

# *WILLIAMS V. ILLINOIS:* ANOTHER LOOK AT EXPERT TESTIMONY AND THE CONFRONTATION CLAUSE

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## I. INTRODUCTION

Before the Supreme Court's 2004 decision in *Crawford v. Washington*,<sup>1</sup> Confrontation Clause jurisprudence was a muddled and unsettled area of constitutional law that often merged with evidentiary hearsay rules. In *Crawford*, however, the Court redefined the purpose of the Confrontation Clause<sup>2</sup> by emphasizing the right of the defendant to test evidence against him in the "crucible of cross-examination."<sup>3</sup> In a string of recent cases, the Court has continued on this trajectory, delineating the scope of its newly developed Confrontation Clause jurisprudence. In *Williams v. Illinois*,<sup>4</sup> the Court will have the opportunity to do so again, this time by focusing on the admissibility of forensic evidence through expert testimony. *Williams* offers the Court yet another opportunity to apply the recently developed doctrine, to strengthen the essential right afforded by the Sixth Amendment, and to ensure the continued viability of the *Crawford* test.

## II. FACTS

On the evening of February 10, 2000, 22-year-old L.J. was walking home from her job at a Chicago clothing store when a man came up behind her and forced her to sit in the backseat of a beige station

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1. 541 U.S. 36, 61 (2004).

2. U.S. CONST. amend. VI. The Confrontation Clause of the Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Id.*

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

4. *Williams v. Illinois*, No. 10-8505 (U.S. argued Dec. 6, 2011).

wagon.<sup>5</sup> The man told her to take off her clothes and then vaginally penetrated L.J. while choking her.<sup>6</sup> After the assault, the man pushed L.J. out of the car and drove away with her coat, money, and other items.<sup>7</sup> L.J. then ran home, where her mother called the police.<sup>8</sup>

When the police officers arrived, L.J. told them what had transpired and was then transported to the emergency room.<sup>9</sup> There, Dr. Nancy Schubert performed a vaginal exam and took vaginal swabs, which she placed into a sexual assault evidence collection kit along with a sample of L.J.'s blood.<sup>10</sup> On February 15, the Illinois State Police (ISP) Crime Lab received the kit and performed tests that confirmed the presence of semen.<sup>11</sup>

Six months later, police arrested the defendant for an unrelated offense and, pursuant to a court order, collected a blood sample.<sup>12</sup> Forensic scientist Karen Kooi performed an analysis on the sample, extracted a DNA profile for the defendant, and entered it into the database at the ISP Crime Lab.<sup>13</sup> Meanwhile, the samples from L.J.'s sexual assault kit had been sent to Cellmark Diagnostic Laboratory for DNA analysis.<sup>14</sup> Cellmark derived a DNA profile for L.J.'s alleged rapist.<sup>15</sup> Finally, ISP forensic biologist Sandra Lambatos received the DNA profile from Cellmark, compared it to the DNA profile she received from Karen Kooi, and concluded that the two profiles were a match.<sup>16</sup> When L.J. identified the defendant in a line-up nearly eight months later,<sup>17</sup> the defendant was arrested for the alleged offenses.<sup>18</sup>

At trial, Lambatos testified that it was “a commonly accepted practice in the scientific community for one DNA expert to rely on the records of another DNA analyst to complete her work,” and that she relied on Cellmark’s testing and analysis to inform her opinion in this case.<sup>19</sup> Over defense counsel’s objections, Lambatos then testified

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5. *People v. Williams*, 939 N.E.2d 268, 270 (Ill. 2010).

6. Brief for Respondent at 1, *Williams v. Illinois*, No. 10-8505 (U.S. Oct. 19, 2011).

7. *Id.*

8. *Williams*, 939 N.E.2d at 270.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 270–71.

14. *Id.* at 271.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

that, in her expert opinion, the DNA from the semen recovered on L.J.'s vaginal swab matched the defendant's DNA.<sup>20</sup> Although Cellmark's report informed Lambatos's testimony and conclusion, the report itself was not introduced into evidence.<sup>21</sup> The trial court denied the defendant's motion to strike the evidence of Cellmark's testing on Sixth Amendment grounds.<sup>22</sup> Thereafter, the trial court found the defendant guilty of two counts of aggravated sexual assault and one count each of aggravated kidnapping and aggravated robbery.<sup>23</sup>

On appeal, the court rejected the defendant's argument that the results of Cellmark's testing and analysis were testimonial in nature and Lambatos's expert testimony—relying on those results—violated the defendant's Sixth Amendment right to confrontation.<sup>24</sup> The appellate court held that “Cellmark's report was not offered for the truth of the matter asserted; rather, it was offered to provide a basis for Lambatos'[s] opinion.”<sup>25</sup> The Illinois Supreme Court affirmed that decision,<sup>26</sup> stating that because the Confrontation Clause does not bar the admission of testimonial statements admitted for purposes other than proving the truth of the matter asserted,<sup>27</sup> the defendant's Sixth Amendment right was not violated.<sup>28</sup>

### III. LEGAL BACKGROUND

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>29</sup> The relationship between exceptions to the hearsay rule and the Confrontation Clause has often raised difficult questions for courts.<sup>30</sup> The Supreme Court has, in recent terms, attempted to address these questions and to refine the scope of the Confrontation Clause, beginning in 2004 with *Crawford v. Washington*.<sup>31</sup>

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20. *Id.* at 272.

21. *Id.*

22. *Id.*

23. *Id.* at 273.

24. *People v. Williams*, 895 N.E.2d 961, 969–70 (Ill. App. Ct. 2008).

25. *Id.*

26. *Williams*, 939 N.E.2d at 282.

27. *Id.* at 277.

28. *Id.* at 282.

29. U.S. CONST. amend. VI.

30. *See, e.g., Ian Volek, Federal Rule of Evidence 703: The Back Door and the Confrontation Clause, Ten Years Later*, 80 FORDHAM L. REV. 959, 963–64 (2011) (evaluating Rule 703's intersection with other rules of evidence and Confrontation Clause jurisprudence).

31. *E.g., Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Washington*, 547 U.S. 813

In *Crawford*, the Supreme Court sought to define the illusory terms contained within the Sixth Amendment.<sup>32</sup> Under *Crawford*, a “witness against” a defendant is defined as one who “bear[s] testimony.”<sup>33</sup> “Testimony,” in turn, is defined as a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.”<sup>34</sup> *Crawford* held that the Sixth Amendment’s primary concern is with “testimonial hearsay.”<sup>35</sup> The Confrontation Clause, therefore, bars only testimonial statements that are admitted for the purpose of proving the truth of the matter asserted.<sup>36</sup> By establishing this test, *Crawford* overruled the 1980 decision in *Ohio v. Roberts*<sup>37</sup> and its progeny, which permitted testimonial hearsay statements if the defendant was unavailable and the statements bore adequate “indicia of reliability.”<sup>38</sup> *Crawford* emphasized that the reliability of evidence was not an adequate substitute for “testing in the crucible of cross-examination.”<sup>39</sup> Thus, the new test transformed the Confrontation Clause from a substantive reliability rule to a procedural guarantee.<sup>40</sup>

The *Crawford* decision, though offering a laundry list of examples, left open the debate on exactly what type of statements qualified as “testimonial.”<sup>41</sup> This question was later explored by the Court in *Davis v. Washington*,<sup>42</sup> which concerned the admissibility of statements made to the police during or immediately after an emergency.<sup>43</sup> In *Davis*, the Court established a primary purpose test, defining statements made during an interrogation as testimonial when “the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”<sup>44</sup> The Court’s recent decision

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(2006); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

32. *Crawford*, 541 U.S. at 51.

33. *Id.* (quoting 2 NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

34. *Id.* (quoting WEBSTER, *supra* note 33).

35. *Id.* at 53.

36. *Id.* at 59 n.9.

37. 448 U.S. 56 (1980).

38. *Id.* at 66.

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

40. *See id.* at 67 (“To be sure, the [Confrontation] Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”).

41. *Id.* at 51–52.

42. 547 U.S. 813 (2006).

43. *Id.* at 817.

44. *Id.* at 822.

in *Michigan v. Bryant*<sup>45</sup> further clarified that the primary purpose test is an objective analysis of a reasonable participant and does not seek to determine the “subjective or actual purpose of the individuals involved in a particular encounter.”<sup>46</sup>

The testimonial applications of the Confrontation Clause were again at issue in *Melendez-Diaz v. Massachusetts*,<sup>47</sup> which addressed the admissibility of laboratory certificates of analysis when the testing analyst does not appear at trial.<sup>48</sup> The Court in *Melendez-Diaz* found the sworn reports of state forensic analysts certifying that a tested substance was cocaine to be testimonial, and thus their admission without the testimony of the analysts violated the Confrontation Clause.<sup>49</sup> The Court stated that because they were “quite plainly affidavits,” the certificates fell within the “core class of testimonial statements” described in *Crawford*.<sup>50</sup> The affidavits were “incontrovertibly a ‘solemn declaration or affirmation made for the purpose of establishing or proving some fact.’”<sup>51</sup> Accordingly, the certificates were meant to serve as a substitute for live witness testimony,<sup>52</sup> had no other purpose than for use at trial, and were therefore unquestionably testimonial in nature.<sup>53</sup>

In *Bullcoming v. New Mexico*<sup>54</sup>—decided only a few days before the Court granted certiorari in the instant case—the “[p]rincipal evidence against [the defendant] was a forensic laboratory report certifying that [his] blood-alcohol concentration was well above the threshold for aggravated DWI.”<sup>55</sup> At trial, the prosecution failed to call to the stand the analyst who performed the test and signed the report.<sup>56</sup> Rather, the state called a different analyst who was knowledgeable about the testing device and laboratory procedures used but “had neither participated in nor observed the test on

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45. 131 S. Ct. 1143 (2011) (holding that a statement given to police by a wounded crime victim is nontestimonial because the primary purpose of the interrogation was to enable police to deal with an ongoing emergency).

46. *Id.* at 1156.

47. 129 S. Ct. 2527 (2009).

48. *Id.* at 2531.

49. *Id.* at 2532.

50. *Id.* at 2531–32 (quoting *Crawford v. Washington*, 541 U.S. 36, 51 (2004)) (internal quotation marks omitted).

51. *Id.* at 2532 (quoting *Crawford*, 541 U.S. at 51).

52. *Id.*

53. *Id.*

54. 131 S. Ct. 2705 (2011).

55. *Id.* at 2709.

56. *Id.*

Bullcoming’s blood sample.”<sup>57</sup> In Justice Ginsburg’s opinion for the Court, she rejected New Mexico’s claim that the expert was simply reporting “a machine-generated number,” explaining that his representations as to procedure and protocol “relat[ed] to past events and human actions not revealed in raw, machine-produced data” and were “meet for cross-examination.”<sup>58</sup>

The Court then held that having a “surrogate” expert testify for the analyst did not satisfy the Confrontation Clause because the surrogate could not convey information about the specific test and testing procedure utilized, nor did he offer any “independent opinion” concerning the data.<sup>59</sup> Further, surrogate testimony could not “expose any lapses or lies on the certifying analyst’s part.”<sup>60</sup> Last, the Court held that “the formalities attending [the certificate were] more than adequate to qualify [the analyst’s] assertions as testimonial.”<sup>61</sup> Thus, when New Mexico elected to introduce the test into evidence, the analyst who performed the test became a witness whom Bullcoming had a Sixth Amendment right to confront.<sup>62</sup>

Justice Sotomayor, concurring in part, emphasized the limited reach of the Court’s opinion by eliciting four scenarios the decision did not address.<sup>63</sup> The third of these scenarios—“a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence”<sup>64</sup>—is similar to the facts now before the Court in *Williams v. Illinois*.

In *Williams*, the Court will have an opportunity to resolve a split on this question and to decide whether out-of-court statements presented to explain the basis of an expert witness’s opinion constitute hearsay. In addition to the Supreme Court of Illinois, another state supreme court, a state appellate court, and the Tenth Circuit have held that out-of-court statements relied upon by expert witnesses do not implicate a defendant’s confrontation rights because the statements are introduced not for their truth but to explain the

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57. *Id.*

58. *Id.* at 2714.

59. *Id.* at 2715–16.

60. *Id.* at 2715.

61. *Id.* at 2717.

62. *Id.* at 2716.

63. *Id.* at 2719 (Sotomayor, J., concurring).

64. *Id.* at 2722.

basis of the expert's opinion.<sup>65</sup> Conversely, the Second Circuit and two other state supreme courts have ruled in the opposite direction and held that the Confrontation Clause does not permit out-of-court testimonial statements to be presented through expert testimony.<sup>66</sup> In reaching its decision, the Court will be forced to fill another gap in the Confrontation Clause analysis and to face the question of where to draw the line in applying *Crawford* and its progeny.

#### IV. HOLDING

In *People v. Williams*,<sup>67</sup> the Supreme Court of Illinois held that because the State did not offer Sandra Lambatos's testimony regarding the Cellmark report for the truth of the matter asserted, Williams's Sixth Amendment right was not violated.<sup>68</sup> The court emphasized that, after *Crawford*, the Confrontation Clause does not bar the admission of testimonial statements admitted for purposes other than proving the truth of the matter.<sup>69</sup>

The court first examined whether the report at issue constituted hearsay.<sup>70</sup> Under the defendant's theory, the Cellmark report constituted hearsay because the State introduced it to establish the truth of the matter asserted.<sup>71</sup> According to the defendant, without accepting the truth of Cellmark's report, Lambatos could not have testified that the defendant's DNA matched the profile provided by Cellmark.<sup>72</sup> The State countered that Lambatos testified about the

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65. See *United States v. Pablo*, 625 F.3d 1285, 1294 (10th Cir. 2010) (holding that experts may testify to the data and information produced by non-testifying analysts but not to the analysts' ultimate conclusions); *State v. Tucker*, 160 P.3d 177, 194 (Ariz. 2007), *cert. denied*, 552 U.S. 923 (2007) (holding that an expert does not admit hearsay or violate the Confrontation Clause when the facts underlying his opinion are admissible only to show the basis of that opinion and not to prove their truth); *State v. Lui*, 221 P.3d 948, 955–56 (Wash. Ct. App. 2009) (holding that conclusions independently derived from the forensic work of others do not implicate *Melendez-Diaz*, and therefore no Confrontation Clause right was violated).

66. See *United States v. Mejia*, 545 F.3d 179, 199 (2d Cir. 2008) (holding that a gang expert could not transmit testimonial statements directly to the jury); *Commonwealth v. Avila*, 912 N.E.2d 1014, 1029 (Mass. 2009) (holding that a medical examiner could not testify to the underlying factual findings of a non-testifying examiner who performed the autopsy); *New York v. Goldstein*, 843 N.E.2d 727, 732–33 (N.Y. 2005), *cert. denied*, 547 U.S. 1159 (2006) (holding that out-of-court statements regarding the defendant's behavior relied upon by the prosecution's expert were inadmissible under *Crawford* because the trier of fact had to accept the statements as true in order to evaluate the expert's testimony).

67. 939 N.E.2d 268 (Ill. 2010).

68. *Id.* at 282.

69. *Id.* at 277 (citing *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004)).

70. *Id.* at 278–80.

71. *Id.* at 278.

72. *Id.*

Cellmark tests only to explain how she formed her own opinion.<sup>73</sup> Therefore, “the only statement that the prosecution offered for the truth of the matter asserted was Lambatos’s own opinion.”<sup>74</sup>

The court agreed with the State, reiterating its previous holdings that prohibitions against the admission of hearsay do not apply when an expert testifies to underlying facts and data for the purpose of explaining the basis of his opinion.<sup>75</sup> Here, the court found that Lambatos testified to her conclusion based upon her own subjective judgment about the comparison of the Cellmark report with the defendant’s DNA profile.<sup>76</sup> Thus, she used the Cellmark report to form the basis of her opinion, in conformity with previous decisions and to no abuse of the Confrontation Clause.<sup>77</sup>

Second, the court distinguished the Cellmark reports from the signed certificates in *Melendez-Diaz*, emphasizing that the reports here were “part of the process used by Lambatos in rendering her opinion” rather than a “bare-bones statement.”<sup>78</sup> The court therefore concluded that the cross-examination of Lambatos satisfied the Sixth Amendment guarantee and upheld the appellate court’s decision that there was no Confrontation Clause violation.<sup>79</sup>

## V. ARGUMENTS

### A. *Williams’s Arguments*

Petitioner Sandy Williams argues that the Confrontation Clause does not permit the introduction of testimonial statements by a forensic analyst through the testimony of a surrogate witness and that the State violated the Confrontation Clause by presenting Cellmark’s forensic DNA report through the live testimony of Sandra Lambatos.<sup>80</sup> In his argument, Williams relies upon the decisions in *Melendez-Diaz* and *Bullcoming*, emphasizing that, as in those cases, the forensic statements were presented for their truth and fell within the scope of the Confrontation Clause’s protections.<sup>81</sup>

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73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 279.

77. *Id.*

78. *Id.* at 281–82.

79. *Id.* at 282.

80. Brief for Petitioner at 9, *Williams v. Illinois*, No. 10-8505 (U.S. Dec. 6, 2011).

81. *Id.* at 10.

### 1. Testimonial Statements

Williams argues that Cellmark's forensic report is directly analogous to the testimonial forensic reports in *Melendez-Diaz* and *Bullcoming*.<sup>82</sup> First, Williams stresses that, as in *Melendez-Diaz* and in *Bullcoming*, the analysis was done at the request of the police in order to assist in investigation and prosecution.<sup>83</sup> The resulting report qualifies as testimonial, Williams claims, because it was generated for an evidentiary purpose—to assist in the prosecution of the case.<sup>84</sup>

In contrast to *Melendez-Diaz* and *Bullcoming*, however, the forensic report here was not itself introduced into evidence.<sup>85</sup> Williams claims that formal admission of a testimonial statement is not necessary for the Confrontation Clause to be implicated, as a declarant's out-of-court statement is "presented" at trial when its substance is conveyed through the in-court testimony of another witness.<sup>86</sup> Because the Confrontation Clause guarantees an opportunity to cross-examine the declarant regarding any testimonial statement used by the prosecution, it does not matter whether that testimonial statement is presented verbatim or is merely summarized by the in-court witness.<sup>87</sup> Williams argues that his confrontation right was implicated when "Lambatos conveyed to the trier of fact the substance of statements that had been conveyed to her by Cellmark."<sup>88</sup> In doing so, Lambatos's in-court testimony impermissibly served as a substitute for "what Cellmark's analysts would have testified to had they testified at trial."<sup>89</sup>

### 2. Statements Presented for Their Truth

After concluding that Cellmark's statements constituted testimony, Williams next contends the Illinois Supreme Court erred in finding that the statements were presented not for their truth but to explain Lambatos's opinion.<sup>90</sup> According to Williams, "[t]he trier of fact therefore necessarily had to assess Cellmark's statements for their truth" because they supported Lambatos's opinion only to the

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82. *Id.* at 14.

83. *Id.*

84. *Id.*

85. *Id.* at 15.

86. *Id.* at 15–16.

87. *Id.* at 17.

88. *Id.* at 19.

89. *Id.*

90. *Id.* at 20.

extent that they were true.<sup>91</sup> If the profile reported by Cellmark was not “accurately derived from the semen recovered from the [victim], Lambatos’s opinion that the two profiles matched had no evidentiary value.”<sup>92</sup> Because Lambatos’s testimony regarding Cellmark’s report was presented to establish the truth of that report, it fell within the scope of the Confrontation Clause’s protections.<sup>93</sup>

As the Cellmark report was both testimonial and presented for the truth of the matter, Williams concludes that affording him the right to confront the analysts who performed the tests is the only way to satisfy the Confrontation Clause.<sup>94</sup> Williams argues that *Bullcoming* “conclusively decided that the Confrontation Clause does not allow the testimonial statements of a forensic analyst to be introduced through the trial testimony of a surrogate analyst.”<sup>95</sup> Cross-examining Lambatos during Williams’s trial did not satisfy the Confrontation Clause because Lambatos could not describe what particular tests and protocols Cellmark’s analysts followed during the “complicated multi-step process.”<sup>96</sup>

### 3. Federal Rule of Evidence 703

Last, Williams compares the Confrontation Clause right with Federal Rule of Evidence 703, which “allows an expert witness to rely on and disclose otherwise inadmissible evidence so long as the evidence is ‘of a type reasonably relied upon by experts in the particular field.’”<sup>97</sup> Williams argues that although the Confrontation Clause does not ensure the reliability of the evidence itself, it *does* ensure that the reliability of the evidence is tested under cross-examination. Accordingly, the constitutional guarantee can only be satisfied through confrontation.<sup>98</sup> Williams points out, however, that because the Confrontation Clause deals only with testimonial statements offered for their truth, FRE 703 is not rendered inapplicable—it still applies when the statements are not testimonial or are not offered for their truth.<sup>99</sup>

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91. *Id.*

92. *Id.* at 22.

93. *Id.*

94. *Id.* at 27.

95. *Id.* at 24 (citing *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011)).

96. *Id.* at 25–26.

97. *Id.* at 28 (quoting *Wilson v. Clark*, 417 N.E.2d 1322, 1326–27 (Ill. 1981) (adopting FRE 703)).

98. *Id.* at 29.

99. *Id.* at 30.

### B. Illinois's Arguments

Respondent Illinois argues that the Confrontation Clause does not prohibit opinion testimony of a scientific expert based on outside forensic reports that do not constitute hearsay.<sup>100</sup> Alternatively, the State argues that even if the Cellmark reports are found to be hearsay, the judgment below should be affirmed because that hearsay was nontestimonial.<sup>101</sup> Finally, the State argues that even if there was a Confrontation Clause violation, it was harmless beyond a reasonable doubt.<sup>102</sup>

#### 1. Opinion Testimony of a Scientific Expert

The State argues that Cellmark's report was permissibly introduced to bolster Lambatos's independent conclusions that Petitioner's DNA profile matched the DNA profile she received from Cellmark.<sup>103</sup> The State relies on Illinois Rule of Evidence 703, which permits an expert witness to base an opinion or inference on facts or data of a type reasonably relied upon by experts in the particular field.<sup>104</sup> The State further relies on *Melendez-Diaz*, claiming that it counsels against a requirement that any person involved in the testing of the sample be subject to cross-examination.<sup>105</sup> Rather than amounting to a Sixth Amendment violation, any weakness in the witness's testimony with regard to the data she relied upon should be considered in the factfinder's assessment of what weight to give the expert's opinion.<sup>106</sup>

The State distinguishes the facts of *Melendez-Diaz* and *Bullcoming* from the case at hand by again characterizing Lambatos as more than a mere "conduit for the unconstitutional introduction of testimonial hearsay."<sup>107</sup> In *Melendez-Diaz* and *Bullcoming*, the in-court witnesses simply parroted the findings of the analysts without

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100. Brief for Respondent, *supra* note 6, at 11.

101. *Id.* at 25.

102. *Id.* at 32.

103. *Id.* at 12–13.

104. *Id.* at 13–14. Illinois Rule of Evidence 703 is substantively the same as FRE 703.

105. *Id.* at 15 (citing *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 n.1 (2009) (“[I]t is not the case . . . that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution’s case.”)).

106. *Id.* at 15 (“If the prosecution opts not to call a witness who can speak to chain of custody, authenticity, or accuracy, this decision may weaken the State’s case, but it is not a Sixth Amendment violation.”).

107. See *id.* at 17–20 (citing *Melendez-Diaz*, 129 S. Ct. at 2530–31; *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2715–16 (2011)).

offering any independent opinion.<sup>108</sup> In contrast, Lambatos discussed Cellmark’s work “only for the non-hearsay purpose of explaining the basis of her expert opinion,” as permitted under *Crawford*.<sup>109</sup> Because the statements were not offered for their truth, the State argues that cross-examining Lambatos was all that was required to satisfy the defendant’s confrontation rights.<sup>110</sup>

## 2. Nontestimonial Hearsay

The State argues alternatively that even if the Court concludes that Lambatos’s testimony included hearsay, such hearsay was not testimonial.<sup>111</sup> In *Crawford*, the Court established that the Confrontation Clause is implicated only when out-of-court *testimonial* statements are admitted for the truth of the matter asserted.<sup>112</sup> The State argues that machine-generated results, like the electropherogram at issue, are not testimonial statements.<sup>113</sup> Because testimony is defined as a “solemn declaration or affirmation,” and solemnity is a human trait, the State concludes that testimony must contain the statements of human witnesses.<sup>114</sup> Though the production of an electropherogram contains some level of human involvement, “the machine output at the end of the testing process contains no assertion by the employee and is, therefore, not that employee’s statement for Confrontation Clause purposes.”<sup>115</sup> At most, the prosecution introduced raw data generated by a machine as the basis for the testimony of an expert witness.<sup>116</sup>

The State also argues that Cellmark’s report does not qualify as a testimonial statement subject to the Confrontation Clause because it does not pass the primary purpose test established in *Michigan v. Bryant*.<sup>117</sup> In contrast with the forensic reports in *Melendez-Diaz* and *Bullcoming*, Cellmark’s report was produced not for “the primary purpose of creating evidence for use at trial,” but for “facilitating

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108. *Id.* at 18 (citing *Melendez-Diaz*, 129 S. Ct. at 2530–31; *Bullcoming*, 131 S. Ct. at 2715–16).

109. *Id.* at 21.

110. *Id.*

111. *Id.* at 25.

112. *Id.* (citing *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004)).

113. *Id.* at 26.

114. *Id.* (quoting *Crawford*, 541 U.S. at 51) (internal quotation marks omitted).

115. *Id.* at 27.

116. *Id.* at 28.

117. *Id.*

further forensic analysis.”<sup>118</sup> The State distinguishes Cellmark’s report from the reports in *Melendez-Diaz* and *Bullcoming* in two ways. First, the Cellmark report did not contain any formality, such as a certification or an oath, which would suggest that it was created with a primary purpose of being introduced at trial.<sup>119</sup> Second, the report was comprised of documents that could be understood only by other scientists and would be meaningless to the factfinder in this case.<sup>120</sup> In contrast, the reports in *Melendez-Diaz* and *Bullcoming* contained citations to court rules or statutory provisions that allowed them to serve as substantive evidence at trial.<sup>121</sup> The State argues that because the report could not serve as an alternative to trial testimony, it likely was not made with that purpose in mind, and thus does not constitute testimony subject to the Confrontation Clause.<sup>122</sup>

### 3. Harmless Error

Finally, the State argues that even if the trial court erred in admitting any part of Lambatos’s testimony, the error was harmless beyond a reasonable doubt.<sup>123</sup> The State contends that “Lambatos’s testimony was independent of the victim’s credible and unequivocal identification” of Williams, in a line-up and at trial, as the man who attacked her.<sup>124</sup> The trial judge specifically discussed the strength and credibility of the victim’s identifications and announced that he was not influenced by any “perceived infallibility of DNA analysis or evidence.”<sup>125</sup> Thus, even if the Court concludes that the trial court erred in admitting Lambatos’s testimony, the error was harmless and the judgment should stand.<sup>126</sup>

## VI. ANALYSIS AND LIKELY DISPOSITION

*Williams v. Illinois* presents an opportunity for the Court to decide whether its newly constructed Confrontation Clause jurisprudence, established in *Melendez-Diaz* and *Bullcoming*, will be extended or curtailed. Like the cases before it, *Williams* will turn on the specifics

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118. *Id.* at 29.

119. *Id.* at 30.

120. *Id.*

121. *Id.*

122. *Id.* at 31.

123. *Id.* at 32.

124. *Id.*

125. *Id.* at 33.

126. *Id.*

of the facts presented and the Court likely will not issue a broad holding.<sup>127</sup> First, the Court will have to decide whether the report at hand constituted testimony for the purposes of the Sixth Amendment. Second, the Court will focus on whether Lambatos truly came to an “independent opinion” using Cellmark’s report. Finally, the Court may also consider the repercussions of extending the Confrontation Clause too far and may be wary of issuing an opinion that conflicts with evidentiary rules and public policy considerations.

Both *Melendez-Diaz* and *Bullcoming* were decided by 5-4 majorities, with Justices Kennedy, Breyer, Roberts, and Alito dissenting. These four Justices likely will maintain their stance that “requiring the State to call the technician who filled out a form and recorded the results of a test is a hollow formality” and no Sixth Amendment violation occurs when that technician is not called.<sup>128</sup> Justices Ginsburg and Scalia are equally likely to continue to extend the Confrontation doctrine crafted in the opinions they issued in the previous two cases. Thus, the outcome of *Williams* likely hinges on the votes of Justice Sotomayor, who voiced concern over a similar situation in her concurrence in *Bullcoming*,<sup>129</sup> and Justice Thomas, who placed an emphasis on the formalities attending the statements in *Melendez-Diaz*.<sup>130</sup>

#### A. *The Court Likely Will Find the Cellmark Report to be Testimonial*

Although the State urges that, without a certification or oath, Cellmark’s report was “informal” and served no direct evidentiary purpose, the Court is unlikely to find this argument persuasive.<sup>131</sup> The Court specifically declared in *Bryant* that “[f]ormality is not the sole touchstone of our primary purpose inquiry.”<sup>132</sup> Thus, even though the report did not have an official certificate or oath, the Court likely will look beyond formalities to the primary purpose of the report’s creation.

Here, arguing that the report was made for any reason other than for aiding the investigation and prosecution of a crime would be an uphill battle. The DNA profile was made at the behest of the police in

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127. See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2719 (2011) (Sotomayor, J., concurring) (emphasizing the limited reach of the Court’s holding).

128. *Id.* at 2724 (Kennedy, J., dissenting).

129. *Id.* at 2722 (Sotomayor, J., concurring).

130. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2543 (2009) (Thomas, J., concurring).

131. Brief for Respondent, *supra* note 6, at 30.

132. *Michigan v. Bryant*, 131 S. Ct. 1143, 1160 (2011).

connection with a specific crime and was not part of any routine gathering of medical information.<sup>133</sup> As in *Melendez-Diaz* and *Bullcoming*, the analysts tested the evidence and submitted a report of their results to the police.<sup>134</sup> It is no great logical leap to conclude that the police requested the analysis in order to assist in the investigation and prosecution of the victim's attacker. Moreover, Lambatos explicitly testified at trial that "all reports in this case were prepared for this criminal investigation [and] the eventual litigation here."<sup>135</sup> Because the report was made for an evidentiary purpose to assist in the prosecution of the case, it should satisfy *Bryant's* primary purpose test and rank as testimonial.<sup>136</sup>

Justice Thomas may argue that, without formalities, this report does not "fall within the core class of testimonial statements governed by the Confrontation Clause."<sup>137</sup> In contrast, Richard Friedman, amicus for Petitioner Williams, argues that the very fact that the statement was made to assist in the prosecution implicates the purpose of the Confrontation Clause, and "a court should guard against allowing the statement to be used to prove a matter that it asserted without the witness who made the statement . . . being subjected to confrontation."<sup>138</sup>

Recently, the Court of Appeals of Maryland decided *Derr v. State*,<sup>139</sup> a case similar to *Williams*. Although not binding on the Supreme Court, the Maryland court's approach is helpful in analyzing the same theories that may be applied in *Williams*. The court in *Derr* found that the DNA profile report introduced at trial constituted testimony because "the DNA profile and report are made for the primary purpose of establishing facts relevant to a later prosecution, and an objective analyst would understand that the statements will be used in a later trial."<sup>140</sup> The court also rejected the theory that machine

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133. See Brief of Richard D. Friedman as *Amicus Curiae* in Support of Petitioner at 15, *Williams v. Illinois*, No. 10-8505 (U.S. Sept. 7, 2011) (suggesting a physician requesting routine blood tests to help him form an opinion in anticipation of testimony would not raise a Confrontation Clause problem).

134. *Melendez-Diaz*, 129 S. Ct. at 2531; *Bullcoming*, 131 S. Ct. at 2710.

135. Brief of Richard D. Friedman as *Amicus Curiae* in Support of Petitioner, *supra* note 133, at 14 n.8.

136. Brief for Petitioner, *supra* note 80, at 14.

137. *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring) (internal quotation marks omitted).

138. Brief of Richard D. Friedman as *Amicus Curiae* in Support of Petitioner, *supra* note 133, at 16.

139. 29 A.3d 533 (Md. 2011).

140. *Id.* at 549.

products are not testimonial and relied on *Bullcoming* to hold that the testimonial statement includes not only the scientific results, but also the underlying process or procedure.<sup>141</sup> Thus, the only way to satisfy the Confrontation Clause is to afford the defendant the right to cross-examine the analyst who in fact performed the testing, allowing any “lapses or lies” to be exposed.<sup>142</sup>

*B. The Court Likely Will Find Lambatos’s Opinion to be Dependent upon the Report*

The question of whether Lambatos offered her own truly “independent opinion,” as characterized by Justice Sotomayor in *Bullcoming*, is intrinsically tied to the question of whether the report was presented for its truth or merely presented to bolster Lambatos’s opinion.<sup>143</sup> This opinion was uncontestedly based, at least in part, on the Cellmark report. Lambatos used the DNA profile Cellmark produced to reach the further conclusion that Williams’s DNA matched that found on the vaginal swabs.<sup>144</sup> Without Cellmark’s report, this conclusion could not have been drawn.<sup>145</sup> Thus, Lambatos’s opinion was “independent” in the sense that she came to a new conclusion: the two profiles matched. Nonetheless, this conclusion was completely dependent on the report provided to her. A more fitting characterization, then, is that put forth by amicus: that Lambatos provided “added value” to the Cellmark report.<sup>146</sup>

Rather than simply transmitting its contents to the factfinder, Lambatos provided added value to the report by using it to conclude that the DNA profiles matched.<sup>147</sup> This use does not match up exactly to the scenario contemplated by Justice Sotomayor, which posits an expert presenting an independent opinion about the very data at issue.<sup>148</sup> Instead, Lambatos relied on the opinion of the analyst who

141. *Id.* at 553–54 (citing *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2715 (2011)).

142. *Id.* at 554 (quoting *Bullcoming*, 131 S. Ct. at 2715).

143. See Richard Friedman, *Initial Thoughts on Williams*, THE CONFRONTATION BLOG (July 9, 2011, 2:26 AM), <http://confrontationright.blogspot.com/2011/07/initial-thoughts-on-williams.html>.

144. See Brief for Respondent, *supra* note 6, at 20.

145. *Id.*

146. Brief of Richard D. Friedman as *Amicus Curiae* in Support of Petitioner, *supra* note 133, at 18.

147. *Id.*

148. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2722 (2011) (explaining that “the State does not assert that [the expert] offered an independent, expert opinion about *Bullcoming*’s blood alcohol concentration,” where the blood alcohol test was the testimony at issue).

had actually performed the initial test and provided no additional insight about the DNA profile analysis performed.<sup>149</sup>

Because Lambatos used Cellmark's report to draw her conclusion, presuming that the report was not presented for its truth would constitute a logical fallacy.<sup>150</sup> Other courts and scholars recognize the incoherency of this argument as well, stating, for example, "[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."<sup>151</sup> The present case provides a perfect illustration of this principle. Proof that Williams's DNA matched the DNA found on the vaginal swabs required three elements: proof that the DNA profile on the vaginal swabs was accurate, proof that Petitioner's DNA profile was accurate, and proof that the matching analysis was accurate.<sup>152</sup> If "the trier of fact did not accept as true" any one of these elements, Lambatos's opinion had no evidentiary value.<sup>153</sup> Thus, the trier of fact necessarily had to consider the truth of Lambatos's testimony regarding the Cellmark report in order to evaluate her opinion, and the testimony fell within the scope of the Confrontation Clause's protections.<sup>154</sup>

### C. Avoiding Possible Conflicts with the Federal Rules of Evidence

The Court should be able to find that Williams had a right to confront the analyst who performed the test without creating a conflict between the Confrontation Clause and Federal Rule of Evidence 703 for three reasons.

First, evidentiary doctrine and the Confrontation Clause involve two separate bodies of law: the evidentiary rule is concerned chiefly with reliability, whereas the Confrontation Clause has been expressly interpreted as rejecting the reliability test in favor of requiring testing

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149. See Brief for Petitioner, *supra* note 80, at 26 ("That Lambatos reviewed one of Cellmark's electropherograms does not make her opinion somehow independent of Cellmark's work. . . . Lambatos's opinion was completely dependent on Cellmark's analysts having performed the analysis correctly.").

150. See *id.* at 20 ("[T]he 'not-for-its-truth' rationale is logically incoherent where such statements support the expert's opinion only to the extent that they are true . . .").

151. *People v. Goldstein*, 843 N.E.2d 727, 732-33 (N.Y. 2005); see also *People v. Dungo*, 98 Cal. Rptr. 3d 702, 713 (Cal. Ct. App. 2009); Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & POL'Y 791, 816 (2007).

152. Brief of Richard D. Friedman as *Amicus Curiae* in Support of Petitioner, *supra* note 133, at 18.

153. Brief for Petitioner, *supra* note 80, at 22.

154. *Id.*

by cross-examination.<sup>155</sup> The rule does not purport to abrogate a constitutional provision through hearsay exceptions. Second, the evidentiary rule would still operate to allow an expert to testify to an inference drawn from one or more testimonial statements when those statements are not disclosed or discussed during trial.<sup>156</sup> The Confrontation Clause is only at issue when, as here, the expert clearly bases his or her opinion on a report generated by a named outside source. Third, the Confrontation Clause is implicated only when a prosecution expert offers an opinion based on a *testimonial* statement made by an outside source.<sup>157</sup> Reports prepared by technicians without any contemplation of assisting in a prosecution would be unaffected, as these statements do not qualify as testimony under the *Bryant* test.<sup>158</sup> Thus, even if the Court finds a Sixth Amendment violation in this case, Federal Rule of Evidence 703 need not be found unconstitutional or rendered inapplicable.

In conclusion, the Court is likely to extend its holdings in *Melendez-Diaz* and *Bullcoming* and find a Sixth Amendment violation here. Though the facts of this case differ only subtly from those of the previous cases, the difference is one that the Court has implicitly acknowledged as worth addressing. The Court should seize the opportunity to seal yet another gap in Confrontation Clause jurisprudence and continue in its “rather straightforward application”<sup>159</sup> of *Crawford* doctrine.

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155. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2720 n.1 (2011) (Sotomayor, J., concurring) (“The rules of evidence, not the Confrontation Clause, are designed primarily to police reliability; the purpose of the Confrontation Clause is to determine whether statements are testimonial and therefore require confrontation.”).

156. See Brief of Richard D. Friedman as *Amicus Curiae* in Support of Petitioner, *supra* note 133, at 11–12, n.5.

157. See Brief for Petitioner, *supra* note 80, at 30.

158. *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011).

159. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2533 (2009).