# *Williams* Plurality Relies on Inherently Unreliable Forensic Evidence: Confrontation Clause Analyses Across the Nation in Disarray

*"[T]hat's the crux of this evidence, and you're telling me that this Confrontation Clause allows you to simply say, well, we're not going to bring in the person who did the test; we are simply going to say, this is a reliable lab. I don't know how that complies with the Confrontation Clause."*[1]

## I. INTRODUCTION

In a widely fractured decision, the Supreme Court held that a defendant's constitutional right to confrontation was not violated when an expert provided testimony concerning a DNA profile linking the defendant to his accused crime.[2] In *Williams v. Illinois*,[3] the Court articulated three different reasons as to why the expert testimony, in the absence of testimony from the primary analyst, did not violate the Confrontation Clause.[4] The plurality decision in *Williams* produced significant inconsistencies among courts analyzing the issue of expert testimony and defendants' right to confront their accusers.[5]

While the Court deemed its holding consistent with precedent, it was arguably a successful attempt to limit defendants' confrontation rights under established law.[6] Before *Williams*, the Court definitively acknowledged the

1. Transcript of Oral Argument at 46-47, Williams v. Illinois, 132 S. Ct. 2221 (2012) (No. 10-8505) (expressing Confrontation Clause application shortcomings).

2. *See* Williams v. Illinois, 132 S. Ct. 2221, 2244 (2012) (concluding no Confrontation Clause violation for two independent reasons). Although dicta, this Note incorporates and discusses Justice Thomas's additional justification that a DNA swab did not violate the Confrontation Clause for lack of formality. *See infra* note 4 and accompanying text (incorporating Justice Thomas's concurring opinion into Note's discussion); *see also infra* notes 48-50 (discussing formality shortcomings to prove no Confrontation Clause violations).

3. 132 S. Ct. 2221 (2012).

4. *See id*. at 2240, 2243, 2255 (providing testimony not admitted for truth, not admitted to accuse defendant, and lacked requisite formality). The Court found that the testimony was not admitted for its truth, but also reasoned that there was no violation of the Confrontation Clause because the testimony was not offered for the primary purpose of accusing the defendant. *See id*. at 2240, 2243. In his concurring opinion, Justice Thomas noted that the DNA profile did not violate the Confrontation Clause solely because it lacked the requisite formality to be considered testimonial. *See id*. at 2255 (Thomas, J., concurring).

5. *See id*. at 2277 (Kagan, J., dissenting) (noting plurality, which agreed on little, left "significant confusion in their wake").

6. *See* Bullcoming v. New Mexico, 564 U.S. 647, 652 (2011) (noting confrontation right not satisfied when accused confronts *surrogate's* testimony for purposes of proving fact); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 (2009) (acknowledging Confrontation Clause prevented State from introducing report except by calling primary analyst).

Confrontation Clause's importance under the Sixth Amendment.[7] Now, with regard to forensic evidence, state courts are left with the opportunity to decide whether a certain situation violates a defendant's confrontation rights under *Williams* and other prior Supreme Court precedent.[8]

Remarkably, the *Williams* plurality understood that it would "also decide whether *Crawford* substantially impedes the ability of prosecutors to introduce DNA evidence and thus may effectively relegate the prosecution in some cases to rel[y] on older, less reliable forms of proof."[9] The plurality, in deeming forensic crime labs inherently reliable, went against prior Court opinions, thus affording greater weight to the prosecution than defendants' rights under the Confrontation Clause.[10] The *Williams* dissent noted that abandoning cross-examining experts because their testimony is inherently trustworthy is akin to abandoning jury trials because of defendants' undeniable guilt.[11] In light of forensic evidence's unreliability, surrogate testimony relating to DNA evidence should face more, not less, scrutiny from courts.[12]

This Note will begin by explaining defendants' right to confrontation and discussing the evolution of the Confrontation Clause through *Crawford*, *Williams*, and other seminal cases.[13] The Note will then discuss the lack of uniformity in Confrontation Clause analyses across the country due to the fractured *Williams* decision.[14] Next, it will examine the unreliability of crime labs and forensic evidence by illustrating crime lab scandals occurring in multiple states.[15] The analysis argues that states should reject the *Williams* notion of inherent DNA testing reliability, and provide defendants with better protection by requiring the primary analyst to testify to satisfy the

7. *See* Crawford v. Washington, 541 U.S. 36, 53-54 (2004) (demonstrating historically stringent application of Confrontation Clause requirements). The Court in *Crawford v. Washington* stated, "[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.*

8. *Compare* State v. Roach, 95 A.3d 683, 693 (N.J. 2014) (considering *Williams* unreliable guide for determining Confrontation Clause violations), *with* State v. Lui, 315 P.3d 493, 503 (Wash. 2014) (considering its decision consistent with plurality opinion in *Williams*).

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

10. *See Bullcoming*, 564 U.S. at 659-60 (noting purported scientific reliability of testimonial statement does not dispense with Confrontation Clause); *Melendez-Diaz*, 557 U.S. at 319 (noting extensive documentation of genuine deficiencies in forensic evidence used in criminal trials).

11. *See Williams*, 132 S. Ct. at 2275 (Kagan, J., dissenting) (citing *Crawford*, 541 U.S. at 62) (demonstrating Confrontation Clause prescribes cross-examination procedure for determining reliability of testimony).

12. *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 319-20 (2009) (emphasizing forensic tests' unreliability, noting tests' invalidity implicated in sixty percent of exoneration cases); Jessica D. Gabel, *Realizing Reliability in Forensic Science from the Ground Up*, 104 J. CRIM. L. & CRIMINOLOGY 283, 289-90 (2014) (highlighting misconceptions regarding validity of forensic science).

13. *See infra* Part II.A (explaining defendants' constitutional right to confrontation); *see also infra* Part II.B.

14. *See infra* Part II.C (providing examples of states' analyses of Confrontation Clause under *Williams*, prior precedent, and common law).

15. *See infra* Part II.D.

Confrontation Clause.[16]

## II. HISTORY

### *A. Right to Confrontation*

The Confrontation Clause of the Sixth Amendment demands that criminal defendants have the right to confront their accusers.[17] Unless a witness is unavailable and there was a prior opportunity for cross-examination, the defendant must be able to confront the witness whose statements qualify as testimonial.[18] The confrontation right's historical origins, and the requirement that the prosecution demonstrates a witness's unavailability, stem from the infamous trial of Sir Walter Raleigh.[19] The right of confrontation is critical for assessing the reliability of evidence against the accused.[20] Confrontation is also fundamental in exposing errors in testimony and ensuring a fair trial.[21] The Confrontation Clause is only implicated when a court deems an out-of-court statement "testimonial."[22]

16. *See infra* Part III (arguing supervisor or reviewing analyst insufficient for meaningful opportunity for cross-examination).

17. *See* U.S. CONST. amend. VI. The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Id*.

18. *See* Williams v. Illinois, 132 S. Ct. 2221, 2232 (2012) (noting Confrontation Clause not violated where witness unavailable and accused had prior opportunity to confront); Bullcoming v. New Mexico, 564 U.S. 647, 658 (2011) (describing confrontation requirement exception of witness unavailability and defendant's prior cross-examination opportunity); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 (2009) (noting Confrontation Clause not violated if aforementioned exceptions met); Crawford v. Washington, 541 U.S. 36, 54 (2004) (emphasizing modern interpretation of confrontation right, incorporating exception limitations). "[T]estimonial statements of a witness who did not appear at trial [are inadmissible] unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 53-54. In *Crawford*, the Court stated that the Sixth Amendment did not suggest limitless exceptions to the right to confrontation, and existing exceptions would have been established at the time states adopted the Sixth Amendment. *See id*. at 54.

19. *See* California v. Green, 399 U.S. 149, 177-78 (1970) (identifying common law right of confrontation originated after Sir Walter Raleigh's infamous trial); *see also Crawford*, 541 U.S. at 44 (considering Sir Walter Raleigh's trial "most notorious" instance of prosecutorial abuses). Charged with treason, Sir Walter Raleigh demanded that his accuser appear before him, arguing, "[T]he Proof of the Common Law is by witness and jury: let Cobham (the accuser), let him speak it. Call my accuser before my face . . . ." *Crawford*, 541 U.S at 44. After Raleigh's death, English law reformed and provided the right of confrontation to safeguard against such abuses. *See id*.

20. *See Crawford*, 541 U.S. at 62 (dispensing with reliability test from *Ohio v. Roberts*, 448 U.S. 56 (1980) and setting forth Confrontation Clause purpose). The Court emphasized that the Confrontation Clause does not command that reliable evidence is admitted, "but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id*. at 61.

21. *See* FED. R. EVID. art. VIII advisory committee's note (considering confrontation integral feature underlying the Anglo-American legal system). Confrontation has been deemed the greatest method for the discovery of truth and necessary to uncover flaws in witnesses' "perception, memory, and narration" against the accused. *Id*.

22. *See Crawford*, 541 U.S. at 51-52 (noting Confrontation Clause bars out-of-court testimonial statements unless witness unavailable and cross-examination opportunity factors satisfied); *see also Williams*, 132 S. Ct. at 2242 (articulating two considerations for determining whether out-of-court statement

### *B.* Crawford *and the Confrontation Clause Trilogy*

In 2004, the Supreme Court abrogated *Ohio v. Roberts*,[23] which utilized an "indicia of reliability" test in determining whether out-of-court statements violated a defendant's right to confrontation.[24] The *Crawford* Court opined that the reliability factors were unpredictable and applied inconsistently, holding that where testimonial statements were at issue, a confrontation was the "only indicium of reliability sufficient to satisfy constitutional demands . . . ."[25] While the Court described the core class of testimonial statements that the Confrontation Clause covers, it failed to define what constitutes "testimonial" statements.[26]

Five years after the *Crawford* opinion in a five-to-four decision, the Court held that certificates of state laboratory analysts qualified as affidavits and fell within the "core class" of testimonial statements.[27] In its holding, the Court criticized the dissent's suggestion that confrontating of forensic analysts would be of little value because such testimony was the result of neutral scientific testing.[28] The *Melendez-Diaz* opinion cited a study supporting its argument that the scientific testing at issue was not as neutral or reliable as the dissent suggested.[29] In light of forensic analysis's inherent unreliability, the Court

"testimonial"); *id*. at 2266 (Kagan, J., dissenting) (articulating third consideration for determining out-of-court statement's "testimonial" nature). Under current Confrontation Clause analysis, a statement may be considered testimonial if: the statement's primary purpose was to target the accused; the statement was sufficiently formalized; or the witness objectively believed the statement would be used at a later trial. *See id*. at 2242, 2266 (Kagan, J., dissenting).

23. 448 U.S. 56 (1980).

24. *See* Crawford v. Washington, 541 U.S. 36, 62-63 (2004) (abrogating reliability analysis for out-of-court statements set forth under *Roberts*). The "indicia of reliability" test deemed hearsay sufficient for purposes of the Confrontation Clause if the statement held "particularized guarantees of trustworthiness." *Id.* at 40.

25. *See id.* at 68-69. The Court also stated that the Framers of the Constitution would be astonished to learn that out-of-court statements solicited by supposedly unbiased government officers could be used against a defendant in a criminal case. *See id*. at 66.

26. *See id*. at 51-52 (stating core examples of "testimonial" statements include affidavits, prior testimony, and depositions). The Court, however, stated it would articulate a comprehensive meaning of "testimonial" at a future time. *See id.* at 68.

27. *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009) (casting little doubt certifications fell within "core class of testimonial statements" described in *Crawford*). The *Melendez-Diaz v. Massachusetts* Court noted that the certifications were affidavits because the declarations of facts were sworn before an officer, and the analysts creating the certification could reasonably expect that the government would use it against the defendant at a later trial. *See* 557 U.S. 305, 310-11 (2009).

28. *See id*. at 317 (claiming dissent's argument trivially regresses to overruled *Roberts* decision); *see also* Ohio v. Roberts, 448 U.S. 56, 66 (1980) (holding evidence with "particularized guarantees of trustworthiness" admissible regardless of Confrontation Clause).

29. *See Melendez-Diaz*, 557 U.S. at 318 (suggesting analysts may have outside forces pressuring them to corrupt evidence in prosecution's favor); *see also* Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, NATIONAL ACADEMIES PRESS (2009) at 183-84, http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf [http://perma.cc/NQ8Q-YKRY] [hereinafter National Research Council] (noting majority of laboratories administered by law enforcement agencies, resulting in legitimacy concerns).

determined that one way of ensuring accurate forensic testing is the right to confrontation.[30] The Court likened an analyst providing inaccurate test results to an untruthful eyewitness, concluding that culprits may reconsider their testimony when under oath in court.[31]

In another five-to-four decision, the Court held that the admission of a DNA report through a surrogate witness violated the defendant's right to confront the primary analyst.[32] In this case, the Court deemed the lab report testimonial because it was sufficiently formal and its primary purpose was to target the accused in a criminal proceeding.[33] The Court re-emphasized the holdings in *Crawford* and *Melendez-Diaz*, stating that any purported reliability of an analyst's report does not dispense with defendants' rights under the Confrontation Clause.[34] Furthermore, the Court reiterated that the constitutional requirement of confrontation may not be disregarded at the convenience of the court and prosecution.[35]

Nearly a year after *Bullcoming*, the Court, in another fractured decision, seemed to conflict with prior precedents when it determined that a DNA report was nontestimonial in nature, thus, resulting in no Confrontation Clause violation.[36] Notably, Justice Thomas's concurring opinion partially agreed with the dissent, finding the plurality's analysis faulty.[37] The *Williams*

30. *See Melendez-Diaz*, 557 U.S. at 319 (hypothesizing certainty of confrontation will deter potentially fraudulent analyses in the first instance).

31. *See id.* (emphasizing Confrontation Clause's ability to deter analysts from providing inaccurate test results).

32. *See* Bullcoming v. New Mexico, 564 U.S. 647, 652 (2011) (holding testimony of scientist who did not perform or observe test insufficient under Confrontation Clause). The *Bullcoming v. New Mexico* Court upheld *Crawford* and *Melendez-Diaz*, reaffirming the accused's right to confront the analyst who performed the forensic testing unless that analyst was unavailable for trial and the accused had an opportunity to cross-examine her. *See id.* at 652-59.

33. *See id.* at 664 (illustrating laboratory report closely resembled one in *Melendez-Diaz*). An officer provided DNA evidence to a state laboratory to assist in the criminal investigation, and the primary analyst tested the evidence and prepared a formalized certificate. *See id.* at 664-65. The certificate contained a legend referring to courts' rules providing for the admission of certified blood-alcohol analyses. *See id.*

34. *See id.* at 661 (reiterating confrontation necessary to assess evidence's reliability, regardless of clear reliability). "[T]he analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess 'the scientific acumen of Mme. Curie and the veracity of Mother Teresa.'" *Id*. (quoting Melendez-Diaz v. Massachusetts, 557 U.S. 305, 319 n.6 (2009)) (demonstrating importance of confrontation right for testimonial evidence).

35. *See Bullcoming*, 564 U.S. at 665 (emphasizing no undue burden on prosecution to produce primary analyst). Prosecutors try to schedule trials around analysts' availability; similarly, trial courts often grant continuances to accommodate unforeseen conflicts. *See id*. at 668; *cf. id*. at 683-84 (Kennedy, J., dissenting) (arguing increasing subpoenas would impede laboratory's ability to keep up with obligations, wasting state resources).

36. *See* Williams v. Illinois, 132 S. Ct. 2221, 2240-44 (2012) (deeming forensic report nontestimonial for multiple reasons). The plurality opinion considered the forensic report at issue nontestimonial, contending that it was not offered for the truth of the matter asserted, nor was its primary purpose to target the accused. *See id*. at 2240, 2243.

37. *See id*. at 2273 (Kagan, J., dissenting) (rejecting plurality's views for either conflicting with precedent or misinterpreting case's facts); *id*. at 2260 (Thomas, J., concurring) (finding forensic report

plurality contended that the forensic report may be considered testimonial if it was introduced for the truth of the matter asserted, its primary purpose was to accuse a targeted individual, or it met some degree of formality; this has led to great confusion and inconsistency in Confrontation Clause analyses across the nation.[38] *Williams* has left lower courts with the decision to analyze forensic reports' admissibility either under one of the three tests offered by the plurality or pursuant to prior Court precedent.[39]

Remarkably, the opinion itself involved a substantial discussion about the reliability of DNA testing and the burden imposed on prosecutors.[40] The dissent largely criticized the plurality's notions of reliable DNA testing as inconsistent with *Crawford*, *Melendez-Diaz*, and *Bullcoming*.[41] The dissent further emphasized that confronting the primary analyst was the only means of discovering mistakes or fraudulent procedures during the testing process.[42]

It is important to note that the *Williams* plurality believed that the testifying analyst was not a surrogate, but an expert witness.[43] Under the Federal Rules of Evidence, the expert's opinion regarding the forensic report was thus admissible even if the report itself was not.[44] While experts are usually not

nontestimonial for lacking sufficient formality). Notably, Justice Thomas disagreed with the plurality and considered the forensic report was actually admitted for the truth of the matter asserted. *See id.* at 2256 (Thomas, J., concurring).

38. *See id*. at 2277 (Kagan, J., dissenting) (asserting plurality opinion left significant confusion in offering three tests lacking support of majority). The dissent further stated it would have decided the case consistently with *Melendez-Diaz* and *Bullcoming*, as theses cases still served as precedent for cases involving the Confrontation Clause and the admissibility of forensic evidence. *See id.*

39. *See id*. (advising lower courts to follow precedent-based decision making in absence of supporting majority).

40. *See Williams*, 132 S. Ct. at 2227 (articulating opinion considering whether *Crawford* considerably affects prosecutors' ability to present forensic evidence). The plurality also noted that DNA testing was inherently reliable, rejecting Justice Kagan's dissenting assertion that the DNA profile could have been altered intentionally or unintentionally. *See id.* at 2244.

41. *See id*. at 2272 (Kagan, J., dissenting) (demonstrating plurality's approach allows "poorly trained, incompetent, or dishonest" analysts to circumvent Confrontation Clause); Bullcoming v. New Mexico, 564 U.S. 647, 652 (2011) (stating prosecutor cannot escape confrontation by offering test results through surrogate analyst); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310-11 (2009) (providing prosecutor cannot avoid exposing analyst to confrontation simply by introducing DNA report).

42. *See* Williams v. Illinois, 132 S. Ct. 2221, 2275 (2012) (Kagan, J., dissenting) (stating Confrontation Clause provides cross-examination procedure to ascertain testimonial reliability in criminal trials).

> That is why a defendant may wish to ask the analyst a variety of questions: How much experience do you have? Have you ever made mistakes in the past? Did you test the right sample? Use the right procedures? Contaminate the sample in any way? Indeed, as scientific evidence plays a larger and larger role in criminal prosecutions, those inquiries will often be the most important in the case.

*Id.*

43. *See id*. at 2267. The plurality further noted that the Court should not "swee[p] away an accepted rule governing the admission of scientific evidence" favoring a reduction of confrontation rights. *See id*. at 2228 (majority opinion).

44. *See id*. at 2228 (concluding expert testimony did not violate Confrontation Clause because statements

allowed to disclose inadmissible information to a jury, the Federal Rules of Evidence allow disclosure if its assistance to the jury in evaluating the opinion substantially outweighs its prejudicial effect.[45] The difference between a surrogate and an expert witness is slight and depends on the degree to which a witness relies on the underlying information.[46] Because the testifying analyst in *Williams* largely repeated the information of the actual analyst, the dissent argued that she should be considered a surrogate witness.[47]

### *C. Lack of Uniform Confrontation Clause Analyses Across the Nation*

#### *1. Confrontation Clause Analyses Under the Fractured* Williams *Opinion*

In *People v. Lopez*,[48] the divided Supreme Court of California found no confrontation violation based simply on a blood alcohol report's lack of formality.[49] The plurality opinion viewed the absence of the laboratory analyst's signature or certification on the report as an indication of lack of the required solemnity.[50] In a concurring opinion, four justices identified that they would resolve the case by focusing the analysis on the primary purpose prong instead of the requisite formality test.[51] A highly critical dissent noted that *Williams* did not provide authoritative guidance, and prior precedent should

not offered for truth). The plurality relied on the Federal Rules of Evidence, which provide, "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." FED. R. EVID. 703.

45. *See* FED. R. EVID. 703; *see also Williams*, 132 S. Ct. at 2233-35 (allowing disclosure of otherwise inadmissible information to help jury evaluate expert's opinion). The plurality deemed that the expert at issue assisted the jury rather than proved the substantive truth of the information. *See Williams*, 132 S. Ct. at 2228, 2239-40.

46. *See* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 168 (1988) (noting only miniscule distinction between statements of fact and opinion). If an expert's opinion merely repeats the findings of a primary analyst, instead of conveying her independent judgment of those findings, that expert would be acting as a surrogate witness, and that would violate the Confrontation Clause. *See Williams*, 132 S. Ct. at 2266 (describing surrogate testimony's precedential shortcomings in confrontation right context).

47. *See Williams*, 132 S. Ct. at 2270 (Kagan, J., dissenting) (demonstrating forensic analyst in question offered testimony for truth of matter asserted). Lambatos, the testifying analyst, affirmed the findings of the primary analyst without qualifying them. *See id*. In this way, Justice Kagan argued that Lambatos testified similarly to the surrogate witness in *Bullcoming*, an individual who knew nothing about the forensic test and process, yet supported them nonetheless. *See id*.

48. 286 P.3d 469 (Cal. 2012).

49. *See id*. at 479 (deeming blood alcohol report nontestimonial for lacking requisite degree of formality). The plurality opinion notably dispensed with considering the report's primary purpose, indicating that the Supreme Court Justices did not agree on what that purpose must be. *See id.* at 477.

50. *See id.* at 479 (analyzing notations of report to decide if prepared with requisite level of formality). While the laboratory analyst's initials were on the document, he did not "sign[], certify[y], or sw[ear] to the truth of its contents." *See id*. Moreover, the court viewed the presence of the text "FOR LAB USE ONLY" to indicate that the report was not prepared with the solemnity that courts require for testimonial statements. *See id.*

51. *See id.* at 481 (Corrigan, J., concurring) (concluding report constituted business record under primary purpose analysis). The concurrence further noted that although other entries on laboratory reports may be more testimonial in nature, such notations go to the weight of evidence rather than its admissibility. *See id*. at 482.

have resolved the issue.[52] Focusing on the process and purpose that resulted in the report, the dissenting opinion criticized the plurality's reliance on the crime laboratory's supposed inherent neutrality.[53]

In a unanimous decision, the Supreme Court of Delaware found a blood analysis report to be testimonial, as it was admitted for the truth of the matter asserted.[54] The court further held that a certifying analyst who simply reviewed the data and conclusions of such a report was not sufficient for purposes of confrontation.[55] Notably, the court mentioned that its holding would put a justified burden on the prosecution.[56]

The Supreme Court of Alabama recently held that a certifying analyst's testimony was sufficient for purposes of confrontation.[57] The court, however, did not decide whether the DNA-profile report at issue was "testimonial."[58] Instead, it simply utilized *Bullcoming* and *Williams* to conclude that the Confrontation Clause did not require the primary analyst's testimony.[59]

The Supreme Court of Washington addressed confrontation rights within the context of statements made by expert witnesses, agreeing with the plurality opinion in *Williams*.[60] The court began its analysis by differentiating between

52. *See Lopez*, 286 P.3d at 483 (Liu, J., dissenting) (arguing combined analysis of *Williams* and binding precedents would present more logical analysis). The dissent opined that the separate opinions offered in the case resembled the "muddled state" of confrontation analysis after the *Williams* decision. *See id*.

53. *See id.* (concluding laboratory's out-of-court statements qualify as testimonial based on process and purpose). The crime laboratory at issue was under the control of the San Diego Sheriff's office. *See id*. at 488. Because this was a government crime laboratory, the dissent declared that the analysts produced notations on the report with "as much solemnity and government involvement as the structured, tape-recorded, station-house witness interview in *Crawford*." *See id*. at 488.

54. *See* Martin v. State, 60 A.3d 1100, 1105-07 (Del. 2013) (relying on *Williams* to conclude analyst's representations and conclusions admitted for their truth). The court applied *Williams* as consistent with *Bullcoming* and *Melendez-Diaz*. *See id*. at 1106-08.

55. *See id*. at 1106 (demonstrating certifying analyst testified, yet had not participated in or observed testing process). The court observed that *Bullcoming* demanded that the certifying witness testify, and also required that the witness either observe or perform the forensic testing. *See id*. at 1107. Confronting an analyst who observes or performs the testing allows the defendant and the jury to determine the witness's "proficiency, care, and veracity." *See id*. at 1109.

56. *See id*. (concluding Constitution demands confrontation even if burden thereby imposed on prosecutors). The court further noted that allowing the testing analyst to prepare and certify her report could potentially satisfy the burden of requiring two analysts to testify. *See id.* at 1109 n.74.

57. *See* Ex parte Ware, 181 So.3d 409, 416 (Ala. 2014) (finding certifying analyst's testimony regarding DNA profile report satisfied constitutional requirement). The court stated that cross-examination of the certifying analyst would provide the defendant an opportunity to find potential errors in the testing of the DNA sample, as well as any errors committed by the primary analyst who performed the testing. *See id*. at 417.

58. *See id*. at 416 (declaring determination of report's "testimonial" nature challenging under *Melendez-Diaz*, *Bullcoming*, and *Williams*).

59. *See id*. at 416-17 (comparing facts regarding testifying analyst with those in *Bullcoming* and *Williams*). The court noted Justice Sotomayor's concurring opinion in *Bullcoming*, which observed that a supervisor or reviewer with a more personal connection to the scientific testing may be sufficient to satisfy a defendant's confrontation rights. *See id*. at 416. The court also cited the dissenting opinion in *Williams*, which noted that none of the confrontation cases before the Court had presented the issue of how many analysts must testify about a forensic report. *See id*.

60. *See* State v. Lui, 315 P.3d 493, 503 (Wash. 2014) (noting opinion does not disregard results in

expert witnesses and "witnesses against" the defendant.[61] The court then reasoned that with regard to DNA evidence, the primary analyst in some way inculpates the defendant.[62] While the expert witness in this case did not personally observe the DNA testing process, the court deemed her testimony sufficient for confrontation purposes under *Bullcoming*.[63] The court concluded by stating its rule would avoid the risk of burdening the prosecution's use of scientific evidence.[64]

### *2. Confrontation Clause Analyses Under Prior Supreme Court Precedent*

In a set of companion cases, the Supreme Court of New Jersey decided whether presentation of a supervisor or reviewer's forensic report sufficiently fulfilled Confrontation Clause requirements.[65] In its decision, the court asserted it would not consider *Williams*.[66] The court provided that a supervisor, and even an independent coworker or another reviewer, may satisfy a defendant's right to confrontation if she is knowledgeable of testing protocols.[67] The Supreme Court of New Jersey, however, further explained the disadvantages of requiring the testifying analyst to have performed or observed the test.[68] The dissenting opinion in both cases claimed that the majority

*Melendez-Diaz* and *Bullcoming*). The court further stated that its decision was aligned with that of the five *Williams* Justices who agreed that experts may obtain independent views on a primary analyst's forensic testing without contravening the Confrontation Clause. *See id*.

61. *See id*. at 504-05 (providing not everyone who makes affirmation of fact falls under Confrontation Clause). To consider an expert a "witness against the accused," the expert must not only make a factual statement, but that statement must also help either identify or inculpate the defendant. *See id*. at 505.

62. *See id*. at 507 (stating DNA evidence differs from testimony of conventional witnesses in several important ways). The court reasoned that DNA testing does not become inculpatory until the final step, where the analyst interprets the machine readings to create a DNA profile. *See id*.

63. *See id*. at 509 (acknowledging *Bullcoming* guarantees accused right of confrontation against analyst who makes certification). The court again cautioned that requiring the State to call all analysts within the DNA testing process would prevent the use of scientific tests in criminal proceedings. *See id*.

64. *See Lui*, 315 P.3d at 509-10 (adopting rule to avoid unnecessarily hindering scientific evidence use in courtrooms). The court further stated that its rule would preserve the benefit of using a multiplicity of analysts. *See id*. Multiple analysts would purportedly promote efficiency within the laboratory and also prevent DNA fabrication and fraud. *See id*.

65. *See* State v. Michaels, 95 A.3d 648, 651 (N.J. 2014) (recognizing forensic reports "testimonial" and thus subject to Confrontation Clause analysis); Jenkins v. State, 102 So.3d 1063, 1069 (Miss. 2012) (holding testimony of independent reviewer who did not observe or perform testing sufficient for confrontation); *see also* State v. Roach, 95 A.3d 683, 692 (N.J. 2014) (providing state's adoption of and adherence to primary purpose test for determining statement's testimonial nature).

66. *See Michaels*, 95 A.3d at 666-77 (claiming reluctance to conclude primary purpose test abandoned and refusing to consider *Williams*); *Roach*, 95 A.3d at 692 (considering *Williams* "unreliable guide" for determining whether defendants' confrontation rights violated).

67. *See Roach*, 95 A.3d at 695-96 (extending allowance of supervisor testimony to independent reviewers who testify based on personal knowledge). The court's analysis suggests that the testimony from an independent reviewer satisfies a defendant's confrontation rights as the primary analyst or her supervisor because she would interpret the raw data in a similar fashion. *See id*.

68. *See Michaels*, 95 A.3d at 677 (illustrating drawbacks of imposing stringent interpretation of confrontation rights in situations involving multiple analysts). Purportedly, a more exacting interpretation of

allowed the prosecution to use a supervisor as a conduit to pass the testimony of the actual analyst who was never subject to cross-examination.[69]

By utilizing the primary purpose test under *Melendez-Diaz* and *Bullcoming*, the Supreme Court of Pennsylvania held that a blood alcohol report was testimonial.[70] The unanimous opinion further addressed the issue of which analyst—in circumstances involving multiple analysts—was an appropriate witness for purposes of satisfying a defendant's right to confrontation.[71] The court held that although the analyst at issue did not perform or observe the test, he was nonetheless a sufficient witness because he had formed an independent opinion of the results.[72] In so concluding, the court acknowledged the possibility of lab misconduct, but stated that subpoena, not confrontation, would be the proper safeguard for a defendant's rights.[73]

The Supreme Court of Colorado found that a primary analyst's supervisor's testimony was sufficient for purposes of the Confrontation Clause, as consistent with *Bullcoming*.[74] The court differentiated the supervisor's testimony from that of a surrogate witness.[75] Colorado joined other courts in concluding that supervisors who conduct independent forensic testing reviews constitute sufficient witnesses for confrontation purposes.[76]

Similar to Colorado and consistent with *Melendez-Diaz* and *Bullcoming*, the

confrontation rights is unhelpful where the primary or certifying analyst is no longer available and unnecessary in providing the defendant with meaningful cross-examination. *See id*.

69. *See Roach*, 95 A.3d at 701 (Albin, J., dissenting) (claiming majority opinion renders confrontation useless when actual analyst's "damning testimonial statements" introduced through surrogate); *Michaels*, 95 A.3d at 682 (Albin, J., dissenting) (stating inability to cross-examine actual analysts prevents exposure of testing's "errors, lapses, and shortcomings").

70. *See* Commonwealth v. Yohe, 79 A.3d 520, 526 (Pa. 2013) (comparing facts of testimonial statements in instant case with those in *Melendez-Diaz* and *Bullcoming*). Moreover, the court viewed *Williams* with extreme caution, stating it could not find the narrowest legal rationale for the judgment. *See id*. at 536.

71. *See id*. at 541 (reading precedent to require certain types of analysts within chain of custody to testify). The court acknowledged that *Melendez-Diaz* required "the analyst" to testify, but *Bullcoming* worked to resolve who was not an appropriate witness: an analyst who had not participated in or observed the test, or who lacked an independent opinion of the test results. *See id*. at 533-34.

72. *See id*. at 540 (stating failure to handle blood sample or observe test not dispositive for issue of confrontation). The court held that the prosecution complied with *Bullcoming* by allowing the defendant to confront the analyst who evaluated the raw data and certified her analysis. *See id*. at 541.

73. *See id*. at 542 (considering confrontation of actual analyst allows defendants to engage in "proverbial fishing expedition[s]"). In considering the presence of laboratory scandals and that cross-examination would reveal impropriety, the court stated that defendants could subpoena suspected analysts, but confronting such analysts was not constitutionally mandated. *See id*.

74. *See* Marshall v. People, 309 P.3d 943, 946 (Colo. 2013) (viewing supervisor's testimony in line with *Bullcoming* decision). It is clear that the laboratory report was testimonial in nature because it acknowledged court rules governing its admissibility and the supervisor signed it. *See id*.

75. *See id*. at 947 (comparing supervisor in question with testifying witness in *Bullcoming* who had no connection with report). The supervisor at issue reviewed the primary analyst's performance, made sure the scientific instruments were working properly, and certified the test results. *See id*.

76. *See id*. (illustrating other courts concluded Confrontation Clause satisfied in similar manner). These courts have found that as long as a supervisor reaches an independent opinion on the forensic report and signs it, that supervisor is a sufficient witness for purposes of a defendant's confrontation rights. *See id*.

Supreme Court of Mississippi held that a drug report reviewer's testimony was sufficient for confrontation purposes.[77] While the drug report was not admitted into evidence, the reviewing analyst testified about test results.[78] The dissenting opinion argued that, because the purpose of the analyst's testimony was to relay information contained within that report, the reviewer could be considered a surrogate witness.[79] As the dissenting opinion indicated, there were many questions the testifying analyst would not be able to answer, thus rendering his testimony insufficient for satisfying the defendant's right to confrontation.[80]

### *3. Confrontation Clause Analyses Under Common Law of the States*

In *Commonwealth v. Tassone*,[81] the Supreme Judicial Court of Massachusetts emphasized the scope of defendants' confrontation rights in light of the *Williams* decision.[82] The court highlighted that Massachusetts's evidentiary rules afford greater protection to defendants than the Sixth Amendment.[83] It further noted that because DNA testing is so reliable, fraud or errors may be the only reason why an opinion is flawed, and therefore, confrontation is the only meaningful way of exposing such inaccuracies.[84]

77. *See* Hingle v. State, 153 So.3d 659, 662-63 (Miss. 2014) (applying rules of *Melendez-Diaz* and *Bullcoming* to reach conclusion reviewer's testimony satisfies defendant's right). In this case, the testifying analyst did not observe the testing process, but reviewed the primary analyst's report and reached an independent conclusion that the pills at issue contained morphine. *See id*. at 661.

78. *See id*. at 664-65 (explaining circumstances of testimony regarding specific testing of drug at issue). It was the court's opinion that the reviewing analyst provided meaningful testimony and responded adequately to all questions asked on direct and cross-examination. *See id*. *But see id*. at 666 (Chandler, J., dissenting) (refusing to allow analyst who does not perform or observe testing to satisfy Confrontation Clause). The dissent, however, argued that because the reviewing analyst did not perform or even observe the test at issue, he could not have adequately responded to cross-examination because he did not possess adequate knowledge of the testing process. *See id*.

79. *See id*. at 668 (arguing testifying analysis constituted channel for hearsay). According to the dissent, the reviewing analyst could not have relied on the report to reach an independent, expert opinion because his opinion was solely based on the results of another analyst's test. *See id*.

80. *See id*. at 669-70 (reasoning *Bullcoming* necessitated certifying analyst to know what occurred during testing process). The testifying analyst could not testify if the drug sample was received intact, had been dropped or mishandled, if the testing equipment had been faulty, or whether there were any fraudulent acts committed by the primary analyst. *See id*. at 669.

81. 11 N.E.3d 67 (Mass. 2014).

82. *See id*. at 72 (deciding not to resolve confrontation analysis under *Williams* because analyst's testimony inadmissible under common law). Despite utilizing the common law of evidence, the court hinted that under *Williams*, the forensic report would qualify as testimonial, as the jury would likely consider the testimony for its truth rather than as an assumption to reach the expert's conclusion. *See id*. Furthermore, the court found that the "primary purpose" of the forensic report was to accuse the defendant at a later trial. *See id*.

83. *See id*. at 73 (noting Massachusetts common law more protective of confrontation rights than Constitution). On cross-examination, Massachusetts's evidentiary rules only allow the defendant to draw out the facts and data underlying an analyst's opinion. *See id*. Furthermore, Massachusetts common law demands that defendants have a "meaningful opportunity" to seek out the reliability of an analyst's opinion as well as its factual underpinnings. *See id*.

84. *See id*. (recognizing importance of cross-examining knowledgeable analysts about what occurred

Furthermore, the Court of Appeals of New York also applied its own case law in determining whether breathalyzer calibration documents were nontestimonial in nature.[85] In analyzing the issue, the court utilized a four-factor test to identify the primary purpose for the records' creation.[86] In utilizing its own primary purpose test, the court found that such records were not testimonial under *Crawford* and its subsequent jurisprudence.[87]

### *D. Unreliability of Crime Labs and Forensic Evidence*

The Supreme Court has consistently noted the systemic problems in laboratory analyses, including sample contaminations, mislabeling, and fraud.[88] Despite this, the *Williams* plurality attempted to rework the issue and allow lower courts to limit confrontation rights based on a purported inherent reliability of forensic crime labs.[89] Some state supreme courts have utilized *Williams* in an open effort to limit any burden on the prosecution in producing forensic analysts.[90] Although these courts believe forensic evidence is largely infallible, recent instances of fraud and mistake prove otherwise.[91]

Fred Zain, a forensic scientist from West Virginia, falsified 134 DNA reports within a decade and gave perjured testimony for criminal investigators

during testing for confrontation purposes). The court acknowledged confrontation of the participating or certifying analyst as the sole means of exposing the possibility of "evidence being mishandled or mislabeled, or of data being fabricated" by the actual analyst. *See id*.

85. *See* People v. Pealer, 985 N.E.2d 903, 906 (N.Y. 2013) (utilizing case law for determining whether records equivalently to in-court testimony). Following New York precedent, the court identified two factors in resolving whether to classify a statement as testimonial: if the statement was akin to an ex parte examination, and if the statement accused the defendant of committing a crime. *See id*.

86. *See id*. at 907 (setting forth common law factors to determine whether records testimonial). The court evaluated whether: the organization producing the records was "independent of law enforcement"; the records reflect objective facts; "the report has been biased in favor of law enforcement"; and "the report accuses the defendant by directly linking him or her to the crime." *See id*.

87. *See id*. at 908 (endorsing widely held view documents relating to "routine inspection, maintenance, and calibration" not testimonial). Although the state offered these documents to demonstrate that the breathalyzer machine used worked properly, the defendant claimed he was entitled to cross-examine each document's author. *See id*. at 905.

88. *See* Bullcoming v. New Mexico, 564 U.S. 647, 654 n.1 (2011) (illustrating risk of human error in laboratory analysis); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 319-20 (2009) (citing instances of fraud and error regarding use of forensic evidence).

89. *See* Williams v. Illinois, 132 S. Ct. 2221, 2243-44 (2012) (disclaiming issue of forensic evidence's reliability). The plurality reasoned that the scientific evidence in question was reliable because there was no prospect of fabrication, many analysts had worked on the same DNA profile, and the profile itself would have detected any error. *See id*.

90. *See* Ex parte Ware, 181 So.3d 409, 416-17 (Ala. 2014) (noting inherent reliability of DNA testing and difficulty for prosecution to produce actual analyst); State v. Lui, 315 P.3d 493, 509 (Wash. 2014) (adopting rule to avoid risk of burdening prosecution's use of scientific evidence).

91. *See* Joseph Goldstein, *F.B.I. Audit of Database That Indexes DNA Finds Errors in Profiles*, N.Y. TIMES (Jan. 24, 2014), http://www.nytimes.com/2014/01/25/nyregion/fbi-audit-of-database-that-indexes-dna-finds-errors-in-profiles.html [http://perma.cc/6ADN-YHEK] (identifying human error still present through 166 DNA profiles containing significant mistakes). The revelation of these mistakes not only signified the unreliability of scientific testing, but also resulted in opening cold cases and dismissing others. *See id.*

and prosecutors.[92] Illinois analyst Pamela Fish not only lied about test results, but also failed to disclose exculpatory forensic evidence leading to the conviction of innocent persons.[93] Ralph Erdmann, a Texas forensic pathologist, provided testimony that resulted in at least twenty capital punishment convictions.[94] Annie Dookhan, a state chemist from Massachusetts, was responsible for the incarceration of innocent people, as well as for the release of guilty persons.[95]

While many states do not require laboratory accreditation from entities like the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB), some states made accreditation mandatory following major crime lab scandals.[96] Nevertheless, even accredited laboratories still face issues regarding mistake and fraud.[97] Accrediting bodies largely fail to identify

92. *See* State v. Woodall, 385 S.E.2d 253, 258 (W. Va. 1989) (noting defendant found guilty of kidnapping and rape based on fraudulent DNA forensic tests); *see also* Brooke G. Malcom, Comment, *Convictions Predicated on DNA Evidence Alone: How Reliable Evidence Became Infallible*, 38 CUMB. L. REV. 313, 320 (2008) (identifying forensic scientist engaged in intentionally manipulating test results). The jury in *Woodall* rejected the defendant's case—consisting largely of alibi testimony—in favor of the prosecution, which primarily consisted of circumstantial evidence, including a blood analysis of the defendant. *See Woodall*, 385 S.E.2d at 258-59.

93. *See* Kristen Bolden, Note, *DNA Fabrication, a Wake Up Call: The Need to Reevaluate the Admissibility and Reliability of DNA Evidence*, 27 GA. ST. U. L. REV. 409, 418 (2011) (illustrating individual incidents of crime laboratory falsification); *see also* Steve Mills et al., *When Labs Falter, Defendants Pay: Bias Toward Prosecution Cited in Illinois Cases*, CHICAGO TRIBUNE (Oct. 20, 2004), http://articles .chicagotribune.com/2004-10-20/news/0410200288_1_wrongful-conviction-pamela-fish-lab/2 [http://perma .cc/E24T-574Z] (identifying defendant Willis convicted and sentenced to 100 years for rape he did not commit). The analyst's faulty DNA analysis resulted in Willis serving over eight years in prison, Chicago paying $2.5 million dollars, and Illinois paying $100,000 dollars to settle his wrongful conviction lawsuit. *See* Mills et al., *supra*.

94. *See* Craig M. Cooley, *Reforming the Forensic Science Community to Avert the Ultimate Injustice*, 15 STAN. L. & POL'Y REV. 381, 401-02 (2004) (providing examples of forensic fraud, including Erdmann's faulty testimony); *see also* K.C. Meckfessel Taylor et al., *CSI Mississippi: The Cautionary Tale of Mississippi's Medico-Legal History*, 82 MISS. L.J. 1271, 1324-26 (2013) (demonstrating Erdmann received continued state support despite suspicions about quality of forensic pathology work). Erdmann was convicted of forensic fraud felony charges, was put on probation for ten years, and had his medical license revoked. *See* Meckfessel, *supra*, at 1325.

95. *See* Katharine Q. Seelye & Jess Bidgood, *Prison for a State Chemist Who Faked Drug Evidence*, N.Y. TIMES (Nov. 22, 2013), http://www.nytimes.com/2013/11/23/us/prison-for-state-chemist-who-faked-drug-evidence.html [http://perma.cc/8B9J-SRWS] (describing impact of Annie Dookhan's misconduct). Dookhan, who was sentenced to three to five years in prison, had "pled guilty to 27 counts, including obstruction of justice, perjury and tampering with evidence." *See id*; *see also* Sean K. Driscoll, *"I Messed Up Bad": Lessons on the Confrontation Clause from the Annie Dookhan Scandal*, 56 ARIZ. L. REV. 707, 715 (2014) (demonstrating ACLU challenged over 40,000 cases occurring during Dookhan's tenure at laboratory). Dookhan was found to have forged other analysts' initials on forms, and she also intentionally contaminated samples to ensure they would test positive for narcotics. *See* Driscoll, *supra*, at 716.

96. *See* OKLA. STAT. ANN. tit. 74, § 150.37 (requiring accreditation by American Board of Forensic Toxicology or other accrediting body, like ASCLD/LAB); TEX. CODE CRIM. PROC. ANN. art. 38.35 (West 2010) (mandating accreditation of crime laboratories by Department of Public Safety).

97. *See* Craig M. Cooley, *Nurturing Forensic Science: How Appropriate Funding and Government Oversight Can Further Strengthen the Forensic Science Community*, 17 TEX. WESLEYAN L. REV. 441, 474-75 (2011) (illustrating failure of accrediting body to identify errors and unscientific practices at North Carolina

serious mistakes within forensic laboratories due to tolerant cultures accepting errors.[98] Forensic laboratories also produce questionable scientific evidence, which has led to wrongful convictions due to sub par oversight, regulation, and funding.[99] Crime laboratories' poor standards and quality control have permitted questionable or fraudulent forensic evidence into the court system, largely to the detriment of criminal defendants.[100]

In addition to the possibility of forensic mistake or fraud, the purported "CSI Effect" frequently causes a jury to give great deference to a forensic report in favor of the prosecution.[101] While it is debatable whether a single television show is responsible, there is no question that jurors believe in the soundness of DNA evidence.[102] Furthermore, it is generally known that jurors overweigh forensic evidence's probative value.[103] With advancements in modern technology over the past few decades, jurors often expect the prosecution to utilize forensic evidence to meet its burden of proving defendants guilty beyond a reasonable doubt.[104] Researchers have also found that individuals have a psychological need to reach closure following the commission of crimes, and jurors' ability to overestimate the probative value and accuracy of

forensic laboratory). An audit by the Attorney General for North Carolina revealed that over sixteen years, eight analysts had failed to report test results that would compromise their findings. *See id*. Laboratory supervisors sanctioned the policy, which affected over 230 cases. *See id*. at 475.

98. *See* Gabel, *supra* note 12, at 303 (demonstrating laboratory produced error or fraud unlikely to affect accreditation from ASCLD/LAB). The ASCLD/LAB's "culture of tolerance for errors stems from a highly forgiving corrections system" that violates its own ethics guidelines. *See id*. (citation omitted). Furthermore, accrediting bodies' failure to give random inspections and permitting laboratories to select the case files for review, perpetuate the permissibility of forensic errors and fraud. *See id*. at 303-04.

99. *See* Cooley, *supra* note 97, at 479 (identifying primary reasons why forensic science leads to wrongful convictions).

100. *See* National Research Council, *supra* note 29, at 44 (calling into question crime laboratories' integrity). Forensic science facilities produce questionable or fraudulent evidence due to the lack of mandatory and enforceable standards. *See id*.

101. *See* Kimberlianne Podlas, *"The CSI Effect": Exposing the Media Myth*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 429, 465 (2006) (showing increasing possibility "CSI Effect" will cause jurors to enter legally unjustifiable verdicts). Doctor Podlas notes, "[I]f there is any effect of CSI, it is to exalt the infallibility of forensic evidence, favor the prosecution, or predispose jurors toward findings of guilt." *Id*.

102. *See* Hon. Donald E. Shelton, *Juror Expectations for Scientific Evidence in Criminal Cases: Perceptions and Reality about the "CSI Effect" Myth*, 27 T.M. COOLEY L. REV. 1, 10-11 (2010) (demonstrating jurors' demand for DNA evidence through survey findings). Although jurors believe in DNA evidence's soundness, one survey demonstrated no significant differences between jurors who do and do not watch CSI in their requirement of DNA evidence for guilt attribution. *See id*. Even if the "CSI effect" does not truly exist, the heightened expectation of forensic evidence is likely attributable to society's cultural advancements in technology and information sharing. *See id*. at 11.

103. *See* Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1063 (2006) (discussing negative impact of "CSI Effect"). Jurors are likely to place great weight on scientific evidence, believing a supposed inherent infallibility. *See id.*

104. *See* Shelton, *supra* note 102, at 11 (illustrating jurors' modern expectation for prosecution to utilize forensic evidence to prove defendants guilty). When the prosecution offers circumstantial evidence without factual testimony, jurors have an increased demand for scientific evidence to link the defendant with the accused crime. *See id.* at 15.

scientific evidence aides that psychological need.[105] It is also important to note that a great number of states will uphold convictions based on forensic evidence alone; this issue is problematic in light of the many cases where convictions have been later overturned based on the prior use of questionable or fraudulent scientific evidence.[106]

## III. ANALYSIS

The Supreme Court of the United States has consistently noted forensic evidence and DNA testing's inherent unreliability, thus necessitating a more demanding confrontation right regarding surrogate analysts' testimony.[107] Despite DNA testing's unreliability, the plurality opinion in *Williams* attempted to diminish forensic reports' testimonial nature to advance and ease its admission for prosecutors.[108] The *Williams* plurality also sought to exempt expert testimony from the Confrontation Clause and thereby diminish defendants' protection under the Constitution where it would normally be applicable.[109] Due to the Court's divided opinion, Confrontation Clause analysis regarding forensic testimony is remarkably different among states.[110] To properly delineate Confrontation Clause analyses in cases dealing with scientific evidence and testimony, the Court must define the term "testimonial" and reiterate forensic analysts' various requirements to serve as sufficient

105. *See* Tyler, *supra* note 103, at 1065-67 (attributing jurors' psychological need to find defendants guilty or innocent to evidence overvaluation). To satisfy their need for closure, jurors not only overvalue the probative value of forensic evidence but also overestimate the scientific accuracy of that evidence. *See id*. at 1070.

106. *See* Malcom, *supra* note 92, at 329-37 (identifying number of states upholding convictions based solely on DNA and circumstantial evidence).

107. *See supra* note 10 and accompanying text (discussing Court's acknowledgement of inherent unreliability of forensic testing in *Melendez-Diaz* and *Bullcoming*). The *Williams* plurality, mainly comprising of the dissenters in *Melendez-Diaz* and *Bullcoming*, attempted to change overall judicial perception of the reliability and admissibility of forensic reports. *See* Williams v. Illinois, 132 S. Ct. 2221, 2244 (2012) (supporting forensic testing's reliability and admissibility); Bullcoming v. New Mexico, 564 U.S. 647, 681 (2011) (Kennedy, J., dissenting) (considering forensic reports "impartial" for their preparation by analysts who purportedly follow proper procedures); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 330 (2009) (Kennedy, J., dissenting) (arguing scientific reports historically introduced into evidence without requiring testimony of primary analyst).

108. *See supra* note 40 and accompanying text (noting outcome of plurality opinion would affect ease of admission of forensic reports for prosecution); *see also Bullcoming*, 564 U.S. at 683-84 (Kennedy, J., dissenting) (describing significant burden on blood alcohol analysts to appear in court via subpoenas); *Melendez-Diaz*, 557 U.S. at 340-41 (Kennedy, J., dissenting) (arguing heightened requirements would place undue burden on analysts, prosecutors, and state resources).

109. *See Williams*, 132 S. Ct. at 2264 (Thomas, J., concurring) (criticizing plurality's attempt to "carve out a Confrontation Clause exception for expert testimony"). Justice Thomas argued that the plurality diminishes the Confrontation Clause protection when experts serve as surrogate witnesses to convey the contents of formalized statements—statements that the accused should have the right to confront. *See id*.

110. *See supra* Part II.C (discussing various Confrontation Clause analyses among ten state supreme courts).

witnesses for purposes of a defendant's right to confrontation.[111]

Many courts have held that the expert testimony of a supervisor or reviewer who has knowledge of the forensic laboratory's testing procedures and protocols, but who does not actually observe or perform the testing, satisfies a defendant's confrontation right.[112] This interpretation of the requirements for satisfying the Confrontation Clause rests on the purported notion that forensic testing is inherently reliable, which is certainly not the case.[113] Courts should not view the use of an expert witness as a constitutionally acceptable exception to the right of confrontation; it is impossible for an expert witness to testify to what actually occurred at each stage during the testing process, and therefore, the defendant would be deprived of a meaningful opportunity to cross-examine.[114] Furthermore, a jury is more likely to confuse an expert witness's opinion for fact and place too much weight on the expert's opinion—or in some cases, the inadmissible forensic report that the expert witness relies on to convey her opinion.[115] Imprecise expert testimony—whether from a supervisor or reviewing analyst—has also contributed to the admission of misleading or fraudulent forensic evidence.[116] Society's belief of scientific infallibility, coupled with the risk of juror confusion, should deem expert witnesses insufficient to satisfy a defendant's right to confrontation.[117]

To secure a defendant's right to confront their accuser, some states permit supervising analysts to testify only if they have either performed or observed the actual testing process.[118] Regardless of the burden on prosecutors—a factor

111. *See* Crawford v. Washington, 541 U.S. 36, 51-52 (2004) (failing to define "testimonial" for purposes of Confrontation Clause analysis); *Bullcoming*, 564 U.S. at 652 (explaining Court mandated testifying analyst to have either performed or observed DNA testing).

112. *See e.g.*, State v. Michaels, 95 A.3d 648, 677-78 (N.J. 2014); State v. Lui, 315 P.3d 493, 508 (Wash. 2014); Jenkins v. State, 102 So.3d 1063, 1069 (Miss. 2012); *see also supra*, notes 66-67 and accompanying text (describing instances where experts removed from actual testing permitted to testify without Confrontation Clause violation).

113. *See* Gabel, *supra* note 12, at 289-90 (discussing misconception of forensic testing and evidence intrinsically reliable and immune from error); *see also supra* notes 102-104 and accompanying text (providing numerous reasons jurors place great weight on forensic evidence).

114. *See supra* note 42 and accompanying text (demonstrating critical questions defendant may ask where expert witness unable to respond). Cross-examining a reviewing analyst would be meaningless for the defendant; the testifying analyst could not determine if any primary analyst made a mistake in the testing process or engaged in fraudulent activities. *See* Williams v. Illinois, 132 S. Ct. 2221, 2275 (2012) (Kagan, J., dissenting) (emphasizing importance of confronting primary analyst).

115. *See Williams*, 132 S. Ct. at 2236 (stating dissent's argument would have more "force" if defendant chose jury trial). The plurality thus implicitly acknowledged a substantial risk that the jury—as opposed to the judge—would confuse an expert's opinion for fact. *See id*.

116. *See* National Research Council, *supra* note 29, at 4 (reporting exaggerated expert testimony sometimes aided in admission of erroneous or fraudulent scientific evidence).

117. *See Williams*, 132 S. Ct. at 2236 (discussing high risk of jurors mistakenly considering experts' opinions uncontested facts); Shelton, *supra* note 102, at 15 (explaining juror's demand for scientific evidence when determining defendant's guilt or innocence).

118. *See* Ex parte Ware, 181 So.3d 409, 416 (Ala. 2014) (finding right to confrontation satisfied when testifying analyst supervised and reviewed testing process); Commonwealth v. Tassone, 11 N.E.3d 67, 68

some courts consider in allowing surrogate testimony—the Constitution demands that defendants have the right to confront the testing analyst when the certifying analyst did not observe the testing.[119] Courts that presume forensic testing is inherently neutral favor admitting forensic documents that significantly aid the prosecution without advancing defendants' right to confrontation.[120] Although the Supreme Court has never required all analysts within the chain of custody for DNA testing to be present for cross-examination, there is much confusion as to which—and how many—analysts should testify in situations where there is a multiplicity of analysts.[121]

In cases dealing with multiple analysts, allowing a single testifying analyst to satisfy a defendant's right to confrontation is problematic; some other participating analyst may engage in fraudulent activities or make mistakes without the supervising or certifying analyst knowing of the incident.[122] Crime laboratory accrediting bodies have overlooked individual instances of forensic fraud, indicating a need to require multiple analysts to testify to deter fraud and prevent perjury during trials.[123] Furthermore, because law enforcement agencies administer a majority of crime laboratories, there is a strong argument that courts should require multiple analysts to testify personally against the defendant; this would help ensure no single analyst within the chain of custody engaged in fraudulent acts.[124]

## IV. CONCLUSION

Modern Confrontation Clause analyses, stemming from the Court's decision in *Crawford*, have dispensed with the notion that a court could allow the

(Mass. 2014) (finding Confrontation Clause violated when testifying expert had no affiliation with laboratory that conducted testing); Marshall v. People, 309 P.3d 943, 947 (Colo. 2013) (finding right to confrontation satisfied where testifying analyst either performed or observed actual forensic testing).

119. *See supra* note 64 and accompanying text (demonstrating court adopted rule to avoid unduly burdening prosecution); *see also supra* note 56 and accompanying text (stating Confrontation Clause demands defendant's right to confront analyst with requisite knowledge of actual testing).

120. *See* Williams v. Illinois, 132 S. Ct. 2221, 2275-76 (2012) (Kagan, J., dissenting) (illustrating preference to allocate prosecutors' burden on defendants when dealing with purportedly neutral scientific evidence); *supra* note 73 and accompanying text (arguing defendants have ability to subpoena analysts believed to have engaged in misconduct).

121. *Compare Williams*, 132 S. Ct. at 2243-44 (contending use of multiple analysts prevents possibility of mistake or fabrication), *with id.* at 2272 (Kagan, J., dissenting) (arguing Court already rejected argument by citing extensive documentation of crime laboratory errors and fraud).

122. *See* Seelye & Bidgood, *supra* note 95 (illustrating instance where individual chemist forged initials of other analysts on forensic documents); *supra* note 42 and accompanying text (demonstrating testifying analyst unable to respond to questions regarding activities of other analysts).

123. *See* National Research Council, *supra* note 29, at 6 (identifying lack of mandatory and enforceable standards for forensic crime laboratories); *supra* notes 97-98 and accompanying text (describing accrediting bodies' "culture of tolerance" for mistake and fraud within forensic laboratories).

124. *See supra* note 29 and accompanying text (stating analysts have strong incentive to alter DNA evidence in favor of prosecution). Since most laboratory administrators report to the heads of law enforcement agencies, this raises concerns of forensic laboratories' independence and neutrality. *See id*.

admission of testimonial hearsay if it deemed that out-of-court statement reliable. The Court in *Melendez-Diaz* and *Bullcoming* furthered that analysis in the context of hearsay evidence dealing with forensic reports. The Court held that analysts were not exempt from coverage of the Confrontation Clause based on the purported theories that they were not conventional or accusatory witnesses and that their testimony consisted of neutral and scientific analysis. The plurality opinion in *Williams*, however, attempted to push against Court precedent and diminish defendants' confrontation rights by viewing DNA evidence as inherently reliable and allowing expert testimony to circumvent the Confrontation Clause. The result, just as the dissenting opinion in *Williams* predicted, created great confusion in the law's application. Consequently, lower courts across the nation began deciding similar Confrontation Clause cases in varying manners.

The Supreme Court must set forth a bright-line rule so that criminal defendants in every state receive the same protection from the Confrontation Clause of the Sixth Amendment. In order to do so, the Court must properly define the term "testimonial" and provide more examples of what constitutes testimonial in differing contexts. In cases involving DNA and forensic evidence, the Court must also set forth a clear ruling defining "primary analyst" for confrontation purposes. Moreover, in cases involving multiple analysts in the DNA or forensic testing process, the Court must identify which analysts within the chain of custody are required to testify to satisfy defendants' Sixth Amendment rights. If the Court does not properly delineate the scope of the Confrontation Clause, criminal defendants' constitutional rights will remain uncertain.

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