



WILLIAMS V. ILLINOIS AND FORENSIC EVIDENCE: THE BLEEDING EDGE OF CRAWFORD

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Prosecutors looking for clear guidance on how to satisfy the requirements of the Sixth Amendment's Confrontation Clause, as interpreted in *Crawford v. Washington*² and its progeny, when the prosecution presents expert testimony that is based in part upon conclusions reached by other (non-testifying) experts or technicians have been disappointed by the United States Supreme Court's 2012 decision in *Williams v. Illinois*.³ Although the Court affirmed the defendant's convictions for sexual assault and related crimes, only four Justices joined the plurality opinion, with the fifth vote resting on an entirely different rationale. The absence of a majority opinion, along with the vigorous dissent joined by the remaining Justices, has raised more questions than it answers about when and how an expert may testify to conclusions based upon the opinions or work of other experts or technicians.

A BRIEF REVIEW OF THE IMPACT OF *CRAWFORD*

Over the past nine years since the United States Supreme Court's landmark decision in *Crawford*, prosecutors have

continually adapted their practices in presenting the State's case to accommodate the requirements of the Confrontation Clause as interpreted in *Crawford*. Before *Crawford*, under the then-applicable standard set forth in *Ohio v. Roberts*,⁴ prosecutors trying domestic violence or other cases involving unavailable witnesses had the option of proving their cases by presenting conventional hearsay evidence subject to firmly established hearsay exceptions. Under the *Roberts* standard, hearsay statements of unavailable witnesses could be admitted, without offending the Confrontation Clause, provided that

[the out-of-court statement] bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.⁵

Thus, under the *Roberts* rule, confrontation analysis depended mainly upon whether the statement fell within a "firmly

rooted hearsay exception” or whether the State could show “particularized guarantees of trustworthiness.” Under this scheme, admissibility of a statement without an opportunity to confront the witness depended upon whether the statement could be deemed sufficiently reliable.

In *Crawford*, the Supreme Court overruled *Roberts* and defined a new standard for the admissibility of the out-of-court statements of unavailable witnesses. Under the new *Crawford* standard, as further developed in subsequent cases,⁶ cross-examination became the *only* acceptable means of satisfying the Confrontation Clause, at least for statements that are deemed to be “testimonial”—in general, those statements made for the purpose of eventual use at trial, as opposed to being made for some other purpose, such as allowing the police to meet an ongoing emergency. An entire jurisprudence has developed for determining which statements are considered to be testimonial, and thus subject to *Crawford*’s cross-examination requirements.⁷ Nontestimonial hearsay statements remain admissible, so long as they are admissible under the jurisdiction’s hearsay exceptions.

FORENSIC EVIDENCE UNDER *CRAWFORD*: *MELLENDEZ-DIAZ* AND *BULLCOMING*

The Supreme Court soon was faced with the question of how *Crawford*’s principles should be applied in the context of forensic evidence, which typically involves expert analyses, reports, and testimony. The first such case the Court considered, *Melendez-Diaz v. Massachusetts*,⁸ was a drug case in which the defendant was charged with distributing over 14 grams of cocaine. Rather than calling a lab analyst to testify, the Commonwealth had submitted a sworn, certified lab report stating that the substance tested positive for cocaine and that the weight was in excess of 14 grams. Although the Massachusetts courts had held that the lab report in question was “nontestimonial,” a five-Justice majority of the United States Supreme Court held that a certified lab report was the equivalent of an affidavit, a form of evidence that is considered to be within the “core class of testimonial statements” under *Crawford*, and that the report was made for the purpose of creating evidence for trial. For those reasons, the Court held that the report was inadmissible except through the testimony of the analyst, subject to cross-examination.⁹

The Court in *Melendez-Diaz* rejected the arguments that lab reports are not “accusatory” in nature, and that scientific evidence is somehow different because it is “neutral” or “objective.”¹⁰ The Court further rejected the argument that the report would be admissible under the “business records” exception to the hearsay rule—under *Crawford*, business records would be considered nontestimonial only where they were not prepared in anticipation of litigation.¹¹ The opinion made it clear that the defendant’s ability to call the analyst to testify did not satisfy the confrontation requirement; however, the Court did approve the use of “notice and demand” statutes requiring the State to provide notice of intent to rely on a lab report without calling the analyst and requiring the defendant to make a timely demand that the analyst be produced for trial or otherwise forfeit his right to cross-examine the analyst.¹² In a footnote, the Court suggested that not all witnesses involved in chain of custody or proper functioning of equipment necessarily need to be called at trial—chain of custody goes to the weight, not the admissibility, of evidence, and records concerning maintenance of equipment might be conventional nontestimonial business records.¹³

The next Supreme Court case involving forensic evidence, *Bullcoming v. New Mexico*,¹⁴ was a DWI case in which the State sought to introduce evidence of the defendant’s blood alcohol level. Because the analyst who had tested the defendant’s blood sample was on unpaid leave for an undisclosed reason,¹⁵ the State instead called a substitute analyst from the same lab. The testifying analyst was familiar with the procedures and protocols used at the lab, although he had had no personal involvement in the tests performed on the defendant’s blood, nor had he personally observed the test procedures on this particular sample. The New Mexico Supreme Court held that, although the lab report was testimonial under *Melendez-Diaz*, the analyst was a “mere scrivener” who had simply made a record of the machine-generated results, and cross-examination of the substitute analyst therefore provided the defendant with sufficient opportunity for confrontation.¹⁶ The United States Supreme Court agreed that the lab report in question was testimonial because it was sufficiently “formal” (having been certified, despite the absence of an oath) and because it had been created for purposes of prosecution.¹⁷ The Court reversed the conviction, however, on the grounds that the defendant was

entitled to cross-examine the analyst who performed the test, not a substitute analyst who had no personal involvement in the testing. Such cross-examination was necessary under the Confrontation Clause, the Court reasoned, to enable the defendant to probe for any errors in the procedure or for any possible dishonesty on the part of the analyst.

The same four Justices (Kennedy, Roberts, Alito, and Breyer) dissented in both *Melendez-Diaz* and *Bullcoming*. The dissenting opinions in these cases raised practical concerns about the application of the majority opinions to cases involving forensic evidence: how can the trial courts, prosecutors, and defense know *which* analysts or technicians must be called to testify in cases where multiple steps in the testing procedures may need to be performed? Must every analyst or technician who participated in the test be called?¹⁸

In her concurring opinion in *Bullcoming*, Justice Sotomayor noted several issues not presented by the facts of that case, among them the situation where one expert testifies to an independent opinion, relying upon the report of a non-testifying expert as a basis for that opinion pursuant to Fed. R. Evid. 703.¹⁹ That scenario was finally presented in the facts of *Williams v. Illinois*.

WILLIAMS V. ILLINOIS: THE FACTS OF THE CASE

The victim, L.J., was abducted, robbed, and raped by a stranger. She immediately reported the crime to the police, and rape kit evidence was collected, including vaginal swabs. At that point, no suspect had been identified. The rape kit evidence was sent to Cellmark, an independent lab under contract with the state. Cellmark performed a DNA analysis, resulting in a male profile that was duly entered into the state's DNA data bank. The computer system indicated a possible match to a profile developed from a sample provided by defendant Williams, who had been required to submit to DNA testing as a result of his arrest for an unrelated crime that occurred a few months after the rape of L.J.. The victim subsequently identified the defendant in a line-up as her attacker.

At the defendant's non-jury trial, the prosecution called the technician from the state lab that had developed the defendant's DNA profile, as well as the DNA analyst who had compared those results with the profile prepared by Cellmark from the DNA collected from the vaginal swabs taken

from the victim. No witness from Cellmark testified. The state lab analyst testified that Cellmark was an accredited lab whose results she and other experts routinely relied upon. She also testified to the chain of custody procedures followed for submitting evidence to, or receiving evidence or reports from, Cellmark. The analyst testified that her comparison between the Cellmark profile based upon the samples submitted from L.J. and the profile of the defendant's DNA sample resulted in a "match." The defendant argued that the testimony identifying the Cellmark profile as having come from the swabs taken from the victim violated his Sixth Amendment right to confrontation, an argument rejected by the Illinois Court of Appeals and the Illinois Supreme Court, both of which concluded that such "basis for the opinion" testimony was not hearsay because it was not offered for the truth of the assertion.²⁰

WILLIAMS: PLURALITY OPINION (BY ALITO, J., JOINED BY ROBERTS, C.J., AND KENNEDY AND BREYER, JJ.)

The plurality opinion offered two alternative grounds for admitting the analyst's testimony concerning the Cellmark report. First, the plurality concluded that the statement concerning the provenance of the Cellmark profile was not offered for the truth of the matter, placing it outside the reach of *Crawford* and its progeny.²¹ The plurality noted that there was circumstantial evidence to show that the Cellmark profile was what it purported to be, based upon evidence markings and manifests showing chain of custody, along with the implausibility that any errors would have produced a profile that just happened to match the defendant (who had not yet been identified as a suspect but was subsequently identified by the victim).²² Observing that if the State had couched its question to the state lab analyst in the traditional hypothetical form there would be no issue as to confrontation, the plurality rejected the notion that failure to word the question in that manner transformed the testimony into substantive testimony that violated the Confrontation Clause.²³ The plurality noted that, although the distinction between "basis for the opinion" testimony not offered for its truth and substantive evidence that is offered for the truth might be problematic where a jury is asked to make such a fine distinction, this was a bench trial in which the trial judge was not likely to mistake the purpose for which the testimony was offered nor to consider it for the wrong purpose.²⁴

The second rationale offered by the plurality for admitting the testimony was that the Cellmark report was not “testimonial” under *Crawford* because no suspect had yet been identified and there was thus no possibility that the results of any testing might accidentally or deliberately be skewed so as to identify a particular suspect.²⁵

Justice Breyer, who joined the plurality opinion, also wrote a concurring opinion in which he expressed a wish that the case be re-argued, with a focus on the practical implications of the application of *Crawford* to expert testimony, which often relies on the work of multiple technicians or analysts, along with the problems presented by experts who may no longer be available in situations where re-testing of samples may not be an option (*e.g.*, autopsy results in “cold cases”).²⁶

WILLIAMS: JUSTICE THOMAS’S CONCURRING OPINION

Although Justice Thomas agreed that the testimony in question did not violate the Confrontation Clause, he explicitly rejected the plurality’s reasoning. He specifically rejected the notion that the testimony concerning the Cellmark report was not admitted for its truth, agreeing with the dissent that if the Cellmark report was not “true” there would be no reason for it to be relied upon by the analyst who testified.²⁷ He also agreed with the dissent that there was no basis to carve out an exception to “testimonial” statements if they do not inculcate an already-identified suspect.²⁸

Justice Thomas affirmed the conviction based upon his belief that the Cellmark report was not “testimonial” for a different reason. For him, any statement that lacks the “formality and solemnity” of a certification or affidavit would be “nontestimonial” under *Crawford*.²⁹ Because the Cellmark report was neither certified to nor sworn to, Justice Thomas would have permitted its admission as a nontestimonial statement.³⁰

WILLIAMS: DISSENTING OPINION (BY KAGAN, J., JOINED BY SCALIA, GINSBURG, AND SOTOMAYOR, JJ.)

The dissenting Justices (all of whom were in the majority in *Bullcoming*) saw no distinction between this case and *Bullcoming* or *Melendez-Diaz*. They rejected the notion that the testimony concerning the Cellmark report was not of-

fered for its truth, reasoning that the Cellmark profile otherwise lacked any relevance at all.³¹ They also discerned no basis for the plurality’s new test for whether a statement was “testimonial” under *Crawford*, noting that nothing in their prior opinions had suggested that evidence must be directed toward a particular individual before it would be considered “testimonial.”³² They also disagreed with Justice Thomas’s rationale for admitting the uncertified Cellmark report, noting that this “formality” distinction had been expressly rejected by a majority of the Court in *Bullcoming*.³³

For the dissenters, this case required a simple application of *Melendez-Diaz* and *Bullcoming*, which they said barred the testimony concerning the source of the DNA profile produced by Cellmark.³⁴ The dissent would have seen no confrontation problem if the analyst had testified in response to a strictly hypothetical question: whether, *assuming* that the Cellmark profile was produced from the DNA extracted from the vaginal samples taken from the victim, the Cellmark profile matched the profile produced from the defendant’s DNA. In that case, it would have been up to the State to present evidence that the Cellmark report was what it purported to be, which could be done circumstantially.³⁵ The dissent hinted in footnote 4 of its opinion that not every analyst or technician involved in the process would necessarily have to testify in order to satisfy the requirements of the Confrontation Clause, observing that this case did not squarely present that question, since it was not an issue whether one or three or six or twelve witnesses testified, but rather it was the fact that no one involved in preparation of the Cellmark report testified.³⁶

WILLIAMS: ANALYSIS

The *Williams* decision, while representing a victory for the prosecutors in that case, has only muddied the already murky waters of confrontation jurisprudence. It fails to answer, in a clear and decisive way, the question of what evidence must be presented at trial when the State’s case is based in part upon scientific evidence, which may have numerous sub-components worked on by various technicians and analysts before a final expert report is prepared.

Because the rationales of the Alito plurality were rejected by a majority of the court (the four dissenters along with Justice Thomas), those rationales cannot be relied upon as

precedent. “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds’” *Marks v. United States*.³⁷ In *Williams*, however, there is no overlap between the rationales relied upon by the plurality and the rationale relied upon in the Thomas concurrence. The *Williams* case is perhaps best viewed as a *sui generis* example of the retreat of a majority of the Court from *Crawford*. Essentially, the conviction was affirmed only because the Cellmark report was not certified or sworn to—a fact that was significant for Justice Thomas alone, based upon a definition of “testimonial” that has been repeatedly rejected by a majority of the Court. It is doubtful whether prosecutors can rely upon admitting hearsay as the “basis for the expert’s opinion,” under Rule 703 of the rules of evidence applicable in most jurisdictions, on the theory that it is not offered for its truth. A jury trial in particular highlights this difficulty—the plurality emphasized that the trial in *Williams* was a bench trial in which there was little risk that the factfinder would consider the report for its truth.

INTERPRETATION OF *WILLIAMS* BY THE LOWER COURTS

As might be expected, given the fractured opinions in *Williams* and the difficulty of extracting a simple rule—or even a complex one—for application in cases not presenting an identical set of facts, the state and lower federal courts have struggled to apply *Williams*’ principles to a wide variety of cases involving forensic evidence. Many opinions frankly acknowledge the difficulty of applying the latest version of the Court’s confrontation analysis to the cases they are deciding.³⁸ One court faced with the task observed, “Making sense out of the case law in this area is to some extent an exercise in tasseomancy [divination by reading tea leaves].”³⁹ The result has been inconsistent application in the various cases in which *Williams*-type questions are presented. Testimony by analysts who did not personally perform the tests in question, testimony by experts who rely on the results of testing actually performed by other technicians, and admissibility of lab reports certified to by a testifying analyst who did not personally perform the testing but analyzed the results are just a few of the scenarios presented. A brief sampling of some of the lower court post-*Williams*

decisions follows. Although the decisions are good law in their respective jurisdictions, the prosecutor must keep in mind that Supreme Court confrontation jurisprudence, as applied in the forensic evidence context, is currently in a state of flux, and that the next decision from that Court may effectively overrule any of these decisions.

The California courts have published more decisions purporting to apply *Williams* in various contexts than any other single jurisdiction. The courts in that state have adopted perhaps the most liberal (and debatable) interpretation of *Williams*, concluding that the two essential elements that all of the *Williams* Justices would agree are necessary for an out-of-court statement to be considered testimonial are: (1) some degree of formality and (2) that the statement “[pertain] in some fashion to a criminal prosecution.”⁴⁰ On October 15, 2012, the California Supreme Court issued three opinions involving *Williams* issues. In *People v. Dungo*,⁴¹ the State had presented testimony of a forensic pathologist who did not perform the autopsy. That pathologist testified to his opinion of the cause of death based upon his own observations of the data contained in an autopsy report prepared by a non-testifying pathologist. The autopsy report itself was not admitted into evidence. The testifying pathologist concluded that the victim had died of asphyxiation due to strangulation. The Court held that the data contained in the autopsy report was not testimonial because (1) since autopsies serve many purposes, prosecution being only one of them, the primary purpose of the autopsy was not to create evidence for purposes of prosecution, and (2) the objective observations of the pathologist who performed the autopsy were not sufficiently formal.⁴² In the second case, *People v. Lopez*,⁴³ a vehicular homicide case, the State introduced a lab report consisting of chain-of-custody notations, calibration data, quality-control sample run data, and the machine-generated gas chromatography results. The technician who performed the testing did not testify, but another analyst from the lab did, providing his own interpretation of the results. Although the lab report bore the initials of the non-testifying analyst who performed the tests, the lab report was neither sworn to nor certified. The Court did not reach the question of the “primary purpose” of the testing, concluding that the report and the data contained therein was not sufficiently “formal” to be considered testimonial.⁴⁴ In the third case, *People v. Rutterschmidt*,⁴⁵ a homicide case in which a lab di-

rector testified to the results of toxicology tests he did not personally perform but rather reviewed for accuracy, the Court declined to determine whether there was any Sixth Amendment violation because any error would have been harmless in light of the overwhelming evidence of guilt.⁴⁶

The intermediate appellate courts in California, following *Dungo* and *Lopez*, have concluded that many kinds of forensic evidence and expert testimony are admissible based on the fact that the out-of-court statements either were not sufficiently formal or were not created for the primary purpose of criminal prosecution. In *People v. Holmes*,⁴⁷ three supervising criminalists from three different labs testified to DNA results in tests they did not personally perform (the lab reports were referred to for purposes of forming their opinions, and were referred to in their testimony, but not admitted into evidence). The Court of Appeals determined that the underlying data was not sufficiently formal to be considered testimonial.⁴⁸ In *People v. Barba*,⁴⁹ the Court of Appeals went even further. In that case, a lab director testified about DNA tests she had not personally performed. The reports themselves were admitted into evidence through her testimony. None of the reports had been sworn to or certified. After a painstaking analysis of the opinions in *Williams* and in the other California decisions that followed, the court held that: "So long as a qualified expert who is subject to cross examination conveys an independent opinion about the test results, then evidence about the DNA tests themselves is admissible."⁵⁰ Although the court did not decide whether admission of the reports themselves was error, the court concluded that any error in their admission was harmless.⁵¹

The Illinois courts have also applied *Williams* in a manner that facilitates the admission of forensic evidence in both autopsy and DNA cases. In *People v. Leach*,⁵² the Illinois Supreme Court held that testimony by a reviewing pathologist who had not performed the autopsy, and admission of the original autopsy report itself, did not violate the Confrontation Clause because autopsies are not performed only for purposes of criminal prosecution, and because they are not intended to target a particular suspect.⁵³ The Court took a pragmatic approach to the issue of admissibility of autopsy reports:

Finally, as a practical matter, because a prosecution for murder may be brought years or even decades after the autopsy was performed and the report prepared, these

reports should be deemed testimonial only in the unusual case in which the police play a direct role (perhaps by arranging for the exhumation of a body to reopen a "cold case") and the purpose of the autopsy is clearly to provide evidence for use in a prosecution. The potential for a lengthy delay between the crime and its prosecution could severely impede the cause of justice if routine autopsies were deemed testimonial merely because the cause of death is determined to be homicide.⁵⁴

In *People v. Negron*,⁵⁵ the Illinois Appellate Court approved the testimony of a DNA analyst who did not personally perform the test procedures, but who was director of the lab that performed the test and later reviewed the results of the testing. In *Negron*, a bloody tissue, found underneath the bed in a home that was burglarized, was sent to a Cellmark lab for analysis. The resulting profile later proved to be a match to the defendant, whose DNA was already in the state's DNA database. The state lab analyst testified to the comparison, and the director of the Cellmark lab testified regarding the profile developed from the bloody tissue, although the director did not herself perform the testing. Following the state Supreme Court's decision in *Leach*, the Appellate Court held that the DNA testing was neither for the purpose of targeting a particular individual nor performed for the primary purpose of creating evidence for a criminal case.⁵⁶ Although the court purports to apply the "primary purpose test" of both the plurality and dissenting opinions in *Williams*, it seems highly doubtful that the dissenting Justices in *Williams* would agree with the proposition that the testing was not done for the primary purpose of creating evidence in a criminal case.

Other courts have taken a far more conservative view of *Williams*, excluding evidence that arguably might have been admissible under a majority view in that case. In *Young v. United States*,⁵⁷ the District of Columbia Court of Appeals held that the testimony of a lead analyst, who conducted the interpretation and comparison of a DNA profile developed from the rape victim's swab with a profile developed from a known sample of the defendant's DNA but did not personally conduct the testing (all of which was performed by her subordinates at the same FBI lab), violated the defendant's right to confrontation. "[I]f *Williams* does have precedential value as the government contends, an out-of-court statement is testimonial under that precedent if its primary

purpose is evidentiary and it is either a targeted accusation or sufficiently formal in character.”⁵⁸ In *Young*, the court reasoned that the DNA test results relied upon and referenced by the lead analyst were obtained for an evidentiary purpose and, at least with respect to testing the DNA taken from the defendant, were obtained with the purpose of obtaining evidence against a targeted suspect.⁵⁹ Although the court went on to say, “We do not hold that every analyst and technician who performed any aspect of the multi-stage process used to isolate, amplify, identify, and analyze DNA evidence must testify at a defendant’s trial absent a waiver,”⁶⁰ the opinion, like *Williams* itself, leaves unanswered the question of which technicians must testify at trial to satisfy the Confrontation Clause. The opinion does not even allude to footnote 4 of the *Williams* dissent, in which Justice Kagan suggests that the testimony of a “lead analyst” may be sufficient to satisfy the Confrontation Clause.

In *Martin v. State*,⁶¹ the Delaware Supreme Court disapproved the testimony of the certifying analyst from the lab that had tested the defendant’s blood for the presence of drugs following his arrest for driving offenses. The testifying analyst in that case took the “batch results” of testing performed by another technician, reviewed them, and certified a report stating that PCP was found in the defendant’s blood sample. In spite of the fact that the machine-generated batch results were not certified by the technician who ran the tests, the Delaware court held that failure to call that technician violated the defendant’s confrontation right.⁶² Finding that the case fell “somewhere between *Bullcoming* and *Williams*,”⁶³ the Court said that the testifying/certifying analyst’s reliance on the non-testifying technician’s testing effectively put the truth of those tests before the jury without the defendant’s having an opportunity to cross-examine the technician about how the tests were performed.⁶⁴ It seems questionable, however, whether a majority of the *Williams* Court, including Justice Thomas, would have found such testimony relying on uncertified test results a violation of the Confrontation Clause.⁶⁵

In *United States v. Cameron*,⁶⁶ the First Circuit applied *Williams* in the context of computer forensic evidence. The court first determined that several different types of reports of user activity maintained by the service provider, Yahoo!, were nontestimonial business records maintained in the ordinary course of business.⁶⁷ However, the court

found that two classes of reports introduced at trial, Yahoo!’s “CP [child pornography] Reports” (which consisted solely of information gleaned from the nontestimonial business records), and “NCMEC [National Center for Missing and Exploited Children] CyberTipline Reports” (a clearing house which forwarded the CP reports to the NCMEC for transmittal to the appropriate law enforcement authorities), were testimonial reports requiring an opportunity to cross-examine the author.⁶⁸ The court said it was irrelevant that the CP Reports (and the CyberTipline Reports that contained the same information) were based upon obvious conclusions drawn from the original nontestimonial business records. The court found there was some element of “analysis” that was conducted in compiling the CP Reports, making them “new statements” that were testimonial because they were prepared only after Yahoo! found images believed to be child pornography.⁶⁹ This conclusion, too, seems to be one not required by *Williams* or any other Supreme Court precedent.

Not all courts have decided that the “primary purpose” of autopsies in criminal cases is anything other than criminal prosecution. In *State v. Kennedy*,⁷⁰ a substitute forensic pathologist, who did not perform the autopsy, referred to the original autopsy report during his testimony, agreed with the original pathologist’s conclusions regarding the cause and manner of death, and additionally testified to some of his own conclusions based upon data contained in the autopsy report, which was admitted into evidence. The West Virginia Supreme Court of Appeals held that autopsy reports are *always* testimonial, and that testimony of the pathologist that agreed with the report’s conclusions about the cause and manner of death violated the defendant’s right to confront the report’s author, but that the independent opinions by the testifying pathologist about the probable source of some of the injuries inflicted were properly admitted.⁷¹ The New Mexico Supreme Court came to a similar conclusion in *State v. Navarette*,⁷² which also involved a second pathologist testifying based upon information contained in the autopsy report of a previous pathologist. In that case, the Court held that some of the information in the autopsy report amounted to “raw data” and objective observations that could be the basis for a second testifying expert’s independent opinion, but that more subjective judgments—in this case observations of gunpowder stippling that shed

light on how the crime was committed—were testimonial and inadmissible without the testimony of the pathologist who made those subjective determinations.⁷³

STRATEGIES AND RECOMMENDATIONS (WHO YOU GONNA CALL?)⁷⁴

As jurisdictions around the country grapple with the recurring problems presented by multi-analyst forensic testing or by forensic analysts who may no longer be available to testify at trial, prosecutors must try to determine how to prove their cases without risking reversal on appeal for confrontation violations. At the same time, most prosecutors' offices are under severe budget constraints that may limit the ability of prosecutors to secure the attendance at trial of all analysts in all but the most serious cases. The trial of "cold cases" years or decades after the crime and the autopsy may mean that the original analyst or medical examiner is no longer available and that samples are no longer available for re-testing. The prosecutor's difficult task, then, is to balance the various considerations that may impact their trial strategy, including such factors as the availability of the various technicians and analysts who may have participated in testing procedures (including the cost of producing such witnesses in court), the degree to which the forensic evidence in question is critical to a conviction, the importance of the case, the availability of notice and demand procedures, and the lead time available. Ultimately, prosecutors must determine the acceptable level of risk that a conviction will be reversed on appeal for a confrontation violation.

As we have seen in the foregoing section, California has taken a liberal approach to admitting DNA expert testimony based upon the reports of non-testifying analysts, by expansively interpreting the plurality opinion in *Williams*. While prosecutors in California can be certain that their appellate courts will approve of DNA evidence presented in this manner, this expansive interpretation of *Williams* has yet to be tested in the United States Supreme Court. New cases concerning these difficult issues are being decided daily all over the nation, with less than predictable results. In deciding how best to prove a particular case involving multi-analyst testing or testing performed and reports prepared by unavailable experts, prosecutors should first check their own state's case law to determine whether their

courts have weighed in on the particular issue. Even where there is controlling case law in the state courts, however, any application of the principles in *Williams* to scenarios not involving an identical or very similar set of facts may not survive the next United States Supreme Court confrontation case involving forensic evidence.

Under the most literal reading of *Williams*, it appears that expert testimony concerning forensic evidence will be admissible under that decision *only* where the report at issue is (a) not offered for the truth of the matter (as defined in the plurality opinion) *or* where a suspect has not yet been identified, *and* (b) where the lab report has not been certified or sworn to. Both sets of conditions would have to be satisfied before such evidence will be deemed admissible under *Williams*. In most cases, therefore, prosecutors attempting to determine what witnesses are needed for trial would do well to heed the concerns expressed in the dissenting opinion, at least until further guidance is received from the Supreme Court.

Clearly, the safest course would be to produce at trial each and every technician or analyst who participated in the testing. Granting the defense the opportunity to cross-examine each participant leaves no room for reversal for a confrontation violation. This course of action is obviously the most costly and time-consuming, however. In cases where it is not possible or practical to produce each witness, and provided that the appellate courts of the particular jurisdiction have not disapproved of such evidence as violating the Confrontation Clause, the following alternative courses can be considered, several of which present at least some degree of risk of reversal on confrontation grounds:

- Where analysts/technicians who performed the tests are unavailable for trial and where time permits, request re-testing of samples, if at all possible, and call the new analysts/technicians. In such cases, testimony should not reference the previous testing procedures, but rely solely upon the new testing.
- Take advantage of any notice-and-demand procedures your jurisdiction may offer, providing written notice of your intention to rely upon a lab report in lieu of live testimony. The defendant would be responsible for timely

objection to such evidence, otherwise forfeiting his right to cross-examine the analyst. The Supreme Court has explicitly approved this course.

- Ask if defense counsel will stipulate to the lab results. Where the test result is not a critical issue to the defense case (*e.g.*, a ballistics report in a case where identity, rather than cause of death, is in issue) such a stipulation may be reasonable from a defense standpoint. To be absolutely safe, secure a verbal or written waiver of cross-examination from the defendant on the record.⁷⁵
- Call at least the lead analyst for each test performed. In footnote 4 of the dissenting opinion in *Williams*, Justice Kagan suggested that calling a single lead analyst may be sufficient to satisfy the Confrontation Clause.⁷⁶ Chain of custody and routine calibration procedures probably can be satisfactorily proved by use of routine business records.
- If the lead analyst is unavailable, call an analyst who observed the test, if such a witness can be identified.
- Consider calling the lab supervisor, in addition to a lead analyst, where there are multiple steps to the testing procedure. He or she can testify concerning normal lab protocols and the role of each subsidiary step in the testing process.
- Consider proving the case *without* introducing the forensic evidence. Not all evidence is necessarily essential to proving the case. If you decide not to present available forensic evidence, file a motion *in limine* to preclude the defense from suggesting that the absence of forensic evidence means an inadequate investigation was conducted or from suggesting that the results of the testing would be exculpatory (assuming they are not).
- Where no other option is available, and the *only* way to admit crucial evidence is through a witness who was not personally involved in the testing, be careful to couch your questions in hypothetical form, and carefully prove, through either direct or circumstantial evidence, all of the predicate facts upon which the hypothetical relies. Be sure to request a strongly worded jury instruction on expert testimony based upon hypothetical facts.

CONCLUSION

Prosecutors must continue to tread cautiously when presenting forensic evidence at trial in order to protect their convictions from reversal for error based on confrontation grounds. Whether the “testimonial/nontestimonial” dichotomy of *Crawford* represents a workable test for forensic evidence adduced at trial appears to be in serious doubt, as demonstrated by the fact that a majority of the Court has withdrawn its support for the test in that context. Absent a more definitive statement from the Court, however, live testimony with cross-examination of all analysts and technicians is the only way to guarantee that a conviction will withstand a confrontation challenge on appeal. Where that is impossible, prosecutors must strategically plan their presentation of forensic evidence to maximize the likelihood of conviction while minimizing the likelihood of reversal on appeal.

ENDNOTES

- 1 Teresa Garvey is an Attorney Advisor at AEQUITAS: The Prosecutors' Resource on Violence Against Women. The author would like to thank Christian Fisanick, Assistant United States Attorney and Chief of the Criminal Division, United States Attorney's Office, Middle District of Pennsylvania for his contributions to this article.
- 2 *Crawford v. Washington*, 541 U.S. 36 (2004).
- 3 *Williams v. Illinois*, 132 S. Ct. 2221 (2012).
- 4 *Ohio v. Roberts*, 448 U.S. 56 (1980).
- 5 *Id.* at 66.
- 6 *E.g.*, *Davis v. Washington*, 547 U.S. 813 (2006); *Hammon v. Indiana*, 547 U.S. 813 (2006); *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).
- 7 *See, e.g.*, AEQUITAS, THE PROSECUTORS' RESOURCE ON CRAWFORD AND ITS PROGENY (2012), http://www.aequitasresource.org/The_Prosecutors_Resource_Crawford.pdf; *see also* JESSICA SMITH, UNC SCHOOL OF GOVERNMENT, CRAWFORD V. WASHINGTON: CONFRONTATION ONE YEAR LATER (April 2005), *available at*, <http://sogpubs.unc.edu/electronicversions/pdfs/crawford.pdf>; JESSICA SMITH, UNC SCHOOL OF GOVERNMENT, EMERGING ISSUES IN CONFRONTATION LITIGATION: A SUPPLEMENT TO CRAWFORD V. WASHINGTON: CONFRONTATION ONE YEAR LATER (March 2007), *available at*, <http://sogpubs.unc.edu/electronicversions/pdfs/crawfordsuppl.pdf>; Jessica Smith, *Understanding the New Confrontation Clause Analysis: Crawford, Davis, and Melendez-Diaz*, 2010/02 ADMIN. OF JUSTICE BULL. (2010), *available at*, <http://www.sog.unc.edu/sites/www.sog.unc.edu/files/SmithUnderstandingtheNewConfrontationClauseAnalysis.pdf>; Jessica Smith, *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*, 2008/07 ADMIN. OF JUSTICE BULL. (2008), *available at*, <http://sogpubs.unc.edu/electronicversions/pdfs/aojb0807.pdf>
- 8 *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).
- 9 *Id.* at 310-11.
- 10 *Id.* at 313-14, 317-21.
- 11 *Id.* at 321-24.
- 12 *Id.* at 324-27.
- 13 *Id.* at 311 n.1.
- 14 *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011).
- 15 The Supreme Court was apparently suspicious of the possible reason for the analyst's unpaid leave, noting that it was not clear whether such leave might have been for reasons of incompetence or dishonesty. *Id.* at 2715-16.
- 16 *State v. Bullcoming*, 226 P.3d 1, 8-9 (N.M. 2010), *rev'd* 131 S. Ct. 2705 (2011).
- 17 *Bullcoming*, 131 S. Ct. at 2716-17.
- 18 *Melendez-Diaz*, 557 U.S. at 332-340 (Kennedy, J., dissenting); *Bullcoming*, 131 S. Ct. at 2725-26 (Kennedy, J., dissenting).
- 19 *Bullcoming*, 131 S. Ct. at 2722-23 (Sotomayor, J., concurring).
- 20 *People v. Williams*, 895 N.E.2d 961 (App. Ct. 2008), *aff'd*, 939 N.E.2d 268 (Ill. 2010), *aff'd*, 132 S. Ct. 2221 (2012).
- 21 *Williams*, 132 S. Ct. at 2235-41 (plurality opinion).
- 22 *Id.* at 2239 (plurality opinion).
- 23 *Id.* at 2234-37 (plurality opinion).
- 24 *Id.* at 2236-38 (plurality opinion).
- 25 *Id.* at 2242-44 (plurality opinion).
- 26 *Id.* at 2244-55 (Breyer, J., concurring).
- 27 *Id.* at 2256-59 (Thomas, J., concurring in the result).
- 28 *Id.* at 2261-64 (Thomas, J., concurring in the result).
- 29 *Id.* at 2259-60 (Thomas, J., concurring in the result).
- 30 *Id.* at 2260-61 (Thomas, J., concurring in the result).
- 31 *Id.* at 2268-72 (Kagan, J., dissenting).
- 32 *Id.* at 2273-75 (Kagan, J., dissenting).
- 33 *Id.* at 2275-77 (Kagan, J., dissenting).
- 34 *Id.* at 2265-68 (Kagan, J., dissenting).
- 35 *Id.* at 2270 (Kagan, J., dissenting).
- 36 *Id.* at 2273 n.4 (Kagan, J., dissenting).
- 37 *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (Stewart, J., plurality opinion)).
- 38 *E.g.*, *People v. Barba*, 155 Cal. Rptr. 3d 707, 728 (Cal. Ct. App. 2013); *Martin v. State*, 60 A.3d 1100, 1104 (Del. 2012).
- 39 *Barba*, 155 Cal. Rptr. 3d at 728.
- 40 *People v. Lopez*, 286 P.3d 469, 477 (Cal. 2012), *cert. denied*, 133 S. Ct. 1501 (2013); *Barba*, 155 Cal. Rptr. 3d at 714.
- 41 *People v. Dungo*, 286 P.3d 442 (Cal. 2012).
- 42 *Id.* at 449-50.
- 43 *Lopez*, 286 P.3d at 469.
- 44 *Id.* at 477-79.
- 45 *People v. Rutterschmidt*, 286 P.3d 435 (Cal. 2012).
- 46 *Id.* at 442.
- 47 *People v. Holmes*, 150 Cal. Rptr. 3d 914 (Cal. Ct. App. 2012).
- 48 *Id.* at 919.
- 49 *Barba*, 155 Cal. Rptr. 3d at 707.
- 50 *Id.* at 730.
- 51 *Id.* at 731-32.
- 52 *People v. Leach*, 980 N.E.2d 570 (Ill. 2012).
- 53 *Id.* at 590-92.
- 54 *Id.* at 592.
- 55 *People v. Negron*, 984 N.E.2d 491 (Ill. App. Ct. 2012).
- 56 *Id.* at 505-06.
- 57 *Young v. United States*, 63 A.3d 1033 (D.C. 2012).
- 58 *Id.* at 1044.
- 59 *Id.* at 1047-48.
- 60 *Id.* at 1049.
- 61 *Martin v. State*, 60 A.3d 1100 (Del. 2012).

62 *Id.* at 1108-09.

63 *Id.* at 1107.

64 *Id.* at 1107-08.

65 Recall that the four-Justice plurality in *Williams* all dissented from the majority opinion in *Bullcoming*.

66 *United States v. Cameron*, 699 F.3d 621 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 1845 (2013).

67 *Id.* at 641-42.

68 *Id.* at 642-652.

69 *Id.* at 647-49.

70 *State v. Kennedy*, 735 S.E.2d 905 (W. Va. 2012).

71 *Id.* at 916-922.

72 *State v. Navarette*, 294 P.3d 435 (N.M. 2013).

73 *Id.* at 440-43.

74 The author wishes to credit Jessica Smith's article, *Confrontation Clause Update: Williams v. Illinois and What It Means for Forensic Reports*, 2012/03 ADMIN. OF JUSTICE BULL. (2012), for its analysis of some of the considerations and options in presenting forensic evidence post-*Williams*.

75 The area of law over a defendant's stipulation to evidence is unsettled on whether the defendant himself has to agree to the stipulation at issue, or whether it is a matter of strategy to be used by defense counsel. *See, e.g.*, *United States v. Williams*, 632 F.3d 129 (4th Cir. 2011) (holding that the Court was not required to reach the question of requiring a defendant's clear waiver of stipulation, since here, both counsel and the district court were aware that the defendant objected to the introduction of the stipulation); *see United States v. Gamba*, 541 F.3d 895, 900 (9th Cir. 2008) (holding that defense counsel may waive the defendant's constitutional rights as a part of trial strategy); *but see Clemmons v. Delo*, 124 F.3d 944, 956 (8th Cir. 1997) (holding that the right of confrontation cannot be waived by counsel alone).

76 Calling the lead analyst would probably not be sufficient in the District of Columbia under *Young, supra*.

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