

Confrontation's Convolutions

*Christine Chambers Goodman**

Despite the Supreme Court's efforts in the 2004 Crawford v. Washington case to narrow the parameters of the Sixth Amendment right to confrontation, lower courts vary widely in interpreting when the Confrontation Clause applies. Subsequent 5–4 and 4–1–4 decisions of the Court have raised more questions than answers, especially in the context of expert testimony. In analyzing the decade of cases, this Article finds that confusion abounds in three primary areas: (1) which witnesses are actually witnesses against the accused, (2) whether the evidence must be accusatory in order to be testimonial, or must be both accusatorial and testimonial, and (3) whether and when testifying experts may rely upon the reports of other non-testifying experts. The Court has had many petitions for certiorari that would have provided opportunities to clarify the scope of the doctrine as to such evidence as autopsy reports, machine-generated data, and reports identifying substances, samples, and DNA profiles, but accepted none involving expert witness testimony. While the Ohio v. Clark decision in June 2015 provided some guidance on the first question of who counts as a witness against the accused, there was little clarification on the accusation issue, nor on any of the other issues involving expert witnesses.

This Article explains the post-Crawford convolutions of Confrontation Clause analysis, and identifies the remaining questions in evaluating whether a statement is testimonial, with special focus on the use of expert witness opinion testimony. Part IV concludes this Article with modes of analysis for Confrontation Clause issues going forward. Given the circuit splits on what counts as testimonial evidence in various areas, this Article addresses three proposals: (1) to treat quasi-

* Professor of Law, Pepperdine University School of Law; J.D. Stanford, A.B. *cum laude* Harvard College. I want to thank the Dean's Summer Research Grant Fund for providing financial support for this research, Ikedi Onyemaobim for his excellent research assistance from the beginning of the project, and Jennifer Volcy for her editing skills as we fine-tuned the Article for publication. This Article benefited greatly from the editorial comments of the *Loyola University Chicago Law Journal* staff, as well as the participants in the Loyola University Chicago School of Law Sixth Annual Constitutional Law Colloquium.

percipient expert witnesses differently than other experts, (2) to consider certain expert reports and other types of statements non-testimonial so that traditional hearsay exceptions will be adequate for admission, and (3) to provide specifically tailored instructions for jury trials involving non-disclosure of expert basis evidence. As long as the Supreme Court declines petitions that provide opportunities to clarify the scope and parameters of the right to confrontation, this Article provides some guidance for lower courts.

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I. INTRODUCTION

The United States Supreme Court's doctrine on the Sixth Amendment's Confrontation Clause has been evolving since the turn of the century. The primary purpose of the right to confront is to ensure reliability by subjecting witnesses against an accused to cross-examination in an adversary proceeding. That right has three components: (1) the right to be present at trial, (2) the right to have prosecution witnesses present at the trial, and the (3) right to cross-examine prosecution witnesses. The physical presence of prosecution witnesses permits the jury to observe the demeanor and other body language of the witnesses, which helps the jurors to evaluate credibility. When the hearsay declarant is not present in a criminal trial, only the person who is in court repeating the declarant's out-of-court statement can be cross-examined, and concerns about credibility and fairness are enhanced.

While the 2004 *Crawford* case made an attempt to streamline Confrontation Clause doctrine, limiting its applicability to "testimonial" statements,¹ the subsequent plurality and sharply divided 5–4 opinions leave prosecutors and criminal defense attorneys (and law professors) still wondering how to analyze expert witness testimony under the Confrontation Clause. Part Two of this Article describes the evolution of the doctrine, noting that these decisions have raised more questions than answers, particularly in cases involving the use of expert evidence.

Litigants in lower courts sought such guidance through a number of petitions for certiorari filed in the 2013–14 term. Those petitions covered such areas as the limits of admissibility for autopsy reports, machine-generated data, and reports identifying substances, samples, and DNA profiles. Of the thirteen petitions for writ of certiorari raising Confrontation Clause issues sent to the Court in the past three years, only one was accepted, and it did not involve expert witness testimony. The petition in *Ohio v. Clark* provided the opportunity to address whether a teacher, as a mandatory reporter, is a state actor when interviewing a child, and whether the child's response to the teacher's inquiries constitutes a testimonial statement.²

1. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

2. On October 2, 2014, the Court finally granted a petition for certiorari in a case implicating the Confrontation Clause in *Ohio v. Clark*, 135 S. Ct. 43 (2014) (mem.). A jury convicted the

Part Three analyzes the varied interpretations of the Confrontation Clause doctrine in light of the *Clark* decision, and the remaining questions as to whether a statement is testimonial, with special focus on the use of expert witness testimony. Confusion abounds in three primary areas: (1) which witnesses are deemed to be a witness *against* the accused, (2) whether the evidence must be accusatory in order to be testimonial, or must be *both* accusatorial and testimonial, and (3) whether and when testifying experts may rely upon the reports of other non-testifying experts in giving their opinions. While the *Clark* decision provided some guidance on the first question of who counts as a witness against the accused, it presented little clarification on the accusation issue, or on any of the other issues involving expert witnesses.

Part Four concludes this Article with modes of analysis for Confrontation Clause issues going forward, making three proposals to help untangle the mixture of approaches applied in various jurisdictions. This Article does not take a position on whether the Confrontation Clause protections should be expanded or contracted, but rather seeks to make sense of the current Court's doctrine.

II. BACKGROUND ON THE LAST DECADE'S EVOLUTION OF THE CONFRONTATION CLAUSE

A. *Confrontation Clause Basics*

The Confrontation Clause of the Sixth Amendment provides the accused with the right “to be confronted with the witnesses against him” in all criminal prosecutions.³ The clause ensures that any evidence submitted against a criminal defendant during trial is subject to rigorous testing, as the accused has the opportunity to cross-examine adverse witnesses.⁴ This kind of face-to-face confrontation, although not an absolute right, is considered a core value protected by the clause.⁵

1. *Crawford* Narrows Its Scope to “Testimonial” Statements

After a long history of cases limiting the scope of the right to

defendant, *Clark*, of felonious assault, child endangerment, and domestic violence. *Clark* appealed his conviction arguing that the hearsay testimony admitted violated his right to confrontation. An Ohio court of appeals reversed and remanded. The State appealed, and the Ohio Supreme Court affirmed in a 4–3 opinion. The U.S. Supreme Court decision is discussed in Part II below. See also *infra* notes 15–29, 33–34, 36–38 and accompanying text.

3. U.S. CONST. amend. VI.

4. Sarah K. Eddy, *Sixth Amendment at Trial*, 90 GEO. L.J. 1708 (2002).

5. *Id.*

confront witnesses against the accused, the United States Supreme Court held that the Confrontation Clause requirements apply only in situations where the hearsay evidence that the prosecution seeks to admit is categorized as a “testimonial” statement.⁶ If the statement is not testimonial, then the prosecution simply must satisfy the elements of the pertinent hearsay exception, and the statement will be admissible.⁷

If the statement is testimonial but the declarant who made the “testimonial” statement outside of court is produced to testify in court, then there is no Confrontation Clause violation for admitting the hearsay statement because the declarant can be cross-examined about the statement under oath.⁸ However, if the statement is testimonial, but the declarant is not produced, then the declarant must be proven to be unavailable by a preponderance of evidence under Federal Rule of Evidence 804(a), and the accused must have had a prior opportunity to cross-examine that declarant about that statement.⁹ Otherwise, admitting the hearsay statement against the criminal defendant violates the defendant’s rights under the Confrontation Clause.¹⁰

So, how does one determine whether a statement is testimonial? The *Crawford* case declined to provide a comprehensive definition, but said that at a minimum, it includes “prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and police interrogations.”¹¹ Subsequent cases have provided more substance to this definition, applying the “primary purpose” test. Where the primary purpose of the conversation or interrogation is to establish or prove past events potentially relevant to later criminal prosecution, then the statement will be considered testimonial, unless it is in response to an ongoing emergency.¹²

6. *Crawford*, 541 U.S. at 68 (2004) (“Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”).

7. *See Id.* (“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 . . .”).

8. *See Id.* at 59 n.9 (2004) (“[W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.”).

9. *See id.* at 59 (“Our cases have thus remained faithful to the Framers’ understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”).

10. *Id.* (holding that testimonial statements of an unavailable witness violates the Confrontation Clause unless there is a prior opportunity for cross-examination).

11. *Id.* at 68.

12. *Davis v. Washington*, 547 U.S. 813, 814 (2006):

[S]tatements are nontestimonial when made in the course of police interrogation under

One researcher performed a statistical analysis of statements determined by lower courts post-*Crawford* to be testimonial and those that were not, and reached the following conclusion:

First, state action matters. A lot. A given statement is almost twice as likely to be found to be testimonial, all else equal, when it is made to a state actor. The fact that the recipient of a statement is either a police officer or a nonpolice government official (for example, a fire marshal, prosecutor, or judge) substantially increases the likelihood that a court will find that statement to be testimonial.¹³

Keenan's research notes that other statistics are more ambiguous, such as statements made to health care professionals, in part because of the variety of situations in which they operate. This variety includes everything from medical emergencies to child witness interviews conducted by social workers in suspected abuse cases, with the latter being seen as a "means to collect evidence" and "the interviews sometimes occur[ing] at the instigation of the police."¹⁴ The Court recently addressed this child abuse witness issue in *Ohio v. Clark*, which is discussed in the next Section.

2. *Ohio v. Clark* Reaffirms the Primary Purpose Test

The central issue in *Ohio v. Clark* was whether a child's out-of-court statements to his teachers in response to the teachers' concerns about possible child abuse rose to the level of "testimonial" statements subject to the Confrontation Clause.¹⁵ Following an investigation by the local child services department, a physician examined the injured child and

circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id.; see also *Michigan v. Bryant*, 562 U.S. 344, 358 (2011) (further defining what constitutes a testimonial statement).

13. Dylan O. Keenan, Note, *Confronting Crawford v. Washington in the Lower Courts*, 122 YALE L.J. 782, 821 (2012). He continues:

Second, some of the results are quite consistent with *Davis*'s emphasis on emergency response. For example, statements made during a crime—in the midst of an emergency with uncertain outcomes—are slightly less likely to be found to be testimonial. The same is true of statements held to be excited utterances and those made while a party is injured.

Id. at 822. For instance, he notes that "statements made during 911 calls are forty percent more likely to be testimonial," which makes sense because the 911 operator is a state actor, especially when one controls for the fact that most 911 calls involve emergencies. *Id.* at 823.

14. *Id.*

15. See *Ohio v. Clark*, 999 N.E.2d 592, 598 (Ohio 2013) (expanding upon the primary purpose test).

determined that the child's injuries had occurred sometime between the day of the examination and the preceding month.¹⁶ Teachers testified as to what the child had said in identifying the defendant as the abuser.¹⁷ The Supreme Court of Ohio held that admitting the child's statements to his teachers violated the defendant's confrontation rights.¹⁸

On petition for certiorari, the State of Ohio argued that the Supreme Court of Ohio's decision conflicted with other cases containing "identical arguments [based] on similar facts."¹⁹ The petition further noted that the child's statements were not made for the purposes of evading confrontation, and as such, did not violate the defendant's Confrontation Clause rights.²⁰ The State requested that the United States Supreme Court address the reoccurring question of when statements to private individuals qualify as testimonial under the Confrontation Clause.²¹

The two issues presented were: (1) whether an individual who is subject to a mandatory reporting duty becomes an agent of law enforcement for Confrontation Clause purposes, and (2) whether a child's hearsay statement made to a teacher inquiring about possible child abuse is "testimonial" and thus subject to the Confrontation Clause.²² The Court determined that teachers did not become state actors simply by virtue of mandatory reporting statutes, and that the intent of the declarant, the child in this case, is the proper perspective from which to evaluate the primary purpose of the out-of-court

16. *Id.* at 595.

17. *State v. Clark*, No. 96207, 2011 WL 6780456, at *6 (Ohio Ct. App. Dec. 22, 2011). "Ramona Whitley, who was [the child's] assistant preschool teacher at the time the abuse was discovered, testified that . . . when she asked [the child] what happened . . . he gave three different answers: that he fell; that he did not know; and that 'Dee did it.'" *Id.* The other teacher, Debra Jones, testified that when she asked the student what happened "he almost looked uncertain, but he said, Dee did it." *Id.*

18. *Clark*, 999 N.E.2d at 600.

19. Petition for Writ of Certiorari at 18, *Ohio v. Clark*, 135 S. Ct. 2173 (2015) (No. 13-1352) [hereinafter Petition for Certiorari, *Clark*] ("[C]ourts in other jurisdictions . . . have held that the mere fact of a declarant making a hearsay statement to a statutorily defined mandatory reporter does not make the statement testimonial.").

20. *Id.* at 28. The petitioner, the State of Ohio, argued that "the absence of evidence suggesting an attempt to evade the requirements of the Confrontation Clause allows the Court to focus narrowly on the questions of what effect a mandatory-reporting obligation has under the Sixth Amendment and of how statements to non-law enforcement should be treated under the amendment." *Id.* at 28-29.

21. *Id.* at 12. The petitioner argued that "the Court's review is sorely needed because its prior cases leave lower courts with little guidance on the method to resolve the recurring and important question presented by this case . . ." *Id.*

22. *Clark*, 999 N.E.2d at 600.

statement.²³ Where the primary purpose as intended by the declarant is not to substitute for trial testimony, the statement is not testimonial.²⁴ The Court found that a three-year-old child could not understand the criminal justice system and, therefore, could not have a primary purpose of creating testimony for a criminal trial.²⁵ The *Clark* Court further determined that ascertaining whether the crime of child abuse had occurred and, if so, the identity of the perpetrator was a response to an ongoing emergency, and thus outside the realm of testimonial statements.²⁶

In *Clark*, the Court reinforced the primary purpose test: “[W]e ask whether a statement was given with the ‘primary purpose of creating an out-of-court substitute for trial testimony.’”²⁷ However, the *Clark* majority deflated this primary purpose test by stating that it is “necessary, but not always sufficient.”²⁸ Instead, the Court pronounced that courts “must evaluate the challenged statement in context, and part of that context is the questioner’s identity.”²⁹

In evaluating the primary purpose, one factor has been whether the circumstances indicate solemnity³⁰ and formality³¹ similar to that for testimony. The statement must be an “out of court analog, in purpose and in form,” to in-court testimony. Also, the possibility of sanctions for lying adds formality.³² In *Clark*, the Court upheld the solemnity and formality factors and found that the conversation between the child and preschool teachers was “informal and spontaneous” and thus did not satisfy the solemnity or formality prongs.³³ Conversely, statements made while in police custody or in response to police interrogation, or even just conversations with the police, can be sufficiently solemn or

23. *Clark*, 135 S. Ct. at 2181–83.

24. *Id.* at 2181–82.

25. *Id.* at 2182.

26. *Id.* at 2181.

27. *Id.* at 2183 (quoting *Michigan v. Bryant*, 562 U.S. 344, 358 (2011)).

28. *Id.* at 2180–81. *But see id.* at 2184–85 (Scalia, J., concurring in judgment) (“That is absolutely false, and has no support in our opinions.”).

29. *Id.* at 2182 (majority opinion).

30. *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (defining testimony as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact”).

31. *Id.* at 51 (“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.”).

32. *Davis v. Washington*, 547 U.S. 813, 826, 830 n.5 (2006) (stating that “[t]he solemnity of even an oral declaration of a relevant past fact to an investigating officer is well enough established by the severe consequences that can attend a deliberate falsehood,” and “[i]t imports sufficient formality, in our view, that lies to such [police] officers are criminal offenses”).

33. *Clark*, 135 S. Ct. at 2181.

formal.³⁴ *Clark* determined that, while teachers may be required to inquire into and report suspected child abuse by questioning children, such conversations are not treated as though they were official interrogations by law enforcement.

Another factor courts have considered is that statements made under circumstances that would lead a reasonable person to believe that the statement would be available for later use at trial were more likely to be testimonial.³⁵ In *Clark*, while the teachers had a reasonable belief that their questions and the child's answers would be for later use at trial, the Court found that their primary purpose was to protect the child and "remove him from harm's way,"³⁶ because the teachers would have "acted with the same purpose whether or not they had a state law duty to report abuse."³⁷ Stating that it is "irrelevant that the teachers' questions [about potential child abuse] and their duty to report the matter had the natural tendency to result in [the defendant's] prosecution," the Court suggested that the reasonable-belief factor no longer matters.³⁸

3. Which Statements Are Not Testimonial?

Several categories of statements are deemed not to be testimonial. For instance, statements made in furtherance of a conspiracy are not testimonial because co-conspirators do not make statements to one another with a reasonable belief that their statements will be used at trial.³⁹ Statements in business records generally are not testimonial,⁴⁰ but if the "business" is a governmental law enforcement agency, then the primary purpose for the communication will have to be analyzed to determine whether the statement falls outside of the testimonial definition.⁴¹

34. *Crawford*, 541 U.S. at 68. "Whatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id.*

35. *Id.* at 52 (describing one formulation of testimonial statements, as referenced within an amicus brief of the National Association of Criminal Defense Lawyers and others, 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").

36. *Clark*, 135 S. Ct. at 2182–83.

37. *Id.* at 2183.

38. *Id.*

39. For further discussion, see Michael L. Seigel and Daniel Weisman, *The Admissibility of Co-Conspirator Statements In A Post-Crawford World*, 34 FLA. ST. U. L. REV. 877 (2007).

40. For further discussion, see Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865, 1904–09 (2012).

41. *Davis v. Washington*, 547 U.S. 813, 819, 829–30 (2006). In *Davis*, statements made by an

In a similar vein, the Court has been consistent in holding that statements made with the purpose of dealing with an ongoing emergency are not testimonial. In *Clark*, the Court determined that the child's statement to a teacher about potential child abuse was an ongoing emergency.⁴² The *Clark* Court also seemed to add an intent requirement, analyzing the primary purpose as intended by the declarant, rather than the interrogator, without citation to authority.⁴³

Until *Clark*, the Court had declined to address whether statements to non-law enforcement personnel were testimonial.⁴⁴ Now, such statements are "much less likely to be testimonial," if made to people who are not principally charged with "uncovering and prosecuting criminal behavior."⁴⁵ Still, the Court avoided a broader rule, stating, "we decline to adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment."⁴⁶

4. Which Expert is a Witness?: *Melendez-Diaz* and *Bullcoming*

Guidance on who counts as a prosecution witness against the accused evolved slightly in 2009 when the Supreme Court decided the *Melendez-Diaz* case in a 5–4 split.⁴⁷ *Melendez-Diaz* involved notarized affidavits stating that analysts performed tests and concluded that a certain substance recovered from the defendant was cocaine.⁴⁸ The Court held that the affidavits from the analysts were testimonial statements, and that the analysts were "witnesses" for Confrontation Clause purposes.⁴⁹ The *Melendez-Diaz* dissenters argued that the

individual to government law enforcement agents were found to be testimonial because her "statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed." *Id.* at 830. The Court also determined that the individual understood she was assisting the officers with a criminal investigation and concluded that "[o]bjectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime." *Id.*

42. *Clark*, 135 S. Ct. at 2181 (noting that the communications between the child and the teacher were "informal and spontaneous").

43. *Id.* at 2182 ("[I]t is extremely unlikely that a 3-year-old child in [his] position would intend his statement to be a substitute for trial testimony.").

44. *Id.* at 2180.

45. *Id.* at 2181, 2182.

46. *Id.* at 2182.

47. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009) (finding that the analysts' certificates of analysis were affidavits within a class of testimonial statements covered by the Confrontation Clause).

48. *Id.* at 307. "The affidavits submitted by the analysts contained only the bare-bones statement that '[t]he substance was found to contain: Cocaine.'" *Id.* at 320.

49. *Id.* at 311 ("[U]nder our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were witnesses for purposes of the Sixth Amendment. Absent a

affidavits were “near-contemporaneous observations of the test” and therefore should not be considered testimonial,⁵⁰ but the majority rejected this argument because the affidavits were completed more than a week after the tests were performed.⁵¹ Thus, it seemed that going forward, the timing of the creation of the hearsay statement might play a role in deciding whether the statement is testimonial.

Then in 2011, the Court decided *Bullcoming*, which involved a trial conducted prior to the Court’s issuance of the *Melendez-Diaz* decision.⁵² In *Bullcoming*, the primary evidence against the defendant was a forensic laboratory report certifying the results of a test showing his blood-alcohol content exceeded the threshold for a charge of aggravated driving while intoxicated.⁵³ The defendant’s blood sample had been tested at the New Mexico Department of Health by a forensic analyst who did not testify at trial.⁵⁴ At trial, the State called another analyst who was familiar with the testing device used and with the laboratory’s testing procedures, but had neither participated in nor observed the test on that particular blood sample.⁵⁵ The Court held that the report was testimonial.⁵⁶

The *Bullcoming* Court reasoned that the certification reported more than a machine-generated number: it represented that the analyst received the

sample intact with the seal unbroken; that he checked to make

showing that the analysts were unavailable to testify at trial *and* that [the defendant] had a prior opportunity to cross-examine them, [the defendant] was entitled to ‘be confronted with’ the analysts at trial.” (citing *Crawford v. Washington*, 541 U.S. 36, 54 (2004))).

50. *Id.* at 345 (Kennedy, J., dissenting) (“First, a conventional witness recalls events observed in the past, while an analyst’s report contains near-contemporaneous observations of the test.”).

51. *Id.* at 315 (“It is doubtful that the analyst’s reports in this case could be characterized as reporting near-contemporaneous observations; the affidavits were completed almost a week after the tests were performed.”).

52. *See generally* *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011).

53. *Id.* at 2707.

54. *Id.* (“*Bullcoming*’s blood sample had been tested at the New Mexico Department of Health, Scientific Laboratory Division (SLD), by a forensic analyst named Caylor, who completed, signed, and certified the report. However, the prosecution neither called Caylor to testify nor asserted he was unavailable; the record showed only that Caylor was placed on unpaid leave for an undisclosed reason.”).

55. *Id.* (“In lieu of Caylor, the State called another analyst, Razatos, to validate the report. Razatos was familiar with the testing device used to analyze *Bullcoming*’s blood and with the laboratory’s testing procedures, but had neither participated in nor observed the test on *Bullcoming*’s blood sample.”).

56. *Id.* at 2717 (finding that *Melendez-Diaz* precluded the State’s argument that introducing the expert report did not implicate the Confrontation Clause because the report was undoubtedly an “affirmation made for the purpose of establishing or proving some fact” in a criminal proceeding, created solely for an “evidentiary purpose,” and thus it was testimonial (citing *Melendez-Diaz*, 557 U.S. at 311)).

sure that the forensic report number and the sample number corresponded; that he performed a particular test and adhered to a precise protocol; and that he left the report's remarks section blank, indicating that no circumstance or condition affected the sample's integrity or the analysis' validity.⁵⁷

These representations, relating to past events and human actions not revealed in raw, machine-produced data, were ripe for cross-examination and the failure to produce the testing analyst (absent a showing of unavailability and prior opportunity for cross-examination), violated the Confrontation Clause.⁵⁸

The Court noted that the comparative reliability of an analyst's testimonial report does not dispense with the requirements of the Confrontation Clause.⁵⁹ The analysts who write reports introduced as evidence must be made available for confrontation even if they have "the scientific acumen of Mme. Curie and the veracity of Mother Teresa."⁶⁰ More fundamentally, the Confrontation Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination.⁶¹ Although the purpose of Sixth Amendment rights is to ensure a fair trial, it does not follow that such rights can be disregarded because, on the whole, the trial was fair.⁶²

5. When the Expert Report Is Not Offered for Its Truth: *Williams*

In 2012, in another divided plurality opinion, the Court revisited the Confrontation Clause doctrine on expert witness reports.⁶³ At the petitioner's bench trial for rape, the forensic specialist testified that she matched a DNA profile that had been produced by an outside laboratory

57. *Id.* at 2714.

58. *Id.* at 2708.

59. *Id.* at 2715 (citing to *Crawford v. Washington*, 541 U.S. 36, 62 (2004)); *see also Crawford*, 541 U.S. at 62 ("The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability.").

60. *Bullcoming*, 131 S. Ct. at 2715 (quoting *Melendez-Diaz*, 557 U.S. at 319, n.6).

61. *See Melendez-Diaz*, 557 U.S. at 318–19. In *Melendez-Diaz*, the Court reinforced the notion that the Confrontation Clause's "ultimate goal is to ensure reliability of evidence." *Id.* at 317–18 (quoting *Crawford*, 541 U.S. at 61–62). The Court rejected the notion of straying from confrontation, stating that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Id.* (quoting *Crawford*, 541 U.S. at 61–62).

62. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145 (2006).

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

to a sample of petitioner's blood that her lab had processed.⁶⁴ No one from the outside lab testified. Swabs taken from the victim had been sent to an outside lab, and a DNA profile was returned to her lab.⁶⁵ The trial court admitted the DNA profile evidence over the defense's Confrontation Clause objection.⁶⁶ The Supreme Court affirmed admitting the profile evidence, reasoning that, because the outside lab report was used for the limited purpose of determining whether that sample matched another sample, it was not offered for the truth of the matter asserted.⁶⁷ The implication of this ruling is that if the evidence is not offered as hearsay, then there is no Confrontation Clause concern. The lower courts' adoption of the "basis as non-truth" portion of the *Williams* plurality opinion has further constricted the effectiveness of the right to confrontation. Subsequent petitions for certiorari have criticized this ruling as adding confusion to the issue of whether and when surrogate expert testimony violates the Confrontation Clause.⁶⁸

The *Williams* plurality added that even if the evidence had been offered for the truth of the matter asserted and thus was hearsay, because the primary purpose of the report was to catch a dangerous rapist who was still at large, rather than to accuse a targeted individual (as occurred in the other cases), there was no incentive to fabricate to

64. *Id.* at 2227, 2235. Sandra Lambatos, a forensic specialist at the Illinois State Police Lab, did not testify to the truth of any matter concerning Cellmark, an outside laboratory. *Id.* at 2235. At no point did she reference the outside laboratory's report—a report that was neither admitted into evidence, nor seen by the trier of fact. *Id.* Additionally, Lambatos did not testify about the work, or quality of work, done at the Cellmark Lab. *Id.* In *Williams*, the purpose of disclosing the facts on which the expert relied was not to prove the truth of the underlying facts, but, rather, the purposes were to show that the expert's reasoning was not illogical and that the expert's opinion did not "depend on factual premises unsupported by other evidence in the record." *Id.* at 2240; *see also id.* at 2227 ("In petitioner's bench trial for rape, the prosecution called an expert who testified that a DNA profile produced by an outside laboratory, Cellmark, matched a profile produced by the state police lab using a sample of petitioner's blood.").

65. *Id.* at 2227 ("The expert also explained the notations on documents admitted as business records, stating that, according to the records, vaginal swabs taken from the victim were sent to and received back from Cellmark.").

66. *Id.* at 2231 ("When Lambatos finished testifying, the defense moved to exclude her testimony 'with regards to testing done by [Cellmark]' based on the Confrontation Clause. . . . The trial judge agreed with the prosecution and stated that 'the issue is . . . what weight do you give the test, not do you exclude it.' Accordingly, the judge stated that he would not exclude Lambatos' testimony, which was 'based on her own independent testing of the data received from [Cellmark].'" (alterations in original)).

67. *Id.* at 2240 ("In this case, the Cellmark report was not introduced into evidence. An expert witness referred to the report not to prove the truth of the matter asserted in the report, i.e., that the report contained an accurate profile of the perpetrator's DNA, but only to establish that the report contained a DNA profile that matched the DNA profile deduced from petitioner's blood. Thus, just as in *Street*, the report was not to be considered for its truth but only for the 'distinctive and limited purpose' of seeing whether it matched something else.").

68. *See infra* notes 72–122 and accompanying text.

find a match, and thus there was no Confrontation Clause violation.⁶⁹ This case has sparked controversy over what constitutes hearsay and what satisfies the primary purpose test, and it has been the subject of other law review articles.⁷⁰ Part III discusses an alternative approach that renders that statement not testimonial.⁷¹ The next Section addresses the issues raised in the recent rejected petitions for certiorari.

B. The Court's Missed Opportunities to Clarify the Doctrine: Petitions in 2013–14

Thirteen petitions for certiorari were submitted to the United States Supreme Court raising Confrontation Clause issues during the 2013–2014 term. The Court accepted one petition in the fall of 2014, which was heard during the 2014–15 term. The Court denied all of the other petitions, many of which raised important ambiguities and splits of authorities in the areas of autopsy reports, machine-generated data, and whether a substance or sample is being analyzed for drug or alcohol content or a DNA profile is being identified or matched. Most of the cases involved experts who testified although they did not perform the tests on the substances or samples, and many of those testifying experts relied upon the testing expert's work in reaching their conclusions. These cases are categorized and described below.

69. *Williams*, 132 S. Ct. at 2243–44.

Here, the primary purpose of the Cellmark report, viewed objectively, was not to accuse petitioner or to create evidence for use at trial. When the ISP lab sent the sample to Cellmark, its primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time. Similarly, no one at Cellmark could have possibly known that the profile that it produced would turn out to inculcate petitioner—or for that matter, anyone else whose DNA profile was in a law enforcement database. Under these circumstances, there was no ‘prospect of fabrication’ and no incentive to produce anything other than a scientifically sound and reliable profile.

Id.

70. See Jennifer R. Varon, *A Powerless Plurality: The Second Circuit Court of Appeals in U.S. v. James Correctly Determined That The Plurality Opinion In Williams v. Illinois Lacks Precedential Value*, 47 CREIGHTON L. REV. 193 (2013) (discussing how the rationale in the *Williams* decision was not supported by five Justices and therefore lacked precedential value); Alexander J. Toney, *The Credibility-Based Evaluative Purpose: Why Rule 703 Disclosures Don't Offend The Confrontation Clause*, 67 RUTGERS U. L. REV. 953 (2015) (where the author discusses the confusion caused by the *Williams* decision and why the Supreme Court will likely have to revisit the issues raised in *Williams*); Paul F. Rothstein, *Unwrapping The Box The Supreme Court Justices Have Gotten Themselves Into: Internal Confrontations Over Confronting The Confrontation Clause*, 58 HOW. L.J. 479 (2015) (discussing the complications in the *Williams* decision, particularly concerning the lack of unity of the Supreme Court Justices).

71. See *infra* notes 123–164 and accompanying text.

1. Autopsy Reports

One petition involved the split in authority as to whether autopsy reports are testimonial. *Edwards v. California* considered an autopsy report and testimony by a pathologist who did not perform the autopsy.⁷² By distinguishing between objective facts and conclusive opinions in the report, the Supreme Court of California found that the autopsy report was not testimonial.⁷³ The petition for certiorari noted that state and federal courts were split on whether and when autopsy reports are testimonial, and the distinction made by the California high court was unworkable and confusing.⁷⁴

2. Machine-Generated Data

The Court had several opportunities to review cases involving the admissibility of machine-generated data when lower courts determined that the data was not hearsay. In *Arauz v. California*, a California Court of Appeal found that a machine-generated DNA report, which was part of a rape kit, was not testimonial because it was not sufficiently formal,⁷⁵ nor did it target a known individual,⁷⁶ nor was it hearsay as a machine generated it.⁷⁷ This case presented a chance to provide guidance for situations in which the non-testing expert had personally analyzed the DNA profiles about which the testifying expert testified,⁷⁸

72. Petition for Writ of Certiorari at 2, *Edwards v. California*, 134 S. Ct. 2662 (2014) (No. 13-8618) [hereinafter Petition for Certiorari, *Edwards*]; see *People v. Edwards*, 306 P.3d 1049, 1088 (Cal. 2013) (noting that autopsy reports typically contain statements that either describe “the [autopsy] pathologist’s anatomical and physiological observations about the condition of the body,” or those that “set forth the [autopsy] pathologist’s conclusions as to the cause of the victim’s death”), *cert. denied*, 134 S. Ct. 2662 (2014). The Supreme Court of California further recognized that an autopsy report contains both observations and conclusions, and that the conclusions regarding the cause of death were considered to be formal and solemn but the observations were not. *Id.* at 1089.

73. *Id.* at 1089.

74. Petition for Certiorari, *Edwards*, *supra* note 72, at 13.

75. *People v. Arauz*, No. B242843, 2013 WL 3357931, at *4–5 (Cal. Ct. App. 2013), *cert. denied*, 134 S. Ct. 2664 (2014). The court noted that there was no explicit reference to court rules and there was no notarization of the report, stating that the report and notification that formed the basis of the testifying expert’s testimony lacked the “requisite degree of formality or solemnity” to qualify as testimonial. *Id.* at *4.

76. *Id.* The court found that the DNA report was not created with the primary purpose of targeting an accused individual because there was no particular suspect known at the time. *Id.* Additionally, the court held that the DNA report was not testimonial because the defendant was not a suspect at the time that the report was produced. *Id.*

77. *Id.* at *5 (“Our Supreme Court held that machine-generated printouts of blood alcohol analyses do not implicate the Confrontation Clause.” (citing *People v. Lopez*, 286 P.3d 469, 478 (Cal. 2012))).

78. The DNA report was referred to in the testimony, and data created by another expert was not admitted into evidence. *Arauz*, 2013 WL 3357931, at 5 (“[The testifying DNA analyst] did

but the court denied certiorari.⁷⁹

Ortiz-Zape v. North Carolina involved a test for cocaine and also exposed the ambiguity in the reasoning of the *Williams* plurality.⁸⁰ The issue for certiorari was again whether an expert who did not observe or participate in the forensic testing could testify at trial analyzing the results of another expert's work.⁸¹ The petition for certiorari requested that the Supreme Court clarify whether a report is testimonial when it is based in whole, or in substantial part, on the analysis and opinion of an out-of-court expert who did not testify.⁸² The petition further emphasized the issue of juror confusion.⁸³

In another case involving machine-based data and surrogacy, *United States v. Maxwell*, the issue was whether the testifying expert's reliance on a non-testifying expert's data in reaching her own conclusion violated the defendant's Confrontation Clause rights.⁸⁴ The petition cited a "deep split in authority" with two circuits and six state high courts on one side.⁸⁵ The Seventh Circuit held that the testifying expert

not testify to what some other analyst concluded. Instead, [the analyst] testified she personally analyzed the DNA profiles. Her conclusions were based on her own analysis.")

79. *Arauz v. California*, 134 S. Ct. 2664 (2014) (mem.) (denying certiorari).

80. *State v. Ortiz-Zape*, 743 S.E.2d 156, 157 (N.C. 2013). Based upon independent analysis of testing performed by another analyst in her laboratory, an expert in forensic science testified that the substance was cocaine. *Id.*

Defendant argues that, because [the testifying expert] did not test the substance at issue herself or personally observe any testing, she could form no independent opinion regarding the identity of the substance, and thus admission of her opinion identifying the substance as cocaine violated defendant's rights under the Confrontation Clause. The State argues that there was no Confrontation Clause violation because the expert testified to her own opinion about the identity of the substance.

Id. at 159. The North Carolina Supreme Court found no Confrontation Clause violation, holding that "when an expert gives an opinion, the expert is the witness whom the defendant has the right to confront" and "[w]e believe our prior holding on this issue is consistent with this conclusion." *Id.* at 161.

81. Petition for Writ of Certiorari at 7, *Ortiz-Zape v. North Carolina*, 134 S. Ct. 2660 (2014) (No. 13-633), *cert. denied*, 134 S. Ct. 2660 (2014) (mem.).

82. *Id.* at 11. After highlighting the confusion amongst the lower courts regarding when an expert is allowed to base her opinions on analyses performed by others, the petitioner presented the Court "with an opportunity to resolve the issue that this Court determined was worthy of certiorari in *Williams v. Illinois*. *Id.* at 10–13.

83. *Id.* at 16. The petitioner contended that the plurality's reasoning in the lower court's decision rested on the assumption that "a trial judge would not be confused about what may be considered as substantive evidence when an expert testifies regarding forensic analysis performed by another and not observed by the testifying expert," and further argued that the plurality's reasoning would fall flat if applied in a criminal proceeding. *Id.*

84. *See United States v. Maxwell*, 724 F.3d 724, 727 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2660 (2014) (mem.).

85. Petition for Writ of Certiorari at 2, *Maxwell v. United States*, 134 S. Ct. 2660 (2014) (No. 13-7394) [hereinafter Petition for Certiorari, *Maxwell*].

made her own independent conclusion based upon the laboratory test results and reports of another analyst,⁸⁶ even though she did not conduct the tests,⁸⁷ and the testing analyst's report was not introduced into evidence.⁸⁸ The Seventh Circuit also held that raw machine data does not implicate a Confrontation Clause violation.⁸⁹ In his petition for certiorari, Maxwell argued that the Seventh Circuit's decision is not helpful to weed out fraudulent as well as incompetent analysts, thus frustrating one purpose of providing criminal defendants a right to confront.⁹⁰

3. Identifying Substances and Samples

Marshall v. Colorado centered on the analysis of a urine sample to determine whether the accused had been under the influence of amphetamine and methamphetamine.⁹¹ The underlying issue for certiorari was the split in authority over whether the testimony of the laboratory analyst's supervisor regarding the results of the defendant's urinalysis violated the defendant's right to confrontation,⁹² and whether

86. *Maxwell*, 724 F.3d at 725. A forensic scientist in the Controlled Substances Unit at the Wisconsin State Crime Laboratory analyzed the substance seized by a detective. *Id.* In doing so, the forensic scientist memorialized his findings in a report that confirmed the presence of crack cocaine. *Id.* Because this initial forensic scientist had already retired by the time of Maxwell's trial, the government called a second forensic scientist from the same lab to take his place. *Id.*

87. *Id.* at 725–26. The second forensic scientist testified that the substance confiscated from Maxwell did contain cocaine. *Id.* at 725. Further, the second forensic scientist explained that, in coming to his conclusion, she did not perform the “primary analysis” of the substance, but rather reviewed the raw data from the tests performed by the initial forensic scientist. *Id.* at 725–26.

88. *Id.* at 727. The second forensic scientist did not read anything from the initial forensic scientist's reports into evidence during her testimony. *Id.* Additionally, the government did not introduce into evidence the initial forensic scientist's report or any readings from the instruments he used during testing. *Id.*

89. *Id.* at 726–27 (“[R]aw data from a lab test are not ‘statements’ in any way that violates the Confrontation Clause.”).

90. Petition for Certiorari, *Maxwell*, *supra* note 85, at 9. The petitioner argued that the Seventh Circuit's decision undermined one of the main purposes of the Confrontation Clause—to ensure reliability of evidence by “testing in the crucible of cross-examination.” *Id.* Petitioner further argued that the Seventh Circuit's decision improperly allows prosecutors to circumvent the Confrontation Clause by depriving defendants “of the principal means provided by the Constitution for rooting out such erroneous statements.” *Id.* at 20.

91. Petition for Writ of Certiorari at 11–17, *Marshall v. Colorado*, 134 S. Ct. 2661 (2014) (No. 13-7768) [hereinafter Petition for Certiorari, *Marshall*]. After lab urinalysis revealed methamphetamine in her system, the petitioner was charged with driving under the influence of drugs, careless driving, and possession of drug paraphernalia. *Marshall v. People*, 309 P.3d 943, 943 (Colo. 2013), *cert. denied*, 134 S. Ct. 2661 (2014) (mem.). Though the testifying analyst did not personally test any of the samples, she did sign that the samples were tested correctly at that time. *Id.* at 945.

92. *See id.* at 946. The technician supervisor testified about the methods used by all of the technicians and indicated that, upon completion of the tests, she would review the packet of information provided by each technician.

the Colorado Supreme Court's ruling conflicted with the United States Supreme Court's rulings in *Bullcoming* and *Melendez-Diaz*.⁹³ The Colorado Supreme Court found that the technician supervisor's use of the language "approved by," when affixing her signature to the completed reports,⁹⁴ was tantamount to certifying, and therefore satisfied the requirements of *Bullcoming* and did not violate the Confrontation Clause.⁹⁵

Another case, *Brewington v. North Carolina*, involved the use of a testing kit to determine whether a substance was cocaine,⁹⁶ and the central issue was over surrogate testimony—specifically whether the defendant's Confrontation Clause rights were violated when the trial court allowed a non-testing supervising analyst to testify based solely on the notes of a second analyst.⁹⁷ The Supreme Court of North Carolina found that it was permissible for the testifying analyst to tell the jury the conclusions of another non-testifying analyst where those conclusions had been presented in a testimonial forensic report, as long as the testifying expert offered an independent opinion that she agreed with the conclusion of the non-testifying expert's notes and reports based on her own individual analysis.⁹⁸

The arguments for granting certiorari were that allowing this testimony would bolster the credibility of the testifying expert while insulating the basis evidence from any criticism, given that the basis for

93. Petition for Certiorari, *Marshall*, *supra* note 91, at 24–28 (criticizing the “supervisor exception” to the Confrontation Clause).

94. *Marshall*, 309 P.3d at 948. Although the screening and confirmation tests were initially performed by two other analysts, the technician supervisor's “expertise was required to generate the final report.” *Id.* Without the supervisor's review, the results could not have been certified as being accurate and mailed to the police department. *Id.* As a result, the Colorado Supreme Court concluded that the supervisor's involvement was the “final and necessary step” needed before the results could be certified, signed, and returned to the requesting police department. *Id.*

95. *Id.* at 947 (“[W]hen a lab supervisor . . . independently reviews scientific data, draws conclusions that the data indicates the positive presence of methamphetamine, and signs a report to that effect that is admitted at trial, the Confrontation Clause is satisfied *if she testifies and is available for cross-examination.*” (emphasis added)).

96. *State v. Brewington*, 743 S.E.2d 626, 627 (N.C. 2013), *cert. denied*, 134 S. Ct. 2660 (2014) (mem.). In *Brewington*, the substance was transported to the North Carolina State Bureau of Investigation, where it was then analyzed by the Assistant Supervisor in Charge. *Id.*

97. *Id.*

98. *Id.* at 627–28. The Supreme Court of North Carolina determined that the opinion of an expert is “substantive evidence,” making the expert the “witness whom the defendant has the right to confront.” *Id.* The Supreme Court of North Carolina also noted that expert witnesses are permitted to base their opinions on “otherwise inadmissible facts or data.” *Id.* at 628. The lab notes of the non-testifying expert were not admitted into evidence. *Id.* Rather, the testifying expert formed her own independent opinion after analyzing the non-testifying expert's lab notes. *Id.* at 628.

that expert's opinion was from a non-testifying expert report.⁹⁹ Further, the petitioner suggested that it would undercut the rationale of the *Bullcoming* case if all one needs to do is to review someone else's report and testify to having reached an independent conclusion.¹⁰⁰ As set forth in the petition, allowing such testimony detracts from the adversarial process of the litigation, and therefore should be found to violate the Confrontation Clause.¹⁰¹

Also considering the perceived "supervisor exception" was *Turner v. United States*. The issue was whether a government expert who reviewed forensic reports of a non-testifying expert—regarding whether the substance distributed by defendant was cocaine—whose reports were certified, but who did not personally conduct or observe any of those tests, could testify regarding the analyst's process, procedures, conclusions, and results.¹⁰² The testifying expert was the analyst supervisor, who reviewed reports that were certified by the testing analyst, but who was not the testing analyst. The Seventh Circuit held that the analyst supervisor's testimony regarding laboratory procedures and his review of the testing analyst's work did not violate the defendant's Confrontation Clause rights.¹⁰³ Noting the split among the circuits with regard to the admissibility of surrogate expert testimony, the petitioner argued that the decision of the Seventh Circuit "undermines the proper administration of criminal proceedings by

99. Petition for Writ of Certiorari at 13, *Brewington v. North Carolina*, 134 S. Ct. 2660 (2014) (No. 12-504) ("[A]llowing a testifying expert to convey a nontestifying expert's testimonial findings to the jury substantially bolsters the testifying expert's opinion while insulating that basis evidence from adversarial challenge.").

100. *Id.* at 7. ("Allowing such testimony through the guise of an 'independent opinion' . . . 'completely ignores the Supreme Court's explanations of the scope of the Sixth Amendment's Confrontation Clause.'" (quoting *Brewington*, 743 S.E.2d at 34 (Hudson, J., dissenting))).

101. *Id.* app. A, at 16a ("To permit independent opinion testimony on a critical element of the offense when that opinion is based on evidence presented at trial not for the truth of the matter asserted is to permit the North Carolina Rules of Evidence to preempt the Confrontation Clause.").

102. *United States v. Turner*, 591 F.3d 928, 931–32 (7th Cir. 2010), *vacated*, 133 S. Ct. 55 (2012) (mem.). The defendant argued that his Sixth Amendment right to confrontation was violated when a government expert was allowed to testify about test results produced by a forensic scientist. *Id.* The defendant also argued that because the forensic scientist's notes, machine-generated test results, and final report were testimonial, and because the government had failed to demonstrate that the forensic scientist was unavailable for cross-examination, the testifying government expert's reliance on these materials violated the Confrontation Clause. *Id.*

103. *Id.* at 933 (disagreeing with the argument that the district court violated the defendant's rights under the Sixth Amendment Confrontation Clause by allowing the testifying, non-testing analyst to give testimony based upon the results and conclusions of the testing analyst). The court also addressed the issue of potential juror confusion, noting that neither the testing scientist's qualifications nor his report were admitted into evidence or placed before the jury. *Id.* at 934.

providing prosecutors an unwarranted shortcut around the rigors of the Confrontation Clause.”¹⁰⁴

Williams v. Massachusetts also involved surrogate testimony by an expert about the testing of a substance to determine whether it was heroin or cocaine.¹⁰⁵ The issue was whether the defendant’s right to confrontation was violated when a testifying chemist was permitted to testify in place of a testing chemist, even though the testifying chemist did not participate in conducting the test.¹⁰⁶ The testifying chemist was not a supervisor, and she did not recite the testing chemist’s findings or conclusions.¹⁰⁷ The Massachusetts Supreme Judicial Court affirmed the lower court’s finding that the defendant’s Confrontation Clause right was not violated.¹⁰⁸

In *Yohe v. Pennsylvania*, the petition noted that “federal courts and state high courts continue to render deeply and intractably divided opinions” over whether toxicology reports are testimonial, for purposes of the Confrontation Clause, and whether the testimony of the forensic toxicologist who authored the report satisfied the defendant’s right to confrontation.¹⁰⁹ The case involved a three-part forensic toxicology report for blood-alcohol content where each part of the analysis was conducted by a different analyst.¹¹⁰ The defendant raised the question

104. Petition for Writ of Certiorari at 2, *Turner v. United States*, 134 S. Ct. 2660 (2014) (No. 13-127). The petitioner argued that the holding of the Seventh Circuit created a shortcut in the Confrontation Clause process by permitting surrogate testimony that cannot be challenged as effectively. *Id.* The petitioner also suggested that surrogate expert testimony provides little in the way of “insight into the nontestifying analyst’s judgment and competence, or safeguard[s] against any error, bias, or prejudice on the analyst’s part.” *Id.*

105. *Commonwealth v. Williams*, No. 12-P-330, 2013 WL 5493054, at *1 (Mass. App. Ct. Oct. 4, 2013), *cert. denied*, 134 S. Ct. 2672 (2014) (mem.). Due to the testing chemist’s unavailability, the Commonwealth called a second forensic chemist to testify in the testing chemist’s place. *Id.* On direct examination, the second chemist testified that, based on her review of the testing chemist’s lab notes and report, she was able to conclude that the substances were powder heroin and crack cocaine. *Id.*

106. *See id.*

107. *Id.* The testifying chemist confirmed that she did not participate in the testing of the substances, was not present when the testing chemist performed the tests, and was not able to testify as to whether the testing chemist followed lab protocol. *Id.* Further, neither the testing chemist’s lab notes nor his drug analysis reports were admitted into evidence. *Id.*

108. *See id.* at *3 (affirming the judgments of the lower court pertaining to the alleged Confrontation Clause issue).

109. Petition for Writ of Certiorari at 6, *Yohe v. Pennsylvania*, 134 S. Ct. 2662 (2014) (No. 13-885) [hereinafter *Petition for Certiorari, Yohe*].

110. The Supreme Court of Pennsylvania held that the toxicology report was testimonial, and that the testimony of the forensic toxicologist who authored the toxicology report satisfied the defendant’s constitutional right to confrontation. *Commonwealth v. Yohe*, 79 A.3d 520, 537–38 (Pa. 2013). The laboratory that conducted the forensic toxicology report administered three tests on the defendant’s blood sample—two gas chromatography tests and a single enzymatic assay

as to who was the “witness” in this case.¹¹¹

4. Identifying DNA Profile Evidence

Several petitions addressed the split in authority over criteria for admitting DNA profile evidence where more than one expert was involved but not all experts testified. *Derr v. Maryland* involved a rape kit test and a DNA profile test.¹¹² The issue was whether Derr’s constitutional confrontation rights had been violated when the State was allowed to introduce the opinion of a serology examiner and the results of DNA testing through the testimony of an expert who neither participated in, nor supervised the administration of the testing.¹¹³ The Court of Appeals of Maryland held that neither the results of the serological exam, nor the results from the DNA test were sufficiently formalized to rise to the level of testimonial.¹¹⁴ Derr noted that both Maryland and the District of Columbia argued that the technician’s report was testimonial hearsay and that the decision should be stayed pending the resolution of the *Williams v. Illinois* case.¹¹⁵ Citing the 4–

test. *Id.* at 524. The defendant objected to the testifying expert’s testimony regarding the toxicology report, and to the admission of the toxicology report, on the grounds that both the testimony and report itself violated his right to confront the specific lab technicians who actually conducted the tests on his blood sample. *Id.*

111. *Id.* at 528.

Appellant argues that requiring the analyst who conducted the relevant testing to testify serves four fundamental purposes: it enables meaningful cross-examination of what the analyst has done; it guarantees that the analyst who generated the testimonial statements is questioned under oath and subject to the penalties of perjury; it allows the fact-finder to observe that witness’s demeanor and her responses to questions; and it ensures that the accuser face the accused.

Id. In the absence of the opportunity to face his accuser, the defendant contended that allowing the testimony of a surrogate witness “renders it impossible to determine whether the analyst was fraudulent or incompetent.” *Id.*

112. *Derr v. State*, 73 A.3d 254, 259–60 (Md. 2013), *cert. denied*, 134 S. Ct. 2723 (2014) (mem.).

113. Petition for Writ of Certiorari at i, *Derr v. Maryland (Derr II)*, 134 S. Ct. 2723 (2014) (No. 13-637) [hereinafter Petition for Certiorari, *Derr II*].

114. *Derr*, 73 A.3d at 272 (finding that “the serological exam results [we]re not sufficiently formalized to be testimonial” and concluding that “the results from the 2002 DNA test [we]re not sufficiently formalized to be testimonial”).

115. Petition for Writ of Certiorari at 5–6, *Maryland v. Derr (Derr I)*, 133 S. Ct. 63 (2012) (No. 11-694) [hereinafter Petition for Certiorari, *Derr I*]. On December 6, 2011, the State of Maryland filed a petition for writ of certiorari with the Supreme Court to review *Derr*, requesting that its petition be suspended while the Court decided *Williams v. Illinois*. *Id.* Following the Supreme Court’s decision in *Williams*—in which the Court affirmed the lower court’s judgment without overruling *Bullcoming*, *Melendez-Diaz*, or *Crawford*—the Court granted the State’s petition for certiorari, vacated *Derr*, and remanded the case in light of *Williams*. *Maryland v. Derr*, 133 S. Ct. 63 (2012) (mem.). The Court eventually denied certiorari after the Court of Appeals of Maryland found in favor of the State on remand. *Derr*, 73 A.3d at 259–60, *cert. denied*, 134 S. Ct. 2723 (2014) (mem.).

1–4 plurality decision later issued in *Williams*, the petitioner noted that its “diverging rationales” provide “conflicting guidance for lower courts” when the non-testing expert testifies.¹¹⁶

In *Galloway v. Mississippi*, the issue was whether permitting a forensic analyst to inform the jury of the results of DNA testing that she did not personally conduct or observe was a violation of the defendant’s Confrontation Clause rights.¹¹⁷ The petition argued that the Mississippi high court decision permitted surrogate testimony and thus conflicted with *Bullcoming*, some federal circuits, and other state high courts.¹¹⁸

In another surrogate case, *Walker v. Wisconsin*, the testifying analyst had performed a peer review of another analyst’s test results and testified regarding that independent review and the conclusions.¹¹⁹ The petitioner’s argument for certiorari was the same conflict of authority that *Galloway* raised—allowing a surrogate witness would not give the jury the opportunity to assess credibility because the tests were being spoken about through someone who did not conduct them.¹²⁰ The petition for certiorari also discussed the basis rationale¹²¹ and whether

116. Petition for Certiorari, *Derr II*, *supra* note 115, at 17.

117. At trial, Galloway moved to exclude the testimony of a forensic DNA analyst, due to the fact that she was not the same analyst who conducted the DNA testing on blood and tissue samples obtained by the case investigators. See *Galloway v. State*, 122 So. 3d 614, 635–36 (Miss. 2013), *cert. denied*, 134 S. Ct. 2661 (2014) (mem.). The expert witness was essentially permitted to testify as a surrogate for the testing expert, due to her familiarity with each element of the case and the steps that the analysts followed during testing. Ultimately, the Supreme Court of Mississippi held that Galloway’s Confrontation Clause right had not been violated by allowing the DNA analyst to testify. *Id.* at 637–38.

118. Petition for Writ of Certiorari at 11, *Galloway v. Mississippi*, 134 S. Ct. 2661 (2014) (No. 13-761).

119. *State v. Walker*, No. 2011AP2091-CR, 2013 WL 2157893, at *1 (Wis. Ct. App. May 21, 2013) (“Walker argued that he had the right to confront [the testing analyst] because her initial DNA analysis was presented through [the non-testing analyst], who acted as a transmitter or conduit for [the testing analyst’s] opinion.”), *cert. denied*, 134 S. Ct. 2663 (2014) (mem.). The State’s DNA expert witness conducted a peer review—a second analyst’s review of the notes, profiles, and reports produced by a prior analyst—of an analysis done by the initial testing analyst, who was on maternity leave at the time of the trial. *Id.* The testifying analyst did not attempt to replicate the tests and was considered to be a surrogate witness. Rather than “create a new profile” or “redo any of the extraction of biological material or DNA,” after reviewing the notes and DNA profiles of the first analyst, the peer reviewer “almost independently” made the determination of whether a known individual is the source of extracted DNA evidence. *Id.*

120. *Id.* The defendant argued, “he had the right to confront [the testing analyst] because her initial DNA analysis was presented through [the testifying analyst], who acted as a transmitter or conduit for [the testing analyst’s] opinion.” *Id.* Further, the defendant contended that the testifying analyst’s “description of [the testing analysts] analysis was testimonial, implicating Walker’s right to confront the witness.” *Id.*

121. Petition for Writ of Certiorari at 11–12, *Walker v. Wisconsin*, 134 S. Ct. 2663 (2014) (No. 13-8743). Dissatisfied with the testifying expert’s ability to use test results that he did conduct, the Petitioner highlighted court of appeals cases “[rejecting] the argument that a

or not the information should be disclosed to the jurors on the underlying basis for the expert's opinion.¹²²

III. THE REMAINING UNCERTAINTY IN CONFRONTATION CLAUSE DOCTRINE

Based on the current doctrine, as discussed in Part II, this Part analyzes three major areas of continuing uncertainty in Confrontation Clause analysis. Those areas are: (1) which witnesses and what information count as “evidence *against* the criminal defendant” that is a substitute for trial testimony, (2) whether evidence that links to a particular individual should be evaluated differently than evidence not (yet) connected to a particular individual, and (3) how the reasonable reliance test should apply to expert witness evidence obtained through a collaborative environment.

A. *Who and What Counts as Evidence Against the Criminal Defendant?*

On the issue of *who* counts as a “witness *against* the defendant,”¹²³ some say this point is settled,¹²⁴ but at least one of the recent petitions indicated that the Court still needs to decide.¹²⁵ In *Clark*, the Court reasoned that where the declarant's primary purpose was that the statement be a substitute for trial testimony, it counts as “against” the

supervisor's testimony is permissible simply because the underlying reports were not admitted,” “[holding] that a supervising medical examiner's testimony based on a report of an autopsy conducted by a different examiner conveyed testimonial hearsay that violated the Confrontation Clause,” and “[finding] that a surrogate expert's testimony that two DNA profiles matched violated the Confrontation Clause because the surrogate expert did not conduct the DNA analyses at issue and based his opinion on his review of a nontestifying analyst's certified report and the documentation generated by that analyst.” *Id.* (citing *Young v. United States*, 63 A.3d 1033, 1043–44 (D.D.C. 2013); *State v. Frazier*, 735 S.E.2d 727, 731–32 (W. Va. 2012); and *Davidson v. State*, No. 58459, 2013 WL 1458654, at *1–2 (Nev. Apr. 9, 2013)).

122. *Id.* Even though none of the materials produced by the testing analyst were entered into evidence, the petitioner took issue with the fact that the testifying expert's testimony made it clear to the jury that the most crucial parts of his testimony were from the testing analyst's reports. *Id.*

123. For a detailed discussion of the term “witness” and the meaning of the phrase “witnesses against,” see Bellin, *supra* note 40, at 1881–88. Professor Bellin notes that the most logical explanation regarding the Framers' inclusion of the phrase “against him” in the Sixth Amendment lies in the distinction between the broad category of “witnesses”—individuals Bellin defines as having “perceived relevant information, but whom play no role in a criminal proceeding”—and the narrower category of “witnesses against”—described by Bellin as those contributing testimony or out-of-court statements to the prosecution's case that result in triggering the confrontation right. *Id.*

124. See Ronald J. Coleman & Paul F. Rothstein, *Grabbing the Bullcoming by the Horns: How the Supreme Could Have used Bullcoming v. New Mexico to Clarify Confrontation Clause Requirements for CSI-Type Reports*, 90 NEB. L. REV. 502, 526 (2011) (opining that the Court adequately addressed and resolved this issue in its *Bullcoming* opinion).

125. Petition for Certiorari, *Yohe*, *supra* note 109, at i.

defendant.¹²⁶ So while the past petitions show that the Court has been unclear on whether the witness is the person who tests the evidence or the person who testifies about the test, extending the rationale in *Clark* would mean that the person who tests and records the data is the witness against the defendant if she intended for her report to substitute for trial testimony. Thus, both the testing expert and the testifying expert would seem to be witnesses against the criminal defendant, and therefore implicate the Confrontation Clause.

Consider when the testimony is like that in *Maxwell* and *Ortiz-Zape*,¹²⁷ where the witness asserts her independent conclusion based on her review of the testing analyst's work is that the testing analyst's conclusion is correct. There, the evidence can be both direct (no inference is needed if one believes the testing analyst's conclusion is correct), and circumstantial (inferences are required to show why and how the testifying analyst's review of the testing analyst's work was appropriate, reliable, thorough, and trustworthy). As petitions like *Turner* described in Part II.B demonstrate, many courts find that the witness giving the "independent opinion" in court is providing the evidence *against* the defendant, and, therefore, there is no Confrontation Clause problem when that witness is available for cross-examination.¹²⁸ In cases where there is no "independent conclusion," there is a greater likelihood of a court finding a Confrontation Clause violation if the testifying witness is basically parroting the results of another expert's analysis.¹²⁹ Still, there is no clear answer to this question.

Lapse of time between when statements are prepared and when a (potential) perpetrator is identified can also be an obstacle when it comes to the Confrontation Clause. This is especially true in cold cases where law enforcement personnel identify a specific criminal defendant. There is no guarantee that a match ever will be found and hence at the time of testing there can be no accusation or identified perpetrator. When reports are prepared months, weeks, or even years, and in some

126. *Ohio v. Clark*, 135 S. Ct. 2173, 2183 (2015).

127. *See United States v. Maxwell*, 724 F.3d 724, 727 (7th Cir. 2013) (noting that the testifying analyst testified that the substance seized from the defendant contained cocaine base); *see also State v. Ortiz-Zape*, 743 S.E.2d 156, 159 (N.C. 2013) (noting that the testifying analyst testified that the substance was cocaine).

128. Brief for Petitioner for Writ of Certiorari at 19 & n.8, *United States v. Turner*, 134 S. Ct. 2660 (2014) (No. 13-127) (describing cases wherein surrogate testimony was permitted based on a report of a non-testifying expert); *see also* Brief for Petitioner for Writ of Certiorari at 10, *Ortiz-Zape v. North Carolina*, 134 S. Ct. 2660 (2014) (No. 13-633) (noting an expert may testify to an independent opinion—based on observations and analysis—without running afoul of the Confrontation Clause).

129. *See supra* notes 84–90 and accompanying text.

cases decades,¹³⁰ before any particular defendant is identified, the argument could be that the report was not testimonial (on the grounds that it is not accusatorial under *Williams*). If instead we look at the intent of the reporter—that it was made to provide evidence for later use at trial—such reports may be more likely to fit in the testimonial category. The *Clark* case provides support for this mode of analysis as the intent of the child declarant was an important factor in determining that the primary purpose of the statement was not testimonial.¹³¹

What about when a machine produces the evidence? Under the general rule that machine-generated evidence does not constitute hearsay, it should not implicate the Confrontation Clause.¹³² Nevertheless, courts and defense attorneys expect that one needs to confront the person who calibrates, runs, checks, and maintains the machine, in order to ensure that the proper procedures were followed.¹³³ Furthermore, the opportunity for errors, omissions, and outright falsification—as evidenced by a chemist in Massachusetts who was found to have tampered with evidence, forged initials on samples, and turned negative samples into positive ones—should give the courts pause when truncating confrontation rights involving physical evidence.¹³⁴

B. Does It Matter Whether the Evidence Connects to a Known Person?

A second open issue that arises from the various court decisions is whether the evidence must be connected to a known person at the time of the testing and analysis in order to be considered testimonial, as some members of the Court and lower court decisions referenced in petitions

130. *Derr v. State*, 73 A.3d 254 (Md. 2013); see also Petition for Certiorari, *Derr I*, *supra* note 115, at 2 (noting almost two decades passed from crime to indictment).

131. *Ohio v. Clark*, 135 S. Ct. 2173, 2182 (2015).

132. See Petition for Certiorari, *Ortiz-Zape*, *supra* note 81 at 9 (discussing the court's finding that machine-generated evidence does not constitute hearsay); see also Petition for Certiorari, *Turner*, *supra* note 104, at 2. Machine-generated evidence is not hearsay because it is not considered to be a statement or assertion. See FED. R. OF EVID. 801-07; *People v. Arauz*, No. B242843, 2013 WL 3357931, at *5 (Cal. Ct. App. July 3, 2013) (noting that because “[m]achine readouts are not ‘statements’ and machines are not ‘declarants,’” machine-generated DNA printouts do not implicate the Confrontation Clause).

133. There is an argument that machine-generated reports do contain assertions; it is just that the assertion is not made by a person. This artificial limitation on the scope of who can create hearsay is based on the fact that machines have no incentive to prevaricate or no real opportunity to do so, unlike people, and therefore the courts see no need to bring the machine into court to re-create its assertion, statement, or conclusion about the makeup of a particular substance. See *Davis v. Washington*, 547 U.S. 813, 823-28 (2006).

134. See Anthony Del Signore, Note, *Into the Rabbit-Hole: Annie Dookhan Confronts Melendez-Diaz*, 40 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 161, 161-62, 168-71 (2014).

before the Court suggest.¹³⁵ According to the *Williams* Court, statements are much more likely to be considered testimonial when they provide a link to a particular suspect who is already in custody.¹³⁶ The Fifth Circuit, in *United States v. Polidore*, has applied *Williams* in just this way (or perhaps extended it) by noting that information obtained to help with an ongoing investigation into an open crime is an additional category of evidence that is not considered testimonial.¹³⁷

If an accusation is not required, then must the statement relate to a targeted individual?¹³⁸ Now, after the Court's decision in *Clark*, it seems that information addressing whether or not a crime occurred (e.g., whether the bruises on the child were a result of the child's own clumsiness or the crime of child abuse) and who might be the perpetrator if there was a crime is not considered testimonial.¹³⁹ Thus, we can answer another question in the negative—accusatory statements are not necessarily testimonial, even if they do identify a specific individual.

A related issue is what is evidence *against* the defendant? Is it the underlying opinion, such as “based on the testing analyst's report, my conclusion is that the DNA profile matches,” as in *Derr*,¹⁴⁰ or the fact that “I agree with the testing analyst's conclusion that the substance was cocaine,” as in *Brewington*?¹⁴¹ The courts answer this question of what counts as evidence against the defendant differently,¹⁴² and the issues

135. See *infra* notes 63–69, 76, and accompanying text.

136. *Williams v. Illinois*, 132 S. Ct. 2221 (2012) (plurality opinion); see also *id.* at 2249–51 (Breyer, J., concurring).

137. *United States v. Polidore*, 690 F.3d 705, 718 (5th Cir. 2012) (referring to Justice Alito's plurality opinion, wherein Alito explained that the primary purpose of the prepared report was to “catch a dangerous rapist who was still at large,” and thus it could not be testimonial because it involved an ongoing investigation (citing *Williams*, 132 S. Ct. at 2243 (plurality opinion))).

138. As Professor Friedman notes, “this, plainly, has never been the law.” Friedman's answer to the second question is similarly negative, stating “such a test has no more merit than an accusation test.” See Richard D. Friedman, *Confrontation in Forensic Laboratory Reports, Round Four*, 45 TEX. TECH L. REV. 51, 81 (2012).

139. *Ohio v. Clark*, 135 S. Ct. 2173, 2182 (2015).

140. *Derr v. State*, 73 A.3d 254, 262 (Md. 2013) (noting that the testifying expert presented her conclusion that the “DNA taken from the vaginal swabs, analyzed in 2002, matched the DNA taken from Derr's buccal swab, analyzed in 2004”).

141. *State v. Brewington*, 743 S.E.2d 626, 627 (N.C. 2013) (noting that the testifying agent testified that “in her opinion, the substance was cocaine base.”).

142. See Petition for Certiorari, *Derr II*, *supra* note 115, at app. 135 (“[E]xpert witness testimony regarding underlying facts and data, which may be otherwise inadmissible, is not considered hearsay when done for the purpose of explaining his or her opinion.” (quoting *Derr v. State*, 29 A.3d 533 (Md. 2011))); see also Petition for Certiorari, *Brewington*, *supra* note 99, at 6a (noting that while a “truly independent expert opinion may serve as evidence in the case,” and that “an opinion based solely on review of an agreement with the inadmissible under the Confrontation Clause,” the testifying analyst did nothing more than review the testing analyst's

presented in *Clark* did not provide an opportunity for clarification. This author proposes that it makes a difference whether the evidence is needed to establish the identity of an alleged perpetrator, which is more likely to involve inferences based on circumstantial evidence, or to establish an element of the crime, which is more likely to involve whether one believes direct evidence. As direct evidence is often more probative and less dependent upon inferences, it may be appropriate for courts to treat direct expert evidence, like substance tests, differently for Confrontation Clause purposes than circumstantial expert evidence, like DNA profiles.

For instance, consider “what was done” evidence. Many courts find autopsy reports to be not testimonial—at least the portions about the observations of the condition of the body—and make similar findings as to machine-generated results identifying a particular substance as being what the substance is.¹⁴³ In both the autopsy and the substance identification situations, the evidence can be characterized as direct evidence—meaning that no inferences are required when the report says that a body had bruising on the neck, or weighed 150 pounds. The finder of fact can believe the evidence and determine that the body had bruising and weighed 150 pounds, or not.

Similarly, no inferences are required when a machine identifies a white powdery substance as “pure cocaine” or as heroin. The finder of fact can believe the evidence and determine the substance was cocaine or heroin, or not. If the charge is possession of a controlled substance and one believes the powdery substance to be a controlled substance, then again, no inference is required to determine the possession element of the crime. When the charge is driving under the influence and the driver’s urine test is positive for an illegal substance, no inference is needed to determine whether the driver was under the influence.

In most drug and alcohol cases, the person who is alleged to have possessed or imbibed the potentially contraband substance is usually known because the substance was found on their person, in the immediate vicinity, or in their bodily fluids. In all of the cases that were presented for review involving the identification of the substance, the perpetrator or person from whom the substance was taken was known. Thus, in the “what was done,” possession, or impairment types of cases, the statement about the substance (or substance in the bodily fluid) is inherently accusative and requires no inferences.

On the other hand, percipient witness identifications may be *either* a

notes and results and agree with her conclusion).

143. See FED. R. OF EVID. 801.

general description *or* a specifically identifiable person. A specific identification is like identifying a substance. For instance, a percipient witness's statement that "I saw Paul get in his car after downing four vodka shots" is analogous to an expert witness's statement that "Paul's blood test revealed the alcohol concentration in his blood to be in excess of the legal limit." Both statements involve direct evidence, and no inference is required if the finder of fact believes it.

However, a general description (such as that the perpetrator had red hair, was male, about thirty to forty years old, and about six-feet, six-inches tall) is more like a DNA profile, which can establish the odds of someone with a similar profile being the perpetrator, or it can establish the presence of a person with that profile at the crime scene. The evidence is circumstantial because it requires inferential links to find a matching person and then to connect that person to the crime. This chain of inferences raises the question of whether there should be a different rule for when the expert's statement is more circumstantial, and therefore less accusatorial, as it is in most DNA cases involving open or unsolved crimes.

Is an open crime exception too narrow a view of the Confrontation Clause? In either case, where the perpetrator is identified or not yet identified, evidence linking to a particular individual, whether in custody or not, seems to be accusatory, just like the child's identification of his abuser in *Clark*. Does the necessity of inferential reasoning make the DNA report less accusatory than the blood-alcohol level? Perhaps it does, at least until a person who matches the profile is identified.¹⁴⁴ At that point, the evidence of the DNA profile amounts to the accusation that "he was present at the crime scene," but, unlike the blood evidence in a driving under the influence case, the DNA profile match does not establish an element of the crime.

Whether the donor is known or later determined, the statement has the same properties. However, there is a concern about reliability and trustworthiness in situations where an expert's testing methodology or interpretation could be compromised if the expert has knowledge of the donor's identity in advance of, or during, the test. The "who did it" DNA-type cases are circumstantial evidence because of how DNA analysis works: It gives a percentage chance of someone other than the

144. It should not make any constitutional difference whether a suspect is in custody. What matters is whether the information links to an individual. In contrast to the identification-of-a-substance cases, in some of the situations in which DNA testing was used, the DNA donor was known. In other situations, the DNA donor information and profile were sent to a nationwide databank and either quickly or, in some cases, decades later found to connect to a specifically identifiable individual.

identified individual matching the DNA sample profile, which directly proves the person's DNA was there, but is only circumstantial evidence of whether the individual connected to the DNA committed the crime.¹⁴⁵

While several petitions provided the Court an opportunity for clarification, after *Clark*, the Confrontation Clause doctrine remains jumbled in the area of whether a statement must be accusatory or connect to a known or identified subject, in order to implicate the defendant's protections under the clause. What we can safely say is that the fact that a statement is accusatory and connects to a known person is not sufficient to render the statement testimonial. By requiring a contextual evaluation of the intent of the speaker, as well as the position or duties of the listener or interrogator, the *Clark* Court has backtracked from the accusation rationale of the *Williams* plurality opinion.

The next Section addresses the issue of reasonable reliance and how errors in the testing process could have greater implications in "what was done" cases than in the "who did it" cases.

C. When Is It Reasonable to Rely on the Work of Another Expert?

A third area of uncertainty is implicated by the collaborative environment in which scientific evidence is analyzed. By denying certiorari in all of the cases involving expert witness testimony, the Court seems unready or unwilling to address the issue of the limits of reasonable reliance among a community of scientific experts.

While experts are permitted to rely on inadmissible matter, as long as reliance upon such matter is reasonable within that field of expertise, the question becomes when is it reasonable to rely upon procedures being properly followed by other experts or other technicians? Some courts and decisions have determined that the information that forms the basis upon which this reasonable reliance attaches is not offered for the truth of the matter asserted and therefore there is no Confrontation Clause violation.¹⁴⁶ The lower courts that interpret *Williams* to assert that basis evidence is not testimonial limit what counts as evidence against the defendant when the evidence is used merely as the *basis* for the expert opinion.¹⁴⁷ Other courts disagree with the notion that there is no Confrontation Clause violation because basis information is

145. Except perhaps in cases of rape, where the issue is identity of the alleged assailant, rather than consent or lack thereof.

146. See *supra* Part II (certiorari petitions).

147. See *State v. Ortiz-Zape*, 743 S.E.2d 156 (N.C. 2013) (discussing the basis of evidence and confusion).

“reasonably relied upon” by experts in their fields, in part, on the grounds that the Framers could not have considered reasonable reliance to excuse Confrontation Clause violations when they drafted the Bill of Rights, given that the notion of reasonable reliance is a relatively recent formulation in the revised Federal Rules of Evidence.¹⁴⁸

When evidence is used in this way, it is similar to the non-truth purpose of explaining subsequent conduct or describing the layout of the room—it is not necessary to prove the layout of the room, but rather that the witness had some knowledge of the room, perhaps by being present in that room in the past.¹⁴⁹

Professors David Kaye and Jennifer Mnookin refer to this as the non-truth purpose of “illumination”—a “nonsubstantive purpose of helping the judge or jury understand and evaluate the expert’s opinions—while suspending all judgment on the truth.”¹⁵⁰ For instance, there is a difference between an expert report stating that “the blood-alcohol level of the accused was X%,” which is direct evidence of guilt in exceeding the legal limit where the limit is less than X, and “the DNA sample profile is YY, and only .000001% of the population have that DNA profile.” The latter can be simply basis evidence, which is only circumstantial evidence of guilt in committing the crime.

Nevertheless, when the roles of gathering, testing, evaluating, analyzing, and testifying are performed by more than one expert, additional issues remain as to who and what counts as evidence against the criminal defendant. For instance, determining whether the evidence is truly being used circumstantially is a point of contention. Kaye and Mnookin criticize the *Williams* decision because the “disclosure of Cellmark’s role [as an accredited outside lab, often used to help with the department’s backlog] cannot be seen as serving ‘the legitimate nonhearsay purpose of illuminating the expert’s thought process.’”¹⁵¹

148. See *supra* Part II (certiorari petitions).

149. See David Kaye & Jennifer Mnookin, *Confronting Science: Expert Evidence and the Confrontation Clause*, 2012 SUP. CT. REV. 99, 133–34 (citing *Bridges v. State*, 19 N.W.2d 529 (Wis. 1945), for a non-hearsay use of a description of a room where a minor was allegedly sexually assaulted:

The very fact that she could describe such a room, proven to exist by other evidence, suggests that she was in fact in such a room—not because she says so, but because the chances of her being able to make up a description based on her imagination or other sources of knowledge is massively implausible and thus extraordinarily unlikely to be the result of mere coincidence or chicanery.

150. *Id.* at 123.

151. *Id.* at 123–24 (citing *Williams v. Illinois*, 132 S. Ct. 2221, 2240 (2012) (plurality opinion)); see also *supra* notes 78–81 and accompanying notes. Kaye and Mnookin provide a detailed analysis of why the evidence does not illuminate “how a computer makes a match, how the matching database record is linked to [the defendant] or how rare the matching features are in

While she admits that the database match on the alleles that Cellmark (the outside lab) returned to the Illinois State Police (government lab), which also matched to a suspect picked out of a line-up, is some circumstantial evidence that the Cellmark lab *properly* performed the tests on the appropriate sample, the circumstantial chain of inference is less strong than the opinion suggests. “[T]rawing large databases creates many opportunities for even an incorrectly generated DNA profile to match *somebody*.¹⁵² Having five people in a line-up fourteen months after the incident increases the chances that the witness will make an erroneous selection, especially if the witness is already inclined to select someone after so much time has elapsed since the crime.¹⁵³

When the evidence is used as a basis, the more important question seems to be “how does or should the court analyze the difference between percipient witnesses and expert witnesses?” Percipient witnesses are usually the ones to provide any direct evidence in the case because they saw, heard, smelled, touched, tasted, or felt something happen.¹⁵⁴ While percipient witnesses can also provide circumstantial evidence—such as when they saw something that requires an inference to connect it to an element of the charge—when they give an opinion, that opinion must be “rationally based on the perception of the witness,” and thus remain directly connected to one of the five senses.¹⁵⁵

In contrast, one common use of expert witness testimony is to provide an opinion based on having facts made known to the expert at or prior to trial and using her expertise to form an opinion without any participation in, testing of, or analyzing of evidence gathered from the crime scene. Federal Rule of Evidence 703 permits experts to rely on other matter, but lay witnesses do not have this option.¹⁵⁶ When the experts are in a scientific field that requires them to observe information and evidence gathered from the crime scene, or from subsequent tests on that evidence, they can become percipient witnesses to the gathering or testing of the evidence, and then use their expertise to form opinions. Those opinions, while based on the data and the evidence, transcend that data and evidence.¹⁵⁷ Thus, in many contexts, expert witnesses can

the population.” Kaye & Mnookin, *supra* note 149, at 127.

152. *Id.* at 134.

153. *Id.* at 135.

154. FED. R. EVID. 701.

155. FED. R. EVID. 701(a).

156. FED. R. EVID. 701, 703.

157. Kaye & Mnookin, *supra* note 149, at 150–51 (“When the conventional witness testifies to ‘bricks’ within his firsthand knowledge, his knowledge does not depend on the other bricks in

be *quasi-percipient* and *quasi-expert*.

This dual role of expert witnesses highlights a fundamental conflict between the requirements of Federal Rule of Evidence 703 and the notion of “scientific validity.” If scientific validity is the standard, then we must analyze how the reliance in a community of scientists enhances or detracts from that standard. The question is when is it appropriate for an expert to rely upon the work of another in giving an opinion, or in reaching a so-called “independent conclusion.”¹⁵⁸

What constitutes “reasonable reliance” should depend more closely on past experience between the expert testifying at trial and the individual analyst who performed the actual test, or at a minimum, with the individual lab where the tests were performed. It may be more reasonable to rely upon the procedures and the accuracy of materials from a lab with which the expert has had a close working relationship, or repeated experience, than it would be to rely on information from a lab with which the expert does not have any prior experience. Only then can one say reliance is reasonable upon someone else’s facts, conclusions, and testing procedures.¹⁵⁹

Error rates matter on the issue of reasonable reliance, as well as on the issue of the criminal defendant’s right to confront the evidence against him. Different tests have different rates of error.¹⁶⁰ Professor Friedman notes that it is harder to make a mistake that would result in identifying a DNA profile that actually matches a particular person. In fact, a mistaken or incompetent analyst can more easily make an error that results in the blood-alcohol level percentage or percentage of cocaine in a substance being greater than it actually is.¹⁶¹ An error that exaggerates the actual percentage may result in evidence that the level exceeds the legal threshold, when in reality the level does not.

Another issue to consider is whether the incompetent analyst is likely to make an error that determines a substance is cocaine when it is not, or that there is alcohol in the blood when there is not. We know of at least one analyst who made this miscalculation or misinterpretation (and even

the same way that an expert’s often does. . . . By contrast, the knowledge claims of forensic science witnesses are, intrinsically, strongly interlinked with the actions and knowledge production of others.”).

158. *Id.* at 157–58.

159. Some courts have found that this question goes to the weight of the evidence provided by the expert testimony and not to its admissibility.

160. For instance, admitting that the odds of both an erroneous match and an erroneous identification are difficult to quantify, Kaye and Mnookin note that we can be confident that those odds, whatever, they might be, “are far higher than the one-in-many-quadrillion random-match probabilities presented for Williams’s DNA.” *Id.* at 136.

161. *See* Friedman, *supra* note 138, at 74.

did so intentionally in some cases) by finding a sample to be positive for a banned substance when the correct analysis was negative.¹⁶²

It is highly probative that a report lists a particular DNA profile, regardless of the reliability of the analyst and her process.¹⁶³ Why? Consider two people being asked to think about a number between one and one million and coming up with numbers that are less than ten numbers apart. Because there are so many millions of combinations of DNA profiles, there is a very low probability of an analyst identifying a profile that matches so well to a particular individual when the DNA sample is not from that individual, or from his or her identical twin. However, as discussed earlier, a DNA match is much more circumstantial and much less direct than a blood-alcohol level.¹⁶⁴ Inferences are required to connect the DNA match to guilt of the criminal charges. Thus it would seem that the danger of unconflicted direct evidence of the blood-alcohol level for “what is it” cases should be of greater concern than it is for DNA profiles in “who is it” cases.

IV. POTENTIAL APPROACHES FOR THE COURTS

The muddled state of the doctrine leaves much room for improvement, and four options come to mind. The first expands upon Professors Kaye and Mnookin's idea to treat expert witnesses in scientific fields differently than other experts. The second is to consider carving out a portion of the testimonial definition to exclude certain percipient and expert testimony. In conjunction with the second option, this Article analyzes a third proposal others have made in relying upon existing hearsay exceptions to admit expert testimony based on the information, observations, and tests of other experts. The fourth option, which complements the other three, is to craft specialized instructions for jury cases.

A. Treating Scientific Experts Differently When They Are Quasi-Percipient

Is there a principled reason for a different assessment of what is reasonable reliance in the scientific community in contrast to what is reasonable reliance with other types of experts? Kaye and Mnookin argue that perhaps there should be,¹⁶⁵ suggesting that some sort of

162. See Del Signore, *supra* note 134, at 162 n.1 (quoting the signed statement of Annie Dookhan, the analyst at issue in *Melendez-Diaz v. Massachusetts*, stating “I intentionally turned a negative sample into a positive a few times.”).

163. Freidman, *supra* note 138, at 74–75.

164. *Id.* at 74.

165. Kaye & Mnookin, *supra* note 149, at 151–52. The article describes the difference

science exception may be warranted and recognizing that “science is a collective phenomenon that both produces distributed knowledge and permits, and indeed requires, a certain bounded degree of epistemic deference to the findings of others.”¹⁶⁶ They conclude:

When thinking about how to approach the Confrontation Clause, the distinctive feature of science that requires focused attention is that it is a collective enterprise: it produces distributed knowledge located across individuals rather than held by someone standing alone, and its participants engage in epistemic deference, deference that is supported by careful documentation. Only by confronting what these aspects of science ought to mean for the operation of the Confrontation Clause will the Court be able to develop an approach to this thorny set of issues that adequately respects both Confrontation Clause values and the practices of science.¹⁶⁷

Expert witnesses who test DNA and blood-alcohol content must be more involved with the evidence, having interacted with it prior to trial in order to conduct their tests, obtain their results, and then draw their conclusions. This involvement occurs in a different situation than the typical “hypothetical question” expert opinion evidence. These experts are *quasi-percipient* and *quasi-expert* as noted above.¹⁶⁸

Can Confrontation Clause jurisprudence address the situation that arises when there is some sort of dual percipient and expert testimony? Kaye and Mnookin suggest that the scientific process of “distributive cognition does directly raise Confrontation Clause problems”¹⁶⁹ and that the Court will not solve that problem until it “forthrightly confronts the question of whether science is special in ways that warrant distinctive treatment” under the clause.¹⁷⁰ While the Federal Rules of Evidence and courts have long understood a bright line between lay opinion testimony and expert opinion testimony,¹⁷¹ allowing a new category that

between a conventional witness and forensic science witnesses whose knowledge “requires reliance on what others have done and what others know.” *Id.* at 154.

166. *Id.* at 155.

167. *Id.* at 159.

168. See *supra* notes 156–164 and accompanying text.

169. Kaye & Mnookin, *supra* note 149, at 152.

170. *Id.* at 158.

171. FED. R. EVID. 701–04; see also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 138 (1999) (noting that Federal Rule of Evidence 703 grants all expert witnesses “testimonial latitude unavailable to other witnesses on the assumption that the expert’s opinion will have a reliable basis in the knowledge and experience of his discipline”); *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (recognizing lay witness testimony as being governed by Federal Rule of Evidence 701, and expert witness testimony as being governed by Federal Rule of Evidence 702); *United States v. Garcia*, 413 F.3d 201, 213 (2d Cir. 2005) (recognizing the limits placed on the admissibility of lay opinions at trial by Federal Rule of Evidence 701); *United States v. Younger*, 398 F.3d 1179, 1189 (9th Cir. 2005) (noting that Federal Rule of Evidence

overlaps the two may provide a more palatable mechanism for applying the Confrontation Clause jurisprudence in these cases. It may be that courts should apply a different standard in cases involving these hybrid types of testimony.

After *Clark*, the Court left open whether any non-law enforcement personnel in any circumstance could be the recipient of a testimonial statement, noting that “at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns.”¹⁷² We now know that who is doing the questioning matters, as well as whether they are charged with uncovering, investigating, or prosecuting crimes.¹⁷³ One group of non-law enforcement personnel is private laboratory employees who test samples and identify DNA. Though they do not necessarily interrogate, they use a scientific process of inquiry to obtain information that helps to “uncover” potential suspects, and thus there is a strong argument based on *Clark* that the “statements” (in the form of data compilations, testing results, and other “reports”) made to these experts in the collaborative scientific environment should implicate the Confrontation Clause. By leaving open the possibility of some separation between the recipient of the statement and the law enforcement or governmental authority, the Court has permitted lower courts to expand the opportunities for the trier of fact to consider the percipient and expert testimony discussed earlier.

Another issue to reconcile is Justice Thomas’s opinion in *Clark*, which notes that sufficient indicia of solemnity should be the main factor in determining whether a statement is testimonial, regardless of whether it was made to a private person or to an agent of law enforcement.¹⁷⁴ Thomas reiterated an argument he presented in his *Williams* opinion, which explained that while basis evidence may be offered for the truth of the matter asserted, there is not the necessary formality or solemnity, and so it is not considered testimonial despite being for the truth of the matter asserted.¹⁷⁵ However, if it is neither solemn nor formal, then it is even less reliable and therefore should be even less likely to be admitted under the reasonable reliance standard.

704(b) bars an expert from stating “an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged”).

172. *Ohio v. Clark*, 135 S. Ct. 2173, 2181–82 (2015).

173. *Id.* at 2183 (noting that teachers are not converted by mandatory reporter statutes into a “law enforcement mission aimed primarily at gathering evidence for prosecution”).

174. *Id.* at 2186 (Thomas, J., concurring in judgment).

175. *Williams v. Illinois*, 132 S. Ct. 2221, 2255, 2259 (2012) (Thomas, J., concurring) (noting that the purpose at bar was an evidentiary one, “concerned with the exigencies of an ongoing emergency, rather than with producing evidence in the ordinary course”).

On the other hand, if we focus on the question of whether the primary purpose of the expert providing the basis evidence is her intent to have the evidence used at trial, then we have two answers. If there is no identified individual, then some on the Court would say that the primary purpose would be an ongoing investigation or to catch an unidentified suspect still at large, which renders the statement not testimonial under Justice Alito's plurality opinion in *Williams*, the Fifth Circuit in the *Polidore* case described earlier,¹⁷⁶ and apparently under the majority opinion of *Clark*. If there is an identified individual, then under *Clark*, the specifically targeted accusation evidence is not sufficient to render the statement testimonial, and we must examine the broader context of the intent of the expert in creating the statement, as well as the expert's role in uncovering, investigating, or prosecuting the crime, in order to determine whether the statement is testimonial.

B. Overcoming the Testimonial Hurdle: Rendering Other Statements Not Testimonial

Justice Breyer presents the option in *Williams* that we could declare expert witness reports as not testimonial and rely upon them as similar to business records under that hearsay exception, particularly if there is no suspect in mind at the time the reports are created.¹⁷⁷ Would it be possible to declare, as Justice Breyer suggested, that expert reports are not testimonial? To the extent the reports were prepared in anticipation of later use at trial, they fit the current definition when they contain some formality and some validity to the extent of being sworn or certified.

Such a declaration would be a significant departure from *Melendez-Diaz*,¹⁷⁸ and likely would further diminish the confrontation rights of criminal defendants if applied to all expert reports. However, there is a principled reason for making a distinction between expert reports that relate to direct evidence in the "what was done" cases, from those reports that relate to "who did it" cases. To the extent the expert is more of a percipient witness, such as when determining the blood-alcohol content of a sample, there is an argument that the report can be excluded from the definition of "testimonial" without significantly impacting the defendant's confrontation rights.

Is the real issue that "testimonial" is the wrong word? From a

176. See Toney, *supra* note 70, at 976–79 (discussing *United States v. Polidore*, 690 F.3d 705 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 1583); see *supra* note 137 and accompanying text.

177. *Williams*, 132 S. Ct. at 2251–52 (Breyer, J., concurring).

178. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009) (holding that the certificates were testimonial).

layperson's perspective, anything that eventually was presented at trial would appear to be testimonial, as the *Clark* Court noted, stating:

Our Confrontation Clause decisions, however, do not determine whether a statement is testimonial by examining whether a jury would view the statement as the equivalent of in-court testimony. The logic of this argument, moreover, would lead to the conclusion that virtually all out-of-court statements offered by the prosecution are testimonial.¹⁷⁹

Toney suggests one solution to the problem: revise the formula of expert witness responses to hypothetical questions to be something like “if X were true, then Y follows,” rather than the current version which seems to be “Y is true because of X.”¹⁸⁰ The “if . . . , then . . .” formula is less conclusory than the “if false, then . . . because . . .” formula that litigators so often use,¹⁸¹ because the jurors still can decide whether or not they believe X to be true before accepting the expert's conclusion. When the expert does not give a conclusion that Y is true, there is a stronger basis for the argument that the opinion is not relying upon underlying data from another expert for the truth of the matter asserted. Rephrasing the evidence in this way, combined with jury instructions that specifically remind the jurors that they cannot use the basis evidence for its truth, might temper some of these concerns.

The next Section analyzes how to use the hearsay exceptions if the more percipient portions of the scientific expert reports are deemed not testimonial.

C. Using Traditional Hearsay Exceptions

A third approach puts greater focus on meeting hearsay exceptions as a basis for admissibility. If quasi-percipient experts are granted special treatment, or if the definition of testimonial is refined to exclude certain expert statements and reports, then traditional hearsay exceptions can apply to render the statements, testimony, and reports admissible. Justice Scalia feared a return to the less-protective *Ohio v. Roberts* standard, stating:

[A] suspicious mind (or even one that is merely not naïve) might regard this distortion [through dictum conveying hostility to the *Crawford* case] as the first step in an attempt to smuggle longstanding hearsay exceptions back into the Confrontation Clause—in other words, an attempt to return to *Ohio v.*

179. *Clark*, 135 S. Ct. at 2183 (majority opinion).

180. Toney, *supra* note 70, at 53; *see also* Friedman, *supra* note 138, at 65.

181. *See* L. TIMOTHY PERRIN, H. MITCHELL CALDWELL & CAROL A. CHASE, *THE ART AND SCIENCE OF TRIAL ADVOCACY* (2d ed. 2011).

Roberts.¹⁸²

If the testimonial hurdle is removed, when an expert report is offered into evidence for the truth of the matter asserted, the next question to ask is “what makes the supervisor testimony adequate over that of the technician who actually performed the scientific test?” In some cases, it seems that a certification makes the difference,¹⁸³ and the language of the certification is important because some certifications attest that the findings or conclusions are accurate,¹⁸⁴ as opposed to attesting that the proper procedures were actually followed.¹⁸⁵

One author suggests that simply including in reports an affirmation by the analyst and the reviewer could provide courts with a “broad basis for admission,” using traditional hearsay exceptions.¹⁸⁶ He suggests specific language that can be included in each report to lay an appropriate foundation for admissibility under a particular hearsay exception. The examples include (1) *present sense impression*: “This report consists of results observed by the analyst”; (2) *recorded recollection*: “This report consists of the observations of the analyst recorded shortly after the occurrence and adopted by the analyst as true, accurate, and complete”; (3) *records of a regularly conducted activity*: “This report was produced by the analyst, a person with personal knowledge, at the time of testing, as part of the normal operation of this laboratory. This report is subject to independent review and confirmation of its validity”; and (4) *public records*: “This report was produced as part of the state’s normal operation and is recorded as a public record.”¹⁸⁷ This language in a certification lays the proper foundation for a hearsay exception for the report when signed by the testing analyst, and the note then argues that the supervisor’s testimony about the test should be admissible.¹⁸⁸

Autopsy reports are often considered public records, which supports the primary purpose analysis. In many situations, the coroner is under a

182. *Clark*, 135 S. Ct. at 2184–85 (Scalia, J., concurring in judgment).

183. *See* *United States v. Turner*, 591 F.3d 928, 930 (7th Cir. 2010); *Marshall v. People*, 309 P.3d 943, 945 (Colo. 2013); *State v. Walker*, No. 2011AP2091-CR, 2013 WL 2157893 (Wis. Ct. App. May 21, 2013).

184. *See Marshall*, 309 P.3d at 945. The technician supervisor testified that she would certify the results of the testing analysts’ report and send them back to the requesting police department. *Id.*

185. *See Turner*, 591 F.3d at 931–32. The testifying expert was the analyst supervisor who reviewed reports that were certified by the testing analyst for proper procedure. *Id.*

186. *See* Eric Nielsen, *The Admission of Scientific Evidence in a Post-Crawford World*, 14 MINN. J.L. SCI. & TECH. 951, 979 (2013).

187. *Id.*; *see also* FED. R. EVID. 803(1), 803(5), 803(6) & 803(8).

188. Nielson, *supra* note 186 at 979.

statutory duty to create the report based on the autopsy, and some courts find that autopsy reports are not testimonial because the purpose is to determine the cause of death, not for later use at trial.¹⁸⁹ Further, autopsy reports are not prepared by police officers or law enforcement personnel, although the coroner usually is an employee of the government in some way.

But is it stretching the imagination to say that these reports are not prepared in order to determine whether a crime was committed (what was done), and, if so, who committed the crime (who did it)? Ascertaining the cause of death can help narrow down whether a crime was committed (what was done), which in turn can help narrow down who could have committed the crime (who did it). This purpose contrasts with the situation where the creator of the report planned to use it against a particular defendant at trial. As a practical matter, however, the facts and circumstances determine the extent to which a coroner's autopsy report could be impacted by the existence of a suspect, or a particular defendant, in the case. In some situations, the police officers have participated in the autopsy and provided advice about a person of interest, suspect, or even actual defendant, during the autopsy, which may have an influence on the coroner's report.

The public records exception under the Federal Rules of Evidence does not apply to statements made by law enforcement in criminal cases.¹⁹⁰ However, the *Melendez-Diaz* Court rejected the use of such reports as business records where the regularly conducted business activity is preparing evidence for use at trial.¹⁹¹ Linking the report to a business record enhances reliability. Moreover, as discussed in Part II, reliability is no longer the linchpin of the Confrontation Clause analysis. What matters is whether or not a statement or report is testimonial, and if so, there must be the opportunity to confront.¹⁹² The formality and solemnity are not necessarily related to reliability, although all three are factors taken into consideration in the business records hearsay exception.

Is the past recollection recorded hearsay exception a potentially

189. Petition for Certiorari, *Edwards*, *supra* note 72, at 2.

190. See FED. R. EVID. 902. The California Evidence Code does not contain this limitation, and if we can address the testimonial aspect of the Confrontation Clause problem, the evidence could be admitted in California courts.

191. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321–22 (2009).

192. *Crawford v. Washington*, 541 U.S. 36, 53–60 (2004); see also Jay M. Tiftickjian & Timothy Bussey, *Unraveling the Confrontation Clause: Expert Testimony and Forensic Reports after Williams v. Illinois*, in *UTILIZING FORENSIC SCIENCE IN CRIMINAL CASES* (Aspatore 2014), 2013 WL 5757942, at *5.

appropriate mechanism for admitting the forensic report for the truth of the matter asserted? If so, the analysis would need to leave open the Confrontation Clause issue on the grounds that the report was not intended to substitute for trial testimony. It is being used as such only because the witness no longer can recall accurately and completely enough to testify fully and truthfully in the matter and, therefore, this substitute testimony is the next best thing. Would that person need to appear as a witness? In federal courts, the answer is “no” because availability is immaterial under Federal Rule of Evidence 803, despite the fact that the language of Rule 803(5) refers to a “witness.”¹⁹³ This mode of analysis may provide a clearer path for the courts because the document could be read into evidence by the offering party (the prosecution), but can be admitted into evidence only by the opposing party (the defense).¹⁹⁴

D. Providing Special Instructions for Jury Trials

The fourth option supplements jury instructions in cases where experts rely upon other experts, or where there are different testing and testifying experts. Whether the case involves a judge trial or a jury trial has important implications because there is a greater risk of confusion with declining to state the underlying basis of evidence that contains inadmissible hearsay or testimonial statements when the jury is supposed to evaluate the credibility and weight of the expert’s opinion testimony. The trial court and jurors hearing the evidence made known to the expert or the hypothetical upon which the opinion is based is very different from withholding otherwise inadmissible evidence from the jury when the expert is using that evidence as the basis for her opinion.

One issue to consider here is whether or not the report of the non-testifying expert or scientific analyst was admitted into evidence. When that report is admitted into evidence it can be hearsay unless offered for

193. See FED. R. EVID. 803(5).

Recorded Recollection. A record that: (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; (B) was made or adopted by the witness when the matter was fresh in the witness’s memory; and (C) accurately reflects the witness’s knowledge. If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

Id. But see CAL. EVID. CODE 1237 (“Past recollection recorded”). The California rule requires a witness to testify that a report is accurate where evidence of a statement previously made by a witness out of court is allowed, if the statement would have been admissible if the witness had made it while testifying; the statement concerns a matter which the witness now does not remember well enough to testify about fully and accurately; and the statement is in a writing that was made when the events recorded in the writing had occurred or were fresh in the witness’ memory. *Id.*

194. See FED. R. EVID. 803(5).

a non-truth purpose. On the other hand, when the report is not admitted into evidence, then courts address the issue of surrogacy or parroting, and many courts have found the report to be inadmissible unless there is evidence of an independent conclusion drawn by the testifying expert.¹⁹⁵ Also, when the report is not admitted into evidence, there is more risk of juror confusion as to the underlying basis evidence for the expert testimony because the jurors hear about the report, but do not ever see or read it.

Circumstantial evidence of the defendant's guilt enhances this risk of juror confusion because it requires inferences to be made about how the evidence establishes guilt. One author suggests that the next case taken by the Supreme Court must be one that involves a jury trial because there is more danger depending upon the impact of limiting instructions on jurors.¹⁹⁶ Most of the cases submitting petitions for certiorari involved jury trials, as did the *Clark* case. *Clark*, however, rejected the argument that one mode of analysis should be whether the jury would consider the out-of-court statement to be the equivalent of, or a substitute for, testimony.¹⁹⁷

This dilemma is demonstrated in cases involving DNA evidence, which provides a percentage of likelihood that the defendant's DNA matches the DNA that was found at the crime scene. In these cases, the jury still must draw an inference from the fact that if they believe the match is accurate, then the prosecution has proven that the defendant was at the crime scene. However, without further inferences, the defendant's presence at the crime scene does not establish the defendant's guilt. The use of DNA may be a closer—but nonetheless circumstantial—link in cases of rape where the issue is lack of consent as opposed to identity of the assailant. But in other cases where the identity of the assailant is at issue—rather than whether or not the other elements of the crime were met—the jury's ability or willingness to

195. See, e.g., *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710–16 (2011) (rejecting the admission of surrogate testimony, where the report was not admitted into evidence, because the testifying analyst had no first-hand knowledge regarding the completed tests and had no independent opinion concerning the defendant's blood-alcohol content).

196. See *Toney*, *supra* note 70, at 997.

On that score, this article argues that the Supreme Court should only grant certiorari if the case below is tried to a jury. This article takes that position primarily because the justices would likely remain divided if the finder-of-fact below were a judge. In that trial, if similarly offensive statements were elicited, the plurality could simply regurgitate its argument from *Williams*: no matter how garbled the expert's delivery is, a trial judge is presumed to adhere to the Federal Rules of Evidence, and those rules do not permit the introduction of basis evidence for its truth.

Id. (citing *Williams v. Illinois*, 132 S. Ct. 2221, 2235–37 (2012)).

197. *Ohio v. Clark*, 135 S. Ct. 2173, 2183 (2015)

follow the limiting instruction is of crucial importance in safeguarding the defendant's Sixth Amendment right to confrontation.

V. CONCLUSION: WHAT REMAINS?

Given the circuit splits on what counts as testimonial evidence in the areas of autopsy reports, machine-generated data, identifying substances, samples, and DNA profile evidence, this Article has three proposals that would clarify Confrontation Clause jurisprudence: (1) to treat quasi-percipient expert witnesses differently than other experts; (2) to consider certain percipient portions of expert reports and other types of statements not testimonial, thus allowing traditional hearsay exceptions to be adequate for admission; and (3) to provide specifically tailored instructions for jury trials involving nondisclosure of expert basis evidence. More remains to be done, and as long as the Supreme Court continues to decline petitions that provide opportunities to clarify the scope and parameters of the right to confrontation, this Article provides some guidance for lower courts.