimonial and nontestimonial evidence.

Davis v. Washington built upon *Crawford*'s definition of testimonial. ⁹⁴ In *Davis*, the Supreme Court considered whether statements made in an emergency situation qualified as "testimonial" under any of the categories set out in *Crawford*. ⁹⁵ The Court decided that statements are nontestimonial when made during an interrogation if the circumstances objectively indicate that the primary purpose of the interrogation is to enable police to respond to an ongoing emergency. ⁹⁶ Michelle McCottry called a 911 operator and claimed that Adrian Davis had assaulted her. ⁹⁷ Because the Court determined that the primary purpose of these statements was to enable police to meet an ongoing emergency, the recording of the 911 call was considered nontestimonial and, therefore, admissible, even though Ms. McCottry did not testify at Mr. Davis's trial. ⁹⁸ Conversely, statements are testimonial when the circumstances

⁹² *Crawford*, 541 U.S. at 68 n.10.

⁹³ Purported confusion may actually be an unwillingness to apply the rule. *See, e.g.*, *State v. Lui*, 221 P.3d 948, 953–54 (noting that the *Crawford* Court "listed three possible formulations for the 'core class' of testimonial statements The Court did not endorse any of these formulations because the statements at issue—made in response to law enforcement interrogation—qualified under *all* of them.") (emphasis added).

⁹⁴ *See* *Davis v. Washington*, 547 U.S. 813, 828 (2006).

⁹⁵ *Id.* at 823.

⁹⁶ *Id.* at 822.

⁹⁷ *Id.* at 817.

⁹⁸ *Id.* at 828.

objectively indicate that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later prosecution or when statements are an obvious substitute for live testimony because they do precisely what a witness does on direct examination.⁹⁹

II. THE INTERSECTION OF CONFRONTATION CLAUSE PRECEDENT AND FORENSIC EVIDENCE: WHAT IS REQUIRED?

Humans have twenty-three pairs of chromosomes that are contained within the nucleus of each cell, and these chromosomes make up DNA.¹⁰⁰ As mentioned above, crimes like murder and rape tend to leave the most DNA evidence behind; consequently, DNA is often gathered, processed, and presented at murder and rape trials.¹⁰¹ Because it is generally recognized that, except for identical twins, no two people can have identical sets of base pairs of DNA,¹⁰² the introduction of DNA-related technologies has obvious benefits. If a DNA profile found at a crime scene matches the DNA profile of a suspect, evidence of the match is highly probative at trial.

If samples are perfectly handled and gathered, the risk of DNA error is slight.¹⁰³ For this reason, DNA profiling technology is also powerful exculpatory evidence. As of November 2011, for example, 289 imprisoned individuals had been exonerated through DNA, after having spent, on average, thirteen years in prison.¹⁰⁴ Whatever the reliability of DNA profiling technology itself, it is undoubtedly compromised by human error.¹⁰⁵ The risk

⁹⁹ *Id.* at 822, 830.

¹⁰⁰ See JAY D. ARONSON, *GENETIC WITNESS: SCIENCE, LAW, AND THE CONTROVERSY IN THE MAKING OF DNA PROFILING* 9 (Rutgers Univ. Press 2007).

¹⁰¹ Brandon L. Garrett & Peter Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 13 (2009).

¹⁰² KRIMSKY & SIMONCELLI, *supra* note 31, at 285-86.

¹⁰³ Kenworthy Bilz, *Self-Incrimination Doctrine is Dead; Long Live Self-Incrimination Doctrine: Confessions, Scientific Evidence, and the Anxieties of the Liberal State*, 30 CARDOZO L. REV. 807, 815 (2008).

¹⁰⁴ *Innocence Project Case Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know> (last visited Apr. 21, 2012).

¹⁰⁵ Bilz, *supra* note 103, at 815.

of human error is compounded, especially in murder and rape trials, if the public views scientific evidence as more reliable than it actually is. Therefore, although it is undeniably useful, it is extremely important that the public not consider DNA evidence infallible.

One method that can be used to diminish the adverse effect of human error in DNA results is to allow a defendant to confront at trial the lab analyst who performed the test. However, lab analysts who perform the tests often do not appear in court for reasons detailed in Part III.¹⁰⁶ In order to compel lab analysts to appear for cross-examination, courts must determine that forensic test results fall into the *Crawford* definition of “testimonial hearsay.”¹⁰⁷ If forensic test results are deemed testimonial, they cannot be admitted into evidence without the testimony of the analyst who performed the test.¹⁰⁸ *Melendez-Diaz* took the first step in this direction, finding that a particular type of forensic evidence constitutes testimonial hearsay.¹⁰⁹

A. *Melendez-Diaz v. Massachusetts*

In 2009, the US Supreme Court held in *Melendez-Diaz v. Massachusetts* that “certificates of analysis,” which show the results of a forensic analysis performed on a seized substance, were within the core class of testimonial statements that require the lab analyst that performed the test to appear under *Crawford*.¹¹⁰ The Court’s opinion in *Melendez-Diaz* addressed the problem of categorizing forensic certificates that succinctly state the results of a drug test.¹¹¹ While *Melendez-Diaz* took a step in the direction of clarifying what the confrontation clause requires with respect to forensic test results,¹¹² it left many questions unanswered. Due to those perceived ambiguities and

¹⁰⁶ See, e.g., *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011); *Williams v. United States*, 131 S. Ct. 3090 (2011); *State v. Lui*, 221 P.3d 948 (Wash. Ct. App. 2009).

¹⁰⁷ *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

¹⁰⁸ *Id.* at 53–54.

¹⁰⁹ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321 (2009).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 319–20.

¹¹² *Id.* at 321.

additional concerns for cost and efficiency, many state courts continue to circumvent the confrontation clause in the forensic context, and thereby deprive criminal defendants of a constitutional right.¹¹³

Mr. Melendez-Diaz was convicted of distributing and trafficking cocaine without having had the opportunity to confront the analysts who swore to the results of the forensic analysis performed on substances seized at his arrest.¹¹⁴ Melendez-Diaz's person was searched, and officers found four clear plastic bags containing a white substance.¹¹⁵ After he was taken to the police station, officers searched the police cruiser and found what appeared to be more drugs hidden in the backseat.¹¹⁶ At trial, the prosecution submitted the certificates of analysis of the seized substances, which indicated the substance was cocaine.¹¹⁷ Melendez-Diaz was convicted despite his objections that *Crawford* required the analysts who performed the tests to testify in person.¹¹⁸

According to the Supreme Court, the certificates were clearly testimonial because they had been created for use at trial and qualified as affidavits:

[N]ot only were the affidavits ‘made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,’ as required by *Crawford*, but under Massachusetts law the *sole purpose* of the affidavits was to provide ‘prima facie evidence of the composition, quality, and the net weight’ of the analyzed substance. We can safely assume that the analysts were aware of the affidavits’ evidentiary purpose, since that purpose—as stated in the relevant state-law provision—was reprinted on the affidavits themselves.¹¹⁹

¹¹³ Cicchini, *supra* note 86, at 754.

¹¹⁴ *Melendez-Diaz*, 557 U.S. 305 (2009).

¹¹⁵ *Id.* at 319–20.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 320.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 321 (emphasis in original) (citations omitted).

Additionally, because the certificates were sworn before a notary public, they qualified as formalized materials and were therefore testimonial.¹²⁰ Since the certificates were clearly affidavits, the Court could have ended its analysis there. But in order to prevent its holding from being cabined to sworn statements, the Court also looked to the primary purpose of the certificates; it emphasized that, without the formality of an affidavit, a statement's primary purpose can still render it testimonial.¹²¹ Here, the primary purpose was to provide information about an illegal substance that could be used against the defendant at trial. Because there was "little doubt" that the certificates fell within the core class of testimonial statements described in *Crawford*, the case was reversed and remanded so that the lab analyst could appear to testify.¹²²

Though it was not an extension of *Crawford*, *Melendez-Diaz* was significant in that it signaled the Court's unwillingness to create a forensic evidence exception to the *Crawford* rule. The Court discussed and rebutted all six of Massachusetts's main arguments, which revealed the majority's attitude toward confrontation requirements in the forensic evidence context. First, the State argued that lab analysts are not subject to confrontation because they are not accusatory witnesses.¹²³ Because analysts' statements alone are insufficient to convict, the State argued, the statements only incriminate an individual to the extent that the other evidence links the defendant to the results.¹²⁴ The Court rejected this argument, responding that any witness's testimony alone is usually insufficient to convict.¹²⁵

The State's second argument, that lab analysts are not "conventional witnesses," stemmed from the concept developed in *Davis* that statements are nontestimonial when made as an event is being witnessed and testimonial

¹²⁰ *Id.*

¹²¹ Jennifer B. Sokoler, *Between Substance and Procedure: A Role for States' Interests in the Scope of the Confrontation Clause*, 110 COLUM. L. REV. 161, 177 (2010).

¹²² *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 332–33 (2009).

¹²³ *Id.* at 323.

¹²⁴ *Id.* at 323–24.

¹²⁵ *Id.* at 324.

when the event being recounted happened in the past. Unlike conventional witnesses, the State argued, in performing the test, the lab analyst was making near-contemporaneous observations, which rendered the observations nontestimonial under *Davis*.¹²⁶ The Court countered that the “near-contemporaneous” nature of the test did not make it actually contemporaneous; it concluded that exempting all witnesses who did not observe the crime from testifying would effectively exempt all expert witnesses, which the Court was unwilling to do.¹²⁷

Additionally, the Court disagreed with the State’s arguments that the analysts were immune from confrontation because the results fell within a business record hearsay exception and the defendant failed to subpoena the analyst.¹²⁸ The Court reasoned that, where a business record is created for use at trial, the existence of a hearsay exception is irrelevant for confrontation purposes.¹²⁹ Regarding the defendant’s failure to subpoena the analyst, the Court concluded that where confrontation is at issue, the burden is on the prosecution to produce adverse witnesses in court.¹³⁰

Next, the Court dismissed the State’s argument that individual states would be overly burdened if the tests were considered testimonial.¹³¹ Citing both the right to trial by jury and the privilege against self-incrimination as examples, the Court responded that it was without authority to relax constitutional requirements simply because the prosecution was overburdened.¹³² It also reasoned that the burden would not be as severe as was depicted by the State and the dissent.¹³³

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 328, 330.

¹²⁹ *Id.* at 328.

¹³⁰ *Id.* at 330.

¹³¹ *Id.* at 330–31.

¹³² *Id.*

¹³³ *Id.* See *infra* Part V.

Finally, and most significantly, the Court rejected the State's argument that lab analysts were exempt from cross-examination because such evidence is "neutral [and] scientific" in nature, and thus the benefits of cross-examining analysts are minimal.¹³⁴ The Court recognized that the State was, in essence, asking it to revert back to the *Roberts* indicia of reliability test in the area of forensic evidence by making an exception for "reliable" evidence.¹³⁵ While reiterating that *Crawford* requires that reliability *only* be tested through cross-examination, no matter how reliable the source, the Court also detailed a recent National Research Council of the National Academies study, which reported widespread error and bias within the forensic testing context.¹³⁶ Because the Court did not need to discuss the reliability of the forensic evidence in order to deem the certificates testimonial, this section of the opinion is especially significant. This discussion points to the majority's recognition of overreliance on forensic evidence and indicates that it could continue to treat forensic evidence as testimonial in future decisions.

B. Why the Majority Was Right

1. Lab Analysts Are Human, Too

As demonstrated by the National Research Council of the National Academies study mentioned in *Melendez-Diaz*, there are serious issues with accuracy in forensic labs and very few safeguards in place to ferret out errors.¹³⁷ The reliability of forensic testing depends on the quality of the DNA being tested; "the care with which it is collected, labeled, and transported; the standards and quality-control procedures of the laboratories performing the DNA profile analysis; and the interpretation of the DNA analyzer data,"

¹³⁴ *Id.* at 326.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY., NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009), Findings and Recommendations, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>.

including whether a partial profile (only part of the DNA sequence) or a mixed profile (more than one donor) is obtained.¹³⁸ Opportunities for errors abound in the collection, handling, and storage stages, and such errors can result in false positives.¹³⁹ It is clear that the results of even reliable forensic testing methods, like DNA testing, can be inaccurate or flawed.¹⁴⁰

Additionally, the lack of comprehensive forensic lab oversight combined with the knowledge that any mistake or indiscretion is unlikely to be discovered may contribute to analysts being less careful or honest than they would be otherwise. Many forensic labs are accountable to the state and report to the prosecution,¹⁴¹ and analysts may feel pressured to come to certain conclusions. Although it may imply a cynical conclusion, in a report that examined the trials of 137 individuals that were found guilty and later exonerated, researchers found that most of the analysts that performed the incriminating tests used in the trials were employed by state or local law enforcement crime laboratories.¹⁴² Further, in high-profile cases, it is possible that analysts will hear about the cases they are working on and develop their own unintentional biases.

While there have been many examples of particularly egregious cases of dishonest or incompetent analysts and labs,¹⁴³ proficiency tests suggest that the

¹³⁸ KRIMSKY & SIMONCELLI, *supra* note 31, at 277.

¹³⁹ *Id.*

¹⁴⁰ See David E. Bernstein, *The Unfinished Daubert Revolution*, 10 ENGAGE 35, 37 (2009), http://www.fed-soc.org/doclib/20090216_BernsteinEngage101.pdf.

¹⁴¹ *Sixth Amendment—Witness Confrontation—Testimony of Crime Lab Experts*, 123 HARV. L. REV. 202, 207 (2009).

¹⁴² Garrett & Neufeld, *supra* note 101, at 13.

¹⁴³ See, e.g., Christine Funk, *Lessons from the Fred Zane Case: Integrity of Forensic Science Starts in the Crime Labs*, EXAMINER.COM (Apr. 6, 2010), <http://www.examiner.com/forensic-science-in-minneapolis/lessons-from-the-fred-zain-case-integrity-of-forensic-science-starts-the-crime-labs>; Roma Khanna & Steve McVicker, *Report: HPD Crime Lab Tailored Tests to Theories*, CHRON.COM (May 12, 2006), <http://www.chron.com/news/article/Report-HPD-crime-lab-tailored-tests-to-theories-1885988.php>; Dustin Gardiner, *Arizona Crime Labs Need Reform, Experts Say*, AZCENTRAL.COM (Nov. 19, 2010),

true false-positive error rate in DNA testing is 1–2 percent.¹⁴⁴ While low compared to other forensic technology, this error rate is still incredibly threatening to defendants, especially if the jury considers forensic evidence infallible. Certainly cross-examination is not sufficient to completely combat this margin of error, but it remains a necessary precaution. Because of the risk of error and the high stakes involved with forensic testing in criminal prosecutions, the reasoning underlying the Court's decision in *Melendez-Diaz* is understandable and rational. There should be no question that the performing analyst must testify in court.

2. "Results" Are Often the Analyst's Subjective Interpretation of the Test

"Results" of forensic tests are not always clear—they require interpretation and analysis.¹⁴⁵ Because analysts will interpret and analyze test results differently, a specific analyst's unique interpretation process can be revealed through cross-examination. In the same way that several eyewitnesses to the same event often have different conclusions about the specifics of the event, different analysts testing the same sample can reach different conclusions based on their subjective interpretations.

There is no standard rule for how an analyst should interpret and report ambiguous DNA results.¹⁴⁶ Ambiguity can result when samples are compromised, when they are declared a match based on less than 100 percent certainty, when they are erroneously tested against and therefore show a perfect match, and when they contain evidence of other DNA profiles that are left unexplored. "Where degradation has occurred . . . the profile might be considered incomplete. One analyst might decide that these measurements are spurious and unreliable and might report this result as 'inconclusive,' while

<http://www.azcentral.com/news/articles/2010/11/19/20101119arizona-crime-labs-reform.html>.

¹⁴⁴ Bilz, *supra* note 103, at 816.

¹⁴⁵ Kimberlianne Podlas, "The CSI Effect": *Exposing the Media Myth*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 429, 438 (2006).

¹⁴⁶ KRIMSKY & SIMONCELLI, *supra* note 31, at 282.

another might report a partial profile.”¹⁴⁷ Indeed, studies of the data underlying reports frequently reveal limitations or problems that are not apparent from the analyst’s report alone.¹⁴⁸ “When faced with ambiguous situations, crime lab analysts frequently slant their interpretations in ways that support prosecution theories.”¹⁴⁹ Without the opportunity for cross-examination, subjective forensic determinations are easily interpreted by the jury as fact.

3. Jurors’ Tendency to Accept Scientific Evidence as Determinative

That jurors may be more likely to view forensic evidence results as truth due to trial depictions in the media has been referred to as the “CSI Effect.”¹⁵⁰ This concept is supported by depictions of the infallibility of forensic science on television shows like *CSI: Crime Scene Investigation*.¹⁵¹ Researchers suggest that jurors want to “resolve tensions associated with uncorrected injustice” and could therefore be motivated to search for ways to “legitimate their desires to convict.”¹⁵² Forensic evidence, especially DNA evidence, can provide that avenue. Further, it can be more “psychologically satisfying” to convict rather than acquit; while there is a desire to acquit the innocent, there is a competing desire to achieve justice for the victim (and therefore punish the defendant).¹⁵³ Because of the desire to correct an injustice, it may be difficult for a juror to see, especially during a trial for a heinous crime, that both the victim and the defendant deserve a just outcome.¹⁵⁴ In the defendant’s case, a just outcome

¹⁴⁷ *Id.*

¹⁴⁸ William C. Thompson et al., *Part 1: Evaluating Forensic DNA Evidence: Essential Elements of a Competent Defense Review*, 27 CHAMPION 16, 18 (2003).

¹⁴⁹ *Id.*

¹⁵⁰ Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1050 (2006). The “CSI Effect” has also been used to refer to the idea that there is a decreased likelihood of conviction where forensic evidence is *not* presented at trial. *Id.* at 1063. This decreased likelihood of conviction is attributed to the public’s heightened expectations of inculpatory evidence resulting from trial depictions in the media. *Id.*

¹⁵¹ *Id.* at 1072.

¹⁵² *Id.* at 1063.

¹⁵³ *Id.* at 1066–67.

¹⁵⁴ *Id.* at 1075.

requires a dedication to truth seeking throughout the trial. Cross-examination of the analyst that performed a forensic test used in a trial is therefore necessary to help prevent the effects of what one scholar calls “the motivation to convict.”¹⁵⁵ In requiring that lab analysts testify in court, jurors are less likely to take scientific evidence as fact, and, accordingly, more likely to preserve their role as fact finders.

C. The Melendez-Diaz Dissent: Wrong about the Requirements of the Confrontation Clause, but Perhaps Understandable in its Concern with the Practical Implications of the Majority's Decision

1. *Melendez-Diaz* Elucidated, But Did Not Expand upon, the Definition of ‘Testimonial’ Set out in *Crawford* and *Davis*

In Justice Kennedy’s dissent, joined by Justice Roberts, Justice Breyer, and Justice Alito, he argues that *Melendez-Diaz* “undoes” law governing the admission of scientific evidence, which had been established for ninety years.¹⁵⁶ The dissent distinguishes *Melendez-Diaz* from both *Crawford* and *Davis* because those cases involved “conventional witnesses,” though that phrase is never relied upon or mentioned in the decisions of *Crawford* or *Davis*.¹⁵⁷ Including scientific evidence in the “testimonial” definition and considering a lab analyst as a witness were concepts certainly not precluded by either *Crawford* or *Davis*. The dissent claims that the holding in *Melendez-Diaz* is “driven by nothing more than a wooden application of the *Crawford* and *Davis* definition of ‘testimonial,’ divorced from any guidance from history, precedent, or common sense”¹⁵⁸ simply because neither *Crawford* nor *Davis* specifically indicated whether lab analysts and their testimony would qualify as testimonial. This argument, however, fails to explain why the

¹⁵⁵ *Id.* at 1071.

¹⁵⁶ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 333 (2009) (Kennedy, J., dissenting).

¹⁵⁷ *Id.* at 343.

¹⁵⁸ *Id.* at 337.

certificates at issue did *not* fall within the core testimonial evidence established in *Crawford* and *Davis*.

Categorizing forensic certificates as testimonial does follow from *Crawford* and *Davis*: the certificates were formal affidavits, the assertions contained in the certificates were made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for use at a later trial, and the certificates were the functional equivalent to live, in-court testimony.¹⁵⁹ Both Justice Kennedy and Justice Breyer joined the *Crawford* majority,¹⁶⁰ and all four of the Justices in the *Melendez-Diaz* dissent joined the majority opinion in *Davis*.¹⁶¹ While the fact that the rules set out in *Crawford* and *Davis* rejected the indicia of reliability test from *Ohio v. Roberts* may appear startling, every dissenting justice at one point thought it a necessary change to make.

2. The Majority's Holding *Does Advance the Purposes of the Confrontation Clause*

The dissent claims that confronting a laboratory analyst will not cause the analyst to change his or her opinion due to the analyst's neutrality.¹⁶² The dissent's position is that an analyst would not retract a prior conclusion upon seeing the defendant, as a "conventional witness" might, because an analyst is far removed from the situation and claims no personal investment in the defendant's guilt.¹⁶³ This argument, however, goes to the heart of how many have come to view scientific evidence. In assuming that test results are simply objective, neutral facts, the dissent sees requiring an analyst to testify as a

¹⁵⁹ *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004); *Davis v. Washington*, 547 U.S. 813, 830 (2006). While the certificates at issue in *Melendez-Diaz* happened to fall within three separate categories of testimony, they only needed to fall within one to be considered testimonial.

¹⁶⁰ *Crawford*, 541 U.S. at 37.

¹⁶¹ *Davis*, 547 U.S. at 814.

¹⁶² *Melendez-Diaz*, 557 U.S. at 338–39.

¹⁶³ *Id.*

meaningless charade, or, worse, as a way to let the guilty “go free.”¹⁶⁴ In fact, as discussed above, subjective opinions, outside evidence, and innocent mistakes contribute to erroneous test results, and a defendant, whose liberty is at stake, deserves to have the opportunity to cross-examine the test-performing analyst in order to uncover any possible errors or sources of bias.

The dissent also distinguishes lab analysts from conventional witnesses in that a lab analyst typically does not respond to questions under interrogation—“they are not dependent upon or controlled by interrogation of any sort.”¹⁶⁵ While not subject to specific interrogation methods of state officers, forensic labs and analysts will likely only perform a forensic analysis if prompted to by police officers or the prosecution, to whom they are often accountable.¹⁶⁶ To argue that a defendant should not be able to confront a lab analyst because the analyst is completely independent is to disregard the reality of how the forensic testing system is often structured.

3. Application of *Crawford* Does Not Impose an Undue Burden on the States

Of all the dissent’s criticisms, its most significant argument (and perhaps the concern underlying its other arguments) is that *Melendez-Diaz*’s application of *Crawford* to forensic evidence will have an unduly burdensome effect on states. Indeed, *Melendez-Diaz* has already made some criminal prosecutions less efficient.¹⁶⁷ And requiring analysts that may have no recollection of

¹⁶⁴ *Id.* at 341.

¹⁶⁵ *Id.* at 343.

¹⁶⁶ *Sixth Amendment—Witness Confrontation—Testimony of Crime Lab Experts*, *supra* note 141, at 207.

¹⁶⁷ Martin F. Murphy & Marian T. Ryan, *Melendez-Diaz, One Year Later*, 54 THE BOS. BAR JOURNAL 24, 25 (2010) (“In the year following that decision, one thing is absolutely clear: cases raising challenges based on *Melendez-Diaz* have occupied an extraordinary amount of attention from this state’s appellate courts. In the first fifteen months following the Supreme Court’s opinion, the Massachusetts Supreme Judicial Court and the Appeals Court have decided 164 appeals raising *Melendez-Diaz* challenges: The SJC decided 15 and the Appeals Court 149 (22 by published opinion; 127 by unpublished Rule 1:28 opinions.) In nearly all of these cases, defense lawyers have challenged the admission of two kinds of certificates

performing a specific forensic test to appear to testify may, at first blush, seem like a waste of time. However, even those analysts who truly do not remember a specific analysis can provide valuable information on cross-examination, like his or her particular interpretation methods or precision. Confrontation “‘was meant to weed out [both] the fraudulent analyst and the incompetent one . . .’ The incompetent analyst can be weeded out whether or not she has a memory of performing the test” and, for the fraudulent analyst, “just the prospect of being called to the stand and subjected to cross-examination may well deter some fraud from ever occurring.”¹⁶⁸

Any inefficiency caused by *Melendez-Diaz* is not only surmountable, but may cause the forensic testing process to change in ways that make the results themselves more accurate. States that hope to avoid having to require multiple analysts who work on a sample to testify could change procedures so that only one analyst performs tests on a sample and interprets the results, and a supervisor (who cannot testify) verifies the results. This would decrease the chance of sample adulteration through degradation and still ensure that more than one individual has checked and verified the results. Especially in the drug context, *Melendez-Diaz* may also force the state to prosecute the most serious charges first. For instance, Massachusetts recently decriminalized possession of one ounce or less of marijuana—this means that analysts are no longer using lab time to analyze drugs in most marijuana possession cases.¹⁶⁹ This time can now be more efficiently spent on work related to more serious charges.

Of course, at bottom, “convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.”¹⁷⁰ As one scholar

which were commonly admitted as a substitute for expert testimony in criminal cases in the years before *Melendez-Diaz*: drug certificates of the kind at issue in *Melendez-Diaz* itself, and similar certificates prepared by police ballisticians, offered by the prosecution in gun cases, attesting that a gun seized from a defendant is in fact a functioning firearm.”)

¹⁶⁸ G. Michael Fenner, *Today’s Confrontation Clause (After Crawford and Melendez-Diaz)*, 43 CREIGHTON L. REV. 35, 78 (2009).

¹⁶⁹ Murphy & Ryan, *supra* note 167, at 26.

¹⁷⁰ Fenner, *supra* note 168, at 80 n.207. (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1943)).

aply points out, “one may not very well argue that we should do away with the right to be free from unreasonable searches and seizures, the right to a trial by jury, or the right to confront witnesses because things would be cheaper and quicker if we did away with them.”¹⁷¹ Once a constitutional right comes into play, the practical consequences of recognizing that right are no longer a concern of the Court; after *Crawford*, whether forensic evidence is testimonial cannot be driven by policy considerations.¹⁷² In sum, it may be that the dissent’s reluctance to consider forensic evidence testimonial, cloaked in disputes over “conventional witnesses” and the minimal benefit derived in confronting a lab analyst, is a result of the perceived inefficiency of *Melendez-Diaz* and the possibility of high costs to states. However, the “enormous”¹⁷³ change required by *Crawford* and its progeny in the way forensic evidence is admitted in criminal trials simply highlights the extent to which defendants have been deprived of their confrontation rights in the past; this change should have been implemented long ago. In absolutely every case in which forensic testimony is admitted against an individual, that individual should have the opportunity to cross-examine the creator of the forensic testimony.

III. CIRCUMVENTING *MELENDEZ-DIAZ*

Under *Crawford*, *Davis*, and *Melendez-Diaz*, where the primary purpose of a forensic report is its use in a future criminal proceeding, the analyst’s report cannot be admitted into evidence unless the analyst-witness is both unavailable and the defendant had a prior opportunity for cross-examination.¹⁷⁴ While the apparent vagueness surrounding the definitions of “testimony” and who constitutes a “witness” in the forensic testing context has undoubtedly contributed to confusion among lower courts, the real issue seems to be the

¹⁷¹ *Id.* at 79 n.206.

¹⁷² Joe Bourne, *Prosecutorial Use of Forensic Science at Trial: When Is a Lab Report Testimonial?*, 93 MINN. L. REV. 1058, 1079 (2009).

¹⁷³ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 340 (2009).

¹⁷⁴ *Id.* at 322.

perceived inefficiency and cost of applying the clear rule, and the lingering belief that forensic testing always produces accurate results. This section will detail a common method states are using to avoid being bound by this new case law and two Supreme Court cases that deal with the constitutionality of lab analysts not testifying.

A. “*Stealth Testimonial Hearsay*”¹⁷⁵

Oddly, even after *Crawford*, it is a fairly common practice for judges to allow expert witnesses to testify regarding the expert’s opinion of testimonial evidence that would otherwise be inadmissible. For example, the prosecution may hire an expert witness to review a forensic report and testify in court regarding her opinion of that report; the lab analyst herself is not required to appear in court. The actual report may or may not be admitted into evidence. In what Julie Seaman calls “stealth testimonial hearsay,” inadmissible hearsay is “smuggled in” through the expert’s opinion.¹⁷⁶ Absent confrontation concerns, this practice is permitted under Evidence Rule (ER) 703, which provides:

[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. . . . If of a type *reasonably relied upon* by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.¹⁷⁷

Thus, ER 703 allows the expert to base her opinion on facts unique to the case and not found by or even known to the jury.¹⁷⁸

ER 703’s “reasonably relied upon” standard (that is, the requirement that the facts or data are of a type reasonably relied on in forming opinions on the subject), which would be easily met for most types of forensic evidence, is

¹⁷⁵ See Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 GEO. L.J. 827 (2008).

¹⁷⁶ *Id.* at 835.

¹⁷⁷ FED. R. EVID. 703 (emphasis added).

¹⁷⁸ Seaman, *supra* note 175, at 838–39.

obviously very similar to the indicia of reliability test overruled in *Roberts*. In the same way that the *Roberts* test took away the defendant's opportunity to cross-examine witnesses by admitting hearsay if the judge deemed it reliable, so ER 703 takes away both the jury's and the defendant's opportunities to assess the reliability of the underlying report—the expert need only find the report reasonably reliable, and it can be admitted without the creator of the report present to testify.

Clearly, however, testimonial hearsay that is admissible under the Rules of Evidence is not admissible if it violates the Constitution. Trial courts have rejected constitutional challenges to stealth testimonial hearsay, though, reasoning that, even if testimonial, the underlying reports are not *hearsay* (an out-of-court statement offered for the truth of the matter asserted) because the reports are offered as a basis for experts' opinions and not for the truth of the matter asserted (the results of the report).¹⁷⁹ *Crawford* only governs testimonial hearsay.¹⁸⁰ This completely immunizes the report itself from cross-examination, since the analyst will not be required to appear. While proponents of this method have argued that *Crawford* is satisfied because the expert witness is present to be cross-examined, the only testimony that is legitimately available for the defense to question is the expert's personal opinion of the report. When the forensic test result report is not itself admitted and the expert bases her opinion on the report, courts reason that *Crawford* is not violated because the report is simply acting as the basis for the expert's opinion, and not offered for its truth—therefore, according to these courts, while the report is testimonial, it is not hearsay, and does not come within *Crawford*'s reach.¹⁸¹

Stealth testimonial hearsay violates the defendant's right to confront witnesses. The argument that the report is not hearsay because it is not offered for its truth when it provides the basis for an expert's opinion is a fiction. The jury cannot realistically be expected to assess the validity of the expert's

¹⁷⁹ *Id.* at 846.

¹⁸⁰ *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

¹⁸¹ *Id.*

opinion without considering the truth of the underlying report, especially when coupled with the possible tendency jurors may have to take forensic evidence as fact.¹⁸² The outcome of Mr. Lui's case, detailed above, will likely turn on whether the Supreme Court of the United States is willing to accept this fiction or whether it will recognize that this practice violates *Crawford*. The Court began to answer this question in *Bullcoming v. New Mexico*, below, and has the opportunity to clearly answer it in *Williams v. Illinois*.

*B. Bullcoming v. New Mexico*¹⁸³

Bullcoming presented a similar, but not identical question to the stealth testimonial hearsay issue presented in *Lui*: when a forensic report is offered into evidence to prove its truth, is a defendant's confrontation right satisfied when a supervisor with no role in producing the report appears and is subject to cross-examination regarding the report?¹⁸⁴ This question arose out of a 2005 driving-while-intoxicated case in New Mexico in which blood was drawn and used against the defendant in court.¹⁸⁵

Donald Bullcoming had rear-ended a truck; there were no injuries and only minor damage to the vehicles.¹⁸⁶ However, he left the scene and the driver of the truck called the police.¹⁸⁷ Police quickly found Mr. Bullcoming and noticed that he appeared intoxicated.¹⁸⁸ After he declined to submit to field sobriety tests and a breath test, the police drove him to a local hospital where his blood was drawn.¹⁸⁹ The blood sample was signed in and stored, and analyst Curtis Caylor tested the sample the next day.¹⁹⁰ In his report, Mr. Caylor wrote down that the blood sample contained an alcohol concentration of .21 grams per

¹⁸² Tyler, *supra* note 150, at 1063.

¹⁸³ *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2705 (2011).

¹⁸⁴ *Id.* at 2710.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

hundred milliliters, declared that the seal of the sample was received intact and broken in the laboratory, and certified that he followed the procedures required on the report.¹⁹¹

Mr. Bullcoming was charged with Driving While Intoxicated.¹⁹² On the day of the trial, the state informed Mr. Bullcoming that the analyst who performed the forensic test, Curtis Caylor, would not be testifying and that Gerasimos Razatos, another analyst, would be testifying instead.¹⁹³ There was no claim made that Mr. Caylor was unavailable.¹⁹⁴ Mr. Bullcoming argued that this substitution violated the confrontation clause under *Crawford*.¹⁹⁵ The trial court disagreed on the grounds that the report did not fall under *Crawford*'s definition of "testimonial" and it admitted the report under the business record exception to the hearsay rule.¹⁹⁶

The report was admitted and another analyst, Mr. Razatos, was allowed to testify.¹⁹⁷ On cross-examination, Mr. Razatos conceded that he had not observed the testing or reviewed Mr. Caylor's analysis in the lab and stated that "you don't know unless you actually observe the analysis that someone else conducts, whether they followed the protocol in every instance."¹⁹⁸ Interestingly, Mr. Razatos also revealed that Mr. Caylor had been put on unpaid leave.¹⁹⁹ Nonetheless, Mr. Bullcoming was found guilty and sentenced to two years in prison, and the conviction was affirmed on appeal.²⁰⁰ The New Mexico Supreme Court granted certiorari, but while the case was pending, the

¹⁹¹ *Id.*

¹⁹² *Id.* at 2711.

¹⁹³ *Id.* at 2711–12.

¹⁹⁴ *Id.* at 2712.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ KRIMSKY & SIMONCELLI, *supra* note 31, at 8.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

US Supreme Court held in *Melendez-Diaz* that forensic reports are testimonial.²⁰¹

Despite the outcome of the *Melendez-Diaz* decision, the New Mexico Supreme Court still did not acknowledge that Mr. Bullcoming's right to confrontation had been violated. While forced to concede that the report was testimonial, the court shifted the question to the sufficiency of the testimony of the surrogate witness, Mr. Razatos.²⁰² The New Mexico Supreme Court held that Mr. Razatos's in-court testimony was sufficient to satisfy the defendant's right to confront witnesses against him.²⁰³

Allowing a substitute, unrelated analyst to appear in the place of the lab analyst who performed a test violated the defendant's rights under the confrontation clause for the reasons stated in the preceding sections. The way this case went through the state system, however, is especially telling. First, the trial court held that the evidence was nontestimonial, and so *Crawford* did not apply.²⁰⁴ When *Crawford* had to apply—that is, when the US Supreme Court clearly held that forensic certificates of analysis are testimonial—the New Mexico Supreme Court used yet another strategy, taking the stance that an unrelated, substitute lab analyst is a “witness,” in order to artificially comply with the *Crawford* framework.²⁰⁵ The New Mexico Supreme Court went to great lengths to avoid complying with the clear confrontation requirement.

The question at issue in *Bullcoming* and the treatment of that question in the lower state courts are likely results of the concepts discussed in this article: a still-prevalent idea that forensic results are unwaveringly accurate, the general desire to convict defendants when a wrong has occurred, and cost and efficiency concerns. In holding that the confrontation clause is not satisfied when an analyst who did not perform or observe the test presented testifies and

²⁰¹ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 322 (2009).

²⁰² *State v. Bullcoming*, 226 P.3d 1, 9 (2010), *rev'd*, 131 S. Ct. 2705 (2011).

²⁰³ *Id.*

²⁰⁴ *Id.* at 6.

²⁰⁵ *Id.* at 8–9.

that a defendant has the right to confront the analyst who performed the test unless the analyst is unavailable and the defendant had a prior opportunity for cross-examination, the US Supreme Court took the appropriate first step of answering *who* must testify by applying the basic principles of *Crawford* and *Melendez-Diaz* concerning *what* is testimonial hearsay. The underlying principle of *Crawford*—that a defendant is not afforded a fair trial when he is denied the opportunity to confront the witness against him—is what should be honored, no matter what technology is involved.

C. Williams v. Illinois

The facts of *Williams* are as follows. In 2000, a woman was raped and robbed.²⁰⁶ A rape kit was sent to the Illinois State Police Crime lab for testing.²⁰⁷ The lab confirmed the presence of semen, and the sample was sent to Cellmark Diagnostic Laboratory in Maryland, who derived a DNA profile.²⁰⁸ The defendant was later arrested for an unrelated offense and, pursuant to a court order, his blood was drawn, tested, and a DNA profile derived.²⁰⁹ The profile was entered into the crime lab's DNA database.²¹⁰ A forensic biologist who did not have a part in either test testified that the DNA profile from the semen sample and the profile from the defendant's blood sample matched.²¹¹ As an expert witness, the biologist testified to the match at the defendant's trial, and neither of the individuals who performed the underlying DNA tests testified.²¹² While the expert's testimony was certainly important for the purpose of cross-examination regarding her personal opinion that the two samples matched, the testimony of the analysts that created the underlying DNA profiles was important for the purpose of cross-examination

²⁰⁶ *People v. Williams*, 939 N.E.2d 268, 270 (2010) *cert. granted*, 131 S. Ct. 3090 (June 28, 2011) (No. 10-8505).

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 271.

²⁰⁹ *Id.* at 270.

²¹⁰ *Id.*

²¹¹ *Id.* at 271.

²¹² *Id.*

regarding the creation of that profile that *led* to the match. Without this underlying testimony, the expert's testimony constituted stealth testimonial hearsay.

To predict how *Williams* may come out, Justice Sotomayor's concurrence in *Bullcoming* is significant. While Justice Ginsburg led the Court in the application of *Crawford* and *Melendez-Diaz* to Mr. Bullcoming's situation in a 5-4 decision, Justice Sotomayor hinted that she is ready to draw a line in *Williams*. Besides offering a proposal that states may suggest a purpose for a report besides its use at trial,²¹³ which would avoid a confrontation problem under *Crawford*'s and *Davis*'s definitions of "testimonial," Justice Sotomayor emphasized that the rule in *Bullcoming* may be limited to its narrow facts.²¹⁴ In *Bullcoming*, the surrogate witness that testified to the results of the forensic report had no role in producing the report or observing the testing. Sotomayor said that "it would be a different case if" either 1) a supervisor who observed an analyst conduct the test testified about the results of the report, or 2) an expert witness testified as to her independent opinion about the underlying reports not admitted into evidence (stealth testimonial hearsay), both of which would insulate the actual analyst from cross-examination.²¹⁵ Two justices in the *Melendez-Diaz* majority (Justice Stevens and Justice Souter) have since been replaced with Justice Kagan and Justice Sotomayor. The four *Melendez-Diaz* dissenters are all still on the Court. Therefore, Justice Sotomayor could join the *Melendez-Diaz* dissent to create a majority if she believes that stealth testimonial hearsay is acceptable.

Despite Justice Sotomayor's hint that an expert's testimony can satisfy the defendant's right to confront the analyst who created a forensic report, not considering a report hearsay because it was not admitted but was used by an

²¹³ *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2721 (2011) (Sotomayor, J., concurring) ("[T]his is not a case in which the State suggested an alternate purpose, much less an alternate *primary* purpose, for the BAC report. For example, the State has not claimed that the report was necessary to provide Bullcoming with medical treatment.").

²¹⁴ *Id.* at 2722.

²¹⁵ *Id.*

expert witness to arrive at her opinion is illogical because the defendant is no less threatened by the report and is prevented from confronting the testing analyst(s). If the underlying test results are incorrect, so are the expert's opinions about the results. Instead, this situation should still be resolved by looking to *Crawford's* basic rule: testimonial hearsay is inadmissible unless a witness is unavailable and the defendant has had a prior opportunity for cross-examination.²¹⁶ The Court should continue to apply the basic principles of *Crawford* and *Melendez-Diaz to Williams*, finding that underlying reports are still testimonial even if they are not admitted and only provide a basis for an expert witness's "independent opinion"—and should find the admission of stealth testimonial hearsay unconstitutional.

IV. CHANGES IN FORENSIC STRUCTURE AND PROSECUTORIAL PRACTICES THAT MAY AID WITH CONFRONTATION CLAUSE COMPLIANCE

While the cost and efficiency of recognizing a constitutional right is not a concern of the Court, the volume of articles and briefs that focus on possible costs and inefficiencies of requiring a lab analyst to appear at trial indicate that practical concerns do indeed impact this issue. In an amicus brief submitted on behalf of the respondent in *Bullcoming*, various state actors argued that requiring the prosecution to call the author of a forensic report it seeks to admit against a defendant would inhibit the development of efficient laboratory procedures that involve more than one centralized analyst.²¹⁷ There is a growing practice in forensic laboratories to use "high-volume processing" of evidence samples, meaning teams of analysts work on many samples instead of

²¹⁶ *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004).

²¹⁷ Brief for the States of California, Alabama, Alaska, Arizona, Colorado, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, Wyoming as Amici Curiae Supporting Respondent at 1, 8, *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) (No. 09-10876).

just one.²¹⁸ Therefore, multiple analysts are responsible for one result of a test in a given case.

It is true that requiring an entire team of analysts that worked on a single sample to appear, which could arguably be required under *Crawford* and *Melendez-Diaz*, would be a significant cost to states. However, this “high-volume processing” practice is itself questionable. When multiple analysts are responsible for different parts of the data-collecting process, the process is at an even greater risk of being inaccurate: there may be too many cooks in the kitchen. If the Supreme Court deems stealth testimonial hearsay unconstitutional in *Williams*, forcing lab analysts to appear in court, it would likely discourage high-volume processing, which would in turn likely help improve accuracy of the forensic testing process. Having only one lab analyst work on a sample is the norm in many jurisdictions. For example, in Washington State, only one analyst will work on a sample.²¹⁹ Testifying in court based on that sample “is not characterized as imposing on analysts an additional demand separable from their case work”—it is just part of the job.²²⁰ Requiring that the author of a forensic report appear in court would place considerable pressure on jurisdictions using high-volume processing, which would reduce the number of analysts working on a sample and could increase accuracy in results.

Somewhat related is the notion that specifically requiring the author of a forensic report to appear in court will cause states to suffer an overwhelming cost. The *Bullcoming* amicus brief submitted on behalf of the State also cites to this cost and the burden on lab analysts as a reason that the specific lab analyst

²¹⁸ *Id.*

²¹⁹ As we saw in *Lui*, however, samples that are aged, degraded, or have extraordinarily low quantities of DNA might occasionally be sent to private labs for testing. Those labs have their own testing procedures. Interview with James Tarver, Lab Manager, Washington State Patrol, December 2, 2010.

²²⁰ *Bullcoming* Amici Curiae Brief by defender organizations, *supra* note 43, at 8.

who performed a test should not be required to appear in court.²²¹ The general idea is that, “in the real world of modern forensic toxicology analysis,” this practice is just not feasible.²²² Again, however, the practices of many states demonstrate that the amicus claim simply is not true.²²³ Examples of cities that already call the analysts who examined the evidence, drew the conclusion, or wrote the report are: Baltimore, Maryland; Denver, Colorado; San Francisco, California; Oakland, California; Seattle, Washington; Chicago, Illinois; and Anchorage, Alaska.²²⁴

This practice is a result of a general recognition on the part of prosecutors that the analyst who produced the report is an important source of incriminating evidence against the defendant; relatedly, the analyst that produced the report is often the prosecution’s most powerful witness.²²⁵ The prosecution often calls the analyst to testify in order to strengthen its case.²²⁶ While all jurisdictions that already require the analyst that performed the test to appear “have their own unique demands and challenges,” “all of them manage.”²²⁷ The burden of requiring the author of a forensic report to appear is further assuaged by placing analysts on call so that they can come to the courthouse just before their testimony is needed, by allowing the analyst’s testimony to be taken out of order when she arrives, and by efforts made by prosecutors to schedule multiple cases for the same day.²²⁸

Finally, besides the fact that stealth testimonial hearsay is based on a fiction that a forensic report providing the basis for an expert’s opinion is not hearsay because it is not offered for its truth, allowing experts to testify instead of the lab analyst who actually performed the test would discourage lab analysts from

²²¹ Brief for National District Attorneys Association et al. as Amici Curiae in Support of Respondent at 33, *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) (No. 09-10876).

²²² *Id.*

²²³ *Bullcoming* Amici Curiae Brief by defender organizations, *supra* note 43, at 5.

²²⁴ *Id.*

²²⁵ *Id.* at 7–8.

²²⁶ *Id.* at 8.

²²⁷ *Id.* at 14–15.

²²⁸ *Id.* at 22.

ever testifying at all. In the forensic context, *Crawford* and *Melendez-Diaz* could be rendered meaningless. While having the lab analyst is a powerful tool for the prosecution, an expert witness testifying to the results is undoubtedly a more powerful one. Any expert witness could testify as to her opinion regarding the results of the test, and, because of misconceptions regarding the accuracy of forensic evidence discussed above, jurors would be likely to listen. Since lab analysts who performed the tests would no longer be required to testify, the potential beneficial changes in forensic testing practices that could lead to more accurate results (reducing the number of analysts that work on a sample) would not occur. In cases involving forensic evidence, therefore, *Williams* has the capacity to make *Crawford* and *Melendez-Diaz* a flash in the pan.

CONCLUSION

The indisputable value of DNA and other forensic technologies, and the potential costs of complying with *Crawford* and *Melendez-Diaz*, should not corrode a criminal defendant's invaluable right to confront witnesses against him. Like any other type of evidence, there is the risk of error, which is exacerbated by forensic evidence's perceived infallibility and various methods used by states to evade *Crawford*, namely stealth testimonial hearsay. An interest in the accuracy of criminal proceedings where forensic evidence has been admitted and our notions of a fair trial require a measured approach to interpreting new technologies as they make their way into the courtroom. To make sure that defendants like Mr. Lui receive fair trials in the face of damning forensic evidence, the need for confrontation of the lab analyst behind the testing process is plain.