



# GIDEON'S PROMISE

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**CRAWFORD:**

## **A Practitioner's Guide**

**By**

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It all seemed so clear after the United States Supreme Court gave us Crawford and the confrontation cases that followed. For the two decades before Crawford, it was the judge who determined whether an out-of-court statement was reliable and the jury should hear it. Crawford, however, places responsibility for determining reliability squarely in the hands of the jury. With some exceptions, then, such statements are not admissible unless the jury can assess the witness's credibility during cross-examination at trial. But what constitutes a statement? When it comes to blood alcohol and drug tests, the court was categorical: The person who generated the test or report had to be available for cross-examination. Yet in its most recent decision on this point, the DNA case Williams, the court seems only to have muddied the waters.

Under Crawford, out-of-court testimonial statements were not admissible unless the witness was unavailable and the accused had a prior opportunity to cross-examine. To determine whether the statement was testimonial, the Court used an objective standard to examine the statement's primary purpose. If the



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statement was made during an ongoing emergency, it was admissible because it was not testimonial. A statement was testimonial, and not admissible, if it was made to establish past events relevant to prosecution. The accused could forfeit his right to confrontation by engaging in behavior designed to prevent the witness from testifying at trial.

Subsequent decisions by the Court made it clear that the Confrontation Clause extended to certain scientific reports. Certificates from a forensic analyst certifying the chemical composition of alleged drugs were not an appropriate substitute for the live testimony of the chemist. (Melendez-Diaz) And the supervisor of the analyst who conducted a blood alcohol test in a DWI case could not testify as a surrogate if he was not present when the analysis was performed. (Bullcoming)

And so when the court granted review in Williams, the decision seemed, to some, a foregone conclusion based on the logical extension of the previous cases. Mr. Williams was accused of the sexual assault and kidnapping of a stranger in Chicago. To alleviate a backlog of cases needing DNA analysis, the Illinois lab sent the evidence samples to a lab in Maryland called Cellmark. After Cellmark developed a male DNA profile from the swab taken from the victim's vagina, an analyst in the Illinois lab found a match to Mr. Williams in the DNA database. At trial, the lab report from Cellmark was not offered into evidence and no one involved in developing the profile testified. Instead, the Illinois analyst testified that Mr. Williams' DNA profile was found on the swab taken from the



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victim's vagina. The court convicted Mr. Williams after a bench trial. The appellate courts in Illinois affirmed the conviction.

In a convoluted plurality opinion released in 2012, the U.S. Supreme Court affirmed the conviction, holding that the testimony of the Illinois DNA analyst did not violate the Confrontation Clause. In a blistering dissent, Justice Elena Kagan wrote that the analyst's testimony was "functionally identical to the 'surrogate' testimony offered in Bullcoming." She went on to say that the plurality can "...boast of two accomplishments; first, they allowed the introduction of evidence that the Confrontation Clause clearly prohibits. And, second, they have left significant confusion in their wake."

## **CRAWFORD V. WASHINGTON**

**541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d (2004)**

Before attempting to parse through the confusion, let's examine why Crawford changed the legal landscape. With Crawford and its progeny, the Supreme Court is interpreting the Six Amendment's Confrontation Clause, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."



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A couple of helpful tidbits: First, the clause applies to criminal cases, not civil. And second, it is the accused who is protected, not the state. To determine whether an out-of-court statement by an unavailable defense witness is admissible, the court must look to the rules of evidence, not the Confrontation Clause.

Before Crawford, the law of confrontation was governed by a 1980 Supreme Court decision, Ohio v. Roberts, 448 U.S. 56 (1980). The holding of Roberts was that if a witness was unavailable, his or her out-of-court statement could be admitted so long as it had adequate indicia of reliability. To have adequate indicia of reliability, it must fall within a firmly rooted hearsay exception or it had to have particularized guarantees of trustworthiness. Under Roberts, it was *the judge* who determined whether a statement was reliable. In other words, if the prosecution convinced the judge that the statement was reliable, it would be admitted into evidence and heard by the jury. The accused would not have the opportunity to cross-examine the witness who made the statement during the trial.

That was the law for 24 years. And then, in 2004, along came Michael D. Crawford, who was convicted of assaulting a man with a deadly weapon whom he believed had tried to rape his wife, Sylvia. She did not testify at the trial because of the state of Washington's marital privilege. But during the trial, the state introduced Sylvia's recorded statement to the police describing the incident to show that the stabbing was not in self-defense. The prosecution played the



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tape for the jury and relied on it during closing, arguing that it refuted Mr. Crawford's claim of self-defense. Mr. Crawford's lawyer had no opportunity to cross-examine Sylvia Crawford. The Washington Supreme Court upheld the conviction after determining that Sylvia's statement was reliable because it bore guarantees of trustworthiness.

The U.S. Supreme Court reversed the conviction, holding that that the prosecution's use of Sylvia's statement violated the Confrontation Clause. In the majority opinion, Justice Antonin Scalia wrote that where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation at trial. Judges would no longer determine reliability as they had under Roberts. Instead, the jury would determine whether the evidence was reliable after seeing it tested by the adversarial process through cross-examination.

To arrive at this conclusion, Scalia first looked to the text of the Constitution. Finding nothing instructive there, he then examined the founding generation's immediate source of the confrontation concept, English Common Law. During Queen Mary's reign in the 16<sup>th</sup> century, statutes allowed justices of the peace to conduct pretrial examinations of witnesses. The justices would then certify the results of the examination in court. So a witness could be questioned before trial and the text of the witness's statement read to the jury. The witness was not required to appear at trial, so the accused could not cross-examine the witness before the jury.



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One of history's great political trials began a sea change in the law of confrontation. In 1603, Sir Walter Raleigh was tried for treason after being implicated by Lord Cobham, his alleged accomplice. Cobham was questioned before trial and his statements were read to the jury, despite Raleigh's protest that he was being denied his right of confrontation. Raleigh is quoted as saying, "{t}he proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face..." Despite Raleigh's belief that Cobham would recant if he had to testify at the trial, he never got the opportunity to confront his accuser. Raleigh was convicted and sentenced to death.

Outrage at Raleigh's execution led to changes in the law of confrontation. One of Raleigh's trial judges later said, "The justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh." A series of statutory and judicial reforms cemented the right of confrontation in English law. And the right to confront one's accuser at trial took hold.

Although many of the American colonies adopted declarations of rights that guaranteed the right of confrontation, the proposed federal Constitution did not. That changed after the First Congress listened to arguments about the essential need for cross-examination at trial, prompting inclusion of the Confrontation Clause in the proposal that became the Sixth Amendment, which was ratified in 1791. This was the historical context examined by Scalia in his search for the meaning of the Confrontation Clause.



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The holding in Crawford is that the accused has the right to confront a witness before the finder of fact if the out-of-court statement is testimonial, unless the witness is unavailable and the accused had a prior opportunity to cross-examine. The Court gave several examples of testimonial statements, including those taken by officers in the course of interrogation (a loose definition), any kind of structured police questioning, or *ex parte* testimony at a preliminary hearing. Since the recorded statement of Sylvia Crawford was taken by the police to investigate an incident that had already occurred, it was not admissible because it was testimonial.

Statements are not testimonial when they are made under circumstances objectively indicating that the primary purpose of the interrogation is to enable the police to meet an ongoing emergency. Because the standard is objective, it doesn't matter what the speaker intends. The question is what an objective person would perceive as the primary purpose of the statement. Finally, the emergency has to be ongoing. An important thing to remember is that statements can change into being testimonial when the emergency has been addressed. In that case, the judge should exclude the portion of the statement that is testimonial.

If an out-of-court statement is not testimonial, there is no confrontation issue. And, according to Scalia in Crawford, in absence of a constitutional issue, it is consistent with the framers' intentions that the states be allowed to develop their own hearsay law. In other words, states may choose to exempt statements



that are not testimonial from Confrontation Clause scrutiny because only testimonial statements require constitutional protection.

**DAVIS V. WASHINGTON**

**HAMMON V. INDIANA**

**547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed 2d 224 (2006)**

The Crawford case left many unanswered questions. The Court addressed some of those issues in the companion cases of Davis and Hammon. In Davis, Michelle McCottry called 911, but the call was terminated. When the operator called back, McCottry said her former boyfriend, Adrian Davis, was hitting her with fists. At one point, she told the operator that Mr. Davis had just run out of the house. When the police arrived, about four minutes later, they saw what they characterized as newly inflicted injuries on McCottry's arm and face. They also said she looked shaken and that she was frantically trying to get her belongings and her children together to get out of the house.

The state charged Mr. Davis with violating a felony domestic no-contact order. At trial, the only witnesses who testified were the two police officers who arrived at the scene. They told the jury about their observations of McCottry's demeanor and her injuries, but they admitted that they did not see who inflicted the injuries, nor did they see Mr. Davis in the home. Ms. McCottry did not testify. Over the objection of Mr. Davis, the court allowed the prosecution to play the



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recording of the 911 call. The jury convicted Mr. Davis. His conviction was affirmed by the Washington Supreme Court.

The U.S. Supreme Court also affirmed the conviction, holding that Ms. McCottry's statements during the 911 call were admissible at trial without her presence because they were non-testimonial. Justice Scalia, again writing for the majority, highlighted several factors leading to the conclusion that the statement was not testimonial. Among them was that McCottry was talking about events as they were happening to her while she spoke with the 911 dispatcher. She faced an ongoing emergency because she was actually being hit as she talked on the phone. The 911 operator elicited information to enable the police to address the emergency, such as the fact that Mr. Davis had just run out the door.

Justice Scalia also noted the striking difference in formality between the environment in which the police took Sylvia Crawford's statement versus the frantic call Ms. McCottry made to 911. Ms. Crawford calmly answered questions at the station house while an officer took notes. And while the statements taken by the police from Ms. Crawford were meant to enable them to investigate an incident that had already occurred, the primary purpose of Ms. McCottry's statements were to help the police meet an ongoing emergency.

In Hammon, the U.S. Supreme Court held that the out-of-court statements were testimonial and therefore not admissible at trial. The police responded to a reported domestic disturbance at the home of Amy and Hershel Hammon. When they arrived, they found Amy standing on the porch looking "somewhat



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frightened,” but she also told them “nothing was the matter.” She gave the police permission to enter the home, where they observed a gas heating unit with broken glass on the ground in front of it. The police separated the two and one of the officers listened to Amy’s account of what happened. Hershel tried to intervene in Amy’s conversation but he was kept away from his wife by the other officer. After listening to Amy, the police officer had her fill out and sign a battery affidavit. In the affidavit, Amy said that Hershel pushed her to the floor and hit her in the chest. She also said that Hershel attacked her daughter.

The state of Indiana charged Hershel Hammon with domestic battery and violating probation. Despite being subpoenaed, Amy did not appear to testify at the bench trial. Over Mr. Hammon’s objection, the officer who questioned Amy testified to Amy’s out-of-court statement about the assault. The trial judge ruled that Amy’s statements were admissible because they were excited utterances and present sense impressions. The court found Mr. Hammon guilty on both charges.

The U.S. Supreme Court held that Amy Hammon’s statements were testimonial and not admissible at trial. Justice Scalia, again writing for the majority, held that the primary purpose of Amy’s statements was the investigation of a possible crime that had already occurred. There was no emergency in progress. Amy clearly told the police that everything was fine. There were two officers present, one of whom made sure that Hershel did not interfere with Amy’s conversation with the other officer. The officer talking to Amy was seeking



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to determine what had happened, not what was happening. She was not seeking aid, but was telling a story from the past.

Beyond the specific holdings in Davis and Hammon, both opinions shed light on other issues. Although most of the discussion focused on police interrogation, the court made it clear that volunteered statements--made in the absence of questioning by law enforcement--were not exempt from the Confrontation Clause. An example given by Scalia was a letter written by Lord Cobham that was used as evidence against Raleigh during the trial. Even though the letter was obviously not the result of a police interrogation, it was still a testimonial statement that would be subject to Confrontation Clause scrutiny today.

Another issue was whether the out-of-court statement had to be made to law enforcement. In Davis, the court found that the 911 operators were acting as agents of law enforcement when they conduct interrogations of 911 callers. The Court declined to go further, having decided the relevant issue in Davis. Scalia did point to a passage from Crawford using the phrase "government officer." He suggested that the formality of making a statement to a government officer may not be present in a casual remark to an acquaintance. A statement made to an acquaintance, however, can objectively be viewed as testimonial, depending on the circumstances under which it is made. This confrontation issue remains open for interpretation.



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One commonality of Davis and Hammon is that they involved allegations of domestic assault. Both respondents and a number of *amici* urged the Supreme Court to allow greater flexibility in the use of testimonial evidence in domestic assault cases. The court declined this invitation, with Scalia specifically noting that although victims of domestic assaults are susceptible to intimidation, “We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free.” Pointing out that the Supreme Court rejected these arguments may be important with a court or prosecutor inclined to apply, or argue, a different confrontation standard in a domestic assault case.



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## FORFEITURE

Justice Scalia did note that there are situations where the accused is judicially deemed to have given up the right to confrontation. This is the doctrine of forfeiture. “The rule of forfeiture by wrongdoing,” Scalia wrote, “extinguishes confrontation claims on essentially equitable grounds.” The idea behind the Common Law forfeiture rule was to remove the incentive for defendants to intimidate, bribe, or kill the witnesses against them. It was grounded in the ability of the courts to protect the integrity of the proceedings. Rather than create a domestic-assault exception to the Confrontation Clause, Scalia suggested to prosecutors that forfeiture was already available to them as a remedy for defendants who attempt to intimidate alleged victims of crime.

The forfeiture doctrine is codified in Federal Rule of Evidence 804(b)(6). Under the federal rule, the prosecution must satisfy three elements to prove forfeiture. First, the state must show that the defendant engaged in, or acquiesced to, wrongful conduct. If “friends” of the accused engaged in wrongdoing, there must be some indication that the accused knew of, and acquiesced in, what they were doing. (As we know, friends and family of our clients often engage in ill-advised behavior of their own accord thinking they are helping the situation when they are not. Often, we need to enlist our client to put a stop to the unwanted behavior.)



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Second, the state must show that the accused intended to procure the witness's unavailability. What was the accused trying to do by engaging in the specific behavior? What was the context of the behavior? If the state presents one isolated recording of a phone conversation from the jail, what was the substance of the other phone conversations?

And third, the state must show that the wrongful conduct did procure the witness's unavailability. What about the alleged victim in a domestic who has made it clear to the state from the beginning that she does not intend to appear at trial without any prodding from the accused? If the accused later pleads for her not to come to court in a tape recorded jail conversation did *he* procure her unavailability even though she made it clear from the beginning that she was not going to show? Each of the three forfeiture elements needs to be proven by the state in order for a court to determine that the accused has waived his right to confrontation.

## **GILES V. CALIFORNIA**

**128 S.Ct. 2678, 171 L.Ed.2d 488 (2008)**

In 2008, the U.S. Supreme Court held that the doctrine of forfeiture only applied in a murder case when the accused murdered the victim with the specific intent to prevent her from testifying at trial. Giles. Dewayne Giles was accused of intentionally murdering his former girlfriend, Brenda Avie. The state sought to use



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statements that Ms. Avie made to a police officer responding to a report of domestic violence three weeks before the shooting. The trial court admitted the statements, finding that Ms. Avie was unavailable and that the statements were trustworthy. A jury convicted Mr. Giles of first-degree murder. The appeals courts in California affirmed the conviction holding that Mr. Giles forfeited his right to confront Avie because he murdered her and his intentional criminal act made her unavailable to testify.

The question presented in Giles was whether a defendant forfeited his Sixth Amendment right to confrontation when his wrongful act made the witness unavailable to testify at trial. Once again, Scalia, writing for the majority, looked to the Common Law for answers. Under the Common Law, there were two forms of testimonial statements that were admitted at trial even though they were not confronted. The first was a declaration made by a speaker who was both on the brink of dying and aware that he or she was dying. This is the dying declaration exception. As Scalia pointed out, however, Ms. Avie did not make her un-confronted statements when she was dying. So her statements were not admissible under the dying declaration exception.

The second Common Law exception permitted introduction of the statement of a witness who was “detained,” or “kept away,” by means or “procurement” of the defendant. The modern day doctrine of forfeiture evolved from this exception. Scalia rejected the use of the forfeiture doctrine in Giles



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because the state could provide no evidence that Mr. Giles murdered Ms. Avie for the specific purpose of preventing her from testifying at trial.

Scalia based his decision on several grounds: First, the most natural reading of the language used at common law; second, the absence of common-law cases admitting prior statements on a forfeiture theory when the defendant had not engaged in conduct designed to prevent the witness from testifying. Third, the common law's uniform exclusion of un-confronted inculpatory testimony by murder victims in the many cases in which the defendant was on trial for killing the victim, but there was no evidence that he did so for the purpose of preventing testimony.

Once again, Scalia dismissed the suggestion that the court should carve out special protection for victims of domestic violence. He asks, "Is the suggestion that we should have one Confrontation Clause (the one the framers adopted and Crawford described) for all other crimes, but a special, improvised, Confrontation Clause for those crimes that are frequently directed against women? Although the state may combat domestic violence in many ways, "abridging the Constitutional rights of criminal defendants is not in the State's arsenal," Scalia cautioned. This is particularly helpful to remember when the state emphasizes the type of crime and complains of the difficulty of prosecuting certain types of crimes such as domestic abuse, or crimes against children.

So, when may the state use the statements of the victim of a murder under the forfeiture doctrine? As Scalia points out, acts of domestic violence



often are intended to dissuade a victim from resorting to outside help and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. If an abusive relationship ends in murder, earlier abuse or threats intended to dissuade the victim from resorting to outside help would be relevant, he opines. He also reminds us that only testimonial statements are inadmissible so that statements to doctors during the course of receiving treatment and statements to friends and neighbors could be admissible.

**MELENDEZ-DIAZ V. MASSACHUSETTS**

**129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)**

The next Confrontation Clause issue to land before the court involved the state of Massachusetts' introduction of lab certificates asserting that a tested substance was cocaine. The government offered the certificates instead of calling the lab analysts who tested and weighed the substance to testify. In Melendez-Diaz, the Supreme Court held that admission of the certificates violated the Confrontation Clause.

In 2001, an informant called the Boston Police Department claiming that a person named Thomas Wright would leave work in a blue sedan after receiving a phone call, and be returned in the same car a short time later. This happened



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many times, according to the informant. Police conducted surveillance at the workplace and arrested Wright as he got out of the blue sedan. A search of Wright by the police revealed four clear plastic bags containing a substance that they believed was cocaine. The police also arrested the two men in the blue sedan, one of whom was Luis Melendez-Diaz. All three men were placed in the back of the police car. After claiming the three men were fidgeting and making furtive movements, the police searched the squad car and found a bag containing 19 smaller plastic bags hidden in the partition between the front and back seats.

The police submitted the seized evidence to a state laboratory, which was required by law to conduct chemical analysis upon police request. After receiving the results of the lab tests, the state charged Mr. Melendez-Diaz with distributing cocaine. At trial, the prosecution placed into evidence the bags seized from Wright and from the police car. It also submitted three “certificates of analysis” sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health. The certificates reported the weight of the seized bags and asserted that the bags contained cocaine. Mr. Melendez Diaz was convicted. His conviction was affirmed on appeal.

The U.S. Supreme Court reversed the conviction holding that admission of the certificates violated Mr. Melendez-Diaz’s Sixth Amendment right to confront the witnesses against him. Justice Scalia again delivered the opinion of the court, dispatching all of the state’s arguments. Among the more interesting was the



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state's assertion that the certificates at issue were the "result of neutral, scientific, testing." Again, Scalia emphasized that it is not the judge's role to determine whether evidence is trustworthy, but that reliability must be determined by the jury after witnessing cross-examination at trial.

Scalia went on to point out that there is nothing unique about forensic evidence that makes it immune from manipulation. Citing extensively from the National Academy of Sciences report on forensic science, Scalia notes that a majority of labs are administered by law enforcement agencies. Because of that relationship, forensic analysts may feel pressure from law enforcement or may have an incentive to offer an opinion helpful to the prosecution's case. Scalia goes on to note that serious deficiencies have been found in the forensic evidence used in criminal trials. He points out that, "Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." Confrontation gives the accused the opportunity to cross-examine the analyst like any other expert, testing the expert's training, proficiency, and methodology.

The certificates submitted into evidence by the prosecution in Melendez Diaz, for instance, contained only the unsupported conclusion that the substance was cocaine. As Scalia notes, the accused had no idea what tests were performed, whether the analyst was qualified to interpret the test results, or whether the results were interpreted accurately. All of these issues were the proper subject of cross-examination.



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The state also claimed that the certificates were admissible as business records, because documents kept in the regular course of business may be admitted at trial under the federal rules of evidence even though they are hearsay. Scalia dispatched this argument pointing out that the regularly conducted business cannot be the production of evidence for trial. To clarify, he writes, “ Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because, having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial, they are not testimonial.” The certificates produced by the lab at the request of the police in Melendez-Diaz were testimonial because they were specifically prepared for use at trial.

The court also rejected the argument that Melendez-Diaz could have subpoenaed the analyst. The Confrontation Clause requires the prosecution to present its witnesses, it does not impose a burden on the accused to bring adverse witnesses into court. Such a requirement would create practical difficulties as well. What if the analyst avoided service of the subpoena? What if the analyst did not appear for court? For both constitutional and practical reasons the court chose not to require the accused to subpoena the forensic analyst.

The court did conclude, however, that states were free to adopt notice and demand statutes. These statutes require the accused to object after receiving proper notice that the state intends to offer a lab report instead of live witness



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testimony at trial. If the accused objects the state is required to produce the witness. These statutes were found constitutional because the court found no reason why the accused could not be compelled to exercise his right to confrontation before trial.

Finally, the court dismissed the “parade of horrors” argument that requiring the lab analyst who conducted the test to testify at trial would overwhelm the labs. As Scalia noted, “Perhaps the best indication that the sky will not fall after today’s decision is that it has not done so already.” He went on to list the numerous states that have already adopted the constitutional rule announced by the court in Melendez -Diaz.

## **BULLCOMING V. NEW MEXICO**

**131 S.Ct. 2705, 180 L.Ed.2d 610 (2011)**

The next Confrontation Clause challenge came to the court in the form of Bullcoming v. New Mexico. In 2005, Donald Bullcoming rear-ended a truck and left the scene. He was later arrested and charged with DWI. After obtaining a warrant, the police had a technician from the local hospital take a sample of Mr. Bullcoming’s blood. The blood was sent to the New Mexico Department of Health, Scientific Laboratory Division for analysis. Curtis Caylor, the forensic



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analyst assigned to test the blood, recorded that the blood alcohol concentration (BAC) was 0.21, well above the legal limit.

At trial, Caylor did not testify because he had recently been put on unpaid leave for a reason that was not disclosed. The trial court admitted the lab report as a business record (Before Melendez-Diaz was decided). The state called another analyst from the same lab, Razatos, to testify. Although he was familiar with the testing device and the laboratory procedures, Razatos did not participate in, nor did he observe, the testing of Bullcoming's blood. After his conviction, Mr. Bullcoming appealed.

The Supreme Court held that a blood-alcohol analysis report certifying test results could not be used as substantive evidence against the accused unless the analyst who prepared and certified the report was subject to confrontation. Justice Ruth Bader Ginsberg, for the majority, wrote, "Surrogate testimony of the kind Razatos was equipped to give could not convey what Caylor knew or observed about the events certified, nor expose any lapses or lies on Caylor's part." The majority also thought it significant that Caylor was on an unpaid leave. Had Caylor been called to testify, Mr. Bullcoming could have cross-examined him about whether his "incompetence, evasiveness, or dishonesty accounted for his removal from work." The Court reversed the conviction and remanded the case.

## **MICHIGAN V. BRYANT**

**131 S.Ct. 1143 (2011)**



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In a decision released in 2011, Michigan v. Bryant, the Supreme Court further elaborated on the “primary purpose” test in a non-domestic dispute. In 2001, the Detroit police responded to a call that a man had been shot. They arrived at a gas station to find Anthony Covington lying on the ground next to his car. Noticing that Covington had been shot in the abdomen, the police asked him “what had happened, who had shot him, and where the shooting had occurred.” Covington indicated that “Rick Bryant” had shot him. Covington died at the hospital. After collecting additional evidence, the state charged Richard Bryant with second-degree murder, along with other charges.

At trial, the court admitted the statements made by Covington to the police in the gas station parking lot. After he was found guilty by a jury, Mr. Bryant appealed to the Supreme Court of Michigan, which reversed his conviction. The state petitioned the U.S. Supreme Court for review, which was granted to determine whether the admission of Covington’s statements to police officers violated Mr. Bryant’s right to confrontation. The U.S. Supreme Court held that the statements were properly admitted and vacated the judgment of the Michigan Supreme Court.

Justice Sonia Sotomayor, writing for the majority, found that Covington’s statements identifying the shooter and the location of the shooting were not testimonial because their primary purpose was to enable the police to meet an ongoing emergency. Whether an emergency exists depends very much on the



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context of the situation. Here, a gun was used, and the perpetrator not yet captured so even though the threat to Covington may no longer have existed, there remained the potential for a continuing threat to the police and to the public. The opinion does caution against interpreting an emergency situation to exist the entire time the perpetrator is free, however, and urges trial courts determine when an interrogation transitions from non-testimonial to testimonial.

This limitation did not deter Justice Scalia from writing a withering dissent in which he decried that the majority's claiming the primary purpose of the officers' interrogation was to meet an ongoing emergency was "so transparently false that professing to believe it demeans this institution." He points out that five officers interrogated Covington and that their questions focused on finding the shooter, not tending to his comfort or his wounds. None of them drew their weapons, nor did they immediately search the scene for the shooter. None of their actions indicated that they had any concern for their safety. Scalia even points to the testimony of one of the officers present, a sergeant who candidly admitted that he knew Covington was dying and that he just wanted to find out who did it. To Scalia, it was obvious that the police were investigating a past crime and not responding to an ongoing emergency.

The majority also diverged from previous cases making it clear that the statements and actions of *both* the declarant and the interrogator provide objective evidence as to the primary purpose of the encounter. The majority characterized Covington's answers to the police as being interrupted by



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questions about when medical help was coming. For their part, the police did not know anything about the crime and the questions they asked, according to the court, were necessary to help them meet an ongoing emergency. The court described the informality of the interaction as being more similar to the harried 911 call made in the Davis case.

Again, Scalia wrote scathingly about this new requirement that the court look at both the perspectives of the declarant and the interrogator. He states simply that it is the declarant's intent that counts. The hidden purpose of the interrogator cannot substitute for the declarant's understanding of how his words will be used. He points out that the declarant's purpose only makes sense when a statement is volunteered because what relevance would the intent of the receiver have? In Bryant, Scalia says that looking at Covington's purpose should have made this an absurdly easy case. The victim was shot six blocks away and he was surrounded by police asking him questions about his assailant's description. His statements had little value except to ensure the arrest and prosecution of Richard Bryant.

## **WILLIAMS V. ILLINOIS**

**132 S.Ct. 2221, 183 L.Ed.2d 89 (2012)**

Until the Williams decision, the U.S. Supreme Court's cases mostly were a logical extension of the principle announced in Crawford. Not only is the result



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in Williams inconsistent with that reasoning, the opinion itself is convoluted and the broader holding incomprehensible. If the Court's intention was to provide clear guidance on to analyze the admissibility of complex lab reports, such as those providing a DNA profile, the Williams decision fails miserably.

In 2000, a young woman was kidnapped and raped in Chicago, Illinois. After being shoved out of the assailant's car, she rushed home and her mother called the police. An ambulance took her to the hospital, where doctors took vaginal swabs for a sexual assault kit. The kit was sent to the Illinois state police lab. The vaginal swabs were then sent to Cellmark Diagnostics Laboratory in Maryland for DNA testing. Cellmark returned a report containing a male DNA profile. Sandra Lambatos, a forensic scientist at the Illinois lab, put the male profile developed by Cellmark into a computer DNA database to see whether it would find a potential match. After the computer matched the profile to Sandy Williams, police conducted a line-up at which the rape victim identified Williams as her assailant. Williams was indicted for criminal sexual assault, aggravated kidnapping, and aggravated robbery.

Mr. Williams opted for a bench trial, which began in April of 2006. The state did not call anyone from Cellmark, the lab that developed the male profile in the sample from the vaginal swab. The lab report from Cellmark was not offered into evidence. Instead, the prosecution called Ms. Lambatos as an expert witness in forensic biology and DNA analysis. On direct, she testified that Cellmark was an accredited lab and that the Illinois lab routinely sent evidence samples there



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to reduce its backlog. She also testified as to the process used to ship evidence samples to Cellmark.

The prosecutor then asked, “Did you compare the semen that had been identified by [forensic analyst] Brian Hapcock from the vaginal swabs of (the victim) to the male DNA profile that had been identified by Karen (from Cellmark) from the blood of (Williams)?” The judge overruled the hearsay objection from the defense. Asked whether she would call the semen from the vaginal swab a match to Williams, Lambatos said yes.

On cross-examination, Lambatos admitted that she did not conduct or observe any of the testing on the vaginal swabs, and that her testimony relied on the DNA profile produced by Cellmark. She said that she trusted Cellmark to do reliable work because it was an accredited lab, but that she had not seen any of the calibrations or work that Cellmark had done in deducing the male DNA profile. After Lambatos left the stand, the defense moved to exclude her testimony with regards to what Cellmark had done because it violated the Confrontation Clause. The judge denied the motion, stating that the issue went to the weight of the testimony not whether it was admissible. The judge found Williams guilty of all charges. The state Court of Appeals affirmed concluding that William’s confrontation rights were not violated because the Cellmark report was not offered for the truth of the matter asserted.

In 2012, the U.S. Supreme Court held that Lambados’ testimony referring to the DNA profile as having been produced from the semen found on the victim



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did not violate the Confrontation Clause. Four justices--Samuel Alito, John Roberts, Anthony Kennedy, and Stephen Breyer--held that the statement was not offered for the truth of the matter asserted. Thomas joined the plurality opinion but did not agree with the four justices' reasoning. He held that the statement was offered for the truth of the matter asserted, but he believed that it was non-testimonial because it lacked formality and solemnity.

The four justices also created a new primary-purpose test, which Thomas rejected. The four ruled that the Cellmark report was admissible because its primary purpose was to get a rapist off the streets, not to target a specific individual, Mr. Williams. This was so because the profile was put into a computer database after it was developed--before the suspect was identified. They were also concerned about the state potentially foregoing the use of DNA evidence if all of the witnesses had to be presented in court. Thomas rejected this "targeted individual" test and held that the primary purpose was to create evidence for trial.

Justice Breyer wanted the case reargued to obtain more information about how the Confrontation Clause should apply to lab reports, when multiple witnesses may play a role in creating the evidence. When he could not convince the other justices to have the case reargued, he joined the plurality opinion. He did, however, acknowledge that if the defense could point to credibility problems with the lab or lack of accreditation, the defense could argue that the confrontation clause should apply.



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The dissent, written by Justice Kagan and joined by Justices Scalia, Sotomayor, and Ginsberg, pulled no punches. “Have we not already decided this case?” asked Kagan, referring to the surrogate testimony banned by the decision in Bullcoming. Kagan says that the plurality can boast of two accomplishments. First, they have approved the introduction of testimony that clearly violates the confrontation clause. Second, they have left significant confusion in their wake.

This is true, because while five justices agreed on the outcome, they did not agree on the reasons for that outcome. Five justices repudiate the pluralities’ understanding of what statements are testimonial. Although Thomas’s vote created an outcome allowing the statement’s admission, he did not agree that it was not offered for the truth of the matter asserted. Instead, he focused on the lack of formality in the Cellmark report. He wrote that while the certificates created in Melendez-Diaz were notarized, the Cellmark report was not. So, in a different scenario he might find the formality great enough that such a statement would violate the right of confrontation.

The takeaways from Williams? The fact that Mr. Williams waived a jury may be of critical importance. As Alito wrote, “The dissent’s argument would have force if petitioner had elected to have a jury trial.” This was because the court, as finder of fact, was in a better position than a jury to understand how to use evidence that was not offered to prove the truth of the matter asserted. Kagan responded, “I welcome the pluralities concession that the clause might forbid presenting (the expert’s) statement to a jury...” Taken together, both the



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plurality and the dissent suggest that if the accused demands a jury trial, the analysis should be different.

Justice Breyer suggests that he would be more open to the confrontation argument if the defense could point to problems with the particular lab in question. One also assumes this extends to issues with the forensic analyst. Is the lab accredited? Does the lab have proper standard operating procedures in place? Is the individual analyst certified? Have errors been made by the lab or the analyst? The answers to these questions may only be discovered by thorough discovery requests. So, we need to demand extensive discovery on both the lab and the analyst. Under Breyer's reasoning, if the defense can point to an issue that might affect the credibility of the analyst or the lab, the right to confront the person who actually conducted the test carries more weight.

Finally, there is no agreement by a majority of the court as to what the holding really is, because although five agreed on the result, those five did not agree on the reasoning. A majority of five actually disagreed with the reasoning for the holding. The real takeaway is that the court needs to address this issue again and, hopefully, arrive at a decision that makes sense. Until then, defense lawyers need to recognize the opportunity presented by the confusion in Williams and ensure that trial courts understand that the conclusion of a DNA profile match in a lab report is not automatically admissible through the testimony of another analyst who simply reads the report.



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