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THROWING OUT JUNK SCIENCE: HOW A NEW RULE OF EVIDENCE COULD PROTECT A CRIMINAL DEFENDANT'S RIGHT TO CONFRONT FORENSIC SCIENTISTS

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As the forensic science industry grows, so do the scandals – overburdened crime labs, unverified science, corrupt analysts, and diminishing federal oversight. Given the need to ensure that valid forensic science-based evidence is used at trial, a criminal defense attorney typically has the opportunity to cross-examine the scientist who conducted the forensic analysis. However, the 2012 Supreme Court decision of Williams v. Illinois has muddied an otherwise cohesive Confrontation Clause doctrine, allowing for the admission of forensic evidence without the testimony of the forensic scientist, but with no clear holding and different interpretations about what is considered "testimonial evidence." To correct the erroneous decision in Williams, and to clarify confusion about the admissibility of forensic science, the federal judiciary should create a new Federal Rule of Evidence specifically barring forensic science-based evidence from being admitted under a hearsay exception. A new evidence rule specifically concerning forensic science would serve multiple purposes, by both protecting a right that many feel is inherent in the constitution and by adapting the Federal Rules of Evidence for the modern world.

INTRODUCTION

Cross-examination is one of the most powerful tools available to trial attorneys.[1] By confronting a witness for the opposing party,

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an attorney has the opportunity to elicit helpful facts that were not discussed on direct examination, to show weaknesses in the witness's perception and memory, and to demonstrate the witness's bias and character for untruthfulness.[2] The power of cross-examination is amplified when the subject of the testimony is forensic science, as attorneys can show the jury the problems inherent with the evidence at issue, the potential bias of the forensic scientist, and the fundamental problems with the forensic science itself.[3] An effective cross-examination can expose to the jury the weaknesses of the forensic analysis that were otherwise hidden – weaknesses which may ultimately amount to reasonable doubt.[4]

The O.J. Simpson trial served as an opportunity for the nation to see an effective cross-examination of a forensic scientist.[5] The trial was viewed worldwide, with 150 million people tuning in to watch the announcement of the "not guilty" verdict.[6] The usefulness of cross-examination, and the importance of confronting

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and family for their incredible support and encouragement throughout law school. Special thanks to the staff of the *Journal of Law and Policy* for all their hard work and thoughtful contributions to this Note.

[1] *See* Gregory A. Hearing & Brian C. Ussery, *Guidelines for an Effective Cross-Examination*, PRACTICAL LITIGATOR (Nov. 2006), http://files.alicle.org/thumbs/datastorage/lacidoirep/articles/PLIT_plit0611_hearing_thumb.pdf.

[2] THOMAS A. MAUET, TRIAL TECHNIQUES AND TRIALS 203 (9th ed. 2013).

[3] *See generally* NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE U.S.: A PATH FORWARD (2009), https://doi.org/10.17226/12589 [hereinafter STRENGTHENING FORENSIC SCIENCE] (discussing the wide range of problems affecting the forensic science in the United States).

[4] *See, e.g.*, Williams v. Illinois, 567 U.S. 50, 118–19 (Kagan, J., dissenting) (describing a trial for rape in which an analyst from the Cellmark laboratory realized during cross-examination that she had accidentally switched the DNA samples for the victim and the defendant).

[5] *See* David Margolick, *A Simpson Lawyer Makes New York Style Play in Judge Ito's Courtroom*, N.Y. TIMES (Apr. 17, 1995), http://www.nytimes.com/1995/04/17/us/a-simpson-lawyer-makes-new-york-style-play-in-judge-ito-s-courtroom.html ("Mr. Scheck's ferocious cross-examination of Dennis Fung, the chief police evidence collector in the case, brought him instant, worldwide notoriety and applause.").

[6] Julia Zorthian, *How the O.J. Simpson Verdict Changed the Way We All Watch TV*, TIME (Oct. 2, 2015), http://time.com/4059067/oj-simpson-verdict/.

a forensic scientist testifying against a criminal defendant, was demonstrated when a Los Angeles Police Department criminalist, Dennis Fung, broke down on the witness stand.[7] Over the course of five days, defense attorney Barry Scheck confronted Fung, pointing out inconsistences with his testimony, and problems with the forensic evidence recovered from the crime scene.[8] Scheck used cross-examination to show the jury that Fung's evidence-collection methods compromised the forensic analysis, which allowed for the possibility of evidence contamination and mistakes in the analysis.[9]

While Scheck was primarily focused on the collection and processing of forensic evidence,[10] these are only a few of the problems affecting forensic science.[11] In 2005, Congress authorized the National Academy of Sciences to assess the state of the forensic science community, determine the demanding problems affecting the community, and make recommendations accordingly.[12] The Forensic Science Committee ultimately identified a wide range of problems plaguing the forensic science community, including inadequate educational programs, a lack of mandatory standards, a dearth of research and testing, and the need for additional resources to handle backlogs.[13] The Committee

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[7] Margolick, *supra* note 5.

[8] Mark Miller, *A Powerful, Damaging Cross*, NEWSWEEK (Apr. 23, 1995), http://www.newsweek.com/powerful-damaging-cross-181620 (noting that "the destruction of LAPD criminalist Dennis Fung was so complete that Simpson defense attorney Barry Scheck seemed reluctant to end it.").

[9] Jessica Siegel, *Handshakes For All, Including Simpson, as Fung Ends Testimony*, CHICAGO TRIBUNE (Apr. 19, 1995), http://articles.chicagotribune.com/1995-04-19/news/9504190183_1_simpson-defense-team-defense-lawyers.

[10] *See* Patt Morrison, *Barry Scheck on the O.J. Trial, DNA Evidence, and the Innocence Project*, L.A. TIMES (June 17, 2014), http://www.latimes.com/opinion/op-ed/la-oe-0618-morrison-scheck-oj-simpson-20140618-column.html.

[11] *See generally* STRENGTHENING FORENSIC SCIENCE, *supra* note 3 (exploring problems in forensic science, including the lack of governance, bias, lack of research, lack of standardization and quality control, and lack of accreditation and certification).

[12] *Id.* at 1.

[13] *Id.* at 10.

concluded with a stern warning that the forensic science community needed to make significant improvements to its standards and practices to ensure that forensic professionals were acting in the interest of justice.[14]

Despite the various problems with forensic science, it remains an important part of many criminal prosecutions.[15] However, the ability of defense attorneys to confront forensic analysts is not absolute.[16] The U.S. Supreme Court's 2012 decision in *Williams v. Illinois* created an avenue through which forensic science could be admitted in court without the testimony of the analyst who conducted the test, and yet not violate the defendant's rights under the Confrontation Clause of the Sixth Amendment.[17] In addition to allowing the admission of forensic science without the testimony of the analyst, the *Williams* decision also sowed confusion among lower courts by offering multiple potential standards for what sort of evidence would violate the Confrontation Clause.[18] Without this constitutional guarantee, otherwise questionable forensic science may be presented to a jury without giving the defense a fair opportunity to refute it.[19] Fortunately, there is another way to

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[14] *Id.* at 15.

[15] *See* MATTHEW R. DUROSE, ET AL., PUBLICLY FUNDED FORENSIC CRIME LABORATORIES: RESOURCES AND SERVICES, 2014, U.S. DEP'T OF JUSTICE: OFFICE OF JUSTICE PROGRAMS: BUREAU OF JUSTICE STATISTICS (Nov. 2016), https://www.bjs.gov/content/pub/pdf/pffclrs14.pdf (stating that the nation's 409 crime labs received an estimated 3.8 million requests for forensic services in 2014).

[16] *See generally* Williams v. Illinois, 567 U.S. 50 (2012) (holding that evidence of a DNA profile created by an analyst who did not testify at trial was admissible).

[17] *See id.* at 86.

[18] *See, e.g.*, State v. Hutchison, 482 S.W.3d 893, 907 (Tenn. 2016) (stating that "any hopes of a single standard on when an out-of-court statement is considered testimonial were dispelled in *Williams v. Illinois*.").

[19] Prior to *Williams v. Illinois*, Confrontation Clause jurisprudence had forbade the admission of out-of-court statements regarding forensic science, and the U.S. Supreme Court had stated that "there are other ways—and in some cases better ways—to challenge or verify the results of a forensic test. But the Constitution guarantees one way: confrontation." Melendez-Diaz v. Massachusetts, 557 U.S. 305, 318 (2009).

provide this protection: a new rule of evidence specifically tailored to forensic science.

This Note argues that a new Federal Rule of Evidence should be created to prevent forensic science-based evidence from being admitted in court under a hearsay exception. Part I of this Note examines the current state of the forensic science community in the United States, and the need to ensure reliability when forensic science is admitted in court. Part II scrutinizes the Supreme Court's recent decisions on the Confrontation Clause of the Sixth Amendment and its application to forensic science. Part III explains the effect that the Supreme Court's muddied Confrontation Clause doctrine has had on criminal trial courts throughout the U.S. Part IV proposes a new Federal Rule of Evidence which ensures that criminal defendants have the ability to confront the forensic scientists offering evidence against them.

I. THE STATE OF FORENSIC SCIENCE

The issues facing the forensic science community today underscore the serious need for more effective tools to ensure the reliability and validity of evidence used in court. From the end of a Federal commission intended to improve the quality of forensic science,[20] to overworked laboratories,[21] to under-performing individual analysts who fabricate evidence,[22] to unreliable science,[23] the forensic science community is far from the perfect,

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[20] *Attorney General Jeff Sessions Announces New Initiatives to Advance Forensic Science and Help Counter the Rise in Violent Crime*, U.S. DEP'T OF JUSTICE: OFFICE OF PUB. AFFAIRS (Apr. 10, 2017), https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-new-initiatives-advance-forensic-science-and-help [hereinafter *Jeff Sessions*].

[21] *See* STRENGTHENING FORENSIC SCIENCE, *supra* note 3, at 61.

[22] *See, e.g.*, Scott Malone, *Thousands of Massachusetts Drug Cases to Be Dismissed After Lab Scandal*, REUTERS (Apr. 18, 2017), http://www.reuters.com/article/us-massachusetts-drugs/thousands-of-massachusetts-drug-cases-to-be-dismissed-after-lab-scandal-idUSKBN17K2JI; Maurice Chammah, *After Drug Lab Scandal, Court Continues to Reverse Convictions*, THE TEXAS TRIBUNE (Mar. 27, 2013), https://www.texastribune.org/2013/03/27/after-drug-lab-scandal-court-reverses-convictions/.

[23] STRENGTHENING FORENSIC SCIENCE, *supra* note 3, at 183.

and checks are necessary to ensure that misleading evidence is not put in front of the jury.

a. The End of the National Commission on Forensic Science

In 2013, in response to problems in the forensic science community, the Department of Justice established the National Commission on Forensic Science (NCFS).[24] The NCFS consisted of professionals in a variety of fields, including science, law, and academia,[25] working together to "strengthen[] the validity and reliability of the forensic sciences" and "enhanc[e] quality assurance and quality control in forensic science laboratories and units."[26] Just four years later, though, the Department of Justice announced that it would not renew the charter for the NCFS, effectively ending the Commission.[27] In a statement announcing the end of the NCFS, Attorney General Jeff Sessions stated, "we bear in mind that the Department [of Justice] is just one piece of the larger criminal justice system and the vast majority of forensic science is practiced by the state and local forensic laboratories[.]"[28]

The Department of Justice's decision to end the NCFS was widely criticized.[29] One co-chair of the NCFS said that the loss of

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[24] *See* NAT'L COMM'N ON FORENSIC SCI., U.S. DEP'T OF JUSTICE, https://www.justice.gov/archives/ncfs (last visited Feb. 20, 2019).

[25] CHARTER FOR THE NAT'L COMM'N ON FORENSIC SCI., U.S. DEP'T OF JUSTICE, https://www.justice.gov/archives/ncfs/file/624216/download (last visited Feb. 20, 2019).

[26] *Id.*

[27] *Jeff Sessions*, *supra* note 20.

[28] *Id.*

[29] *See, e.g.*, Suzanne Bell, *Jeff Sessions Doesn't Understand the Necessity of Science*, SLATE (Apr. 20, 2017), http://www.slate.com/articles/health_and_science/science/2017/04/the_dangers_of_killing_the_national_commission_on_forensic_science.html; Janet Burns, *Sessions Scraps Federal Commission on Forensic Accuracy, For Some Reason*, FORBES (Apr. 11, 2017), https://www.forbes.com/sites/janetwburns/2017/04/11/sessions-scraps-federal-commission-on-forensic-accuracy-because-reasons/#202ab73576c2; Rebecca McCray, *Jeff Sessions' Rejection of Science Leaves Local Prosecutors in the Dark*, SLATE (June 7, 2017),

the Commission "disrupts our work to help forensic science come of age and to insure the scientific validity of all its subdisciplines[.]"[30] New York University School of Law Professor Erin E. Murphy considered the Commission's end a reversion to law enforcement control of forensic science, and a return to "an embarrassing parade of wrongful conviction, tragic incompetence, laboratory scandal[s] and absurdly unsupported forensic findings."[31] Moreover, Rolling Stone, Slate, and Newsweek published articles shortly after the announcement which were critical of Attorney General Sessions' decision.[32]

Many members of the law enforcement community welcomed the news of the Commission's end.[33] A statement by the National

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http://www.slate.com/articles/news_and_politics/trials_and_error/2017/06/disbanding_the_ncfs_will_lead_to_worse_outcomes.html; Erin E. Murphy, *Sessions is Wrong to Take Science Out of Forensic Science*, N.Y. TIMES (Apr. 11, 2017), https://www.nytimes.com/2017/04/11/opinion/sessions-is-wrong-to-take-science-out-of-forensic-science.html.

[30] Bell, *supra* note 29.

[31] Murphy, *supra* note 29.

[32] *See* Bell, *supra* note 29 ("The loss of the NCFS, of which I was a member, disrupts our work to help forensic science come of age and to insure the scientific validity of all its subdisciplines—a desirable outcome for its practitioners, the legal system, and all of us who are served by it."); Jessica Gabel Cino, *Sessions's Assault on Forensic Science Will Lead to More Unsafe Convictions*, NEWSWEEK (Apr. 20, 2017), http://www.newsweek.com/sessionss-assault-forensic-science-will-lead-more-unsafe-convictions-585762 ("The practical effect of this action is not that states are going to pick up the mantle and bear the burden of creating forensic science standards. Instead, the ensuing stagnation will lock the forensic science community into a silo and allow problems to persist."); Bridgette Dunlop, *Jeff Sessions is Keeping Junk Science in America's Courts*, ROLLING STONE (Apr. 13, 2017), https://www.rollingstone.com/politics/features/jeff-sessions-is-keeping-junk-science-in-americas-courts-w476468 ("Keeping innocent people from being deprived of their freedom is the most basic responsibility of the criminal justice system, so you'd think addressing America's egregious and well-documented junk evidence problem would be among the attorney general's top priorities.").

[33] *See, e.g.*, Nat'l Dist. Attorneys Ass'n, National District Attorneys Association Applauds Expiration of National Commission on Forensic Science (Apr. 10, 2017), http://courses.ndaa.org/pdf/NDAA%20Statement%20on%20Expiration%20of%20National%20Commission%20on%20Forensic%20Science.pdf (last visited Oct. 17, 2018).

District Attorneys Association supported the announcement, and criticized the NCFS's lack of representation from the state and local communities.[34] However, not all law enforcement officials were supportive of the choice to end the NCFS.[35] One district attorney, who disagreed with the decision, noted that "[i]t's not news that local prosecutors and defense attorneys are overworked, and most of our offices have limited resources . . . We look to better resourced agencies such as the [Department of Justice] to develop guidelines and recommendations for us."[36]

The range of scandals and serious issues plaguing the forensic science community illustrate the importance of the National Commission on Forensic Science.[37] The Commission served as the federal government's attempt to regulate the forensic science community[38] after the National Academy of Sciences' report on the wide range of problems plaguing crime laboratories.[39] Now that the Commission has ended, the "wrongful conviction[s], tragic incompetence, laboratory scandal[s], and absurdly supported forensic findings"[40] may be exacerbated by the lack of federal oversight and guidance.

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[34] *Id.*

[35] *See, e.g.*, McCray, *supra* note 29 (quoting Oregon District Attorney John Hummel's critical comments on Session's decision to discontinue the NCFS).

[36] *Id.*

[37] *See* STRENGTHENING FORENSIC SCIENCE, *supra* note 3, at 18 ("The committee thus concluded that the problems at issue [in the forensic science community] are too serious and important to be subsumed by an existing federal agency.").

[38] *See* STRENGTHENING FORENSIC SCIENCE, *supra* note 3, at xix.

[39] Spencer S. Hsu, *Sessions Orders Justice Dept. To End Forensic Science Commission, Suspend Policy Review*, WASH. POST (Apr. 10, 2017), https://www.washingtonpost.com/local/public-safety/sessions-orders-justice-dept-to-end-forensic-science-commission-suspend-review-policy/2017/04/10/2dada0ca-1c96-11e7-9887-1a5314b56a08_story.html?utm_term=.6aa54f1db411.

[40] Murphy, *supra* note 29.

b. Problems in Crime Laboratories Today

The sheer size of the forensic science industry is one of the primary reasons why effective oversight is so important. As of December 31, 2014, there were 409 publicly funded crime laboratories in the United States.[41] These 409 crime laboratories received 3,783,000 requests for a variety of services, including controlled substance testing, crime scene analysis, and forensic biology casework.[42] The combined budget for these laboratories in 2014 was $1.7 billion.[43]

Given the volume of forensic science requests in comparison to the amount of publicly funded crime laboratories, the accompanying issues for the industry come as no surprise. Crime laboratories in 2014 had 570,100 backlogged requests for services.[44] One particularly troubling type of backlogged request that has received publicity is the backlog of rape kits.[45] One USA Today article surveyed 1,000 of the 18,000 police departments across the country and found that 70,000 rape kits had gone untested.[46] Rape kits are often not submitted for testing, due to the limited resources of the labs, and the fear that the submission would interfere with the analysis of kits in more pressing cases.[47] Despite these justifications, failure to test rape kits has clear negative consequences, as the reduction of the backlog can help protect the community, and aid in catching serial rapists.[48] Clearly,

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[41] Andrea M. Burch, et al., *Publicly Funded Forensic Crime Laboratories: Quality Assurance Practices, 2014*, U.S. DEP'T OF JUSTICE: OFFICE OF JUSTICE PROGRAMS: BUREAU OF JUSTICE STATISTICS (Nov. 2016), https://www.bjs.gov/content/pub/pdf/pffclqap14.pdf.

[42] DUROSE, ET AL., supra note 15.

[43] *Id.*

[44] *Id.*

[45] Steve Reilly, *Tens of Thousands of Rape Kits Go Untested Across USA*, USA TODAY (July 16, 2017), https://www.usatoday.com/story/news/2015/07/16/untested-rape-kits-evidence-across-usa/29902199/.

[46] *Id.*

[47] *See id.*

[48] *See Why Testing Rape Kits Matters*, END THE BACKLOG, http://www.endthebacklog.org/backlog/why-testing-matters (last visited Feb. 20, 2019).

the need to rectify any issues preventing forensic science labs from reliably and efficiently analyzing evidence is urgent.

In addition to backlogged service requests, recent scandals have called the validity of some laboratory testing into question. For example, Annie Dookhan, a forensic scientist at a state crime laboratory in Massachusetts, plead guilty in 2013 to tampering with evidence.[49] In her nine years at the forensic lab,[50] Ms. Dookhan regularly certified that drug samples in her care had tested positive for illegal substances, without actually conducting the tests.[51] She also forged signatures and lied during sworn testimony to enhance her credentials.[52] After Ms. Dookhan's crimes came to light, prosecutors announced that they would dismiss 21,587 drug cases due to her conduct.[53] Ms. Dookhan's actions had significant impact on the local community, making it difficult for some defendants to find housing and jobs, and harming the credibility of the criminal justice system in Massachusetts.[54]

A similar scandal unfolded in Houston, Texas in February 2012.[55] In this instance, authorities learned that Jonathan Salvador, a forensic scientist at a state crime laboratory, had falsified results in cases involving the testing of controlled substances, including marijuana, cocaine, and heroin.[56] Mr. Salvador had worked on nearly 5,000 drug cases between 2006 and 2012, and after the scandal broke, district attorney's offices throughout Texas began reviewing Mr. Salvador's cases and overturning guilty verdicts

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[49] Malone, *supra* note 22.

[50] *Id.*

[51] Katharine Q. Seelye & Jess Bidgood, *Prison for a State Chemist Who Faked Drug Evidence*, N.Y. TIMES (Nov. 22, 2013), http://www.nytimes.com/2013/11/23/us/prison-for-state-chemist-who-faked-drug-evidence.html.

[52] *Id.*

[53] Tom Jackman, *Prosecutors Dismiss More Than 21,500 Drug Cases in Wake of Mass. Lab Chemist's Misconduct*, THE WASH. POST (Apr. 18, 2017), https://www.washingtonpost.com/news/true-crime/wp/2017/04/18/prosecutors-dismiss-more-than-19000-drug-cases-in-wake-of-mass-lab-chemists-misconduct/?utm_term=.0d645b0767d8.

[54] *See id.*

[55] *See* Chammah, *supra* note 22.

[56] *Id.*

which may have been supported by tainted evidence.[57] Without more stringent standards and better oversight of forensic analysts, scandals like those in Massachusetts and Texas may continue to plague the forensic science community.

c. Use of Controversial Science Crime Laboratories

In addition to the problems caused by dishonest forensic analysts, the validity of forensic evidence may be impaired by the nature of the science itself. For example, the Office of the Chief Medical Examiner in New York recently discontinued its use of "low copy number analysis" and a program called "Forensic Statistical Tool."[58] The low copy number DNA method involves testing trace amounts of DNA by amplifying the sample, and the Forensic Statistical Tool uses computer software to calculate the probability that a suspect's DNA is present in a mixture at a crime scene.[59] The New York City medical examiner's lab had used low copy number DNA testing for eleven years and the Forensic Statistical Tool for six years, before phasing out their use.[60] Attorneys for the Legal Aid Society and Federal Defenders of New York have alleged that the medical examiner's office realized that there were problems with the forensic tools, but did not alert the authorities about cases which had already been affected by their use.[61]

Low copy number DNA testing and the Forensic Statistical Tool are just two examples of the many forensic sciences with questionable scientific foundations.[62] In their 2009 assessment of the forensic science community, the Forensic Science Committee determined that "a number of the forensic science disciplines, as they are currently practiced, do not contribute as much to criminal

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[57] *Id.*

[58] *See* Colleen Long, *DNA Lab Techniques, 1 Pioneered in New York, Now Under Fire*, U.S. NEWS AND WORLD REPORT (Sept. 9, 2017), https://www.usnews.com/news/best-states/new-york/articles/2017-09-09/dna-lab-techniques-pioneered-in-new-york-now-under-fire.

[59] *Id.*

[60] *Id.*

[61] *See id.*

[62] *See* STRENGTHENING FORENSIC SCIENCE, *supra* note 3, at 183.

justice as they could."[63] Many forensic science disciplines suffer from a lack of underlying research, and therefore a lack of scientific validity.[64] Though some disciplines are laboratory based, others are based on experts' forensic interpretations.[65] The Forensic Science Committee noted that there were several forensic science disciplines used throughout the country that were based on unscientific techniques and unfounded premises.[66] Underlying these concerns is the potential for bias in the forensic science community: Many forensic science laboratories are not independent of law enforcement agencies, but instead often report directly to law enforcement agencies and police departments.[67]

d. The Confrontation Clause as a Tool for Ensuring Reliability

In light of the NCFS's dissolution, the scandals at crime laboratories around the country, and the legitimate questions surrounding certain forensic sciences, a check on the power of forensic evidence in criminal courts is more important than ever. Such a check may be found in the Sixth Amendment of the United States Constitution. The Confrontation Clause of the Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . . to be confronted with the witnesses against him."[68] Thanks to this constitutional right, a defendant in a criminal case can test the evidence presented against him by cross-examining the witnesses against him.[69] The modern interpretation of the Confrontation Clause did not start to take shape until 2004, with the U.S. Supreme Court decision *Crawford v. Washington*, which held that the admissibility of statements from unavailable

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63 *Id.*

64 *Id.* at 187.

65 *See id.* at 188.

66 *See id.* at 189.

67 *Id.* at 183–84.

68 U.S. CONST. amend. VI.

69 Crawford v. Washington, 541 U.S. 36, 61 (2004).

witnesses did not depend on the reliability of the statements, but on whether or not the statements were testimonial.[70]

II. THE LAW SURROUNDING THE ADMISSIBILITY OF FORENSIC SCIENCE

In order for evidence to be admissible at trial in federal court, it must be admissible under the Federal Rules of Evidence, and it must comport with the Confrontation Clause of the Sixth Amendment.[71] The Federal Rules of Evidence only control in United States federal courts.[72] Originally enacted in 1975, these rules were created to fix the poor state of federal evidence law that had existed up until that time.[73] Rather than start from scratch, however, the advisory committee which drafted the Federal Rules of Evidence acknowledged that they relied in part on "help provided by the American Law Institute Model Code of Evidence, Uniform Rules of Evidence, New Jersey Rules of Evidence, and California Evidence Code." [74] After relying on other evidence codes at its inception, including state evidence rules, the Federal Rules of Evidence have become tremendously influential in their own right: "over forty States have now adopted the Federal Rules of Evidence or some variant [thereof]."[75]

However, just because a piece of evidence is admissible under the rules of evidence does not mean that it is necessarily constitutional. The Supreme Court's decision in *Crawford v. Washington* established a new doctrine governing when the admission of certain evidence would violate the Confrontation

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[70] *See* Lyle Denniston, *The Confrontation Clause — Again, and Again*, SCOTUSBLOG (May. 9, 2014, 2:24 PM), http://www.scotusblog.com/2014/05/the-confrontation-clause-again-and-again/.

[71] *See* U.S. CONST. amend. VI ; FED. R. EVID. 101.

[72] *See* FED. R. EVID. 101.

[73] *See* Josh Camson, *History of the Federal Rules of Evidence*, A.B.A: LITIG. NEWS, https://apps.americanbar.org/litigation/litigationnews/trial_skills/061710-trial-evidence-federal-rules-of-evidence-history.html (last visited Feb. 20, 201).

[74] *Id.*

[75] *See* Joseph M. McLaughlin, *Preface to the Second Edition* of WEINSTEIN'S FEDERAL EVIDENCE, at xxv, xxvii (2d ed. 2002).

Clause, regardless of whether it was otherwise admissible under the rules of evidence.[76] Prior to *Crawford*, the Confrontation Clause was interpreted to require that statements from unavailable witnesses have adequate "indicia of reliability,"[77] meaning either a "firmly rooted hearsay exception"[78] or a showing of "particularized guarantees of trustworthiness."[79] After *Crawford* and its subsequent applications in *Melendez-Diaz v. Massachusetts* and *Bullcoming v. New Mexico*, it appeared that the admission of forensic science-based evidence without in-court testimony by the analyst who conducted the test was effectively barred.[80] With the 2012 *Williams v. Illinois* decision, however, it seems that the in-court confrontation of the analyst is no longer a certainty.[81]

a. Crawford v. Washington and "Testimonial" Evidence

In *Crawford v. Washington*, the Supreme Court introduced a modern interpretation of the Confrontation Clause, moving away from 24 years of precedent concerned with reliability or trustworthiness.[82] In *Crawford*, the criminal defendant Michael Crawford was charged with assault and attempted murder.[83] Out-of-court statements, made by a witness during a police interrogation, were offered in court as evidence that the defendant was not acting in self-defense.[84] These statements were admitted in court because they bore "particularized guarantees of trustworthiness."[85] The jury convicted Crawford of assault,[86] and

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76 *See* Crawford v. Washington, 541 U.S. 36, 61–62 (2004).

77 Ohio v. Roberts, 448 U.S. 56, 66 (1980).

78 *Id.*

79 *Id.*

80 *See* Bullcoming v. New Mexico, 564 U.S. 647, 659 (2011); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 (2009).

81 *See* Denniston, *supra* note 70.

82 *See* Crawford v. Washington, 541 U.S. 36, 61–62 (2004); *see also Roberts*, 448 U.S. at 66.

83 *Crawford*, 541 U.S. at 40.

84 *Id.* at 40.

85 *Id.* at 40.

86 *Id.* at 41.

the defendant ultimately petitioned to the Supreme Court, claiming that the use of the statements violated the Confrontation Clause.[87]

The Court ruled in favor of Crawford, holding that testimonial statements of a witness who did not appear at trial were not admissible unless a witness was not available to provide testimony, and the defendant had previously been afforded an opportunity for cross-examination.[88] Associate Justice Antonin Scalia, in his majority opinion, stated that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[89] Applying the rule to the facts of *Crawford*, the testimonial nature of the statements was clear: the witness made the statements to police officers during an interrogation.[90] Justice Scalia left the scope of the *Crawford* holding unclear, stating "[w]e leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"[91]

The effect of the newly established "Crawford Doctrine" was widespread.[92] Shortly after *Crawford* was decided, one California court claimed that the *Crawford* decision represented a huge change in how the Confrontation Clause would be applied.[93] An integral part of that analysis was determining which statements could be considered testimonial.[94] Though the Court in *Crawford* did not define the meaning of the word "testimonial,"[95] they offered a few examples of *potential* definitions: "*ex parte* in-court testimony or its functional equivalent . . . such as affidavits,

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87 *Id.* at 42.

88 *Id.* at 53–54, 68–69.

89 *Id.* at 68–69.

90 *Id.* at 52–53.

91 *Id.* at 68.

92 *See* Denniston, *supra* note 70.

93 People v. Cage, 15 Cal. Rptr. 3d 846, 851 (Cal. Dist. Ct. App. 2004).

94 *Crawford*, 541 U.S. at 68 ("Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").

95 *Id.* ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").

custodial examinations, . . . or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;"[96] "extrajudicial statements . . . contained in formalized testimonial materials;"[97] "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."[98] The practical application of this new constitutional doctrine was, in the immediate aftermath of *Crawford*, left to the lower courts.

After *Crawford*, trial courts grappled with determining which statements were testimonial.[99] For example, statements made to people who were not members of law enforcement were often found to not be testimonial,[100] as were statements made by co-conspirators in furtherance of their conspiracy.[101] Within a few years of the decision, the issue of how to apply *Crawford* to statements in forensic reports began to become apparent.[102] As one legal commentator stated in 2006, "[c]oncern and disagreement has arisen since the *Crawford* decision as to whether the term 'testimonial' would include certifications, affidavits, or reports . . . whereby an official or agent of the government or private entity makes certified statements as to whether certain

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[96] *Id.* at 51.

[97] *Id.* at 51–52.

[98] *Id.*

[99] *See generally* Jerome C. Latimer, *Confrontation After Crawford: The Decision's Impact on How Hearsay is Analyzed Under the Confrontation Clause*, 36 SETON HALL L. REV. 327 (2006) (citing Wiggins v. State, 152 S.W.3d 656, 659 (Tex. App. 2004); Herrera-Vega v. State, 888 So.2d 66, 69 (Fla. Dist. Ct. App. 2004); People v. Cage, 15 Cal. Rptr. 3d 846, 854–55 (Ct. App. 2004); State v. Vaught, 682 N.W.2d 284, 291 (Neb. 2004); United States v. Manfre, 368 F.3d 832, 838 n.1 (8th Cir. 2004)) (discussing the various attempts by state and federal courts to apply *Crawford* and determine whether a given statement is "testimonial.").

[100] *See, e.g.*, *Cage*, 15 Cal. Rptr. 3d at 854–55; *Herrera-Vega*, 888 So. 2d at 69; *Vaught*, 682 N.W.2d at 291; *see also* Latimer, *supra* note 99, at 364 ("[S]tatements made by children, adult victims, and witnesses to persons unconnected to law enforcement have consistently been found to be non-testimonial and unaffected by *Crawford*.").

[101] Latimer, *supra* note 99 (citing *Wiggins*, 152 S.W.3d at 659; *Manfre*, 368 F.3d at 838 n.1).

[102] *See* Denniston, *supra* note 70.

procedures were followed or results obtained, or whether certain records exist."[103]

b. Crawford's Effect on Forensic Science

Following *Crawford*, the Supreme Court decided three cases which defined how this new Confrontation Clause analysis would be applied to forensic science-based evidence: *Melendez-Diaz v. Massachusetts*, *Bullcoming v. New Mexico*, and *Williams v. Illinois*.[104] In these cases, known as the Laboratory Trilogy,[105] the Supreme Court attempted to clarify *Crawford*'s application to statements from forensic science experts and analysts.[106]

In the first of the Laboratory Trilogy cases, *Melendez-Diaz*, the defendant was arrested with several white plastic bags containing a substance that appeared to be cocaine.[107] At trial, the prosecution submitted three certificates of analysis reporting the results of forensic testing, which found that the substance in the plastic bags was cocaine.[108] The defendant appealed, citing *Crawford* in support of his argument that forensic analysts must testify in person.[109]

The Supreme Court agreed, holding that the analysts' certificates were "testimonial statements" and the analysts themselves were "witnesses."[110] The Court noted that the Confrontation Clause guarantees criminal defendants the right to

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[103] Latimer, *supra* note 99, at 377.

[104] *See generally* Williams v. Illinois, 567 U.S. 50, 50 (2012) (regarding the admission of DNA profile evidence in a rape case through expert testimony); Bullcoming v. New Mexico, 564 U.S. 647 (2011) (regarding the admission of a forensic laboratory reporting demonstrating the defendant's blood alcohol content); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) (regarding the admission of "certif[i]cates of analysis" that stated that a forensic analysis determined that a substance was cocaine).

[105] *See* Jennifer Mnookin and David Kaye, *Confronting Science: Expert Evidence and the Confrontation Clause*, 2013 SUP. CT. REV. 99, 103 (2012).

[106] *See Williams*, 567 U.S. at 56; *Bullcoming*, 564 U.S. at 658–59; *Melendez-Diaz*, 557 U.S. at 309–10.

[107] *Melendez-Diaz*, 557 U.S. at 308.

[108] *Id.*

[109] *Id.* at 309.

[110] *Id.* at 311.

confront "witnesses against him," and that the analysts fit squarely within that category because they proved a fact "necessary for [the defendant's] conviction—that the substance he possessed was cocaine."[111] The importance of confrontation of forensic analysts was stated explicitly by the Court: "Confrontation is one means of assuring accurate forensic analysis . . . Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well."[112]

With simple facts and a clear holding, *Melendez-Diaz* served as a straightforward case. In cases where forensic analysts provided statements that would be used against a defendant in court, the analyst could not simply submit an affidavit including those statements but would actually need to appear in court and subject themselves and their scientific discipline to cross-examination.[113] However, this rule did not cover all forensic science-related evidentiary issues, as became clear two years later when the Supreme Court decided *Bullcoming v. New Mexico*.

In *Bullcoming*, the defendant was charged with driving while intoxicated, and at trial the prosecution admitted a forensic laboratory report demonstrating his blood-alcohol content.[114] The prosecution offered this lab report into evidence but did not call the forensic analyst who certified the machine run conducted the test to testify, instead calling another analyst familiar with the testing device used and the laboratory's testing procedures.[115] The forensic laboratory report was admitted under the state law "business record" exception to hearsay.[116]

The New Mexico Supreme Court found that there was no Confrontation Clause violation because the original analyst was a "mere scrivener who simply transcribed the results generated by the gas chromatograph machine."[117] The analyst who testified in

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111 *Id.* at 313.

112 *Id.* at 318–19.

113 *See id.* at 318–20.

114 Bullcoming v. New Mexico, 564 U.S. 647, 651 (2011).

115 *Id.*

116 State v. Bullcoming, 2010-NMSC-007, ¶ 9, P.3d 1, 6.

117 *Id.* at 490.

court did so as an expert witness, with specialized knowledge as to how the gas chromatograph machine operated.[118]

The U.S. Supreme Court reversed the decision of the New Mexico Supreme Court, finding the admission of the analyst's report to be a violation of the Confrontation Clause.[119] The Court ruled that it does not matter whether or not independent judgment was used by the analyst, because "comparative reliability . . . does not overcome the Sixth Amendment bar."[120] The Court also rejected the prosecution's argument that the statements were not testimonial, finding, as it did in *Melendez-Diaz*, that documents made for an evidentiary purpose in connection with a criminal investigation were testimonial.[121] Notably, the Court stated that the "analysts who write reports that the prosecution introduces [as evidence] must be made available for confrontation even if they have 'the scientific acumen of Mme. Curie and the veracity of Mother Teresa.'"[122]

The application of the *Crawford* doctrine to forensic science-based evidence was fairly clear after *Melendez-Diaz* and *Bullcoming*: When forensic science is used in court, it is almost always testimonial, and the defendant has the right to confront the analyst who conducted the tests, regardless of how simple the tests may be.[123] Both of these decisions, however, were decided with a close 5–4 majority.[124] In his dissent in *Melendez-Diaz*, Associate Justice Anthony Kennedy warned that the decision had "vast potential to disrupt criminal procedures that already [gave] ample protections against the misuse of scientific evidence."[125] By the time *Bullcoming* was decided, Justice Kennedy had grown concerned over the state of *Crawford*, stating "[t]hat the Court in the wake of *Crawford* has had such trouble fashioning a clear vision of the case's meaning . . . " and "[t]he persistent ambiguities

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118 *Id.* at 495.

119 *Bullcoming*, 564 U.S. at 657–58.

120 *Id.* at 661.

121 *Id.* at 664.

122 *Id.* at 661 (quoting Melendez-Diaz v. Massachusetts, 557 U.S. 305, 319 n.6 (2009)).

123 *See Bullcoming*, 564 U.S. at 661; *Melendez-Diaz*, 557 U.S. at 329.

124 *Bullcoming*, 564 U.S. at 649; *Melendez-Diaz*, 557 U.S. at 306.

125 *Melendez-Diaz*, 557 U.S. at 331-332 (Kennedy, J. dissenting).

in the Court's approach are symptomatic of a rule not amenable to sensible applications."[126] Justice Kennedy's fears of an unclear application of the *Crawford* doctrine were realized in *Williams v. Illinois*.[127]

c. Williams v. Illinois

In *Williams*, the prosecution in a rape case called an expert witness to testify about a DNA profile produced from vaginal swabs of the victim and a DNA profile created from a sample of the defendant's blood.[128] The expert testified that vaginal swabs from the victim were sent to the outside laboratory that conducted the DNA test, Cellmark.[129] The defendant appealed his conviction, arguing that the expert violated the Confrontation Clause by referring to the DNA profile from Cellmark as being produced from the victim's vaginal swabs.[130] The prosecution argued that, under Illinois Rule of Evidence 703, an expert may disclose the facts underlying her opinion regardless of whether she has personal knowledge of those facts, and that cross-examination of the expert witness was sufficient for the purpose of the defendant's Confrontation Clause rights.[131]

The Court ultimately held that the testimony about the Cellmark DNA profile was admissible, and that there was no Confrontation Clause violation.[132] The underlying basis for that ruling, however, was unclear. *Williams* was decided by a plurality, with four Justices signing on to the opinion of the Court, Associate Justice Clarence Thomas concurring with the judgment on wholly different grounds, and four Justices signing on to the dissent.[133]

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126 *Bullcoming*, 564 U.S. at 679 (Kennedy, J., dissenting).

127 Williams v. Illinois, 567 U.S. 50 (2012).

128 *Id.* at 56.

129 *Id.*

130 *Id.* at 57.

131 *Id.* at 63.

132 *Id.* at 86.

133 *See generally id.* (Chief Justice Roberts and Justices Alito, Breyer, and Kennedy signed on to the opinion of the Court. Justice Thomas alone signed on to his concurrence. Justices Kagan, Scalia, Ginsburg, and Sotomayor signed on to the dissent).

Associate Justice Samuel Alito's plurality opinion rested on two independent grounds. First, the evidence of the Cellmark DNA profile was not offered for the truth of the matter asserted, and therefore did not implicate the Confrontation Clause.[134] Second, and most important for this discussion, is that even if the evidence were offered for its truth, the Cellmark DNA profile was different than the evidence offered in *Bullcoming* and *Melendez-Diaz*.[135] The evidence in those cases were "made for the purpose of proving the guilt of a particular criminal defendant at trial."[136] The evidence in *Williams*, however, was not made for the primary purpose of accusing an individual of a crime.[137] According to Justice Alito, DNA profiles created by accredited labs were not the kinds of things that the Confrontation Clause was meant to exclude from trial.[138]

Justice Thomas, in his concurrence, agreed that there was no Confrontation Clause violation, but solely on the grounds that the Cellmark report "lacked the requisite 'formality and solemnity' to be considered 'testimonial' for the purposes of the Confrontation Clause."[139] Justice Thomas believed that the statements were clearly being used for their truth, and disagreed with the plurality's analysis.[140] In determining that the report lacked the requisite formality and solemnity, Justice Thomas noted that the report was not a sworn or certified document, as opposed to the evidence at issue in *Melendez-Diaz* and *Bullcoming*.[141] He also criticized the plurality's "primary purpose" test, arguing that it "lacks any grounding in constitutional text, in history, or in logic."[142]

Dissenting, Associate Justice Elena Kagan stated that she considered this an "open-and-shut case" given previous

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134 *Id.* at 78.

135 *Id.* at 84.

136 *Id.*

137 *Id.*

138 *Id.* at 86.

139 *Id.* at 103–04 (Thomas, J., concurring) (citing Michigan v. Bryant, 562 U.S. 344, 378 (2011) (quotations omitted)).

140 *Id.* at 104 (Thomas, J., concurring).

141 *Id.* at 112 (Thomas, J., concurring).

142 *Id.* at 114 (Thomas, J., concurring).

Confrontation Clause precedent.[143] The expert's testimony on the Cellmark DNA profile was "functionally identical to the 'surrogate testimony' that New Mexico proffered in *Bullcoming*."[144] Justice Kagan even cited a specific instance in which a Cellmark analyst, under cross-examination, realized she had made an error in her analysis.[145] This is a prime example of the utility of the Confrontation Clause--as "a mechanism for catching such errors."[146] Justice Kagan pointed out that precedent indicates the accused's "'right is to be confronted with' the actual analyst [who had conducted the test], unless he is unavailable and the accused 'had an opportunity, pre-trial, to cross-examine' him."[147] Justice Kagan concluded her dissent with concern for the future of forensic evidence, lamenting that "[b]efore today's decision, a prosecutor wishing to admit the results of forensic testing had to produce the technician responsible for the analysis."[148] After *Williams*, that requirement was no longer guaranteed.[149]

III. THE EFFECT OF THE MUDDIED DOCTRINE OVER THE PAST TEN YEARS

The *Williams* decision generated controversy, with some commentators questioning the Court's reasoning, and wondering what this decision would mean for the future of forensic science-based evidence.[150] An anomaly of the Supreme Court's Confrontation Clause jurisprudence, *Williams* has been ignored by

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143 *Id.* at 119 (Kagan, J., dissenting).

144 *Id.* at 124 (Kagan, J., dissenting).

145 *Id.* at 118–19 (Kagan, J., dissenting).

146 *Id.* at 119 (Kagan, J., dissenting).

147 *Id.* at 122 (Kagan, J., dissenting) (quoting Bullcoming v. New Mexico, 564 U.S. 647, 652 (2011)).

148 *Id.* at 140–41 (Kagan, J., dissenting).

149 *Id.* at 140–41 (Kagan, J., dissenting).

150 *See, e.g.*, Andrew Cohen, *The Supreme Court Splinters Apart Over the Confrontation Clause*, THE ATLANTIC (June 19, 2012), https://www.theatlantic.com/national/archive/2012/06/the-supreme-court-splinters-apart-over-the-confrontation-clause/258634/; *The Confrontation Clause, Confused*, N.Y. TIMES (June 18, 2012), https://www.nytimes.com/2012/06/19/opinion/the-confrontation-clause-confused.html.

some courts and only selectively followed by others.[151] Practically, *Williams* has meant that the constitutional right of confrontation means different things in different jurisdictions.

a. Immediate Reaction to Williams

The *Williams* decision, and what effect it might have on Confrontation Clause analysis, was highly anticipated throughout the legal community.[152] Although *Bullcoming* had clarified some issues surrounding the confrontation of forensic scientists, there were still questions left open, and *Williams* appeared to be an opportunity for the Supreme Court to provide answers.[153] *Williams* appeared to be an opportunity to clarify the scope of the

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[151] *See, e.g.*, United States v. Mallay, 712 F.3d 79 (2d Cir. 2013); *aff'g* United States v. James, 415 F. Supp. 2d 132 (E.D.N.Y. 2006); People v. Lopez, 55 Cal.4th 569 (2012); State v. Michaels, 219 N.J. 1 (N.J. Sup. Ct. 2014); Derr v. State, 73 A.3d 254, 271 (Ct. of App. Of M.D. 2013).

[152] *See, e.g.*, Scott A. Anderson, *The Right to Confront Witnesses, But Not Necessarily at Trial: Predicting a Judge-Focused Remedy in Williams v. Illinois*, 39 RUTGERS L. REC. 75, 76 (2011/2012) ("The crucial question in *Williams*, then, is not whether the Confrontation Clause will require cross-examination of all lab analysts who have prepared reports for trial. The answer is that it will. Instead, the question now is whether the Court will sidestep the right to confront witnesses by imposing a new *Williams* remedy for applying the *Crawford* right."); Ronald J. Coleman & Paul F. Rothstein, *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*, 90 NEB. L. REV. 502, 541 (2011) ("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*."); Jeffrey L. Fisher, *The Bill of Rights Doesn't Come Cheap*, N.Y. TIMES (Dec. 1, 2011), https://www.nytimes.com/2011/12/02/opinion/forensic-analysts-should-defend-reports-in-court.html (suggesting that the Supreme Court re-affirm that the Confrontation Clause requires in-court testimony by analysts and comparing the issue with the Sixth Amendment right to counsel assured in *Gideon v. Wainwright*); Aaron Tang, *The Confrontation Clause and Williams v. Illinois*, SCOTUSBLOG (Dec. 5, 2011, 8:50 AM), http://www.scotusblog.com/community/the-confrontation-clause-and-williams-v-illinois/ (discussing the upcoming oral arguments in *Williams v. Illinois* on a community forum on SCOTUSblog).

[153] Coleman & Rothstein, *supra* note 152, at 541.

protections of the Confrontation Clause.[154] Despite an expectation that the decision would bring clarity, however, the *Williams* decision raised more questions than it answered.

Williams described three potential tests for forensic evidence: Justice Alito's "primary purpose" test,[155] Justice Thomas' "formality and solemnity" test,[156] and Justice Kagan's "confront the actual analyst" test.[157] When a court decides a case based on a plurality and a concurrence, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[158] Since the fractured *Williams* Court did not announce a single standard with the support of five or more Justices, Justice Kagan was right to say that the "clear rule is clear no longer."[159]

Regardless of the actual rule, the *Williams* decision shows that there are certain instances where forensic evidence may be admitted in court without the defendant having an opportunity to confront the analyst that generated the report.[160] The day after the opinion was announced, a writer for *The Atlantic* criticized the decision, stating "[y]ou would think that a criminal justice system that has been confronted lately by so many awfully inaccurate convictions would be looking for ways to *increase* the accuracy of forensic evidence which makes its way into court."[161]

Additionally, *Williams* appeared to be inconsistent with the progression of the Confrontation Clause analysis since *Crawford*. In *Crawford*, Justice Scalia stated that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."[162] This language seems fairly conclusive about the importance of

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154 *Id.*

155 Williams v. Illinois, 567 U.S. 50, 79 (2012).

156 *Id.* at 104.

157 *Id.* at 123.

158 Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

159 *Williams*, 567 U.S. at 140–41 (Kagan, J., dissenting).

160 *See id.* at 58–59.

161 Cohen, *supra* note 150.

162 Crawford v. Washington, 541 U.S. 36, 62 (2004).

confrontation. Yet both before and after *Crawford*, trial courts have used "judicial sleight of hand" to admit forensic evidence in court without confrontation.[163]

b. Inconsistencies in the Application of Crawford and the Laboratory Trilogy

The practical effect of *Crawford* and the Laboratory Trilogy on trial courts has been varied. Several courts have found that the rule in *Williams* is so unclear that it should be ignored entirely in Confrontation Clause analysis.[164] Others have used Justice Thomas' analysis of examining the "formality and solemnity" of the evidence in question.[165] Given the confusion caused by *Williams*, the constitutional protections of the Confrontation Clause mean different things in different jurisdictions.

The United States Court of Appeals for the Second Circuit applied *Crawford* shortly after it was decided in *United States v. Feliz*.[166] In *Feliz*, the defendant contended that the admission of an autopsy report violated his rights under the Confrontation Clause because he had no opportunity to cross-examine the creator of the report.[167] The court disagreed, finding that the autopsy report was not testimonial because it fit into the "business record" hearsay exception of the Federal Rules of Evidence.[168] Following the Supreme Court's guidance, the court declined to use an expansive definition of "testimonial," stating "[g]iven that the Supreme Court did not opt for an expansive definition that depended on a declarant's expectations, we are hesitant to do so here."[169] In the

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[163] *See* Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 508 (2006) (citing Smith v. Alabama, 898 So.2d 907, 916 (Ala. Crim. App. 2004); Johnson v. Renico, 314 F.Supp.2d 700, 707 (E.D. Mich. 2004); Howard v. United States, 473 A.2d 835, 838 (D.C. 1984)).

[164] *See, e.g.*, United States v. James, 712 F.3d 79 (2d Cir. 2013); State v. Michaels, 219 N.J. 1 (N.J. Sup. Ct. 2014).

[165] *See, e.g.*, Derr v. State, 73 A.3d 254, 271 (M.D. 2013); People v. Lopez, 55 Cal.4th 569 (Cal. Sup. Ct. 2012).

[166] United States v. Feliz, 467 F.3d 227 (2d Cir. 2006).

[167] *Id.* at 230.

[168] *Id.* at 233–34.

[169] *Id.* at 236.

immediate aftermath of *Crawford*, the Second Circuit decided on a less expansive definition of what sort of statements would be considered testimonial.

In *United States v. James*, the Second Circuit attempted to reconcile *Feliz* with Laboratory Trilogy.[170] In *James*, the defendants raised the issue of whether their rights under the Confrontation Clause were violated when forensic reports about the deaths of two victims were admitted into evidence.[171] At trial, a member of the Office of the Chief Medical Examiner testified as to the results of an autopsy that was conducted by another person.[172]

Attempting to clarify the case law prior to *Williams*, the court stated that "a laboratory analysis is testimonial if the circumstances under which the analysis was prepared, viewed objectively, establish that the primary purpose of a reasonable analyst in the declarant's position would have been to create a record for use at a later criminal trial."[173] This "primary purpose" test is akin to the one used by Justice Alito in the *Williams* plurality, but the Second Circuit stated that it was ignoring the *Williams* decision, noting the lack of "a single, useful holding relevant to the case before us."[174] The forensic report was ultimately deemed admissible, as the report was not completed "primarily to generate evidence for use at a subsequent criminal trial."[175]

Similarly, the New Jersey Supreme Court discussed the problems with *Williams* in *State v. Michaels*.[176] In *Michaels*, the defendant appealed her conviction for a number of charges, including second degree vehicular homicide.[177] At trial, the laboratory results of the Michaels' blood were admitted into

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[170] *See generally* United States v. James, 712 F.3d 79, 87 (2d Cir. 2013) (considering the holdings in *Melendez-Diaz*, *Bullcoming*, *Williams* and *Feliz* to determine whether admission of evidence about an autopsy and toxicology report without the medical examiner or analyst present constituted a violation of the Confrontation Clause).

[171] *Id.*

[172] *Id.*

[173] *Id.* at 94.

[174] *Id.* at 91, 95–96.

[175] *Id.* at 101–02.

[176] State v. Michaels, 219 N.J. 1, 31 (N.J. Sup. Ct. 2014).

[177] *Id.* at 5–6.

evidence, and an assistant supervisor at the laboratory who had reviewed the results testified at trial, but the actual analyst did not testify.[178] The New Jersey Supreme Court found *William*'s influence to be "at best, unclear."[179] The three *Williams* opinions "embrace[] a different approach to determining whether the use of forensic evidence violat[ed] the Confrontation Clause" and the approach used in *Williams* appeared to deviate from the primary purpose test that had previously been used in Confrontation Clause analysis.[180]

Like the Second Circuit, the New Jersey Supreme Court relied on pre-*Williams* Confrontation Clause analysis.[181] The court decided that the defendant's Confrontation Clause rights were not violated because the lab supervisor who testified in court was knowledgeable about the testing process and was a "truly independent reviewer or supervisor of testing results."[182] The court distinguished these facts from the facts in *Bullcoming* by noting that the defendant in *Bullcoming* only had a co-analyst testifying in court who had not participated in evaluating the lab results, as opposed to the supervisor in *Michaels*.[183]

The Supreme Court of California, on the other hand, used Justice Thomas' rationale in *Williams* when it decided *People v. Lopez*.[184] There, Lopez appealed her conviction of vehicular manslaughter while intoxicated, on the grounds that a lab report of the defendant's blood alcohol content being admitted into evidence, but the analyst who created the report did not testify.[185] Out of the three *Williams* opinions, the Supreme Court of California decided to analyze the lab reports under the "formality and solemnity" analysis used by Justice Thomas in his *Williams* concurrence.[186] Though the defendant argued that the lab report at

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178 *Id.* at 6.

179 *Id.* at 31.

180 *Id.* at 30–31.

181 *Id.* at 32.

182 *Id.* at 45–46.

183 *Id.* at 42.

184 People v. Lopez, 55 Cal. 4th 569, 579–80 (2012).

185 *Id.* at 573.

186 *See id*. at 584; Williams v. Illinois, 567 U.S. 50, 103 (2012) (Thomas, J. concurring) (citing Michigan v. Bryant, 562 U.S. 344, 378 (2011)).

issue is indistinguishable from those in *Melendez-Diaz* and *Bullcoming*, the court disagreed, noting that the statements were not sworn before a notary or formalized in accordance with court rules for admissibility.[187]

The Supreme Court of Delaware has also acknowledged the lack of clarity provided by *Williams*, but nevertheless has applied its Confrontation Clause analysis.[188] In *Martin v. State*, a blood test was conducted to detect drugs in the defendant's blood, but at trial the laboratory manager testified, rather than the chemist who analyzed the blood.[189] Relying on a combination of the *Williams* dissent and Justice Thomas' *Williams* concurrence, the court held that the laboratory report in question was offered for the "truth of the matter asserted."[190] As for the question of whether the statements were testimonial, and thus required confrontation, the court relied on *Bullcoming* and *Melendez-Diaz*, noting that "[a] document . . . made in the aid of a police investigation[] ranks as testimonial," and therefore the defendant had the right to confront the analyst who conducted the test.[191]

Post-*Williams*, courts at the Federal and the State level have used varying approaches when analyzing whether the confrontation of forensic scientists is constitutionally mandated.[192] From the "formality and solemnity" test, to the "primary purpose" test, to the *Bullcoming* "confront that actual analyst" rule, courts have their choice to decide which test is mandated by the Sixth Amendment. The *Williams* decision showed that the Supreme Court Justices simply cannot agree on what is required by the

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187 *Lopez*, 55 Cal. 4th at 584–85.

188 Martin v. State, 60 A.3d 1100, 1104–06 (Del. 2013).

189 *Id.* at 1101.

190 *Id.* at 1107.

191 *Id.* at 1107–09.

192 *See generally* United States v. James, 712 F.3d 79 (2d Cir. 2013); State v. Michaels, 219 N.J. 1 (N.J. 2014); Martin v. State, 60 A.3d 1100 (Del. 2013) (choosing which text is mandated by the Sixth Amendment: formality/solemnity, primary purpose or confronting the actual analyst); People v. Lopez, 55 Cal.4th 569 (2012).

Confrontation Clause.[193] Rather than continuing to argue over which test best protects a constitutional defendant's rights, the Supreme Court should instead *create* a new protection, using the Federal Rules of Evidence.

IV. REMEDY – AMEND THE FEDERAL RULES OF EVIDENCE

a. Historical Support for a New Evidence Rule

Pre-*Crawford* Confrontation Clause analysis supports the proposition that a new rule of evidence is a valid means of protecting a criminal's defendants right to confront forensic scientists who have generated accusatory evidence against them. Prior to *Crawford*, the controlling case on Confrontation Clause analysis was *Ohio v. Roberts*.[194] *Roberts*, decided in 1980, extensively explored the issues and rationale behind the Confrontation Clause and hearsay exceptions.[195] Under *Roberts*, statements were admissible if they were sufficiently reliable, and that reliability could be shown when the evidence fell into certain hearsay exceptions.[196] In explaining its rationale for this rule, the Court noted the similarities between the goals of hearsay rules and the Confrontation Clause, and that the foundations of certain hearsay exceptions provided sufficient protection for constitutional rights.[197] The Supreme Court in *Roberts* recognized that evidentiary procedures might be necessary to protect constitutional rights in the uncertain world of criminal trials.[198]

The Court's rationale in *Roberts* was similar to the rationale behind the hearsay exceptions that were first enacted in 1975: "under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at trial even though he

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193 *See generally* Williams v. Illinois, 567 U.S. 50 (2012) (discussing three separate tests for determining whether a defendant's Confrontation Clause rights have been violated).

194 Ohio v. Roberts, 448 U.S. 56 (1980).

195 *Id.* at 62–66.

196 *Id.* at 66.

197 *Id.* at 66.

198 *See id.* at 66.

may be available."[199] Under both the rationales for the *Roberts'* test and the hearsay exceptions, certain categories of statements had enough inherent trustworthiness that their admission in court did not infringe on the defendant's rights.[200] However, when the *Roberts* rule was overruled in *Crawford*, the Court criticized its prior analysis, noting its departure from traditional principles.[201] Though the *Crawford* Court did not believe that the rules of evidence should govern Confrontation Clause analysis, they also did not think that "the Framers meant to leave the Sixth Amendment's protections to . . . notions of 'reliability.'"[202] Reliability's amorphous, subjective nature made the *Roberts* test unworkable.[203]

Although the *Roberts* rule has been overturned, the hearsay rules that were based on similar rationales and created at a similar time are still in place. The Federal Rules of Evidence remain "in large part . . . substantively unchanged from the first Proposed Draft submitted in 1969."[204] But the inclusion of a method of amending the federal rules indicates an understanding that over time, new issues will arise for evidence law and the federal rules will need to evolve to adapt to those issues.[205] Thus, the dramatic changes in both forensic science and the Confrontation Clause are issues that should be addressed through a new evidence rule.

Using the *Crawford* analysis, forensic evidence often appears to be testimonial, and therefore no hearsay exception should allow

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[199] FED. R. EVID. 803 advisory committee's note to 1972 proposed rules.

[200] *Compare id.* (" . . . under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant at trial even though he may be available."), *with* Ohio v. Roberts, 448 U.S. 56, 66 (1980) (holding that hearsay statements must be excluded unless they "bear adequate indicia of reliability" or otherwise have "particularized guarantees of trustworthiness." (internal quotation marks omitted)).

[201] Crawford v. Washington, 541 U.S. 36, 60 (2004).

[202] *Id.* at 61.

[203] *See id.* at 63.

[204] *See* Josh Camson, *History of the Federal Rules of Evidence*, A.B.A.: LITIGATION NEWS, https://apps.americanbar.org/litigation/litigationnews/trial_skills/061710-trial-evidence-federal-rules-of-evidence-history.html (last visited Feb. 20, 2019).

[205] *See* FED. R. EVID. 1102.

its admissibility.[206] As the Court noted in *Melendez-Diaz*, a forensic scientist can fit squarely in the category of witnesses who need to be confronted because they often provide facts which are necessary to convict a defendant.[207] This evidence is, by its nature, accusatory,[208] and the person who has conducted the forensic testing to produce this evidence should rightly be considered the accuser for the purpose of Confrontation Clause analysis. Since the Confrontation Clause and hearsay rules exist to protect similar values,[209] and considering the ways in which Confrontation Clause analysis has changed, so, too, should hearsay rules.

b. Adding a New Forensic Analysis Rule to the Federal Rules of Evidence

The Supreme Court should amend the Federal Rules of Evidence to create a new rule barring forensic science evidence from being admitted in court under a hearsay exception. A clear, uniform rule would clear up the confusion caused by different constitutional analyses and their varied applications in trial and appellate courts, and would help ensure the validity of forensic science-based evidence.

The Supreme Court has been reluctant to use the rules of evidence to ensure a criminal defendant's Confrontation Clause rights.[210] Justice Scalia noted in his opinion in *Crawford* that "we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence."[211] In contrast to the Court in *Roberts*, Justice Scalia believed that using the rules of

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[206] *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 329 (2009) ("This case involves little more than the application of our holding in *Crawford v. Washington* . . . The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error.").

[207] *See id.* at 313.

[208] *Id.* at 313–14.

[209] *See* California v. Green, 399 U.S. 149, 155 (1970) (noting that hearsay rules and the Confrontation Clause generally protect similar, though not identical, values).

[210] *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 61 (2004).

[211] *Id.*

evidence to regulate testimonial statements would mean that the Confrontation Clause would offer little protection for a criminal defendant.[212] This binary distinction between the rules of evidence and the Confrontation Clause was delineated by Justice Sotomayor in her concurrence in *Bullcoming*, where she stated that "[w]hen the primary purpose of a statement is not to create a record for trial, . . . the admissibility of [the] statement is the concern of state and federal rules of evidence, not the Confrontation Clause."[213]

This distinction is at odds with the nature of hearsay and the Confrontation Clause. The Supreme Court has previously stated that "hearsay rules and the Confrontation Clause are generally designed to protect similar values."[214] The Confrontation Clause is violated when testimonial out-of-court statements are offered in court to prove the truth of the matter asserted.[215] According to Rule 801(c) of the Federal Rules of Evidence, hearsay is "a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."[216] Under the rules of evidence, hearsay is not admissible in court[217] unless it falls under an exception to the hearsay rule.[218] These exceptions exist because certain statements may have sufficient "circumstantial guarantees of trustworthiness" to justify their admission without the testimony of the declarant.[219]

The Confrontation Clause is frequently implicated when a hearsay exception allows an out-of-court statement to be admitted into evidence.[220] This can be plainly seen in the facts of the Laboratory Trilogy: In *Melendez-Diaz*, the hearsay statements were admissible because of the now-repealed Massachusetts law which allowed for the admission of certificates stating the results

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212 *Id.* at 51.

213 Bullcoming v. New Mexico, 564 U.S. 647, 669 (2011) (Sotomayor, J., concurring) (citing Michigan v. Bryant, 562 U.S. 344, 358 (2011).

214 *Green*, 399 U.S. at 155.

215 *See* Williams v. Illinois, 567 U.S. 50, 57–58 (2012).

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

217 FED. R. EVID. 802.

218 FED. R. EVID. 803.

219 FED. R. EVID. 803 advisory committee's note to 1975 proposed rules.

220 *See Williams*, 567 U.S. at 57–58.

of analyses;[221] in *Bullcoming*, the hearsay statements were admissible under the "business record" exception to hearsay;[222] in *Williams*, the hearsay statements were admissible under Illinois Rule of Evidence 703, which allows an expert to base opinions on facts or data that they do not know personally.[223] Despite the Supreme Court wishing to separate the rules of evidence and the Confrontation Clause, the rules of evidence are the very things which trigger these Confrontation Clause issues.

One solution for this problem would be for the Supreme Court to create a new rule of evidence specifically requiring forensic analysts to appear in court to testify when forensic science evidence is offered. Congress gave the federal judiciary the power to create rules of evidence in the Rules Enabling Act,[224] meaning that the Supreme Court has the power to prescribe rules that govern in federal district courts.[225] As many Justices and judges around the country have noted, the current rules surrounding the Confrontation Clause are unclear and difficult to apply,[226] so a new evidence rule would provide much-needed clarity.

The federal judiciary plays an active role in amending the Federal Rules of Evidence. These rules are amended in accordance with 28 U.S.C. § 2072,[227] which states that "[t]he Supreme Court

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[221] *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 308–09 (2009); Mass. Gen. L. ch. 111, § 13 (repealed 2012).

[222] Bullcoming v. New Mexico, 564 U.S. 647, 655–56 (2011).

[223] *See Williams*, 567 U.S. at 63; ILL. R. EVID. 703. Rule 703 of the Illinois Rules of Evidence is the Illinois analogue to Rule 703 of the Federal Rules of Evidence. *Compare* FED. R. EVID. 703 *with* ILL. R. EVID. 703.

[224] *See* James C. Duff, *The Federal Rules of Practice and Procedure*, UNITED STATES COURTS, http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public (last visited Feb. 20, 2019); 28 U.S.C. § 2071–77 (2017).

[225] § 2072.

[226] *See, e.g.*, *Williams*, 567 U.S. at 141 (Kagan, J., dissenting) ("[The] clear rule is clear no longer. The five Justices who control the outcome of today's case agree on very little."); *Bullcoming*, 564 U.S. at 679 (Kennedy, J., dissenting) ("The persistent ambiguities in the Court's approach are symptomatic of a rule not amenable to sensible applications."); Jenkins v. United States, 75 A.3d 174, 184–85 (D.C. 2013) ("[Williams v. Illinois] has not provided any clarity [on Confrontation Clause jurisprudence].").

[227] *See* § 2072; FED. R. EVID. 1102.

shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . ."[228] To propose new federal rules, an advisory committee recommends proposed rules to a "Standing Committee" made up of "federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice," who consider and vote on proposed changes to the rules.[229] These rules are then published for six months to allow for public comments.[230] After the public comments are considered, the rules must be approved by the Standing Committee, the Judicial Conference, and then the Supreme Court.[231] The proposed rules will become law if Congress does not enact a law to reject the new rules within at least seven months.[232]

If the federal judiciary were to utilize its power to propose and create new federal rules of evidence, it could correct some confusion caused by *Williams* without waiting for a Confrontation Clause case to come before the Supreme Court. Members of the Supreme Court have commented several times on the confusion and problems caused by the application of the Confrontation Clause to forensic science.[233] By actually amending the rules of evidence, they can do something to correct this confusion.

An amendment to the Federal Rules of Evidence would not necessarily need to be perfectly congruent with the rights protected by the Confrontation Clause. The issues presented to the court in *Melendez-Diaz*, *Bullcoming*, and *Williams* were a matter of interpretation of the Sixth Amendment and the Confrontation Clause.[234] Justice Thomas' "formality and solemnity" test and

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228 § 2072.

229 Duff, *supra* note 224.

230 *Id.*

231 *Id.*

232 *Id.*

233 *See, e.g.*, Williams v. Illinois, 567 U.S. 50, 141 (2012) (Kagan, J., dissenting); Bullcoming v. New Mexico, 564 U.S. 647, 679 (2011) (Kennedy, J., dissenting).

234 *See Williams*, 567 U.S. at 56 ("In this case, we decide whether [*Crawford*'s Confrontation Clause analysis] bar[s] an expert from expressing an opinion based on facts about a case that have been made known to the expert but about which the expert is not competent to testify[.]"); *Bullcoming*, 564 U.S. at

Justice Alito's "primary purpose" test only speak to what is required by the Sixth Amendment.[235] A new evidentiary rule concerning forensic analysts would have a prophylactic effect: for the Justices of the *Williams* dissent, the rule would codify what they already believe to be the Constitutional protections for criminal defendants; for Justice Thomas and the *Williams* plurality, the rule could serve as a useful expansion of protections in order to ensure that the evidence used against criminal defendants is reliable and discussed in court, and would also clarify a clearly messy Constitutional doctrine.

Though a new Federal Rule of Evidence would not control state evidence rules,[236] it could have an influential effect on how state courts approach forensic science. Given the influence that the Federal Rules of Evidence have on state evidentiary codes,[237] similar rules may be proposed at the state level. By announcing a new federal rule, the Supreme Court would be signaling to the lower courts that the best way to protect the rights of criminal defendants would be to ensure that forensic reports are not admitted through hearsay exceptions, but that the analysts who conduct the reports actually come to court to testify.

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652 ("The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification."); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 307 (2009) ("The question presented is whether those affidavits are 'testimonial,' rendering the affiants 'witnesses' subject to the defendant's right of confrontation under the Sixth Amendment.").

[235] *See Williams*, 567 U.S. at 83–84 (" . . . if a statement is not made for 'the primary purpose of creating an out-of-court substitute for trial testimony,' its admissibility 'is the concern of state and federal rules of evidence, not the Confrontation Clause.'" (quoting Michigan v. Bryant, 562 U.S. 344, 358–59 (2011)); *Id.* at 103–04 (Thomas, J., concurring) (" . . . Cellmark's statements lacked the requisite 'formality and solemnity' to be considered 'testimonial' for the purposes of the Confrontation Clause." (quoting Michigan v. Bryant, 562 U.S. 344, 378 (2011)).

[236] FED. R. EVID. 1101 (stating that these rules only apply to proceedings in United States Federal courts).

[237] *See* McLaughlin, *supra* note 75.

V. CONCLUSION

The right to confront one's accuser is an essential and long-standing principle of criminal law. This right was important enough to the Founding Fathers that they included this protection in the Sixth Amendment of the Constitution. However, over time, as forms of accusation and rules of evidence change, the protections must also change to adapt to the new environment.

An analysis of *Crawford* and the Laboratory Trilogy makes it clear that new protections must be implemented to ensure that criminal defendants have the right to cross-examine forensic scientists whose analyses are used in court against them. Though the Supreme Court is undecided about whether or not these rights are inherent in the Constitution, the ultimate utility of this right should be clear. As hearsay is inadmissible unless it falls under a hearsay exception,[238] the right to cross-examine forensic analysts can be protected by specifically tailoring a new rule of evidence to prevent the results from forensic analyses from being admitted under a hearsay exception. This rule of evidence would protect the rights of criminal defendants, ensure the validity of forensic science-based evidence, and would help the trier-of-fact to ascertain the truth and determine a just verdict.

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[238] FED. R. EVID. 802.