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**WHO MUST TESTIFY?:
THE LIMITS OF THE CONFRONTATION
CLAUSE WHEN IT IS APPLIED TO
FORENSIC LABORATORY REPORTS**

*Andrew Arons**

I. INTRODUCTION

The Sixth Amendment to the United States Constitution guarantees, *inter alia*, that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”¹ When interpreting this provision, which has been deemed the “Confrontation Clause,”² the U.S. Supreme Court observed that “a primary interest secured by [the provision] is the right of cross-examination.”³ In *Ohio v. Roberts*,⁴ the Court summarized its long-standing approach to addressing whether and to what extent the Confrontation Clause guaranteed a criminal defendant the right to cross-examine individuals who made out-of-court statements.⁵ *Roberts* held that such statements were constitutionally admissible absent cross-examination so long as the declarant was “unavailable” and the statement “b[ore] adequate ‘indicia of reliability.’”⁶

The Court reversed course in *Crawford v. Washington*.⁷ There, Justice Antonin Scalia led a six-Justice majority in holding that,

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1. U.S. CONST. amend. VI.
2. *E.g.*, *Michigan v. Bryant*, 131 S. Ct. 1143, 1152 (2011).
3. *Douglas v. Alabama*, 380 U.S. 415, 418 (1965).
4. 448 U.S. 56 (1980).
5. As is the case in the Federal Rules of Evidence, this Comment refers to such individuals as “declarants.” *See* FED. R. EVID. 801.
6. *Roberts*, 448 U.S. at 66.
7. 541 U.S. 36 (2004).

absent the in-court testimony of the declarant,⁸ the Confrontation Clause prohibits the prosecution from introducing out-of-court “testimonial statements”⁹ unless the declarant is unavailable to testify in court and the criminal defendant had a prior opportunity to cross-examine that person.¹⁰ The Court reasoned that, in drafting the Sixth Amendment, the Framers intended to have the right to cross-examine the declarant be a necessary, and not merely a sufficient, means of testing the out-of-court statement’s reliability.¹¹

Five years later, in the 5–4 decision of *Melendez-Diaz v. Massachusetts*,¹² the Court expanded *Crawford*’s scope by holding that reports prepared by forensic laboratories are “testimonial statements.”¹³ Thus, absent a showing that those involved in the report’s production were unavailable and that the defendant “had a prior opportunity to cross-examine them,” the Confrontation Clause required “the analysts” to testify.¹⁴ The dissenters raised a slew of arguments, including that the Court’s holding failed to clearly state which analysts need to testify to satisfy the Confrontation Clause, that it imposed high costs on the government by requiring the prosecution to call forensic analysts every time it offers forensic laboratory reports, and that it created a rule that was unnecessary given the reliability of such reports.¹⁵

Three years later in *Williams v. Illinois*,¹⁶ a fractured Court¹⁷ heard another case involving the Confrontation Clause’s application

8. The Court concluded that a declarant of an out-of-court statement is a “witness” for the purposes of the Confrontation Clause. *See id.* at 51.

9. The Court later defined “testimonial statements” as out-of-court statements that have the “primary purpose” of “establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.” *Davis v. Washington*, 547 U.S. 813, 822 (2006). This Comment would not alter *Davis*’s definition of “testimonial” because restricting the protections of the Confrontation Clause to only statements (e.g., forensic reports) that are “certified” and “sworn to” would improperly value form over substance. *Williams v. Illinois*, 132 S. Ct. 2221, 2275–77 (2012) (Kagan, J., dissenting).

10. *Crawford*, 541 U.S. at 37, 53–54.

11. *Id.* at 55–56, 61.

12. 557 U.S. 305 (2009).

13. *See id.* at 306, 310–11.

14. *Id.* at 311.

15. *See id.* at 343 (Kennedy, J., dissenting). Chief Justice John Roberts and Justices Stephen Breyer and Samuel Alito joined Justice Anthony Kennedy’s dissenting opinion. *Id.* at 330. The Court later reiterated that forensic laboratory reports are testimonial. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2709–10 (2011).

16. 132 S. Ct. 2221 (2012).

17. *Id.* at 2227.

to forensic laboratory reports.¹⁸ The plurality, which consisted of the four justices who dissented in *Melendez-Diaz*,¹⁹ concluded that the prosecution's introduction of a laboratory report in *Williams* did not violate the Confrontation Clause.²⁰

Just as the dissenters in *Melendez-Diaz* were concerned about the Court's imprecise application of the Confrontation Clause to forensic laboratory reports,²¹ so too was Justice Breyer in *Williams*. In his concurring opinion, he emphasized that *Melendez-Diaz* provides "no logical stopping place" with regard to the number of witnesses who need to be called.²² Noting that as many as six analysts can work on a particular DNA profile,²³ Justice Breyer was apprehensive that the prosecution would need to call all of them to satisfy the Confrontation Clause.²⁴

Because of this perceived problem, he posed the following question: "Who should the prosecution have . . . to call to testify" when it offers a forensic laboratory report against a criminal defendant?²⁵ Answering this question is of immense importance because judges, prosecutors, and defense attorneys need to know how to constitutionally try their cases.²⁶ And despite the fact that *Williams* is now the third time in three years that the Supreme Court has applied the Confrontation Clause in the context of laboratory reports,²⁷ the answer is no clearer. Moreover, although the plurality did not expressly state a concern that *Melendez-Diaz*'s imprecise application would impose high costs on the government, it is fair to assume that such concern played a role, since the plurality strained its analysis to conclude that there was no Confrontation Clause violation.²⁸ Consequently, this Comment strives to answer Justice Breyer's question.

18. *Id.* (plurality opinion).

19. *See Melendez-Diaz*, 557 U.S. at 306.

20. *Williams*, 132 S. Ct. at 2228 (plurality opinion).

21. *Melendez-Diaz*, 557 U.S. at 343 (Kennedy, J., dissenting).

22. *Williams*, 132 S. Ct. at 2246 (Breyer, J., concurring).

23. *Id.* at 2252–55.

24. *See id.* at 2247.

25. *Id.*

26. *Id.* at 2248.

27. Two years before *Williams*, the Court held that the Confrontation Clause should apply to laboratory reports. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310–11 (2009). One year before *Williams*, the Court again reached the same conclusion. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011).

28. *See infra* Part III.A.

Part II of this Comment presents the facts and procedural history of *Williams v. Illinois*. Part III describes how a fractured Court attempted to resolve the Confrontation Clause issue in the case. Part IV proposes an answer to Justice Breyer's question, which animated the controversy in both *Williams* and its precursors: when the prosecution offers a forensic laboratory report against a criminal defendant, the Confrontation Clause requires the prosecution to (1) call all of the analysts who tested the evidence at issue *or* (2) call a supervisor²⁹ who authored the laboratory report and witnessed all stages of the testing of the evidence either firsthand or by watching a videotape (or like medium) that recorded the actual testing.³⁰ This approach is consistent with *Crawford's* principles³¹ and effectuates the objective of reliability without unduly burdening the government.³²

II. STATEMENT OF THE CASE

On February 10, 2000, a young woman (designated by the initials "L.J.") was raped in Chicago, Illinois.³³ After she reported the crime, the police took swabs of semen found in her vagina.³⁴ Defendant Sandy Williams was not a suspect at that time.³⁵ The police then sent the samples to Cellmark Diagnostics Laboratory ("Cellmark") for testing, and Cellmark sent back a report that described a male DNA profile.³⁶ Although two "reviewers" signed the report, they did not certify or formally swear to its contents.³⁷

29. As a shorthand, this Comment will refer to the supervisor defined here as a "supervisor with personal knowledge." Such supervisors presumably have the expertise to meaningfully evaluate the results of each stage of the testing.

30. The prosecution would have to comply with this rule unless all of the appropriate declarants are unavailable and the defendant had a prior opportunity to cross-examine them. The appropriate declarants would be all of the analysts *unless* a supervisor observed the testing and authored the report.

31. Because it is consistent with *Crawford*, this proposal permits the defendant an opportunity for meaningful cross-examination. *See Crawford v. Washington*, 541 U.S. 36, 61 (2004) (holding that the Confrontation Clause requires that the reliability of evidence "be assessed in a particular manner: by testing in the crucible of cross-examination").

32. As discussed in Part IV.A, in the event that any other person makes a "testimonial" statement that is relied upon in the laboratory report offered by the prosecution, the prosecution would need to call that individual to the stand in order to satisfy the Confrontation Clause.

33. *Williams v. Illinois*, 132 S. Ct. 2221, 2229 (2012) (plurality opinion).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 2260 (Thomas, J., concurring in the judgment).

On August 3, 2000, the police drew Williams's blood after he had been arrested on charges unrelated to the L.J. rape.³⁸ A state forensic laboratory tested the blood and prepared a DNA profile that was stored in an electronic database.³⁹ Later, Sandra Lambatos, a forensic technician at a state police laboratory, checked the electronic database to see if any DNA profiles matched the one provided in the Cellmark report.⁴⁰ The computer indicated that the DNA profile of Williams's blood matched the DNA profile prepared by Cellmark.⁴¹

After L.J. identified Williams as her attacker in a lineup conducted on April 17, 2001, he was formally indicted for her rape.⁴² During Williams's bench trial in 2006, the prosecution called a state laboratory forensic scientist who had verified the presence of semen on the swabs before they were purportedly sent off to Cellmark.⁴³ The prosecution also called the state analyst who had developed the DNA profile from Williams's blood.⁴⁴ The state did not call any employee from Cellmark.⁴⁵

After the two other analysts testified, the prosecution called Lambatos to the stand.⁴⁶ The prosecutor asked her: "Was there a computer match generated of the male DNA profile found in semen from the vaginal swabs of [L.J.] to a male DNA profile that had been identified as having originated from Sandy Williams?"⁴⁷ Over an objection from the defense, Lambatos answered in the affirmative.⁴⁸ The prosecution next asked Lambatos if she had compared the two DNA profiles and concluded that they matched.⁴⁹ She answered in the affirmative to both of those questions.⁵⁰

The defense moved to exclude Lambatos's testimony regarding the Cellmark DNA profile on Confrontation Clause grounds because

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

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 2230.

46. *Id.* at 2229.

47. *Id.* at 2267 (Kagan, J., dissenting) (alteration in original) (internal quotation marks omitted).

48. *Id.* at 2230 (plurality opinion).

49. *Id.*

50. *Id.*

no analyst from Cellmark had testified.⁵¹ The prosecution responded that Lambatos's testimony did not violate the Confrontation Clause because under the Illinois Rules of Evidence, experts are allowed to rely on facts of which they do not have personal knowledge to explain the basis of their opinions.⁵² The trial judge denied the motion and later found Williams guilty.⁵³

The Illinois Appellate Court affirmed in relevant part on the basis that, under state law, the report was offered merely to provide a foundation for Lambatos's expert opinion (i.e., that the two DNA profiles matched) and not for its truth (i.e., the Cellmark profile and its accurateness).⁵⁴ The Supreme Court of Illinois affirmed for the same reasons.⁵⁵ After granting certiorari on the issue of whether Lambatos's testimony concerning the Cellmark report violated the Confrontation Clause, a divided U.S. Supreme Court affirmed the judgment.⁵⁶

III. THE FRACTURED COURT'S ATTEMPT TO RESOLVE *WILLIAMS*

The Court issued four different opinions in *Williams*.⁵⁷ Justice Alito authored a plurality opinion, which Chief Justice Roberts and Justices Kennedy and Breyer joined. Justice Kagan wrote a dissent, joined by Justices Scalia, Ginsburg, and Sotomayor. Justice Breyer wrote a separate concurrence, and Justice Thomas concurred only in the judgment.⁵⁸

A. *The Plurality Opinion*

The plurality, led by Justice Samuel Alito, concluded that the Confrontation Clause did not bar the state analyst from testifying about Cellmark's DNA profile.⁵⁹ Justice Alito reasoned that this evidence was not being offered for its truth but, instead, merely to explain the basis of the expert's opinion that there had been a DNA

51. *Id.* at 2231.

52. *Id.*

53. *Id.*

54. *See id.*

55. *Id.* at 2231–32.

56. *See id.* at 2227–28, 2232.

57. *Id.* at 2221.

58. *Id.*

59. *Id.* at 2227–28.

match between the defendant's blood and (whatever) DNA sample was in Cellmark's possession.⁶⁰ According to the plurality, testifying that the blood DNA profile matched the profile from the semen was no different from expert testimony that a particular configuration of the DNA profile produced from the semen would have matched the DNA profile from Williams's blood.⁶¹ Because *Crawford* held that statements that are not offered for their truth are not "testimonial,"⁶² the plurality concluded that Lambatos's testimony about the Cellmark report did not violate the Confrontation Clause.⁶³

Further, as an independent basis of the plurality's conclusion that the report was not "testimonial," Justice Alito determined that Cellmark's report was not generated for the "primary purpose of accusing a targeted individual." He arrived at this conclusion because the police did not know that Williams was a suspect at the time the sample was being tested or that the DNA profile would inculcate Williams.⁶⁴ Rather, Justice Alito concluded that the report's "primary purpose was to catch a dangerous rapist who was still at large[,]"⁶⁵ thus diminishing the "prospect of fabrication . . ."⁶⁶ The plurality concluded that this "primary purpose of accusing a targeted individual" test was appropriate based on its interpretation of the facts of *Crawford* and its progeny.⁶⁷

B. Justice Breyer's Concurrence

Although Justice Stephen Breyer joined the plurality opinion, he would have rather set the case for reargument.⁶⁸ He wanted the parties to help the Court decide who should testify if the prosecution introduces a forensic laboratory report.⁶⁹ Concerned about the cost implications for the government, Justice Breyer pointed out that under the Court's precedent, *all* of the analysts who test a forensic

60. *Id.* at 2236, 2238.

61. *See id.* at 2238.

62. *Crawford v. Washington*, 541 U.S. 36, 59–60 n.9 (2004).

63. *Williams*, 132 S. Ct. at 2238–40 (plurality opinion).

64. *Id.* at 2243–44.

65. *Id.* at 2243.

66. *Id.* (quoting *Michigan v. Bryant*, 131 S. Ct. 1143, 1157 (2011)) (internal quotation marks omitted).

67. *Id.* at 2242–43. Justice Alito went on to say that laboratory analysts are generally neutral and probably do not fabricate forensic results. *Id.* at 2244. This conclusion appears to contradict *Melendez-Diaz*'s rationale. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009).

68. *Williams*, 132 S. Ct. at 2245 (Breyer, J., concurring).

69. *Id.* at 2247.

sample may have to testify because analysts “regularly rely on the technical statements and results of other [analysts] to form their own opinions.”⁷⁰ In the absence of reargument on this issue, Justice Breyer relied on the dissenting opinions in *Melendez-Diaz* and *Bullcoming v. New Mexico*⁷¹ to conclude that laboratory reports were not testimonial.⁷²

*C. Justice Thomas’s Concurrence
in the Judgment*

Although Justice Clarence Thomas concluded that Lambatos’s testimony did not violate the Confrontation Clause, he refused to adopt the plurality’s reasoning because he concluded that testimony offered to explain the basis of an expert’s testimony is always offered for its truth.⁷³ This is because if the underlying facts are not true, the expert’s opinion is irrelevant.⁷⁴ Moreover, Justice Thomas concluded that the plurality’s “primary purpose test” was flawed because it “lack[ed] any grounding in constitutional text, in history, or in logic.”⁷⁵

However, Justice Thomas still concluded that Cellmark’s report was not testimonial because its authors had neither certified nor sworn to it. Thus, it did not have sufficient “indicia of solemnity.”⁷⁶ He stated that the solemnity rule would not allow prosecutors to circumvent the Confrontation Clause because its scope “reaches the use of technically informal statements when used to evade the formalized process.”⁷⁷

70. *Id.* at 2246.

71. 131 S. Ct. 2705 (2011).

72. *Williams*, 132 S. Ct. at 2248 (Breyer, J., concurring).

73. *See id.* at 2255, 2257 (Thomas, J., concurring in the judgment).

74. *See id.* at 2257 & n.1.

75. *Id.* at 2261–62.

76. *Id.* at 2259–60 (quoting *Davis v. Washington*, 547 U.S. 813, 837 (2006) (Thomas, J., concurring in part and dissenting in part)).

77. *Id.* at 2260 n.5 (quoting *Davis*, 547 U.S. at 838 (Thomas, J., concurring in part and dissenting in part)) (internal quotation marks omitted). The legal effect of Justice Thomas’s conclusion regarding whether a statement is “testimonial” is unclear because the plurality’s and Justice Thomas’s opinions rest on “two essentially distinct rationales.” *See* Linda Novak, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 763–67 (1980).

D. The Dissenting Opinion

Justice Elena Kagan, writing for the dissent, would have held that the analyst's testimony concerning Cellmark's report violated the Confrontation Clause.⁷⁸ She agreed with Justice Thomas that the report was offered for its truth because "the factfinder must assess the truth of the out-of-court statement—i.e., Cellmark's DNA profile was produced from the semen found in L.J. and was accurate—in order "to determine the validity of the [testifying analyst's] conclusion" that the semen profile matched the defendant's blood profile.⁷⁹ Justice Kagan also concluded that the plurality's new "primary purpose" test was flawed for essentially the same reasons that Justice Thomas rejected it.⁸⁰

However, she refused to adopt Justice Thomas's definition of "testimonial" because she believed that it would "grant[] constitutional significance to minutia."⁸¹ Moreover, Justice Kagan did not believe that Justice Thomas's evasion test would prevent prosecutors from circumventing the Confrontation Clause (by using laboratory reports that are not certified or sworn to, for example) because he did not explain how the test was workable.⁸²

IV. ANALYSIS

A majority of the Court (both Justice Thomas and the dissent) subscribes to the belief that the Confrontation Clause's purpose is to test the reliability of testimonial statements through cross-examination.⁸³ Conversely, the plurality seems to believe that the Clause's purpose is to ensure the reliability of testimony so long as doing so does not impose unreasonably high costs on the government, and that cross-examination is not the sole method of constitutionally ensuring reliability.⁸⁴ Therefore, there is one key issue that separates the two camps: Who, if anyone, has to be available for cross-examination when the prosecution introduces a

78. *Williams*, 132 S. Ct. at 2265 (Kagan, J., dissenting).

79. *Id.* at 2268–69.

80. *See id.* at 2272–73.

81. *Id.* at 2275–76.

82. *See id.* at 2276 n.7.

83. *See id.* at 2259 (Thomas, J., concurring in the judgment) (quoting *Crawford v. Washington*, 541 U.S. 36, 61 (2004)); *id.* at 2266 (Kagan, J., dissenting) (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 317 (2009)).

84. *See, e.g., id.* at 2227, 2239 (plurality opinion).

forensic report? This Comment argues that the prosecution should be required to call either all of the analysts who analyzed the sample *or* a supervisor with personal knowledge. Such an approach effectuates both camps' purposes because it is consistent with *Crawford's* principles and effectuates the goal of reliability without unduly burdening the government.

*A. Calling All of the Analysts
Is Generally Mandated by Crawford's Principles*

Crawford and its progeny have announced certain doctrinal principles intended to safeguard a defendant's right to cross-examine witnesses. *Crawford* held that unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine him or her, "testimonial statements" are admissible only if the prosecution calls the declarant to the stand at trial.⁸⁵ Two years later, *Davis v. Washington*⁸⁶ further defined "testimonial statements" as those that have the "primary purpose" of "establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution."⁸⁷ This Comment's proposal is consistent with these principles.

Producing *all* of the analysts that test a relevant piece of forensic evidence is ordinarily mandated by *Crawford's* requirement that declarants be subject to cross-examination.⁸⁸ As Justice Breyer pointed out, when a particular forensic sample works its way through the testing process, the analysts "regularly rely on the technical statements and results of other [analysts] to form their own opinions," thus rendering the final laboratory report the culmination of "layer upon layer of technical statements (express or implied) made by one expert and relied upon by another."⁸⁹ Because, in the absence of a supervisor with personal knowledge, the final laboratory report is really a collection of testimonial statements—i.e., each analyst explicitly or implicitly communicates the results of a particular part of a procedure that are in turn used to establish the

85. *Crawford*, 541 U.S. at 53–54.

86. 547 U.S. 813 (2006).

87. *Id.* at 822.

88. *See Crawford*, 541 U.S. at 53–54.

89. *Williams*, 132 S. Ct. at 2246 (Breyer, J., concurring). For instance, in a typical DNA test, the technicians who subject the DNA to electrophoresis (so as to get a visual depiction of the genetic material) rely on the assumption that another analyst had properly amplified the DNA earlier. *See id.* at 2252–55.

guilt of the defendant—all of the analysts in the chain of testing would need to testify to satisfy *Crawford*. Having them all testify would allow the defendant to point out whether an analyst erroneously or disingenuously performed any of the testing stages.

Justice Kennedy believes that *Crawford*'s application to forensic testing is more expansive because it could require the prosecution to call individuals who calibrate the machines that analysts use.⁹⁰ His conclusion is incorrect because although analysts may rely on these statements in arriving at their final results, the calibrators probably do not primarily intend for their statements to be used in a trial against the accused. This is not only because a calibrator may be an independent contractor hired specifically to perform that task,⁹¹ but also because such calibrations are ordinarily not made for particular criminal cases.⁹² Rather, the laboratory analysts who handle the sample or a supervisor with personal knowledge tend to be the only individuals during the testing of the forensic evidence who make testimonial statements.⁹³ Because calibrators do not typically respond to requests from law enforcement officials regarding particular cases, they have less of an incentive to falsify results or to forsake acting with due care.⁹⁴

B. Effectuating the Goal of Reliability Without Unduly Burdening the Government

This section describes ways to accommodate the constitutional command that not only yield the benefit of reliability but also avoid imposing substantial costs on state and federal governments.

90. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 332–33 (2009) (Kennedy, J., dissenting).

91. See *id.* at 332.

92. See *id.* at 311 n.1 (majority opinion); see, e.g., 2 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, *SCIENTIFIC EVIDENCE* § 23.03[b] (2011) (explaining that some instruments used for a type of drug testing require “daily or weekly adjustments”).

93. See, e.g., *Williams*, 132 S. Ct. at 2252–55 (Breyer, J., concurring) (summarizing with a diagram a typical DNA test in which only analysts work on the DNA sample).

94. See *Melendez-Diaz*, 557 U.S. at 318. Personnel in the shipping department of the laboratory may make testimonial statements relied upon by analysts because such employees record the receipt of evidence relevant to *particular* criminal cases. See, e.g., *United States v. Jones*, 356 F.3d 529, 535–36 (4th Cir. 2004) (stating that a form pertaining to particular evidence “indicated that the bag had been received on [a particular date], with its seal unbroken”). Consequently, the Court may conclude that such individuals have the incentive to falsify those records or to manage them negligently.

1. Benefits of Cross-Examination of Forensic Analysts

The Justices who joined the plurality opinion have claimed that the Constitution does not mandate that forensic analysts be cross-examined as a condition to a laboratory report's admission, in part because there is no perceptible benefit to such a requirement.⁹⁵ However, cross-examination does have value in this context because it allows defendants to show the fact-finder that an analyst lied or made a mistake. For instance, the dissent in *Williams* cited a California case in which Cellmark had mistakenly switched the defendant's and victim's DNA samples in a rape case; the report thus erroneously concluded that DNA on the victim's sweater matched the defendant's DNA.⁹⁶ Although the error was revealed on redirect examination of an analyst,⁹⁷ the mistake was a perfect candidate for cross-examination because the defendant had discovered the grounds on which he could challenge the validity of the report⁹⁸ and could have addressed it by questioning the witness. And had the expert not been required to testify as to the error, it would have been more difficult for the defense to challenge the report's accuracy.⁹⁹ Therefore, cross-examination can only help ensure that forensic evidence is reliable.

2. The Costs and the Measures that Minimize Them

a. The costs

The members of the *Williams* plurality claimed that it is too costly to require the government to call forensic analysts to introduce the forensic reports. That is because doing so would require analysts

95. See *Melendez-Diaz*, 557 U.S. at 338–40, 343 (Kennedy, J., dissenting).

96. *Williams*, 132 S. Ct. at 2264–65 (Kagan, J., dissenting) (citing Reporter's Partial Transcript at 3–4, *People v. Kocak*, No. SCD110465 (Cal. Super. Ct. Nov. 17, 1995), available at http://www.nlada.org/forensics/for_lib/Documents/1037341561.0/JohnIvanKocak.pdf).

97. Reporter's Partial Transcript, *supra* note 96, at 2.

98. William C. Thompson, *DNA Evidence in the O.J. Simpson Trial*, 67 U. COLO. L. REV. 827, 845 (1996).

99. The plurality contended that the defendant's right to subpoena a state forensic analyst is an adequate safeguard for reliability. See *Williams*, 132 S. Ct. at 2228 (plurality opinion); *id.* at 2251–52 (Breyer, J., concurring). However, holding that the analyst's testimony is not a condition of the report's admissibility would make it more difficult for the defendant to challenge the validity of the report if the declarant refuses to testify or is otherwise unavailable. See *Melendez-Diaz*, 557 U.S. at 324.

to leave their posts and courts to accommodate scheduling conflicts.¹⁰⁰ The plurality asserted that these costs would cause prosecutors to rely on less reliable evidence, like eyewitness testimony.¹⁰¹ However, as Justice Scalia noted, the cost assumptions relied upon by the members of the plurality are founded on the unsupported assumptions that, in all unsettled criminal cases, no defendant will ever stipulate to a report's findings and every defendant will object to the evidence and therefore demand that the appropriate analyst appear to testify¹⁰² Furthermore, there are measures available to jurisdictions that can help them ameliorate costs incurred.

*b. Measure #1:
Consolidation*

One measure is to reduce the number of analysts who work on forensic samples. Doing so would lessen the burden on the government because the Confrontation Clause would require fewer analysts to be taken away from their posts, and the courts would need to accommodate fewer scheduling conflicts. To accomplish this, jurisdictions can have analysts consolidate the different roles in the testing process.¹⁰³ For instance, the appendix to Justice Breyer's concurring opinion in *Williams* demonstrates that in a typical DNA testing procedure, one analyst looks for biological materials in the sample and while another extracts DNA from the swabbing.¹⁰⁴ The laboratories might be able to consolidate these two positions because examination and extraction likely do not require substantially disparate expertise and training.¹⁰⁵

100. See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2728 (2011) (Kennedy, J., dissenting); *Melendez-Diaz*, 557 U.S. at 340–44 (Kennedy, J., dissenting). The dissenters in those cases were the members of the plurality in *Williams*. See *Williams*, 132 S. Ct. at 2227.

101. See *Williams*, 132 S. Ct. at 2228 (plurality opinion).

102. *Melendez-Diaz*, 557 U.S. at 325 n.10. Defendants may wish to stipulate to the results of the test so as to not emphasize its contents through live testimony. *Id.* at 328.

103. One may argue that in some jurisdictions, consolidating positions would be very costly because the possible reduction in efficiency may contribute to the backlogs suffered by forensic laboratories. See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF PUBLICLY FUNDED FORENSIC LABORATORIES 4 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpffcl09.pdf> (“The 411 publicly funded crime labs . . . had a backlog of about 1.2 million requests [at the end of 2009].”). In those circumstances, it may still be cost-effective to outsource any excess work to private laboratories, as was done in *Williams*.

104. See *Williams*, 132 S. Ct. at 2252–55 (Breyer, J., concurring).

105. Forensic laboratories often use a “rotation system” in which “each technician performs an assigned task for a week (e.g., DNA extraction) and then rotates to a different task the next

*c. Measure #2:
“Notice-and-Demand” Statutes*

Statutory measures constitute another cost-cutting option. The *Melendez-Diaz* majority spoke favorably of “notice-and-demand” statutes. These laws require the defendant to raise Confrontation Clause challenges in writing within a specified period of time before trial, so long as the prosecution has provided written notice that it will introduce a forensic laboratory report. If the defendant fails to timely raise an objection, this constitutes a waiver.¹⁰⁶ Such statutes should help limit the costs of having analysts and supervisors testify because defendants may choose not to object if there is no apparent defect in the forensic report or if the defendant would like to stipulate to those facts (so as to not emphasize the laboratory’s adverse findings through analyst testimony).¹⁰⁷

However, the members of the plurality have suggested that notice-and-demand statutes are ineffective because defendants have an incentive to require the prosecution to call the analysts so as to obtain the chance of windfall if the witnesses cannot attend trial (e.g., because attendance is too costly).¹⁰⁸ Nevertheless, this phenomenon is unlikely due to the fact that the risk of nonattendance is low. This is because the plurality’s cost assumptions are unfounded,¹⁰⁹ “[c]ourts are highly deferential to the analysts’ schedules and liberally grant continuances to accommodate their conflicts,”¹¹⁰ and

week (e.g., DNA amplification).” Brief of Amici Curiae for New York County District Attorney’s Office and the New York City Office of the Chief Medical Examiner in Support of Respondents at 4, *Williams v. Illinois*, 132 S. Ct. 2221 (2012) (No. 10-8505), 2011 WL 5125054, at *6–7 (italics omitted). The fact that DNA technicians are frequently assigned different tasks in the testing process suggests that each of those technicians probably has similar expertise and training.

106. See *Melendez-Diaz*, 557 U.S. at 326–27.

107. See *id.* at 326–28. Empirical support for this proposition may be demonstrated by the experience of Michigan, which has a “notice-and-demand” statute. MICH. COMP. LAWS § 600.2167 (2012). The statute may be partially responsible for the fact that the increase in the percentage of tests for which analysts provided testimony in the state of Michigan between 2006 and 2010 (which includes a stretch of time after *Melendez-Diaz*) was a mere 0.3 percent. See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2719 n.10 (opinion of Ginsburg, J.). The only other justice to join this portion of the opinion was Justice Scalia. *Bullcoming*, 131 S. Ct. at 2709.

108. See *Melendez-Diaz*, 557 U.S. at 354 (Kennedy, J., dissenting).

109. See *supra* Part IV.B.2.a.

110. Brief of Amici Curiae Public Defender Service for the District of Columbia, et al., in Support of Petitioner at 4, *Bullcoming*, 131 S. Ct. 2705 (No. 09-10876), 2010 WL 5043098, at *4.

other measures discussed in this Comment reduce the burden on the government.¹¹¹

*d. Measure #3:
Supervisor with Personal Knowledge*

Allowing the prosecution to call a supervisor with personal knowledge instead of all of the analysts who worked on the evidence is another way to satisfy *Crawford*. The approach does not violate *Crawford*'s requirement that the declarant testify because, if the supervisor actually observed the testing and wrote the report, his or her report would not rely on the statements made by other analysts.¹¹² Rather, it would simply be the supervisor's declaration of a fact. Cross-examination would be meaningful because the supervisor's report would be the product of his or her own analysis, and would reflect his or her own "perception, memory, narration, and sincerity."¹¹³ Thus, the defendant could adequately test each of these qualities of the report on cross-examination.¹¹⁴ Furthermore, if a testing analyst committed an error or attempted to fabricate the results of the test, cross-examining the supervisor could elicit that fact because he or she would have observed the whole analysis.

This measure is also an excellent cost-saving option. In such a scenario, the government needs to call only a single analyst, rather than endure the costs entailed by calling multiple analysts. Therefore,

111. Arguably, notice-and-demand statutes also impose costs on criminal defendants by causing them to miss out on the opportunity to raise Confrontation Clause objections when defense counsel learns something new and important during trial, is overworked, or otherwise overlooks an evidentiary issue. Pamela R. Meltzer, *Cheating the Constitution*, 59 VAND. L. REV. 475, 517 (2006). Even if that is true, the statute may be worth this cost on the defense because the proposal's attempt to safeguard the defense's right to meaningfully cross-examine witnesses at each stage of the testing might be rejected if notice-and-demand statutes were not permitted by the proposed rule.

112. The supervisor with personal knowledge who watches a tape would not be relying on a "testimonial statement" made by the camera because an unedited video has no human declarant. Cf. DAVID P. LEONARD & VICTOR J. GOLD, EVIDENCE: A STRUCTURED APPROACH 143 (2d ed. 2008) ("If the goal of the hearsay rule is to require percipient witnesses to be called to testify and be subjected to cross-examination rather than allow their observations to be proved through hearsay witnesses, nothing would be gained by requiring the in-court testimony of an animal.").

113. *Williams v. Illinois*, 132 S. Ct. 2221, 2249 (2012) (Breyer, J., concurring).

114. This conclusion is not contradicted by *Bullcoming v. New Mexico*, because, unlike the testifying surrogate analyst in that case, a supervisor with personal knowledge has "observe[d] the test reported in the certification." 131 S. Ct. at 2710. In fact, Justice Sotomayor expressly left the door open for this option when she stated that *Bullcoming* might have been decided differently had "a supervisor who observed an analyst conducting a test testified about the results or a report about such results." *Id.* at 2722 (Sotomayor, J., concurring).

this course of action would impose no more of a burden on the government than did *Melendez-Diaz*.

However, it may not always be feasible for supervisors to be physically present when the particular test is conducted. In those circumstances, having the supervisor watch a videotape (or like medium) of the entire test would be a practicable substitute.¹¹⁵

Moreover, even if the video quality in a particular case is somewhat questionable, both the prosecution's and the defense's interests are accommodated by this measure. The prosecution gets to admit the results of the report, while the defense, through cross-examination, can expose the witness' perception problems by pointing out the inadequacies of the tape that the supervisor relied upon. Further, if the testing procedures have been captured on videotape, the defense can more easily monitor the testing so as to determine whether an analyst committed an error or falsified results. The defense can then confront the supervisor with the issues discovered on the videotape and diminish the reliability of the report.

Finally, so long as each test is recorded on tape, the prosecution can choose to require a supervisor to watch the tape only when it knows that the case is going to trial. Thus, the supervisor need not waste his or her time on examining tests for which the prosecution does not need to produce a laboratory report at trial.

V. CONCLUSION

Justice Kagan correctly observed that “[the five Justices who controlled the outcome of *Williams*] have left significant confusion in their wake.”¹¹⁶ Part of the cause of this fractured decision is “four Justices’ desire to limit *Melendez-Diaz* . . . in whatever way possible.”¹¹⁷ However, much of the confusion and dissention could be eliminated by this Comment’s proposal. By clarifying the government’s constitutional obligations in the context of forensic

115. Jurisdictions may find the videotape approach to be much cheaper than having all of the analysts who worked on the sample testify. Nevertheless, this approach may not be appropriate for forensic testing that relies on senses other than sight or hearing. *See, e.g.*, Catherine de Lange, *Casey Anthony Trial: Is the ‘Smell of Death’ Evidence?*, NEWSCIENTIST (May 17, 2011), <http://www.newscientist.com/article/dn20487-casey-anthony-trial-is-the-smell-of-death-evidence.html> (discussing a forensic test that detects a decomposed body via a “smell test”). In those odd cases, the government can still call all of the analysts or a supervisor with personal knowledge who was physically present.

116. *Williams v. Illinois*, 132 S. Ct. 2221, 2277 (2012) (Kagan, J., dissenting).

117. *Id.*

laboratory reports, the Court would accommodate the cost-related concerns of the plurality while holding true to the doctrinal underpinnings of *Crawford*. Doing so would provide much needed “guidance to lower court judges and predictability to litigating parties.”¹¹⁸

118. *Id.*

