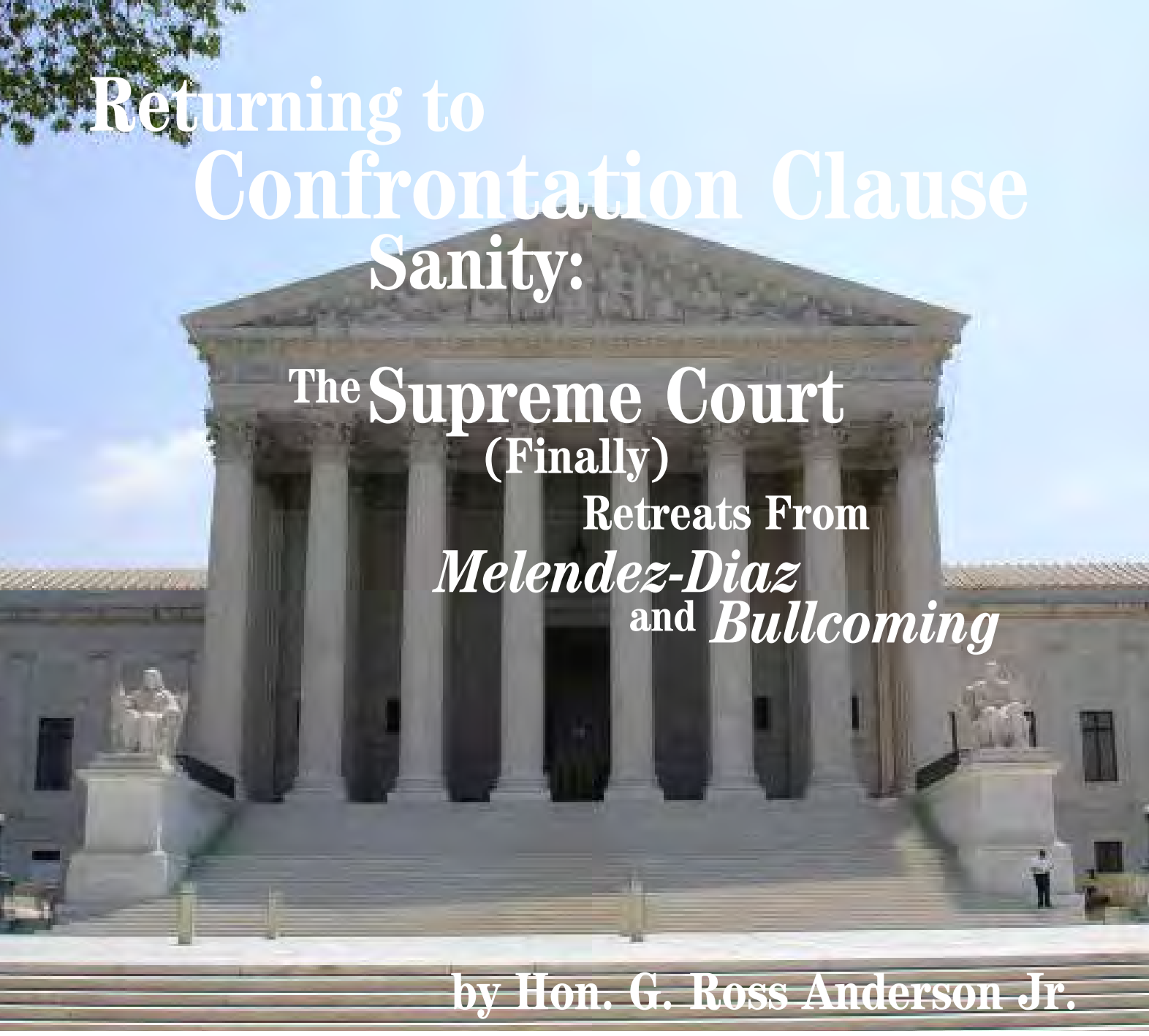

Returning to Confrontation Clause Sanity:

The Supreme Court (Finally) Retreats From *Melendez-Diaz* and *Bullcoming*

by Hon. G. Ross Anderson Jr.

On March 8, 2004, with its *Crawford v. Washington*[1] decision, the U.S. Supreme Court made one of the most impractical decisions in recent criminal procedure history—plaguing trial courts with confusion and overburdening prosecutors. In a majority opinion written by Justice Antonin Scalia, the Court overturned *Ohio v. Roberts*[2] and ruled that certain hearsay statements would no longer be admissible in criminal proceedings—even though the same statements had been deemed reliable by the courts for decades.[3] Waxing poetic about the history of the Confrontation Clause, the majority held that the Sixth Amendment "demands unavailability and a prior opportunity for cross-examination" when a criminal defendant is faced with a "testimonial" hearsay statement.[4] While some scholars hailed the decision as "a vindication of the rights of the accused,"[5] others conjectured that the Court's refusal to define "testimonial" would create uncertainty for defendants and prosecutors alike.[6]

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The latter group's fears proved to be true, and the Court took it upon itself to address the problem just two years later in *Davis v. Washington*.[7] But in attempting to define "testimonial statement," the Court failed to dispel the confusion and left lower courts and criminal practitioners with many unanswered questions.[8] Then, *Michigan v. Bryant*[9] seemed like a step in the right direction, but the Court again muddied the waters with *Melendez-Diaz v. Massachusetts*[10] and *Bullcoming v. New Mexico*.[11] Thankfully, the Court appears to be interpreting the Confrontation Clause more narrowly with its most recent *Crawford* decision, *Williams v. Illinois*.[12] While *Williams* provides some welcome relief to trial courts, prosecutors, and lab analysts, the decision does not go far enough and give what is so desperately needed—a complete reevaluation of the Confrontation Clause that provides better guidance and a more workable standard.

Background

The Sixth Amendment guarantees that a criminal defendant "shall enjoy the right ... to be confronted with the witnesses against him."[13] This is commonly known as the Confrontation Clause. Although the Supreme Court's recent jurisprudence has further complicated the Confrontation Clause landscape, such confusion is hardly new. Ever since defense lawyers began arguing its violation, courts have struggled to define the outer limits of this constitutional right.[14] Despite this, the Supreme Court did not make a *major* ruling implicating the Confrontation Clause until 1965's *Pointer v. Texas*.[15] Further, it was not until *Roberts*[16] that the Court articulated any sort of framework for how trial courts should approach the issue.[17] The *Roberts* Court held that the Sixth Amendment's right of confrontation does not bar admission of an unavailable witness' statement against a criminal defendant if the statement bears "adequate 'indicia of reliability.'"[18] Rather than leaving it to guesswork as to which evidence would be reliable enough, the Court clearly stated that evidence is reliable when it "falls within a firmly rooted hearsay exception" or has "particularized guarantees of trustworthiness."[19] The *Roberts* standard worked well for almost a quarter of a century.[20]

However, in 2004, the Supreme Court turned heel and attempted to formulate a new standard with its *Crawford* decision.[21] In *Crawford*, the Court proclaimed that the Confrontation Clause does not allow "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."[22] However, unlike the defined "reliability" standard in *Roberts*, the Court refused to address in any comprehensive fashion which statements are "testimonial."[23]

Some scholars heralded the new *Crawford* standard as a "very positive development" that afforded essential protections to criminal defendants.[24] Others saw the undefined "testimonial" mandate for what it truly was—an unworkable and impractical standard that would unleash havoc on trial courts for years to come. One such voice came from the late Chief Justice William Rehnquist in his *Crawford* concurrence.[25] Chief Justice Rehnquist insisted that prosecutors "need answers as to what ... kind[] of 'testimony' ... is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner."[26] Unfortunately, Chief Justice Rehnquist's admonition proved true, and courts and prosecutors are still largely left in the dark as to the "testimonial" standard.

The Court's first attempt to clarify the "testimonial" standard came in 2006 in two cases decided together: *Davis* and *Hammon v. Indiana*.[27] *Davis* involved statements made during a 911 call, and *Hammon* concerned statements given to a police officer after the underlying emergency had stopped and later included in an affidavit.[28] In what has become known as the "primary purpose" analysis, the Court defined a testimonial statement as one made when there is no "ongoing emergency, and [when] the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[29] Yet this definition of "testimonial" was criticized from the very beginning as "difficult for courts to apply" and has proven to be grossly inadequate to meet every statement within the purview of the Confrontation Clause.[30]

Several years later, in *Michigan v. Bryant*,[31] the Court gave hope for a narrower interpretation of the Confrontation Clause and, with it, more practicality. Keeping within the bounds of the "primary purpose" test, the Court held that because statements of a mortally wounded crime victim about the identity of his shooter were made during an ongoing emergency and their "primary purpose" was to enable police to meet that emergency, the statements were not "testimonial."[32] Interestingly, the Court

sought to broaden the "primary purpose" test somewhat by finding that "rules of hearsay, designed to identify some statements as reliable, will be relevant" in the determination—a statement strikingly similar to the *Roberts* standard.[33] Justice Scalia, in his scathing dissent, saw the opinion for what it truly was—a departure from the "testimonial" standard he set forth in *Crawford* and "a revisionist narrative in which reliability continues to guide our Confrontation Clause jurisprudence."[34]

Yet, the Court beat back hope of a return to sanity that arose from *Bryant* later that same year, with *Bullcoming*.[35] In its 2009 *Melendez-Diaz* decision,[36] the Court held that "certificates of analysis" identifying evidence as cocaine are testimonial and thus cannot be used against a defendant absent unavailability of the declarant[37] and a prior opportunity for cross-examination.[38] The Court stated that the analysts who conducted the tests (and identified the substance as cocaine) are witnesses providing testimony against the defendant[39] and that confrontation would be useful in "testing analysts' honesty, proficiency, and methodology" in "many of the other types of forensic evidence commonly used in criminal proceedings."[40]

In 2011 with *Bullcoming*,[41] the Court extended the claws of *Crawford* even further by labeling yet another laboratory report testimonial.[42] The Court held that a blood alcohol concentration analysis could not be admitted because the analyst who testified was not the analyst who had prepared the report.[43] As Justice Anthony Kennedy points out in the dissent: "Before [*Bullcoming*] the Court had not held that the Confrontation Clause bars admission of scientific findings when an employee of the testing laboratory authenticates the findings, testifies to the laboratory's methods and practices, and is cross-examined in trial."[44] Effectively, the Court held that the prosecution must bring to trial the very same analyst who conducted the test, lest the results be deemed inadmissible testimonial evidence. Nevertheless, Justice Sonia Sotomayor, a former prosecutor and district court judge, noted in her prescient concurrence in *Bullcoming* a number of factual circumstances to which *Bullcoming* did not apply.[45] With this bit of silver lining, the Court would go on in the very next term to decide the case of *Williams*.[46]

Williams: A Step in the Right Direction

Williams presented the Court with yet another opportunity to broaden the Confrontation Clause. *Williams* involved a bench trial for rape during which the prosecution called an expert from the Illinois State Police lab who testified that a DNA profile produced by an outside laboratory, Cellmark, matched a profile produced by the state lab using a sample of the defendant's blood.[47] The DNA profile produced by Cellmark was never admitted into evidence, but the defense argued that because no analyst from Cellmark testified about the report, it was a violation of the Confrontation Clause for the state's expert to refer to the report on the stand.[48] In a plurality opinion written by the dissenters from *Bullcoming*, with Justice Clarence Thomas concurring in the judgment, the Court held that DNA profiles do not implicate the Confrontation Clause because they are not "testimonial."[49] Thus, the economic and logistical nightmare that could have arisen from an opposite holding did not come to pass.

However, both the plurality's and Justice Thomas' legal analysis try to skate around the *Crawford* framework rather than explicitly overrule it. Justice Samuel Alito and the plurality certainly indicate a willingness to re-evaluate *Crawford* and the decisions that followed.[50] Yet, the plurality fails to transcend these "binding precedents" and instead offers two "independent bas[es]" for the Court's practical decision.[51]

> ***While Williams offers some relief to trial courts and others, the long-term effects of the decision still remain to be seen. With such convoluted analysis, trial courts are left to wade through the murky waters of the Confrontation Clause with little guidance.***

First, the Court says that the expert's reference to the DNA profile was "not admitted for the truth of the matter asserted" because under Rule 703 of the Federal Rules of Evidence, "an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true."[52] Yet as Justice Elena Kagan retorts in her dissent: "[T]he Confrontation Clause's protections are not coterminous with rules of evidence."[53] Even Justice Thomas proclaimed in his concurrence that "I do not think that rules of evidence should so easily trump a defendant's confrontation right."[54] Moreover, the reference to the DNA profile was obviously admitted for its truth. The state's expert unequivocally vouched for the Cellmark report when she said that the vaginal swab contained DNA matching the defendant's.[55] The defendant was convicted at least partly based on this positive match, and the plurality utterly fails to explain away a statement so clearly "bound up with its truth."[56]

Justice Alito then offers a second independent reason why the Confrontation Clause would not have been violated even if the report had been admitted into evidence.[58] He distinguishes the Cellmark report from the reports at issue in *Melendez-Diaz* and *Bullcoming*. Justice Alito confidently explains that this report "is very different, [because] [i]t plainly was not prepared for the primary purpose of accusing a targeted individual."[58] The difference seems to be the fact that the defendant was still at large when the sample was sent to the Cellmark lab for processing; therefore, the "primary purpose" of the report was not to accuse the defendant of the crime. As Justice Kagan points out in the dissent: "[W]here that test comes from is anyone's guess."[59] None of the prior post-*Crawford* cases had formulated what the dissent calls "an accusation test."[60]

The fact that the report was not made with a specific individual in mind, the plurality argues, also negates any motivation that the analyst might have to fabricate the data, effectively rendering it trustworthy.[61] This harkens back to the "reliability" standard of *Roberts*. However, as Justice Kagan points out, the Cellmark report is not really distinguishable from the report at issue in *Bullcoming*: "The Cellmark analysis has a comparable title; similarly describes the relevant samples, test methodology,

and results; and likewise includes the signatures of laboratory officials."[62] Furthermore, Justice Kagan writes, the majority in *Melendez-Diaz* conjectured at length about the "'serious deficiencies ... in the forensic evidence used in criminal trials.'"[63] Thus, trying to use the reliability standard within the *Crawford* framework simply does not work.

Finally, in a last ditch effort to distinguish this case from the *Crawford* progeny, Justice Thomas offers his own interpretation of the Confrontation Clause in a concurring opinion. He reasons that the Confrontation Clause "regulates only the use of statements bearing 'indicia of solemnity.'"[64] Justice Thomas goes on to conclude that the Cellmark report in *Williams* does not qualify for Confrontation Clause protection because it is "neither a sworn nor a certified declaration of fact."[65] Yet, as Justice Kagan rebuts, Justice Thomas' approach "grants constitutional significance to minutia."[66] The dissent warns that this approach "would turn the Confrontation Clause into a constitutional geegaw" and would allow prosecutors to avoid any Confrontation Clause problems by simply "using the right kind of forms with the right kind of language."[67] Whatever the original intent of the Confrontation Clause was, this certainly does not seem to be it.

While *Williams* offers some relief to trial courts and others, the long-term effects of the decision still remain to be seen. With such convoluted analysis, trial courts are left to wade through the murky waters of the Confrontation Clause with little guidance. Indeed, as the law presently stands, a blood alcohol analysis report[68] is subject to the Confrontation Clause,[69] but a DNA profile report lies outside of the clause's purview.[70] Further, courts are left guessing how many of the analysts that were involved in a report's preparation actually have to testify.[71] In fact, unless something changes, the Supreme Court will have to address every situation involving a forensic laboratory report on a case-by-case basis. Justice Stephen Breyer, in his concurring opinion, exposed this conundrum and expressed the need for a new framework:

> [*Williams v. Illinois*] raises a question that I believe neither the plurality nor the dissent answers adequately: How does the Confrontation Clause apply to the panoply of crime laboratory reports and underlying technical statements written by (or otherwise made by) laboratory technicians? In this context, what, if any, are the outer limits of the "testimonial statements" rule set forth in *Crawford v. Washington* ... ? Because I believe the question difficult, important, and not squarely addressed either today or in our earlier opinions ... I would set this case for reargument.[72]

In just the short time since *Williams* was decided, this uncertainty about the outer limits of the Confrontation Clause and how *Williams* is to be applied has already surfaced in lower court opinions. For instance, in *Hall v. State*,[73] the Texas Court of Appeals faced the issue of whether the trial court's admission of a drug analysis report violated the Confrontation Clause. In its analysis, the appellate court had to decide whether *Melendez-Diaz/Bullcoming* or *Williams* controlled.[74] The *Hall* court held that the case was analogous to *Melendez-Diaz* and *Bullcoming*, partly because "the lab report [was] prepared … after appellant's arrest."[75] The court seems to have applied "the accusation test."

On the other hand, in *Wisconsin v. Deadwiller*,[76] the Wisconsin Court of Appeals discussed *Williams* at length and held that it controlled.[77] The court stated that it was not necessary to give a reason for affirming the trial court's admittance of an analyst's testimony regarding a DNA profile match based on a different laboratory's report because "the narrowest holding agreed-to by a majority [in *Williams*] … is that the Illinois DNA technician's reliance on the outside laboratory's report did not violate [the] right to confrontation because the report was not testimonial. ..."[78]

Likewise, the U.S. Court of Appeals for the Tenth Circuit showed its frustration with *Williams* and the Court's current Confrontation Clause confusion in *United States v. Pablo*,[79] stating:

> [W]e cannot say the district court plainly erred … as it is not plain that a majority of the Supreme Court would have found reversible error … it appears that five Justices would affirm the district court in this case, albeit with different Justices relying on different rationales as they did in *Williams* ... The four-Justice plurality in *Williams* likely would determine that Ms. Snider's testimony was not offered for the truth of the matter asserted ... Meanwhile, although Justice Thomas likely would conclude that the testimony was being offered for the truth of the matter asserted, he likely would further determine that the testimony was nevertheless constitutionally admis-

sible because the appellate record does not show that the report was certified. ...[80]

As these cases demonstrate, lower courts throughout the country are dumbfounded by the Supreme Court's current Confrontation Clause jurisprudence and have been left to guess the meaning of "testimonial" since *Crawford*. Further, the Court's recent decisions have wreaked logistical and economic havoc that *Williams* may be too little and too late to remedy. Indeed, the added workload these decisions have created for prosecutors, the courts, and lab analysts is formidable. In these difficult economic times, states and the federal government are forced to use already limited resources to ensure analysts' availability. In 2009, there were only 411 publicly funded crime laboratories in the nation with an estimated 13,100 full-time personnel.[81] Yet, that same year—the year *Melendez-Diaz* was decided—there were an estimated 4.1 million requests for forensic services.[82] Furthermore, in 2010, there were a total of 27,648 violent crimes reported in South Carolina alone.[83] While the majority in *Bullcoming* tried to ease the pain by saying only "a small fraction of ... cases ... actually proceed to trial,"[84] the five to 10 percent of cases that *do* go to trial are the cases in which the most is at stake and in which analysts are most likely to be used.[85] For example, in July 2008 the Virginia Department of Forensic Science had only 43 drug case subpoenas.[86] However, just one year later after the decision in *Melendez-Diaz*, the number of subpoenas had increased to 925.[87] In the last six months of 2009, state lab analysts in Virginia were subpoenaed to testify in 5,651 drug cases and sometimes had to travel over 100 miles just to testify in court.[88]

All of this increased activity has worsened the already substantial backlog in the nation's crime labs. Since the decision in *Melendez-Diaz*, some state laboratories estimate that the backlog of drug tests has risen 40 percent and the backlog of alcohol or toxicology tests has increased by 15 percent.[89] In turn, this backlog in cases and increased burden on prosecutors, courts, and analysts has greatly slowed the wheels of justice and, in some cases, thrown them off course. Justice Scalia conjectured that "defense attorneys and their clients will often stipulate to [the contents of the lab report, and that it] is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis."[90] However, as pointed out by Justice Kennedy in his dissent, Justice Scalia's optimism is contrary to what has been "understood to be defense counsel's duty to be a zealous advocate for every client."[91] Criminal defense attorneys now possess "the formidable power to require the government to transport the analyst to the courtroom at the time of trial."[92] Advocating for their clients, Justice Kennedy predicted that these attorneys would either use this right at trial or use it as a bargaining chip to "insist upon concessions" from the government.[93]

In the years following these decisions, Justice Kennedy's fears have been validated in lower courts. In numerous cases, prosecutors have had to ask whether "it's really worth it" to call the lab analysts to testify.[94] In fact, many prosecutors have had to make plea deals that they otherwise would not have made because of the fear that they will have to make the lab analyst available at trial.[95] Moreover, many lower courts have had to "delay or even dismiss cases when lab technicians didn't show up."[96] This "giant game of chicken" that the Supreme Court has allowed defense attorneys to play with prosecutors must come to an end.[97]

Time for a Change

The time has now come for the Supreme Court to re-examine *Crawford* and its progeny. Lower courts, prosecutors, defense attorneys, and especially the nation's limited supply of lab analysts need a clearer and more workable standard.

While *Roberts* may not have been perfect, its framework was at least widely understood and efficient.[98] Prosecutors, lower court judges, and defense attorneys alike knew that a statement was admissible if it fell "within a firmly rooted hearsay exception"[99] or if the trial court determined that it had "particularized guarantees of trustworthiness."[100] The standard may have been vague, but it left the determination as to what evidence is reliable enough to be admitted to trial courts—a gatekeeping role trial courts have often played (e.g., with scientific evidence).

Of course, it is unlikely that the Supreme Court will return to the *Roberts* standard, but the Court could reevaluate its interpretation of "testimonial" and pull back from its broad application in *Melendez-Diaz* and *Bullcoming*. But for the sake of ensuring the administration of justice in our courts, and for the sake of the sanity of forensic analysts across the country, the Court should retract the claws of *Crawford*.

Notably, pulling back from *Crawford* through a narrower reading of the Confrontation Clause would not leave defendants without a remedy. The state will still have to make its case, which, under the Federal Rules of Evidence, necessitates showing evidentiary chain of custody and interpreting test results before a lab report will be admitted.[101] Also, if reliability of a report is at issue, a defendant may always subpoena the authoring analyst.[102] In this manner, the defense will have an opportunity to cross-examine and point out any problems. Finally, the defense can call its own experts to demonstrate the unreliability of a report at issue.

Conclusion

When *Crawford* was decided in 2004, then-Chief Justice Rehnquist foresaw that "thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what ... kind[] of 'testimony' ... is covered by the new rule."[103] He said that these answers are needed "now, not months or years from now."[104] It has been almost eight years since *Crawford* was decided, and prosecutors, as well as trial courts and defense attorneys, are still waiting. The few bits of information provided by the Supreme Court have been confusing and disjointed. Moreover, the decisions in *Melendez-Diaz* and *Bullcoming* threaten to overwhelm the justice system by constantly requiring the country's limited number of forensic analysts to appear at trial. While the recent decision in *Williams* has departed somewhat from those decisions, in the end it may only further increase the confusion surrounding *Crawford* and the Confrontation Clause. The day has come for the Supreme Court to re-evaluate its Confrontation Clause jurisprudence and consider the practical effects of its decisions. ⊙

Judge G. Ross Anderson Jr. is a U.S. District Court Judge for the District of South Carolina and has served on the bench since 1980. He would like to commend his two law clerks, Drew Bradshaw and Kristen Nowacki, for their help researching and drafting this article.

Endnotes

[1]541 U.S. 36 (2004).

[2]448 U.S. 56 (1980).

[3]*Crawford*, 541 U.S. at 60; *see* United States v. Arnold, 486 F.3d 177 (6th Cir. 2007) ("Quite understandably then, quite wrongly now, the district court rejected these [admissibility] challenges on the ground that the applicability of a traditional hearsay exception to each statement freed the evidence from challenge under the Confrontation Clause in accordance with *Ohio v. Roberts*. ...").

[4]*Id.*

[5]Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004 Cato Sup. Ct. Rev. 439, 439 (2004).

[6]*See* Miguel A. Mendez, Crawford v. Washington: *A Critique*, 57 Stan. L. Rev. 569, 587 (2004) (writing that "Crawford has its costs, [and c]hief among them is uncertainty about the definition of 'testimonial statements.'"); Adam Silberlight, *Confronting a Testimonial Definition in a Post-*Crawford *Era*, 29 Am. J. Trial Advoc. 65, 67 (2005) ("Despite much detail about the historical significance of the Confrontation Clause and the evils it was designed to eradicate, the most obvious question emanating from the decision was left unanswered: 'What is a testimonial statement?'").

[7]547 U.S. 813 (2006). The Supreme Court attempted to distinguish between testimonial and nontestimonial statements by finding that "statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicated that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 822.

[8]*See* Craig M. Bradley, *Confusion Over Confrontation*, 42 Trial 66, 67 (2006) ("The testimonial/nontestimonial confusion created by *Crawford* and reinforced in *Davis/Hammon* only takes courts farther away from this commonsense approach to confrontation."); Josephine Ross, *After* Crawford *Double-Speak: "Testimony" Does Not Mean Testimony and "Witness" Does Not Mean Witness*, 97 J. Crim. L. & Criminology 147, 171 (2006) ("There are many problems with the Court's reasoning in Davis/Hammon. The new decision fails to give a satisfactory explanation of why the two cases … merit different results. The opinion is confusing. ...").

[9]562 U.S. ___, 131 S. Ct. 1143 (2011) (holding that victim's statements to the police were nontestimonial and thus did not violate the Confrontation Clause, because the "primary purpose of the interrogation" was to assist in an ongoing emergency).

[10]557 U.S. 305 (2009).

[11]564 U.S. ___, 131 S. Ct. 2705 (2011).

[12]567 U.S. ___, 132 S. Ct. 2221 (2012).

[13]U.S. Const. amend. VI.

[14]*See, e.g.*, *Kirby v. United States*, 174 U.S. 47, 56 (1899) (discussing whether the Sixth Amendment guarantees that a defendant being tried for receipt of stolen property has the right to confront evidence regarding the stolen status of that property: "This precise question has never been before this court, and we are not aware of any adjudged case which is in all respects like the present one."); *United States v. Cree*, 778 F.2d 474 n.23 (8th Cir. 1987) ("The truly difficult questions that are presented in current confrontation clause cases are what additional exceptions, if any, may properly be recognized in light of the unilateral interpretations the Supreme Court has given the confrontation clause over the years."); *United States v. Mills*, 446 F. Supp. 2d 1115, 1121 (C.D. Cal. 2006) ("In the next section, the Court tackles the difficult issue of whether a defendant's Sixth Amendment right to confront the witnesses against him extends to the eligibility and selection phases of capital sentencing."); *United States v. Pack*, 65 M.G. 381, 384 (C.M.A. 2007) (citations omitted) ("[T]here are glimmers of an interpretation of the Confrontation Clause tied more closely to its text and historical context in the Supreme Court's recent opinions … the *Crawford* opinion itself contains statements that are difficult to reconcile with certain other statements in the *Craig* opinion.").

[15]380 U.S. 400 (1965) (holding that through the Fourteenth Amendment, the Confrontation Clause applies to the states); Donald A. Dripps, *Controlling the Damage Done by* Crawford: *Three Constructive Proposals*, 7 Ohio St. J. Crim. L. 521, 524 (2010) ("Prior to 1965, the Supreme Court had decided only a handful of Confrontation Clause cases. These cases left the relationship between the constitutional provision and the hearsay rule quite unclear.").

[16]448 U.S. at 56.

[17]*See* Chris Hutton, *Sir Walter Raleigh Revived: The Supreme Court Re-Vamps Two Decades of Confrontation Clause Precedent in* Crawford v. Washington, 50 S.D. L. Rev. 41, 41–43; Roger W. Kirst, *Does* Crawford *Provide a Stable Foundation for Confrontation Doctrine?*, 71 Brook. L. Rev., 35, 40–51 (2005).

[18]*Roberts*, 448 U.S. at 66.

[19]*Id.*

[20]*See* Brief for Respondent at 12, *Crawford v. Washington,* 541 U.S. 36 (2004) (No. 02-9410) ("During the ensuing 23 years since the *Roberts* decision, the trend of this [C]ourt has been to adhere to and refine this framework. Petitioner and Amici, however, would have this Court disregard both this past 23 years of successful application of the *Roberts* framework. ...").

[21]541 U.S. at 36.

[22]*Id.* at 53–54 (emphasis added).

[23]*Id.* at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"). The Court did set forth various formulations of a "core class of 'testimonial' statements," such as "ex parte in-court testimony"; "extrajudicial statements … contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 52. However, the Court never chose to follow any of these exact formulations, and even if it did, none of the categories sets forth a comprehensive definition of "testimonial." *Id.*

[24]Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 Crim.

Just. 4, 5 (2004).

[25]*See Crawford*, 541 U.S. at 75 (Rehnquist, C.J., concurring).

[26]*Id.*

[27]547 U.S. 813 (2006).

[28]*Id.*

[29]*Id.* at 822.

[30]*Id.* at 834 (Thomas, J., concurring in part & dissenting in part).

[31]562 U.S. ___, 131 S. Ct. 1143 (2011).

[32]*Id.*

[33]*Id*. at ___, 131 S. Ct. at 1155.

[34]*Id*. at ___, 131 S. Ct. at 1174 (Scalia, J., dissenting).

[35]564 U.S. at ____, 131 S. Ct. at 2705.

[36]557 U.S. at 305.

[37]In this case, the declarant was the analyst who conducted the test. *Id.* at 308.

[38]*Id.* at 311.

[39]*Id*. at 313.

[40]*Id.* at 320–21.

[41]564 U.S. at ____, 131 S. Ct. at 2705.

[42]*Id*. at ___, 131 S. Ct. at 2711.

[43]*Id*. at ___, 131 S. Ct. at 2713.

[44]*Id*. at ___, 131 S. Ct. at 2705.

[45]*Id.*

[46]*Id*. at ___, 132 S. Ct. at 2221.

[47]*Id*. at ___, 132 S. Ct. at 2227.

[48]*Id.*

[49]*See id*. at ___, 132 S. Ct. at 2244.

[50]*See id*. at ___, 132 S. Ct. at 2242 n.13 ("Experience might yet show that the holdings in those cases should be reconsidered for the reasons, among others, expressed in the dissents the decisions produced.").

[51]*See id*. at ___, 132 S. Ct. at 2228.

[52]*Id.*

[53]*Id*. at ___, 132 S. Ct. at 2272 (Kagan, J., dissenting).

[54]*Id*. at ___, 132 S. Ct. at 2256 (Thomas, J., concurring).

[55]*Id*. at ___, 132 S. Ct. at 2270 (Kagan, J., dissenting).

[56]*Id.*

[57]*Id*. at ___, 132 S. Ct. at 2243.

[58]*Id.*

[59]*Id*. at ___, 132 S. Ct. at 2273 (Kagan, J., dissenting).

[60]*Id*. at ___, 132 S. Ct. at 2274 (Kagan, J., dissenting).

[61]*Id*. at ___, 132 S. Ct. at 2244.

[62]*Id*. at ___, 132 S. Ct. at 2266 (Kagan, J., dissenting).

[63]*Id*. at ___, 132 S. Ct. at 2275 (Kagan, J., dissenting) (quoting *Melendez-Diaz*, 557 U.S. at 319).

[64]*Id*. at ___, 132 S. Ct. at 2259 (Thomas, J., concurring).

[65]*Id.*

[66]567 U.S. at ___, 132 S. Ct. at 2276 (Kagan, J., dissenting).

[67]*Id.*

[68]*Bullcoming v. New Mexico*, 564 U.S. ___, 131 S. Ct. 2705, 2717 (2011).

[69]*Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009).

[70]*Williams*, 567 U.S. at ___, 132 S. Ct. at 2244.

[71]*See id.* at ___, 132 S. Ct. 2212 ("Each [DNA] case will involve at least 12 technicians … more complex cases involve an even greater number of technicians.").

[72]*Id*. at ___, 132 S. Ct. at 2244 (Breyer, J., concurring).

[73]Nos. 05-10-0084-CR, 05-10-0085-CR, 05-10-00086-CR, 05-10-00087-CR, 2012 WL 3174130 (Tex. App. Ct. Aug. 7, 2012).

[74]*Id.* at **7–8.

[75]*Id.* at *8.

[76]Nos. 2010AP2363-CR, 2010AP2364-CR, 2012 WL 2742198 (Wis. Ct. App. July 10, 2012).

[77]*Id.* at *5 ("We are bound in this case by the judgment in Williams …. ").

[78]*Id.*

[79]No. 09-2091, 2012 WL 3860016 (10th Cir. Sept. 6, 2012).

[80]*Id.* at *8.

[81]Matthew R. Durose et al., Census of Publicly Funded Forensic Crime Laboratories, Bureau of Justice Statistics 1 (2009).

[82]*Id*.

[83]FBI, Crime in the United States (2010), *available at* www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s./2010/crime-in-the-u.s.-2010/tables/10tbl05.xls.

[84]*Bullcoming*, 564 U.S. at ___, 131 S. Ct. at 2718 (quoting *Melendez-Diaz*, 557 U.S. at 305).

[85]Tamara F. Lawson, *Before the Verdict and Beyond the Verdict: The CSI Infection Within Modern Criminal Jury Trials*, 41 Loy. U. Chi. L.J. 119, 127 (2009) ("At first glance, ten percent may appear to be a small percentage of the overall criminal justice caseload. However, cases that proceed to jury trial carry the highest stakes and most severe punishments; allegations often include violent rape or murder."); *see* James L. Spies, *Violent Crimes Murder Charges*, Law Office of James L. Spies, www.aggressivecriminallaw.com/admin.aggressivecriminallaw.lawoffice.com/PracticeAreas/Violent-Crimes-Murder-Charges.html (last visited Oct. 2, 2012) ("As a former prosecutor and current criminal defense attorney, I know that violent crime and murder cases will almost always go to trial—rarely are they resolved through plea negotiations.").

[86]Ben Conery, *Court's Aid to Defendants Snarls Crime Labs*, Wash. Times, Aug. 31, 2009, at A1.

[87]*Id.*

[88]Tim McGlone, *High Court Ruling Throws Sand Into Wheels of Justice*, Virginian Pilot, Jan. 9, 2010, at 1.

[89]*See id.* (statement of Pete Marone, director of the Virginia Department of Forensic Science).

[90]*Melendez-Diaz*, 557 U.S. at 328.

[91]*Id.* at 353 (Kennedy, J., dissenting).

[92]*Id.* at 355 (Kennedy, J., dissenting).

[93]*Id.*

[94]Conery, *supra* note 86.

[95]*Id.*

[96]McGlone, *supra* note 88.

[97]*Id.*

[98]*See* Brief for Respondent at 12, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410) ("During the ensuing 23 years since the *Roberts* decision, the trend of this [C]ourt has been to adhere to and refine this framework. Petitioner and Amici, however, would have this Court disregard both this past 23 years of successful application of the *Roberts* framework ….").

[99]*Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

[100]*Id.*

[101]*Melendez-Diaz*, 557 U.S. at 340.

[102]*Id.*

[103]*Crawford*, 541 U.S. at 75 (Rehnquist, C.J., concurring).

[104]*Id.*