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## Grabbing the Bullcoming by the Horns: How the Supreme Court Could Have Used *Bullcoming v. New Mexico* to Clarify Confrontation Clause Requirements for CSI-type Reports

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# Grabbing the Bullcoming by the Horns: How the Supreme Court Could Have Used *Bullcoming v. New Mexico* to Clarify Confrontation Clause Requirements for CSI-type Reports

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I. INTRODUCTION

In the pilot episode of the hit television show CSI, Grissom says to Warrick: “Concentrate on what cannot lie. The evidence.”<sup>1</sup> Although Grissom is a beloved figure in U.S. popular culture, the U.S. is currently unwilling to accept that evidence never lies.<sup>2</sup> In stark contrast to Grissom’s statement, the common law has a long history of allowing criminal defendants to cross-examine and question witnesses providing evidence against them. The right to confront an accusatory witness is reflected in the historical legal documents of Great Britain,<sup>3</sup> in

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1. *CSI: Crime Scene Investigation* Quotes by Gil Grissom, CRIMELAB.NL <http://crime-lab.nl/quotes.php?series=1&season=99&episode=99&characters=Gil%20Grissom> (last visited Mar. 11, 2011).

2. Or, perhaps, more appropriately, the U.S. is unwilling to accept that those providing testimony never lie. Thus, although Grissom is most likely referring to physical evidence, cross-examination can help to control mistaken and false testimonial evidence. It may also lead to correcting mistaken interpretations of physical evidence.

3. See M. HALE, HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 258 (1713) (discussing the examination of witnesses as a means to ascertain the truth); 3

Shakespearean writing,<sup>4</sup> and even in the Bible.<sup>5</sup> In the United States, the right to confront was enshrined in the Sixth Amendment to the Federal Constitution which provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .”<sup>6</sup> The right to confront applies at both the federal level and at the state level (through the Fourteenth Amendment).<sup>7</sup>

Although there is some consensus that the Constitution grants criminal defendants some right to confront their accuser, there is much less agreement on exactly who must be confronted and for what kinds of accusations or statements.<sup>8</sup> Particularly controversial is whether the Confrontation Clause requires a scientific analyst (e.g., from the CSI lab) to testify in criminal cases where such an analyst conducts a test, perhaps using a machine or other apparatus, and then prepares a report communicating the results of that test, and that report (or evidence of it) is offered at trial against an accused.<sup>9</sup>

In *Melendez-Diaz v. Massachusetts*<sup>10</sup> the Supreme Court held that reports from forensic analysts were not exempted from the accused’s Confrontation Clause protection.<sup>11</sup> The prosecution in *Melendez-Diaz* attempted to introduce the analyst’s report or affidavit of what he found, alone, without presenting the analyst himself for testimony and cross examination.<sup>12</sup> The decision held that the analyst of the narcotic substance found on the accused had to testify.<sup>13</sup>

But the Court left open multiple questions, not necessary to the decision on the facts, including whether exceptions could be made for certain, specific types of analysts, which specific analyst must testify where several were involved, whether someone else from the lab—say a supervisor—could testify instead, and whether an expert witness relying on the report could obviate the need for confrontation of the analyst(s).<sup>14</sup> Moreover, the continued vitality of even the issue

WILLIAM BLACKSTONE, COMMENTARIES \*373 (discussing the examination of witnesses as a means to ascertain the truth).

4. WILLIAM SHAKESPEARE, RICHARD II act I, sc. 1; WILLIAM SHAKESPEARE, HENRY VIII, act ii, sc. 1.
5. *Acts 25:16*. See generally Lilly v. Virginia, 527 U.S. 116, 140–41 (1999) (Breyer, J., concurring) (acknowledging the historical bases of the Confrontation Clause).
6. U.S. CONST. amend. VI.
7. See *Pointer v. Texas*, 380 U.S. 400, 403 (1965).
8. See *infra* Part II.
9. See *infra* sections II.D–E, Part III.
10. 129 S. Ct. 2527 (2009); see also John Wait, *Another “Straightforward Application”: The Impact of Melendez-Diaz on Forensic Testing and Expert Testimony in Controlled Substances Cases*, 33 CAMPBELL L. REV. 1, 4–5 (2010) (“Taking into consideration each new justice’s prosecutorial background, the future of *Melendez-Diaz* is not clear or certain.”).
11. 129 S. Ct. 2527.
12. See *id.* at 2531.
13. See *id.* at 2542.
14. The many unresolved issues are discussed in detail below. See *infra* section IV.A.

purportedly resolved by the Court in *Melendez-Diaz* (which is widely regarded as a pro-defense decision) was called into question by the later appointments of Justice Kagan and Justice Sotomayor (who has significant experience as a New York city prosecutor)<sup>15</sup> to replace Justices who voted with the Court in *Melendez-Diaz* (who did not have significant prosecutorial experience). As a result of all this, as we see it, after *Melendez-Diaz* there were nine important issues<sup>16</sup> still left open about how the Confrontation Clause applied to the prosecution using reports from forensic experts against a criminal accused at trial.

Just this last term, the Supreme Court was presented with the opportunity to tackle one of these issues in a case styled *Bullcoming v. New Mexico*.<sup>17</sup> In *Bullcoming* the Court was specifically asked to determine: “Whether the Confrontation Clause permits the prosecution to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements.”<sup>18</sup> *Melendez-Diaz* left that issue untouched, since no attempt was made by the prosecution to use an in-court substitute witness for the analyst. The evidence at issue in *Melendez-Diaz* was an affidavit or report of the testing analyst.<sup>19</sup>

Only this somewhat narrow question was presented to the Supreme Court in *Bullcoming*. But the opportunity was there to address many of the other nine issues we have identified. Although prosecutors, crime labs, law enforcement officials, defense lawyers, judges, and Evidence and Confrontation Clause scholars would have dearly loved—indeed, needed—to see the Court tackle all of these broader issues, there is an argument of judicial restraint that counsels against a court taking on issues unnecessary to the particular decision—issues that are not specifically raised, briefed, and argued in the case before it—on the grounds that such excursions are likely to be poorly thought out.<sup>20</sup>

It is not the purpose of this Article to weigh in on whether the *Bullcoming* Court should have tackled these broader issues. There are

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15. Office of the Press Secretary, Background on Judge Sonia Sotomayor, The White House (May 26, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Background-on-Judge-Sonia-Sotomayor/](http://www.whitehouse.gov/the_press_office/Background-on-Judge-Sonia-Sotomayor/) (last visited Apr. 18, 2011).

16. See *infra* section IV.A (discussing each of these issues in detail).

17. 131 S. Ct. 2705 (2011).

18. *Bullcoming v. New Mexico: Question Presented*, SUPREMECOURT.GOV, <http://www.supremecourt.gov/qp/09-10876qp.pdf> (last visited Mar. 10, 2011) [hereinafter *Question Presented*].

19. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2530 (2009).

20. See generally *Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011) (“A ‘longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.’” (quoting *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 445 (1988))).

benefits to both views.<sup>21</sup> Rather, our purpose is to set out the nine issues regarding Confrontation law as applied to scientific reports that arise after *Melendez-Diaz*, and examine what, if anything, the Court said or implied about such issues in *Bullcoming*. We will also venture some tentative thoughts of our own on each of these issues, and some consequences of the various possible views.

Part II provides some case law history of Confrontation Clause jurisprudence so that the issues may be placed in their historical and analytical context. Part III sets forth the facts, the lower court proceedings, and the Supreme Court decision, in *Bullcoming*. Part IV identifies the nine important issues that arose prior to *Bullcoming* and discusses where they stand after that decision. Also considered in that Part are some consequences to law enforcement policy. Finally, Part V presents our conclusions. Even though the Supreme Court in *Bullcoming* chose to refrain from laying to rest most of the issues we identify, we hope that this paper will, at least, add to the ongoing dialogue on forensics and confrontation rights, and encourage more work in this important and developing area of law.

## II. MODERN CONFRONTATION CLAUSE JURISPRUDENCE

Although the right to confront an accuser has a long history, the modern Confrontation Clause jurisprudence in the United States has developed over approximately the last thirty years.<sup>22</sup> In this Part, we will detail several modern, landmark Confrontation Clause cases in order to provide a necessary background for the remainder of this Article. We present the cases generally in chronological order, but will depart once from chronology for thematic reasons. The modern Confrontation Clause history begins with the case of *Ohio v. Roberts*.<sup>23</sup>

### A. *Ohio v. Roberts*

In *Ohio v. Roberts*, a suspect was arrested and charged with criminal conduct relating to forgery and having stolen a credit card.<sup>24</sup> The state attempted to enter a witness's transcript into evidence and the defendant asserted that without producing the witness for trial this violated his rights under the Confrontation Clause.<sup>25</sup> In determining the relationship between the hearsay rules and the Confrontation Clause, the Court stated:

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21. See generally Jack Wade Nowlin, *The Judicial Restraint Amendment: Populist Constitutional Reform in the Spirit of the Bill of Rights*, 78 NOTRE DAME L. REV. 171 (2002) (discussing the pros and cons of judicial restraint and discussing potential reforms of current judicial restraint doctrine).

22. See *infra* text accompanying notes 24–114.

23. 448 U.S. 56 (1980).

24. *Id.* at 58.

25. *Id.* at 59.

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.<sup>26</sup>

The Court, therefore, found that both unavailability and an indication of reliability were required to satisfy the Confrontation Clause.<sup>27</sup> The Court would later modify its Confrontation Clause analysis in *Crawford v. Washington*.<sup>28</sup>

### B. *Crawford v. Washington*

In *Crawford*, the Court rejected its *Roberts* analysis.<sup>29</sup> The Court faced the case of a man, Crawford, charged with attempted murder and assault.<sup>30</sup> Crawford claimed self-defense, and the state wanted to enter recorded statements from the defendant's wife which would help rebut the self-defense claim.<sup>31</sup> The wife was not available to testify because the wife had marital privilege.<sup>32</sup> The trial court applied the *Roberts* test and admitted the evidence because several indicia of reliability existed: the wife was attempting to support her husband's defense not blame him; the wife was an eyewitness with direct knowledge of the events; the wife was describing events which were still recent; and the wife was questioned by a law enforcement officer who was "neutral."<sup>33</sup> Although the appellate court reversed, the Washington Supreme Court also found indicia of reliability, namely that there was a great deal of overlap between the wife's testimony and the story recounted by the accused husband.<sup>34</sup> The United States Supreme Court granted certiorari and rejected the *Roberts* reliability test.<sup>35</sup>

Writing for the Court, Justice Scalia turned to what he understood to be the original understanding of the Confrontation Clause.<sup>36</sup> Justice Scalia suggested the primary evil that the Confrontation Clause attempts to address is the use of *ex parte* interrogations as evidence

26. *Id.* at 66.

27. *Id.*

28. 541 U.S. 36 (2004).

29. *Id.* at 60–62.

30. *Id.* at 40.

31. *Id.*

32. *Id.* The court stated that the marital privilege "generally bars a spouse from testifying without the other spouse's consent." *Id.* (citing WASH. REV. CODE § 5.60.060(1) (1994)).

33. *Id.*

34. *Id.* at 41.

35. *Id.* at 60–62.

36. *See id.* at 50–55, 59–60.

against a criminal defendant.<sup>37</sup> Justice Scalia argued that by using the term “witnesses”<sup>38</sup> in the Confrontation Clause, the Clause was meant to target individuals who provide some form of testimony: “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”<sup>39</sup> Justice Scalia noted that an individual who provides an out-of-court, *formal* statement to an officer gives a form of testimony, but the same individual who makes an out-of-court, casual statement to a friend would not necessarily be giving a form of testimony.<sup>40</sup> Statements providing testimony (what the Court terms testimonial statements)<sup>41</sup> are the type of statements which Justice Scalia suggested were intended to be covered by the Confrontation Clause.<sup>42</sup>

Justice Scalia found that the *Roberts* reliability test was inconsistent with his understanding of the original principles of the Confrontation Clause.<sup>43</sup> As Justice Scalia stated, the *Roberts* test:

[D]eparts from the historical principles identified above in two respects. First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that do consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.<sup>44</sup>

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37. *Id.* at 50. Justice Scalia relied on the English authorities for this proposition. *Id.* at 50–51.

38. U.S. CONST. amend. VI.

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

40. *Id.*

41. *Id.*

42. *See id.* at 50–55. Justice Scalia based this conclusion on historical and English precedent. *Id.* Justice Scalia also suggested that this understanding of the Confrontation Clause has been reflected in the way in which the Court has actually applied the Clause in past cases: “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.” *Id.* at 59.

43. *Id.* at 60.

44. *Id.* Although Justice Scalia did not provide his own concise definition of everything which could be covered by the term *ex parte* testimony, he clearly used the term to refer to at least the formal, out-of-court statements of one party or witness provided to a police officer during questioning and for trial (such as those made by *Crawford*’s wife) without the other party’s ability to question the witness. *See generally id.* A general legal definition of *ex parte* testimony would seem to cover formal testimony by or for one party and in the absence of the other party. *Black’s Law Dictionary* defines testimony as “[e]vidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition.” *BLACK’S LAW DICTIONARY* 703 (2d. Pocket Ed. 2001). Justice Scalia defined testimony as a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Crawford*, 541 U.S. at 51 (citing 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). *Ex parte* would normally be defined as “[d]one or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested . . . .” *BLACK’S LAW DICTIONARY* 262 (2d. Pocket Ed. 2001). Justice Scalia



Justice Scalia acknowledged that reliability is one of the goals of the Confrontation Clause, but the Clause grants primarily a *procedural right* to confront.<sup>45</sup> Indeed, the Clause does not simply insist that the evidence be reliable, but that the reliability of the evidence be specifically tested by cross-examination.<sup>46</sup> The *Roberts* rule, according to Justice Scalia, substituted a judge's determination of reliability for the Constitution's prescribed mechanism of cross-examination.<sup>47</sup> Moreover, Justice Scalia argued that the reliability rule was too unpredictable<sup>48</sup> and led to courts admitting evidence which clearly violated the intentions of the Confrontation Clause.<sup>49</sup>

After *Crawford*, the Confrontation Clause analysis would turn on whether the statement itself was *testimonial*.<sup>50</sup> The Court did not enumerate all potential classes of testimonial statements but the Court did provide examples of what could be testimonial:

*ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; 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 . . .*<sup>51</sup>

The Court made clear, however, that these were merely examples of testimonial statements: “These formulations all share a common nucleus and then define the Clause’s coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing.”<sup>52</sup> The *Crawford* analysis continues

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did provide a nice list of equivalents to *ex parte* testimony and this helps define the contours of the concept as he uses it. See *infra* note 51 and accompanying text.

45. *Crawford*, 541 U.S. at 62.

46. *Id.* at 61.

47. *Id.* at 61.

48. *Id.* at 63. For instance, Justice Scalia suggested that at least one court used a test consisting of eight factors and allowed the judge to weigh them all and attach importance to whichever she chose. *Id.*

49. *Id.* For instance, Justice Scalia suggested that courts were mistakenly admitting accomplice statements to authorities. *Id.* at 63–64.

50. *Id.* at 50–51.

51. *Id.* at 51–52 (citations omitted) (internal quotation marks omitted). This exact language was also specifically approved by Justice Scalia writing for the Court in *Melendez-Diaz*. See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531 (2009).

52. *Crawford*, 541 U.S. at 52. The “common nucleus” would seem to be formal statements, with the government involved, where the declarant is aware that the statements can be used for trial purposes. See *generally id.* Thus, if person X is interrogated by the police after a robbery and person X tells the police that person Y stole the jewelry, then the Confrontation Clause protections should apply.

to guide the courts,<sup>53</sup> but the courts have also come to refine what statements are testimonial.<sup>54</sup> For example, in *Davis v. Washington*,<sup>55</sup> the Court carved out an exception for statements made in connection with an ongoing emergency.<sup>56</sup>

### C. *Davis v. Washington*

As stated above, *Davis* established the ongoing emergency exception in Confrontation Clause cases.<sup>57</sup> In *Davis*, the court consolidated appeals from two separate state court decisions: the Washington Supreme Court's decision in *State v. Davis*<sup>58</sup> and the Indiana Supreme Court's decision in *Hammon v. State*.<sup>59</sup> Both cases concerned domestic violence.<sup>60</sup> In *Davis*, the State sought to enter into evidence the conversation of a victim with a 911 operator (made before police arrived on the scene) in order to connect the accused to the crime.<sup>61</sup> In *Hammon*, the state sought to enter evidence of an account by the domestic violence victim made after police had arrived on the scene and after the perpetrator appeared under control.<sup>62</sup> The Court found that statements will not be testimonial if they are made during the course of interrogation where the primary purpose of such interrogation is to aid in resolving an "ongoing emergency."<sup>63</sup> As the Court said:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. 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.<sup>64</sup>

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If, however, the same person X is merely talking casually with a friend and mentions that he knows that person Y stole the jewelry, and a passer-by overhears person X's statement, then the Confrontation Clause protections would probably not apply because person X would not anticipate the statement's use for trial. However, such a casual remark might have been barred under a *Roberts* reliability test if it did not seem reliable. *See id.* at 51–52 (discussing how a simple casual remark may be barred under a reliability test).

53. *See, e.g.*, *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

54. *See infra* notes 55–90 and accompanying text.

55. 547 U.S. 813 (2006).

56. *Id.* at 822.

57. *Id.*

58. 111 P.3d 844 (Wash. 2005).

59. 829 N.E.2d 444 (Ind. 2005).

60. *Davis*, 547 U.S. at 818–20.

61. *Id.* at 818–19.

62. *Id.* at 819–21.

63. *Id.* at 822.

64. *Id.* (emphasis added). This same passage from *Davis* was recently cited with approval by the Court. *See Michigan v. Bryant*, 131 S. Ct. 1143, 1154 (2011).

Applying this exception to the facts, the Court found that the statements in *Davis*, made during the 911 call and before the officers arrived on the scene, helped resolve an ongoing emergency and were therefore nontestimonial.<sup>65</sup> By contrast the statements made in *Hammon* were deemed testimonial because they were made to officers already on the scene (when the perpetrator was under control) and were not primarily concerned with an ongoing emergency.<sup>66</sup> The Court further clarified the distinction between *Davis* and *Hammon*, and expounded upon the category of cases which are nontestimonial, in *Michigan v. Bryant*.<sup>67</sup>

#### D. *Michigan v. Bryant*

In *Bryant*, the Court built upon its ongoing emergency concept. Although *Bryant* is a much more recent case than *Melendez-Diaz v. Massachusetts*, we will cover *Bryant* first because *Bryant* is more closely related to *Davis* and *Hammon* and *Melendez-Diaz* is more closely related to *Bullcoming* (the subject of Part III).

The victim in *Bryant* was discovered mortally wounded and made statements to the police.<sup>68</sup> These statements, describing the shooter and the location and time of the shooting, were admitted into evidence against the defendant, Richard Bryant, even though the victim was not available and was not cross-examined.<sup>69</sup> Bryant was convicted by a jury of, among other things, second-degree murder.<sup>70</sup> The United States Supreme Court granted certiorari to determine whether admission of the victim's statements was barred by the Confrontation Clause.<sup>71</sup>

In its opinion, the Supreme Court cited *Davis* and *Hammon* for the proposition that not all statements in response to questions from police officers were necessarily testimonial.<sup>72</sup> The Court noted that statements made under circumstances suggesting the primary purpose was to assist an ongoing emergency were a form of nontestimonial statements made to police officers.<sup>73</sup> The Court approved the distinction between the nontestimonial statements in *Davis* (where an ongoing emergency was present) and the testimonial statements in *Hammon* (where no ongoing emergency existed).<sup>74</sup> The Court stated

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65. *Davis*, 547 U.S. at 827–31.

66. *Id.*

67. 131 S. Ct. 1143.

68. *Id.* at 1150.

69. *Id.* at 1150–52.

70. *Id.* at 1150.

71. *Id.* at 1152.

72. *Id.* at 1154–56.

73. *Id.*

74. *Id.* For a more thorough discussion of the circumstances presented in *Davis* and *Hammon*, see *supra* section II.C.

that the application of the Confrontation Clause normally turned on whether the objective, primary purpose of making or eliciting the statement was for use at trial.<sup>75</sup> The Court then stated that aiding in ongoing emergencies is one of the most important circumstances suggesting that the primary purpose of the statements during the investigation was not to provide trial testimony, but that an ongoing emergency was not the only relevant circumstance.<sup>76</sup> In making the determination of whether the primary purpose is to provide testimony for trial, the Court will objectively evaluate all the circumstances<sup>77</sup> and considers multiple factors, including: the actions and motivations of the public official and the declarant,<sup>78</sup> reliability,<sup>79</sup> formality,<sup>80</sup> and

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75. *Id.* at 1154–56.

76. *Id.* at 1155–57, 1162–63. Justice Sotomayor, writing for the Court, did not venture much speculation as to what other situations would lead to the conclusion that statements made were not the equivalent of trial testimony. *Id.* If we had to speculate, we would assume that Justice Sotomayor wanted to both reserve the possibility of finding future factual circumstances as giving rise to nontestimonial statements and reformulate the testimonial or nontestimonial divide into a more general test. What types of statements will now be nontestimonial will depend in part on how broadly the Court uses the new indicia factors established in *Bryant*. See *infra* notes 77–81 and accompanying text. A very broad reading of the new indicia may mean that a statement could be rendered nontestimonial simply because the investigator was not intending to ask the declarant with the motivation for eliciting trial testimony (even if the declarant intended the statement to be testimony) or because the declarant did not intend to provide testimony (even though eliciting testimony was the explicit intention of the investigator). What is clear is that by framing the ongoing emergency exception as one important circumstance indicating that the primary purpose was not to give testimony, the Court seemed to suggest that a good deal more classes of statements may now be found nontestimonial.

77. *Bryant*, 131 S. Ct. at 1156.

78. *Id.* at 1160–61.

79. *Id.* at 1157–58. Justice Sotomayor’s inclusion of reliability is somewhat perplexing. First, it is unclear how reliability bears on the statement’s *purpose*. The purpose of the statement and the reliability of the statement seem like two separate considerations. Second, it is unclear whether the inclusion of reliability was an attempt to move the Court back toward the standard as set in *Roberts*. See *supra* section II.A. If the Court wishes to move back toward *Roberts*, it is unclear why the Court would retain the “testimonial” or “nontestimonial” language. Third, and finally, the inclusion of reliability is surprising given how critical the Court was of “reliability” in *Crawford*. As discussed above, the Court criticized the *Roberts* test based on reliability because the Court believed that the Confrontation Clause granted a *procedural right* to cross-examine rather than a right to credible evidence. See *supra* section II.B. The Court in *Crawford* was also concerned about use of reliability because the Court felt that a reliability standard was too amorphous and could allow admittance of statements which should be excluded by the Confrontation Clause (such as accomplice statements to authorities). *Id.* In her concurring opinion in *Bullcoming*, Justice Sotomayor suggested reliability was a relevant but not essential component of the Confrontation Clause analysis, with the rules of evidence as the primary means of ensuring reliability. See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2720 n.1 (2011) (Sotomayor, J., concurring).

whether the statements will resolve the present activity or merely describe a past activity.<sup>81</sup>

On the facts of the *Bryant* case, the Court found that the objective primary purpose was to allow the police to deal with an ongoing emergency and the Confrontation Clause did not apply.<sup>82</sup> Justice Thomas filed a concurring opinion where he reiterated his commitment to deciding Confrontation Clause cases on the basis of the “formality and solemnity”<sup>83</sup> of the statements (finding such formality lacking in this case) in accordance with the historical rationale for the Clause.<sup>84</sup> Justices Scalia and Ginsburg both dissented and suggested that it was the intention of the declarant, not the investigator, which should be

80. *Bryant*, 131 S. Ct. at 1159–60.

81. *Id.* at 1160–61.

82. *Id.* at 1167.

83. *Id.* at 1167–68 (Thomas, J., concurring). Justice Thomas made a similar argument in his concurring opinion in *Melendez-Diaz*. See *infra* section II.E.

84. *Bryant*, 131 S. Ct. at 1167–68. Justice Thomas disliked the primary purpose test and would instead focus on “the extent to which the interrogation resembles those historical practices that the Confrontation Clause addressed.” *Id.* at 1167 (citing *Davis v. Washington*, 547 U.S. 813, 835–836 (2006)). In *Davis*, Justice Thomas had argued that the primary purpose test was unpredictable in the same way that the *Roberts* reliability test had been unpredictable. *Davis*, 547 U.S. at 834 (Thomas, J., concurring in part and dissenting in part). The Confrontation Clause, according to Justice Thomas, was intended to target practices developed under Queen Mary which employed a “civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.” *Id.* at 835 (citing *Crawford v. Washington*, 541 U.S. 36, 43, 50 (2004); *White v. Illinois*, 502 U.S. 346, 361–62 (1992)). In Queen Mary’s time, an oral examination would be made of the accuser and the accused and the results would be recorded, transmitted to the judge, and sometimes used instead of in-court testimony. *Id.* at 835–36. Justice Thomas argued that in *Crawford*, the Court recognized that the language of the Clause and history would be better reflected by a test which turned on whether the statement was testimonial. *Id.* at 836. Justice Thomas specifically adopted Justice Scalia’s definition of “testimony” for the Court in *Crawford*: “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Id.* However, Justice Thomas suggested that the plain wording of the Court’s definition of testimony requires “some degree of solemnity before a statement can be deemed testimonial.” *Id.* (internal quotation marks omitted). Citing to his opinion in *White*, Justice Thomas contended that the Court’s opinions have consistently protected those statements which are contained in formalized documents or which have been obtained formally, and have not readily found non-formalized statements to be testimonial. *Id.* at 836–37; *White*, 502 U.S. at 365. Instead, Justice Thomas suggested that the Court has moved away from a requirement of formalization in order to foreclose the possibility of law enforcement easily evading the Confrontation Clause by taking the statements informally. See *Davis*, 547 U.S. at 837–38. While evasion prevention seems important to Justice Thomas, he contends that the primary purpose analysis is overly inclusive and that the better approach would be to focus on preventing admission of formal ex parte testimonial statements which were historically abused. *Id.* at 838; *White*, 502 U.S. at 364–65.

relevant.<sup>85</sup> Moreover, Justices Scalia and Ginsburg suggested that the Confrontation Clause would still apply to this case whether the objective primary purpose test considered the motivations of the declarant or the investigators.<sup>86</sup> Justice Scalia also accused the Court of creating “an expansive exception to the Confrontation Clause for violent crimes.”<sup>87</sup> This exception, Justice Scalia suggested, will allow emergencies to persist for Confrontation Clause purposes until officers learn of a violent criminal’s location and his motive for the shooting.<sup>88</sup> Justice Scalia argued that this is a dangerous precedent for the Court to set because it will allow for the evasion of the Constitutional rights of the accused by empowering investigators to gather many statements while the accused is at large and then introduce them at trial without producing the actual witnesses for cross-examination.<sup>89</sup>

*Bryant* represented the Court’s most recent word on the Confrontation Clause prior to *Bullcoming*. Approximately two years before *Bryant*, the Court handed down its decision in *Melendez-Diaz v. Massachusetts*. We chose to present *Melendez-Diaz* last because *Melendez-Diaz* has the most significance for our purposes. *Melendez-Diaz* speaks specifically to the confrontation issues which will also play a background role in the *Bullcoming* opinion, namely to what extent a scientific report should be considered a testimonial statement

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85. *Bryant*, 131 S. Ct. at 1168–69 (Scalia, J., dissenting), 1176–77 (Ginsburg, J., dissenting). For Justice Scalia, the declarant’s intention is vital because in the case of out-of-court statements, it is the intention of the declarant to have his words used to invoke action by the State which renders the statement sufficiently formal such that the Confrontation Clause is implicated. *Id.* at 1168–69. Further, Justice Scalia notes that a declarant-based analysis works in all circumstances (because some statements will be volunteered by the declarant and unsolicited by officers and so an investigator standard would be inapplicable in such cases). *Id.* Moreover, Justice Scalia suggested that adding in the additional motives of the investigator makes it more difficult to parse “mixed motive” situations (situations where the speaker has two or more motives for making the statement) because it adds an additional set of motives to consider (those of the investigator). *Id.* at 1170. Finally, Justice Scalia charged that allowing the motives of the investigator to transform the statements of a dying victim (who may only be speaking informally and by reflex) into statements of testimony makes no sense. *Id.* at 1169–70. Justice Ginsburg agreed with Justice Scalia on these points. *Id.* at 1176–77.

86. *Id.* at 1171–72, 1176–77.

87. *Id.* at 1173

88. *Id.*

89. *Id.* Justice Scalia provided a hypothetical to demonstrate why this is a dangerous precedent for the Court to set. *Id.* The police could gather statements about the crime from witnesses while the assailant is still at large or while the motivations for the crime are not yet understood. *Id.* Thereafter, the police officers who heard the statements from the witnesses could testify at trial from their own memory without ever producing the original witnesses for cross-examination. *Id.* Such a broad definition of emergency, which would cover the situation where the location and motivation of the accused was not yet known, would thus effectively rob the accused of his Constitutional rights under the Confrontation Clause. *Id.*

for the purpose of the Confrontation Clause and to what extent a scientific analyst is a witness for Confrontation Clause purposes.<sup>90</sup>

### E. *Melendez-Diaz v. Massachusetts*

*Melendez-Diaz* provided the Court with the opportunity to consider the Confrontation Clause in light of forensic reports.<sup>91</sup> In *Melendez-Diaz*, the police found four plastic bags which contained a substance—appearing to be cocaine—on the person of Thomas Wright.<sup>92</sup> The officers submitted the substance to a state laboratory, in accordance with Massachusetts law, for chemical analysis.<sup>93</sup> Wright was charged with two cocaine-related crimes.<sup>94</sup> At trial, the prosecution offered into evidence three certificates which showed the results of the chemical analysis.<sup>95</sup> The certificates reported the weight and size of the bags, as well as the fact that the conducted analysis demonstrated the substance contained in the bags to be cocaine.<sup>96</sup> As required by Massachusetts law, the certificates were also sworn before a public notary.<sup>97</sup> The certificates were admitted even though the analysts preparing the reports did not testify and Wright was found guilty.<sup>98</sup> Wright appealed the conviction, asserting that admission of the certificates without the ability to cross-examine the analysts violated his rights under the Constitution's Confrontation Clause.<sup>99</sup>

The Court (Justice Scalia, with Justices Stevens, Souter, and Ginsburg) determined that the certificates consisted of out-of-court written statements made by individuals not appearing in court<sup>100</sup> and were testimonial.<sup>101</sup> Justice Scalia had "little doubt that the documents at issue in this case fall within the core class of testimonial statements thus described [in *Crawford*]."<sup>102</sup> Justice Scalia noted that the Court's description of testimonial statements in *Crawford* mentions affidavits twice and although the state of Massachusetts refers to the statements in the present case as certificates, they are clearly affidavits.<sup>103</sup> Justice Scalia argued that the statements were sworn and the func-

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90. See generally *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

91. *Id.* at 2530.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 2530–31.

96. *Id.* at 2531.

97. *Id.*

98. *Id.*

99. *Id.* The Court's opinion does not make explicitly clear exactly what role each of these analysts played in conducting the tests and compiling the certificates.

100. *Id.* at 2532, 2542.

101. *Id.* at 2532.

102. *Id.* (internal quotation marks omitted).

103. *Id.*

tional equivalent of in-court live testimony.<sup>104</sup> Moreover, Justice Scalia stated that not only were the statements made under circumstances leading a reasonable person to believe they would be used at trial, but also the sole purpose of the affidavits, under Massachusetts law, was for use at trial.<sup>105</sup> Justice Scalia concluded that the statements were testimonial and that the analyst must be presented for cross-examination, absent a showing of unavailability and previous opportunity for cross-examination.<sup>106</sup>

Justice Thomas joined the Court's opinion but wrote separately to make clear that he believed that the Confrontation Clause only covered statements in "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."<sup>107</sup> Justice Thomas agreed with the Court's opinion in this specific case, however, because the statements were contained in documents which were sworn and "quite plainly affidavits."<sup>108</sup>

Justice Kennedy (along with Justices Roberts, Breyer, and Alito) dissented and criticized the Court for using two cases which do not mention scientific evidence, *Crawford*<sup>109</sup> and *Davis*,<sup>110</sup> to "sweep away an accepted rule governing the admission of scientific evidence."<sup>111</sup> That long accepted rule, according to Justice Kennedy, was that "scientific analysis could be introduced into evidence without testimony from the "analyst" who produced it."<sup>112</sup> Justice Kennedy noted that the framers of the Constitution chose to use the word "witnesses" and therefore the Court should distinguish between laboratory testing analysts and conventional witnesses.<sup>113</sup> What *Crawford* and *Davis* require, according to the dissent, is that formal statements of conventional witnesses—those with some personal knowledge as to the guilt of the defendant—are inadmissible unless the witness appears at trial.<sup>114</sup>

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104. *Id.* (citing *Davis v. Washington*, 547 U.S. 813, 830 (2006)).

105. *Id.*

106. *Id.*

107. *Id.* at 2543 (Thomas, J., concurring) (citing *White v. Illinois*, 502 U.S. 346, 365 (1992)).

108. *Id.* We have provided a more expansive treatment of the rationale of Justice Thomas above. *See supra* note 83.

109. *See supra* section II.B.

110. *See supra* section II.C.

111. *Melendez-Diaz*, 129 S. Ct. at 2543 (Kennedy, J., dissenting).

112. *Id.*

113. *Id.*

114. *Melendez-Diaz*, 129 S. Ct. at 2543 (Kennedy, J., dissenting). Justice Kennedy suggests that a line may be drawn between declarants such as those in *Davis* and *Crawford* (who had seen or been the victim of the crime) and scientific analysts who had no first-hand knowledge of the parties or events in the alleged crime. *Id.* In some ways, this line is problematic because the analysts will have personal knowledge as to the guilt of the accused (for instance, the analysts may be the only ones who knows that the alcohol level of an accused is above the legal limit).



Following *Melendez-Diaz*, many issues remained unresolved,<sup>115</sup> most notably whether forensic analysts will have to testify in all situations<sup>116</sup> and which forensic analyst or analysts in a laboratory will be required to testify.<sup>117</sup> Because the Court in *Melendez-Diaz* was sharply divided (5-4 with one of the five being a concurrence) and because two of the Justices in the Court's Majority opinion were replaced by two new Justices (one of whom has significant criminal prosecutorial experience)<sup>118</sup> the stage was set for another landmark

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Moreover, the line will be difficult to draw in cases where an analyst personally comes to the scene to collect samples and conducts the test on the samples herself because that would seem to blur the line between personal knowledge and laboratory reporting.

115. We will discuss all the unresolved issues, which the Court should clarify, below. *See infra* Part IV.
116. For instance, it is not entirely clear from the Court's opinion whether a forensic analyst would need to appear if all she did was copy a machine print-out. In *Melendez-Diaz*, both the Court's opinion and the dissenting opinion accept the existence of a traditional exception for copyists. *See Melendez-Diaz*, 129 S. Ct. at 2538–39; *Id.* at 2252–53 (Kennedy, J., dissenting). Justice Kennedy points out that the certified copies of records by clerks (called “copyists”) have long been admitted into evidence. *Id.* at 2252–53. These statements, according to Justice Kennedy, seemed testimonial in nature and did require skill and care on the part of the copyists preparing the copies. *Id.* Justice Kennedy suggests that this copyist exception evinces an intention on the part of the Framers to exclude unconventional witnesses (such as copyists and forensic analysts) from the Confrontation Clause requirements. *Id.* Justice Scalia and the Court accept the existence of a copyist exception but do not accept Justice Kennedy's analysis of the exception. *Id.* at 2538–39. Justice Scalia says that the copyist exception was “narrowly circumscribed” and covered only the specific case of certifying copies of records in the clerk's office. *Id.* The copyist exception would not seem to cover forensic analysts under Justice Scalia's reading of the exception, nor would it allow for certifications on the part of the forensic analyst as to effect or substance. *Id.* It is possible that some form of middle ground could theoretically exist between the Court's opinion and the dissenting opinion which would allow an analyst who was doing nothing more than acting like a copyist to avoid the implications of the Confrontation Clause. It seems somewhat doubtful, however, whether Justice Scalia would be willing to extend the copyist exception to cover forensic analysts making transcriptions (especially because analysts are normally conducting the actual test and making certifications about the test itself). *See infra* subsection IV.A.2.
117. There are many cases where forensic testing involves the actions of multiple individuals. *See, e.g., Melendez-Diaz*, 129 S. Ct. at 2544–45; *see also infra* subsection IV.A.4 (performing a toxicology test could involve as many as five individuals, each of whom could ostensibly speak to the reliability of the evidence). If the Court requires testimony from forensic analysts, it is not fully clear which of the analysts must testify if more than one is involved. Moreover, it is also an open question whether a supervisor at the laboratory may be permitted to testify for all the analysts she supervises or works with at the laboratory. *See infra* subsection IV.A.4.
118. As mentioned above, Justice Sotomayor is a former New York City prosecutor. *See supra* note 15 and accompanying text. Justice Kagan was an academic, government attorney during the Clinton Whitehouse, and Solicitor General. *See Sheryl Gay Stolberg et al., A Climb Marked By Confidence And Canniness*, N.Y.

opinion by the Court. That opportunity came along this past term in *Bullcoming v. New Mexico*.<sup>119</sup> In *Bullcoming*, the Court was asked to decide “[w]hether the Confrontation Clause permits the prosecution to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements.”<sup>120</sup> The Court, if it chose, would have a chance not only answer this question, but to reach out and clarify many issues left unresolved by *Melendez-Diaz*, including the specific issues of when an analyst must testify and which analyst must testify. Whether the Court in *Bullcoming* would in fact do so was another matter.

### III. THE BULLCOMING CASE

*Bullcoming* came to the Court after the case had been decided by the Supreme Court of New Mexico.<sup>121</sup> In this Part, we will present the factual circumstances in the *Bullcoming* case. A firm knowledge of the facts will be contextually helpful in understanding the issues which the court could have clarified, considered in Part IV.

In *Bullcoming*, Mr. Bullcoming’s vehicle hit Mr. Jackson’s vehicle from behind at an intersection.<sup>122</sup> When Mr. Jackson got out of his vehicle to exchange insurance information with Bullcoming, Mr. Jackson smelled alcohol on Bullcoming’s breath and noticed that Bullcoming’s eyes were bloodshot.<sup>123</sup> Mr. Jackson asked his wife to phone the police.<sup>124</sup> Upon being informed that the police were on the way, Bullcoming left for the bathroom.<sup>125</sup> After arriving on the scene, Officer Marty Snowbarger pursued Bullcoming and noticed him moving rapidly and crossing over a bridge nearby.<sup>126</sup>

Officer Snowbarger finally caught up to Bullcoming and noticed indicia of intoxication (including the smell of alcohol, watery and bloodshot eyes, and slurred speech).<sup>127</sup> Bullcoming was escorted back to the accident scene and another officer, David Rock, also noticed indicia of intoxication—including blood-shot eyes, the smell of alcohol, and a sway while walking.<sup>128</sup> Officer Rock asked Bullcoming if he had

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TIMES (May 10, 2010), <http://www.nytimes.com/2010/05/10/us/politics/10kagan.html?pagewanted=1&r=1>.

119. 131 S. Ct. 2705 (2011).

120. See *Question Presented supra* note 18.

121. See *State v. Bullcoming*, 226 P.3d 1 (N.M. 2010), cert. granted *Bullcoming v. New Mexico*, 131 S. Ct. 62 (2010).

122. *Id.* at 4.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 4–5.

127. *Id.* at 5.

128. *Id.*

been drinking.<sup>129</sup> Bullcoming admitted to having a drink at 6:00 in the morning, but said that he had no alcohol since then.<sup>130</sup> After failing a series of tests for sobriety, Bullcoming was arrested for Driving While Intoxicated (DWI) and taken to the police station.<sup>131</sup> Bullcoming refused a breath test and Officer Rock obtained a warrant for performance of a blood alcohol test.<sup>132</sup> Bullcoming's blood alcohol content was 0.21gms/100ml, well above the 0.08gms/100ml legally permitted.<sup>133</sup>

At trial, the prosecution successfully admitted into evidence the Blood Alcohol Report (the Report) from the Scientific Laboratory Division, Toxicology Bureau (SLD) of the New Mexico Department of Health as a business record (an exception to the hearsay rule).<sup>134</sup> The Report contained several certifications<sup>135</sup> and chain of custody information.<sup>136</sup> The Report was signed by multiple individuals: the 'analyst' (here, a Mr. Caylor) signed Part B, section 2 (certifying that the sample was intact when received, that the laboratory broke the seal, that the procedures set out in the report were followed,<sup>137</sup> and that

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129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 5–6.

135. *See infra* footnotes 136–140 and accompanying text. A full copy of the Blood Alcohol Report appears as part of the Joint Appendix to the case. *See* Joint Appendix at 62–65, *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) (No. 09–10876) [hereinafter Joint Appendix]. The first page of the report shows all the original signatures as well as Part A and Part B, which are discussed below. *Id.* at 62. The chain of custody information and procedures are also available from the report. *Id.* at 62–65.

136. The chain of custody information is contained in Part A and Part B of the Report. *Bullcoming*, 226 P.3d at 6. The chain of custody information in Part A consists of identification of the officer who made arrest, identification of the donor, identification of the person who drew blood from the donor, and the time, date, and place of the blood withdrawal from the donor. *Id.* Part A also set out the information the officer sought and where the results should be sent. *Id.* The chain of custody information in Part B consists of a certification of the specimen type, how the specimen was received, whether the seal was intact, and whether the procedures set out on page two of Exhibit 1 were complied with. *Id.*

137. The standard procedures are set out in the Blood Alcohol Report. *See* Joint Appendix, *supra* note 135 at 63–65. The enumerated procedures are as follows:

1. The laboratory named on the front of this report is a laboratory authorized or certified by the Scientific Laboratory Division of the Health Department to perform blood and alcohol tests. The agency has established formal procedures for receipt, handling and testing of blood samples to assure integrity of the sample, a formal procedure for conduct and report of the chemical analysis of the samples by the gas chromatographic method (\_\_\_\_\_) (*specify, if other method used*) and quality control procedures to validate the analyses. The quality control procedures include semi-annual proficiency testing by an independent agency. The procedures have the general acceptance and approval

the analyst recorded the results);<sup>138</sup> a report “reviewer” signed Part B, section 3 (certifying that both the analyst and the supervisor of the analyst were qualified to make the analysis and that the procedures were followed);<sup>139</sup> and an “employee” of the laboratory signed Part B, section 4 (certifying that the donor had been mailed a legible copy of the laboratory report).<sup>140</sup> The analyst, Caylor, who conducted Bullcoming’s alcohol test, signed Part B, section 2, and prepared the

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of the scientific community, including the medical profession, and of the courts, as a means of assuring a chemical analysis of a blood sample that accurately discloses the concentration of alcohol in the blood. The same procedures are applicable for samples other than blood if submitted for alcohol analysis. The analyst who conducts the analysis in this must meet the qualification required by the director of this laboratory to properly conduct such analyses. The supervisor of analysts must also be qualified to conduct such analyses. 2. When a blood sample is received at the laboratory, the receiving employee examines the sample container and: (a) determines that it is a standard container of a kit approved by the director of the laboratory; (b) determines that the container is accompanied by this report, with Part A completed; 64(c) determines that the donor’s name and the date that the sample was taken have already been entered on this report and on the container and that they correspond; (d) makes a log entry of the receipt of the sample and of any irregularity in the condition of the container or its seals; (e) places a laboratory number and the date of receipt on the log, on the container, and on this report, so that each has the same laboratory number and date of receipt; (f) completes and signs the Certificate of Receiving Employee, making specific notations as to any unusual circumstances, discrepancies, or irregularities in the condition or handling of the sample up to the time that the container and report are delivered to the analysis laboratory; (g) personally places the container with this report attached in a designated secure cabinet for the analyst or delivers it to the analyst. 3. When the blood sample is received by the analyst, the analyst: (a) makes sure the laboratory number on the container corresponds with the laboratory number on this report; (b) makes sure the analysis is conducted on the sample which accompanied this report at the time the report was received by the analyst; (c) conducts a chemical analysis of the sample and enters the results on this report; 65(d) retains the sample container and the raw data from the analysis; (e) completes and signs the Certificate of Analyst, noting any circumstance or condition which might affect the integrity of the sample or otherwise affect the validity of the analysis; (f) delivers this report to the reviewer. 4. The reviewer checks the calculations of the analysis, examines this report, signs the Certificate of Reviewer, and delivers the report to a laboratory employee for distribution. 5. An employee of the agency mails a copy of this report to the donor at the address shown on this report, by depositing it in an outgoing mail container which is maintained in the usual and ordinary course of business of the laboratory. The employee signs the certificate of mailing to the donor, and mails the original of this report to the submitting law enforcement agency. 6. The biological sample will be retained by the testing laboratory for a period of at least six (6) months pursuant to regulations of the scientific laboratory division.

*Id.*

138. *Bullcoming*, 226 P.3d at 6.

139. *Id.*

140. *Id.*

Report, which among other things set forth the result of the alcohol test. Caylor did not testify at trial because he was placed on unpaid leave.<sup>141</sup> Instead, the state offered the testimony of Gerasimos Razatos, another laboratory analyst who played no role in the Report's preparation but who helps to oversee the blood alcohol program.<sup>142</sup>

Razatos testified regarding the Blood Alcohol Content of Bullcoming and the laboratory's standard procedures.<sup>143</sup> Razatos worked at the same laboratory, was a qualified expert witness with respect to the gas chromatograph (GC) machines used, and was qualified to testify regarding the specific laboratory procedures employed in the test of Bullcoming's blood.<sup>144</sup> Razatos testified at trial about the GC machine used to analyze Bullcoming's blood,<sup>145</sup> that any human could look at the GC machine and record the results,<sup>146</sup> and that the machine prints out results which are then transcribed into the Report.<sup>147</sup> Bullcoming objected, under *Crawford*,<sup>148</sup> to the Report's admission be-

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141. *Id.* The court did not explain why the analyst was on unpaid leave and it is certainly possible that he was placed on unpaid leave due to incompetence or even wrongdoing. On the facts, this could be a reason to support the need for cross-examination.

142. *Id.* at 5–6.

143. *Id.* at 6. Again, the procedures for this specific laboratory are described in the Blood Alcohol Report. *See supra* note 137.

144. *Bullcoming*, 226 P.3d at 5–6, 9.

145. *Id.*

146. *Id.* at 6. One way to understand how a GC machine works is to use a ball analogy. *See* Brief for the NACDL as Amicus Curiae Supporting Petitioner at 9–11, *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) (No. 09–10876) [hereinafter Brief for the NACDL]. Imagine that you are standing at the bottom of a driveway which slopes upward. *Id.* Imagine that you are blindfolded and that there are many sports balls of different kinds at your feet (including wiffle balls, ping pong balls, and one bowling ball). *Id.* You need to determine which one is the bowling ball but you are blindfolded. *Id.* You do, however, have a leaf blower. *Id.* In order to determine which one is the bowling ball, you use the leaf blower to push the balls up the driveway and the one that does not move is the bowling ball. *Id.* The GC machine does a similar thing except it determines the amount of alcohol in the blood using such “separation science.” *Id.* at 11.

147. The New Mexico Supreme Court accepted that Razatos was qualified to testify about these issues. *Bullcoming*, 226 P.3d at 9. However, because Razatos played no role in compiling the Report, one may wonder whether Razatos was actually in a position to know whether the specific machine was in good working order, was properly calibrated, and whether the machine was properly operated by the analyst. Again, the fact that the specific analyst was placed on unpaid leave may actually suggest incompetence on the part of the analyst. Of course, it is certainly possible that Razatos would have been in a position to testify as to the testing analyst's incompetence because Razatos worked for the laboratory and helped supervise the blood alcohol program. *Id.* at 5–6, 9.

148. *Id.* The appeal was on the basis of *Crawford* because the U.S. Supreme Court did not hand down its opinion in *Melendez-Diaz* until the appeal was pending before the New Mexico Supreme Court.

cause the preparing analyst was not present at trial for cross-examination.

Bullcoming asserted that admission of the evidence without the opportunity to cross-examine the preparing analyst constituted a violation of Bullcoming's rights under the Confrontation Clause.<sup>149</sup> The New Mexico Court of Appeals upheld admission of the Report because the court found that forensic reports are nontestimonial.<sup>150</sup> Bullcoming then appealed his conviction to the New Mexico Supreme Court and while his appeal was pending, the U.S. Supreme Court handed down its opinion in *Melendez-Diaz*.<sup>151</sup> The New Mexico Supreme Court accepted the case and then applied Justice Thomas's opinion in *Melendez-Diaz* (as the narrowest holding).<sup>152</sup> The court acknowledged that the Report was testimonial, notwithstanding that it was not a sworn affidavit like the report in *Melendez-Diaz*.<sup>153</sup> However, the New Mexico Supreme Court found that the analyst preparing the report was not adding anything new and was a mere scrivener.<sup>154</sup> Therefore, because Razatos was qualified to testify as to the workings

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149. *Id.*

150. *Id.*

151. *Id.* at 7.

152. *See id.* at 7–8. This means that in a case such as *Melendez-Diaz*, where the tie-breaking vote is a concurrence, the New Mexico Supreme Court applied the opinion of the concurrence (Justice Thomas) rather than the opinion of the Court (which only had the five required votes with Justice Thomas concurring).

153. *Id.* at 8. The New Mexico Supreme Court did not find the lack of swearing in this case made the statements nontestimonial because the state was attempting to prove a toxicology level in blood in the same way as was done in *Melendez-Diaz* and *Crawford* made clear “that the absence of oath was not dispositive in determining if a statement is testimonial.” *Id.* (international quotation marks omitted) (citing *Crawford*, 541 U.S. at 52). More detail about Justice Thomas's opinion in *Melendez-Diaz*, including his views on formality, is presented above. *See supra* section II.E; *see also supra* note 83 and accompanying text (evaluating standards of admissibility for documents and statements as testimony in light of historical abuse of ex parte testimonial statements).

154. *Bullcoming*, 226 P.3d at 8–10. The derivation of a mere scrivener exception is not fully clear. The New Mexico Supreme Court cites to three federal appeals court opinions for the proposition that “raw data” or data generated automatically by machines was either not a statement, not testimonial, or that even if it were a testimonial statement, the operator of the machine was not the declarant. *See id.* at 9 (citing *United States v. Moon*, 512 F.3d 359, 362 (7th Cir. 2008); *United States v. Washington*, 498 F.3d 225, 230 (4th Cir. 2007); *United States v. Hamilton*, 413 F.3d 1138, 1142–43 (10th Cir. 2005)). Although not cited to by the New Mexico Supreme Court, the idea of a scrivener exception may also have been inspired by the traditional confrontation exception for copyists discussed by the Court's opinion and the dissenting opinion in *Melendez-Diaz*. *See supra* note 116. It is possible that the New Mexico Supreme Court read into the copyist debate and believed that some common ground existed between Justice Scalia and Justice Kennedy in a situation where the analyst was doing nothing more than acting like a copyist. *Id.* The New Mexico Supreme Court may have believed that a mere scrivener fell within the narrow copyist exception.

of a GC machine and the specific laboratory procedures of the testing laboratory preparing the Report, and because Mr. Razatos was available to testify at trial, this was sufficient protection for Mr. Bullcoming's Confrontation Clause rights.<sup>155</sup> The New Mexico Supreme Court did note that the Report contained special chain of custody information (going beyond the machine's print-out) but asserted that *Melendez-Diaz* did not require the in court appearance of everyone whose testimony may be relevant to establishing chain of custody.<sup>156</sup>

As is apparent from the facts, *Bullcoming* raised issues not specifically covered by *Melendez-Diaz*, including which factual scenarios will trigger the requirement for an analyst to testify, which analyst must testify, and whether certain substitute witnesses will suffice. *Bullcoming* also presented an opportunity for the Court to clarify sev-

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155. *Bullcoming*, 226 P.3d at 8–10. As mentioned above, Razatos played no role in the actual compilation of the Report from the analysis. See *supra* note 147 and accompanying text. Thus, it is unclear whether he would be qualified to testify as to the fact that the specific analyst conducting the testing actually complied with the procedures or used the machine appropriately. Moreover, it is not clear from the New Mexico court's opinion whether there was sufficient interaction between the testing analyst and Razatos, such that Razatos could testify as to whether the testing analyst was a good employee and normally conducted thorough tests.

156. *Bullcoming*, 226 P.3d at 9–10 (quoting *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 n.1 (2009)). Specifically, the court stated:

[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that '[i]t is the obligation of the prosecution to establish the chain of custody,' post, at 2546, this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent's own quotation, *ibid.*, from *United States v. Lott*, 854 F.2d 244, 250 (C.A.7 1988), 'gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.' It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live. Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.

*Id.* We believe that this passage, essentially stating that not every link in the chain of custody must be shown in order to establish chain of custody and render evidence admissible, is correct law. But it is beside the point. The question is whether, if the prosecution *does* choose to strengthen the chain of custody proof by addressing a link that it doesn't necessarily have to address, it has to do so with live testimony. In *Bullcoming*, by introducing the certifications about links in the chain of custody which links they did not necessarily have to address, the prosecutors chose to address them. The question then is whether prosecutors can do so through certifications without live testimony. The principle espoused by the court that not all links need to be proved says nothing on that subject. Strangely, the court seems to say as much when it notes, in the above quote, "what testimony *is* introduced must be introduced live." *Id.* But the court does not seem to recognize the implications of its own statement. We think the court in the footnote in *Melendez-Diaz* was similarly confused.

eral other issues which remained unresolved in the context of scientific reporting and confrontation.

The United States Supreme Court in *Bullcoming* issued a 5-4 decision reversing the New Mexico Supreme Court.<sup>157</sup> The U.S. Supreme Court determined that admission of the report without presentation of the preparing analyst violated Mr. Bullcoming's rights under the Confrontation Clause, absent unavailability and a prior opportunity to cross-examine.<sup>158</sup> Justice Ginsburg authored the opinion of the Court, joined by Justices Scalia, Kagan, Thomas, and Sotomayor.<sup>159</sup> However, Justices Kagan, Sotomayor, and Thomas, did not join the entirety of Justice Ginsburg's opinion.<sup>160</sup> Moreover, Justice Sotomayor authored a separate concurring opinion to specifically emphasize the narrow scope of the Court's majority opinion.<sup>161</sup> Although the Court sufficiently disposed of the case before it, the Court did not clarify many issues which remain unresolved in the area of forensic reports and confrontation rights.

#### IV. OPEN ISSUES CONCERNING CONFRONTATION AND FORENSIC REPORTS WHEN *BULLCOMING* WAS ACCEPTED FOR DECISION BY THE U.S. SUPREME COURT

Immediately prior to *Bullcoming*, U.S. Supreme Court precedents left several questions unresolved in the area of scientific testing and the Confrontation Clause. The New Mexico Supreme Court compounded the confusion by spawning new conceptual debates, such as exempting an analyst from testifying when he merely transcribes material from a machine (the mere scrivener concept)<sup>162</sup> and allowing one witness to testify on behalf of another (the surrogate witness concept).<sup>163</sup>

In this Part, we identify nine important issues related to the Confrontation Clause which arguably were unresolved, or not completely resolved, as *Bullcoming* arrived on the doorstep of the U.S. Supreme Court. For each issue we indicate the extent to which we believe the ultimate decision in *Bullcoming* addressed the issue, provide our own thoughts on the issue, and attempt to present law enforcement concerns.

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

158. See *id.* at 2714-16.

159. See *id.* at 2709.

160. See *id.*

161. See *id.* at 2719 (Sotomayor, J., concurring).

162. See *infra* subsection IV.A.2.

163. See *infra* subsection IV.A.4.



### A. Issues Needing Resolution as *Bullcoming* Reached the U.S. Supreme Court

In this section, we will identify the nine issues which we believe the Court could have resolved in its *Bullcoming* opinion. Only one of them was actually resolved by the Court. Even if some of the other issues appear to have been addressed by *Melendez-Diaz*, or were not specifically raised by the facts of *Bullcoming*, the Court could have nevertheless put doubts about such issues to rest by providing more guidance in the *Bullcoming* opinion. Such a single Court opinion—representing the view of the Court as currently constituted—could provide much needed guidance to state labs, prosecutors, defense lawyers, and judges in criminal forensic evidence cases. As stated in the introduction, however, we are not saying whether the Court in *Bullcoming* should have reached out and decided these issues—there are arguments on both sides of the question of how far a Court should go beyond the facts of the particular case—merely that these are issues which need to be resolved by the Court sometime soon. We may say a few words about our preferred resolution for some of the issues, but it is more important that the Court, at some point, provide clear guidance on these issues and somewhat less important that the Court resolve the issues in the way we would prefer.

#### 1. *Who is a ‘Witness’ for Confrontation Clause Purposes (Or is That Irrelevant)?*

*Bullcoming* was an ideal opportunity for the Court to reaffirm what types of witnesses are contemplated by the Confrontation Clause, and clarify what type of witnesses are extraneous to the Confrontation Clause analysis.

Justice Kennedy, in his dissenting opinion in *Melendez-Diaz*, suggested that only traditional witnesses (those who perceived events relevant to the crime, and not scientific analysts) are covered by the Confrontation Clause.<sup>164</sup> This “type of witness” analysis differs from the Court’s “type of statement” analysis (that is, which statements are testimonial and therefore covered by the Confrontation Clause). Justice Kennedy argued that the Confrontation Clause does not refer to testimonial statements, or any class of statements.<sup>165</sup> Instead, the Confrontation Clause singles out a class of person: “witnesses against” a criminal defendant.<sup>166</sup> Justice Kennedy argues that although the framers’ intent is unclear with regard to who is a qualified witness, it is at least clear that the framers did not contemplate that covered witnesses included “an analyst who conducts a scientific test far removed

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164. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2550 (2009).

165. *Id.*

166. *Id.* at 2550–51 (citing U.S. CONST. amend. VI).

from the crime . . .”<sup>167</sup> Justice Kennedy contended that his position is consistent with precedent, as both *Crawford* and *Davis* involved traditional witnesses (not testing scientists).<sup>168</sup> Since Justice Kennedy’s dissent raised an argument that could possibly have some traction with the new Justices coming to the Court after *Melendez-Diaz*, it was incumbent upon the Court in *Bullcoming* to set the issue to rest.<sup>169</sup> If, however, the Court determined that focusing only on the type of statement is appropriate in Confrontation Clause cases, then the Court needed to explicitly dismiss the type of witness approach.

In the recent *Bryant* case, the Court’s rhetoric still revolved around statements which were testimonial.<sup>170</sup> This seemed to suggest the Court would continue to follow a form of statement analysis, rather than a qualified witness analysis. The *Bryant* case did not resolve the issue, however, because *Bryant* dealt with a traditional witness and not a scientific analyst,<sup>171</sup> and so the current Court had not spoken explicitly on this issue in the context of scientific evidence.

In its *Bullcoming* opinion, the Court did address the issue of whether form of statement or type of witness should govern in forensic report cases. Justice Kennedy in the dissent repeated his argument that the Confrontation Clause was not intended to regulate the admission of “impartial lab reports, like the instant one, reports prepared by experienced technicians in laboratories that follow professional norms and scientific protocols.”<sup>172</sup> However, the opinion of the Court specifically rejected the argument that scientific reports were non-adversarial and re-emphasized the centrality of the *Crawford* analysis and the classification of statements as testimonial or nontestimonial.<sup>173</sup> The Court cited *Melendez-Diaz* as support for the contention that scientific reports available for trial are testimonial and that the preparing analyst is a qualified witness for the purposes of the Confrontation Clause.<sup>174</sup>

Therefore, in our view the Court adequately addressed and resolved this issue in its *Bullcoming* opinion. The Court determined that form of statement analysis would govern the Confrontation

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167. *Id.* at 2551.

168. *Id.* at 2543–44 (Kennedy, J., dissenting).

169. It is difficult to find a principled distinction between scientific witnesses and traditional witnesses. For example, it is unclear that there would be a real distinction between an individual analyst who witnesses the results of a process showing an incriminating fact (such as a blood alcohol level which exceeds the legal limit) and a traditional witness who sees an incriminating fact (such as a footprint connecting the accused to the scene of the crime).

170. *See supra* section II.D.

171. *See supra* section II.D.

172. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2726 (2007) (Kennedy, J., dissenting).

173. *Id.* at 2716.

174. *Id.*

Clause in forensic report cases rather than type of witness analysis.<sup>175</sup> In our view, the Court reached the best result in reaffirming its commitment to a “form of statement” analysis. Categorically exempting forensic scientists from the Confrontation Clause makes little sense because just as in cases where a traditional witness claims to have seen a license plate or the time on a clock, the report of a toxicology machine’s results may only be as trustworthy as the person who views the machine’s results.<sup>176</sup> Nor are we convinced that the framers intended to draw a distinction between traditional and nontraditional witnesses, and any such distinction is nearly impossible to draw on any principled basis.<sup>177</sup>

2. *If Scientific Analysts Must Testify, Should There Be a Scrivener Exception and What Should Count as a Scrivener?*

When the U.S. Supreme Court took the *Bullcoming* case, an unresolved issue in the relevant Confrontation Clause jurisprudence was whether some analysts, who might otherwise be required to testify, would be exempted because they were mere scriveners of raw data.

In *Bullcoming*, the New Mexico Supreme Court suggested that the analyst preparing the report was merely transcribing machine issued results and was therefore a mere scrivener.<sup>178</sup> Unsurprisingly, the Petitioners in *Bullcoming* suggested that no such scrivener exception exists.<sup>179</sup> For some, even the bare act of transcribing a number from a machine screen onto paper transforms nontestimonial data into a testimonial assertion.<sup>180</sup> Is a scientist, working for the state in connection with a case, who merely transcribes the results of a machine, more like a person making an accusation or is she merely recording neutral data from a machine? Certainly there is a chance of error or mendacity in such transcription.

Instead of explicitly addressing the merits of a scrivener exception, the Court side-stepped the issue. The Court noted that the analyst in *Bullcoming* was not a mere scrivener because he made multiple certifications of numerous facts beyond merely what the machine pro-

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175. *Id.* at 2713–16.

176. Brief for Petitioner at 33–35, *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) (No. 09–10876) [hereinafter Brief for Petitioner].

177. Justice Kennedy’s argument for a distinction between ordinary witnesses and expert witnesses would be helped if he could find, for example, a historical case where an expert in horseshoes who identified certain horseshoe tracks could submit his testimony in writing.

178. *See Bullcoming*, 131 S. Ct. at 2713.

179. Brief for Petitioner, *supra* note 176, at 33–35.

180. Respondent’s brief discusses this issue. *See* Brief for Respondent at 18, *Bullcoming*, 131 S. Ct. 2705 (No. 09–10876) [hereinafter Brief for Respondent].

vided.<sup>181</sup> The Court, without deciding, further noted that the existence of a scrivener exception could prove problematic.<sup>182</sup> Justice Sotomayor in her concurring opinion specifically states that the Court was not faced with, and need not determine, whether the state attempting to introduce machine-generated raw data such as a printout from a gas chromatograph (assuming an adequate chain of custody is shown), in conjunction with the testimony of a qualified expert witness, was permissible.<sup>183</sup> If what Justice Sotomayor meant was not the printout itself, but an analyst's report of the printout, her opinion (whose vote with the Court was essential in the 5-4 decision), would seem to leave room for a narrow scrivener exception in future cases.<sup>184</sup>

If, as we suspect, the Court intentionally reserved the possibility of finding a scrivener exception applicable in future cases, the Court could have provided some further guidance concerning who might qualify as a mere scrivener. Presumably, a continuum of types of statements would be established with some being testimonial evidence and others being nontestimonial transcriptions. On one side of the continuum (if such a scrivener exception were eventually found) might be the situation where an analyst merely records raw data from a machine (such as recording the number .21 as a person's blood alcohol content).<sup>185</sup> On the opposite side of the continuum would be the situation, as in *Bullcoming*, where the analyst makes multiple signed certifications contained in a formalized report.<sup>186</sup> However, what about the situations in the middle of the continuum? Would an analyst be a scrivener if some *de minimus* interpretation is required to

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181. *Bullcoming*, 131 S. Ct. at 2714–15. The Court stated that Caylor, the preparing analyst, went beyond merely transcribing machine-generated raw data by including representations regarding human actions and past events. *Id.* The Court noted Caylor's representations as to chain of custody, the performance of a test, that proper protocols were followed, and that no conditions affected the integrity of the analysis or the sample. *Id.*

182. *Id.* In making the argument that the scrivener exception is a problematic concept, the Court used the example of a police report which presented a purportedly objective fact such as the print-out of a radar gun. *Id.* The testimony of an officer who was not present at the scene to witness the radar gun print-out, but who otherwise was qualified as to the radar gun technology, could not satisfy a defendant's confrontation rights by appearing for cross-examination. *Id.* The Court argues that simply because a forensic report may be more reliable than the report of an officer at the scene should not change the Confrontation Clause analysis. *Id.*

183. *Id.* at 2722–23 (Sotomayor, J., concurring). We do not see how this could conceivably present any kind of Confrontation problem unless what she means is not the printout itself, but an analyst's report of the printout.

184. *Id.*

185. See Brief for Respondent, *supra* note 180, at 18. Although Justice Sotomayor chose not to provide great detail on this issue in her concurrence, Justice Sotomayor's opinion could be read to permit such an individual to be deemed a scrivener. See *Bullcoming*, 131 S. Ct. at 2722–23 (Sotomayor, J., concurring).

186. See *supra* footnotes 135–40 and accompanying text.

read the machine, and he provides it in the report, even if no other certifications are made? For instance, in *Bullcoming*, the machine involved is said to provide both a number and graphs (which allows the analyst to ensure that the machine tested properly).<sup>187</sup> If the analyst merely reads and relates in his report the contents and meaning of the graph but makes no certification of anything else, should this be enough to make his report more than mere scrivener? How many and which type of assurances on the part of an analyst will render the analyst a non-scrivener? The Court at some point should provide clear guidance.

We think any scrivener exception is inconsistent with the Court's approach to the Confrontation Clause. A report recounting the results of a machine is analytically no different than a report recounting the color of a traffic light. Both are fraught with the same kinds of credibility concerns which can be tested by cross examination. Assuming both are made with prosecution in mind, they are both testimonial under the logic of the Supreme Court's testimonial approach to the Confrontation Clause.

Nevertheless, there is a possibility the Court will, in future cases, evolve a narrow confrontation exception for scribes even though it seems inconsistent with the Court's general testimonial approach. This possibility remains because the majority opinion in *Bullcoming* did not unequivocally rule out a narrow scrivener exception, as indicated above.<sup>188</sup> Justice Sotomayor, whose vote was indispensable, seems to countenance the possibility of a narrow scrivener excep-

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187. See Brief for Petitioner, *supra* note 176, at 35 n.4; see also Brief for the NACDL, *supra* note 146, at 12 (suggesting that the analyst must set the baseline for the machine, that doing so requires comparing the sample to other samples and making adjustments, and that such a process "is a wholly subjective task"). Presumably, many such neutral machines require the interpretation of human analysts. If the Court accepts that analysts' reports of machine statements are not equivalent to testimony, should interpretations of the analysts be testimonial? If so, that may mean that the state could merely introduce reports of exactly what the machine said but not a report which places the number or graph into context. Such a narrow scrivener exception, though, would serve very little purpose. It would not normally be needed because the prosecution could merely introduce the machine printout. This would not involve a confrontation problem, whether there is a scrivener exception or not. In many forensic techniques, the machine printout alone or a report of a machine printout alone, may be useless in court. Interpretation may be required. For example, in fingerprints, DNA, and voiceprints, certain things that show up on the visual displays may be disregarded by an expert as static or noise or other artifact or anomaly, which would affect the ultimate conclusion of a possible match or no match. See generally Brief for the NACDL, *supra* note 146, at 21-23 (discussing the interpretation process of machine-produced results). Should such a judgment by the analyst, expressed in his report, be part of the mere scrivener exception, or should live expert testimony be required for the interpretation?

188. See *supra* notes 181-84 and accompanying text.

tion.<sup>189</sup> Both the Court's opinion and the dissent in *Melendez-Diaz* recognized a "copyist's" exception,<sup>190</sup> which would seem analytically tantamount to a very narrow scrivener exception. A scrivener, then, might include an analyst who merely transcribes what a machine has said, although the utility of the exception embracing only such a "copyist" would be minimal because in most cases, the machine printout could be brought to court instead. Would the scrivener exception encompass a report about bringing a sample to the machine? What if an analyst makes additional certifications such as "the machine was working properly," or interprets in more than a de minimis way what the results mean? Justice Ginsburg's opinion for the Court suggests that these would not be mere scriveners.<sup>191</sup>

3. *In Determining Whether an Analyst's Report is Covered by the Confrontation Clause, Should It Matter Whether the Statement is Formally Sworn?*

Prior to *Bullcoming*, the importance of formally swearing the statement in determining whether a scientific report will be testimonial was murky. As noted previously, *Melendez-Diaz* was a narrow opinion (5-4) with Justice Thomas writing separately and casting the tiebreaking vote.<sup>192</sup> Justice Thomas emphasized that he only joined the opinion of the Court because Massachusetts required that the scientific report be formally sworn (rendering it equivalent to an affidavit).<sup>193</sup> In *Bryant*, the Court re-emphasized the importance of some uncertain degree of formality as one of several relevant factors, but again *Bryant* was not a forensic report case.<sup>194</sup> Is being sworn relevant to Confrontation Clause analysis, and if so, to what extent?

The Report in *Bullcoming* was not formally sworn, but was signed and termed a "certification."<sup>195</sup> Some, such as the *Bullcoming* Respondent, suggested that whether a scientific report is testimonial or not turns in part on whether the report was formalized and sworn.<sup>196</sup> The *Bullcoming* Respondent noted that in *Melendez-Diaz*, one of the reasons why a majority of the Court found the statements in the reports were testimonial was because the statements were formally sworn and were thus functionally affidavits.<sup>197</sup>

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189. See *supra* note 183 and accompanying text.

190. A traditional copyist exception is discussed by both the Court's opinion and the dissent in *Melendez-Diaz*. See *supra* note 118.

191. See *supra* note 182 and accompanying text.

192. See *supra* section II.E.

193. See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2543 (2009); see also *supra* section II.E (discussing further Justice Thomas's concurrence).

194. See *supra* section II.D.

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

196. Brief for Respondent, *supra* note 180, at 10-16.

197. *Id.*

A focus on whether the statements in a report are legally sworn holds some public policy attractiveness because it would aid legal certainty. Yet there is something perverse about saying sworn statements (which presumably have some guarantee of reliability because of the oath and the penalty for perjury that attaches) are more suspect than unsworn statements. But perhaps the conundrum is explained by the traditional Anglo-American distrust of authority and officially garnered statements,<sup>198</sup> or by the supposed greater credibility with which juries view sworn statements, although we doubt that juries really do make that distinction. If the law treats sworn reports less favorably than unsworn reports, then the state could functionally evade the confrontation rights of a defendant simply by instructing its crime laboratories to create only unsworn reports.

The Supreme Court of New Mexico did not seem concerned by the fact that the statement was unsworn and accepted that the statement itself was testimonial.<sup>199</sup> That position on this issue was seemingly supported by the U.S. Supreme Court's opinion in *Melendez-Diaz* (not including Justice Thomas's tie-breaking concurrence).<sup>200</sup> This open debate on the role of formality in scientific reports was a backdrop as the U.S. Supreme Court wrote the *Bullcoming* opinion.

In *Bullcoming*, the U.S. Supreme Court held that statements contained even in unsworn forensic reports could still be testimonial.<sup>201</sup> Although Justice Sotomayor in her concurrence noted that formality was not an *essential* component of the determination of whether a statement is testimonial,<sup>202</sup> her concurrence and the Court's discussion of formality at least suggest formality's continued relevance to the analysis.<sup>203</sup> Without endorsing specific and exhaustive indicia of formality, the Court suggested that the report in *Bullcoming* was sufficiently formal because the statements were contained in a signed, written report, which was headed "report,"<sup>204</sup> and the report "contains a legend referring to municipal and magistrate courts' rules that provide for the admission of certified blood-alcohol analyses."<sup>205</sup> Thus, although the Court did not provide specific guidance, the Court seemed to maintain that some degree of formality would continue to impact the Court's analysis.

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198. See *Crawford v. Washington*, 541 U.S. 36, 44–47 (2004). See generally *infra* text accompanying notes 227–35 (discussing the process by which forensic lab reports are created).

199. *State v. Bullcoming*, 226 P.3d 1, 8 (N.M. 2010).

200. See *supra* section II.E.

201. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2716–17 (2011).

202. *Id.* at 2721 (Sotomayor, J., concurring).

203. *Id.* at 2716–17.

204. *Id.* at 2717.

205. *Id.*

We believe the Court will eventually have to clarify the extent to which formality affects the determination of whether a report is testimonial or not, and address more concretely the components of formality. In our view, the Court was correct to find that swearing the report is not central to the testimonial analysis. There is little difference between a report that is signed by one or more analysts at a laboratory and one which is signed and also formally sworn. As long as the analyst compiles results into a formal report, signs the report, and provides the report to police officers or prosecutors in connection with an investigation, this is sufficiently formal to be equivalent to testimony. The Court did not sufficiently explain what degree of informality could render forensic statements nontestimonial. In our view, it would be dispositive if a statement was sufficiently informal. For instance, if analyst X merely told analyst Y the results of a test over lunch (or wrote a note to analyst Y of results on a paper napkin), these statements should not be sufficiently formal to make them equivalent to out-of-court testimony.<sup>206</sup> Such statements may be unreliable under the hearsay rules,<sup>207</sup> but they should not be unconstitutional under the Confrontation Clause.

In sum, the Court in future opinions should provide more guidance as to what degree of formality is required to subject the statements of forensic analysts to the Confrontation Clause.

4. *If a Scientific Analyst is a Witness for Confrontation Clause Purposes, Which Analyst Must Testify?*

Prior to *Bullcoming*, there was a question as to which, if any, of the forensic analysts involved must appear to support a forensic report. The question included (1) whether one analyst (or a supervisor) may testify as a surrogate for another; and, if not, (2) which of the sometimes many analysts involved in the report's preparation should be made available to testify.

i. *The Surrogate Witness Question*

Regarding the surrogate witness question, on one hand the Court in *Bullcoming* could have decided to permit surrogate witness testimony provided that certain conditions were met. The Court could have taken note of the arguably serious consequences for law enforcement if the specific analyst must necessarily testify.<sup>208</sup> If the Court had permitted the admission of reports through a surrogate witness, it

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206. An alternative approach might be to link the formality factor to the "purpose" factor. Under that view, the degree of formality would be a factor to consider in deciding whether the purpose was prosecutorial use.

207. See generally FED. R. EVID. 801 through 807.

208. See *infra* section IV.B. Respondent asserted that any analyst should be able to testify for another. See Brief for Respondent, *supra* note 180, at 56–59.



would also have been desirable to provide guidance as to who could qualify as a sufficient surrogate and perhaps advise lower courts to instruct the jury, as they assign weight to the report, to consider who is and is not providing supporting testimony.<sup>209</sup>

On the other hand, the Court could have determined that surrogate witness testimony was never sufficient and that a defendant has the right to be confronted by the specific analyst involved. The Court in so doing would have reinforced the notion that scientific analysis is not neutral data reporting;<sup>210</sup> but is instead subject to human error,<sup>211</sup> report manipulation,<sup>212</sup> or the intelligence and training limitations of the specific analyst,<sup>213</sup> and these must be tested in court. An example of the importance of cross-examining a specific observing witness was advanced by Mr. Bullcoming.<sup>214</sup> Suppose that X witnesses an altercation and that X assumes that Y started the altercation. If X tells his wife about the altercation (including that he believes Y started it), then the wife may assume that X witnessed Y starting the fight (rather than merely assuming that Y started it) and the wife may testify simply that her husband saw Y start the altercation. Cross-examining the wife in this example could not uncover the error in testimony and only cross-examining X could. In *Bullcoming*, the specific analyst may have made mistakes or may not have been diligent<sup>215</sup> and Mr. Bullcoming may have wanted to cross-examine the

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209. For instance, Justice Kennedy said that in the case of chain of custody evidence, normally the potential holes in chain of custody go to the weight placed on the admitted evidence. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2547 (2009) (Kennedy, J., dissenting). Presumably, other sorts of forensic evidence could be given to the jury and the jury could freely disregard the forensic evidence if not supported by the in court testimony of the specific analyst.

210. *Melendez-Diaz*, 129 S. Ct. at 2533–37.

211. See Brief for the Innocence Network as Amicus Curiae Supporting Petitioner at 6, *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) (No. 09-10876) (“The fact that a machine is used in the course of forensic analysis does not eliminate the specter of human error.”).

212. For instance, what if mistakes were made, necessary steps skipped, or the analyst deliberately falsified the results? See Brief for Petitioner, *supra* note 176, at 28–29; Brief for the NACDL, *supra* note 146, at 33 (recounting the story of a police laboratory toxicology lab supervisor who falsified certifications concerning an alcohol machine test and others in the laboratory helped cover up the falsification).

213. Brief for Petitioner, *supra* note 176, at 30. This means that there may be value in interviewing the specific analyst even if the analyst has no memory of writing the specific report. *Id.*

214. *Id.* at 21–22.

215. For instance, the analyst may not have been careful in bringing Bullcoming’s blood sample to the machine. The analyst may have failed to check if the machine was in good working order or may have misread the results. Alternatively, the analyst may have attempted to exhibit care when moving and inputting the sample and when operating the machine, but the analyst may simply not be a very diligent and careful person and may have made mistakes.

specific analyst for that reason. Both Mr. Bullcoming in the Petitioner's Brief<sup>216</sup> and Justice Scalia in oral argument<sup>217</sup> were concerned with the fact that the analyst in *Bullcoming* was recently placed on leave without pay (because that may be a reflection of the analyst's diligence or skill level). The Court could have determined that Mr. Bullcoming had the right to cross-examine the specific analyst for these reasons.<sup>218</sup>

In its *Bullcoming* opinion, the U.S. Supreme Court did in fact determine that surrogate witness testimony was *generally* insufficient and that the defendant *normally* had the right to be confronted with the specific reporting analyst.<sup>219</sup> In the Court's words: "As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness."<sup>220</sup> Notice, however, that the Court seems to characterize this conclusion as a mere *general* rule, suggesting there may be exceptions.

Justice Sotomayor's concurring opinion, necessary for the decision, specifically emphasized that *Bullcoming* did not involve a supervisor who played any role, not even a limited role, in the testing or in the preparation of the report.<sup>221</sup> If a qualified supervising or reviewing individual who was involved in the testing or report in some substantial way was presented to give testimony at trial, Justice Sotomayor suggests the outcome may be different:

It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results.

We need not address what degree of involvement is sufficient because here Razatos had no involvement whatsoever in the relevant test and report.<sup>222</sup>

Justice Sotomayor's opinion—which represented a necessary vote for the majority, and without which the decision would have gone the

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216. Brief for Petitioner, *supra* note 176, at 31. The analyst might even have acted in bad faith. For instance, what if the analyst noticed a problem with the sample or with the test after he had completed conducting the test? A self-interested analyst may not have wanted to take the time to re-run the test and so might have simply signed the assurances on the report to avoid having to retest and waste his time. Cross-examination could help illuminate such bad faith if bad faith existed.

217. Transcript of Oral Argument at 37, *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) (No. 09-10876), 2011 WL 719620 [hereinafter Transcript].

218. We are not suggesting that this issue should turn upon whether only faulty motives or lack of diligence is apparent from the facts of the case. We are simply suggesting that in *Bullcoming* there are factual reasons to question the analyst's performance level and such reasons exemplify why cross-examining the specific analyst may be beneficial to a criminal defendant.

219. *Bullcoming*, 131 S. Ct. at 2714–15.

220. *Id.* at 2713 (emphasis added).

221. *Id.* at 2722 (Sotomayor, J., concurring).

222. *Id.*

other way—could be read to allow a limited surrogate witness concept in future cases if a certain threshold of qualifications and involvement is demonstrated on the part of the proposed surrogate. In view of the majority opinion’s allusion to a *general* rule regarding surrogate witnesses and Justice Sotomayor taking pains to point out that the case did not involve anyone who could conceivably qualify as a surrogate witness, we believe the Court will eventually adopt a limited surrogacy concept.

*ii. The “Which Analyst Must Testify” Question*

Because the Court did not, however, adopt any concept of surrogacy, and instead determined that the specific analyst must testify, a question arises as to which analyst must appear.

Scientific testing often requires the participation of multiple analysts.<sup>223</sup> We conducted an informal interview with Dr. Michael William Cleman, Professor of Medicine and Director of the Cardiac Catheterization Laboratory at Yale Medical Group, to determine how a typical scientific laboratory involving toxicology analysis operates.<sup>224</sup> Dr. Cleman informed us that a typical toxicology analysis will begin with a *first individual* (e.g., a physician or nurse) extracting blood or collecting a urine sample.<sup>225</sup> The collected sample is then sent by the first individual to a separate laboratory.<sup>226</sup> The sample is then normally received by a *second individual* at the laboratory and checked-in (to ensure chain of custody).<sup>227</sup> A *third individual* will then normally be given the sample for testing.<sup>228</sup> That third individual will conduct the test and then may enter the results into a com-

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223. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2544–45 (2009). The Justices also raised this issue in the *Bullcoming* oral argument. See Transcript, *supra* note 217, at 9. Justice Kennedy in his *Bullcoming* dissent emphasized that multiple individuals are involved in forensic analysis (in DNA cases it can be as many as forty), and in *Bullcoming* the opinion of each of the multiple participants has independent evidentiary significance. *Bullcoming*, 131 S. Ct. at 2724 (Kennedy, J., dissenting). As an example of the ambiguity of the Court’s opinion as to which of the many involved analysts must testify, see *Id.* Justice Kennedy suggests that the Court’s analysis does not adequately explain whether each and every one of the many individuals involved in making important certifications must be presented. *Id.*

224. Dr. Cleman obtained his M.D. from Johns Hopkins University, completed his residency at the University of Florida-Shands Teaching Hospital, and completed his Fellowship at the Yale University School of Medicine. See Telephone Interview with Michael William Cleman, Professor of Med. and Dir. of the Cardiac Catheterization Lab., Yale Med. Grp. (Apr. 21, 2011) *discussed in* E-mail from Michael Cleman, MD, to Ronald J. Coleman (July 31, 2011, 2:58 PM) (on file with author).

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

puter system.<sup>229</sup> In some cases a *fourth individual* will be responsible for interpreting the results that the third individual entered into the computer and that fourth individual may be the one to create a report of the analysis.<sup>230</sup> Meanwhile, the laboratory will normally be overseen by a Laboratory Director.<sup>231</sup> The Laboratory Director, a *fifth individual*, will be responsible for Quality Assessment (QA), which entails ensuring that the machines are operating properly and that the laboratory personnel are functioning appropriately.<sup>232</sup> The Director may or may not sign the report, but laboratory scientists and medical personnel normally consider the Director (or equivalent supervisor) to be responsible for the activities of the laboratory.<sup>233</sup> If a typical toxicology test may involve as many as five individuals who are all performing tasks requiring skill, attention, and some judgment, then which one of these analysts should be required to testify?

If discovering human error or purposive misconduct is the goal for requiring in court testimony of the reporting analyst, then it would seem that all of the involved analysts must testify in order to ensure such errors or misconduct are discovered.<sup>234</sup> However, if all involved analysts were required to appear, a good case could be made that scientific testing in court cases may be effectively barred.<sup>235</sup>

One solution might be for laboratories to simply appoint one person as the in-court representative to testify in all cases. But this would require that surrogate witnesses be allowed.<sup>236</sup> In smaller laboratories, a single supervisor may be able to actually observe or supervise all tests, and such observance may qualify that one supervisor to be a satisfactory Confrontation Clause witness for everyone in the laboratory.<sup>237</sup> This really is the surrogate witness concept, and the two questions (the surrogate witness question and the which of many analysts question) coalesce. In larger laboratories, such actual observance will probably not be possible.

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229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. Assuming, that is, that they each provided an indispensable link in the chain that produced the result contained in the report that is offered in evidence to establish that result.

235. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2545 (2009).

236. *Id.* at 2545–46 (citing *Davis v. Washington*, 547 U.S. 813, 826 (2006)). Alternatively, it may be allowed by Rule 703 of the *Federal Rules of Evidence*. See *infra* subsection IV.A.5.

237. Professor Richard Friedman, of Michigan Law School, argues that any analyst or supervisor who *observes* the test may testify to the results without a Confrontation Clause issue. Brief for Richard D. Friedman as Amicus Curiae Supporting Petitioner at 9–10, *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) (No. 09–10876).

In *Bullcoming*, the Court's opinion merely states (on the which analyst question) that "the analysts who write reports that the prosecution introduces must be made available for confrontation . . . ." <sup>238</sup> Use of the word "analysts" is somewhat ambiguous and could be interpreted to either mean that (1) each of the analysts with involvement in the process must testify, or (2) so long as at least one significantly involved witness testifies, that will be sufficient to afford defendants their confrontation rights. The use of the phrase "analysts who write" could mean the one who puts pen to paper. But, in the quotation, it says he must also be an analyst—i.e., he must be involved in the analysis process. But *how* involved is not specified.

If the court intends option (2), we have difficulty in detecting a substantive difference between that approach and a strict conception of surrogate witness testimony. The Court will inevitably have to provide the states and laboratories with clearer direction concerning which involved analysts may suffice.

The Court in *Bullcoming* could have explained whether surrogate testimony would be permitted in *any* circumstances and, if so, under what circumstances. In choosing to adopt specific witness/analyst testimony as the general rule, the Court could have provided guidance as to which analyst or how many analysts are required to support a given report involving multiple analysts. But on the facts of the case it was unnecessary, as there was only one analyst with significant involvement and only this analyst was the subject of the petition to the Court.

As indicated above, the Court in future cases may, and probably will, adopt a limited surrogate witness concept, out of considerations of practicality. Although practical considerations should not ordinarily trump a defendant's clear constitutional rights, the Court has said repeatedly that the right to confront is a procedural right, not a right to reliable evidence. <sup>239</sup> Thus, the Confrontation Clause may grant the defendant a right to confront a laboratory analyst, but would not necessarily require all analysts who could speak to the reliability of the evidence to appear. All that may be required is some substantial basis in cross examination for assessing credibility, not every basis. <sup>240</sup> As long as the defendant can confront one important supervising or observing analyst from the laboratory, who has some substantial involvement or knowledge of the important steps used in the test conducted, the Court may hold the defendant has been provided with his procedural confrontation rights. The reliability of the underlying evidence (that is, the statements in the report itself) should be judged by the rules of evidence and the jury. Thus, the Court in future cases

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238. *Bullcoming*, 131 S. Ct. at 2715.

239. See *supra* section II.B.

240. See *United States v. Owens*, 484 U.S. 554 (1988).

may consider adopting a limited version of the surrogate witness concept.

5. *In Determining Whether a Separate Analyst Can Testify, What is the Interrelationship Between the Surrogate Witness Concept and Federal Rule of Evidence 703 (and Similar State Rules)?*

As *Bullcoming* came to the U.S. Supreme Court, it was unclear whether the Confrontation Clause was an obstacle to a familiar use of the *Federal Rules of Evidence* (widely found also in state rules). Rule 703, on its face, permits a qualified expert to testify in opinion form against an accused, based in part on a forensic report of another expert who does not testify (even if the testifying expert had nothing to do with the report or the analysis itself).<sup>241</sup> But does this violate the Confrontation Clause? This question would have been squarely raised by *Bullcoming* if Mr. Razatos had been presented as a qualified expert giving his own opinion on Mr. Bullcoming's blood alcohol level, based in part on the report but also on some independent efforts of his own.<sup>242</sup> Rule 703 allows an expert to give an opinion based on otherwise inadmissible underlying material (such as the report here), if that kind of material is found by the judge to be reasonably relied upon by experts in the field in their practice.<sup>243</sup> In addition, the Rule allows *disclosure* of that underlying material to the jury if the judge finds that the probative value of disclosure *in explaining the basis of the expert's opinion* outweighs its prejudicial effect (the tendency of

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241. Of course, Rule 703 also applies in the civil context and in the criminal context when the evidence is not being used against a criminal defendant. These contexts would present no Constitutional Confrontation problem. See generally FED. R. EVID. 101 (stating essentially that the *Federal Rules of Evidence* govern all proceedings in United States Federal court, unless the Rules provide an exception to the contrary).

242. For his testimony to have been presented this way under the *Federal Rules of Evidence*, Razatos would have had to meet certain qualifications as an expert, and his testimony would need to have been soundly based on sufficient and reliable information, *only part of which could be the report done by the analyst in question in Bullcoming*. If an "expert witness" is a mere conduit for someone else's opinion or findings, with no independent input, the testimony is inadmissible under the Rules. See FED. R. EVID. 702; *Brooks v. People*, 975 P.2d 1105, 1109 (Colo. 1999). On the facts of the case it is doubtful that Mr. Razatos ever could have satisfied these evidentiary requirements. If the expert's testimony is based on *reading the actual printout of the machine*, there is likely no confrontation problem, at least as to the printout being considered testimonial. It seems that a machine statement cannot be considered testimonial. There could be, at least theoretically, confrontation problems if his testimony is also based on other human certifications which could be considered testimonial (e.g., that the substance brought to the machine was from Bullcoming, that the machine was properly calibrated, etc.).

243. FED. R. EVID. 703.

the jury to credit the truth of the underlying material).<sup>244</sup> Thus, there are two issues at work here: one is the opinion itself and the other is the disclosure of the opinion's underlying basis. The issue of most interest for our present purposes is the disclosure of the underlying basis, because the independent *opinion* of the expert itself is probably (though not inevitably) sufficiently supported for confrontation clause purposes by the expert being on the witness stand.<sup>245</sup> The question, then, is whether an expert testifying for the prosecution as to his opinion, can introduce in support of his opinion, actual statements from forensic reports he relied on, which statements would otherwise be prohibited by the Confrontation Clause because the reporting analyst does not testify. In other words, can the expert witness (or more properly, can the prosecution in connection with the expert's testimony) constitutionally use the gateway provided by Rule 703 and similar state rules, that allows underlying basis disclosure in the case of an "independent" testifying expert who played no role in preparing the report or making the test. This is different than the surrogate witness concept because the expert witness may or may not have had anything whatever to do with the underlying analysis or report. Even if the expert was a supervisor, admitting evidence supported by the testi-

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244. *See generally id.*; PAUL F. ROTHSTEIN, FEDERAL RULES OF EVIDENCE 522–38 (3d ed. 2011). If the underlying material is let into evidence, the judge is to instruct the jury not to take the underlying material for its truth, but just to use it to explain the basis of the expert's testimony. *Id.* It is questionable whether the Supreme Court would accept that this feat could be done by the jury. Whether the Court does may be critical to whether the Confrontation Clause applies. It is an undetermined question whether the Confrontation Clause applies only to statements offered for their truth, but there is some reason to believe that is the case. *See Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) ("The Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985))).

245. If for some reason the state's version of Rule 703 were interpreted by the state to allow an expert to base his opinion *exclusively* on the report of another who does not testify, it is clear from what has been said of *Bullcoming* above, that this would violate the Confrontation Clause. *See supra* subsections IV.A.4–5. A more subtle question would be whether the Confrontation Clause would be violated if the report were not the *exclusive* basis for the expert's opinion, but still an *indispensable* part of the basis (without which the expert would have the opposite opinion or be unable to give his opinion). We think the clause would not be violated if the other requirements were met. For example, cross examination of the expert could adequately alert the jury to possibilities of infirmity in this situation. But *Bullcoming* has nothing to say on this. Justice Sotomayor's concurrence in *Bullcoming*, however, may have an implication that it might be all right. *See infra* notes 247–48 and accompanying text. In a pair of recent decisions, one of them based on Justice Sotomayor's concurrence, this was held to be all right. *See People v. Williams*, 939 N.E.2d 268, 275 (Ill. 2010), *cert. granted*, 131 S. Ct. 3090 (2011) (No. 10-8505); *State v. Roach*, No. 06-03-0342, 2011 WL 3241467 (N.J. Super. Ct. App. Div. Aug. 1, 2011). *Williams* is discussed *infra* notes 249–57 and accompanying text.

mony of a supervising analyst *as an independent expert* is distinct from admitting the same evidence supported by the testimony of a supervising analyst *as surrogate witness*.<sup>246</sup> The former requires not only certain expert qualifications on the part of witnesses, but also requires that they make an independent judgment based on more than merely the report. The latter may not require any of that, but requires some involvement with the report or the test itself.

In *Bullcoming*, the Court chose not to resolve the Rule 703 issues. Justice Sotomayor in her concurrence noted that the case did not implicate a Rule 703 analysis because the state was attempting to introduce the report itself rather than opinion testimony of an expert that may have included discussion of the report.<sup>247</sup> According to Justice Sotomayor, the witness testifying was attempting to support the report rather than enter his independent professional judgment.<sup>248</sup> She thus left open the questions presented here concerning expert testimony and Rule 703.

In this connection, the facts of a recent Illinois Supreme Court case, *People v. Williams*,<sup>249</sup> which considered Rule 703 in a forensic analysis situation, are instructive. In *Williams*, the defendant was

246. Brief for the States as Amicus Curiae Supporting Respondent at 12, *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) (No. 09–10876) [hereinafter Brief for the States].

247. *Bullcoming*, 131 S. Ct. at 2723 (Sotomayor, J., concurring).

248. *See id.* at 2722. Justice Sotomayor added that *Bullcoming*:

[I]s not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence. . . . We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence.

*Id.* (citations omitted). She thus is a bit ambiguous about whether she is addressing the opinion itself, disclosure of the underlying basis, or both. In addition, she suggests there is a difference between allowing the expert witness to “discuss” others' testimonial statements (i.e., statements in the report), “discussion” which she suggests might constitute permissible disclosure, and “admitting them into evidence” in connection with the expert's testimony, which she suggests would not be permissible disclosure. *Id.* In our view, both a “discussion” and “admittance” of the statements in support of expert testimony can be functionally equivalent. The real question should be the extent to which the substance and contents of the statements are transferred to the jury and what kind of role the statements are allowed to play with the jury—regardless of whether the statements are merely “discussed” by the expert or “admitted into evidence” in connection with his testimony. If the distinction is, as Justice Sotomayor suggests, between “discussion” of the statements and formal admission of them into evidence, then we have placed form over substance. Under this distinction the prosecution, instead of seeking to “admit” the statements into evidence in connection with the expert testimony, could have the expert discuss them quite thoroughly—getting their substance into evidence just the same, but without the constitutional trouble.

249. 939 N.E.2d 268 (Ill. 2010).



charged with, among other things, criminal sexual assault.<sup>250</sup> At trial, a police analyst testified to a likely DNA match between defendant and the DNA deposited on the victim.<sup>251</sup> This testifying police analyst expressly relied in part upon her own analysis<sup>252</sup> and in part upon a DNA report compiled by a different analyst at a private lab<sup>253</sup> who did not testify.<sup>254</sup> The testifying police analyst was also allowed to disclose the results of that private lab analysis.<sup>255</sup> The Illinois Supreme Court upheld all of the police analyst's testimony,<sup>256</sup> and the case is now before the U.S. Supreme Court.<sup>257</sup>

In cases such as this, the U.S. Supreme Court could find that Rule 703 empowers one analyst to testify for the prosecution and to disclose the findings of a forensic test done by another—that the testifying analyst played no role in compiling<sup>258</sup>—so long as the appearing analyst is an independently qualified expert making a sufficiently independent judgment. In other words, the Court could take the approach of the Illinois Supreme Court in *Williams*.

The U.S. Supreme Court's decision in *Williams* will be the next big decision in the unfolding story of forensic reports and the Confrontation Clause, perhaps answering the expert witness questions left open by *Bullcoming*. Taking its cue from Justice Sotomayor's concurrence in *Bullcoming*—which, after all, was the swing or controlling vote—the Court may well rule that as long as the witness is not merely parroting the conclusions of the previous analyst, a qualified expert witness can testify to her own sufficiently independently based opinion without violating Confrontation rights, even if part of that basis is the previous analyst's report. The Court may further find, in accord with Justice Sotomayor's implications,<sup>259</sup> that some limited disclosure of the report itself in connection with such an expert's testimony may also be permissible, if necessary to support the expert's opinion. The court may also require that jurors be adequately instructed in some comprehensible way that the report material itself can play only a limited role in their deliberations and should be heard with caution. It may be that the instruction, for confrontation purposes, will need to caution the jury not to use the report statements for their truth, al-

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250. *Id.* at 269.

251. *Id.*

252. She tested the defendant's blood and derived a DNA profile. *Id.* at 271.

253. This lab tested the DNA left on the victim. *Id.* The testifying police analyst also reviewed this private lab's work, and did the comparison of the two DNA samples, concluding there was a match. *Id.* at 271.

254. *Id.* at 270–72.

255. *Id.* at 284.

256. *Id.* at 287.

257. *Williams*, 939 N.E.2d 268, *cert. granted*, 131 S. Ct. 3090 (2011) (No. 10-8505).

258. An argument to this effect is advanced by the Amicus Brief of the States. Brief for the States, *supra* note 246, at 12.

259. See *supra* notes 247–48 and accompanying text.

though we do not believe this untenable distinction (between taking material “for its truth” and taking it as “explanation of the expert’s opinion”) made by Rule 703 jurisprudence should be embraced by Confrontation Clause jurisprudence, at least in this connection. In essence, we are predicting that the U.S. Supreme Court will substantially affirm most of the Illinois Supreme Court’s ruling in *Williams*.<sup>260</sup>

The mere fact that a jurisdiction’s interpretation of Rule 703—or even Rule 703 itself—would allow the evidence should be extraneous to the Confrontation Clause analysis. The Court will make its own independent determination for Confrontation Clause purposes, as to whether the above parameters are met. The Court has previously stated that whether the Confrontation Clause applies does not hinge on the contours of the rules of evidence.<sup>261</sup> It would indeed be strange to allow a rule of evidence to render admissible, evidence that the Constitution would otherwise prohibit.

If the Court does go down the road we think it will, it will need to define, for Confrontation Clause purposes, the nature and quantum of independent judgment and independent basis which is required to permit testimony of an expert predicated in part upon the forensic report compiled by another analyst. Further, the Court will eventually have to clarify exactly what is required to permit mentioning or introducing the content of the report itself in connection with such opinion, how extensive that mention can be in various situations, and how its reception can be properly limited in instructions to the jury.

In other words, the Court will need to inform lower courts and the other players in the process, as to what it believes are the constitutional uses of Rule 703 against the accused in the scientific reporting context. This should clarify the relationship amongst Rule 703, the surrogate witness concept, and the Confrontation Clause.

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260. We are predicting, from the Sotomayor concurrence in *Bullcoming*, that Justice Sotomayor will join with the four dissenters in *Bullcoming*, to find no confrontation violation in *Williams*, though she will not join in their reasons. In a case remarkably similar to *Williams*, one state court decision has already found there was no confrontation violation because, based on Justice Sotomayor’s concurrence in *Bullcoming*, the court believed that is how the U.S. Supreme Court would rule. See *State v. Roach*, No.06-03-0342, 2011 WL 3241467 at \*4–5 (N.J. Super. App. Div. Aug. 1, 2011); see also *Rector v. State*, 681 S.E.2d 157, 160 (Ga. 2009) (finding that testimony of toxicologist agreeing with results from report prepared by doctor did not violate the confrontation clause). But see *State v. Aragon*, 225 P. 3d 1280, 1283–91 (N.M. 2010).

261. Reply Brief for Petitioner at 14, *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) (No. 09-10876) (citing *Crawford v. Washington*, 541 U.S. 36, 61 (2004)) [hereinafter Reply Brief for Petitioner].

6. *Should the Defense's Own Right to Call the Specific Analyst to the Stand Be Sufficient, With No Need for the Prosecution to Present the Analyst?*

Another question that could have been more effectively laid to rest in *Bullcoming* is whether defendant's right to subpoena the specific analyst satisfies his confrontation rights. Both the majority and the dissenting opinion in *Melendez-Diaz* discuss the inter-relationship between the confrontation rights of the defendant and his ability to subpoena a scientific witness.<sup>262</sup> The Court's opinion in *Bullcoming* suggested the defense's ability to subpoena was irrelevant to the analysis.<sup>263</sup> Justice Kennedy in the *Melendez-Diaz* dissent supported his position that the analyst need not be presented, by noting that "if, in an extraordinary case, the particular analyst's testimony is necessary to the defense, then, of course, the defendant may subpoena the analyst."<sup>264</sup> Justice Kennedy made a similar assertion in support of his contention that the analyst need not be presented in his dissenting opinion in *Bullcoming*.<sup>265</sup>

It does seem somewhat plausible that if the defendant is actually concerned with human error or the misconduct of the specific testing analyst, then the defense could simply subpoena the analyst or another to impeach the credibility of the test report. In many cases today, the defense may not genuinely question the accuracy of the report but may still seek to exclude it based on a Confrontation Clause right.<sup>266</sup>

The Court in *Bullcoming*, in accord with these considerations, could have adopted a rule that in forensic report cases, the ability of the defense to subpoena the specific analyst (if the defense wants to cross-examine him for some reason) obviates the need for the specific analyst to always be presented for in-court testimony by the prosecution in order to admit the report. Alternatively, the Court could have explicitly reaffirmed the position that the defendant's ability to subpoena the specific witness is wholly irrelevant because of the clear mandate of the Confrontation Clause, that the defendant is to be confronted with the witnesses against him.<sup>267</sup> Justice Scalia in *Melendez-Diaz* stated that the right to subpoena a witness is not a substitute for the right to cross-examine under the Confrontation

262. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540; *Id.* at 2547 (Kennedy, J., dissenting). It is the Compulsory Process Clause of the U.S. Constitution that gives the criminal defendant the right to summon and present evidence and witnesses in his own defense. See U.S. CONST. amend. VI.

263. See *Bullcoming*, 131 S. Ct. at 2719 n.9.

264. *Melendez-Diaz*, 129 S. Ct. at 2547.

265. *Bullcoming*, 131 S. Ct. at 2728 (Kennedy, J., dissenting).

266. Justice Kennedy also raises this issue in his *Melendez-Diaz* dissent. *Melendez-Diaz*, 129 S. Ct. at 2549 (Kennedy, J., dissenting).

267. See U.S. CONST. amend. VI.

Clause.<sup>268</sup> Justice Scalia's statement is supported by the Court's act of sending *Briscoe v. Virginia*<sup>269</sup> back to the lower court for application of *Melendez-Diaz*.<sup>270</sup> The Justices' questions in the *Bullcoming* oral argument also alluded to the irrelevance of the ability to subpoena.<sup>271</sup> But, unfortunately, Justice Ginsberg's reaffirmation of the irrelevance of the defendant's right to subpoena the specific witness, is in the portion of the *Bullcoming* opinion which was not joined by a majority of the Court.<sup>272</sup> Although it may continue to be inferred that the ability to subpoena is no substitute for the right to confront the specific preparing analyst, the Court could have made this more explicit.

In the future, the Court will probably reaffirm that the defendant's ability to subpoena is largely irrelevant to the confrontation question (even if the state bears the cost of finding and subpoenaing the witness for the defendant). The Confrontation Clause restricts the ability of the prosecution to enter evidence without providing the defendant her procedural right to confront the accuser providing such evidence.<sup>273</sup> The prosecution is therefore allocated the cost of finding the witness and cannot enter the evidence if the witness is deceased or unavailable. If the Court stated that the defendants' ability to subpoena the witness was sufficient to meet the Confrontation Clause, the Court would be shifting the burden of finding the witness (and the risk of the witness's unavailability) to defendants<sup>274</sup> and would be denying them their *right* to be confronted with the witness. If the ability to subpoena satisfied the right to confront, there would be little need for the prosecution to present *any* witnesses live, not just analysts (unless those witnesses provided some tactical benefit to the prosecution).

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268. *Melendez-Diaz*, 129 S. Ct. at 2540 (Kennedy, J., dissenting).

269. 130 S. Ct. 1316 (2009).

270. *Briscoe* presented the question of whether, *if the state pays for it*, the defendant's right to summon the analyst to the stand would obviate the need for the state to present the analyst in court as a witness, and would allow the state to present the analyst's report instead. See generally *Magruder v. Commonwealth*, 657 S.E.2d 113, 117–18 (Va. 2008). The state's payment could have been a reason which distinguished the case from the holding in *Melendez-Diaz* that the defendant's right to subpoena did *not* obviate his right to be presented with the witness. But apparently the Court did not feel this was a significant distinction when it remanded *Briscoe*. By sending *Briscoe* back to the lower court, the Supreme Court was effectively stating that *Melendez-Diaz* could already act as authority for the proposition that a defendant's ability to subpoena does not satisfy the Confrontation Clause, whether the state pays or not.

271. Transcript *supra* note 217, at 5.

272. *Bullcoming*, 131 S. Ct. at 2718–19.

273. See *supra* note 6 and accompanying text.

274. Although it is conceivable to limit the rule that a defendant's ability to subpoena suffices by saying that it suffices only if the witness is available for the defendant to subpoena—i.e., not dead or beyond reach—and the prosecution pays all expenses in connection with the defendant finding and presenting the witness.

In such a system, the prosecution could enter written statements it gathered, such as eyewitnesses to a murder, and the murder defendant could simply subpoena the witnesses if the defense believed that the evidence was defective. Such a subpoena-based system is far from our present system of trial, and the Court, in our view, will not countenance this.

The Court could, however, adopt a more limited rule, allowing defendants' subpoena ability to play a more limited role in confrontation analysis. For example, the court could adopt a subpoena ability analysis only in certain situations, such as cases of expert or scientific reports. However, based on the above discussion,<sup>275</sup> it is unlikely the Court would allow the ability to subpoena to totally obviate the obligation of the prosecution to present the analyst in such cases. But defendants' subpoena ability may be one of the reasons the Court would adopt a surrogate witness and/or expert witness approach to easing the confrontation requirement in the case of scientific reports.<sup>276</sup> The ability to subpoena the basic analysts is precisely what would soften any harm associated with the Court's adoption of a surrogate witness or expert witness "exception" to the need to confront the basic analysts. It may also be a reason not to require *all* analysts who had anything to do with a report to be presented by the prosecution.<sup>277</sup> In each of these instances, the Court may feel that cross-examination of the person who *is* presented, when combined with the right of the defendant to subpoena any others, may, in combination, sufficiently protect the rights of the defendant.<sup>278</sup>

Thus, in future cases, the Court may hold that defendants do not always have a constitutional right to confront every single one of the analysts involved in reports, because defendants can still use their ability to subpoena in order to cross-examine analysts whom they fear may have made mistakes in scientific analysis.

### 7. *Should There Be Some Practical Time Limitation on the Requirement that the Analyst Appear?*

Prior to *Bullcoming*, an open question was whether there could be any practical time limit on any duty of an analyst to appear in forensics cases. *Bullcoming* did nothing to clarify the matter.

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275. See *supra* notes 262–74 and accompanying text.

276. For the surrogate witness notion, see *supra* subsection IV.A.4. For the expert witness notion, see *supra* subsection IV.A.5.

277. See *supra* subsection IV.A.4.

278. Alternative or additional safeguards might be the right to argue to the jury that there are *potential* infirmities if participants are *not* presented by the prosecution; and an instruction by the judge to the jurors, alerting jurors to such potential infirmities.

Criminal investigations and prosecutions can move extremely slowly. Imagine, for example, that Colonel Mustard kills Miss Scarlet in the Conservatory. Professor Plum is investigating the murder of Miss Scarlet and has Miss Scarlet's body shipped to an autopsy facility to determine the cause of death. An employee of the facility performs the autopsy and determines that Miss Scarlet was struck in the head with a lead pipe causing her death. Professor Plum knows that Colonel Mustard was in possession of a lead pipe and wants to enter the report of the autopsy employee into evidence at Colonel Mustard's trial. Unfortunately, the court system in the state of Clue is slow and so it takes time for Colonel Mustard's trial to commence. In the meantime, the employee of the testing facility dies in a car accident. Assume that the body of Miss Scarlet has deteriorated by now so that re-testing to determine if a lead pipe caused her death is not possible. If, following *Bullcoming*, the autopsy report is testimonial, and if only the specific employee preparing the autopsy report will satisfy the Confrontation Clause, then the autopsy report cannot be used to prosecute Colonel Mustard. In this way, Colonel Mustard will quite literally get away with murder. At least one author has asserted that "excluding the autopsy report where a medical examiner dies [sometimes] effectively functions as a statute of limitations for murder . . ." <sup>279</sup> If the Constitution effectively imposes a statute of limitations for crimes which otherwise have no statute of limitations, the Court may want to rethink the implications of *Bullcoming* in a case where time has caused this problem. The Court's opinion in *Bullcoming* made no attempt to address practical time limitations on the requirement of the specific witness to testify <sup>280</sup> even though the lack of such limitations could prove extremely problematic.

If surrogate witness testimony is ultimately allowed, <sup>281</sup> this problem would be diminished. When one examiner died, another examiner working in the same laboratory and involved in the process could (assuming he qualified for the surrogacy role) testify in the deceased examiner's place. Similarly, allowing expert testimony based on and/or supported by statements from the report as discussed above, <sup>282</sup> could also diminish the problem. Another less rational solution might be merely to impose a time limit. After a certain period of time, if the analyst became unavailable for a legitimate reason, the duty to produce him would expire.

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279. Carolyn Zabrycki, Comment, *Toward A Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 96 CALIF. L. REV. 1093, 1115 (2008).

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

281. See *supra* subsection IV.A.4.

282. See *supra* subsection IV.A.5.

8. *Would the Analyst Have to Testify (If at All) Only When the Testing/Reporting is Done for Purposes of a Legal Proceeding?*

As *Bullcoming* was moving through the courts, it was an open question whether the Confrontation Clause is only implicated if the forensic testing or reporting was done with prosecution specifically in mind.<sup>283</sup> Of course, this question did not present itself in *Bullcoming* because the test and report in *Bullcoming* were obviously done with prosecution in mind.

In both *Bryant* and *Davis*, discussed above, the Court said that if a statement was not made with the objective, primary purpose to be used at trial as a substitute for testimony, then the statement could be admitted without violating the Confrontation Clause rights of the defendant.<sup>284</sup> Should that mean that objective statements in a report by scientific analysts which are primarily made for purposes other than legal proceedings do not implicate the Confrontation Clause? Are there any scientific reports that might be used at a criminal trial against a defendant that could be said to have been made for other purposes? The answer is likely yes, but few (and not normally forensic reports, almost by definition). For example, there may be scientific studies done by a University medical school well before any specific case has arisen, about the nature of a particular mental illness, which might become relevant for the prosecution in a subsequently arising case involving the insanity defense. In practice, however, most forensic reports are clearly compiled with trial in mind (for instance testing for DNA, drugs, alcohol, or skin under the fingernails).

Nevertheless, because there are instances like the University medical school example and others, the question here is a real one. In light of the primary purpose formulation in *Bryant* and *Davis*, the Court will eventually need to clarify the extent to which some tests, studies, or reports may be seen as not having been done for legal/prosecutorial purposes (and therefore perhaps evade the Confrontation Clause), though the Court did not address this issue—and did not need to—in *Bullcoming*. In *Bullcoming*, the Court simply reaffirmed its position in *Melendez-Diaz*: “An analyst’s certification prepared in connection with a criminal investigation or prosecution . . . is testimo-

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283. Finer distinctions could of course be drawn. For example, is it the purpose of the test or the report that is significant? Are all legal purposes alike, or should we distinguish among purposes of investigation, prosecution, trial, civil, and criminal proceedings? What if there are multiple purposes, some non-legal? What if the test and report were done for *another* legal proceeding, or one of a different nature than the one in which it is offered? These are distinctions that could be drawn in cases like *Davis* and *Bryant*, as well as the scientific evidence cases we are considering. There is virtually no elucidation of them in the case law.

284. Sections II.C–D.

nial, and therefore within the compass of the Confrontation Clause.”<sup>285</sup> Subsequently, in footnote six of the opinion, which was not joined by Justice Thomas and therefore does not represent a majority of the Court, Justice Ginsburg cited *Melendez-Diaz* for the proposition that business and public records would be admissible without confrontation because such records were prepared without the primary purpose of proving or establishing facts at trial and were instead primarily concerned with “administration of [the] entity’s affairs . . . .”<sup>286</sup> Justice Sotomayor’s concurrence suggested that where the primary purpose of creating the report was medical treatment or diagnosis, the report could potentially be admissible absent confrontation.<sup>287</sup> Thus, although the Court’s opinion in *Bullcoming* did not officially endorse a specific set of purposes which could remove forensic reports from Confrontation Clause protection, the opinions of several of the Justices who constituted the majority strongly implied that several such alternative purposes existed.

The Court in *Bullcoming* could have better explained the extent to which a reporting analyst need not testify if the test and report are done without trial in mind. The Court’s opinion could have, first, given a clear pronouncement on the issue, and then, second, provided guidance as to how to determine whether a given report requires confrontation based on purpose. The Court’s opinion could have enumerated a non-exhaustive list of purposes which might fall outside Confrontation Clause protection, discussed the extent to which a mixed motivation of medical diagnosis and trial could require confrontation, and suggested the degree of weight to be accorded the subjective intention and belief of the analyst creating the report at the time of creation. But the Court chose not to do so, and these matters will have to be clarified by later decisions.

The likely result will ultimately be that, based on *Davis* and *Bryant*, the Court will find that at least where there was no legal motivation for the report or any link in the process it reports, the evidence is nontestimonial. For example, it seems likely that if a test were conducted for the primary purposes of diagnosing a patient for treatment purposes and a report of the test were compiled for that purpose, even if the doctor knew or could foresee that such a report could potentially

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285. *Bullcoming*, 131 S. Ct. at 2713–14 (emphasis added) (internal quotation marks omitted) (citing *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2537–40 (2009)).

286. *Id.* at 2714 n.6 (citing *Melendez-Diaz*, 129 S. Ct. at 2539–40). This, of course, assumes that the records were made for such neutral purposes, which is not inevitably so. It is not even clear that the hearsay exceptions for business and public records always requires such neutral purposes, as was recognized by Justice Scalia. See *Michigan v. Bryant*, 131 S. Ct. 1143, 1174–75 (2011) (Scalia, J., dissenting).

287. See *Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring).



be used at trial, the statements contained in the report would be non-testimonial. Focusing on whether the parties primarily intended the statements to be used as testimony seems consistent with the Court's primary purpose analysis as most recently formulated in *Bryant*.<sup>288</sup>

9. *Should It Matter Whether the Laboratory is Public or Private?*

An open question not answered by *Crawford*, *Davis*, *Bryant*, or any other case, is whether a statement can be testimonial if there is no state involvement in the making or receiving of the statement? In

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288. See *supra* section II.D. Although the reliability portion of the *Bryant* test may be dubious, we agree with the Court that the intention of the person making the statement is an important factor in determining whether the statement is testimonial or not. *Id.* Asking whether a report was prepared with prosecutorial use in mind may be painting with too broad a brush. Suppose a state crime lab routinely analyzes the chemical profile of the fertilizer of each in-state manufacturer, as the fertilizer leaves each plant. The crime lab does this because fertilizer is sometimes used as an ingredient in terrorist bombs. At the bombing scene, the chemical profile of the fertilizer, and hence its manufacturing source, can be ascertained. The government may be able to use this information to identify the ultimate purchaser of the fertilizer. The state lab routinely does these analyses and makes these records well before any bombings have occurred. Thus, the state lab does not focus on any particular prosecutions or suspects when these records are made, but it can still be said that the lab makes these records with a future prosecutorial use in mind. Suppose that eventually a bombing does occur, a defendant is caught, and part of the proof proffered against the defendant is that the fertilizer was traced to the defendant through the state crime lab's chemical profile records. Accordingly, the state wants to introduce the state crime lab report as part of its evidence. While the report was expressly made for the purpose of possible prosecution, arguably it should not be regarded as "testimonial" for purposes of the Confrontation Clause, since no motive to implicate any particular person could possibly have affected its making (as it was purely routine and made in a non-adversarial setting before any crime occurred or a case arose). Whether there is such a "routine records" or "non-adversarial records" exception to the Confrontation Clause—as there is to the ban on law enforcement records in the Public Records hearsay exception under cases such as *United States v. Grady*, 544 F.2d 598, 604 (2d Cir. 1976)—is another question the Supreme court is eventually going to have to answer. A similar situation would arise where a crime lab is asked to derive a DNA profile from a crime-scene sample supplied by the police, but the lab is not informed that the police or prosecution want the profile to yield a particular result, nor is the lab informed of anything about the case. In this situation, like the situation discussed above, arguably no adversarial motive would taint the result, despite the fact that the analysis is done in connection with a particular crime. However, this situation may be distinguishable from the above situation, because in this situation there is always the possibility that the wishes of the police or prosecution may have surreptitiously gotten to the lab and influenced the report. This issue could play a role in evaluating the private DNA lab used in the *Williams* case, which is currently pending before the Supreme Court. See *People v. Williams*, 939 N.E.2d 268 (Ill. 2010), *cert. granted*, 131 S. Ct. 3090 (2011) (No. 10-8505); *supra* notes 249-60 and accompanying text.

*Crawford, Davis, and Bryant*, the statements, made by citizens, were obtained by police.<sup>289</sup> In *Melendez-Diaz* and *Bullcoming* (the forensic report cases), the statements were made by official agents of the state, but also to police and prosecutors.<sup>290</sup>

But what if we remove official involvement entirely in making or receiving the statement? For example, what if a citizen makes a statement in his home to a friend, that later is offered in evidence against a criminal accused via the testimony of the friend? There are suggestions in *Crawford, Davis, and Bryant*, that both (1) intention (that the statement be used in the criminal process) of the person making the statement, and (2) official participation, are significant to a holding that the Confrontation Clause applies.<sup>291</sup> Both factors were present in those cases which involved police questioning and those which involved forensic reports, where the Court found confrontation violations.<sup>292</sup>

But suppose the former (intention) is present, but not the latter (official involvement). For example, in the friend-to-friend example, suppose the friend making the statement means to incriminate the criminal defendant and hopes the statement will get to police and prosecutors.<sup>293</sup> The cases do not say whether the Confrontation Clause would be violated. If distrust of government—the possibility of government pressure, overreaching, or cheating, in the creation of the statement—is behind the confrontation requirement, perhaps this example is not within the ambit of the Confrontation Clause. But it is not clear that the Court feels this way. In *Davis*, the Court had an opportunity to address whether state involvement in making or garnering the statement was indispensable to finding a statement to be testimonial.<sup>294</sup> The statement in *Davis* was taken from a citizen by a 911 operator.<sup>295</sup> Some 911 operators may be employed by private entities and not by the state. The court could have addressed whether that kind of independent status would prevent a finding that the statement was testimonial and therefore would avert a confrontation violation. But it did not, because, regardless of that issue, the state-

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289. See *supra* sections II.B–D.

290. See *supra* section II.E, Part III.

291. See *supra* sections II.B–D.

292. See *supra* sections II.B–D.

293. If there is no such contemplation by either friend, then neither of the factors present for a confrontation violation are present. The clearest case of a nontestimonial statement in this regard would be the following friend-to-friend statement, made in idle conversation: “At 3:50 p.m. Tuesday I saw Fred Jones at the corner of Main and Sixth Streets.” It later develops that, unbeknownst to the friends, at 3:50 p.m. on that Tuesday, the bank at Main and Sixth was robbed. The statement is sought to be offered (via the friend to whom the statement was made) by the prosecution in the criminal prosecution of Fred Jones for the robbery.

294. See *supra* section II.C for an in depth discussion of *Davis*.

295. *Davis v. Washington*, 547 U.S. 813, 818–19 (2006).

ment was not testimonial, owing to the fact that it was stated in an emergency context.<sup>296</sup> The court assumed without deciding the issue, that the 911 operator was an agent of the state or the functional equivalent of the state<sup>297</sup> but did not say whether that would make any difference in some case where it was not an emergency situation. It thus did not answer what would be the result if it were not an emergency context (so the statement *might* be testimonial) and the operator was totally independent.

Now suppose that the lab in *Bullcoming* was a private lab instead of a state lab, in no way under the effective control of the state. Would this have removed the “official involvement” factor? It would not, because the requesting authority—the people who requested the test and report—were official entities, the police and prosecutors. So it would seem that offering the report without the analyst would still be a confrontation violation. The statements in the report would still be testimonial.

This result is supported by Justice Scalia’s dissent in *Bryant*.<sup>298</sup> He states that even though business records may pass muster with regard to the *Federal Rules of Evidence*, if such records were made even by neutral (non-state) scientific parties providing support for litigation, the Confrontation Clause would bite even if the rules of evidence would not.<sup>299</sup> This result is also supported by the fact that the non-appearing witnesses in the landmark Confrontation Clause cases discussed in Part II (*Crawford*, *Davis*, *Bryant*) were *private* individuals and the Confrontation Clause applied with full force.<sup>300</sup>

However, the U.S. Supreme Court has never clearly resolved the issue. The Court in *Bullcoming* could have indicated that a public laboratory, or one under the effective control of the state, is less neutral than a private laboratory. If the Court determined that one rationale for finding scientific reports testimonial is that they are non-neutral accusations, then the Court might have considered drawing a distinction between public laboratories (which are presumably less neutral to state prosecutions) and private laboratories (which are presumably more neutral to state prosecutions). However, even if such a distinction were drawn, there would also have to be an investigation into whether a private entity were under the effective control of the state (for instance if the state’s patronage made up a sufficiently large percentage of the laboratory’s revenue). Although the Court chose not to specifically draw a distinction between public and private laboratories

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296. *Id.* at 822.

297. *See supra* section II.C.

298. *Michigan v. Bryant*, 131 S. Ct. 1143, 1174–75 (2011) (Scalia, J., dissenting).

299. *Id.*

300. Also in support of the result is the Court’s tendency to focus on the statement itself and not on who makes the statement. *See supra* subsection IV.A.1.

in *Bullcoming*, neither did the Court specifically state that no such distinction exists. Thus, even after the Court's opinion, local laboratories continue to lack sufficient notice of their position.

The issue could possibly be addressed when the U.S. Supreme Court reviews the Illinois Supreme Court's decision in *Williams*.<sup>301</sup> In *Williams* one of the two labs involved was one of the country's most renowned private laboratories, Cellmark of Maryland.<sup>302</sup> The Illinois Supreme Court did not reach the question of whether its private status made any difference because in either event the expert witness was allowed to address the lab reports as part of her opinion.<sup>303</sup> If the U.S. Supreme Court does not agree with this "expert testimony" rationale when it decides *Williams*, the Court may have to address the public-private question.

For the reasons mentioned above in this section, we believe the U.S. Supreme Court will not, and should not, draw a distinction between public and private entities. We do not believe that a private entity doing a job for the state is significantly more trustworthy, credible, or reliable than a state entity doing the job. The Court should not treat a similar statement in a report differently depending on whether the report was compiled by a public or private laboratory.

## **B. Implications of *Bullcoming* Opinion For Law Enforcement**

The nine issues identified above have major consequences for local and federal law enforcement, as well as for the use of forensic sciences in criminal trials generally.<sup>304</sup> Depending on the Justices' views on constitutional interpretation, such practical considerations may be unimportant. However, these practical considerations will be extremely important to states, localities, federal agencies, and lower federal courts.

To begin, laboratories may simply be unable to meet the needs imposed by requiring the specific analyst to testify. Some laboratories perform thousands of tests in a year.<sup>305</sup> Analysts within those laboratories will often have many duties such as training, attending to du-

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301. *People v. Williams*, 939 N.E.2d 268 (Ill. 2010), *cert. granted*, 131 S. Ct. 3090 (2011) (No. 10-8505).

302. *Id.* at 271.

303. *Id.* at 277–82.

304. The case will likely have reverberations in many forensics areas including autopsies, DNA, toxicology, ballistics, hair and skin analysis, and fingerprinting. In his dissenting opinion in *Bullcoming*, Justice Kennedy was again concerned that the Court's opinion would negatively impact law enforcement. *See Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2726 (2011) (Kennedy, J., dissenting).

305. *See* Brief for the NDAA as Amicus Curiae Supporting Respondent at 22, *Bullcoming*, 131 S. Ct. 2705 (2011) (No. 09-10876) (citing statistics that one Ohio County Coroner, with a staff of seven forensics professionals and two Ph.D.'s, performed

ties in the lab, quality assurance, and administration.<sup>306</sup> The specific analyst who compiled the report may very often be unavailable to testify. If admissibility now turns on the specific analyst having time to travel to court, wait for her appearance, and testify, great harm could be done to prosecutions requiring DNA, toxicology, controlled substances, and other forensic analysis.<sup>307</sup> Prosecutions in certain state courts will be even more difficult. In some state courts, trials may be postponed, moved forward, or plead out at the last second.<sup>308</sup> It is impracticable to believe that a single analyst will be able to keep her schedule open for months on the chance that any given day will be the day for her testimony.<sup>309</sup> Thus, a good deal of evidence may necessarily be excluded due to unavailability.

Requiring specific analyst testimony may hinder even routine laboratory support for trials. For instance, the prosecution must account for the chain of custody in forensic analysis criminal cases.<sup>310</sup> Accounting for chain of custody may require representations that an investigative officer obtained the evidence from the scene of the crime, that his partner took the evidence to the evidence holding locker, that a third individual ensured that the evidence was properly sealed in the holding locker, and so on.<sup>311</sup> Should all or most of these individuals be required to appear in Court, then even routine chain of custody representations will become quite problematic. Although the opinion of the Court in *Melendez-Diaz* appears to exempt some individuals representing the chain of custody,<sup>312</sup> the Court's opinion still seems to require the prosecution to support, with live testimony, any evidence the prosecution chooses to offer (on objection by the defense).<sup>313</sup> Holding that confrontation rights attach to certain chain of custody representations may go beyond traditional law in this area<sup>314</sup> and discourage prosecutorial efficiency.<sup>315</sup>

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some 35,000 toxicology tests in eight years); *see also* Brief for the States, *supra* note 246, at 5–8.

306. Brief for the States, *supra* note 246, at 7.

307. *Id.* at 7–8.

308. *Id.* at 7.

309. *Id.* at 7–8.

310. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2546 (2009).

311. *Id.*

312. *See id.* at 2561 n.1 (“[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person . . .”).

313. *Id.*

314. Justice Kennedy makes this argument in the dissent. *See id.* at 2546 (Kennedy, J., dissenting).

315. If prosecutorial efficiency was severely curtailed, this could impinge upon a defendant's constitutional right to a speedy trial. Amber N. Gremillion, *I'll Be Seeing You In Court: Melendez-Diaz v. Massachusetts' Flawed Decision and Its Impact On Louisiana*, 37 S.U. L. REV. 255, 273 (2010).

Requiring the specific analyst to testify may also harm special forensics functions. For instance, the efficacy of DNA data banks may be curtailed.<sup>316</sup> DNA data bank programs have been successful at holding DNA and helping solve cold cases which are many years old.<sup>317</sup> In such cold cases, it is unlikely that the original analysts will be available or even alive.<sup>318</sup> If the specific analyst must testify, then these data bank programs may lose efficacy.<sup>319</sup> Similarly, federal agency support for local prosecutions may be hindered. For example, a federal agency, such as the Federal Bureau of Investigation (FBI), may provide laboratory support for state prosecutions.<sup>320</sup> Such support will be of little use if the FBI agent conducting the analysis cannot fly to the state in question to appear for testimony.

Requiring the specific analyst to testify may even hinder states from exercising their basic police powers and instituting public safety and public policy initiatives. For instance, if a state was attempting to institute a zero-tolerance policy toward drinking and driving, the state may be unable to police such a policy if the blood alcohol analyst had to appear in every trial for DUI or DWI.<sup>321</sup> Likewise, requiring specific analyst testimony would severely limit the efficacy of drug prosecutions, which are often supported by scientific analysis, and numbered 25,000 in Philadelphia in 2007 alone.<sup>322</sup> One commentator suggests that states may be effectively forced to either decriminalize certain activities (which the state would otherwise choose to keep criminal) or plea out many more cases (with the state offering very generous plea agreements).<sup>323</sup> The result for states may be a loss of effective police power and more criminals evading conviction on technicalities.<sup>324</sup>

Finally, even if crime laboratories were able to function effectively, requiring the specific analyst to testify may create unreasonable fi-

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316. Brief for the States, *supra* note 246, at 10–11.

317. *Id.* at 10.

318. *Id.*

319. *Id.*

320. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2550 (2009) (Kennedy, J., dissenting).

321. This public policy concern is highlighted by the New Mexico Department of Health Laboratory Division. Brief for the New Mexico Department of Health Laboratory Division as Amicus Curiae Supporting Respondent at 30–31, *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) (No. 09–10876).

322. *Melendez-Diaz*, 129 S. Ct. at 2550 (Kennedy, J., dissenting). In Louisiana, there were 17,959 arrests for offenses relating to drugs. *Gremillion*, *supra* note 315, at 272.

323. Bradley W. Hines, *Melendez-Diaz v. Massachusetts: Forcing America To Pay The Premium Price For The Nation's New Confrontation Clause*, 21 *GEO. MASON U. C.R. L.J.* 123, 147 (2010).

324. *Melendez-Diaz*, 129 S. Ct. at 2550 (Kennedy, J., dissenting).

nancial burdens for the states.<sup>325</sup> Analysts at state crime laboratories are paid out of public money and if such analysts are spending more time out of the laboratory, then more analysts might need to fill the gap created by the frequent court appearances of laboratory personnel.<sup>326</sup> Additionally, there will be pecuniary costs associated with travel to court and preparation for testimony.<sup>327</sup> These costs could be significant and may result in greatly increased taxes<sup>328</sup> or further harm to state budgets.

Despite these concerns, some knowledgeable sources question whether such severe consequences would result from requiring the analyst to testify. Justice Scalia, for instance, doubted that dire consequences would result from making the analyst testify.<sup>329</sup> He noted that several states had already required analyst testimony and the consequences have not been dire.<sup>330</sup> The Petitioners in *Bullcoming* and the Amicus Brief of the Public Defender Service in *Bullcoming* made a similar point.<sup>331</sup> States may also take certain actions to mitigate the economic and social costs of analyst testimony in criminal prosecutions.<sup>332</sup> First, some states have adopted a “subpoena system” whereby the confrontation rights of a defendant in forensics cases are satisfied by the defendant’s ability to subpoena the specific forensic analyst.<sup>333</sup> Although the Supreme Court seemed to contend that the subpoena ability is not sufficient for confrontation purposes,<sup>334</sup> a reversal of that position would certainly mitigate the costs on the states. Second, some states have enacted notice-and-demand laws, which require the prosecutor to notify the defense of the intention to use a scientific report and allow the defendant a chance to object to the report’s use unless the reporter appears in court.<sup>335</sup> If the defendant does not object, the report is admissible without the analyst’s testimony. These laws are consistent with even a broad right to confront because under the Confrontation Clause the defendant has the responsibility to raise

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325. Hines, *supra* note 323, at 142–46.

326. *Id.*

327. *Id.*

328. *Melendez-Diaz*, 129 S. Ct. at 2550 (Kennedy, J., dissenting).

329. *Id.* at 2540–42.

330. *Id.*

331. Reply Brief for Petitioner, *supra* note 261, at 18; Brief for the Public Defender Service as Amicus Curiae Supporting Petitioner at 5–15, *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) (No. 09–10876) [hereinafter Brief for the Public Defender Service].

332. Reply Brief for Petitioner, *supra* note 261, at 18–19; Brief for the Public Defender Service, *supra* note 331, at 7–25.

333. Hines, *supra* note 323, at 150–51.

334. *See supra* subsection IV.A.6.

335. *Melendez-Diaz*, 129 S. Ct. at 2540–42; *see also* Gremillion, *supra* note 315, at 282–85 (noting two separate types of Notice and Demand statutes).

an objection on the basis of the Clause.<sup>336</sup> These notice-and-demand laws, then, merely create a time-limited mechanism through which the defendant can invoke (or waive) her right to confront the forensic analyst.<sup>337</sup> The U.S. Supreme Court seems to have approved such notice and demand laws.<sup>338</sup> Third, states could employ technology such as “two-way video conferencing . . .”<sup>339</sup> If an analyst could ‘testify’ directly through the front-facing camera on his laboratory computer, the analyst would expend significantly less time and resources in giving court testimony. Fourth, and finally, there is often the possibility of re-testing, as Justice Ginsburg pointed out in a portion of her opinion that did not receive full majority subscription.<sup>340</sup> If an analyst whose testimony would be required is gone or dead, in many cases the substance or material tested will still be available for the state to re-test with an analyst who is available to be called to testify.

Thus, there is certainly support for the contention that specific analyst testimony is possible without impracticable costs to the states and federal government.

Although the severity of harm caused by requiring analyst testimony in forensics cases is debated, it is clear that the Court’s interpretation of the scope of confrontation rights and guidance as to how to meet the rights of defendants has major implications for states, localities, and even the federal government. Given the importance of the Court’s position, the Court’s treatment of law enforcement considerations in its *Bullcoming* opinion was surprisingly minimal. Justice Ginsburg was joined only by Justice Scalia in the portion of her opinion which attempted to address law enforcement policy.<sup>341</sup> Even Justice Ginsburg’s opinion failed to move beyond the reassertion of arguments employed previously by the Court<sup>342</sup> and bare assertions that the harm would not be severe.<sup>343</sup>

In our view, the practical consequences for law enforcement are relevant but not dispositive. Where the Constitution is clear in granting criminal defendants the right to cross-examine the specific forensic analyst who performed the analysis, then such clear right in our

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336. Hines, *supra* note 323, at 134. *Melendez-Diaz* seemed to approve the constitutionality of these laws. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2541 (2009).

337. Hines, *supra* note 323 at 134.

338. *See Melendez-Diaz*, 129 S. Ct. at 2541.

339. Hines, *supra* note 323 at 154–57.

340. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2718 (2011).

341. *Id.* at 2709, 2717–19.

342. For instance, Justice Ginsburg makes the argument that notice-and-demand statutes can minimize the harm to law enforcement and that very few cases actually result in trial proceedings. *Id.* at 2718.

343. For instance, Justice Ginsburg suggests that in states which require analyst testimony to support scientific reports, “the sky has not fallen.” *Id.* at 2719.



view does and will trump these practical considerations. However, we are not persuaded that the Confrontation Clause envisages in all circumstances an absolute right to confront the specific analyst or all specific analysts. In unclear circumstances, the practical consequences are relevant. Creating an unqualified right to confront the specific analyst in all the situations discussed in this Article would too severely curtail law enforcement and the protection to citizens that law enforcement affords. In the final Part of this Article, we will present our conclusions.

## V. CONCLUSION

While it is true that practical concerns such as the needs of law enforcement cannot trump an individual's clear constitutional right to confrontation,<sup>344</sup> it is also true that where the constitutional right is not clear, such concerns can properly influence filling in the contours of that right, in our view.

We believe that the practical law enforcement concerns discussed above militate in favor of a limited surrogate witness and expert witness exception to *Melendez-Diaz's* and *Bullcoming's* requirement that the prosecution cannot use a forensic report without the specific analyst being presented by the prosecution for testimony. The exception should allow a properly qualified surrogate witness or expert witness, who has a sufficiently strong foundation or basis, to testify in place of the analyst, at least if the analyst is unavailable.

*Bullcoming* could have taken the bull by the horns and said whether such exceptions will be recognized and if so, what their general parameters are, as it could have with other of the issues discussed herein. This would have been desirable from the standpoint of providing much needed guidance to all the participants in the process, but perhaps the guidance would have been ill thought out at this early stage of developing jurisprudence on the issue. Presumably owing to concerns of this nature, the Court did not take the opportunity. It was not necessary to do so on the facts<sup>345</sup>—there was no way the testifying witness could have met the qualifications of any reasonable version of the exceptions.

We are fairly confident, however, that the Court will find it necessary to pronounce on these exceptions in the not-too-distant future, and that the Justices will recognize some version of one, or both, of these exceptions.

The purpose of this Article was to highlight the issues raised by, and potential consequences of, the applicability (or inapplicability) of the Confrontation Clause to forensic scientists creating purportedly

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344. See *supra* notes 342–43 and accompanying text.

345. See *supra* note 20 and accompanying text.

objective reports, in various situations. Part I introduced the Article. Part II provided the necessary case law history such that the issues were placed in their historical contexts. Part III introduced the *Bullcoming* case. Finally, Part IV first identified a number of issues which we believe required clarification prior to the *Bullcoming* decision, then discussed the extent to which the Court adequately clarified and addressed each issue, and finally highlighted the importance of these issues in terms of individual rights, forensics and law enforcement policy.

Analysis of the relevant cases and materials led us to believe that the Court will eventually have to more clearly instruct participants in the process as to the applicability of the Confrontation Clause to forensic reports like those involved in *Bullcoming* and variations thereof. The Court in *Bullcoming* could have resisted the impulse to answer only the narrow question before it and resolved some of the confusion that surrounds many of the other questions in the area of forensic reporting and confrontation rights. The Court could have specifically addressed and more fully clarified the issues that we have raised in this Article, which would have provided much needed guidance to all involved in the system. On the other hand, there are strong considerations that counsel judicial restraint and a gradual exposition of the issues, and these considerations appear to have won out in *Bullcoming*. Nevertheless, we would hope that the Court will clarify the remaining issues in future Confrontation Clause opinions as rapidly as possible, consistent with good judging. Although evidence itself—much to the chagrin of CSI's Grissom—may not always be explicitly clear, the U.S. Supreme Court's interpretation of evidence law and constitutional rights should be, at least after a decent period of gestation.