

Notes

Confronting *Williams*: The Confrontation Clause and Forensic Witnesses in the Post-*Williams* Era

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In Williams v. Illinois, the division of the U.S. Supreme Court created substantial confusion as to the proper application of the Confrontation Clause to forensic witnesses. In the decision, the Court affirmed the conviction of the defendant, Sandy Williams, because the plurality and Justice Thomas, in his concurrence, determined that the DNA profile produced by an outside laboratory was not testimonial and thus Williams did not have a constitutional right to cross-examine the laboratory analysts. The plurality and the concurrence, however, presented two distinct rationales for deeming the report nontestimonial. The case has consequently left lower courts without firm guidance as to when forensic reports are testimonial.

This Note critically examines two state responses to the testimonial nature of autopsy reports following the confusion created by the Williams decision, and whether testimony of surrogate witnesses on these reports under the current legal interpretation violates the Confrontation Clause.

I will argue that this confusion creates a demand for judicial restraint. Courts should err on the side of excluding evidence in order to preserve the Sixth Amendment confrontation right.

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INTRODUCTION

The Confrontation Clause of the Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”¹ The clause generally prohibits the use of out-of-court statements offered to prove the truth of the matter asserted when the declarant is unavailable to testify.² By requiring that a witness present her evidence on the stand and be subject to cross-examination, the Confrontation Clause gives a defendant the opportunity to probe into the potential deficiencies of a witness’ testimony.³ As a result, this right gives criminal defendants the opportunity to show the potential incompetence of a witness or to awaken the conscience of a fraudulent one.⁴ Accordingly, the protections provided by the Confrontation Clause of the Sixth Amendment are

1. U.S. CONST. amend. VI.

2. See *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004).

3. *Sixth Amendment at Trial*, 34 GEO. L.J. ANN. REV. CRIM. PROC. 594, 604–05 (2005).

4. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318–19 (2009).

critical to ensuring the right to a fair trial. Courts, however, have steadily eroded this right.⁵

In particular, the Supreme Court's 2012 decision in *Williams v. Illinois* critically diminished a defendant's right to cross-examine forensic witnesses.⁶ There, a plurality of the Court determined that the lab technician from an independent laboratory, which ran the original DNA sample found on the victim, was not required to testify because the results were not testimonial.⁷ Instead, the sole testimony of the Illinois State Police forensic specialist who matched the defendant's DNA sample to the independent report was sufficient,⁸ and accordingly, the defendant had no right to confront the independent lab technician who ran the initial test.⁹ As a whole, the *Williams* plurality provided little guidance to lower courts as to when forensic evidence must be submitted by those directly responsible for its production or when it can be submitted by other "surrogate"¹⁰ witnesses.¹¹ Consequently, as courts have interpreted the decision in a variety of ways,¹² the diverse applications of *Williams* have left defendants vulnerable to inconsistent and unpredictable applications of the Confrontation Clause.

This Note explores the confusion resulting from the split of the *Williams* Court and concludes that these uncertainties demand judicial restraint and deference to the defendant's Sixth Amendment confrontation right. Part I will explore the pre-*Williams* decisions that developed the "testimonial"¹³ doctrine which now lies at the center of the

5. See John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 220 (1999) (describing the Confrontation Clause as a "shrinking right" and explaining that this shrinking trend is due to judicial concerns regarding the "all-or-nothing choice the rule imposes").

6. 132 S. Ct. 2221 (2012).

7. *Id.* at 2228.

8. *Id.* at 2227–28.

9. *Id.*

10. For the purposes of this Note, a surrogate witness or surrogate testimony will refer to a witness or testimony presented by an individual who had little or no involvement in the production of the forensic evidence presented at trial. See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011) (denying surrogate testimony by "a scientist who did not sign the certification or perform or observe the test reported in the certification"); see also Marc D. Ginsberg, *The Confrontation Clause and Forensic Autopsy Reports—A "Testimonial,"* 74 LA. L. REV. 117, 121 (2013) (explaining that forensic pathology results can be presented by "the examining pathologist—the pathologist who performed the forensic autopsy on the victim and prepared the autopsy report" or presented by "a 'surrogate' pathologist, one who was not the examining pathologist, from the office of the coroner or medical examiner").

11. *Williams*, 132 S. Ct. at 2277 (Kagan, J., dissenting) ("[The plurality has] left significant confusion in their wake.").

12. See, e.g., *United States v. James*, 712 F.3d 79, 95 (2d Cir. 2013) (determining that *Williams* created no binding precedence); *State v. Navarette*, 294 P.3d 435, 437 (N.M. 2013) (calculating which principles five justices could agree upon).

13. Testimonial statements, defined by *Crawford v. Washington* and its progeny as formal statements or those statements given in preparation for trial, give rise to the Confrontation Clause and

Confrontation Clause discussion, while Part II will examine forensic science in the context of wrongful convictions. Scholars have emphasized the danger of faulty forensic science¹⁴ and this Note will echo these concerns, which strongly suggest that forensic science does not warrant the amount of reverence it typically receives from courts. Because cross-examination is an essential safeguard against wrongful convictions, forensic scientists do not warrant special treatment with regard to confrontation rights.

Part III will present *Williams v. Illinois*. As this case is of particular importance to the discussion of forensic witnesses, it is discussed in three parts: (1) the underlying facts; (2) the conflict between the plurality, Justice Thomas' concurrence, and the dissent; and (3) a brief introduction to the resulting confusion among lower courts. Part IV then reviews two state cases¹⁵—*People v. Dungo* and *State v. Navarette*—that attempted to deal with the Confrontation Clause in the aftermath of *Williams*. Both cases addressed the admissibility of testimony regarding autopsies presented by surrogate pathologists either not directly responsible, or entirely uninvolved, in the autopsy itself.¹⁶ Both cases dealt with similar facts, and yet, reached contrary results on whether the forensic evidence was admissible, emphasizing the malleability of the *Williams* decision. These decisions further demonstrate that *Williams* has left defendants unduly vulnerable to inconsistent applications of the Sixth Amendment. This Note recommends that judges err on the side of exclusion of forensic evidence submitted by a witness not directly involved in its production. This is necessary to reduce the risk of wrongful convictions resulting from inconsistent applications of *Williams* and to preserve a defendant's Sixth Amendment right to confrontation.

I. THE CONFRONTATION CLAUSE BEFORE *WILLIAMS*

Part I discusses the development of the “testimonial” standard introduced in *Crawford v. Washington*, which requires that defendants be afforded the opportunity to cross-examine witnesses whose statements are either formal or given under circumstances where their use at trial would be reasonably foreseeable.¹⁷ It will also address the establishment

its protections. *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004); see *infra* Part I. By “testimonial doctrine,” this Note refers to these guiding cases and the standard for determining whether a statement is testimonial, as described therein.

14. See generally BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (2003) (detailing real-life stories of how DNA testing has often destroyed supposed solid evidence that condemned people to death).

15. Because the Confrontation Clause was incorporated via the Fourteenth Amendment, the right extends to state prosecutions. See *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

16. See *infra* Part IV.

17. *Crawford*, 541 U.S. at 51–52.

of the “primary purpose” inquiry into the testimonial standard.¹⁸ Pursuant to the primary purpose test a statement may not be testimonial if its primary purpose was not for prosecution even where its use at trial was foreseeable.¹⁹ Part I will then discuss the application of these standards in the context of forensic science both in *Melendez-Diaz v. Massachusetts* and *Bullcoming v. New Mexico*, which determined that the defendant has the right to confront the forensic scientist directly responsible for the production of results.²⁰

A. BACKGROUND LEADING UP TO *WILLIAMS*

The Confrontation Clause provides a criminal defendant the right to cross-examine an adverse witness.²¹ The admission of hearsay evidence implicates this right because the defendant must be afforded the opportunity to confront the out-of-court declarant.²² Under the hearsay rule, the Federal Rules of Evidence prohibit the admission of out-of-court statements offered for the truth of the matter asserted,²³ absent some qualifying exception.²⁴ Whether a statement is “offered for the truth of the matter asserted” is admittedly an unclear standard²⁵ that even divides the Supreme Court,²⁶ but it generally means statements offered into evidence for the truth of their contents.²⁷ The “declarant,” meanwhile, is the person who made the statement, which is the oral, written, or nonverbal conduct intended as an assertion.²⁸ Ultimately, this evidentiary prohibition, coupled with the right to cross-examination, is an essential protection against the accusations of noncredible sources.

18. See *infra* Part I.B.

19. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

20. See *infra* Subparts I.C. and I.D.

21. U.S. CONST. amend. VI.

22. *Sixth Amendment at Trial*, *supra* note 3, at 612–13.

23. FED. R. EVID. 801(c).

24. See FED. R. EVID. 803, 804, 807. While important to the admissibility of out-of-court statements, these exceptions will not be addressed in this Note.

25. Jennifer L. Mnookin & David H. Kaye, *Confronting Science: Expert Evidence and the Confrontation Clause*, 2012 SUP. CT. REV. 99, 101 (emphasis added) (“The phrase is more easily remembered than understood. What it means to introduce an item of evidence ‘for the truth of the matter asserted’ has confused generations of law students, lawyers, and jurists.”).

26. See *generally* *Williams v. Illinois*, 132 S. Ct. 2221 (2012) (disagreeing as to whether the Cellmark report was offered for the truth of the matter asserted).

27. For example, if the statement “I saw the Queen of England at the mall on February 8th” is offered to show that in fact the Queen was at the mall, then the statement is offered for the truth of the matter asserted. If, however, the statement is offered as circumstantial evidence to show the declarant’s mental state (perhaps the declarant has certain mental delusions), then it is not offered for its truth. For an introduction to the hearsay rule, see Roger C. Park, *Hearsay from Square One: The Definition of Hearsay*, CALI, <http://www.cali.org/lessons/web/evdo8/jq.php#Contents> (last visited Apr. 8, 2016).

28. FED. R. EVID. 801(a)–(b).

As finders of fact, juries carry the responsibility of determining whether the declarant is a credible source and is telling the truth when testifying in court. For instance, the jury may observe the witness' demeanor during cross-examination to determine if that witness is lying.²⁹ If the jury determines that a witness is not credible, the evidence presented by that witness would lose its influence as well. Without this vetting process, the reliability of out-of-court statements would be relatively unknown and defendants would be susceptible to incompetent or fraudulent attacks by out-of-court declarants.

Overall, the Confrontation Clause, which only applies to criminal cases, provides an additional barrier against the admission of such out-of-court statements by granting defendants the constitutional right to confront their accusers.³⁰ A defendant has a right, under the Confrontation Clause, to subject a witness to the rigors of the adversarial system, probing into the witness' potential deficiencies in knowledge and credibility through cross-examination at trial.³¹

Although the clause promises increased protection for defendants, the Supreme Court's interpretation of the Confrontation Clause in *Ohio v. Roberts* added little to the protections already afforded by the general prohibition against hearsay.³² Under *Roberts*, the Court held that out-of-court statements were admissible if the declarant was unavailable and the statements fell within a "firmly rooted" hearsay exception or had "particularized guarantees of trustworthiness."³³ Moreover, the Court even loosened the requirement for unavailability, explaining that a "demonstration of unavailability, however, is not *always* required."³⁴ The Court, therefore, set an extraordinarily low threshold for the admissibility of statements of adverse witnesses not subject to cross-examination, and as a result, allowed trial judges to use substantial discretion for the admission of out-of-court statements. Regardless of the witness' availability, the prosecution could conceivably circumvent the defendant's confrontation right by merely arguing that a statement was trustworthy.³⁵ In light of these consequences, the *Roberts* decision was discarded twenty-four years later in *Crawford v. Washington*.³⁶

In *Crawford*, the Court rejected the "trustworthiness" rationale and instead adopted a standard to exclude hearsay statements that are

29. See James P. Timony, *Demeanor Credibility*, 49 CATH. U. L. REV. 903, 911 (2000).

30. U.S. CONST. amend. VI.

31. *Sixth Amendment at Trial*, *supra* note 3, at 602, 605.

32. See *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) ("The historical evidence leaves little doubt, however, that the Clause was intended to exclude some hearsay.").

33. *Id.* at 65–66.

34. *Id.* at 65 n.7 (emphasis added).

35. See Peter Nicolas, *'I'm Dying to Tell You What Happened': The Admissibility of Testimonial Dying Declarations Post-Crawford*, 37 HASTINGS CONST. L.Q. 487, 490–91 (2010).

36. 541 U.S. 36, 60 (2004).

deemed “testimonial.”³⁷ By requiring courts to determine the purpose and formality of out-of-court statements,³⁸ this standard provided greater structure and guidance for lower courts determining the admissibility of statements offered without the opportunity for cross-examination. Before the *Williams* decision, *Crawford* and its progeny developed and applied this testimonial standard³⁹ and generally enforced a confrontation right that was more robust in nature.⁴⁰

B. *CRAWFORD V. WASHINGTON*

Marking a dramatic shift in Confrontation Clause doctrine,⁴¹ the *Crawford* Court rejected the traditional trustworthiness standard⁴² established in *Ohio v. Roberts*. Writing the opinion for the Court, Justice Scalia explained, “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with the jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”⁴³

In *Crawford*, the defendant was charged with assault and attempted murder for stabbing a man.⁴⁴ At trial, the prosecution offered a statement made by the defendant’s wife during a police interrogation to refute the defendant’s self-defense claim.⁴⁵ While the defendant claimed that the victim had reached for a weapon prior to the fight, the wife, who witnessed the stabbing, indicated to the police that she did not believe the victim had a weapon.⁴⁶ Because his wife asserted marital privilege and refused to testify at trial,⁴⁷ the defendant argued that the use of her out-of-court statement violated his Sixth Amendment right to confront “witnesses against him.”⁴⁸ The Court agreed with him.⁴⁹

The Supreme Court determined, in a 7-2 majority, that the admissibility of the wife’s out-of-court statement was dependent upon the “testimonial” nature of the statement.⁵⁰ In other words, without the opportunity to cross-examine, out-of-court statements would be considered inadmissible if they have the quality of “bear[ing] testimony”

37. *Id.* at 51.

38. *See infra* notes 52–54.

39. *Crawford*, 541 U.S. at 60; *see also* *Davis v. Washington*, 547 U.S. 813, 822 (2006) (introducing the “primary purpose” analysis to the test for testimonial statements).

40. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009).

41. *See* Ginsberg, *supra* note 10, at 122.

42. 541 U.S. 36, 62 (2004).

43. *Id.*

44. *Id.* at 38.

45. *Id.* at 40.

46. *Id.* at 39–40.

47. *Id.* at 40.

48. *Id.*

49. *Id.* at 68.

50. *Id.* at 51.

similar to in-court statements.⁵¹ The Court continued and established three general characterizations for such testimonial statements. First, formal statements are commonly held to be testimonial.⁵² The Court explained that “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”⁵³ Second, statements prepared for prosecution are also generally deemed testimonial.⁵⁴ If a declarant would reasonably believe that her statements would be used in a later trial, then the declarant should be subject to cross-examination.⁵⁵ Third, the Court held that such out-of-court testimonial statements are inadmissible “unless [the declarant] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”⁵⁶ This narrow exception ensures that the defendant retains the right to confront her accusers, even if that confrontation cannot take place before a jury.

As a result of this doctrine, out-of-court statements closely akin to in-court testimony must be subject to cross-examination in order to be admissible.⁵⁷ For example, statements like those made to an investigator would be inadmissible without opportunity for cross-examination because they “bear testimony” against the defendant. In other words, these statements would be considered “testimonial” because they are formal (that is, stated to a government official) and are reasonably foreseen by the declarant to be used at trial.⁵⁸ If, however, the declarant was unavailable and the defendant had a prior opportunity to cross-examine the declarant, the statements would be admissible.⁵⁹ Alternatively, if the statements were nontestimonial, they would not invoke Confrontation Clause protection.⁶⁰ Overall, *Crawford* provided much less discretion for the admissibility of out-of-court statements. Under this standard, if statements fell within the categories of “formal” or “foreseeable use at trial,” but failed to fall within the narrow exceptions of “unavailable” and “prior opportunity to cross-examine,” then the statements would be inadmissible regardless of whether the judge considered them trustworthy.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 52.

55. *Id.*

56. *Id.* at 54.

57. Mark K. Hanasono, *The Muddled State: California's Application of Confrontation Clause Jurisprudence in People v. Dungo and People v. Lopez*, 41 HASTINGS CONST. L.Q. 1, 3 (2013).

58. *Crawford*, 541 U.S. at 51.

59. *See id.* at 54, 59.

60. *Id.* at 68 (“Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law . . .”).

C. *DAVIS* V. *WASHINGTON*

In *Davis v. Washington*, the Court introduced the “primary purpose” test to the testimonial inquiry.⁶¹ Under this standard, the Court explained that statements made by a declarant having a reasonable foreseeability that they will be used in prosecution could *still* be admissible if the primary purpose of those statements was not for use at trial.⁶² The *Davis* Court held that these types of statements are not testimonial and, therefore, do not give rise to the Confrontation Clause.⁶³

In *Davis*, a victim of a domestic dispute called 911.⁶⁴ During the call, the 911 operator asked questions that led to statements by the assailant and the victim that incriminated the defendant.⁶⁵ At trial, the victim did not testify, and the prosecution instead played the recording of the 911 call.⁶⁶ The Court determined that the out-of-court statement was admissible, despite the defendant’s inability to cross-examine the victim, because the primary purpose of the call was to solicit aid, not to investigate for prosecution.⁶⁷ In the decision, the Court explained, “[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.”⁶⁸ However, the Court indicated that statements are testimonial when “the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”⁶⁹ Consequently, in determining the primary purpose of the statements, it is relevant to consider the circumstances that gave rise to the statements as well as the intent of both the investigator and the declarant.⁷⁰

D. *MELLENDEZ-DIAZ* V. *MASSACHUSETTS*

In *Melendez-Diaz v. Massachusetts*, the Court effectively concluded that “forensic laboratory reports are testimonial for purposes of the Confrontation Clause.”⁷¹ The defendant in *Melendez-Diaz* was apprehended and detained in the back of a police car,⁷² and, after the drive to the police

61. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

62. *Id.*

63. *Id.* at 829.

64. *Id.* at 817–18.

65. *Id.*

66. *Id.* at 819.

67. *Id.* at 822.

68. *Id.*

69. *Id.*

70. *See id.*

71. Richard D. Friedman, *The Sky Is Still Not Falling*, 20 J.L. & POL’Y 427, 429 (2012).

72. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 308 (2009).

station, during which the detained made “furtive movements,” officers searched the police vehicle and found several bags containing a substance resembling cocaine.⁷³ The officers then submitted the bags for lab analysis.⁷⁴ At trial, the prosecution offered three certificates of analysis that disclosed the results of the lab testing, which indicated that the bags did in fact contain cocaine.⁷⁵

The Court determined, following a “rather straightforward application” of *Crawford*,⁷⁶ that the “affidavits were testimonial statements, and the analysts were ‘witnesses’ for purposes of the Sixth Amendment.”⁷⁷ After quickly determining the testimonial nature of the reports, Justice Scalia systematically presented and rejected the arguments given by the dissent.⁷⁸ For the purposes of this Note, Justice Scalia’s rejection of the dissent’s claim that the testimony at issue should be admissible because it was the “resul[t] of neutral, scientific testing” is of the greatest relevance.⁷⁹

Justice Scalia stated that the dissent’s argument was “little more than an invitation to return to [the] overruled” trustworthiness standard of *Roberts*, and frankly rejected this reversion.⁸⁰ He went on to attack the merits of the claim,⁸¹ and rightfully so. As Richard D. Friedman later explained in his article, “[l]ab testing, while usually accurate, is far from foolproof. Nor can agents of the government properly be called neutral in a criminal prosecution.”⁸² With deliberate strikes, Justice Scalia proceeded to plainly demonstrate the fallibility of forensic science.⁸³

First, he acknowledged the existence of fraud within the scientific community.⁸⁴ In particular, the opinion emphasized “drylabbing,” a practice in which forensic scientists report results to tests that were never conducted, as a primary example of fraudulent behavior.⁸⁵ It is here in particular that the Confrontation Clause can bring to light the untruths of a forensic witness’ testimony. As Justice Scalia explained, “[w]hile it is true, as the dissent notes, that an honest analyst will not alter his

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 312.

77. *Id.* at 311.

78. Friedman, *supra* note 71, at 429 (“This gave Justice Scalia a chance to clear away a good deal of underbrush, as one by one—quite correctly—he set these arguments aside.”).

79. *Melendez-Diaz*, 557 U.S. at 317.

80. *Id.*

81. *Id.* at 317–21.

82. Friedman, *supra* note 71, at 430.

83. *Melendez-Diaz*, 557 U.S. at 318–21.

84. *Id.*

85. *Id.* at 319; *see also* SCHECK ET AL., *supra* note 14, at 140 (“It was powerful evidence, with one slight problem: Zain’s laboratory couldn’t perform those tests . . . He had made up a story to make people happy about a suspect.”).

testimony . . . the analyst who provides false results may, under oath in open court, reconsider his false testimony.”⁸⁶ Moreover, he posited that confrontation may act to deter fraudulent analysis before the defendant is ever even charged and brought to trial.⁸⁷

Next, Justice Scalia addressed the possibility of incompetent analysts.⁸⁸ He asserted that confrontation can bring to light an analyst’s improper or insufficient training and any deficiencies in judgment.⁸⁹ While forensic science, “the gold standard” of evidence, is often viewed as purely objective, it involves a great deal of subjective interpretation and is therefore subject to human error.⁹⁰ Moreover, highlighting recent DNA exonerations, Justice Scalia also illustrated the existence of faulty forensics.⁹¹ “[T]he legal community now concedes,” Justice Scalia explained, “with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics.”⁹² Thus, not only is science subject to error due to the analyst’s misinterpretations but the science presented may not be real “science” at all. These flaws can be discovered and presented to the jury upon cross-examination, but only if the forensic analyst testifies at trial. The Court reconsidered this decision regarding the standard for surrogate testimony just two years later in *Bullcoming v. New Mexico*.

E. *BULLCOMING V. NEW MEXICO*

Reaffirming the *Melendez-Diaz* decision, *Bullcoming v. New Mexico* asserted that admitting lab reports through the testimony of a surrogate witness violated the Confrontation Clause.⁹³ In *Bullcoming*, the defendant was arrested for driving while intoxicated, leading the trial court to admit a lab report certifying that his blood alcohol concentration was above the legal limit.⁹⁴ At trial, the prosecution did not call the analyst who conducted the tests and prepared the report because he was on unpaid leave.⁹⁵ Instead, a surrogate analyst, who was familiar with the lab’s testing, but who “neither observed nor reviewed” the testing of the defendant’s blood sample, sponsored the report.⁹⁶

The Court rejected the New Mexico Supreme Court’s argument that the defendant’s “true accuser” was the machine that the analyst used to

86. *Melendez-Diaz*, 557 U.S. at 318–19.

87. *Id.* at 319.

88. *Id.*

89. *Id.* at 320.

90. SCHECK ET AL., *supra* note 14, at 157–58.

91. *Melendez-Diaz*, 557 U.S. at 319.

92. *Id.* (quoting Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 491 (2006)).

93. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011).

94. *Id.* at 2709.

95. *Id.* at 2709, 2716.

96. *Id.* at 2712.

conduct the test.⁹⁷ Rather, the Court determined that the analyst, being more than a “mere scrivener” of the machine, was the defendant’s accuser because the analyst needed specialized skill and knowledge to operate the machine and interpret its results.⁹⁸ Furthermore, the Court decided that surrogate testimony was insufficient to demonstrate any errors the original analyst might have made,⁹⁹ asserting:

[S]urrogate testimony of the kind [the surrogate] was equipped to give could not convey what [the analyst] knew or observed about the events his certification concerned, [that is,] the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst’s part.¹⁰⁰

Furthermore, the Court determined that the report was formally certified and its primary purpose was for use in prosecution.¹⁰¹ The Court explained that when a report is “created solely for an ‘evidentiary purpose,’” the report “ranks as testimonial.”¹⁰² Consequently, the surrogate testimony violated the defendant’s Sixth Amendment rights because the defendant was not afforded the opportunity to cross-examine the analyst *directly* responsible for the results.¹⁰³ Overall, the sheer space for error in forensic analysis leaves far too much room for wrongful conviction and fraud.

II. FORENSIC SCIENCE AND WRONGFUL CONVICTIONS

To understand such lapses in the perceived sanctity of forensic sciences, one need only look to a handful of its failings. On January 22, 1987, a man in a ski mask, carrying a knife, attacked a young woman.¹⁰⁴ Three weeks later, another woman was attacked, but she was able to see her attacker’s reddish-brown beard.¹⁰⁵ Glen Dale Woodall was later convicted of these crimes, despite conflicting evidence, the victims’ hypnotized accusations,¹⁰⁶ and Woodall’s unwavering assertion of innocence.¹⁰⁷

97. *Id.* at 2714.

98. *Id.*

99. *Id.* at 2715.

100. *Id.*

101. *Id.* at 2712 n.6.

102. *Id.* at 2717.

103. *Id.*

104. SCHECK ET AL., *supra* note 14, at 142.

105. *Id.*

106. *Id.* (“After hypnosis, both victims said that Woodall was their attacker, recognized both by his appearance and a singular scent.”). While beyond the scope of this Note, hypnotized accusations or confessions are highly controversial and typically inadmissible as evidence. See Daniel R. Webert, Note, *Are the Courts in a Trance? Approaches to the Admissibility of Hypnotically Enhanced Witness Testimony in Light of Empirical Evidence*, 40 AM. CRIM. L. REV. 1301, 1306–08 (2003).

107. *Id.* at 142–43.

The primary witness used in the prosecution's case-in-chief was Fred Salem Zain, the state trooper in charge of serology for Virginia's crime laboratory.¹⁰⁸ Zain testified that forensic tests performed on the attacker's and Woodall's blood and semen proved that "only six in ten thousand people could have attacked the woman, and Glen Dale Woodall was a member of that very narrow group."¹⁰⁹ However, Zain's laboratory did not have the ability to conduct those tests and, even if he could, his statistics, according to a state investigator, were "off by a mile."¹¹⁰ In fact, in this case Zain's statistics were not just "off"; they were outright fabricated.¹¹¹ Even more alarming, this was not the first time Zain had concocted false lab results.¹¹² As the Woodall story came to light, the State of Virginia—which convicted Woodall and employed Zain—conducted an investigation into Zain's body of work, and it discovered that in a sampling of thirty-six cases Zain had testified in, he "faked data in every case."¹¹³

In this way, forensic science is a double-edged sword. It has the ability to help solve crimes and convict the guilty, but it also has the capacity to condemn the innocent.¹¹⁴ The story of Zain and his morally disastrous career is not just anecdotal. Faulty forensics, including both fraudulent and incompetent analysis, contributed to forty-seven percent of the first confirmed wrongful convictions, totaling over 150 cases.¹¹⁵ Moreover, as the number of wrongful convictions continues to rise as a result of subsequent DNA exoneration, many scholars believe this is only "the tip of a much larger iceberg."¹¹⁶ Thus, it is clear that forensic science is far from infallible. As Barry Scheck of the Innocence Project and his coauthors explain, "[w]hat passes for 'scientific evidence' in courtrooms frequently goes unchallenged, and carries tremendous weight with jurors panning for nuggets of truth in the muddy river of conflicting stories and rickety memories. Too often, though, the 'scientific evidence' is fool's gold."¹¹⁷ Forensic science, consequently, can be dangerous because of its inherently persuasive nature. Defendants require a strengthened confrontation right to combat this danger.

108. *Id.* at 140.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 140, 146.

114. See Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 5 (2009) (explaining that "scientific advances led to Dotson's exoneration, but invalid forensic science testimony had also supported his conviction").

115. *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes-wrongful-conviction> (last visited Apr. 8, 2016) (explaining that faulty forensics contributed to 154 cases of the first 325 confirmed wrongful convictions).

116. See, e.g., Garrett & Neufeld, *supra* note 114, at 8.

117. SCHECK ET AL., *supra* note 14, at 141.

Because the defense subjected Zain to cross-examination, but still failed to expose the fraudulent analysis, it is arguable that confrontation is an ineffective tool against forensic science and therefore does not warrant additional protections from the Supreme Court. Other scholars have advocated alternative methods of control over forensic witnesses, including measures such as external audits to monitor the quality and proficiency of laboratories,¹¹⁸ and even the complete exclusion of evidence from scientific fields deemed unreliable in order to galvanize reform.¹¹⁹ While these are excellent *additional* steps that should be taken to guard against faulty forensics and its impact on wrongful convictions, the role of cross-examination should not be undervalued.

As John Henry Wigmore explained, cross-examination is “the greatest legal engine ever invented for the discovery of truth.”¹²⁰ This is especially true given the central nature of the adversarial system in the U.S. justice system.¹²¹ The U.S. courts are unlikely to shift the responsibility away from the parties to establish the deficiencies of a witness’ testimony.¹²² Thus, if a forensic scientist were to overcome the proposed pretrial safeguards, cross-examination would still be needed to expose any lies and inconsistencies. Just as Justice Scalia explained in *Melendez-Diaz*, cross-examination is an essential tool for exposing faulty forensic science.¹²³ Yet, its effectiveness is greatly undermined if the responsible witness is not required to take the stand.¹²⁴ So, while forensic witnesses like Zain should indeed be subject to additional safeguards like audits, if unreliable or fraudulent science does make it into the courtroom, the defendant should be assured that the responsible witness will be subject to the full force of the adversarial system.

Additionally, cross-examination is a tool that is already available and it should therefore be duly protected. While proposed pretrial safeguards may deter faulty forensics in the future, criminal defendants must rely on their confrontation rights as these proposed safeguards take effect. Moreover, confrontation rights are constitutional safeguards,

118. See, e.g., Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 163 (2007) (“[Q]uality assurance programs, including proficiency testing and external audits, should be mandated.”).

119. See, e.g., D. Michael Risinger, *The NAS/NRC Report on Forensic Science: A Path Forward Fraught With Pitfalls*, 2 UTAH L. REV. 225, 246 (2010) (“Exclusion is a blunt instrument to try to coerce forensic science to reform, but in the end it may be the only one we are left with.”).

120. Kent Roach, *Wrongful Convictions: Adversarial and Inquisitorial Themes*, 35 N.C. J. INT’L L. & COM. REG. 387, 393 (2010) (quoting 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 27 (2d ed. 1923)).

121. *Id.* at 416 (explaining that the United States is unlikely to adopt elements of an inquisitorial system that would shift the responsibility from the jury to judges to determine the merits of a forensic witness’ testimony).

122. *Id.*

123. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318–20 (2009).

124. *Id.*

meaning they cannot be disregarded or replaced because alternative protections exist. Even if additional protections are added, the right to confront adverse witnesses must still be ensured. Because the adversarial system is essential in the United States¹²⁵ and is embraced in its constitutional precepts, better cross-examination should be pursued in tandem with other suggested protections.

Wrongful convictions not only emphasize the need for cross-examination to expose potential inaccuracies and fraud among forensic scientists, but they also act as a reminder that Sixth Amendment protections apply to everyone. The criminal defendants discussed in Part IV of this Note are likely perpetrators of horrendous crimes. In fact, in *People v. Dungo*,¹²⁶ the central issue of the case was not whether Dungo strangled and killed his girlfriend, but for how long he strangled her.¹²⁷ When met with facts such as these, it might be difficult to remain neutral as to inclusion of incriminating evidence, but for such reasons, it is essential to keep in mind that the right to confront “witnesses against him” is not only Dungo’s right, but is also the right of Woodall and every other defendant who retains a presumption of innocence in the face of criminal charges.¹²⁸

III. THE WILLIAMS DECISION AND THE RESULTING CONFUSION

Despite the rather straightforward decisions made in the cases preceding it, the plurality in *Williams v. Illinois* generally disregards the precedence surrounding surrogate testimony for forensic evidence. Due to a flip in the voting composition, the divided Court dramatically shifted its position on the admissibility of surrogate testimony for forensic science. In *Melendez-Diaz*, the majority was comprised of Justices Scalia, Stevens, Souter, Thomas, and Ginsburg,¹²⁹ with Justice Thomas joining with a concurring opinion.¹³⁰ While between *Melendez-Diaz* and the decision in *Bullcoming* the composition of the Court changed, Justice Sotomayor and Justice Kagan replacing Justices Souter and Stevens,¹³¹ the voting configuration remained much the same. This normalcy would, however, cease to be the case three years later when *Williams* came before the Court.

125. See *supra* note 121.

126. *People v. Dungo*, 286 P.3d 442 (Cal. 2012).

127. *Id.* at 446.

128. See, e.g., *Coffin v. United States*, 156 U.S. 432, 452 (1895) (“The law presumes that persons charged with crime are innocent until they are proven by competent evidence to be guilty.”).

129. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 306 (2009).

130. *Id.* at 329 (Thomas, J., concurring) (“I continue to adhere to my position that ‘the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.’”).

131. *Members of the Supreme Court of the United States*, SUP. CR. U.S., http://www.supremecourt.gov/about/members_text.aspx (last visited Apr. 8, 2016).

In *Williams*, the dissenters in *Melendez-Diaz* and *Bullcoming* became the plurality.¹³² Justice Alito wrote that opinion and was joined by Chief Justice Roberts and Justices Kennedy and Breyer.¹³³ The plurality determined the forensic report was nontestimonial because it was not presented for the truth of the matter asserted.¹³⁴ Justice Thomas wrote a concurring opinion that disagreed with all aspects of the plurality decision, but still found the report nontestimonial because it was insufficiently formal.¹³⁵ Justice Kagan, joined by Justices Scalia, Ginsburg, and Sotomayor dissented and wrote a fierce critique of the plurality and the concurring opinion.¹³⁶

Thus, between 2011 and 2014 the Court effectively changed its position on forensic evidence and surrogate witnesses, and the combined opinions of the plurality and concurrence have fostered increased confusion regarding the application of the Confrontation Clause.¹³⁷ Whereas the testimonial nature of lab reports and the requirement for the responsible lab analyst to testify was relatively clear under *Melendez-Diaz* and *Bullcoming*, this shift and the division of the *Williams* Court makes it unclear when forensic evidence is nontestimonial and when the use of a surrogate witness is permissible. Consequently, the decision substantially reduced defendants' ability to effectively predict the admissibility of forensic evidence.

A. THE FACTS

In *Williams*, the defendant, Sandy Williams, was convicted of aggravated criminal sexual assault, aggravated robbery, and aggravated kidnapping.¹³⁸ The victim was taken from her car on her way home from work and then raped and subsequently robbed.¹³⁹ After the attack, doctors treated her wounds and took a blood sample and a vaginal swab.¹⁴⁰ Confirming the presence of semen in the sample, the Illinois State Police ("ISP") laboratory sent the vaginal swab to Cellmark Diagnostics, an independent laboratory, for DNA testing.¹⁴¹ Cellmark returned a report to ISP containing a DNA profile produced from the

132. See *Williams v. Illinois*, 132 S. Ct. 2221 (2012).

133. *Id.* at 2227.

134. *Id.* at 2228.

135. See *id.* at 2255 (Thomas, J., concurring).

136. *Id.* at 2264–77 (Kagan, J., dissenting).

137. See generally Michael H. Graham, *Confrontation Clause: Williams Creates "Significant Confusion" Prompting California Avoidance*, 49 CRIM. L. BULL. 1533 (2013) (explaining the confusion in the legal landscape that the *Williams* opinion creates).

138. *Williams*, 132 S. Ct. at 2231.

139. *Id.* at 2229.

140. *Id.*

141. *Id.*

semen, but at the time of the testing, ISP did not yet suspect Williams of the rape.¹⁴²

Sandra Lambatos, a forensic specialist at ISP, conducted a computer search and found a match to the Cellmark DNA profile.¹⁴³ However, Lambatos neither conducted the initial tests nor observed any of Cellmark's testing.¹⁴⁴ The profile match was for a blood sample taken from Williams after a previous, unrelated arrest.¹⁴⁵ At Williams' bench trial, the prosecution did not call any of the analysts from Cellmark, nor was the report admitted into evidence.¹⁴⁶ Instead, the prosecution relied only on the testimony of forensic witnesses from ISP.¹⁴⁷

Lambatos was among these witnesses, and in her testimony, she relied on the Cellmark DNA profile.¹⁴⁸ She explained that it is common practice to rely on the reports of another expert and, specifically, that the ISP regularly relied on Cellmark, an accredited crime lab, to expedite the testing process.¹⁴⁹ Lambatos testified that, based on her comparison of the two profiles, the sample taken from the vaginal swab "matched" Williams' DNA.¹⁵⁰ However, the testimony presented by Lambatos, and the plurality's subsequent characterization of her testimony, oversimplified the process required to create a DNA sample like the one provided by Cellmark.¹⁵¹

While Lambatos conceded that the sample had been degraded, she failed to call attention to the fact that the rape kit sample was a mixture containing DNA from both the male attacker and the victim.¹⁵² Due to the complexity of the sample, DNA mixture analysis requires greater subjective interpretation.¹⁵³ As a result, the Cellmark analysis, like the tests in *Bullcoming*, required both substantial skill and subjective determinations to interpret the results. Additionally, Lambatos failed to reveal that male profiles other than Williams could have been consistent with the vaginal swab mixture.¹⁵⁴ While these limitations likely had only a minimal effect on the probative value of the evidence, it is the

142. *Id.*

143. *Id.*

144. *Id.* at 2230.

145. *Id.* at 2229.

146. *Id.* at 2230.

147. *Id.* at 2229–30.

148. *Id.* at 2230.

149. See Hanasono, *supra* note 57, at 8.

150. *Williams*, 132 S. Ct. at 2227.

151. See D. H. Kaye, *Williams v. Illinois (Part II: More Facts, from Outside the Record, and a Question of Ethics)*, FORENSIC SCI., STAT. & L. (Dec. 15, 2011), <http://for-sci-law-now.blogspot.com/2011/12/williams-v-illinois-part-ii-more-facts.html>.

152. *Id.*

153. See Itiel E. Dror & Greg Hampikian, *Subjectivity and Bias in Forensic DNA Mixture Interpretation*, 51 SCI. & JUST. 204, 205 (2011).

154. Kaye, *supra* note 151.

oversimplification that is problematic.¹⁵⁵ For example, showing the complexity of the testing process can help a jury recognize the possibility of error. In a case of a less accurate match or more fallible testing methods, information regarding the complexity of the testing method could keep a jury from convicting an innocent person. Despite these dangers, the trial court admitted Lambatos' testimony and the jury convicted Williams, which was ultimately upheld by the Court.¹⁵⁶

B. THE DIVISION

As previously noted, the Justices remained divided in *Williams* as they were in *Melendez-Diaz* and *Bullcoming*, but the dissent now represented the plurality and the majority was now dissenting.¹⁵⁷ Justice Thomas continued to advocate for the formality distinction, developed in *Crawford*,¹⁵⁸ but determined that a signed and detailed report failed to give rise to the requisite level of formality.¹⁵⁹ With Justice Thomas' vote, the Court upheld Williams' conviction.¹⁶⁰ However, because Justice Thomas disagreed with the plurality's rationale,¹⁶¹ the guiding principle for deciding similar cases was left unknown.¹⁶²

1. *The Plurality*

The plurality of the Court decided the Cellmark report was nontestimonial and did not give rise to Sixth Amendment protections.¹⁶³ First, the plurality determined that "this form of expert testimony does not violate the Confrontation Clause because that provision has no application to out-of-court statements that are not offered to prove the 'truth of the matter asserted.'"¹⁶⁴ Justice Alito maintained that Lambatos used the Cellmark report only to establish that it contained a DNA profile, and specifically, did not testify as to the accuracy of the profile that was used to match Williams' DNA.¹⁶⁵ Accordingly, the report was

155. *Id.*

156. *Williams v. Illinois*, 132 S. Ct. 2221, 2244 (2012).

157. *See supra* notes 127–34.

158. *Crawford v. Washington*, 541 U.S. 36, 51 (2004) ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.").

159. *Williams*, 132 S. Ct. at 2255 (Thomas, J., concurring).

160. *Id.* at 2244.

161. *Id.* at 2255 (Thomas, J., concurring) ("As I explain below, I share the dissent's view of the plurality's flawed analysis.").

162. *See Hanasono, supra* note 57, at 11 ("[T]he U.S. Supreme Court leaves state courts, such as California's Supreme Court, with little structured guidance as to the evaluation of out-of-court statements sought to be introduced by the prosecution in criminal trials.").

163. *Williams*, 132 S. Ct. at 2228.

164. *Id.*

165. *Id.*

not offered for the truth of what it asserted, but instead was only offered for the purpose of producing a match.

Furthermore, the plurality contended that even if the report had been offered in such a way, it would still be admissible because it did not target a specific individual.¹⁶⁶ Justice Alito explained that “[t]he report was sought not for the purpose of obtaining evidence to be used against petitioner . . . but for the purpose of finding a rapist who was on the loose.”¹⁶⁷ The testimony, therefore, was not utilized for “accusing a targeted individual of engaging in criminal conduct.”¹⁶⁸ Here, the plurality analogized the circumstances to the ongoing emergency in *Davis v. Washington*.¹⁶⁹ Like the 911 call in *Davis*, the primary purpose of the Cellmark report was to apprehend a rapist and resolve an ongoing emergency.¹⁷⁰ Thus, the primary purpose was not to gather evidence against Williams to be used at trial; rather, it was to apprehend a dangerous criminal.¹⁷¹

2. *The Concurrence*

In his concurrence, Justice Thomas agreed that Lambatos’ testimony did not infringe on Williams’ Sixth Amendment right,¹⁷² yet offered a completely different rationale than the plurality. Justice Thomas asserted that the Cellmark report “lack[ed] the solemnity of an affidavit or deposition” because it was “neither a sworn nor a certified declaration of fact.”¹⁷³ For this reason, he concluded that the report was not testimonial and did not give rise to Sixth Amendment protections.¹⁷⁴

Justice Thomas went on to disagree with the remainder of the plurality’s decision, especially their claim that the statements were not introduced for the truth of the matter asserted.¹⁷⁵ He stressed that “statements introduced to explain the basis of an expert’s opinion are not introduced for a plausible nonhearsay purpose,”¹⁷⁶ and added that “[t]here is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert’s opinion and disclosing that statement for its truth.”¹⁷⁷ Here, Lambatos relied on the Cellmark report for its truth to establish the DNA match and, therefore,

166. *Id.* at 2243.

167. *Id.* at 2228.

168. *Id.* at 2242.

169. *Id.* at 2243.

170. *Id.*

171. *Id.*

172. *Id.* at 2255 (Thomas, J., concurring).

173. *Id.* at 2260.

174. *Id.*

175. *Id.* at 2257–58.

176. *Id.* at 2257.

177. *Id.*

by disclosing her evaluation of that report she disclosed the report for its truth—evidence that would otherwise be inadmissible without opportunity for cross-examination.¹⁷⁸ In a similar fashion, Justice Thomas rejected the plurality’s “targeted individual” rationale and asserted that this approach “lacks any grounding in constitutional text, in history, or in logic.”¹⁷⁹ With such biting remarks, Justice Thomas’ concurrence, as Justice Kagan keenly and repeatedly pointed out,¹⁸⁰ resembled the dissent much more than it resembled any form of agreement with the plurality.

3. *The Dissent*

Writing for the dissent, Justice Kagan addressed and rejected the plurality’s contention that the Cellmark report was not offered for the truth of the matter asserted, stating that “when a witness, expert or otherwise, repeats an out-of-court statement as the basis for a conclusion . . . the statement’s utility is then dependent on its truth.”¹⁸¹ She explained that “[i]f the statement is true, then the conclusion based on it is probably true; if not, not.”¹⁸² Consequently, Justice Kagan expounded, “to determine the validity of the witness’ conclusion, the factfinder must assess the truth of the out-of-court statement on which it relies.”¹⁸³ Accordingly, because Lambatos relied on the truth of the Cellmark report to form her conclusions as to the existence of a match, the prosecution essentially submitted the substance of that report.¹⁸⁴ With “a wink and a nod,” Justice Kagan asserted, the prosecution attempted to circumvent the Confrontation Clause by entering only Lambatos’ testimony.¹⁸⁵ Here, the dissent reiterated concerns about incompetent analysts and argued that the plurality’s decision by admitting surrogate testimony allowed these dangers to go unaddressed.¹⁸⁶

Additionally, Justice Kagan agreed with Justice Thomas that the plurality’s targeted individual test lacked proper precedential foundation.¹⁸⁷ The dissent declared, “[w]here that test comes from is anyone’s guess. . . . None of our cases has ever suggested that . . . the statement must be meant to accuse a previously identified individual.”¹⁸⁸ Additionally, the plurality’s analogy to an ongoing emergency stretched

178. *Id.* at 2258.

179. *Id.* at 2262.

180. *See, e.g., id.* at 2272 (Kagan, J., dissenting).

181. *Id.* at 2268–69.

182. *Id.* at 2268.

183. *Id.* at 2268–69.

184. *See id.* at 2269–70.

185. *Id.* at 2270.

186. *Id.* at 2272.

187. *Id.* at 2273.

188. *Id.* at 2273–74.

the doctrine too far, as the corresponding cases never address the routine practices of laboratory analysts.¹⁸⁹ Consequently, without requiring the trial court to give Williams the opportunity to confront the Cellmark analyst, the plurality's decision allowed the prosecution to continue to circumvent the Confrontation Clause despite the testimonial nature of the out-of-court statement.¹⁹⁰

While the dissent considered Justice Thomas' argument that the Cellmark report was insufficiently formal,¹⁹¹ Justice Kagan asserted that Justice Thomas' opinion, if adopted, "would turn the Confrontation Clause into a constitutional gee-gaw—nice for show, but of little value."¹⁹² Specifically, prosecutors could avoid confrontation by using the right kind of forms and particular language.¹⁹³ As Justice Kagan stated, prosecutors can merely find the "magic words" to prevent reports from being deemed "certified."¹⁹⁴ As a result, the Confrontation Clause would be reduced to an insignificant procedural obstacle that could be easily avoided by, for example, reducing the number of signatures on the report.

C. THE CONFUSION

With Justice Thomas' concurrence, a total of five Justices rejected the idea that statements, like those contained in the Cellmark report, are not hearsay when offered to show the basis for the expert's opinion. Additionally, the same five Justices disagreed with the idea that the Confrontation Clause does not apply to statements gathered for prosecution when there is no individualized suspect. As Justice Kagan pointed out, however, no five Justices agreed with any of the plurality's interpretations of the testimonial standard.¹⁹⁵ Following the decision, it could be gleaned that testimony might be admissible, as it was in *Williams*, if it satisfies the plurality's nontargeted individual test and fails to have the requisite number of signatures and certifications that Justice Thomas demands for formality. Thus, lower courts are left wondering where the majority of the Court truly lies.

Just as Justice Kagan predicted, the *Williams* decision has consequently left "significant confusion in [its] wake."¹⁹⁶ As the Seventh Circuit Court of Appeals noted in *United States v. Maxwell*, "the Court's

189. *Id.* at 2274.

190. *Id.* at 2272 ("The plurality thus would countenance the Constitution's circumvention.").

191. *Id.* at 2276.

192. *Id.*

193. *Id.*

194. *Id.*

195. *See id.* at 2272 ("What a neat trick—but really, what a way to run a criminal justice system. No wonder five Justices reject it.").

196. *Id.* at 2277.

4-1-4 division left no clear guidance about how exactly an expert must phrase its testimony about the results of testing performed by another analyst in order for the testimony to be admissible.”¹⁹⁷ Consequently, courts have utilized various methods of interpretation to deal with confusion in the aftermath of *Williams*. Some have decided that *Williams* is only binding in its narrow circumstances and results,¹⁹⁸ while others have chosen to ignore the *Williams* decision all together. For example, in *United States v. James*, the Second Circuit Court of Appeals determined that *Williams* created no binding precedent.¹⁹⁹ Others, notably state courts, have resorted to more mathematical methods.

IV. A COMPARATIVE LOOK AT STATE RESPONSES

Similarly frustrated by the *Williams* decision, some state courts have found a mathematical form of abiding by the Court’s vague ruling, predicting the voting of each Justice until a principle that will garner five votes is discovered.²⁰⁰ As Michael H. Graham noted in his article, “[i]t is self-evident from recent reported California Supreme Court opinions that the California Supreme Court has simply run out of patience with the U.S. Supreme Court’s inability to fashion a coherent logical, practical interpretation of the confrontation clause.”²⁰¹ To manage this confusion over the admissibility of surrogate testimony for autopsy reports, the California Supreme Court and the New Mexico Supreme Court implemented a system referred to, for the purposes of this Note, as head-counting.²⁰² Specifically, head-counting occurs when the courts determine the admissibility of testimony by calculating whether five or more U.S. Supreme Court Justices would agree to the inclusion of specific testimony. The following Subparts explore New Mexico’s and California’s application of *Williams* and analyze their results.

197. *United States v. Maxwell*, 724 F.3d 724, 727 (7th Cir. 2013).

198. *See Hanasono*, *supra* note 57, at 10–11 (exploring the various interpretations of the *Williams* decision).

199. *See United States v. James*, 712 F.3d 79, 91 (2d Cir. 2013).

200. Because a bare majority of the Court determines the outcome of the case head counting or “counting noses” appears to be generally accepted and widely used. *See, e.g.*, Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 YALE L.J. 1692, 1703 n.39, 1724 (2014) (quoting Roderick M. Hills, Jr., *Are Judges Really More Principled than Voters?*, 37 U.S.F. L. REV. 37, 58–59 (2002)) (“Because the Justices are political equals: we assess the quality of argument by counting noses.”). But, as demonstrated by the decisions in *Dungo* and *Naverette*, this method can lead to contradictory results.

201. Graham, *supra* note 137, at 1541.

202. *See State v. Navarette*, 294 P.3d 435, 437 (N.M. 2013); *People v. Dungo*, 286 P.3d 442, 455–56 (Cal. 2012) (Chin, J., concurring).

A. *PEOPLE V. DUNGO*

In *Dungo*, the defendant was charged with the murder of his girlfriend Lucinda Correia Pina.²⁰³ The defendant admitted to the crime, but argued at trial that he killed her in the heat of passion and without malice, and as a result²⁰⁴ the prosecution offered the testimony of forensic pathologist Robert Lawrence to refute this claim.²⁰⁵ Lawrence testified that Pina had died of “asphyxia caused by strangulation,”²⁰⁶ further explaining that because Pina’s hyoid bone—the bone located in front of the neck and between the lower jaw and the larynx²⁰⁷—was not fractured, she had in fact been continuously strangled for “more than two minutes.”²⁰⁸ With this information, the prosecution argued that the defendant “could not have been acting in the heat of passion for that length of time and that therefore the killing was murder rather than manslaughter.”²⁰⁹

Lawrence, however, did not conduct the autopsy; rather, pathologist George Bolduc performed the autopsy on Pina’s body.²¹⁰ The prosecution did not indicate that Bolduc was unavailable to testify at trial²¹¹ and, moreover, it was revealed during a pretrial evidentiary hearing that Bolduc had been fired from his position in Kern County and had resigned from Orange County “under a cloud.”²¹² In a corresponding footnote, the California Supreme Court surreptitiously explained that “under a cloud” meant that Bolduc was suspected of “basing his conclusion regarding the cause of death on a police report rather than on medical evidence.”²¹³ Although the trial judge permitted the defendant to cross-examine Lawrence about Bolduc’s qualifications,²¹⁴ confronting a credible surrogate witness would likely not have the same impact as crossing the pathologist directly responsible for producing fraudulent work.

Ultimately, the majority of the California Supreme Court determined that the information relayed by Lawrence was informal and that the primary purpose of the autopsy was not for criminal investigation.²¹⁵ First,

203. *Dungo*, 286 P.3d at 444–45.

204. *Id.* at 445–46.

205. *Id.*

206. *Id.* at 446.

207. *Hyoid Bone*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/279422/hyoid-bone> (last visited Apr. 8, 2016).

208. *Dungo*, 286 P.3d at 446.

209. *Id.* at 445.

210. *Id.*

211. *Id.*

212. *Id.* at 445–46.

213. *Id.* at 445 n.2.

214. *Id.* at 446.

215. *Id.* at 450.

the court explained that statements that record objective facts are less formal than statements that introduce a pathologist's conclusions.²¹⁶ Here, the court reasoned that Bolduc's report was more appropriately categorized as observations rather than conclusions.²¹⁷ In her concurrence, Justice Werdegar further emphasized that the autopsy report was not "sworn or certified."²¹⁸ Second, the court maintained that the autopsy was not prepared with the primary purpose of prosecution, but rather in accordance with the governing statute that requires inquiries into the cause of death for a number of various circumstances.²¹⁹ The court explained that "the scope of the coroner's statutory duty to investigate is the same, regardless of whether the death resulted from criminal activity."²²⁰ The autopsy report, therefore, had several purposes, including but not limited to the use in prosecution.²²¹

The court maintained that the defendant did not have the right to confront Bolduc, the actual preparer of the autopsy,²²² and consequently, Dungo's confrontation right had not been violated.²²³ As Justice Chin clearly asserted, "[i]t took a combination of two opinions [the *Williams* plurality and Justice Thomas' concurrence]—each containing quite different reasoning—to achieve the majority result."²²⁴ The court applied a test that would satisfy one Justice and four Justices separately, but would never satisfy a uniform majority of the Supreme Court. As a consequence of the divided *Williams* Court, the decision in *Dungo* represents a somewhat piecemeal application of the Confrontation Clause doctrine.

In her dissent, Justice Corrigan attacked the foundation of the majority's decision by sharply explaining that the majority's distinction between observations and conclusions was previously rejected in *Bullcoming*.²²⁵ Additionally, she asserted that, while the primary purpose of some autopsies may not be prosecutorial, other circumstances may well give rise to the production of testimonial statements.²²⁶ The question

216. *Id.* at 449.

217. *Id.*

218. *Id.* at 452 (Werdegar, J., concurring).

219. *Id.* at 450; see also CAL. GOV'T CODE § 27291 (West 2016) ("It shall be the duty of the coroner to inquire into and determine the circumstances, manner, and cause of all violent, sudden, or unusual deaths. . .").

220. *Id.*

221. *Id.*

222. *Id.* at 444.

223. *Id.*

224. *Id.* at 455 (Chin, J., concurring); see also *id.* at 456 ("[W]e must identify and apply a test which satisfies the requirement of both Justice [Alito's] plurality opinion and Justice [Thomas's] concurrence.").

225. *Id.* at 463 (Corrigan, J., dissenting).

226. *Id.* at 466.

then was whether Bolduc's report was testimonial.²²⁷ In response to this, due in large part to the presence of the police during the autopsy, Justice Corrigan determined that Bolduc's primary purpose was to prepare statements for use in a criminal trial.²²⁸ Accordingly, she concluded that the testimony violated the Confrontation Clause.²²⁹

B. *STATE V. NAVARETTE*

In a similar case in New Mexico, Reylando Ornelas was shot and killed while leaning into the open driver's side window of a parked car.²³⁰ Navarette, who was in the passenger's seat of the car during the incident, claimed that the driver was the shooter.²³¹ The prosecution called Dr. Ross Zumwalt to testify as to the cause and manner of death,²³² even though Dr. Mary Dudley performed the autopsy and Zumwalt "neither participated nor observed Dr. Dudley perform the autopsy."²³³ Despite Zumwalt's absence from the autopsy procedure, he testified that Dudley "followed the standard procedure for performing autopsies."²³⁴ Additionally, Zumwalt concluded, based on the autopsy report and the photographs of the body, that due to the absence of soot and stippling, the gun was not within two feet of Ornelas when the shooter fired the gun.²³⁵ With this testimony, the prosecution argued that the shooter could not have been the driver.²³⁶

In this case, the New Mexico Supreme Court was explicit about its head-count technique. The court explained, "[o]ur examination of *Crawford* and its progeny reveals that at least five justices of the [U.S.] Supreme Court have agreed upon the following principles that we conclude are essential to a Sixth Amendment Confrontation Clause analysis."²³⁷ The opinion then methodically introduced each principle, which the court believed had gained the favor of five Justices. The U.S. Supreme Court established five of these principles prior to *Williams*.²³⁸ To discern the other principles, as in *Dungo*, the Court attempted to reconcile the division of the *Williams* Court.²³⁹ Here, rather than utilizing the plurality and the concurring opinion in *Williams*, the New Mexico

227. *Id.*

228. *Id.* at 466–67.

229. *Id.*

230. *State v. Navarette*, 294 P.3d 435, 436 (N.M. 2013).

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 437.

236. *Id.*

237. *Id.*

238. *Id.* at 437–39 (establishing the principles identified as the first, second, third, fifth, and sixth).

239. *Id.* at 439.

Supreme Court ultimately followed only those principles accepted by a uniform majority of the U.S. Supreme Court. In fact, the court in *Navarette* discussed three principles established by taking the dissenting and concurring opinion of the *Williams* decision.²⁴⁰

The first of these principles asserts that “even if a statement (in this case, a forensic report), does not target a specific individual, the statement may still be testimonial.”²⁴¹ In *Williams*, both Justices Thomas and Kagan rejected the plurality’s choice to make reports nontestimonial if they were not targeted at a specific individual.²⁴² Second, “the fact that an out-of-court statement (in this case, the forensic report) is not inherently inculpatory does not make it nontestimonial.”²⁴³ Again in *Williams*, both Justices Kagan and Thomas refused to recognize the distinction between “inherently inculpatory” statements and those that are “merely helpful.”²⁴⁴ Justice Kagan asserted that the plurality could not “gain any purchase from the idea that a DNA profile is not inherently inculpatory.”²⁴⁵ Third, “an out-of-court statement that is disclosed to the fact-finder as the basis for an expert’s opinion is offered for the truth of the matter asserted.”²⁴⁶ The dissenting opinion and Justice Thomas’ concurring opinion agreed that the report, which acted as the basis of the testifying witness’ knowledge, was in fact offered for the truth of the matter asserted.²⁴⁷

Relying on these principles, the court determined that Zumwalt’s in-court statements related testimonial hearsay and therefore, violated *Navarette*’s confrontation right.²⁴⁸ The court explained that it was self-evident that the statements Dudley made in the autopsy report were prepared for use at trial.²⁴⁹ The controlling New Mexico statutes, section 24-11-5 and section 24-11-8, provided that “any . . . sudden, violent or untimely death[,] . . . the cause of which is unknown, shall [be] report[ed] . . . to law enforcement,”²⁵⁰ and a “medical investigator shall promptly report his findings . . . to the district attorney in each death investigated.”²⁵¹ As a result, Dudley should have reasonably foreseen the

240. *Id.* at 438–39.

241. *Id.*

242. *Id.* at 439.

243. *Id.*

244. *Id.*

245. *Williams v. Illinois*, 132 S. Ct. 2221, 2274 n.5 (2012).

246. *Navarette*, 294 P.3d at 439.

247. *Id.*

248. *Id.* at 444.

249. *Id.* at 440.

250. N.M. STAT. ANN. § 24-11-5 (West 2016).

251. *Id.* § 24-11-8.

use of the report at trial.²⁵² Consequently, the statements were testimonial and inadmissible unless Dudley testified at trial.²⁵³

C. THE COMPARISON

In both *Dungo* and *Navarette*, surrogate witnesses presented the results of autopsies performed by other forensic pathologists,²⁵⁴ yet the courts came to contrary results regarding the admissibility of that testimony. In *Dungo*, the court deemed the testimony of the surrogate witness sufficient²⁵⁵ and in *Navarette*, the court concluded that the surrogate testimony violated the defendant's Sixth Amendment right.²⁵⁶ The circumstances of these cases are quite similar, both pathology reports were similarly formal and prepared for trial, and both cases presented dangers the Court sought to restrict prior to the *Williams* decision, namely, the danger of deficient or fraudulent forensic science.

First, the intent for prosecution is essentially the same in both cases. The statutes in California and New Mexico both require autopsies be performed in the event of a violent death.²⁵⁷ While, as the court noted, the California Government Code requires autopsy reports in a variety of circumstances, irregularity or violence appear to be the underlying factors for the listed conditions.²⁵⁸ For example, the first lines read: "It shall be the duty of the coroner to inquire into and determine the circumstances, manner, and cause of all violent, sudden, or unusual deaths."²⁵⁹ Consequently, similar to the explicit requirement in the New Mexico statute, the California Code implicitly mandates autopsies in criminal situations. Therefore, although there may be other purposes for determining the cause and manner of death, the primary purpose of the autopsy reports in both of these cases appear to be use in prosecution.

Moreover, autopsies are important tools for prosecution in general.²⁶⁰ In fact, in homicide cases, the autopsy is typically the central piece of incriminating evidence.²⁶¹ A pathologist could plainly predict, especially in a case of a violent death through strangulation or a gunshot wound, the use of that autopsy report in a criminal prosecution. Consequently, regardless of the individual circumstances of a case,

252. *Navarette*, 294 P.3d at 441.

253. *Id.* at 444.

254. *See id.* at 436; *see also* *People v. Dungo*, 286 P.3d 442, 445-46 (Cal. 2012).

255. *Dungo*, 286 P.3d at 444.

256. *Navarette*, 294 P.3d at 444.

257. *See* CAL. GOV'T CODE § 2749I (West 2016); N.M. STAT. ANN. § 24-11-5 (West 2016).

258. CAL. GOV'T CODE § 2749I (West 2016).

259. *Id.*

260. Andrew Higley, *Tales of the Dead: Why Autopsy Reports Should Be Classified as Testimonial Statements Under the Confrontation Clause*, 48 NEW. ENG. L. REV. 171, 172 (2013).

261. *Id.*

autopsy reports appear to inherently fall within the category of foreseeable use at trial.

Second, the reports are also similarly formal. As Justice Corrigan outlines in her dissent, Bolduc's autopsy report bore the badge of the San Joaquin County Sheriff, had "Coroner's Autopsy Report" on the upper right of every page, and included Bolduc's name at the bottom of each page.²⁶² Further, the physical report had the appearance of formality similar to that described in *Bullcoming*.²⁶³ Because the New Mexico Supreme Court justices focused on the primary purpose of the autopsy report, the opinion does not describe in detail the appearance of the report. However, the statements within the report as to the manner and cause of death are similar to those produced by Bolduc.²⁶⁴ The statements, therefore, are likely similar in formality.

Finally, both cases represent the dangers of forensic evidence that the Court worked to guard against. In *Melendez-Diaz*, Justice Scalia asserted that confrontation could expose analysts with improper or insufficient training and any deficiencies in judgment.²⁶⁵ Justice Ginsburg further endorsed this reasoning in *Bullcoming*, explaining that "surrogate testimony [could not] expose any lapses or lies on the certifying analyst's part."²⁶⁶ The Court in these cases worked to guard against forensic evidence that might have deficiencies due to the analyst's faulty judgment or mistaken interpretations, as might have been the case with *Navarette*.

In *Navarette*, the pathologist, Zumwalt, made conclusions as to the position of the shooter based on the absence of stippling and soot.²⁶⁷ Stippling "consists of multiple punctate abrasions of the skin due to the impact of small fragments of foreign material"²⁶⁸ and has been subject to scientific critiques.²⁶⁹ For example, some critics have stated that "[g]unpowder residue is usually associated with a distance of contact up to 12 in[ches]. The determination of distance by counting burned and unburned powder indentations is arbitrary at best."²⁷⁰ Thus, a determination as to the distance at which a gun was fired can require a great deal of subjective interpretation. In fact, the court in *Navarette* conceded that

262. *People v. Dungo*, 286 P.3d 442, 463–64 (Cal. 2012) (Corrigan, J., dissenting).

263. *Id.* at 464.

264. *Compare id.* at 446 (majority opinion) (explaining that the autopsy report contained photographs and a description of the body), and *State v. Navarette*, 294 P.3d 435, 437 (N.M. 2013) (stating that the autopsy report contained photographs and a description of the victim's injuries).

265. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 320 (2009).

266. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2715 (2011).

267. *Navarette*, 294 P.3d at 437.

268. VINCENT J.M. DI MAIO, *GUNSHOT WOUNDS: PRACTICAL ASPECTS OF FIREARMS, BALLISTICS, AND FORENSIC TECHNIQUES* 103 (2d ed. 1999).

269. John Louis Larsen & Arthur H. Borchers, *Handguns: Range of Fire and Gunpowder Stippling*, EVIDENCE TECH. MAG. (2008), http://www.evidencemagazine.com/index.php?option=com_content&task=view&id=1119.

270. *Id.*

exact fact.²⁷¹ Stippling analysis, therefore, presents substantial risk of deficiencies, both in training and judgment, just as Justice Scalia discussed in *Melendez-Diaz*.²⁷²

Any dangers of incompetence in *Dungo*, on the other hand, are not as apparent. Unlike *Navarette*, as the court in *Dungo* contended, the determination of whether a bone is broken requires less interpretation and more objective observations.²⁷³ Something such as a broken bone, for example, is less likely to be incorrectly or incompetently analyzed. However, the U.S. Supreme Court explained that the Confrontation Clause protects defendants against fraudulent attacks as well as incompetent ones. For instance, in *Melendez-Diaz*, Justice Scalia contended that the Confrontation Clause was designed to awaken the conscience of fraudulent witnesses.²⁷⁴

So, though the subjective interpretation required in *Dungo* is less than that in *Navarette*, this does not eliminate the danger of fraud. In *Dungo*, the danger of fraudulent reports seems substantially higher than in *Navarette*. While there was no evidence of fraud in *Dungo*, the suspicious history of Bolduc²⁷⁵ raised concerns of repeated questionable practices, information that would have been important to introduce to the jury. In this way, the dangers of testimonial hearsay that the Confrontation Clause is specifically designed to inhibit are present in both cases.²⁷⁶

Overall, despite the fact that *Navarette* and *Dungo* presented similar circumstances and posed similar hearsay dangers, the cases produced contrary results. Quite simply, the cases demonstrate that *Williams* can be used in a multitude of ways. Courts can choose from a variety of different interpretations to base their opinions. Thus, the question is not how can *Williams* be used, but rather, how *should* it be used.

V. LIMITING THE IMPACT OF THE *WILLIAMS* DECISION

By relying on the plurality's rationale and Justice Thomas' concurrence, the court in *Dungo* failed to follow principles established by the majority of the U.S. Supreme Court. Rather, the *Dungo* court satisfied four Justices and one Justice separately and, consequently, overemphasized the importance of those conflicting opinions, particularly by exaggerating the significance of formality. The plurality and concurring opinions not only lack majority support, but also fail to address the dangers of forensic science that the Court intended to

271. *Navarette*, 294 P.3d at 443.

272. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 320 (2009).

273. *People v. Dungo*, 286 P.3d 442, 449 (Cal. 2012).

274. *Melendez-Diaz*, 557 U.S. at 318.

275. *Dungo*, 286 P.3d at 445-46.

276. *See Melendez-Diaz*, 557 U.S. at 318-20.

safeguard against via the exclusion of surrogate testimony. Specifically, it fails to protect against those dangers that lead to wrongful convictions.

First, formality “will not guarantee honesty, proficiency, or methodology.”²⁷⁷ The number of labels or signatures, in other words, cannot prevent incompetent or fraudulent work. Certification does not “make any laboratory technician infallible.”²⁷⁸ Second, ongoing emergencies like the 911 call in *Davis* may have greater assurances of honesty because they are not provided for trial but seek aid in dangerous circumstances. Yet the “ongoing emergency” represented in *Williams* is not similarly situated. There, the forensic analyst had ample time to make mistakes or lie. Finally, Lambatos’ analysis relied on the accuracy of the Cellmark report and consequently her testimony as to the existence of a match, affirmed that accuracy for the jury. As Justice Kagan explained, “[i]f the statement is true, then the conclusion based on it is probably true; if not, not.”²⁷⁹ However, Lambatos’ testimony alone does not demonstrate the quality or honesty of the Cellmark report. Only by cross-examining the preparer of the Cellmark report and the individual who established the subsequent match could the defendant establish if one or the other engaged in fraudulent acts during the production of the material. Thus, the rationales supported by the plurality and concurrence inadequately protect defendants from incompetent or fraudulent forensic evidence.

As a result, courts should act to limit the impact of the *Williams*’ plurality and concurring opinion by relying on those principles truly supported by a majority of the Court. In the context of forensic science and surrogate witnesses, this requires that defendants be afforded the right to confront analysts directly responsible for the production of evidentiary materials, whether those materials are used to directly accuse the defendant or indirectly implicate the defendant through comparative processes like DNA matching. By adhering to this majority, lower courts can ensure that the principles followed will protect the Confrontation Clause.

Overall, if *Williams v. Illinois* is to be followed at all,²⁸⁰ it should be treated as a narrow exception, not the rule. Instead, emphasis should be placed on principles supported prior to *Williams* and those standards within *Williams* that were supported by five unified Justices, namely those principles identified by the dissent.

277. See Hanasono, *supra* note 57, at 19.

278. *Id.* at 20.

279. *Williams v. Illinois*, 132 S. Ct. 2221, 2268 (2012) (Kagan, J., dissenting).

280. See, e.g., *United States v. James*, 712 F.3d 79, 95 (2d Cir. 2013) (determining that *Williams* created no binding precedent).

CONCLUSION

In general, courts are often leery of excluding evidence.²⁸¹ What is more, they are particularly hesitant to exclude autopsy reports for fear of creating a “statute of limitations on murder.”²⁸² Additionally, as a result of the *Williams* decision, courts have been forced to create piecemeal standards for the Confrontation Clause. They must now pick and choose standards that they hope will be upheld. For example in *People v. Dungo*, the court chose principles introduced in *Williams* that only have the support of four Justices, or perhaps even just one Justice, in order to admit the condemning evidence.

As a consequence, the U.S. Supreme Court has left defendants vulnerable to inconsistent applications of the Sixth Amendment and perhaps greater inclusion of faulty forensic science. Depending on what state or district a defendant is in, she may be protected by a substantially weaker confrontation right than if she happened to be somewhere else. This approach does not sufficiently guard against the hearsay dangers addressed in *Melendez-Diaz* and *Bullcoming*. Nor does this approach protect innocent defendants from wrongful convictions. Therefore, while the cutting comments that are rife in the dissent’s opinion make the *Williams* case interesting to read, the overwhelming confusion created by this decision necessitates a second look. Hopefully future decisions from the Supreme Court will not only clarify the current confusion but also reinforce the Confrontation Clause, as its impact has been significantly diminished with the varying applications of *Williams*.

In the interim, however, courts should employ restraint. Rather than overemphasizing the formality requirement championed by Justice Thomas, as California did in *People v. Dungo*, courts should follow the lead of New Mexico as in *State v. Navarette*. That is, they should err on the side of exclusion and protecting the defendant’s confrontation rights by focusing on the rationales agreed to by five Justices. This will help to preserve the force of the Confrontation Clause and stop it from becoming a simple gee-gaw.

281. See Douglass, *supra* note 5, at 220.

282. Ginsberg, *supra* note 10, at 119.
