

CONFRONTATION AND FORENSIC LABORATORY REPORTS, ROUND FOUR

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I. INTRODUCTION	51
II. ANALYSIS OF THE ARGUMENTS FAVORING ADMISSIBILITY	57
A. <i>A Testimonial Statement?</i>	57
1. <i>No Primary Purpose to Accuse a Targeted Individual</i>	58
2. <i>Formality</i>	61
B. <i>Used for the Truth of What It Asserted?</i>	68
1. <i>Sufficiently Conveyed?</i>	68
2. <i>Support of the Expert's Opinion</i>	70
3. <i>No Plausible Alternative Explanation</i>	74
C. <i>Cost Considerations</i>	77
III. WHAT IS THE HOLDING?	81

I. INTRODUCTION

Crawford v. Washington radically transformed the doctrine governing the Confrontation Clause of the Sixth Amendment to the Constitution.¹ Before *Crawford*, a prosecutor could introduce against an accused evidence of a hearsay statement, even one made in contemplation that it would be used in prosecution, so long as the statement fit within a “firmly rooted” hearsay exception or the court otherwise determined that the statement was sufficiently reliable to warrant admissibility.² *Crawford* recognized that the Clause is a procedural guarantee, governing the manner in which prosecution witnesses give their testimony.³ Therefore, a prosecutor may not introduce a statement that is testimonial in nature to prove the truth of a matter that it asserts unless the accused has, or has had, an opportunity to be confronted with the witness who made the statement.⁴

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1. See *Crawford v. Washington*, 541 U.S. 36, 42-60 (2004).

2. See *id.* at 42; accord *Ohio v. Roberts*, 448 U.S. 56, 68 (1980), *abrogated by Crawford*, 541 U.S. 36.

3. *Crawford*, 541 U.S. at 61.

4. See, e.g., Richard D. Friedman, *Giles v. California: A Personal Reflection*, 13 LEWIS & CLARK L. REV. 733, 733-37 (2009). This principle is qualified only slightly: in some circumstances, the accused may forfeit the confrontation right by wrongful conduct that prevents the witness from testifying subject to confrontation. See *id.* at 734. And the Supreme Court has held open the possibility that there is a dying-declaration exception to the right. See *id.* at 737. In my view, the dying-declaration

Though this principle represented a fundamentally different way of applying the Confrontation Clause, it did not have a pervasive impact on the results of cases. Indeed, Justice Scalia's opinion for the *Crawford* majority pointed out explicitly that most of the results reached by the Supreme Court in Confrontation Clause cases were consistent with the testimonial approach to the Clause enunciated by *Crawford*.⁵ I believe that is because courts and rule makers had a sense, although not usually articulated and perhaps not usually conscious, of the basic principle underlying *Crawford*—that a court ought not admit a statement against an accused if doing so would effectively allow the maker of the statement to testify out of court and without confronting the accused.⁶

There are, however, some significant areas in which this principle had become so obscured that pre-*Crawford* courts casually admitted testimonial statements against criminal defendants.⁷ Some of these have not given rise to much controversy.⁸ Before *Crawford*, courts often admitted formal statements, such as allocutions and grand jury testimony, made without an opportunity for confrontation in prior judicial proceedings.⁹ Since *Crawford*, though, courts have generally recognized that this is improper.¹⁰

In two other areas, however, the effect of *Crawford* has been far more contested and controversial, leading to repeated intervention by the Supreme Court. One of these is fresh accusations—accusatory statements made shortly after the commission of a crime, most often to a police officer or some other law enforcement agent.¹¹ Before *Crawford*, courts were often very lax in admitting these statements, most often on the grounds that they fit within the hearsay exceptions for excited utterances or present sense impressions.¹² In *Davis v. Washington*, the Supreme Court's first Confrontation Clause decision after *Crawford*, eight Justices recognized that many of these statements are testimonial in nature.¹³ Only Justice Thomas declined to characterize an oral accusation made to a police officer in the witness's living room as testimonial; he regarded the statement as insufficiently formal to fall within the scope of the Clause.¹⁴ More recently, in *Michigan v. Bryant*, a majority of the Court has taken a completely

cases are best explained as instances of forfeiture doctrine, if that doctrine is properly conceived. *See id.* at 733-38.

5. *See Crawford*, 541 U.S. at 55-59.

6. *See id.* at 53-59.

7. *See id.* at 58-59.

8. *See id.*

9. *See id.* at 63.

10. *See, e.g., Williams v. Illinois*, 132 S. Ct. 2221, 2232 (2012).

11. *See* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1252-53 (2002).

12. *See id.* at 1178-79.

13. *Davis v. Washington*, 547 U.S. 813, 822 (2006). Two cases were decided together in *Davis*—*Davis* itself and *Hammon v. Indiana*. *Id.* at 813. I represented the petitioner in *Hammon*. *Id.* at 815.

14. *Id.* at 840 (Thomas, J., concurring).

different tack to loosen the strictures of the Clause in this area—a generous reading of the doctrine first enunciated in *Davis* that if a statement is made principally to respond to an “ongoing emergency,” then it should not be deemed testimonial in nature.¹⁵

The second controversial area, and the principal subject of this Article, is forensic laboratory reports. Forensic science has become an increasingly important and routinized aspect of our criminal justice system. In the years before *Crawford*, many jurisdictions found it irresistibly tempting to allow prosecutors to present the results of forensic lab tests by presenting reports from the lab without the need for a live witness.¹⁶ Indeed, some states passed statutes designed to permit and regulate this result.¹⁷ Absent such special-purpose provisions, some jurisdictions determined that confrontation, as well as hearsay concerns, could be satisfied by characterizing lab reports as business or public records.¹⁸

After *Crawford*, however, I believe it should have been obvious that a forensic lab report created on the understanding that it would likely be used as prosecution evidence is testimonial within the meaning of *Crawford* and so subject to the Confrontation Clause. The Supreme Court so held in *Melendez-Diaz v. Massachusetts*, calling this conclusion a “rather straightforward application” of *Crawford*.¹⁹ But Justice Kennedy, joined by Chief Justice Roberts and Justices Breyer and Alito, wrote a pained dissent.²⁰ Among them, the dissenters, the respondent Commonwealth, and its supporting amici raised a slew of arguments²¹ that Justice Scalia, again writing for the majority, methodically cast aside. It did not matter that the lab reports, though they identified a substance as cocaine, could be characterized as not accusatory or as akin to business records; that they might (rather dubiously) be regarded as the product of neutral, scientific testing; that the analysts who prepared the reports could be characterized as not “conventional” or “ordinary” witnesses; or that the accused could have subpoenaed the authors of the reports and made them his own witnesses if he had so chosen.²² Nor did Justice Scalia put much stock in what he called the dissent’s “dire predictions” of disaster if lab analysts were required to testify.²³ “Perhaps the best indication that the sky will not fall” as a result of the decision, he wrote, “is that it has not done so already.”²⁴ And, more

15. *Michigan v. Bryant*, 131 S. Ct. 1143, 1154-56 (2011).

16. *See, e.g., Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312-15 (2009).

17. *See id.* at 325-28.

18. *See id.* at 324.

19. *Id.* at 312, 329.

20. *See id.* at 330-57 (Kennedy, J., dissenting).

21. *See id.*

22. *See id.* at 315 (majority opinion).

23. *See id.* at 327-28.

24. *Id.* at 325.

fundamentally, “[W]e may not disregard [the Confrontation Clause] at our convenience.”²⁵

The *Melendez-Diaz* dissenters proved to be a resilient group. Four days after the case was decided, the Court granted certiorari in another case involving forensic lab reports, *Briscoe v. Virginia*.²⁶ The grant appeared strange because the basic issue raised by the petition—whether the accused’s ability to present the lab analyst as his own witness obviated the need for the prosecution to present the analyst live—had, so it seemed, just been resolved in *Melendez-Diaz*.²⁷ There was widespread speculation that the four dissenters were trying to undercut the case already: Justice David Souter, a member of the majority, had announced his retirement, and Judge Sonia Sotomayor, a former prosecutor, had been nominated to succeed him.²⁸ But when the case reached oral argument, it became rather apparent that the new Justice was not about to join the dissenters in overruling or limiting a precedent that was just seven months old.²⁹ The Court did what it should have done in the first place, vacating the decision of the Virginia Supreme Court and remanding for proceedings consistent with *Melendez-Diaz*.³⁰

That was just round two. In both *Melendez-Diaz* and *Briscoe*, the prosecutors had tried to get away with simply introducing a piece of paper.³¹ In the next case in the line, *Bullcoming v. New Mexico*, the prosecution introduced a live witness from the laboratory.³² The live witness was not, however, the analyst who performed the test in question; he had been placed on unpaid administrative leave for reasons that were never revealed but that presumably did not lend credibility to his reports.³³ Again, the case seemed easy to me; after all, Justice Kennedy had noted in his *Melendez-Diaz* dissent that the Court had made clear that it “will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second.”³⁴ And a five-member majority of the Court—again with a change of membership, this time Justice Elena

25. *Id.*; see also Richard D. Friedman, *The Sky Is Still Not Falling*, 20 J.L. & POL’Y 427, 429-37 (2012) [hereinafter Friedman, *The Sky Is Still Not Falling*] (summarizing *Melendez-Diaz* more fully).

26. See *Briscoe v. Virginia*, 130 S. Ct. 1316, 1316-17 (2010) (per curiam). I represented the petitioners in *Briscoe*.

27. See *Melendez-Diaz*, 557 U.S. at 324-25.

28. See Friedman, *The Sky Is Still Not Falling*, *supra* note 25, at 432. Justice Scalia lent additional force to the speculation when, during the oral argument in *Briscoe*, he suggested that the Court had taken the case to consider overruling *Melendez-Diaz*. Transcript of Oral Argument at 58-59, *Briscoe*, 130 S. Ct. 1316 (No. 07-11191) (“Why is this case here except as an opportunity to upset *Melendez-Diaz*? . . . I’m criticizing us for taking the case.”).

29. See Friedman, *The Sky Is Still Not Falling*, *supra* note 25, at 432.

30. See *Briscoe*, 130 S. Ct. at 1316.

31. See Friedman, *The Sky Is Still Not Falling*, *supra* note 25, at 429-33.

32. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2709-10 (2011).

33. See *id.* at 2714.

34. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 334 (2009) (Kennedy, J., dissenting).

Kagan taking the place of Justice John Paul Stevens, who had retired—saw it the same way.³⁵ But the four *Melendez-Diaz* dissenters still resisted.³⁶

After *Bullcoming*, it was not surprising that the Court soon took another Confrontation Clause case involving forensic laboratory analysis. But this latest case, *Williams v. Illinois*, was different in some crucial respects from the earlier ones.³⁷ And this time, the *Melendez-Diaz* dissenters gained a crucial fifth vote from an unexpected source.

Williams arose out of an abduction and rape in Chicago.³⁸ The victim, referred to as L.J., did not know the assailant, who escaped from the scene in his car.³⁹ The police took a vaginal swab from L.J.⁴⁰ After determining that there was semen on the swab, the Illinois State Police (ISP) crime lab, for reasons of convenience and speed, shipped it for DNA analysis to Cellmark, a private forensic lab then operating in Germantown, Maryland.⁴¹ Ultimately, Cellmark sent the swab back to the ISP, together with a report, which was signed by two analysts, giving the profile of male DNA that it stated had been found on the swab.⁴² Sandra Lambatos, a forensic scientist at ISP, compared that profile to those in a computerized database that ISP maintained.⁴³ She determined that the profile matched that of Sandy Williams, who had provided a DNA sample when he was arrested on an unrelated charge several months after the assault on L.J.⁴⁴ Though she had previously mistakenly identified another man as the assailant, L.J. now picked him out of a lineup, and he was charged with the crime.⁴⁵

At trial, L.J. again identified Williams, but the prosecution relied heavily on the DNA evidence.⁴⁶ To link Williams to the crime through DNA, the State had to prove three basic propositions: (1) that DNA of a given profile was found on the vaginal swab; (2) that Williams had a given DNA profile; and (3) that the two profiles matched—or, put more precisely, that the probability of Williams's semen generating the profile found on the swab was close to one and the probability of semen from any other given male generating that profile was infinitesimally small.⁴⁷ The State proved the second of these propositions by presenting the live testimony of Karen Abbinanti, a forensic scientist at ISP, who developed a DNA profile from

35. See *Bullcoming*, 131 S. Ct. at 2709-19.

36. See *id.* at 2723-28 (Kennedy, J., dissenting).

37. See Friedman, *The Sky Is Still Not Falling*, *supra* note 25, at 434.

38. See *Williams v. Illinois*, 132 S. Ct. 2221, 2229 (2012).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. See *id.* at 2229-30.

blood drawn from Williams when he was arrested on the unrelated charge.⁴⁸ The State presented this evidence in an unexceptionable manner, and Williams did not object.⁴⁹ And the third proposition, taken by itself, did not pose a particular problem: Given DNA profiles yielded by two samples, Lambatos could testify that they matched and what the probability would be of such a match if they did not come from the same man.⁵⁰

It was the first proposition that was more troublesome because the prosecution did not present anybody from Cellmark to testify at trial.⁵¹ Indeed, it did not even introduce the report into evidence.⁵² But Lambatos's testimony explicitly referred to Cellmark's report of a profile of DNA found on the vaginal swab, and it made very clear the critical fact about that profile—that it was such that, as analyzed both by a computer program and by her, it matched that of Williams.⁵³

Williams objected on Confrontation Clause grounds to Lambatos's testimony, but the trial court, sitting without a jury, overruled the objection.⁵⁴ Williams was convicted, the Illinois courts affirmed the judgment, and so ultimately did the United States Supreme Court, by a 5-4 vote.⁵⁵

There was no majority opinion. This time, Justice Alito wrote for the four *Melendez-Diaz* dissenters, concluding that Williams's confrontation rights had not been violated.⁵⁶ Justice Kagan, joined by Justices Scalia, Ginsburg, and Sotomayor, wrote an opinion rejecting virtually every substantive point that he made.⁵⁷ Justice Thomas wrote a separate opinion doing the same—but he nevertheless joined with the *Melendez-Diaz* dissenters in concluding that the State had not violated Williams's confrontation rights.⁵⁸ He did so solely on the rather surprising ground, which the Alito foursome did not endorse, that the Cellmark report was not sufficiently formal to be deemed testimonial.⁵⁹

I will now analyze the various arguments and factors cited in favor of the result in *Williams*.

48. *Id.* at 2229.

49. *See id.*

50. *See id.* at 2230.

51. *See id.* at 2245.

52. *See id.* Nor was the report made a part of the record on appeal. *See* Richard D. Friedman, *The Cellmark Report, and What It Shows*, CONFRONTATION BLOG (Dec. 15, 2011, 12:43 AM), <http://www.confrontationright.blogspot.com/2011/12/cellmark-report-and-what-it-shows.html> [hereinafter Friedman, *Cellmark Report Blog Post*]. Williams lodged a copy of the report with the Supreme Court. *See id.*

53. *See Williams*, 132 S. Ct. at 2236.

54. *Id.* at 2223.

55. *Id.* at 2244.

56. *See id.*

57. *See id.* at 2264-75 (Kagan, J., dissenting).

58. *See id.* at 2256-64 (Thomas, J., dissenting).

59. *See id.* at 2260-61.

II. ANALYSIS OF THE ARGUMENTS FAVORING ADMISSIBILITY

Crawford provides a categorical but narrow rule, subject to very limited qualification.⁶⁰ If a statement is (a) testimonial in nature and (b) offered by a prosecutor to prove the truth of what it asserts, then its use is improper unless the accused has had or will have an adequate opportunity to be confronted with the witness who made the statement. Justice Alito concluded both that the statement was not testimonial in nature and that it was not offered to prove the truth of what it asserted.⁶¹ Justice Thomas agreed that the report was not testimonial, but only on a basis that the Alito foursome did not share.⁶²

A. A Testimonial Statement?

Justice Alito's opinion appears to attempt to create two requirements for a statement to be deemed testimonial for purposes of the Confrontation Clause: It must (a) have "the primary purpose of accusing a targeted individual of engaging in criminal conduct," and (b) be "formalized."⁶³ The first of these standards, if adopted by the Court, would represent a stunning constriction on the confrontation right. Five Justices properly rejected it.⁶⁴ By contrast, the Court has previously spoken of a formality requirement, though for good reasons it has not previously given such a requirement any real force. In *Williams*, Justice Thomas, the Court's principal advocate of the requirement, gave it unprecedented force.⁶⁵ The Alito foursome, though seemingly motivated to find any plausible way of concluding that the state had not violated Williams's confrontation rights, did not join him in declaring that the Cellmark report was insufficiently formal to fall within the Clause; they did, however, take a sideswipe at a decision in which, just six years ago, every member of the Court but Justice Thomas indicated that a violation of the Clause was quite clear.⁶⁶

60. See *Crawford v. Washington*, 541 U.S. 36, 42, 60 (2004). The rule does not apply if the accused has forfeited the confrontation right, and perhaps there is a sui generis exception for dying declarations. See *id.*

61. See *Williams*, 132 S. Ct. at 2243-44.

62. See *id.* at 2260-61, 2264 (Thomas, J., concurring).

63. *Id.* at 2242 (plurality opinion). He contends that these two characteristics are shared by "[t]he abuses that the Court has identified as prompting the adoption of the Confrontation Clause" and were present in "all but one [*Hammon*] of the post-*Crawford* cases in which a Confrontation Clause violation has been found." *Id.* (footnote omitted).

64. See *id.* at 2264 (Thomas, J., concurring); *id.* at 2275 (Kagan, J., dissenting).

65. See *id.* at 2260-61 (Thomas, J., concurring).

66. See *infra* Part II.A.2.

I. No Primary Purpose to Accuse a Targeted Individual

Justice Alito noted that the Cellmark report, unlike the statements in the post-*Crawford* cases in which the Court has found a confrontation violation, “plainly was not prepared for the primary purpose of accusing a targeted individual.”⁶⁷ This sentence seems to be attempting to establish three components of a requirement for a statement to be deemed testimonial.

(A) *Accusation*. An accusation test was already rejected in *Melendez-Diaz*, and quite properly so.⁶⁸ The Confrontation Clause applies to all “witnesses against” an accused.⁶⁹ It is not, and cannot sensibly be, limited to those who actually make an accusation.⁷⁰ If it were, then the right could apply only to those witnesses who observe a crime—and in many cases (including most murders) no such witness testifies. Imagine a case in which Wanda testifies that she left Donald and Victor alone in a small room at 10:01 in the midst of a nasty argument; Wendy testifies that she came into the room at 10:02 as Donald was leaving, saying, “Victor has been shot!” and that she found a smoking pistol by the side of Victor’s body; Whitney, a forensic scientist, testifies that fingerprints on the pistol match a known exemplar taken from Donald; and Wilma, another forensic scientist, testifies that the pistol was the source of the bullet that killed Victor. None of those witnesses have accused Donald of a crime; if the Confrontation Clause were limited to accusations, each of them could testify against Donald without confronting him—say, by making a videotape before trial. This, plainly, has never been the law; if it were, the common-law criminal trial would have had a very different appearance over the last 500 years.

(B) *Targeted Individual*. Justice Alito’s opinion appears to be suggesting that a statement cannot be testimonial, and so subject to the Confrontation Clause, unless it is directed at “a targeted individual.”⁷¹ Such a test has no more merit than an accusation test. As Justices Thomas and Kagan pointed out, this test has no pedigree; it appears to be made up out of thin air.⁷² Moreover, this test does not square easily with the language of the Confrontation Clause. If a statement that would otherwise be considered testimonial is offered against an accused at trial, without the accused having an opportunity to be confronted with the witness who made

67. *Williams*, 132 S. Ct. at 2243 (plurality opinion).

68. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 (2009); *see also Williams*, 132 S. Ct. at 2263 (Thomas, J., concurring); *id.* at 2273-74 (Kagan, J., dissenting) (discussing *Melendez-Diaz*’s rejection of the test).

69. *Melendez-Diaz*, 557 U.S. at 309.

70. *See id.* at 313-14.

71. *See Williams*, 132 S. Ct. at 2242-43 (plurality opinion).

72. *See id.* at 2262-63 (Thomas, J., concurring); *id.* at 2273 (Kagan, J., dissenting).

the statement, it seems rather clear that the accused has not “enjoy[ed] the right . . . to be confronted with the witnesses against him.”⁷³

Consider this case: After a murder has been committed, and before a suspect has been identified, a police officer visits the scene. She then makes a videotaped statement that begins this way:

We do not yet have a suspect, but I am confident that eventually we will identify the perpetrator of this crime. And when we do, the state will prosecute that person. I may then find it inconvenient to testify at trial. Accordingly, I am now recording this statement so that it may be presented as evidence at trial.

Again, if the Confrontation Clause tolerated statements of that sort, common-law trials would have been very different for centuries.

A targeted-individual test also would raise a host of ambiguities. How tightly focused does the targeting have to be? If a witness tells police that she saw a man running away from the scene of a crime to a red car, is that a targeted individual? If not, suppose that she also says that the man was 6’5” tall and had red hair. Does that narrow the universe down sufficiently? Presumably the name of a person is not the only identifying information that will constitute targeting. Or suppose the witness provides a genuinely unique description—oh, say, a 13-locus DNA profile unlikely to be shared by anyone else on the planet—and indicates that the semen of that person was found in a vaginal swab of the victim of a rape. Is that sufficient targeting? What if the lab technician who performs a test on a drug sample and reports on it has no idea of the identity of the suspect? Does that mean that the statement is so untargeted that the Confrontation Clause is not a concern, even though the police officer who requested the test knows who the suspect is?

The one thing to be said for a targeted-individual test, I suppose—and Justice Alito does say it—is that if a statement is not directed at a targeted individual then it is less likely to be the product of dishonesty.⁷⁴ But so what? That a statement may be reliable has no bearing on whether it is testimonial for purposes of the Confrontation Clause. Moreover—though given the context of the case the Cellmark report may have been highly reliable—as a general matter, to say that a statement was not motivated by the desire to frame a given individual does not guarantee that the statement is reliable, for other possible sources of unreliability remain. A witness may have an incentive to make it appear falsely that a crime has been committed; more likely, perhaps, inaccuracy may result from misperception or failure of memory. Five Justices in *Williams* rejected a targeted-

73. *Id.* at 2232 (plurality opinion) (second alteration in original) (quoting U.S. CONST. amend. VI).

74. *See id.* at 2243-44.

individual test.⁷⁵ I hope the Court as a whole buries it at the next opportunity.

(C) *Primary Purpose*. Examining the “primary purpose” of the statement has been a part of Confrontation Clause doctrine, for better or worse, since the decision in *Davis* in 2006.⁷⁶ In *Williams*, Justice Alito’s opinion asserts that the primary purpose of the Cellmark report “was not to accuse petitioner *or to create evidence for use at trial*.”⁷⁷ Thus, he seems to be hedging his bets; even if the accusation and targeted-individual components of his test are rejected, he is saying, the report still is not testimonial because it was not written primarily to create evidence for use at trial.⁷⁸ Why not? The primary purpose of the ISP in requesting the report, Justice Alito wrote, “was to catch a dangerous rapist who was still at large, not to obtain evidence for use against [Williams], who was neither in custody nor under suspicion at that time.”⁷⁹ And as for Cellmark, no one there “could have possibly known that the profile that it produced would turn out to inculcate [Williams]—*or for that matter, anyone else whose DNA profile was in a law enforcement database*.”⁸⁰

These assertions are quite dubious in two respects. First, distinguish between the initial and ultimate purposes of the report. The initial purpose of requesting, and furnishing, the report was certainly to identify, and then catch, the perpetrator. But what then? In our system, perhaps it bears reminding, catching the bad guy is not the end of the story: We have to put him on trial, and to convict him requires evidence. The *ultimate* purpose behind the report (and if one had to choose, I would say the primary purpose) was to create evidence so that the perpetrator would not only be identified but also be convicted and punished—in other words, given the

75. See *id.* at 2245 (Breyer, J., concurring); *id.* at 2255 (Thomas, J., concurring); *id.* at 2264 (Kagan, J., dissenting).

76. *Davis v. Washington*, 547 U.S. 813 (2006). Justice Thomas’s opinion in *Davis*, dissenting in part, was sharply critical of the test. *Id.* at 834 (Thomas, J., concurring in part and dissenting in part). For criticism of the test from a very different vantage point, see Richard D. Friedman, Crawford, *Davis*, and *Way Beyond*, 15 J.L. & POL’Y 553, 559-61 (2007): “[T]he decisive question in deciding whether a statement is testimonial should [not] be one of ‘primary purpose,’ either of the declarant or of the state agents.” *Id.* at 559; accord Richard D. Friedman, *Preliminary Thoughts on the Bryant Decision*, CONFRONTATION BLOG (Mar. 2, 2011), <http://confrontationright.blogspot.com/2011/03/preliminary-thoughts-on-bryant-decision.html> (criticizing the elaboration of the test given in *Bryant*—evaluating primary purpose from a mixed perspective of questioner and declarant). For a recent illustration of the difficulties that the primary-purpose test can create, see *United States v. Polidore*, 690 F.3d 705, 715 (5th Cir. 2012) (holding that statements made by an anonymous 911 caller asking for a drug dealer to be arrested at a later time were not testimonial, despite the fact that they were not made to relieve an ongoing emergency—the caller’s primary purpose was to provide information to lead to arrest, not to provide evidence for trial).

77. *Williams*, 132 S. Ct. at 2243 (plurality opinion) (emphasis added).

78. See *id.*

79. *Id.* at 2225.

80. *Id.* at 2243-44 (emphasis added).

gravity of the crime, to ensure not only that he would be caught but also that he would *stay* caught for a considerable period of time.

Second, distinguish between certain knowledge and anticipation. Nobody at Cellmark (or at the ISP, for that matter) could *know*—in the sense of having knowledge to a certainty—that the profile produced by Cellmark would inculcate someone “whose DNA profile was in a law enforcement database.”⁸¹ But certainly that was the hope and the entire reason behind the report; indeed, if the profile produced by Cellmark did not match a profile that was, then or later, known by some law enforcement agency, then it is difficult to discern what possible good it could have done, either to catch the perpetrator or to secure his conviction.

Once again, it is good to note that Justice Alito’s opinion spoke for only four Justices; the other five rejected his views in this respect.⁸² The viewpoints of the Alito foursome do not reflect the law.

2. Formality

The idea that formality is a prerequisite for a statement to fall within the Confrontation Clause appears to have entered the discourse on the Clause in Justice Thomas’s concurrence in *White v. Illinois* in 1992.⁸³ That was an important opinion; it was the first opinion in the Supreme Court to suggest that the Clause is limited to a relatively narrow set of statements, but that as to those statements it establishes a categorical rule.⁸⁴ Moreover, the test Justice Thomas suggested, that the Clause be limited to statements “contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,” certainly is on the right track, in the sense that it *describes* a significant category—and probably the great majority—of statements that should be deemed testimonial.⁸⁵ But it is unfortunate that in the two decades since *White*, Justice Thomas has not moved beyond the position he staked out then; as a test for *determining* whether a statement is testimonial, formality fails. Having argued the point at length elsewhere, I will summarize it here.⁸⁶

Some formalities—in particular, the oath or some suitable substitute, presence of the accused, and an opportunity for cross-examination—are a large part of what makes testimony *acceptable*. Without them, the testimony is not satisfactory.⁸⁷ Other formalities, such as the question-and-answer format and the ceremonial nature of the courtroom, are desirable but

81. *Id.* at 2244.

82. *See id.* at 2255 (Thomas, J., concurring); *id.* at 2264 (Kagan, J., dissenting).

83. *See White v. Illinois*, 502 U.S. 346, 358 (1992) (Thomas, J., concurring).

84. *See id.* at 364.

85. *Id.* at 365.

86. *See, e.g.*, Richard D. Friedman, *Grappling with the Meaning of “Testimonial,”* 71 BROOK. L. REV. 241, 266-69 (2005).

87. *See, e.g.*, FED. R. EVID. 603.

less essential. The absence of formalities, then, creates a problem, and depending on the formality that is missing, the problem may be decisive. The absence of formalities should not be a factor rendering the Confrontation Clause inapplicable and, therefore, making it *easier* for the statement to be admitted. If a statement is made in full knowledge that it will be used as prosecution evidence—and to make it simple, let us assume that both the speaker and an official inquisitor have this understanding and that in fact their exclusive purpose in generating the statement is to achieve that result—it would make no sense at all to say that the statement, nevertheless, falls outside the reach of the Confrontation Clause because it was made informally.

Part of the weakness of the formality test is indicated by Justice Thomas's inclusion of confessions in his listing of formal statements.⁸⁸ It is obvious that A's confession to the authorities cannot be introduced against B if B has not had an opportunity to be confronted with A; that has been the law at least since *Tong's Case* in 1662.⁸⁹ But if a confession is inherently *formal*, it would seem a plain accusation should also be. That is, if A's statement to the police "B and I did it" is necessarily formal, his statement under identical conditions, "B did it alone" should be as well. But that is not Justice Thomas's view.

In *Hammon v. Indiana*, decided as part of *Davis*, the Court held 8-1, with only Justice Thomas dissenting, that Amy Hammon's oral statement to a police officer, made in her living room and describing an assault allegedly committed by her husband, was testimonial for purposes of the Confrontation Clause.⁹⁰ The Court acknowledged that the interrogation in *Crawford* was more formal—it contained factors that "made it more objectively apparent . . . that the purpose of the exercise was to nail down the truth about past criminal events"—but the Court stated explicitly that "none was essential to the point": "It was formal enough that Amy's interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his 'investigat[ion].'"⁹¹ What is more, the Court indicated that *Hammon* was an easy case.⁹²

Among the Justices who joined the majority opinion in *Davis-Hammon* were Chief Justice Roberts and Justices Kennedy, Breyer, and

88. See *White*, 502 U.S. at 361.

89. See *Case of Thomas Tong*, [1662] 84 Eng. Rep. 1061, 1062 (stating that an out-of-court confession may be used against the confessor but not against his alleged co-conspirators).

90. See *Hammon v. Indiana*, 547 U.S. 813, 814 (2006).

91. *Id.* at 830 (alteration in original). In a footnote, the Court also said, "We do not dispute that formality is . . . essential to testimonial utterance. But . . . [i]t imports sufficient formality, in our view, that lies to [examining police] officers are criminal offenses." *Id.* at 830 n.5 (citations omitted).

92. See *id.* at 829 ("Determining the testimonial or nontestimonial character of the statements that were the product of the interrogation in *Hammon* is a much easier task [than in the *Davis* case], since they were not much different from the statements we found to be testimonial in *Crawford*.").

Alito—that is, the four Justices who dissented in *Melendez-Diaz* and *Bullcoming* and signed on to the Alito opinion in *Williams*.⁹³ And yet in *Williams*, the foursome took an unsubtle and gratuitous swipe at *Hammon*—on the grounds of formality.⁹⁴ Using the formula originated in Justice Thomas’s *White* concurrence, they said that, except for *Hammon*, every post-*Crawford* case in which the Court had found a Confrontation Clause violation “involved formalized statements such as affidavits, depositions, prior testimony, or confessions.”⁹⁵ Notwithstanding the “formal enough” characterization in *Hammon* itself, the foursome said explicitly that in *Hammon*, “an informal statement was held to violate the Confrontation Clause.”⁹⁶

It probably was not surprising that Justice Alito would do what he could to make *Hammon* appear vulnerable. Consider the concurring opinions that he and Justice Thomas wrote in *Giles v. California*.⁹⁷ That case concerned the circumstances in which an accused forfeits the confrontation right.⁹⁸ The statements in question, like the one in *Hammon*, constituted an oral accusation of domestic violence made to the police some time after the incident occurred.⁹⁹ The California Supreme Court had noted on the basis of *Hammon* that there was “no dispute that the victim’s prior statements were testimonial in nature,”¹⁰⁰ and so that issue was not before the United States Supreme Court.¹⁰¹ Justice Thomas wrote a brief concurrence noting that the statements at issue were “indistinguishable” from those in *Hammon*, and so, though given the procedural setting he was bound to treat them as testimonial, he did not believe they were.¹⁰² Justice Alito’s opinion, though not quite so blunt, pointed in the same direction.¹⁰³ “[L]ike Justice Thomas,” he wrote, he was “not convinced” that the statements fell within “the scope of the confrontation right.”¹⁰⁴ He did not attempt to reconcile this assessment with his vote in *Hammon*, and neither did he question Justice Thomas’s assessment that *Giles* and *Hammon* were indistinguishable in this respect.¹⁰⁵ It may well be that Justice Alito’s vote

93. See *Williams v. Illinois*, 132 S. Ct. 2221, 2227 (2012); *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2723 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 330 (2009); *Hammon*, 547 U.S. at 815.

94. See *Williams*, 132 S. Ct. at 2243.

95. *Id.* at 2242.

96. *Id.* at 2243.

97. See *Giles v. California*, 554 U.S. 353, 377-78 (2008) (Thomas, J., concurring); *id.* at 378 (Alito, J., concurring).

98. See *id.* at 355 (plurality opinion).

99. See *id.* at 377.

100. *People v. Giles*, 152 P.3d 433, 438 (Cal. 2007).

101. See *Giles*, 554 U.S. at 358 (plurality opinion) (“The State does not dispute here, and we accept without deciding, that Avie’s statements accusing Giles of assault were testimonial.”).

102. *Id.* at 377-78 (Thomas, J., concurring).

103. See *id.* at 378 (Alito, J., concurring).

104. *Id.*

105. See *id.*

in *Hammon* resulted from the fact that it was the first term on the Court for Chief Justice Roberts as well as for himself, and this was a “honeymoon” period of relatively high consensus.¹⁰⁶

I was more surprised by the fact that three other Justices in *Williams* joined in the snipe at *Hammon*. But perhaps I should not have been. The *Bullcoming* dissent suggests that, though all three had concurred in *Crawford*, they are suffering some buyer’s remorse.¹⁰⁷ These Justices seem willing to latch on to almost any argument with surface plausibility that will limit the reach of *Crawford*. Indeed, I have called the foursome’s discussion of formality in *Williams* gratuitous because it had no bearing on *Williams* itself but was apparently a seed sown for possible future growth.¹⁰⁸ Justice Alito did not, in fact, suggest that the Cellmark report lacked sufficient formality to be considered testimonial.¹⁰⁹

Perhaps they regarded that idea as outlandish. I do. “[I]t seems to me,” I wrote before the Court issued the *Williams* decision, “that simply looking at the report demonstrates whatever degree of formality any [J]ustice is likely to require for a statement to be considered testimonial.”¹¹⁰ That statement still seems substantively right to me, though I suppose I should have said “any Justice but one.”

But there is that one Justice. Though he disagreed forcefully with virtually every point the Alito opinion made—making five Justices who rejected those arguments—Justice Thomas nevertheless concluded that the Cellmark report was not sufficiently formal to invoke the Confrontation Clause.¹¹¹ It seems to me that this conclusion virtually makes a parody of a bad idea.

Clearly, the report was made in contemplation of use in investigation and prosecution of crime.¹¹² Indeed, Justice Thomas acknowledged, it was “produced at the request of law enforcement,” though he said that “it was not the product of any sort of formalized dialogue resembling custodial interrogation.”¹¹³ But why not? The evidence was sent under seal from ISP to Cellmark, pursuant to their usual procedures.¹¹⁴ ISP documented the shipping records that it kept in the ordinary course of its business “to maintain a record of the chain of custody of evidence.”¹¹⁵ Now, consider

106. See Michael J. Gerhardt, *Constitutional Humility*, 76 U. CIN. L. REV. 23, 38-39 (2007).

107. See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2723 (2011). Note also Justice Breyer’s comment during the argument in *Giles*: “I joined *Crawford*, and Justice Scalia would like to kick me off the boat, which I’m rapidly leaving in any event” Transcript of Oral Argument at 13, *Giles*, 554 U.S. 353 (No. 07-6053).

108. See *Giles*, 554 U.S. at 389 (Breyer, J., dissenting).

109. See *id.* at 378 (Alito, J., concurring).

110. Friedman, *Cellmark Report Blog Post*, *supra* note 52.

111. See *Williams v. Illinois*, 132 S. Ct. 2221, 2255 (2012) (Thomas, J., concurring).

112. See *id.* at 2228 (plurality opinion).

113. *Id.* at 2260 (Thomas, J., concurring).

114. *Id.* at 2229 (plurality opinion).

115. *Id.* at 2229-32.

what is obvious on the face of the report itself. It is on Cellmark's letterhead, dated, titled "Report of Laboratory Examination," addressed to a recipient at the Forensic Science Center of the ISP in Chicago, and signed by two laboratory directors who recite their titles.¹¹⁶ It bears two case numbers (apparently one for Cellmark and one for the ISP, the submitting agency).¹¹⁷ It refers to the "exhibits received" and then to the disposition of "evidence."¹¹⁸ That sounds pretty formal to me. So why was it not formal enough for Justice Thomas?

He said that the report "lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact."¹¹⁹ But from the beginning, *Crawford* established that this fact in itself does not make a statement non-testimonial.¹²⁰ Such a rule would make no sense, because a jurisdiction could virtually nullify the Confrontation Clause by the simple expedient of taking testimony without the protection of an oath.

Moreover, given that two directors signed the report, one might wonder what was missing; it appears that if the signatures had been under the word "Certifier" rather than the word "Reviewer," Justice Thomas would have regarded the report as sufficiently formal to be testimonial, and the outcome of the case would have changed.¹²¹

But to Justice Thomas, the particular words chosen have great significance. "Nowhere," he wrote, "does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained."¹²² I am dubious. Presumably, Cellmark—and the two reviewing directors—intended their work to be taken seriously and to be regarded as accurate. I would think the signatures amount to an assertion of the truth of the contents of the report. Between the assertion, "X is true" and a statement "I attest X is true," I wonder if there is even what Justice Kagan, in dissent, characterized as "a nickel's worth of difference."¹²³

Justice Thomas did, however, have a substantive point in mind. The signatories, he wrote, "neither purport to have performed the DNA testing nor certify the accuracy of those who did."¹²⁴ He is certainly right that the signatories did not purport to have performed the tests.¹²⁵ On the face of the report, one might also believe he is right that the signatures have a more

116. Friedman, *Cellmark Report Blog Post*, *supra* note 52 (quoting CELLMARK DIAGNOSTICS, REPORT OF LABORATORY EXAMINATION 1 (Feb. 15, 2001) [hereinafter CELLMARK REPORT], available at <http://www-personal.umich.edu/~rdfrdman/CellmarkRpt3.pdf>).

117. *Id.*

118. *Id.* (quoting CELLMARK REPORT, *supra* note 116, at 1).

119. *Williams*, 132 S. Ct. at 2260 (Thomas, J., concurring).

120. *See Crawford v. Washington*, 541 U.S. 36, 52 n.3 (2004).

121. *See Williams*, 132 S. Ct. at 2260.

122. *Id.*

123. *See id.* at 2276 (Kagan, J., dissenting).

124. *Id.* at 2260 (Thomas, J., concurring).

125. *See id.*

limited meaning than an assertion, “The results reported here are accurate”; it might appear that they mean only, “This report is in proper form, and I have no reason to doubt that the tests were performed properly.”¹²⁶ Taken in context, however, it appears rather clear that the signatures represent an assertion of accuracy.¹²⁷

But even if Justice Thomas were correct in perceiving limited meaning to the signatures, how could that excuse a confrontation problem? If the signatories did not perform the tests or write the body of the report or assert its accuracy, that means that someone else at Cellmark did so, presumably in full knowledge that reviewers at Cellmark would sign it and send it back to the state police, clearly in contemplation of its eventual use in prosecution. It would be unfortunate if *Melendez-Diaz* and *Bullcoming*—in both of which Justice Thomas joined, providing a crucial fifth vote¹²⁸—could be rendered dead letters quite so easily: One analyst performs the test and writes the report, and another signs it. Indeed, if the report in *Williams* is outside the scope of the Confrontation Clause—even though those who prepared the body of the report understood its eventual prosecutorial use—because they did not sign it, attest to its accuracy, or even make their identities known, it is difficult to see why the Clause would ever have real force: government officials or other evidence gatherers could simply take statements from witnesses and tack on a covering statement to the effect that the evidence presented is an accurate reflection of the statement made. Or perhaps they would not even need that tack-on, so long as the statement was presented informally and someone could authenticate it.

Justice Thomas suggested that such a tactic is not constitutionally troublesome, because to invoke it the prosecution must present a

126. *See id.*

127. Section 21034(b) of the Violent Crime Control and Law Enforcement Act of 1994, P.L. 103–322, which is now codified at 42 U.S.C. § 14132(b) and is part of what is referred to as the DNA Identification Act, provides that, in order to submit DNA profiles to the National DNA Index System, a laboratory must comply with quality assurance standards issued by the Federal Bureau of Investigation. Cellmark’s corporate parent affirms, “Our offender profiles are generated following the strict acceptance standards required for upload to the FBI’s Combined DNA Index System (CODIS).” *Forensic DNA: Offender Testing*, ORCHID CELLMARK, <http://www.orchidcellmark.com/forensicdna/offendertesting.html> (last visited Dec. 19, 2012). Those standards, *Quality Assurance Standards for Forensic DNA Testing Laboratories*, FBI: LABORATORY SERVICES (Sept. 1, 2011), <http://www.fbi.gov/about-us/lab/codis/qas-standards-for-forensic-dna-testing-laboratories-effective-9-1-2011>, contain numerous provisions indicating the formality of reports submitting such profiles. *See, e.g.*, Standard 11.1 (“The laboratory shall have and follow written procedures for taking and maintaining casework notes to support the conclusions drawn in laboratory reports.”). These include an extensive set of “elements” that the report must contain. Standard 11.2. One of these, Standard 11.2.9, is “[a] signature and title, or equivalent identification, of the person accepting responsibility for the content of the report.” This requirement has been in the Standards since at least 1998. DNA Advisory Board, *Quality Assurance Standards for Forensic DNA Testing Laboratories* (1998), http://www.bioforensics.com/conference04/TWGDAM/Quality_Assurance_Standards_2.pdf.

128. *See Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2709 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 329 (2009) (Thomas, J., concurring).

denigrated, and therefore less persuasive, form of evidence.¹²⁹ But I believe that argument is very weak. The Confrontation Clause guarantees the accused a right to be confronted with the witnesses against him—not a right to point out to the jury that a witness is testifying against him anonymously or without subjecting herself to the oath and confrontation.¹³⁰

Apparently recognizing the need to incorporate a safety valve into his formality test, Justice Thomas asserted here, as he did in *Davis*, that the Confrontation Clause “reaches the use of technically informal statements when used to evade the formalized process.”¹³¹ Given that one making a statement in contemplation of litigation always has a choice of whether to make the statement more or less formal, it is hard to know how this standard should apply; one could argue that any time a less formal process is used it reflects a decision to avoid a more formalized one. Assuming that argument is rejected, a multitude of ambiguities remains. Suppose a jurisdiction now requires certification of forensic lab reports in a manner that even Justice Thomas would recognize makes the reports formal. And suppose further that in light of *Williams* the jurisdiction decides to require certification no longer. Would that constitute evasion? Would we have to read the minds of the legislature? In *Hammon*, after Amy Hammon made her oral accusation, which became the subject of the Supreme Court case, she swore out an affidavit, presumably formal even in Justice Thomas’s view.¹³² Was the informal statement not an evasion of the “formalized process” because it was immediately followed by that process? (I might have thought it was *part of* that process.) If so, perhaps this means that evidence gatherers have a sure way around the Confrontation Clause: take an informal statement and then a formal one; the latter cannot be used at trial absent confrontation, but it prevents the former from appearing evasive. I hope that is too bizarre a doctrine to be adopted.

In his path-breaking concurrence in *White*, Justice Thomas rejected a test of the scope of the Confrontation Clause based on whether the statement was made in contemplation of legal proceedings.¹³³ His principal reason was that such a standard would be too difficult to apply.¹³⁴ It is time to recognize that a formality standard raises no fewer problems of application. But it is headed in the wrong direction from the start, and so

129. See *Williams*, 132 S. Ct. at 2261. The Solicitor General’s Office made a similar argument in *Williams*. Transcript of Oral Argument at 47-50, *Williams*, 132 S. Ct. 2221 (No. 10-85051) (argument of Michael Dreeben).

130. See *Crawford v. Washington*, 541 U.S. 36, 38 (2004).

131. See *Williams*, 132 S. Ct. at 2260 n.5 (quoting *Davis v. Washington*, 547 U.S. 813, 838 (2006) (Thomas, J., concurring in part and dissenting in part)). He repeated the point later in the opinion, saying that “the Confrontation Clause reaches bad-faith attempts to evade the formalized process.” *Id.* at 2261.

132. See *Davis*, 547 U.S. at 820.

133. See *White v. Illinois*, 502 U.S. 346, 358-66 (1992) (Thomas, J., concurring).

134. *Id.* at 364.

those problems are not the ordinary ones of line drawing that virtually any legal standard poses. Formality fails as a standard because, though formality is essential for testimony to be acceptable, it is not the essence of what makes a statement testimonial.

B. Used for the Truth of What It Asserted?

Even assuming—contrary to the votes of five Justices—that the Cellmark report was testimonial in nature, it would not raise a problem under the Confrontation Clause unless the prosecution used it for the truth of one or more statements that it asserted.¹³⁵ The Alito foursome believed the report was not so used; the other five Justices disagreed.¹³⁶

1. Sufficiently Conveyed?

I have referred to whether the statement was “used,” rather than the more usual “offered,” for the truth of what it asserted, because the Cellmark report was never introduced into evidence or even made part of the record in the Illinois courts.¹³⁷ So if it was not offered into evidence, could it possibly create a confrontation problem?

Though the Cellmark report was not formally presented to the trial judge, who sat as trier of fact, certainly Lambatos’s testimony conveyed to him some of the substance of the report. Lambatos made clear that the report indicated that found on the swab was DNA with a profile meeting a very definite criterion—it was such that both a computer program and Lambatos herself determined that it matched Williams’s DNA.¹³⁸ No other evidence indicated what the profile of the DNA found on the swab was.¹³⁹

With respect to oral statements, it is clear that a verbatim repetition of the statement, or even an attempt to quote it, is not necessary for the Confrontation Clause to come into play.¹⁴⁰ Indeed, a rule that made the

135. See *Crawford*, 541 U.S. at 59 n.9; *Tennessee v. Street*, 471 U.S. 409, 410-17 (1985).

136. See *Williams*, 132 S. Ct. at 2228, 2240-41; *id.* at 2264-77 (Kagan, J., dissenting).

137. See *id.*

138. *Id.* at 2223.

139. See *id.*

140. See *Idaho v. Wright*, 497 U.S. 805, 811 (1990). In *Idaho v. Wright*, for example, the in-court witness reported a conversation from notes that were “not detailed.” *Id.* The examination of the in-court witness in *Wright* illustrates the summary nature of the testimony by which out-of-court testimonial statements are often reported to the trier of fact:

“Q. . . . [W]hat was, as best you recollect, what was her response to the question ‘Do you play with daddy?’

“A. Yes, we play—I remember her making a comment about yes we play a lot and expanding on that and talking about spending time with daddy.

“Q. And ‘Does daddy play with you?’ Was there any response?

“A. She responded to that as well, that they played together in a variety of circumstances and, you know, seemed very unaffected by the question.

“Q. And then what did you say and her response?

Clause inapplicable unless the exact oral statement was presented to the trier of fact would make no sense and would render the Clause a virtual nullity.¹⁴¹ And plainly out-of-court written statements should receive no different treatment in this respect from oral statements. That is true as a matter of principle: the purpose of the Confrontation Clause is to ensure that witnesses give their testimony in a prescribed manner, in the presence of the accused, and subject to cross-examination.¹⁴² If a witness makes a testimonial statement out of court and the substance of that statement is presented to the trier of fact to prove the truth of the matter asserted and without the accused having had an opportunity for confrontation, the Clause is violated—and it makes no difference whether the witness made the testimonial statement in writing or orally.¹⁴³

“A. When I asked her ‘Does daddy touch you with his pee-pee,’ she did admit to that. When I asked, ‘Do you touch his pee-pee,’ she did not have any response.

“Q. Excuse me. Did you notice any change in her affect or attitude in that line of questioning?

“A. Yes.

“Q. What did you observe?

“A. She would not—oh, she did not talk any further about that. She would not elucidate what exactly—what kind of touching was taking place, or how it was happening. She did, however, say that daddy does do this with me, but he does it a lot more with my sister than with me.

“Q. And how did she offer that last statement? Was that in response to a question or was that just a volunteered statement?

“A. That was a volunteered statement as I sat and waited for her to respond, again after she sort of clammed-up, and that was the next statement that she made after just allowing some silence to occur.”

Id. at 810-11; *accord, e.g.*, *Ocampo v. Vail*, 649 F.3d 1098, 1108 (9th Cir. 2011). Even before *Crawford v. Washington*, Supreme Court case law clearly established that “out-of-court statements . . . trigger[] the protections of the Confrontation Clause, even if the in-court testimony described rather than quoted the out-of-court statements.” *See Ocampo*, 649 F.3d at 1108 (citing *Wright*, 497 U.S. at 811); *State v. Swaney*, 787 N.W.2d 541, 554 (Minn. 2010) (holding that a trial court “violates the Confrontation Clause when it admits testimony that inescapably implies a nontestifying witness’s testimonial hearsay statement,” even though the in-court witness does not “expressly state[]” the out-of-court testimonial statement).

141. In most situations, the in-court witness is not able to quote an earlier testimonial statement exactly. Moreover, even if she is able to do so, such a rule would provide an easy way to avoid the Clause, simply by having the in-court witness offer a paraphrase or summary of the statement or, for that matter, any other testimony from which the substance of the statement might be inferred. In *United States v. Meises*, 645 F.3d 5 (1st Cir. 2011), for example, the prosecutor, recognizing that statements made by a cooperating arrestee to law enforcement agents were testimonial, did not ask a testifying agent what the arrestee said; instead, he secured the agent’s testimony that after the interview “the targets of [the] investigation changed” and that the accused was taken into federal detention. *Id.* at 11, 19. The Court of Appeals for the First Circuit saw through this blatant ruse: “It makes no difference that the government took care not to introduce [the out-of-court witness’s] ‘actual statements. . . .’ [A]ny other conclusion would permit the government to evade the limitations of the Sixth Amendment . . . by weaving an unavailable declarant’s statements into another witness’s testimony by implication.” *Id.* at 21-22.

142. *See Crawford v. Washington*, 541 U.S. 36, 53-54 (2004).

143. *See id.* at 50-59.

Furthermore, a bizarre consequence would follow if written statements, unlike oral ones, could be made categorically exempt from Confrontation Clause scrutiny through the simple expedient of an in-court witness testifying to the substance of the statement. Any witness who made an oral testimonial statement but did not want to confront the accused could repeat the statement in writing. Another witness could then testify at trial to the substance of the written statement, and the Clause would provide no protection to the accused. Such a rule would, in fact, tend perversely to denigrate the quality of the evidence offered at trial because prosecutors would have an incentive to present their testimony in summary form. Accordingly, formal admission of a statement, whether it was made orally or in writing, cannot be necessary for the statement to fall within the scope of the Confrontation Clause.¹⁴⁴

The Alito foursome did not deny the validity of this general argument, which was presented to the Court in *Williams*.¹⁴⁵ Nevertheless, a passage in Justice Alito's opinion may be understood as contending that because the report was not introduced, there could not be a Confrontation Clause problem.¹⁴⁶ Justice Alito wrote that the absence of any evidence that Cellmark produced a reliable DNA profile from the vaginal swab would pose a relevance problem, not a Confrontation Clause problem.¹⁴⁷ That may be, but the problem is that Lambatos's testimony *did* convey that Cellmark produced such a profile.¹⁴⁸ The prosecution could not avoid a confrontation problem by refraining to make a formal proffer of the report. I am not sure the Alito foursome believes that it could; the other five Justices clearly do not.

2. *Support of the Expert's Opinion*

Justice Alito put his principal reliance in this part of the case on the nature of expert testimony. As he noted, expert witnesses have long been allowed to testify to opinions without having personally observed all the factual events or conditions on which the opinions are based.¹⁴⁹ His initial indication of the point, in the first paragraph of his opinion, is unnecessarily tendentious: “[D]oes *Crawford* bar an expert from expressing an opinion based on facts about a case that have been made known to the expert but

144. *See id.*

145. It was presented by me, in an amicus brief from which the preceding paragraphs have been adapted. *See* Brief of Richard D. Friedman as Amicus Curiae Supporting Petitioner, *Williams v. Illinois*, 132 S. Ct. 2221 (2012) (No. 10-8505)

146. *See Williams*, 132 S. Ct. at 2238 (“[I]t is . . . suggested that the State somehow introduced ‘the substance of Cellmark’s report into evidence.’” (quoting *id.* at 2268 (Kagan, J., dissenting))).

147. *See id.*

148. *See id.* at 2227.

149. *See id.* at 2233-34.

about which the expert is not competent to testify?”¹⁵⁰ No one in *Williams* contended—and so far as I know, no one has ever seriously contended—that the Confrontation Clause would require an affirmative answer to that question.

Federal Rule of Evidence 703 and its state counterparts regulate the procedure governing the information on which experts base their opinions.¹⁵¹ Rule 703 now provides the following:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.¹⁵²

Thus, according to Rule 703, an expert may testify to an opinion based on information made known to her by one of the parties to the litigation, even though that information is not admissible independently of the opinion.¹⁵³ In some cases, the need to evaluate the opinion can shoehorn that information into evidence.

Of course, Rule 703 did not apply to this case of its own force, and it could not take priority over the Constitution, but a reader of Justice Alito’s opinion might infer that the Rule reflects a procedure that is two hundred years old and so was presumably the one contemplated when the Confrontation Clause was adopted. But that is not so. The Advisory Committee Note to Rule 703, which was first enacted in 1975, makes clear that there were two traditional sources of the information on which an expert might base her opinion—“firsthand observation of the witness” and “presentation at the trial,” with the information transmitted to the expert either through “the familiar hypothetical question” or by “having the expert attend the trial and hear the testimony establishing the facts.”¹⁵⁴ And the Advisory Committee Note makes equally clear that the third method that it authorized was *not* one with deep historical roots:

The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception. In this

150. *Id.* at 2227.

151. *See* FED. R. EVID. 703.

152. *Id.*

153. *See id.*; *see also* FED. R. EVID. 705 (“Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.”).

154. FED. R. EVID. 703 advisory committee’s note.

respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court.¹⁵⁵

Thus, this aspect of Rule 703 does not reflect long-established historical practice. It cannot be taken, as Justice Alito seems to suggest, as a codification of principles governing the Confrontation Clause.¹⁵⁶ It is, rather, an innovation of the second half of the twentieth century, from a time when modern Confrontation Clause doctrine was in its infancy; not until 1965 did the Supreme Court hold that the Clause was binding on the states,¹⁵⁷ and it was only in 1980 that the Court attempted to articulate an overall doctrine governing the Clause—the now-discredited approach of *Ohio v. Roberts*.¹⁵⁸ Rule 703 provides no help whatsoever in interpreting the Confrontation Clause.

That is not to say that this aspect of Rule 703 is always troublesome when invoked by a prosecutor. If the expert has received information through a non-testimonial statement—say, a routine blood-test report, not prepared in contemplation of litigation—then there is no Confrontation Clause problem. But if the statement was testimonial in nature—and this part of the case becomes significant only if we assume that the Cellmark report was—then the existence of Rule 703 cannot overcome a Confrontation Clause objection.

Nevertheless, Justice Alito invokes the logic underlying this aspect of Rule 703 to conclude that the Cellmark report was not used to prove the truth of what it reported.¹⁵⁹ He goes to considerable length to establish that under Illinois law, Lambatos’s reference to the DNA profile “found in semen from the vaginal swabs” was only a premise for her opinion of a match, “not admissible for the purpose of proving the truth of the matter asserted—*i.e.*, . . . as substantive evidence to establish where the DNA profiles” come;¹⁶⁰ although he acknowledges that a jury might not understand the difference, he insists that a trial judge can be expected to.¹⁶¹

There are at least three problems with that argument in this case. First, if a testimonial statement helps support the expert’s opinion only if it is true, then there is no distinction in substance between admitting the

155. *Id.*

156. *See Williams v. Illinois*, 132 S. Ct. 2221, 2226 (2012).

157. *See Pointer v. Texas*, 380 U.S. 400, 402-07 (1965).

158. *See Ohio v. Roberts*, 448 U.S. 56, 56-60 (1980), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004).

159. *See Williams*, 132 S. Ct. at 2224.

160. *Id.* at 2236.

161. *Id.* at 2236-38.

statement to prove the truth of what it asserts and admitting it in support of the opinion.¹⁶² Justice Alito makes no real effort to counter this point.

Second, although Justice Alito was correct in saying that Lambatos's testimony that the two profiles matched "was not in any way dependent on the origin of the samples from which the profiles were derived,"¹⁶³ he had to acknowledge that without "evidence to establish the provenance of the profiles," this opinion would have been devoid of probative value.¹⁶⁴ This is not a case in which, say, a physician gives an opinion as to the medical condition of a personal injury plaintiff based, in part, on information that is not in itself admitted into evidence. In that setting, the witness has given an opinion about a material fact that is within her field of expertise; plainly, the opinion has probative value. In *Williams*, however, the opinion that a given profile matched that of Sandy Williams would prove nothing worthwhile at all absent proof tying that profile to the facts of the crime; it would be about as effective as one hand clapping.

Third, Lambatos's testimony in fact provided that necessary missing link, but it could not properly be used in that way. That is, the prosecution needed proof of the provenance of the DNA profile reported by Cellmark, and taking Lambatos's testimony at face value, she did transmit the essence of Cellmark's account that it was reporting a profile that was derived (accurately) from the vaginal swabs.¹⁶⁵ But the theory endorsed by Justice Alito required the trier of fact to put out of mind this aspect of Lambatos's testimony—and if one put aside Lambatos's testimony there was no proof of the provenance of the DNA profile.¹⁶⁶

In the end, then, if we assume that the Cellmark report was testimonial and that Lambatos's testimony conveyed part of the substance of the report in a way tantamount to formal admission, that testimony raises a Confrontation Clause problem notwithstanding the fact that the substance so conveyed was a premise of an expert opinion. At least the arguments analyzed so far do not relieve the prosecution of the need to prove missing links—that the profile reported by Cellmark was derived from the vaginal swabs taken from L.J. and that this was done accurately.

162. See *id.* at 2258 (Thomas, J., concurring); *id.* at 2268-69 (Kagan, J., dissenting); *People v. Goldstein*, 843 N.E.2d 727, 732-33 (N.Y. 2005) (holding, in a case in which testimonial statements could buttress expert's opinion only if true, that "[t]he distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context"); *People v. Hill*, 120 Cal. Rptr. 3d 251, 270-75 (2011) (reviewing cases and academic literature, and characterizing *Goldstein*'s logic as "compelling").

163. *Williams*, 132 S. Ct. at 2239 (plurality opinion).

164. *Id.*

165. See *id.* at 2239.

166. See *id.* at 2241.

3. *No Plausible Alternative Explanation*

The principal point on which Justice Alito relied in filling in the missing links was one to which he referred repeatedly in the opinion, the prominence he gave to it suggesting that it may have been decisive for at least one member of the plurality. In this case, the chance that the lab report resulted from any process other than accurate analysis of Williams's DNA appears to have been very small, and without regard to whether the proficiency of the lab or those who performed the test and reported on it.¹⁶⁷

In *Melendez-Diaz*, *Briscoe*, and *Bullcoming*, the questions were how much, if any, of a bad factor (cocaine in the first two cases, blood alcohol in the last) was present in a given sample; the presence, and an elevated level, of that factor would help the prosecution.¹⁶⁸ It would, therefore, be perfectly plausible that laziness or incompetence on the part of the analyst could yield an inaccurate report of results helpful to the prosecution. Moreover, the analyst would presumably know what answers would help the prosecution—"Yes, and a lot," in effect—so dishonesty as well could produce such inaccuracy.

In *Williams*, by contrast, the chance that Cellmark would by chance come up with a DNA profile that would help the prosecution of *any* defendant would be very small.¹⁶⁹ Not only would the chance process have to yield the DNA profile of an actual man, but to make a prosecution viable, that man would presumably have to live in, or at least have contact with, the vicinity of the crime. Moreover, the real question, I believe, is how probable chance error would yield a DNA profile matching that of Sandy Williams,¹⁷⁰ against whom there was, in the end, significant other evidence. (Recall that L.J. identified Williams, though the identification was shaky.) That chance was infinitesimally small.

Furthermore, at the time that Cellmark performed the test, it appears that there was no way that anybody at the lab could have known what profile would help the prosecution. Recall that Williams was not a suspect at that time, and so far as it appears, Cellmark could not have had knowledge of his profile.¹⁷¹ Accordingly, a dishonest analyst eager to help the prosecution would not know what profile to report.

My point is not that the Cellmark report is reliable; if *Crawford* is clear on one matter, it is that the reliability of a testimonial statement does not satisfy Confrontation Clause concerns. Rather, the point is that the fact that the Cellmark report contained a given DNA profile is highly probative

167. *See id.* at 2238.

168. *See* discussion *supra* notes 16-36.

169. *See Williams*, 132 S. Ct. at 2237-38, 2239, 2244.

170. *See generally* Peter Donnelly & Richard D. Friedman, *DNA Database Searches and the Legal Consumption of Scientific Evidence*, 97 MICH. L. REV. 931 (1999).

171. *See Williams*, 132 S. Ct. at 2229.

in the prosecution of Williams without reference to the credibility of the analysts who authored the report. The report might have significant probative value even if it is considered not as a truthful relation of what it asserts—the only basis on which it would raise a Confrontation Clause concern—but rather as a phenomenon that could plausibly have arisen only in one way.

To see this point, it may help to consider an old, non-DNA case, *Bridges v. State*.¹⁷² Bridges was accused of molesting a young girl, Sharon.¹⁷³ Sharon made a statement to her mother describing the apartment where the incident occurred.¹⁷⁴ The description closely matched that of Bridges's apartment.¹⁷⁵ Assume that, taken in conjunction, the set of features that Sharon described was highly unusual. Assume also that she did not testify at trial and that there was no reason to suspect that she was in the apartment on any occasion other than the one in question. The statement might appear to be offered for the truth of what it asserts—that Sharon was in (and molested in) a room meeting the description that she stated. But now suppose that instead of stating that she was in a room of that description, she came home from school with a story she wrote featuring such a room. Clearly, the story is not offered for the truth of what it asserts, on the basis that Sharon is a reliable reporter. And yet, if the description is sufficiently odd, but matches the accused's apartment, it has substantial probative value. Given that Sharon was not in the apartment on any other occasion, the fact that she put together the unusual conjunction of features may be powerful evidence that she was in the apartment on the occasion in question—even if she is not regarded as a reliable witness.

How does this tie in to a DNA case like *Williams*? Suppose (1) a crime scene sample is sent to a lab; (2) the lab sends back a piece of paper bearing the case number for that sample and a set of numbers that, it turns out, match the DNA profile of a given person; (3) the lab was not given that person's DNA profile; and (4) there is substantial other evidence suggesting that that person left DNA in the crime scene sample. I believe all of these facts were true in *Williams*. In these circumstances, the prosecution has at least a plausible argument that it should be allowed to follow the same sort of logic I have suggested in conjunction with *Bridges*—that is, that it should be allowed to present that piece of paper and say, in effect, "I'm not asking you to rely on the proficiency of this lab. But there is no plausible way in these circumstances that the lab could have come up with those numbers unless Accused left his DNA in the crime scene sample and the lab did an accurate DNA test on the sample."

172. See *Bridges v. State*, 19 N.W.2d 529, 530 (Wis. 1945); Richard D. Friedman, *Route Analysis of Credibility and Hearsay*, 96 YALE L.J. 667, 682-83 (1987) (analyzing *Bridges*).

173. *Bridges*, 19 N.W.2d at 530.

174. *Id.* at 531.

175. *Id.* at 530-31.

The logic here is not airtight; it is *possible* that somehow Cellmark got a sample containing Williams's DNA and somehow mixed it up with the vaginal swab from L.J., therefore reporting a profile matching Williams's, even though his DNA was not on the swab. But it is also *possible* that Sharon was in Bridges's apartment on some occasion other than the one in question. In each case the possibility, though conceivable, appears highly unlikely. In each case, the bare possibility is not in itself a sufficient reason to exclude the evidence. It appears more appropriate to cast the burden on the defense to demonstrate that what appears to have been highly improbable is true, or simply to allow the defense to argue on the basis of the possibility and let it go to the weight of the evidence.

This argument suggests a way in which DNA results might be presented in a case like *Williams*, consistently with Confrontation Clause principles, without the need for a witness from the lab that performed the test. But doing so does not allow reliance on the laboratory as a reliable tester and reporter. The prosecution cannot say, in effect—as it did in *Williams*—“We sent the sample to the lab. They are very good at doing DNA tests and reporting on the results, and that is what they did with this sample. Accordingly, their report very reliably indicates the profile of DNA that was found in the sample.” Rather, the prosecution's account must be on the order of, “We sent the sample to the lab. They sent back a report with numbers on it, and those match with the accused's DNA profile. Given that the lab had no access to that profile, and given the extraordinarily small probability that any process other than performing a DNA test on material from the accused would produce those numbers, the only plausible conclusion is that material from the accused was in fact in the sample.”

Furthermore, admitting the evidence on this basis would affect the probative value of the DNA evidence by expanding the set of alternative accounts that could explain that evidence. Suppose a witness from Cellmark had testified at trial and related from firsthand knowledge everything that happened with respect to the swabs from the time Cellmark received them to the time that it sent its report. Assuming the trier of fact believed this testimony, and also accepted Lambatos's testimony that the profile matched that of Williams, then the only possible hypothesis other than that Williams's DNA was on the swab would be that some other man with a matching profile left his DNA on the swab. But if what the trier learns is that the ISP sent the swabs to Cellmark and received back a piece of paper bearing numbers that constitute a DNA profile matching Williams's, a broader range of possibilities is open as well. It could be that those numbers result from the testing of a sample other than the vaginal swabs that somehow got mixed up with the swabs. Or perhaps someone at the ISP with knowledge of Williams's profile conspired with someone at Cellmark to frame Williams. And it is mathematically possible, though

extremely unlikely, that the numbers were generated by some process other than DNA testing.

Ultimately, then, I do not believe that the “no plausible alternative explanation” argument justifies the result in *Williams*, though it might have justified admissibility if the evidence had been presented differently. Certainly, one can understand why Justice Alito referred to this factor three times; it comes closer than any other to providing an arguable justification for the result.

C. Cost Considerations

In *Melendez-Diaz* and *Bullcoming*, the dissenters expressed concern that the costs of requiring live testimony by lab analysts would be intolerable.¹⁷⁶ It is hard to escape the conclusion that the same concern motivated the same four Justices in *Williams*. In the first paragraph of his opinion, Justice Alito makes this remarkable statement: “We . . . decide whether *Crawford* substantially impedes the ability of prosecutors to introduce DNA evidence and thus may effectively relegate the prosecution in some cases to reliance on older, less reliable forms of proof.”¹⁷⁷

To which my response is, Oh, come on, really. Though the foursome have repeatedly made predictions of looming disaster if a Confrontation Clause claim with respect to lab reports were upheld,¹⁷⁸ they seem persistently unwilling to grapple with the facts demonstrating that their concern is vastly overblown. As in *Melendez-Diaz*, “[p]erhaps the best indication that the sky [would] not fall [if *Williams* won] is that it has not done so already,” though many states require lab analysts to testify live.¹⁷⁹

One might be concerned that the problem is worse with respect to DNA evidence than with respect to tests for the presence of drugs or of blood alcohol content because DNA tests are more complex and are often performed by more than one person. Indeed, both Justice Alito’s opinion and Justice Breyer’s concurring opinion indicate that the brief of the New York County District Attorney’s Office and the Office of the Chief Medical Examiner of New York City¹⁸⁰ had considerable impact in persuading some of the Justices that victory for *Williams* would require a parade of lab witnesses in order for the prosecution to introduce any DNA results; Justice Breyer speaks of “the additional cost and complexity involved in requiring

176. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 340-52 (2009) (Kennedy, J., dissenting); *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2723-28 (2011) (Kennedy, J., dissenting).

177. *Williams v. Illinois*, 132 S. Ct. 2221, 2227 (2012).

178. See *Melendez-Diaz*, 557 U.S. at 352-57.

179. *Id.* at 325-26 (majority opinion).

180. Brief of Amicus Curiae New York County District Attorney’s Office and the New York City Office of the Chief Medical Examiner in Support of Respondent, *Williams*, 132 S. Ct. 2221 (No. 10-8505) [hereinafter New York Amicus Brief].

live testimony from perhaps dozens of ordinary laboratory technicians.”¹⁸¹ But that is just fanciful. In connection with *Bullcoming*, I supervised a study of Michigan trials in which DNA evidence was presented. Michigan is one of those states that, before *Melendez-Diaz*, required live testimony from reporting lab analysts; Michigan defendants rarely raise a serious objection to procedures used by the prosecution.¹⁸² We found that in rape cases in which DNA results were presented, an average of 1.24 lab witnesses per trial testified live to present those results.¹⁸³ That is a very short parade.

Several factors account for the fact that the reality is so much less burdensome than the dire pictures painted by those resisting the confrontation rights of defendants with respect to DNA tests.¹⁸⁴

(1) Justice Breyer took a lead from the New York Amicus Brief, which characterized the position of those supporting Williams as advocating an “all-technicians-must-testify” rule.¹⁸⁵ This was simply wrong.

Bear in mind that the Confrontation Clause applies only to testimonial statements that are presented in some manner to the trier of fact. So consider the stages of DNA analysis discussed in the New York Amicus Brief.¹⁸⁶

(a) *Examination*: A technician “examines the sample . . . and takes cuttings for DNA extraction.”¹⁸⁷ There is no testimonial statement there—examining and cutting do not constitute a statement.

(b) *Extraction*: A technician adds reagents to the sample.¹⁸⁸ Again, no statement.

181. *Id.* at 2244 (plurality opinion); *id.* at 2251 (Breyer, J., concurring).

182. See Richard D. Friedman, *Is There a Multi-Witness Problem with Respect to Forensic Lab Tests?*, CONFRONTATION BLOG (Dec. 7, 2010, 10:11 AM), <http://confrontationright.blogspot.com/2010/12/is-there-multi-witness-problem-with.html>.

183. *Id.*

184. Much of this discussion is taken from a blog post, *Thoughts on the Brief of the New York DA and OCME in Williams*. See Richard D. Friedman, *Thoughts on the Brief of the New York DA and OCME in Williams* (Dec. 5, 2011), <http://confrontationright.blogspot.com/2011/12/thoughts-on-brief-of-new-york-da-and.html>.

185. See New York Amicus Brief, *supra* note 180, at 10; *accord Williams*, 132 S. Ct. at 2246 (Breyer, J., concurring) (noting that there is “no logical stopping place” between requiring none of the lab technicians to testify and requiring all of them to do so).

Justice Breyer in *Williams v. Illinois* also adopted one of the more extravagant suggestions in the New York brief—that victory for Williams would cause some jurisdictions to reduce the amount of DNA testing they conduct. See New York Amicus Brief, *supra* note 180, at 10. But neither Justice Breyer nor the New York Brief offers any basis for concluding that states that require reporting DNA analysts to testify live rely on DNA evidence less than states that do not. See *Williams*, 132 S. Ct. at 2251. Nor do they offer any reason to believe that a result contrary to the one in *Williams* would diminish the authorities’ desire to identify the actual assailant or the ability of DNA testing to do that.

Id.

186. See New York Amicus Brief, *supra* note 180, at 7.

187. See *id.*

188. See *id.*

(c) *Quantitation*: A technician measures the amount of DNA.¹⁸⁹ Presumably this technician reports on that amount. But even assuming that this report is a testimonial statement, there is no need for it to be presented to the trier of fact. The witness who reports on the profile found in the latter part of the process does not have to convey to the trier of fact, or even rely in her own testimony, on the results of this stage; we know from the fact that a DNA profile was ultimately found that there was enough DNA to perform the analysis.¹⁹⁰

(d) *Amplification*: A technician copies specific portions of the DNA to raise them to sufficient levels for testing.¹⁹¹ Again, this is not a statement.

(e) *Electrophoresis*: Here at last we have the performance of the test that matters. A technician who performs this test must report on the results.¹⁹² That report, in a case in which the test is clearly performed for forensic purposes, should be regarded as a testimonial statement, and it provides the essential information that the prosecution needs.

So even if Williams had won and some labs continued to adhere to the procedure described by the New York Amicus Brief, the Confrontation Clause would say nothing about most of the technicians involved in that procedure.¹⁹³

I have not said anything in this context about chain of custody. So long as a witness speaks only about what she knows from personal knowledge, chain of custody is not a confrontation problem per se. *Melendez-Diaz* makes clear that as an initial matter, it is up to the prosecution to decide what witness's statements it wishes to present to establish the chain of custody.¹⁹⁴ If the gaps in the chain are too great, there may be insufficient proof, and at some point, that could be a due process violation. But reasonable inferences can bridge some substantial gaps.¹⁹⁵

(2) Given modern DNA techniques, retesting is virtually always a possibility. Neither any Justice nor anyone on the State side in *Williams* gave any reason to suggest that it would not be routinely possible in a case like *Williams*. Only a small minority of cases go to trial; in a given case, if the original technician could not conveniently testify at trial, a technician better placed to do so could retest the sample without adding great expense.

189. *See id.*

190. *See* Friedman, *The Sky Is Still Not Falling*, *supra* note 25, at 434.

191. *See* New York Amicus Brief, *supra* note 180, at 7.

192. *See id.*

193. If Williams had won this case, I do not believe that the signatories to the New York Amicus Brief would then proclaim that all the technicians in this procedure would have to testify.

194. *See* *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 n.1 (2009).

195. Obviously, during such gaps the sample would change naturally over time in at least some respects, and this would not make proof of the chain of custody inadequate. Moreover, I do not believe that the sample needs to have been sitting still during the gaps; technicians may have performed some procedures without rendering the chain of custody inadequate.

(3) The Sixth Amendment does not incorporate the Cellmark protocol. Much of the New York Amicus Brief, like Justice Breyer's opinion, reads as if Confrontation Clause jurisprudence must take as given the procedures such as those used by Cellmark in *Williams*. But other labs use different procedures. Note, for example, that only one technician from the Illinois State Police Lab did the test on the blood sample taken from Williams—and she testified at trial.¹⁹⁶ The Michigan State Police Lab rarely involves more than three people in a given lab test.¹⁹⁷

Of course, such vertically integrated procedures might not be as efficient as those used by Cellmark. But it appears clear that the Cellmark procedures were designed with little regard to the confrontation rights of the accused. It is hardly surprising that procedures designed without that constraint would be more efficient than procedures subject to it.

Neither any Justice nor anyone on the State side has suggested any reason why states that do not already operate under more vertically integrated procedures cannot emulate states that do.

(4) Defense counsel often stipulate to the results of DNA tests; often, they recognize that their chances of securing an acquittal will not be improved by drawing the attention of the trier of fact to an aspect of the prosecution case that might appear overwhelmingly strong. True, counsel may sometimes decline to stipulate until confident that the State will in fact produce all necessary witnesses, but states that have fully protected confrontation rights have not found this to be an insuperable burden. Why not? Often counsel realizes this tactic is more likely to do harm than good. For example, they may recognize from experience that the prosecution will do whatever it takes to ensure that any necessary lab witnesses appear. And often they understand that their chance of reaching an acceptable plea bargain will be substantially impaired if they are perceived as game-playing in hopes of imposing costs on the prosecution.¹⁹⁸

Trying a criminal defendant is, no doubt, more expensive in a system that gives him a right to demand that the witnesses against him testify face-to-face than in other systems that could be devised. But if a lab technician performs a test and writes a report on it, knowing that it is likely to be used in prosecution, and before the accused is convicted of a serious crime that technician is required to testify live rather than simply mail the report in, this does not strike me as a terrible result. Nor does such a requirement cast an intolerable burden on a criminal justice system.

196. See *Williams v. Illinois*, 132 S. Ct. 2221, 2229 (2011).

197. See Richard D. Friedman, *Michigan—A State That Does It Right*, CONFRONTATION BLOG (Jan. 20, 2011, 4:55 PM), <http://confrontationright.blogspot.com/2011/01/michigan-state-that-does-it-right.html>; Interview with John Collins, Director, Michigan State Police Crime Laboratory (Jan. 2011).

198. In his *Melendez-Diaz* dissent, Justice Kennedy argued that it would be unprofessional for counsel to waive a client's rights for fear of incurring judicial displeasure. *Melendez-Diaz*, 557 U.S. at 330 (Kennedy, J., dissenting). I am putting aside the possibility that counsel would act in that way.

III. WHAT IS THE HOLDING?

That the *Williams* Court was so splintered makes it difficult to determine what the holding was. The conventional wisdom is that, given the lack of a majority opinion, the holding of the Court is the narrowest theory supporting the judgment articulated by any of the Justices.¹⁹⁹ That approach strikes me as misguided. If one group of three Justices in a six-member majority says the result should prevail in circumstances A and B, and another says it should prevail in circumstances B and C, who is to say which is narrower? In *Williams*, it is tempting to say that Justice Thomas's opinion stated a narrower theory than Justice Alito's.²⁰⁰ But if Justice Thomas's view of what is required to make a statement formal applies across the board, not just with respect to lab tests—and nothing he said suggests such a limitation—then it might be considered stunningly broad.

I think a more fruitful approach is to ask: In what set of circumstances do the principles adopted by at least five Justices lead to a result like the one in the present case? Obviously they do at least in that case itself, but presumably the principles apply more broadly than that. In the schematic example given above, the holding would clearly be that the result should prevail in set B.

In *Williams*, I believe all we can say is that five Justices hold that there is no Confrontation Clause violation when (1) an expert compares two DNA profiles, one from a crime scene sample and the other known to come from a given person, and declares that they match (or that there is a very small probability that such two samples not coming from a common source would yield such similar profiles); (2) one of the profiles was generated by a laboratory that had no access to the DNA profile of that person, and at a time when neither the laboratory nor the authorities had any reason to tie that person to the crime; and (3) the report of that profile was not sworn or certified (according to standards determined by Justice Thomas).²⁰¹

At the same time, however, it appears that five Justices are steadfast in maintaining the holdings of *Melendez-Diaz* and *Bullcoming*; in rejecting a test limiting testimonial statements to those that accuse a targeted individual; in recognizing that a statement not formally admitted into evidence may yet raise Confrontation Clause concerns if its substance is conveyed to the trier of fact and it is used to prove the truth of the matter that it asserts; in realizing that if a statement supports an opinion only if it is

199. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (noting that “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds” (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976))).

200. See *Williams*, 132 S. Ct. at 2227; Jeffrey Fisher, *The Holdings and Implications of Williams v. Illinois*, SCOTUS BLOG (June 20, 2012, 2:20 PM), <http://www.scotusblog.com/2012/06/the-holdings-and-implications-of-williams-v-illinois/>.

201. See *Williams*, 132 S. Ct. at 2255 (Thomas, J., concurring).

true, then the Clause cannot be avoided by holding that the statement is being admitted in support of the opinion rather than for its truth; and in refusing to be frightened from applying the confrontation right to its full extent by unjustified fears that doing so would cause the criminal justice system to break down.

It will be interesting to see what happens if, in a case similar to *Williams*, the defendant, being forewarned by Justice Thomas's opinion, demonstrates that one who signs the report accepts responsibility for it.²⁰² In any event, it seems almost certain that before very long, the Supreme Court will hold round five in the battle over the Confrontation Clause implications of forensic lab reports.

202. *See id.*; *see supra* note 127.