"The Most Important Rule In Constitutional Law Is How To Count To Five": The Confrontation Clause In Light Of The 4-1-4 Holding Of Williams V. Illinois

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“THE MOST IMPORTANT RULE IN CONSTITUTIONAL LAW IS HOW TO COUNT TO FIVE.”\(^1\):

THE CONFRONTATION CLAUSE IN LIGHT OF THE 4-1-4 HOLDING OF WILLIAMS V. ILLINOIS

Nicole T. Castiglione\(^*\)

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\(^1\) Justice William Brennan was famous for instructing his law clerks that the most important talent a member of the Supreme Court could possess was the ability to “count to five.”

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I. INTRODUCTION

In *Williams v. Illinois*, the Supreme Court held that a government expert’s testimony about a DNA report, absent cross-examination of the technician who prepared the report and a showing that that particular technician was unavailable to testify, did not violate the Confrontation Clause because the report was not introduced for the truth of the matter asserted and because the report itself was non-testimonial. However, with five Justices expressly rejecting the entirety of the plurality’s analysis, no majority agreed on the reasoning underlying the decision. The absence of a majority or a clear determination as to which, if any, of the plurality’s grounds is the “narrowest” has left lower courts with even less guidance as to what constitutes “testimonial” evidence going forward. Both the plurality’s and Justice Thomas’s test run afoul of earlier Confrontation Clause precedents and set the stage for *Crawford v. Washington* to be overruled, in favor of the amorphous concept of reliability that the Court cast aside almost a decade ago.

In Part II, this Note provides an overview of the major Confrontation Clause cases before *Williams*, including *Roberts v. Ohio, Crawford v. Washington, Melendez-Diaz v. Massachusetts*, and *Bullock v. New Mexico*. Part III details the various opinions set forth by the Court in

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II. THE CONFRONTATION CLAUSE AT ITS ROOTS: CRAWFORD V. WASHINGTON AND ITS PROGENY

The Sixth Amendment to the United States Constitution provides that in criminal prosecutions, the accused shall enjoy the right to be confronted with witnesses against him. The Supreme Court has interpreted this clause as providing various guarantees to the criminal defendant, most importantly, the right to vigorous cross-examination. Although the Supreme Court's recent jurisprudence has further complicated the Confrontation Clause landscape, such confusion is nothing new. Ever since the Court's 1899 decision, Kirby v. United States, courts have struggled to define the scope of this constitutional right. Despite such ongoing confusion and uncertainty, the Supreme Court did not make a major ruling implicating the Confrontation Clause until Pointer v. Texas in 1965.

a. Ohio v. Roberts

It took another fifteen years for the Supreme Court to articulate any sort of substantive framework as to how to evaluate the scope of the Sixth Amendment. In Ohio v. Roberts, the Court held that the right to confrontation does not bar admission of an unavailable witness'.

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3 U.S. Const. amend. VI.
6 174 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 away of any adjudged case which is in all respects like the present one.").
7 380 U.S. 400 (1965) (holding that through the Fourteenth Amendment, the Confrontation Clause applies to the states).
statement against a criminal defendant if the statement bears "adequate indicia of reliability."  

This standard could be satisfied in either of two ways: first, any hearsay statement meeting a "firmly rooted" hearsay exception qualified as bearing an adequate indicia of reliability; second, a statement that did not satisfy a firmly rooted exception could nevertheless be admitted if it bore other "particularized guarantees of trustworthiness."  

Although a valiant first attempt, the Roberts framework was quickly criticized as unclear and unstable, insufficiently protective of defendants' rights, and contrary to the text and the history of the Confrontation Clause.

b. Crawford v. Washington

Twenty-five “murky, subjective, inconsistent, and unworkable” years later, the Supreme Court overruled Ohio v. Roberts and effected a drastic change in Confrontation Clause jurisprudence in Crawford v. Washington. Justice Scalia, writing for the majority in a 7-2 decision, took issue with the “malleable standard” of Roberts and found it inconsistent with the original meaning of the Confrontation Clause. He stated, “[the Confrontation Clause] commands not that the evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” In rejecting Roberts, the Court adopted a fundamentally new interpretation of the confrontation right and held “[t]estimonial statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”

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8 448 U.S. 56, 66 (1980).
9 Id. at 100.
12 Crawford, 448 U.S. at 60.
13 Id. at 61.
14 Id. at 59.
Although the Court found the Confrontation Clause to bar only certain types of "testimonial" statements, it "[left] for another day any effort to spell out a comprehensive definition of 'testimonial.'" The majority acknowledged that the absence of a concrete definition of "testimonial" would create turmoil in the lower courts, but reasoned that any "interim uncertainty" would not yield results any worse than those reached under Roberts. The Court did state that the Confrontation Clause applies to "witnesses," or those who "bear testimony" against the accused. It defined testimony as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." The Court also articulated a "core class" of testimonial statements, such as "ex parte in court testimony or its functional equivalent ... material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." The Court also included in this core class "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions" as well as "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."

c. Melendez-Diaz v. Massachusetts

The Court's first opportunity to refine the scope of Crawford and provide a more concrete definition of "testimonial" came in 2009 in Melendez-Diaz v. Massachusetts. In Melendez-Diaz, the defendant was arrested and charged with distributing and trafficking in

15 Id. at 68.
16 Id. at 68 n. 10.
17 Id. at 51.
19 Id.
20 Id. at 51-52.
cocaine. At trial, the prosecution introduced bags of a white powdery substance that had been found in the defendant’s possession. Three “certificates of analysis” were also admitted from the state forensic laboratory that reported the weight of the seized bags and stated that the bags had been “[e]xamined with the following results: The substance was found to contain: Cocaine.”

As required by Massachusetts law, the certificates were sworn before a notary public and submitted as prima facie evidence of what they asserted. The defendant’s counsel objected, claiming Crawford required the analysts to testify in person. The trial court disagreed, and the certificates were admitted as prima facie evidence of the composition, quality, and the net weight of the narcotic analyzed, and petitioner was convicted. On appeal, the Supreme Court was left to decide whether the “certificates of analysis” were testimonial, rendering the affiants “witnesses” subject to the defendant’s right of confrontation under the Sixth Amendment.

Applying the Crawford test, the Court held that the admission of the certificates violated the Confrontation Clause because they were created for the “sole purpose of providing evidence against the defendant” and were, “quite plainly, affidavits.” The court found the certificates tantamount to live, in-court testimony because they did precisely what the analyst would do on direct examination: testify that the substance found in the possession of Melendez-Diaz and his co-defendants was cocaine. Accordingly, the Court held that the certificates were testimonial statements and could not be introduced into evidence unless their authors were subject to the

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22 Id. at 308.
23 Id.
24 Id.
25 Id.
26 Id. at 309.
28 Id. at 307.
29 Id. at 311; id. at 330 (Thomas, J., concurring).
30 Id. at 310-11.
"crucible of cross-examination." Because there was no evidence that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, the Court held that Melendez-Diaz was entitled to confront them at trial. In requiring confrontation, Melendez-Diaz refused to create a "forensic evidence" exception to Crawford, holding that a forensic laboratory report, created specifically to serve as evidence in a criminal proceeding, ranked as testimonial for Confrontation Clause purposes.

**d. Bullcoming v. New Mexico**

Just two years after Melendez-Diaz, the Court in Bullcoming v. New Mexico was once again asked to refine the scope of the Confrontation Clause, this time with respect to surrogate testimony. The main issue in Bullcoming was whether in-court testimony of an analyst who did not sign, perform, nor observe the test was sufficient to satisfy the Confrontation Clause. At defendant’s trial for driving while intoxicated, the court admitted into evidence a forensic report certifying that the defendant’s blood-alcohol concentration was well above the threshold for an aggravated DWI. The report also certified that the testing analyst had received the sealed blood sample intact and followed the prescribed laboratory procedures when testing the sample. Instead of calling Curtis Caylor, the analyst who completed, signed, and certified the report to testify, the prosecution called another analyst, Gerasimos Razatos, in his place. Although Razatos was familiar with the lab’s general testing devices and procedures, he had neither participated in nor observed the test on defendant’s blood sample, making him Caylor’s

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31 Id. at 317 quoting Crawford, 541 U.S. at 61.
32 Id. at 311.
34 131 S. Ct. 2705 (2011).
35 Id. at 2710.
36 Id. at 2711-12.
37 Id. at 2710.
38 Id. at 2712.
surrogate. The defendant's counsel objected on Confrontation Clause grounds, but the trial court overruled the objection and permitted Razatos to testify. Although acknowledging that the report at issue qualified as testimonial under Melendez-Diaz, the trial court nonetheless held that its admission did not violate the Confrontation Clause because the Caylor was a mere scrivener and Razatos qualified as an expert witness with respect to the lab procedures and testing machine.

On appeal, the Supreme Court reversed the lower court's conviction and held that the Confrontation Clause did not permit the introduction of a forensic laboratory report containing a testimonial certification made in order to prove a fact at a criminal trial through the in-court testimony of an analyst who did not sign the certification nor personally perform or observe the test reported. As with the narcotics report at issue in Melendez-Diaz, the Court found that the blood-alcohol report fell squarely within the core class of testimonial statements enunciated in Crawford. Although not notarized, the Court found the report sufficiently formal to qualify as testimonial. With respect to the surrogate testimony, the Court declined to accept Razatos's testimony despite the fact that he was a knowledgeable representative of the laboratory who could explain the lab's processes and details of the report. The Court emphasized that surrogate testimony is insufficient under the Confrontation Clause because it cannot convey what the certifying analyst knew or observed about the test and testing procedures, or expose any lapses or lies in the report. The Court stated simply, "[t]he accused's right is to be confronted
with the analyst who made the certification." Faithfully applying the Crawford test, the Court held that the report could not be introduced at trial because the State never asserted that Caylor was unavailable and defendant was not given the opportunity to cross-examine him.

While concurring in the plurality’s result, Justice Sotomayor wrote separately to emphasize the fact that the forensic report had been admitted into evidence for the purpose of proving the truth of the matter asserted. Although she did not opine on the matter, Justice Sotomayor stated that the Court would face a different question if it was asked to determine the constitutionality of allowing an expert witness to discuss another analyst’s testimonial statements if the testimonial statements themselves were not admitted as evidence. This precise hypothetical was presented to the court barely a year later in Williams v. Illinois.

III. THE CONFRONTATION CLAUSE IN FLUX: WILLIAMS V. ILLINOIS

On June 18, 2012, almost a decade after rejecting the indicia of reliability standard of Ohio v. Roberts as too malleable to protect against “paradigmatic confrontation violations,” the Supreme Court took a major step towards its revival in Williams v. Illinois. In Williams, the defendant was accused of rape, and at the bench trial, the prosecution introduced the testimony of Sandra Lambatos, a forensic specialist at the Illinois State Police Lab (“ISP”). Lambatos testified that she matched a DNA profile produced by an outside laboratory, Cellmark, to a profile that the state police provided of Williams’ blood. She also testified that Cellmark was an accredited crime lab and that records reflected that the vaginal swabs taken from the victim,
L.J., were sent to Cellmark and returned. Importantly, Lambatos did not make any statements regarding how Cellmark handled or tested the sample nor did she vouch for the accuracy of Cellmark's profile. The defense moved to exclude Lambatos's testimony on Confrontation Clause grounds insofar as it implicated events at Cellmark, but the trial court admitted the evidence and found Williams guilty. Both the Illinois Court of Appeals and the State Supreme Court affirmed, holding that Lambatos's testimony did not violate petitioner's confrontation rights because the Cellmark report was not offered into evidence to prove the truth of the matter asserted. On appeal, the Supreme Court held on two separate, independent bases that there was no Confrontation Clause violation.

a. The Cellmark Report Was Not Offered for the Truth of the Matter Asserted

The first part of the Court's opinion focused on one of the hypotheticals set by Justice Sotomayor in her concurrence in Bullcoming, regarding the constitutionality of allowing an expert witness to discuss another expert's testimonial statements when the statements themselves are not admitted as evidence. Historically, the Court has held that the Confrontation Clause does not bar the use of testimonial statements admitted for purposes other than establishing the truth of the matter asserted. For example, out-of-court statements referenced by an expert solely for the purpose of explaining the assumptions on which his opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause. Here, the Court found that Lambatos testified to the truth of the following matters:

54 Id.
55 Id.
56 Id.
57 Id.
59 Bullcoming, 131 S. Ct. at 2722 (Sotomayor, J., concurring).
60 Williams, 132 S. Ct. at 2235 (citing Tennessee v. Street, 471 U.S. 409 (1985)).
61 Id. at 2228.
Cellmark was an accredited lab, the ISP occasionally sent forensic samples to Cellmark for DNA testing, according to shipment manifests admitted into evidence, the ISP lab sent vaginal swabs taken from the victim to Cellmark and later received those swabs back from Cellmark, and finally, the Cellmark DNA profile matched a profile produced by the ISP lab from a sample of petitioner's blood. 62

Significantly, Lambatos did not testify to the truth of any other matter concerning Cellmark and made no other reference to the Cellmark report, which was not admitted into evidence. 63 She also did not vouch for the quality of the work performed by the diagnostic lab or testify regarding anything that was done at the Cellmark lab. 64 While Justice Kagan took issue with Lambatos’s reference to petitioner’s DNA profile, Justice Alito equated it as a mere premise of the prosecutor’s question which Lambatos assumed to be true when she gave her answer indicating that there was a match between the two DNA profiles. 65 For these reasons, the plurality concluded that the Cellmark report was not offered for its truth and therefore there was no Confrontation Clause violation. 66

b. The Cellmark Report Was Non-Testimonial

More significant for Sixth Amendment jurisprudence is the plurality’s second independent basis for concluding that no Confrontation Clause violation occurred; that the Cellmark report, even if introduced for its truth, was non-testimonial. 67 Abandoning nearly a decade of precedent, Justice Alito and the plurality reasoned that because the introduction of a DNA report prepared by a modern, accredited laboratory bore little, if any, resemblance to the historical practices that the Confrontation Clause aimed to eliminate, there was no Sixth

62 Id. at 2235.
63 Id.
64 Id.
65 Id.
67 Id. at 2242.
Amendment violation. The Court then stated that the only modern day practices prohibited by the Confrontation Clause are those that (1) involve out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct and (2) involve formalized statements such as affidavits, depositions, prior testimony, or confessions.

Although a similar primary purpose test had been utilized to determine whether a statement was made for the primary purpose of providing evidence, the Court, prior to Williams, had never suggested that the statement must also be meant to accuse a previously identified individual to qualify as testimonial. In fact, “[w]here this test comes from is anyone’s guess,” as it derives neither from the text nor the history of the Confrontation Clause and has no basis in the Court’s precedents. Not a single post-Crawford case ever utilized or even hinted at this type of “accusation test.” Even Justice Thomas rejected the plurality’s primary-purpose test as lacking grounding in any constitutional text, history, or logic. He described this type of test as “disconnected from history,” “divorced from solemnity,” and “unworkable in practice.” Nevertheless, the plurality concluded that the Cellmark report “plainly” was not prepared for the primary purpose of accusing a targeted individual or creating evidence for trial, but to respond on an ongoing emergency.

In finding that the Cellmark report’s primary purpose was to catch a dangerous rapist who was still at large, the Court misapplied and impermissibly expanded the ongoing emergency

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68 Id. at 2242.  
69 Id. (emphasis added).  
70 Id. at 2274 (Kagan J., dissenting) (citing Melendez-Diaz, 557 U.S. at 313 (rejecting a related argument that laboratory analysts are not subject to confrontation because they are not accusatory witnesses)).  
71 Id. at 2273.  
73 Id at 2262 (opinion concurring in the judgment).  
74 Id. at 2261-62.  
75 Id. at 2243-44.
test set forth in *Hammon v. Indiana.* The test, as originally articulated in *Hammon* holds statements to be non-testimonial when they are given within minutes of an event by frantic victims of criminal attacks because the statements are made to enable police to respond to an ongoing emergency and not to create evidence for trial. In contrast, in this case, Lambatos herself testified that “all reports ... were prepared for this criminal investigation ... [a]nd with the purpose of eventual litigation;” in other words, for the purpose of producing evidence, not enabling emergency responders. Significantly, it took over a year for the semen on L.J.’s vaginal swabs to be tested and a report sent to the police. Given this timeline, it strains credulity to assert that the police and Cellmark were primarily concerned with the exigencies of an ongoing emergency rather than producing evidence in the ordinary course. To apply the ongoing emergency doctrine in this case, where the swabs were not sent by police to Cellmark until nine months after the rape and were not received for another four months would be to stretch the ongoing emergency test beyond all recognition. Despite the plurality’s contention, the Cellmark report is, in every conceivable respect, a statement meant to serve as evidence in a potential criminal trial, and thus is testimonial under the Confrontation Clause.

The plurality also attempted to distinguish the Cellmark report from the reports at issue in *Melendez-Diaz* and *Bullcoming,* stating that in the latter cases, the reports were the equivalent of affidavits made for the purpose of proving the guilt of a particular criminal defendant at trial and prepared by technicians who knew their contents (an elevated blood-alcohol level and the presence of an illegal drug) would be incriminating. Here, the Court claimed that the Cellmark

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78 *Id.*
79 *Id.*
80 *Id.* at 2262-63 (Thomas, J., concurring).
81 *Id.* at 2274 (Kagan, J., dissenting).
82 *Id.* at 2243.
report could not possibly have been generated to prove the guilt of a particular individual since at the time ISP sent the sample to Cellmark, petitioner was neither in custody nor under suspicion.\(^{83}\) Instead, the primary purpose of the Cellmark report was to generate an objective profile of a then-unknown suspect’s DNA.\(^{84}\) Viewed side-by-side with the *Bullcoming* report, however, the Cellmark analysis has a comparable title; similarly describes the relevant samples; test methodology and results; and includes the signatures of laboratory officials.\(^{85}\) It also established “some fact” in a criminal proceeding, the identity of L.J.’s attacker and detailed the results of forensic testing on evidence gathered by police.\(^{86}\) In all material respects, the Cellmark report is identical to the ones at issue in *Melendez-Diaz* and *Bullcoming*.\(^{87}\)

The plurality also emphasized that because no one at Cellmark could have possibly known that the profile it produced would inculpate Williams, there was no prospect of fabrication or an incentive to produce anything other than a scientifically sound and reliable profile.\(^{88}\) However, as stated by Justice Kagan in her dissent, the problem with laboratory analyses has more to do with careless and incompetent work and less to do with personal vendettas.\(^{89}\) For example, a study conducted in 2009, merely three years before the Court’s decision in *Williams*, concluded that invalid forensic testimony contributed to convictions in 60% of the cases where exonerating evidence resulted in the overturning of criminal convictions.\(^{90}\) If one of the goals of cross-examination is to expose an analyst’s lack of proper

\(^{84}\) Id. at 2251.
\(^{85}\) Id. at 2267 (Kagan, J., dissenting).
\(^{86}\) Id. at 2266-67.
\(^{87}\) Id. at 2266.
\(^{88}\) Id. at 2244 citing Bryant, 131 S. Ct. at 1157.
training or a deficiency in judgment, it makes not a “whit of difference” whether, at the time of
the laboratory test, the police already have identified a suspect. 91

In his concurrence, Justice Breyer also reasoned that the Cellmark report was non-
testimonial because statements of that kind do not implicate the principal evil at which the
Confrontation Clause is directed: ex parte examinations against the accused. 92 In support of that
proposition, Justice Breyer stated that when a laboratory employee is removed from an
investigation, operating in the normal course of professional work, and has no way of knowing
whether the test results will help incriminate or exonerate a particular defendant, “the need for
cross-examination is considerably diminished.” 93 However, the requirement that a statement be
inherently inculpatory is contrary to history as neither law nor practice limited ex parte
examinations to those witnesses who made inherently inculpatory statements. 94 This
requirement also makes little sense because a statement that is not facially inculpatory may
become highly probative of a defendant’s guilt when considered with other evidence. 95

Justice Breyer also looked to the Cellmark report’s inherent reliability when finding it
non-testimonial under the Confrontation Clause. He reasoned that because the Cellmark report
embodied technical and professional data prepared by analysts in a certified laboratory, it was
akin to the “regular entries” hearsay exception that presumptively falls outside the category of
testimonial statements under the Confrontation Clause. 96 Further, because the employees were
operating behind a veil of ignorance that prevented them from knowing the identity of the
defendant, Justice Breyer found it unlikely that a particular researcher would have a defendant-

91 Williams, 132 S. Ct. at 2274 (Kagan, J., dissenting).
92 Id. at 2249 citing Crawford, 541 U.S. at 50.
93 Id.
94 Id. at 2263 (Kagan, J., dissenting) (discussing 16th century Marian statutes and 17th and 18th century practice
manuals for magistrates).
95 Id.
96 Id. at 2248-49 (opinion concurring).
related motive to behave dishonestly or misreport test results.\textsuperscript{97} However, only one year before 
\textit{Williams}, the Court in \textit{Bullcoming} treated as testimonial a forensic report prepared by a modern 
accredited laboratory and held that it “fell within the core class of testimonial statements” 
implying the Confrontation Clause.\textsuperscript{98} The Supreme Court unequivocally rejected a reliability 
analysis when it overruled \textit{Ohio v. Roberts}, stating that “dispensing with confrontation because 
testimony is obviously reliable is akin to dispensing with a jury trial because a defendant is 
obviously guilty. This is not what the Sixth Amendment prescribes.”\textsuperscript{99} Any analyst who writes a 
report that the prosecution introduces must be made available for confrontation even if they 
possess “the scientific acumen of Mme. Curie and the veracity of Mother Teresa.”\textsuperscript{100}

Justice Thomas’s concurrence, while rejecting the plurality’s holding that the 
introduction of the Cellmark report was not for the truth of the matter asserted, reasoned that the 
report lacked the “formality and solemnity” to be considered testimonial for purposes of the 
Confrontation Clause.\textsuperscript{101} Once again, the Court had rejected this exact argument in \textit{Bullcoming} 
and held that the report at was testimonial even though it was not sworn before a notary public.\textsuperscript{102} Nevertheless, Justice Thomas found an indicia of solemnity test to better comport with 
the Confrontation Clause than the plurality’s “accusatory” test because solemnity had historically 
marked the practice that the Confrontation Clause was originally designed to eliminate: \textit{ex parte} 
examination of witnesses.\textsuperscript{103} Under this rationale, the Confrontation Clause only reaches

\textsuperscript{98} \textit{Id.} at 2273 (Kagan, J., dissenting).
\textsuperscript{99} \textit{Crawford}, 541 U.S. at 62.
\textsuperscript{100} \textit{Melendez-Diaz}, 557 U.S. at 316 n. 6.
\textsuperscript{101} \textit{Williams}, 132 S. Ct. at 2255.
\textsuperscript{102} \textit{Bullcoming}, 131 S. Ct. at 2717 (reasoning that “the absence of an oath is not dispositive in determining if a 
statement is testimonial.”)
\textsuperscript{103} \textit{Williams}, 132 S. Ct at 2260 (opinion concurring in the judgment).
"formalized testimonial materials," such as depositions, affidavits, prior testimony, or statements resulting from formalized dialogue, such as custodial interrogations.\textsuperscript{104}

Applying the indicia of solemnity test to \textit{Williams}, Justice Thomas concluded that the Cellmark report was not testimonial because it was not made by a "witness" or sufficiently "solemn."\textsuperscript{105} Unlike the reports at issue in \textit{Melendez-Diaz} and \textit{Bullcoming}, the Cellmark report was not a sworn or certified declaration of fact or the product of any formalized dialogue resembling custodial interrogation even though it was produced at the request of law enforcement.\textsuperscript{106} Although the report was signed by two "reviewers," they did not purport to have performed the DNA testing or certify the accuracy of those who did.\textsuperscript{107} Justice Thomas also distinguished the Cellmark report from the forensic report at issue in \textit{Bullcoming} because although unsworn, the report included a "Certificate of Analyst" signed by the forensic analyst who tested the defendant's blood sample.\textsuperscript{108} In contrast, the Cellmark report, in substance, certified nothing.\textsuperscript{109} In her dissent, Justice Kagan rejected the indicia of solemnity test and found only "(maybe) a nickel's worth of difference" between the reports at issue in \textit{Melendez-Diaz} and \textit{Bullcoming} and the Cellmark report.\textsuperscript{110} She stated, "Justice Thomas's approach grants constitutional significance to minutia, in a way that can only undermine the Confrontation Clause's protections."\textsuperscript{111}

\begin{itemize}
\item \textsuperscript{104} \textit{Id.}
\item \textsuperscript{105} \textit{Id.}
\item \textsuperscript{106} \textit{Id.}
\item \textsuperscript{107} \textit{Id.}
\item \textsuperscript{108} \textit{Id.} citing \textit{Bullcoming}, 131 S. Ct. at 2710.
\item \textsuperscript{109}Williams v. Illinois, 132 S. Ct. 2221, 2260 (2012).
\item \textsuperscript{110} \textit{Id.} at 2276 (opinion dissenting).
\item \textsuperscript{111} \textit{Id.}
\end{itemize}
IV. THE CONFRONTATION CLAUSE COMES FULL CIRCLE: A RETURN TO OHIO v. ROBERTS?

Almost a decade ago, Chief Justice Rehnquist criticized the Supreme Court’s failure to clearly articulate a definition of testimonial in Crawford v. Washington. He stated:

The Court grandly declares that “[w]e leave for another day any effort to spell out a comprehensive definition of ‘testimonial,’ ...” But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of “testimony” the Court lists, ... 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.\(^{112}\)

In the Supreme Court’s third case in as many years, it once again failed to provide a concrete definition of testimonial statements. Without of a clear standard to evaluate the reach of the Confrontation Clause, the “mantle of uncertainty” that Chief Justice Rehnquist feared has been cast over criminal trials post-Williams.\(^{113}\) Although on its face Williams may seem like a limited decision regarding expert testimony not offered for the truth of the matter asserted, the heart of the opinion is much more malignant. The Court not only failed to clarify the narrow issue before it, but issued a fractured opinion that calls into serious question the entire Crawford line of cases.

a. The “Narrowest Grounds” of the 4-1-4 Holding

The decision in Williams reveals significant discord amongst the Justices and a badly-splintered Court regarding the future interpretation of the Confrontation Clause. The decision itself was a 4-1-4 split, with no single opinion garnering the support of a majority of the Court. Justice Alito wrote the plurality opinion, joined by Chief Justice Roberts, Justice Kennedy, and Justice Breyer.\(^{114}\) Justice Breyer wrote a separate concurrence to express his skepticism of the

\(^{112}\) Crawford, 541 U.S. at 75-76 (opinion concurring in part, dissenting in part).
\(^{113}\) Id. at 70.
\(^{114}\) Williams, 132 S. Ct. at 2227.
plurality and dissent's approaches in defining the outer scope of testimonial statements post-
*Crawford*, specifically in reference to crime-laboratory reports.\(^{115}\) Justice Thomas concurred in
the judgment only, and specifically rejected every aspect of the plurality's test. Instead, he found
the Cellmark report non-testimonial under his own, "indicia of solemnity" test.\(^{116}\) Justice Kagan,
joined by Justice Scalia, Justice Ginsburg, and Justice Sotomayor, dissented from the opinion
and found it an "open and shut case" under the Court's precedents.\(^{117}\) Although the plurality
found Cellmark report to be non-testimonial, the five Justices who joined in the opinion agreed
on very little and left significant confusion in their wake.\(^{118}\) No single opinion garnered the
support of a majority of the Court. The lack of either a majority opinion or a clear holding, in
addition to the internal flaws of the various opinions, deeply muddles Confrontation Clause
doctrine. As it stands, *Williams* leaves the Confrontation Clause's application to forensic
evidence in question and opens the door for an even more complicated body of cases going
forward.\(^{119}\)

By their very essence, plurality opinions are problematic because they leave lower courts
guessing as to which opinion is binding precedent.\(^{120}\) The Court in *Marks v. United States*\(^{121}\)
addressed this issue and stated:

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\(^{115}\) *Id.* at 2244-45.

\(^{116}\) *Id.* at 2255.

\(^{117}\) *Id.* at 2265.

\(^{118}\) *Id.* at 2277 (Kagan, J., dissenting).

\(^{119}\) See, e.g., U.S. v. Turner, No. 08 3109, 2013 WL 776802, at *6 (7th Cir. Mar. 4, 2013) ("We begin by noting that
the 4 1 4 division of the Justices in *Williams* ... makes it somewhat challenging to apply *Williams* to the facts of this
case. As the dissenting opinion in *Williams* observes, the divergent analyses and conclusions of the plurality and
dissent sow confusion as to precisely what limitations the Confrontation Clause may impose ...").

\(^{120}\) *Id.*

\(^{121}\) 430 U.S. 188 (1977).
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.”

Even with *Marks* in mind, discerning the “narrowest grounds” of the plurality and concurring opinions in *Williams* seems to be challenging at best. Assuming the “not for the truth” rationale could even qualify as the narrowest ground given that it was expressly rejected by five Justices, its grounds are broader than the non-testimonial approach. Indeed, in the few months since *Williams* was decided, courts have consistently rejected the plurality’s “not for truth” rationale as invalid and not supported by a majority of the Court. With respect to the second independent basis for the decision, the plurality held that the Cellmark report was non-testimonial because it was not accusatory, was produced when the perpetrator was at large and before the defendant was under suspicion, and was not inherently incriminatory. Justice Thomas, on the other hand, held that the Cellmark report was non-testimonial because it lacked sufficient formality and solemnity. “Which of these is the narrower grounds? I have no idea.”

Instead of having broader and narrower opinions, *Williams* may present a case where the opinions are just different. Courts have already begun to speculate that there simply may not

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122 Id. at 193.
124 See, e.g., State v. Manion, 295 P. 3d. 270, 280-81 (Wash. Ct. App. 2013) (“After Williams, the question is whether the lead opinion’s first rationale—that testimonial statements admitted for a purpose other than for their truth—is valid. For the reasons explained in Justice Kagan’s opinion, we think not. That is because five Justices of the Court disavowed that rationale.”); State v. Kennedy, 735 S.E.2d 905, 922 (W. Va. 2012) (“[W]e find Williams a tenuous and highly distinguishable opinion which does not, with majority support, dispense with the issue of to what extent a surrogate expert may ‘rely’ upon testimonial hearsay.”).
125 Smith, *supra* note 125.
126 Id.
128 Smith, *supra* note 125.
be a “narrowest ground” of Williams.\textsuperscript{129} According to Justice Liu in his dissent in \textit{People v. Lopez}, “[as of Oct. 15, 2012] [n]o published lower court decision, state or federal, that has examined Williams has identified a single standard or common denominator commanding the support of a five-justice majority.”\textsuperscript{130} “When it is not possible to discover a single standard that legitimately constitutes the narrowest ground for a decision on that issue, there is then no law of the land because no one standard commands the support of a majority of the Supreme Court.”\textsuperscript{131} In that case, the only binding aspect of such a splintered decision is its specific result.\textsuperscript{132}

In \textit{State v. Kennedy}, the Court of Appeals of West Virginia stated, “we construe Williams with extreme caution and admonish lower courts to do likewise.”\textsuperscript{133} The lack of guidance in the opinion leaves lower courts with incredible difficulty in deciding which parts of the opinions to follow, leading to an even more problematic situation where courts look to the various arguments made in each opinion, whether technically binding or merely dicta, for guidance.\textsuperscript{134}

\textbf{b. Confusion in the Court System}

\textit{Williams}’s principal fault is the failure to issue a majority opinion, leaving chaos at the lower court level in the wake of its 4-1-4 decision. While five votes approve the admission of

\begin{itemize}
\item \textsuperscript{129} See, \textit{e.g.}, \textit{Kennedy}, 229 S.E.2d at 916 (“[W]e need not determine what the ‘narrowest grounds’ obtaining concurrence in \textit{Williams} are, or whether there are any such grounds, for that matter.”); \textit{People v. Lopez}, 286 P.3d 469, 483 (Cal. 2012) (Liu, J., dissenting) (“The United States Supreme Court’s most recent decision in this area produced no authoritative guidance beyond the result reached on the particular facts of that case.”)
\item \textsuperscript{130} 286 P.3d at 484.
\item \textsuperscript{131} U.S. v. Alcan Aluminum Corp, 315 F.3d 179, 189 (2d Cir. 2003).
\item \textsuperscript{132} Id.
\item \textsuperscript{133} 229 S.E.2d at 919.
\item \textsuperscript{134} \textit{Leading Cases}, 126 HARV. L. REV. 266, 272-73 (2012); See, \textit{e.g.}, \textit{Lopez}, 286 P.3d at 485 (Liu, J., dissenting) (“[I]t is a mistake to contend … that we should resolve confrontation clause cases by determining what would garner the votes of the five justices who supported the outcome in \textit{Williams}. That approach-cobbling together the nonoverlapping rationales put forward by Justice Alito and Justice Thomas in \textit{Williams}-does not identify a “single standard” or “common denominator” on which five justices of the high court agree.”); United States v. Pablo, No. 09-2091, 2012 WL 3860016 at *8 (10th Cir. Sept. 6, 2012) (“[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 \textit{Williams} …”);}
\end{itemize}
the Cellmark report, not a single good explanation is given as to why. The decision has left scholars, practitioners, prosecutors, law enforcement agencies, and crime labs shaking their heads in dismay. "Yesterday's decision in Williams v. Illinois should have been simple. But not with these justices." "[W]hat a bloody mess!" "With such confusion, can Williams v. Illinois really be called a decision at all?" "[G]uidance for future expert testimony remains wanting." "[L]eaves questions unanswered." "[N]othing short of a jurisprudential disaster..." "If one of the jobs of the United States Supreme Court is to give practitioners guidance on what is allowable in the courtroom, the court has failed when it comes to the effect of the Confrontation Clause."142

In the short time since Williams has been decided, uncertainty about how to evaluate testimonial statements has already surfaced in lower court opinions.143 For example, in Hall v. State,144 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.145 The Hall court held that

140 Id.
142 Wade V. Davies, Confronting Expert Testimony, 48 TENN. B. J. 30 (Nov. 2012)
143 Anderson, Jr., supra note 5, at 70.
145 Id. at *7-8
the case was analogous to *Melendez-Diaz* and *Bullcoming*, partly because "the lab report [was] prepared ... after appellant's arrest."\(^{146}\) Although analogizing the case to *Melendez-Diaz* and *Bullcoming*, the court appears to have adopted the "accusation" test set forth by the plurality in *Williams*.\(^{147}\)

On the other hand, in *Wisconsin v. Deadwiller*,\(^{148}\) the Wisconsin Court of Appeals discussed *Williams* at length and held that it controlled. 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 the 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."\(^{149}\) In the absence of a true majority opinion or clear holding, courts across the country are left struggling with forensic evidence as it relates to the right of criminal defendants to confront all the witnesses against them without any clear guidance from the Supreme Court.\(^{150}\)

c. A Standard Going Forward

Amplifying the uncertainty surrounding the Confrontation Clause is the obvious philosophical schism amongst members of the Court regarding how forensic reports should be evaluated post-*Williams*. Indubitably, *Williams* is the coming to fruition of what had hereto been the minority position, as expressed in *Melendez-Diaz* and *Bullcoming*, in the majority by the

\(^{146}\) Id. at *8.
\(^{147}\) Anderson, Jr., *supra* note 5, at 70.
\(^{149}\) Id. at *5.
\(^{150}\) See, e.g., *Lopez*, 286 P.3d at 485 (Liu, J., dissenting) ("The nine separate opinions offered by [the Supreme Court of California] in three confrontation clause cases decided today reflect the muddled state of the current doctrine concerning the Sixth Amendment right of criminal defendants to confront the state's witnesses against them.")
same rough grouping of Justices. The four dissenters in Melendez-Diaz and Bullcoming now make up the plurality, with Justice Thomas casting the crucial swing vote based on a test that he alone espouses. While previously joining Justices Scalia, Ginsburg, Kagan and Sotomayor in the majority in Melendez-Diaz and Bullcoming, Justice Thomas “switched sides” in Williams for purposes of the outcome only, not the rationale. The Court could have avoided such a confusing outcome if only a single additional Justice had either joined the plurality to write a majority opinion overruling Melendez-Diaz and Bullcoming or joined the dissent and strengthened and clarified the requirements of Melendez-Diaz and Bullcoming. Instead, the Supreme Court displayed, in a relatively simple case, displayed virtually all the dysfunction the justices’ most vocal and powerful critics ever could realistically contemplate. Although Melendez-Diaz and Bullcoming are technically still good law, their once clear holdings now seem hazy in light of Williams.

Post-Williams, lower courts can evaluate Confrontation Clause cases in many ways, most of which are in tension with one another. Courts could generally narrow the reach of the Sixth Amendment by requiring a certain degree of formality for testimonial statements, as per Justice Thomas’s indicia of solemnity test or require testimonial statements to be targeted at a particular individual, as per the plurality’s “accusatory” test. A number of the Justices also seem open to returning to the reliability standard of Ohio v. Roberts. Most sensible for courts, however, would be to continue to follow the precedents of Melendez-Diaz and Bullcoming by refusing to extend the holding of Williams beyond its specific result. Given the array of possible doctrinal

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152 Leading Cases, supra note 136, at 276.
153 Cohen, supra note 138.
154 Keenan, supra note 12 at 809.
approaches left open by Williams, one can only surmise that the Supreme Court will soon weigh in again.155

1. Justice Thomas's Indicia of Solemnity Test

Going forward, an argument can be made that Justice Thomas’s opinion controls Confrontation Clause jurisprudence because the indicia of solemnity test is the narrowest rationale set forth by the Court in Williams.156 Unfortunately, this test is one that Justice Thomas alone espouses. While relevant, the Supreme Court has never relied solely on a statement’s formality to invoke the Confrontation Clause, and this type of approach has been consistently rejected by the Court as “implausible” and likely to make the right to confrontation “easily erasable.”157 Not only is the indicia of solemnity test contrary to precedent, but it is also subject to abuse and unworkable in practice. The formality of a forensic report would have to be evaluated on a case-by-case basis and it will be impossible to determine which documents were genuinely prepared informally and thus fall outside the ambit of the Confrontation Clause and which were deliberately left void of certifications or seals to evade the Confrontation Clause. Although Justice Thomas qualified the indicia of solemnity test by stating “the Confrontation Clause reaches bad-faith attempts to evade the formalized process,” states may still be able to evade the Confrontation Clause with a wink and a nod, simply by making – in good faith – forensic reports as informal as possible.158

155 Lopez, 286 P.3d at 483 (Liu, J., dissenting)
157 Lopez, 286 P.3d at 483 (Liu, J., dissenting); Crawford, 541 U.S. at 52 n. 3 (“We find it implausible that a provision which concededly condemned trial by sworn ex parte affidavit thought trial by unsworn ex parte affidavit perfectly OK.”); Bullcoming, 131 S. Ct. at 2717 (“As the New Mexico Supreme Court recognized, ‘the absence of [an oath] is not dispositive’ in determining if a statement is testimonial ... [r]ead the Clause in this ‘implausible’ manner, the Court noted, would make the right to confrontation easily erasable.”)
158 Williams, 132 S. Ct. 2261.
Furthermore, Justice Thomas’s test, if adopted, would create an unworkable distinction between which characteristics of a report make it formal enough to fall within the Confrontation Clause and which do not. For example, in Bullcoming, the Court found the forensic report at issue to be identical to the one at issue in Melendez-Diaz, “in all material respects,” even though it was not sworn before a notary public.\textsuperscript{159} In Williams, however, Justice Thomas refused to find the Cellmark report testimonial because it was not labeled a “certificate.”\textsuperscript{160} The subjective nature of a formality inquiry has already been exposed in the few lower court opinions that have attempted to employ the indicia of solemnity test. In U.S. v. Turner,\textsuperscript{161} for example, the court deemed the report at issue to be the functional equivalent of the report in Bullcoming.\textsuperscript{162} The report was both official and signed, constituted a formal record of the results of the laboratory tests that the analyst performed, and was clearly designed to memorialize the that result for purposes of the pending legal proceedings against the defendant.\textsuperscript{163} Nevertheless, the court held that although the report was certified, “it was not certified in the sense that Justice Thomas deemed relevant.”\textsuperscript{164} Because of the divided nature of the Williams decision and the difficulty in applying it to the facts at hand, the court ultimately “[gave the defendant] the benefit of the doubt” and found the report sufficiently testimonial to trigger the protection of the Confrontation Clause.\textsuperscript{165} If Justice Thomas’s test controls Sixth Amendment jurisprudence going forward, the opinion in Turner may simply be the first of many to reflect the muddled state of the Confrontation Clause and the subjective nature of “solemnity.”

\begin{footnotesize}
\begin{enumerate}
\item[159] 131 S. Ct. at 2717.
\item[160] 132 S. Ct. at 2260.
\item[161] No. 08 3109, 2013 WL 776802 (7th Cir. Mar. 4, 2013).
\item[162] Id. at *6.
\item[163] Id.
\item[164] Id.
\item[165] Id.
\end{enumerate}
\end{footnotesize}
2. Primary Purpose of “Accusing a Targeted Individual” Test

The plurality’s new “accusatory” test is arbitrary and equally as flawed as Justice Thomas’s indicia of solemnity test and serves only to further muddle Confrontation Clause analysis. The primary purpose test as originally enunciated in *Davis v. Washington,* finds statements testimonial when “the circumstances objectively indicate ... that the primary purpose ... is to establish or prove past events potentially relevant to later criminal prosecution.” In *Williams,* the plurality distorts this test into one requiring testimonial statements to have the “primary purpose of accusing a targeted individual of engaging in criminal conduct.”

The first problem with the plurality’s “accusatory” test is the broad, overarching exception it makes for “ongoing emergencies.” Traditionally and appropriately, the ongoing emergency test has been used to exclude statements made within minutes of a criminal attack by frantic victims trying to aid the police in their investigation. In *Williams,* however, the Court stretched the ongoing emergency test beyond all recognition and created a dangerous precedent going forward. Extending the ongoing emergency test to cases like *Williams* where a routine forensic report was generated months after the initial attack opens the door for virtually any forensic report to be considered non-testimonial as long as the suspect is not yet in custody. “[L]et us not confuse ‘emergencies’ with accusations for Sixth Amendment purposes.”

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166 *547 U.S. 813, 822 (2006).*
167 *Id. at 822.*
168 *Williams,* 132 S. Ct. at 2242.
169 *Williams,* 132 S. Ct. at 2274 (Kagan, J., dissenting); *See, e.g.,* Hammon v. Indiana, *547 U.S. 813, 822 (2006)* (“[A] statement does not fall within the ambit of the Cause when it is made ‘under circumstances objectively indicating that the primary purpose of the interrogation is to enable police to meet an ongoing emergency.’”); Michigan v. Bryant, 131 S. Ct. 1143, (“[T]he existence of an emergency or the parties’ perception that an emergency is ongoing is among the most important circumstances that court must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation.”)
170 *Sabino, supra* note 153 at 331.
Furthermore, there is no practical or textual justification for limiting the Sixth Amendment to statements made only after the accused’s identity is known.171 The very words of the Confrontation Clause utterly fail to constrain the time on may become a witness.172 True to the text of the Confrontation Clause, the court in Crawford specifically held that a declarant may become a witness before the accused is prosecuted.173 As a practical matter, it is unrealistic to believe that until the suspect is in custody, forensic testing is simply part of a heroic effort to get a dangerous criminal off the streets, and only after the suspect is apprehended forensic testing is generated in preparation for trial. Given the rationale behind the Sixth Amendment, the right to cross-examination should be triggered regardless of whether the suspect has been identified at the time the forensic report is prepared and the ongoing emergency exception limited to its traditional application.

Imbedded in Justice Alito’s primary purpose test are shades of the flaws fatal to the now-rejected formulation of Roberts.174 To the extent that the Williams plurality justifies the allowance of evidence without the absolute need for confrontation, it paves the way for a return to the inadequacies of Roberts.175

3. Ohio v. Roberts’s Reliability Test

In the wake of Williams, the stars seem to be aligned for the overruling of Crawford v. Washington and a return to the reliability standard of Ohio v. Roberts. While some scholars find a return to the reliability analysis of Roberts unlikely, since Crawford a majority of the Justices have joined opinions that suggest the importance of reliability (or, the dangers of unreliability) to

171 Williams, 132 S. Ct. at 2262 (Thomas, J., concurring in the judgment).
172 Sabino, supra note 153 at 332.
173 Crawford, 541 U.S. at 50-51 (rejecting the view that the Confrontation Clause applies only to in-court testimony).
174 Sabino, supra note 153 at 330.
175 Id.
proper Confrontation Clause analysis. Members of the Court have even written separately to suggest that they are open to reconsidering Sixth Amendment issues. Some scholars have even opined that not only does a coalition of justices exist that could overrule Crawford, but that the Court’s decision in Williams arguably does in fact overrule it.

Williams highlighted a desire to return to the reliability standard of Roberts. The plurality emphasized that “reliability is a salient characteristic of a statement that falls outside the reach of the Confrontation Clause.” To downplay the need for confrontation when “reliable” statements are at issue, Justice Alito reasoned that because no one at Cellmark could have possibly known that the profile they produced would inculpate Williams, or anyone else for that matter, there was no “prospect of fabrication” and no incentive to produce anything other than a scientifically sounds and reliable profile. Justice Breyer agreed, stating that because the employees were operating behind a veil of ignorance, it was unlikely that a particular researcher had a defendant-related motive to behave dishonestly or misrepresent a step in the analysis or misreport test results.

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176 Ben Trachenberg, Confronting Coconspirators: Coconspirator Hearsay, Sir Walter Raleigh, and the Sixth Amendment Confrontation Clause, 64 FLA. L. REV. 1669, 1708 (2012) (quoting George Fisher, Williams v. Illinois: Case Note, at 13-17 (June 25, 2012)) (“[T]he urge to root the rationale and reach of the Confrontation Clause to the apparent unreliability of contested hearsay evidence has gripped at least five members of the Court ... [T]he broader question is whether the revival of reliability reasoning someday might claim a stable court majority.”); But see, Anderson, Jr., supra note 5, at 71 (“Of course, it is unlikely that the Supreme Court will return to the Roberts standard ...”)

177 Williams, 132 S. Ct. at 2242 n. 13 (plurality opinion) (“Experience might yet show that the holdings in [post-Crawford] cases should be reconsidered for the reasons, among others, expressed in the dissents the decisions produced. Those decisions are not challenged in this case and are to be deemed binding precedents, but they can and should be distinguished on the facts here.”); Id. at 2248 (Breyer, J., concurring) (advocating for reargument so the parties and amici can discuss, “not only the possible implications of our earlier post-Crawford opinions, but also any necessary modifications of statements made in the opinions of those earlier cases.”)

178 Crump, supra note 4 at 150, 155 (“In fact, one can argue that the Court now has overruled Crawford’s wholesale exclusion of testimonial evidence – in Williams, sub silentio, by a majority that excludes only the narrower category of manufactured statements. An explicit opinion discarding the old regime would be preferable, but perhaps the reality that Crawford has been overruled already exists.”)

179 Williams, 132 S. Ct. at 2243.

180 Id. at 2243-44.

181 Id. at 2248-49.
However, this argument is little more than an invitation to return to the overruled
decision in *Roberts*, which held that evidence with “particularized guarantees of trustworthiness”
was admissible notwithstanding the Confrontation Clause.\(^\text{182}\) As stated by the Court in
*Melendez-Diaz* and reaffirmed in *Bullcoming*, the Constitutional right to the Sixth Amendment
may not be disregarded at the Court’s convenience.\(^\text{183}\) Almost a decade ago, the Supreme Court
in *Crawford* made it clear that it is not enough for testimonial statements to be reliable to fall
outside the ambit of the Confrontation Clause. The Court stated:

> Where testimonial statements are involved, we do not think the
> Framers meant to leave the Sixth Amendment’s protection to the
> vagaries of the rules of evidence, much less to amorphous notions
> of ‘reliability.’ Certainly none of the authorities discussed above
> acknowledges any general reliability exception to the common law
> rule. Admitting statements deemed reliable by a judge is
> fundamentally at odds with the right of confrontation.\(^\text{184}\)

There is no reason to believe that a reliability inquiry will be any less “murky, subjective,
inconsistent, or unworkable” now than it was thirty years ago.\(^\text{185}\) This test was deemed by
scholars as “devaluing the Confrontation Clause” and an “amorphous and mystifying evidentiary
doctrine” whose value was widely questioned.\(^\text{186}\) Further, it was found to insufficiently protect
defendant’s rights by abdicating the Supreme Court’s responsibility for regulating the admission
of hearsay and instead relying on evidence law to control the content of the Confrontation
Clause.\(^\text{187}\) Any return to a reliability mode of analysis must be avoided as it is antithetical to
*Crawford’s* explicit ouster of *Roberts* and the latter’s now discredited theorems.\(^\text{188}\)

\(^\text{182}\) 448 U.S. at 66.
\(^\text{183}\) 557 U.S. at 325; 131 S. Ct. at 2718.
\(^\text{184}\) *Crawford*, 541 U.S. at 61.
\(^\text{185}\) *Bibas*, supra note 13 at 189.
\(^\text{187}\) Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. Rev. 557, 622
\(^\text{188}\) *Sabino*, supra note 153 at 331.
4. Primary Purpose of “Providing Evidence” Test

The most sensible doctrinal approach for lower courts to take post-Williams is Justice Kagan’s “evidentiary” primary purpose test. This test is most faithful the Supreme Court’s authoritative pronouncements in prior cases going back to Crawford.\footnote{Lopez, 286 P.3d at 490 (Liu, J., dissenting)} In Crawford, “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” were deemed within the “core class” of testimonial statements that the Confrontation Clause was designed to protect against.\footnote{Crawford, 541 U.S. at 51-52.} This definition was reaffirmed in both Davis and Melendez-Diaz.\footnote{557 U.S. at 310-11.}

Similarly, in Bullcoming, the Court stated, “a document created solely for an ‘evidentiary purpose’ … made in aid of a police investigation ranks as testimonial.”\footnote{131 S. Ct. at 2717.}

While there may be alternative pathways to evaluating forensic evidence, the Constitution recognizes only one – confrontation. The Court does not have license to suspend the Confrontation Clause when a preferable trial strategy is available.\footnote{Melendez Diaz, 557 U.S. at 318.} Just as the sky did not fall in 2009 after the Supreme Court mandated confrontation in Melendez-Diaz, neither will rigid adherence to the Crawford test going forward.

V. CONCLUSION

Although it seems clear that Crawford and its progeny are endangered, what will replace it is anyone’s guess, as no proposed alternative has commanded the support of a majority of the Court. In fact, with the Court evenly divided on this issue, the controlling vote on any cases involving expert testimony belongs to Justice Thomas – who will decide the case based on a test
that none of the other Justices agree with. One can only hope that the Supreme Court will weigh in on the Confrontation Clause again in the near future and provide a more coherent, workable standard to evaluate testimonial evidence. Until that time, however, lower courts should take Williams for what it is – a fractured 4-1-4 opinion that stands for little more than the facts it was decided upon. “For now, the Crawford revolution – as some have called it – lives on. But its foothold also appears to be somewhat more tenuous than before.”

\[194 Id.\]

\[195 Fisher, supra, note 158.\]