

The Muddled State: California's Application of Confrontation Clause Jurisprudence in *People v. Dungo* and *People v. Lopez*

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Introduction

John Willey never met Virginia Hernandez Lopez. He never saw her drink any alcohol. He never analyzed her blood sample, despite his profession as a blood alcohol analyst. However, Willey sealed the fate of Virginia Hernandez Lopez. He told a jury at Hernandez Lopez's criminal trial that someone else had measured her blood alcohol concentration ("BAC") at 0.09 percent, two hours after she was involved in a traffic collision that killed another motorist.

Similarly, Robert Lawrence was not present to hear Lucinda Correia Pina tell her ex-boyfriend, Reynaldo Santos Dungo, "I'll fuck whoever I want . . . I will do whatever I want." Lawrence did not see Dungo grab Pina's arm, nor did he see Pina respond by punching Dungo on the chin and biting his arm. Lawrence did not hear Pina declare, "You're not even a good father. You're a lousy fucking father . . . you're a worthless piece of shit." Lawrence did not see Dungo snap. He did not see Dungo strangle Pina, as he told her, "I'm a good dad. I'm a good dad. I'm not a bad father. Fuck you."

Despite his profession as a pathologist, Lawrence did not even perform Pina's autopsy. But Lawrence *did* tell a jury about an autopsy report which was prepared by another doctor named George Bolduc. The jury never heard how Bolduc was fired from his prior position as a coroner in one county, and resigned "under a cloud" in another county. The jury never heard how Bolduc's reputation led media to assert his incompetence, and prosecutors to refuse to use him as an expert witness in homicide cases. Based only on his review of Bolduc's report, Lawrence did tell the jury that Pina was

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apparently strangled for more than two minutes. This conclusion enabled the prosecutor to argue that this length of time negated Dungo's claim of acting in the heat of passion or during a sudden quarrel.

Juries convicted both Hernandez Lopez and Dungo based on the testimony of witnesses who had no personal knowledge of the actual analyses performed on forensic evidence that incriminated them in their respective cases. Both of their cases were appealed to the California Supreme Court. Respectively, *People v. Lopez*¹ and *People v. Dungo*² involved the constitutionality of admitting a prosecution witness's testimony regarding analysis of forensic evidence contained in a report which someone else prepared. The defense in both cases challenged the testimony on Sixth Amendment Confrontation Clause grounds, citing *Crawford v. Washington*³ and its progeny. The California Supreme Court found that the testimony about the reports on forensic evidence neither implicated the Sixth Amendment's right to confrontation, nor required that either defendant confront the actual preparer of the report.

The analysis of forensic evidence is complex and requires explanation by witnesses with specialized knowledge. This article explores the concerns raised by the introduction of testimony by witnesses who did not participate in the original analysis of the evidence at issue. This article reviews United States Supreme Court Confrontation Clause jurisprudence as applied to forensic evidence analysis, including its most recent case of *Williams v. Illinois*.⁴ This article critiques the California Supreme Court's most recent decisions in *Lopez* and *Dungo* for their interpretation of *Williams*, and their departure from the guidelines set forth by *Crawford* and its progeny. Specifically, in determining the type of statement that should constitutionally require confrontation of its declarant, the court narrowly focused on the statement's formalized presentation. This approach overemphasizes the significance of the statement's form over its production and substance. Consequently, this overemphasis on formality detracts from the more significant consideration of whether the statement's primary purpose is for criminal prosecution.

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1. See *People v. Lopez*, 286 P.3d 469 (Cal. 2012).
 2. See *People v. Dungo*, 286 P.3d 442 (Cal. 2012).
 3. See *Crawford v. Washington*, 541 U.S. 36 (2004).
 4. See *Williams v. Illinois*, 132 S. Ct. 2221 (2012).

I. *Crawford* and Its Progeny

Crawford v. Washington is arguably the most important constitutional criminal procedure case decided by the U.S. Supreme Court in the past decade. *Crawford* did not construct a mere evidentiary rule limiting the admissibility of certain types of hearsay. Rather, it breathed new life into the Confrontation Clause and its protection against governmental abuse of criminal defendants.⁵ It generated dozens of articles by scholars and practitioners. Finally, it created challenges for trial courts to consider for the admissibility of a variety of statements.

When interpreting the Confrontation Clause, the U.S. Supreme Court in *Crawford* declared that the accused is guaranteed the right to confront any “witness against” him.⁶ The Confrontation Clause, thus, demands that the prosecution must present its witnesses in open court, under oath, and make them available for cross-examination. The Court evaluated the historical applications of the Confrontation Clause and determined that it was aimed at protecting against the prosecution’s *ex parte* examinations introduced as evidence against the accused.⁷ Thus, the Confrontation Clause protects against the introduction of out-of-court statements by certain witnesses.

The Court defined a witness against the accused as someone who “bears testimony” against him.⁸ To determine whether a statement may be introduced against the accused at trial, the Court focused on whether the declarant of the statement was acting as a witness who bears testimony.⁹ According to the Court, such statements would violate the Confrontation Clause if offered against the accused at trial without prior confrontation.¹⁰ Thus, the prosecution must not use statements that bear testimony, or the “testimonial statements” of a witness who is unavailable to appear at trial, unless the defendant had a prior opportunity for cross-examination.¹¹

The witness at issue in *Crawford* was Sylvia Crawford, who told the police that her husband, Michael Crawford, stabbed a man who had allegedly attempted to rape her. Both Sylvia and Michael were taken into custody and interrogated by the police. Sylvia’s statement

5. See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

6. *Crawford*, 541 U.S. at 51 (2004).

7. *Id.* at 50.

8. See *id.* at 51.

9. *Id.*

10. *Id.* at 54.

11. See *id.*

to the police rebutted Michael's statement that he acted in self defense against the victim. Specifically, Sylvia stated that she did not see any weapon in the victim's hand during his altercation with Michael. At trial, Sylvia claimed spousal privilege to avoid testifying as a prosecution witness against Michael. The trial court deemed Sylvia legally unavailable to testify, but allowed the prosecution to introduce her recorded statement to the police. The defense never had the opportunity to cross-examine Sylvia. Accordingly, the defense challenged the introduction of Sylvia's recorded statement as a testimonial statement that violated the Confrontation Clause.

In determining the admissibility of Sylvia's statement, the Court in *Crawford* offered three definitions of what constitutes a testimonial statement, although it declined to select any one of them as the standard.¹² The first definition of a testimonial statement is "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."¹³ The second definition includes "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."¹⁴ The third definition includes 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."¹⁵

The Court found Sylvia's statements at issue in the case "testimonial" under all three definitions.¹⁶ Subsequently, lower courts have observed that the third definition is the broadest of the three.¹⁷ Generally speaking, many informal statements or statements made without an oath, or not during a deposition or interrogation, may still lead an objective observer to reasonably expect the statements' availability for use at a later trial.

The definition and scope of "testimonial," for the determination of the admissibility of statements, has created some controversy and

12. See *id.* at 51–52.

13. *Id.*

14. *Id.*

15. *Id.* at 52.

16. See *id.* at 61.

17. See Dylan O. Keenan, *Confronting Crawford v. Washington in the Lower Courts*, 122 YALE L.J. 782, 828 (2012) (citing *United States v. Hadley*, 431 F.3d 484, 500 n.11 (6th Cir. 2005); *State v. Mizenko*, 127 P.3d 458, 466 (Mont. 2006)).

the need for clarification by subsequent cases. Two years after *Crawford*, the U.S. Supreme Court revisited the definition of “testimonial” in *Davis v. Washington* and its companion case of *Hammon v. Indiana*.¹⁸ In these cases, the Court introduced a fourth definition of “testimonial” with its inquiry into the primary purpose behind the statement when it was made.¹⁹ Specifically, the Court declared, “[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.”²⁰ The Court conversely saw statements as testimonial “when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”²¹

Since *Crawford*, the Supreme Court began to review applications of the Confrontation Clause in the context of forensic scientific evidence. In *Melendez-Diaz v. Massachusetts*, the police arrested and seized white powder from a K-Mart employee named Sergio Melendez-Diaz.²² A government laboratory analyst tested the white powder and determined that it was cocaine. One week after the testing, the analyst recounted the test results in certificates of analysis. The certificates were sworn before a notary public.

Following *Crawford*’s requirement for cross-examination of declarants who make testimonial statements, the Supreme Court held that the content of lab report affidavits was effectively a “witness against” the defendant, and that the defendant deserved Confrontation Clause protection.²³ The Court held that crime lab affidavits were testimonial, as they fell within the “core class of testimonial statements” implicated in *Crawford*.²⁴ Affidavits were mentioned twice in that list of core testimonial statements.²⁵ The affidavits in *Melendez-Diaz* included facts sworn by the analyst, and were designed to replace his live testimony.²⁶ The circumstances

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

19. See *id.*

20. *Id.*

21. *Id.*

22. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 307–08 (2009).

23. See *id.* at 322–23.

24. See *id.* at 310.

25. *Id.*

26. See *id.* at 310–11.

surrounding the certificates would lead an objective observer to believe they would be available for use at a later trial, and served no other purpose than to prove a fact at trial. The affidavits even contained language that made them prima facie evidence of the composition, quality, and the net weight of the analyzed substance.²⁷ Moreover, use at trial was the affidavits' sole purpose under Massachusetts law.²⁸

The Supreme Court took its holding in *Melendez-Diaz* one step further with the case of *Bullcoming v. New Mexico*.²⁹ There, the Court reviewed whether a surrogate witness could testify in place of the analyst who actually performed the particular forensic test at issue.³⁰ The state of New Mexico prosecuted Donald Bullcoming for aggravated driving while intoxicated, after rear-ending a pickup truck at an intersection in Farmington, New Mexico. After the collision, Bullcoming refused to take a breathalyzer test. A blood sample was drawn from Bullcoming at a local hospital. The sample was then sent to the New Mexico Department of Health's Scientific Laboratory Division.

A report was generated on a standard form identifying the participants in the testing. The report contained information provided by the arresting police officer, including the reason for stopping the suspect, and the date and time when the blood was drawn.³¹ The report also included certifications by the nurse who drew the blood, and the intake employee who sent the blood to the laboratory. The original analyst, Curtis Caylor, determined that Bullcoming's blood alcohol level was 0.21 grams per hundred milliliters. Caylor recorded this finding, his observation that the seal of the sample was received intact, and that he followed the procedures written on the back of the report. Another examiner reviewed Caylor's analysis and certified that he was qualified to conduct the test and that he followed the established procedure.³²

During trial, the prosecution announced that it would not call Caylor to testify because he had been recently placed on unpaid leave. The prosecutor instead called another analyst named Gerasimos Razatos. The prosecutor introduced Caylor's finding as a

27. *See id.* at 311.

28. *See id.*

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

30. *See id.* at 2710.

31. *Id.*

32. *Id.* at 2711.

business record through Razatos, who had neither observed nor reviewed the original analysis. Razatos was a surrogate for the original analyst who did not testify at trial.³³ He merely read in the results contained in the original analyst's report.

The Court treated the case as a simple application of *Crawford* and *Melendez-Diaz*, holding that the surrogate testimony violated the Confrontation Clause.³⁴ The contents of the report were testimonial hearsay. The Court found that the original work and documentation by Caylor related to past events and human actions, which were "meet [sic] for cross-examination."³⁵ Caylor tested the evidence and prepared a certificate concerning his analysis. His report resembled those in *Melendez-Diaz*: a police officer provided seized evidence to a government laboratory, where an analyst tested it and prepared a certificate concerning the result of his analysis.³⁶ The Court stated that such "[a] document created solely for an 'evidentiary purpose,' . . . made in aid of police investigation, ranks as testimonial."³⁷

In its most recent application of the Confrontation Clause to forensic reports, the Court reviewed the case of *Williams v. Illinois*, which involved the testimony of an expert witness who gave an opinion based on a laboratory report that he did not personally author.³⁸ Sandy Williams was prosecuted for the aggravated sexual assault, aggravated kidnapping, and aggravated robbery of a woman in Chicago. After the incident, the victim went to a hospital where doctors took a blood sample and vaginal swabs for a sexual assault kit. A police detective collected the kit and sent it to the Illinois State Police lab. A scientist at the Illinois State Police lab named Brian Hapack received the kit, and conducted a test that confirmed the presence of semen on the vaginal swabs. For purposes of DNA testing, the lab sent the vaginal swabs to Cellmark Diagnostics Laboratory in Germantown, Maryland. Cellmark sent a report which contained a male DNA profile produced from the semen found in the swabs. A forensic specialist at the Illinois State Police lab named Sandra Lambatos conducted a computer search to see if the Cellmark

33. See *id.* at 2714 (noting that the prosecution never asserted that the analyst who signed the certification was unavailable).

34. See *id.* at 2717.

35. See *id.* at 2714.

36. See *id.* at 2717.

37. See *id.*

38. See *Williams v. Illinois*, 132 S. Ct. 2221, 2227 (2012).

profile matched any entries in the state's database. The computer showed that it matched Williams' sample, which was previously taken by an analyst named Karen Abbinanti from an unrelated arrest.³⁹

At trial, Hapack and Abbinanti testified. The prosecution also called Lambatos to testify as an expert witness about the general process of generating DNA profiles from forensic samples including blood and semen. She testified that in comparing two DNA profiles, it is common in the scientific community for one expert to rely on the records of another expert. Lambatos further testified that Cellmark was an accredited crime lab to which her lab routinely sent samples for DNA testing in order to expedite the testing process and to reduce its backlog. Lambatos testified that to keep track of evidence samples and preserve the chain of custody, analysts relied on regularly accepted protocols, including sealed shipping containers and labeled shipping manifests. The shipping manifests for sending the victim's vaginal swabs between the state lab to Cellmark were admitted as business records.

The prosecutor asked Lambatos if she compared the DNA found in semen that Brian Hapack identified from the victim's vaginal swabs to the male DNA profile from which Karen Abbinanti identified Williams' blood. Lambatos testified that based on her comparison of the two profiles, she concluded that Williams could not be excluded as a source of semen in the vaginal swabs. She further testified that the probability of the profile's appearing in the general population was 1 in 8.7 quadrillion black men, 1 in 390 quadrillion white men, or 1 in 109 quadrillion Hispanic men. She ultimately concluded that the sample "matched" Williams' DNA.⁴⁰

Lambatos did not conduct or observe any of the testing of the vaginal swabs. Her testimony relied on the DNA profile produced by Cellmark. She had not seen any of the work Cellmark did to identify the male DNA profile in the vaginal swabs. Lambatos acknowledged that the DNA sample might have degraded before Cellmark analyzed it. However, the state lab would have probably noticed degradation before sending it to Cellmark. Additionally, the visual representation of the DNA sequence did not appear to exhibit any patterns of degradation in the profile that Cellmark produced.

U.S. Supreme Court Justice Samuel Alito authored a plurality opinion, joined by three other members of the Court: Chief Justice John Roberts, and Justices Anthony Kennedy and Stephen Breyer.

39. *Id.* at 2230.

40. *Id.*

The plurality opinion found that the testimony did not violate the Confrontation Clause because the expert's statements were not offered to prove the truth of the report's contents.⁴¹ Specifically, Justice Alito determined that the expert referred to the report only to establish that it contained a DNA profile that matched the DNA profile deduced from Williams' blood. According to Justice Alito, Lambatos did not testify that it contained an accurate profile of the perpetrator's DNA.⁴² In other words, Justice Alito stated that the report was not to be considered for its truth, but only for the purpose of seeing whether it matched something else.

Justice Alito further stated that even if the Cellmark report had been introduced for its truth, it would not have violated the Confrontation Clause. Justice Alito declared that statements which violate the Confrontation Clause share two characteristics: (1) they have the primary purpose of accusing a targeted individual of engaging in criminal conduct, and (2) they involve formalized statements such as affidavits, depositions, prior testimony, or confessions.⁴³ According to Justice Alito, the Cellmark report was not prepared for the primary purpose of accusing a targeted individual.⁴⁴ The primary purpose was not to specifically accuse Williams, or to create evidence for use at trial. Justice Alito stated that its primary purpose was "to catch a dangerous rapist who was still at large," not for use as evidence against Williams, who was neither in custody nor under suspicion at that time.⁴⁵ He reasoned that no one at Cellmark could have known that the profile would inculcate Williams, or anyone else whose profile was in the Illinois database. Justice Alito believed that there was no "prospect of fabrication" under such circumstances and "no incentive to produce anything other than a scientifically sound and reliable profile."⁴⁶ As such, according to Justice Alito, the report bore little resemblance to "the historical practices that the Confrontation Clause aimed to eliminate."⁴⁷

The Court did not produce a majority opinion in *Williams*. Justices Elena Kagan, Antonin Scalia, Ruth Bader Ginsburg, and Sonia Sotomayor dissented. In his separate opinion, Justice Clarence

41. *See id.* at 2228.

42. *See id.* at 2240.

43. *See id.* at 2242.

44. *See id.* at 2243.

45. *See id.* at 2243.

46. *See id.* at 2244.

47. *See id.*

Thomas concurred only in judgment with the plurality. He ultimately agreed that disclosure of the Cellmark report through Lambatos did not violate the Confrontation Clause.⁴⁸ However, Justice Thomas disagreed with the plurality's conclusion that statements introduced to explain an expert's opinion are introduced for a non-hearsay purpose.⁴⁹ Disclosing an out-of-court statement for the factfinder to evaluate an expert's opinion presents the same effect as disclosing it for its truth: the factfinder must still determine whether the information is true.⁵⁰ The validity of Lambatos' opinion turned on the truth of the statements contained in the Cellmark report. Specifically, the statements regarding the DNA profile being characteristic of a male donor and being found in semen from vaginal swabs were introduced for their truth.

Justice Breyer also wrote a separate opinion, even though he agreed with the plurality's decision that the trial court should allow Lambatos to rely on the Cellmark report as evidence to ground her expert opinion.⁵¹ Justice Breyer concurred primarily for practicality. Unlike the plurality, he understands the legitimate need in calling the original author of the report.⁵² Without that original author, an expert may inappropriately slip in hearsay evidence under the guise of her reliance on it while forming her expert opinion. Justice Breyer agrees with Justice Thomas in this regard. However, Justice Breyer seeks to avoid the inefficient practice of calling every single person who was potentially involved in the production of the report.⁵³ Because both the dissent and the plurality failed to present any alternative, Justice Breyer promotes the traditional yet "artificial" practice of allowing experts to introduce inadmissible basis evidence.⁵⁴

48. *See id.* at 2254. Justice Thomas took the position that the Cellmark statements were not testimonial solely because they lacked the characteristic of "formality and solemnity," which he believed was required under *Crawford*. As discussed below, Justice Thomas further disagreed with the plurality's newly created formulation of the primary purpose test, which required the statement to have the primary purpose of accusing a "targeted individual of engaging in criminal conduct." *See id.* at 2262.

49. *See id.* at 2257.

50. *See id.*

51. *Id.* at 2246.

52. *Id.*

53. *See id.* at 2246–47. Justice Breyer would prefer to follow the dissent in *Melendez-Diaz*, which promoted accepting the introduction of scientific analysis without testimony from the analyst who originally produced it. *See id.* at 2245; *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 330 (2009) (Kennedy, J., dissenting).

54. *See Williams v. Illinois*, 132 S. Ct. 2221, 2246 (2012). Justice Breyer urged to set the case for reargument because he did not believe the plurality nor the dissent adequately

Ultimately, the plurality opinion does not express the holding of *Williams*. Justice Alito's opinion captured the agreement of the necessary five justices only with respect to the case disposition. Five Justices reject every other aspect of Justice Alito's opinion.⁵⁵ Justice Thomas' concurrence is not the narrowest ground on which the *Williams* decision rests. It cannot be regarded as narrower than the plurality opinion because it is not a subset of it.⁵⁶ Justice Kagan's dissent is "only labeled a 'dissent' by convention."⁵⁷ The Supreme Court has previously declared, "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.'"⁵⁸ Consequently, *Williams* is an example of a decision where the only binding aspect is its specific result.⁵⁹

As this article discusses, the variety of views expressed by the U.S. Supreme Court leaves state courts, such as California's Supreme Court, with little structured guidance as to the evaluation of out-of-court statements sought to be introduced by the prosecution in criminal trials.

II. California's Post-*Williams* Cases: *People v. Lopez* and *People v. Dungo*

A. *People v. Lopez*

The California Supreme Court faced the admissibility of forensic reports through surrogate testimony in *People v. Lopez*. In *Lopez*, Virginia Hernandez Lopez drove a sport utility vehicle that collided with a pickup truck. The collision resulted in the pickup truck driver's death. Witnesses testified that while working at a restaurant in Julian, San Diego County, Hernandez Lopez consumed a single shot of tequila at 8:30 p.m., and two shots between 9:45 p.m. and 10:15 p.m. She left work shortly before 11:00 p.m. The traffic collision

addressed how the Confrontation Clause applies to forensic reports and the underlying technical statements written by laboratory technicians. See *id.* at 2244–45 (Breyer, J., concurring).

55. See *id.* at 2265 (Kagan, J., dissenting).

56. See *id.* at 2259 (Thomas, J., concurring).

57. See *People v. Lopez*, 286 P.3d 469, 485 (Cal. 2012) (Liu, J., dissenting).

58. *Id.* (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)).

59. See *id.* at 483.

occurred during her drive from work. At 1:04 a.m., two vials of blood were drawn from Hernandez Lopez for testing.

The prosecution alleged that Hernandez Lopez committed the offense of vehicular manslaughter while intoxicated. During the jury trial, San Diego County Sheriff's Regional Crime Laboratory criminalist, John Willey, testified that he had reviewed a report prepared by his colleague, Jorge Peña. Although he supposedly analyzed Hernandez Lopez's blood sample, Peña did not testify at trial. As described in Peña's report, Willey testified that Peña used a gas chromatograph to analyze the blood sample. Willey further testified that the report indicated that Hernandez Lopez's blood sample contained a blood alcohol content of 0.09 percent. Moreover, Peña's report was admitted into evidence.

Willey had been employed by the laboratory for over seventeen years, and knew its "procedures for processing blood samples for alcohol analysis."⁶⁰ He had trained Peña, and was "intimately familiar" with his procedures and how he tests blood for alcohol. According to Willey, "each of the people who work at the lab is trained to process blood alcohol analysis in the same manner."⁶¹ Willey added that based on his own "separate abilities as a criminal analyst," his conclusion was also that the BAC was 0.09 percent.⁶²

Based on the 0.09 percent figure, a toxicologist named John Treuting testified about the expected BAC of a person at the time of a traffic collision. Treuting extrapolated that a person who had a BAC of 0.09 percent two hours after that traffic collision would have had a BAC of 0.12 percent at the time of driving. Treuting further determined that it was impossible for the person to have a significantly lower BAC, based on a drinking pattern provided by Ms. Hernandez Lopez and the restaurant bartender.⁶³

Ms. Hernandez Lopez testified that she had two shots of tequila at the end of her work shift at the restaurant. A coworker, Jorge Acosta, corroborated the account provided by Hernandez Lopez. As she drove about fifty to fifty-five miles per hour, an oncoming car, with its highbeams illuminated, drove toward her in her lane. Hernandez Lopez became scared and steered to her right. Steering to the right was the last event that she could remember. Dr. Ian McIntyre of the San Diego County Medical Examiner's forensic

60. *See id.* at 471–72.

61. *Id.* at 472.

62. *Id.*

63. *See id.*

toxicology laboratory testified that the driver of the other car was intoxicated with a BAC of 0.11 percent.⁶⁴

The jury convicted Ms. Hernandez Lopez of vehicular manslaughter while intoxicated.⁶⁵ The Fourth District Court of Appeal affirmed the trial court's judgment. The California Supreme Court granted review, and transferred the case back to the court of appeal for reconsideration in light of *Melendez-Diaz*. On reconsideration, the court of appeal reversed the judgment of conviction, holding that admitting Peña's report into evidence and permitting Willey to testify about its contents violated Ms. Hernandez Lopez's right to confront Peña at trial.⁶⁶

Upon reviewing *Crawford*, *Melendez-Diaz*, *Bullcoming*, and *Williams*, the California Supreme Court acknowledged that the U.S. Supreme Court has not agreed on a definition of "testimonial" for *Crawford* purposes. However, with each case, the California Supreme Court focused on the U.S. Supreme Court's search for formality in the suspects' statements. The California Supreme Court summarized the reasons given in *Melendez-Diaz* for finding laboratory certificates testimonial and thus triggering *Crawford*. The California Supreme Court noted that:

each certificate was (1) a solemn declaration or affirmation made for the purpose of establishing or proving some fact, (2) functionally identical to live, in-court testimony, (3) made under circumstances which would lead an objective witness reasonably to believe that [it] would be available for use at a later trial, and (4) created to provide 'prima facie evidence of the composition, quality, and the net weight' of the substance found in the plastic bags seized. . . .⁶⁷

The California Supreme Court then reviewed *Bullcoming*, pointing out the formal character of the analyst's certificate in that particular case. According to the California Supreme Court, the U.S. Supreme Court in *Bullcoming* found the certificate was formalized in a signed document, which referred to state court rules that provide

64. *See id.* at 473.

65. *See id.*

66. *See id.*

67. *Id.* at 474 (citations omitted).

“for the admission of certified blood alcohol analyses.”⁶⁸ The Court in *Bullcoming* found these formalities “more than adequate” to qualify the report as testimonial in nature.⁶⁹

With its review of *Williams*, the California Supreme Court echoed the plurality’s decision to find a surrogate analyst’s testimony non-testimonial because it was admitted to explain the basis of her independent conclusion.⁷⁰ The California Supreme Court also pointed out that the plurality opinion in *Williams* decided that the primary purpose of the report was to find a dangerous rapist who was still at large, as opposed to accusing a specific targeted individual. The court noted that the U.S. Supreme Court plurality found this was insufficient to trigger Confrontation Clause protection.⁷¹

From its interpretation of the U.S. Supreme Court cases, the California Supreme Court in *Lopez* decided that the presence of two critical components make a statement “testimonial.” First, courts should evaluate whether a statement was made with some degree of formality or solemnity. The court cited language from *Crawford* (“a formal statement to government officers bears testimony”), *Melendez-Diaz* (“a solemn declaration or affirmation”), *Bullcoming* (“formalized in a signed document”), and *Davis v. Washington* (“formality is indeed essential to testimonial utterance”).⁷² Second, courts should consider whether the statement’s primary purpose relates to a criminal prosecution.⁷³

On the facts in *Lopez*, the court did not reach the primary purpose issue. The court found that Peña’s report was not made with the required formality or solemnity to be considered testimonial.⁷⁴ The court characterized each of the report’s six pages. The second page of the report was a printout of a gas chromatography machine’s calibrations on the day of the test. Peña’s signature appears on this page, and his initials appear on the remaining pages. Pages three and six were the quality control runs before and after the subject samples. Pages four and five showed two computer-generated numerical

68. *Id.* at 475 (citations omitted).

69. *Id.* (citing *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2712 (2011)).

70. *See id.*

71. *See id.* at 475–76.

72. *See id.* at 477 (citing *Crawford v. Washington*, 541 U.S. 36, 51 (2004); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009); *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2717 (2011); *Davis v. Washington*, 547 U.S. 813, 830 n.5 (2006)).

73. *See People v. Lopez*, 286 P.3d 469, 477 (Cal. 2012).

74. *See id.* at 479.

results (0.0906 and 0.0908) of two laboratory analyses of Hernandez Lopez's sample. The court determined that pages two through six consisted entirely of data generated by a machine. The court found that machine printouts do not violate the Confrontation Clause.⁷⁵

In the court's view, the first page of the report was the only page to present any Confrontation Clause issue. The first page contained a chain of custody log sheet showing the results of nine blood samples Peña tested on August 31, 2007. One of the blood samples belonged to Hernandez Lopez. The page contained handwritten information including the booking number, lab number, subject's name, arresting officer's name, and whether the sample was sealed, for each of the nine people who produced samples. The surrogate witness, Willey, testified that an assistant named Brian Constantino wrote this information. Constantino specifically wrote down Hernandez Lopez's name, laboratory number, date and time of collection, and date and time of receipt by the laboratory. Peña's initials appear in a box marked, "Analyzed by." The chart also includes the date on which the blood was analyzed and the results of the blood test as "0.09," indicating that Hernandez Lopez's sample tested at 0.09 percent BAC. In this chart, Peña wrote this information about Hernandez Lopez's BAC based on the content contained on the report's first page. Specifically, he relied on Constantino's designation of Hernandez Lopez's sample and the machine generated results for that particular sample. Constantino's written notes linking Hernandez Lopez's name to the particular blood sample was admitted for its truth.⁷⁶

The California Supreme Court found that Constantino's written notation did not meet the requisite level of formality or solemnity to be considered "testimonial" hearsay.⁷⁷ The court faulted the page for including neither Constantino's nor Peña's signature, certification, or swearing to the truth of the contents. The court distinguished Peña's report from the certificates in *Melendez-Diaz*, which were sworn before a notary by the testing analysts who had prepared them.⁷⁸ The court also highlighted the certificate in *Bullcoming* as formalized in a signed document that expressly referred to court rules for admissibility. The court characterized the written notation in Peña's report as "nothing more than an informal record of data for internal

75. *Id.* at 478.

76. *See id.*

77. *See id.*

78. *See id.* (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 308 (2009)).

purposes, as is indicated by the small printed statement near the top of the chart: ‘FOR LAB USE ONLY.’”⁷⁹ In the court’s view, this particular notation was not prepared with the formality required for testimonial statements.

B. *People v. Dungo*

In *People v. Dungo*, a companion case to *Lopez*, the California Supreme Court considered the testimony of the employer of a non-testifying pathologist.⁸⁰ The pathologist’s opinion was crucial to disprove the defense’s theory that Reynaldo Dungo acted in the heat of passion or in a sudden quarrel when he killed his ex-girlfriend, Lucinda Correia Pina.

After about a year in a romantic relationship, Dungo began exhibiting jealousy and hostility toward Pina. One night, Pina disappeared. Dungo was arrested and admitted to killing Pina. He told the police that they argued, and she punched him, pushed him, and threw children’s toys at him. He ultimately grabbed her by the throat and strangled her.

Before trial, the prosecution announced it would not call George Bolduc, the pathologist who performed Pina’s autopsy. Bolduc’s employer, Robert Lawrence, testified in a pretrial evidentiary hearing that Bolduc had been fired from his previous job as a Kern County coroner and resigned “under a cloud” from his position in Orange County. Lawrence referred to newspaper articles asserting that Bolduc was incompetent. Lawrence further indicated that prosecutors in several counties refuse to use Bolduc as a witness. However, Lawrence dismissed the criticisms, and testified that he had never personally seen any evidence that Bolduc did anything incompetent.

During trial, Lawrence did not testify about Bolduc’s opinion. Rather, Lawrence testified that he reviewed Bolduc’s autopsy report and accompanying photographs. Based on these materials and his independent opinion as a forensic pathologist, Lawrence concluded that Pina died from asphyxia caused by strangulation. Lawrence concluded “that Pina had ‘hemorrhages in the neck organs consistent with fingertips during strangulation’ and that she had ‘pinpoint hemorrhages in her eyes,’ indicating a lack of oxygen.” Lawrence further testified that “‘the purple color of her face,’ the ‘absence of

79. See *id.* (citing *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2717 (2011)).

80. See *People v. Dungo*, 286 P.3d 442, 445 (Cal. 2012).

any natural disease that can cause death,’ and the fact that Pina had bitten her tongue shortly before death” indicated strangulation as the cause of death. Lawrence finally opined that “Pina was strangled ‘for more than two minutes,’” based on her hyoid bone remaining intact. According to Lawrence, had a fracture occurred, “death could have occurred sooner.”⁸¹

Dungo testified that on the night he killed Pina, he told her that he was suspicious that she had resumed her relationship with another man named Isaac Zuniga. Pina and Dungo argued, and engaged in the back and forth dialogue described above. Dungo’s testimony supported the defense theory that he acted in a sudden quarrel or in the heat of passion—and without the element of malice aforethought which is required for murder. To counter the defense theory, the prosecutor relied on Lawrence’s testimony. Specifically, the prosecutor emphasized how Lawrence concluded that Pina was strangled for over two minutes, thus implying that Dungo could not have acted in the heat of passion for that length of time.

The jury convicted Dungo of second-degree murder. The court of appeal reversed the judgment, concluding that Lawrence’s testimony violated Dungo’s Sixth Amendment right to confront Bolduc.⁸² The California Supreme Court granted review.

As in *Lopez*, the California Supreme Court reviewed the same three U.S. Supreme Court cases applying *Crawford* to documents reporting laboratory findings of non-testifying analysts. The court focused on two critical components it believed were found in testimonial out-of-court statements: (1) whether the statement was made with some degree of formality or solemnity, and (2) whether the statement’s primary purpose pertained, in some fashion, to criminal prosecution. The court recognized that the Supreme Court justices have not agreed on what the statement’s primary purpose must be.⁸³

The California Supreme Court narrowed its analysis to the admission of Lawrence’s description of Pina’s body at the time of the autopsy.⁸⁴ This description was based on his review of Bolduc’s autopsy report and the accompanying photographs. The court evaluated whether these portions of Lawrence’s testimony should entitle Dungo to confront Bolduc.

81. *Id.* at 446.

82. *Id.* at 447.

83. *See id.* at 535.

84. *See id.* at 534–35.

As in *Lopez*, the court focused most on the formality evaluation articulated in the United States Supreme Court cases.⁸⁵ The California Supreme Court found that Bolduc's observations of Pina's body's condition were objective facts and less formal than statements setting forth the pathologist's expert conclusions. The court saw that Bolduc's statements were comparable to a physician's observations of a report by another physician who diagnosed a particular injury or ailment to determine the appropriate treatment based on the prior diagnosis. The court did not find such observations testimonial in nature.

III. Criticism of California's Requirement of Formality

As seen by the majority opinions in *Lopez* and *Dungo*, the California Supreme Court appears to have decided to evaluate two factors in its consideration of whether statements contained in forensic reports are testimonial hearsay.⁸⁶ First, the court requires that the statement be made with formality. Second, the court considers whether the statement's primary purpose pertained to criminal prosecution. The court confines its analysis to a search for these two factors, as if they are requisite elements for a statement to qualify as testimonial.

Of the two factors, the California Supreme Court overemphasized the importance of formality. The court in *Lopez* went so far as to terminate its analysis once it found that the report at issue was not sufficiently formal.⁸⁷ Practically speaking, the majority in *Lopez* would likely have been satisfied if mere labels of "certificate" or "attested" accompanied the analyst's notations.

The decision to rigidly focus on the formality factor does not appear to have come from U.S. Supreme Court precedent; it has never relied exclusively on a statement's lack of formality to conclude that it was not testimonial hearsay.⁸⁸ *Crawford* and its progeny have never limited its Confrontation Clause analysis to the level of formality of a statement.⁸⁹ The Court has no precedent basing its entire focus on a statement's formality to determine whether it is

85. See *id.* at 535–36.

86. See *People v. Lopez*, 286 P.3d 469, 477–78 (Cal. 2012); *People v. Dungo*, 286 P.3d 442, 449 (Cal. 2012).

87. See *Lopez*, 286 P.3d at 479.

88. See *id.* at 483 (Liu, J., dissenting).

89. See *id.* at 591.

testimonial.⁹⁰ Indeed, the Court has never determined that a statement's lack of formality alone would render it non-testimonial.⁹¹ And certainly, the Court has never terminated its analysis after only considering the formality of a particular statement.

In *Bullcoming*, the report at issue was unsworn.⁹² However, the Court recognized that “the absence of [an] oath [i]s not dispositive’ in determining if a statement is testimonial.”⁹³ The Court recalled that in *Crawford*, it had rejected any construction of the Confrontation Clause that would render inadmissible only sworn ex parte affidavits, while leaving admission of formal, but unsworn statements “perfectly OK.” Reading the Clause in this manner would make the right to confrontation “easily erasable.”⁹⁴ The Court further stated that the absence of notarization does not remove the analyst's certification from Confrontation Clause governance.⁹⁵

Notations of formality will not effectively cure unreliability in a forensic report. Analysts may make mistakes in gathering data or in performing the tests. An analyst must use independent judgment and skill in a variety of forensic tests.⁹⁶ Some methodology requires exercising judgment and presents risks of error that cannot be cured simply by adding the words “certified” or “sworn.” Such labels will not guarantee honesty, proficiency, or methodology. Adding mere labels such as “Certification” or “Attestation” do not make a statement formal to the level of sufficiently ensuring reliability.

Lab analysts remain human beings and are subject to aggressive or unscrupulous law enforcement officers who pressure them to change their procedures or results to conform to their investigations.⁹⁷ Scientific tests are not immune from manipulation.⁹⁸ Many labs are affiliated with police departments, and analysts may face pressure to skew interpretations and to alter results so that they favor police

90. See *id.* at 594.

91. See *id.*

92. See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2717 (2011).

93. *Id.*

94. *Id.*

95. *Id.* at 2716–17.

96. See Tara R. Price, “Bull” Coming from the States: Why the Supreme Court Should Use *Williams v. Illinois* to Close One of *Bullcoming*'s Confrontation Clause Loopholes, 39 FLA. ST. U. L. REV. 533, 541 (2012).

97. See Justin Chou, *Melendez-Diaz v. Massachusetts: Raising the Confrontation Requirements for Forensic Evidence in California*, 14 BERKELEY J. OF CRIM. L. 439, 449–50 (2009).

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

investigation.⁹⁹ They may even cut corners and sacrifice adhering to precise methodology in order to expedite the testing. In sum, a wide variety of forensic science is subject to errors. The National Research Council of the National Academies has documented problems of “subjectivity, bias, and unreliability of common forensic tests such as latent fingerprint analysis, pattern/impression analysis, and toolmark and firearms analysis.”¹⁰⁰

Jurors consider scientific test results to have significant credibility.¹⁰¹ However, scientific tests are not inherently neutral.¹⁰² Not only may scientists improperly perform the tests, but sometimes the tests rely upon outdated science. For example, in 2004, the National Academy of Sciences found that the FBI’s comparative bullet lead analysis was unreliable, despite its widely accepted use for decades.¹⁰³ Similarly, the National Academy released a report criticizing many laboratories for their analyses of fingerprinting, firearms identification, bite marks, blood spatter, hair, and handwriting.¹⁰⁴ Faulty or discredited forensic science has caused a large proportion of false convictions.¹⁰⁵ The National Academy of Sciences consequently proclaimed that a “national commitment to overhaul” the forensic science system is necessary.¹⁰⁶ The National Academy of Sciences’ findings support the danger in accepting the analyses of laboratories at face value. No mere formalized stamp of approval will prevent deficiencies and unreliability in forensic examination procedures themselves, or make any laboratory technician infallible.

In *Melendez-Diaz*, the affidavits demonstrated that the mere label of “affidavit” failed to ensure proper and reliable testing.

99. *See id.* at 318–19.

100. *See id.* at 320–21 (citing NAT’L RES. COUNCIL OF THE NAT’L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 138–39, 142–43, 154–55 (2009)).

101. *See Price, supra* note 96, at 542 (citing NAT’L RES. COUNCIL OF THE NAT’L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 48–49 (2009)).

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

103. *See Price, supra* note 96, at 540 (citing John Solomon, *FBI’s Forensic Test Full of Holes*, WASH. POST, Nov. 18, 2007, at A1).

104. *See id.* at 540–541 (citation omitted).

105. *See Melendez-Diaz*, 557 U.S. at 319 (citing Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 491 (2006)).

106. *See* Jesse J. Norris, *Who Can Testify About Lab Results after Melendez-Diaz and Bullcoming?: Surrogate Testimony and the Confrontation Clause*, 38 AM. J. CRIM. L. 375, 410–11, 421 (2011) (citation omitted).

Specifically, the affidavits did not contain information about “what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or use of skills that the analysts may not have possessed.”¹⁰⁷ The Court rejected any suggestion that the testing was neutral and minimized the need for confronting the analyst that performed the tests in question¹⁰⁸ The Court even acknowledged the existence of more effective ways to challenge the results of forensic tests. However, the Court declared that confrontation of the analyst was the absolute method guaranteed by the Constitution.

Problems of unreliability cannot be easily cured by allowing the defense to subpoena the analysts who wrote the certificates. First and foremost, this proposition improperly shifts the burden of the prosecution’s duty to the defense.¹⁰⁹ Second, the advantages of cross-examination, over direct examination, include spontaneous testimony that would yield honest answers. Cross-examination of an analyst may encourage them to tell the truth on the witness stand.¹¹⁰ Even if cross-examination of an analyst proved ineffectual in a particular case, the prospect of confrontation would help deter improper practices by analysts in the first place.¹¹¹

Moreover, as Justice Kagan warned, focusing on the ultimate format of a lab report “grants constitutional significance to minutia, in a way that can only undermine the Confrontation Clause’s protections.”¹¹² Prosecutors and police agencies could avoid the demands of the Confrontation Clause by using certain kinds of forms with certain language, or by never labeling anything a certificate. This is precisely why it is much more meaningful to examine the process from which the statements were generated. The absence of such labels reveals nothing about whether the statements were generated in a formal manner to suggest that they were testimonial.¹¹³ In the end, defendants must be afforded the opportunity to cross-examine analysts to find errors or falsification.

107. *Melendez-Diaz*, 557 U.S. at 320.

108. *See id.* at 318.

109. *See id.* at 324–25.

110. *See id.* at 319.

111. *See id.*

112. *Williams v. Illinois*, 132 S. Ct. 2221, 2276 (2012).

113. *See People v. Lopez*, 286 P.3d 469, 488 (Cal. 2012) (Liu, J., dissenting).

A. Primary Purpose: The More Revealing Factor

Crawford jurisprudence actually indicates that the proper determination for whether a statement is testimonial depends more on the nature and purpose of the process that generated the statement than on the statement's format.¹¹⁴ *Crawford* itself explained that the original concern behind the Confrontation Clause was "the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused."¹¹⁵ Specifically, it served to guard against ex parte examinations by the government outside of the defendant's presence. The determination of what constitutes such an ex parte examination would focus on the process through which a statement was generated, not the statement's mere format or appearance. One of the testimonial hearsay definitions discussed in *Crawford* encompasses this concept's consideration of whether the statement was made under circumstances that would lead an objective witness to reasonably believe that it would be available for use at a later trial. Subsequent to *Crawford*, the Supreme Court continued to evaluate the context in which the statement was made and the purpose for which it was produced.¹¹⁶

Lower courts presently engage in a two-part analysis when deciding if a statement is testimonial for Confrontation Clause purposes.¹¹⁷ First, the recipient of the statement must be a state actor, and the Court described the state actors to those who perform an "investigative and prosecutorial function." This requirement provides protection from state actors who manipulate evidence, as well as the abuses of inquisitorial style prosecutions.¹¹⁸ The focus on governmental involvement in the production of evidence prevents prosecutorial abuse.¹¹⁹ The Court in *Crawford* was concerned with statements made by the accused to government officials; it is these statements to government officials that "bear testimony" in the manner against which the Confrontation Clause was designed to protect. This protection serves as the entire reason behind the

114. *See id.* at 486.

115. *Crawford v. Washington*, 541 U.S. 36, 50 (2004).

116. *See Davis v. Washington*, 547 U.S. 813, 830 (2006); *Michigan v. Bryant*, 131 S. Ct. 1143, 1160 (2011).

117. *See Keenan, supra* note 17, at 828.

118. *See id.* at 830.

119. *See People v. Lopez*, 286 P.3d 469, 486 (Cal. 2012) (Liu, J., dissenting) (citing *Crawford v. Washington*, 541 U.S. 36, 56 n.7 (2004)).

Confrontation Clause, and consideration of a statement's purpose falls squarely within this context.

Second, lower courts evaluate the circumstances surrounding the statement.¹²⁰ *Crawford's* three definitions of testimonial—and the added fourth definition from *Davis v. Washington*—serve as illustrations or examples rather than rigid instructions by the Court. Evaluations by courts should be primarily guided by the concern of preventing the government from using statements obtained through a “civil law mode of interrogation.”¹²¹ The courts should consider whether the circumstances resemble situations where declarants are questioned unilaterally by government agents about matters that will be at issue in later prosecutions.

In a series of Confrontation Clause cases decided after *Crawford*, the U.S. Supreme Court has focused on the primary purpose for which a statement was made. This is the fourth definition of testimonial, as articulated in *Davis v. Washington*.¹²² In *Davis*, and its companion case of *Hammon v. Indiana*, the Court addressed the particular application of the primary purpose evaluation of statements made in response to an ongoing emergency. Both cases involved domestic violence incidents; both were decided separately.

In *Davis*, the victim, Michelle McCottry, did not testify at trial. The prosecution introduced her 911 call, which included statements that Adrian Davis physically abused her. The Supreme Court found this 911 call admissible.¹²³ The Court said that statements in response to police interrogation “are testimonial when the circumstances objectively indicate . . . that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”¹²⁴ The Court contrasted the 911 call with the interview taken in *Crawford*. In *Crawford*, the declarant's responses in a stationhouse interview were recorded. The Court in *Davis* did not evaluate the formality with which the 911 call was memorialized.¹²⁵ Instead, the Court focused on the caller's frantic demeanor and her presence in a potentially unsafe environment. The Court highlighted the urgent situation for the caller and the likely need to resolve an emergency, rather than reveal what had happened

120. See Keenan, *supra* note 17, at 830.

121. See *Crawford*, 541 U.S. at 51–52.

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

123. See *id.* at 819.

124. See *id.* at 822.

125. See *id.* at 827.

in the past. The Court ultimately found that the primary purpose of eliciting the statements was to facilitate police response to the emergency—not to provide testimony as a witness. It was this evaluation of the statement’s primary purpose upon which the Court’s decision rested.

In *Hammon v. Indiana*, the companion case to *Davis*, police officers met with Amy Hammon at her home in response to a domestic disturbance call.¹²⁶ The officers separated her from her husband, Hershel Hammon, and asked her what happened. She stated that Hammon had beaten her, and signed an affidavit which attested to her accusation. The victim’s statements were not recorded, sworn, or certified in any formal manner.

The Court found that the statements and affidavit were inadmissible.¹²⁷ It placed little emphasis on the lack of formality of the circumstances around taking the statement. The Court noted that the victim answered the police officer’s questions for purposes of his investigation. The questioning took place in a room where the victim was separated from the suspect. With Amy Hammon’s statements, the Court saw a “striking resemblance” to the statement described in *Crawford* as the civil law *ex parte* examinations. The Court emphasized that the police deliberately separated both declarants from the suspect during the interviews. Both statements described how the past events began and progressed. Both statements were taken at a time after the events had concluded. The Court declared that these statements were a clear substitute for live testimony. Thus, the Court’s decisions demonstrated its focus on the process by which an out-of-court statement was created, and not on its formal appearance.

As seen with its review of two different statements in the same decision, the Court in *Davis* dispelled any suggestion that prior cases, including *Crawford*, may have emphasized formality.¹²⁸ The Court stated that formality is not dispositive in determining whether a statement is testimonial. The Court reiterated that statements violating the Confrontation Clause should not be limited to prior formal court testimony and depositions. According to the Court, a note-taking police officer reciting unsworn hearsay is as testimonial as the admission of a deposition signed by a declarant.¹²⁹ The California

126. See *id.* at 819-20.

127. See *id.* at 834.

128. See Keenan, *supra* note 17, at 800.

129. See *Davis v. Washington*, 547 U.S. 813, 823–26 (2006).

Supreme Court would have reached a different decision regarding the testimonial character of the statements at issue in *Dungo* and *Lopez*, if it had minimized the significance of formality as a determinative factor.

B. *Bryant*: Formality is Not the Sole Touchstone of Testimonial Hearsay

The U.S. Supreme Court in *Michigan v. Bryant* considered the scope of *Davis*' primary purpose test.¹³⁰ In *Bryant*, the prosecution introduced the testimony of police officers who had questioned the decedent immediately prior to his death. When asked who had shot him, the victim responded that Rick had shot him. The Court found the statement to be non-testimonial, reasoning that the primary purpose of the statement was to assist the police in response to an ongoing emergency.

According to the Court, this ongoing emergency centered on the officers and the general public, rather than on the victim himself.¹³¹ At the time they obtained the statements, the police had limited knowledge of the incident.¹³² They did not know how, why, where, or when the shooting had occurred. They did not know the location of the shooter, or anything else about the circumstances surrounding the crime. By contrast, officers who already have knowledge about an incident, and believe that it involved criminal activity, are more likely to obtain statements for prosecutorial use.

Although it expanded the ongoing emergency reasoning from *Davis*, *Bryant* did not provide a new definition of a testimonial statement. The Supreme Court applied the same consideration of the statement's primary purpose as in *Davis*.¹³³ The Court instructed lower courts to objectively determine the primary purpose of the questioning, considering all of the surrounding circumstances, including the characteristics of the declarant and the questioner.¹³⁴

In *Bryant*, the Court continued to de-emphasize formality as dispositive for the determination of whether a statement is testimonial.¹³⁵ Although formality was a factor to be considered, it

130. See *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011).

131. See *id.* at 1166–67.

132. See *id.* at 1165.

133. See *id.* at 1154.

134. See *id.* at 1150.

135. See *id.* at 1160.

was not a decisive factor.¹³⁶ The formality in an encounter between a witness and a police officer may inform the primary purpose of the interview.¹³⁷ As in *Davis*, the statement in *Bryant* was not recorded or memorialized in any formal manner. The Court also noticed the other informal circumstances surrounding the statement. Specifically, the questioning occurred in a disorganized manner, and in an exposed, public area before the arrival of an ambulance.¹³⁸ However, none of these factors precluded the Court from finding that the statement was testimonial. The Court stated, “although formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to ‘establish or prove past events potentially relevant to later criminal prosecution,’ informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent.”¹³⁹ *Bryant*, then, is additional Supreme Court precedent that the California Supreme Court—as well as the *Williams* plurality—ignored, all while overemphasizing a statement’s formality in Confrontation Clause analysis.

C. California’s Lack of Emphasis on Formality in *Cage* and *Geier*

Prior to *Lopez* and *Dungo*, the California Supreme Court had not emphasized a statement’s formality as a primary factor in Confrontation Clause analysis. In 2007, the court in *People v. Cage* reviewed an unsworn statement by an assault victim in a hospital emergency room.¹⁴⁰ The declarant’s words were not audio recorded or memorialized in an affidavit or sworn statement. The declarant was asked a single question. This question called for, and elicited, “a considered and detailed narrative response.”¹⁴¹ The court found the circumstances no less formal or structured than the residential interview of the declarant in *Davis*.¹⁴² The court considered the mere potential criminal consequence of lying to a police officer as formalizing the statement. All of the other circumstances negated the formality of the statement. Despite these detracting circumstances, the court found the statement testimonial.

136. *See id.*

137. *See id.* at 1166.

138. *See id.* at 1158.

139. *See id.* at 1160.

140. *See People v. Cage*, 155 P.3d 205, 218–19 (Cal. 2007).

141. *See id.* at 218 n.16.

142. *See id.* at 218.

Prior to *Melendez-Diaz*, the California courts relied on the 2007 case of *People v. Geier* in reviewing whether the admission of statements contained in forensic reports violated the Confrontation Clause.¹⁴³ In *Geier*, the California Supreme Court reviewed a DNA report that implicated the defendant as the perpetrator of a sexual assault. The original analyst of the DNA testing did not testify at trial. Instead, the supervisor of the original analyst testified as a surrogate witness. The prosecution introduced the contents of the original analyst's report and the supervisor was permitted to rely on it as an expert witness.

The court in *Geier* relied mostly on the opinions of various state courts, but also considered the decisions of *Crawford* and *Davis*.¹⁴⁴ The court formulated a three part test, declaring: "a statement is testimonial if (1) it is made by a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial."¹⁴⁵ The court in *Geier* held that a statement is non-testimonial if it does not meet all three criteria.

The DNA report in *Geier* satisfied the first prong because it was requested by a law enforcement agency.¹⁴⁶ The report also satisfied the third prong because it was prepared for a criminal trial.¹⁴⁷ However, the court did not believe that the report satisfied the second prong.¹⁴⁸ According to the court, a statement's possible use at a later trial is an important—but not the *sole*—consideration. The court found that the report did not describe a past fact related to criminal activity. Instead, it appeared to contemporaneously describe a fact because the analyst prepared it as she performed the tests.¹⁴⁹ The court said that the report thus resembled a 911 call in which the declarant relayed present events.¹⁵⁰ The court held that the report

143. See *People v. Geier*, 61 P.3d 104 (Cal. 2007).

144. See *id.* at 134–40 (citing *State v. Caufield*, 722 N.W.2d 304, 309 (Minn. 2006); *People v. Lonsby*, 707 N.W.2d 610, 619 (Mich. 2005); *Las Vegas v. Walsh*, 124 P.3d 203, 208 (Nev. 2005); *State v. Crager*, 844 N.E.2d 390, 398–399 (Ohio 2005); *State v. Miller*, 144 P.3d 1052, 1058 (Or. 2006)).

145. See *id.* at 139–40.

146. See *id.* at 139.

147. See *id.*

148. See *id.*

149. See *id.* at 139–40.

150. See *id.* at 139.

was non-testimonial hearsay, and did not violate the Confrontation Clause.¹⁵¹

It appears that *Geier* will not survive much longer in the wake of *Melendez-Diaz*.¹⁵² In *Lopez*, the California Supreme Court commented that under *Geier*, it would have treated Peña's report as non-testimonial for *Crawford* purposes. However, the Court in *Lopez* acknowledged that *Melendez-Diaz* determined a laboratory report "may be testimonial, and thus inadmissible, even if it 'contains near-contemporaneous observations of [a scientific] test.'"¹⁵³ This acknowledgement suggests that *Melendez Diaz* undermines the reasoning and holding of *Geier*.

The key takeaway from *Geier* is that the California Supreme Court did not rely on the statement's formality to determine whether it was testimonial. The report at issue in *Geier* lacked any sort of formality. It was not sworn before a notary. The only manner in which the original analyst's finding was made formal was when the surrogate witness testified about them under oath.¹⁵⁴

IV. A Call for Guidance

A. The Plurality's Errors

The U.S. Supreme Court's failure in *Williams* to provide helpful guidance is partly to blame for the California Supreme Court's decisions in *Dungo* and *Lopez*. If the Court in *Williams* adhered to its prior precedent, other courts such as the California Supreme Court may not have approached the admissibility of statements contained in forensic reports with such an unbalanced consideration of their formality. The court in *Dungo* practically threw up its arms and expressed frustration over the "widely divergent views" in *Williams* which "highlight the complexity of the issue" of how to determine whether a statement is testimonial.¹⁵⁵

But, buried within *Williams* is the appropriate guideline for evaluating forensic reports in the context of Confrontation Clause jurisprudence: In determining the admissibility of statements contained within forensic reports, Justices Kagan, Scalia, Ginsburg, and Sotomayor agreed that the question for courts to ask is: "whether

151. See *id.* at 140.

152. For an analysis of *Geier* after *Melendez-Diaz*, see Chou, *supra* note 97, at 463–67.

153. *People v. Lopez*, 286 P.3d 469, 477 (Cal. 2012).

154. See *People v. Geier*, 161 P.3d 104, 139 (Cal. 2007).

155. See *People v. Dungo*, 286 P.3d 442, 448 (Cal. 2012).

a statement was made for the primary purpose of establishing ‘past events potentially relevant to later criminal prosecution’—in other words, for the purpose of providing evidence.”¹⁵⁶ *Davis*, *Bullcoming*, *Bryant*, *Melendez-Diaz*, and *Crawford* have all considered this same question.¹⁵⁷ In Justice Kagan’s words, these “precedent[s] cannot sensibly be read any other way.”¹⁵⁸ Even Justice Thomas agreed that “for a statement to be testimonial within the meaning of the Confrontation Clause, the declarant must primarily intend to establish some fact with the understanding that his statement may be used in a criminal prosecution.”¹⁵⁹

Melendez-Diaz suggests that the key is the objective purpose of the statements.¹⁶⁰ This “evidentiary primary purpose test” contemplates exactly what the Framers had in mind with the protection of the Sixth Amendment: statements by witnesses against the accused.¹⁶¹ In *Melendez-Diaz*, the laboratory certificates at issue were considered testimonial statements because they had a clear “evidentiary purpose.”¹⁶² They really only served for use in trial. The Court used the original *Crawford* language to find that the statements were “made under circumstances which would lead an objective witness reasonably to believe that they would be available for use at a later trial.”¹⁶³

Similarly, the Court in *Bullcoming* found that the forensic report at issue was designed to prove some fact in a subsequent criminal proceeding.¹⁶⁴ As discussed *supra*, the report indicated the defendant’s blood alcohol content. Additionally, the prosecution at trial introduced the report through the testimony of a person who worked at the laboratory but had neither observed the blood test, nor

156. *Williams v. Illinois*, 132 S. Ct. 2221, 2273–74 (2012) (Kagan, J., dissenting).

157. See *Davis v. Washington*, 547 U.S. 813, 822 (2006); *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2717 (2011); *Michigan v. Bryant*, 131 S. Ct. 1143, 1155–56, 1160 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310–11 (2009); *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004).

158. *Williams*, 132 S. Ct. at 2268 (Kagan, J., dissenting).

159. *Id.* at 2261 (Thomas, J., concurring).

160. See *Melendez-Diaz*, 557 U.S. at 310–11.

161. See *People v. Lopez*, 286 P.3d 469, 490 (Cal. 2012) (Liu, J., dissenting) (citing *Davis v. Washington*, 547 U.S. 813, 822 (2006); *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2717 (2011); *Michigan v. Bryant*, 131 S. Ct. 1143, 1157 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310–11 (2009); *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004)).

162. See *Melendez-Diaz*, 557 U.S. at 311.

163. *Id.*

164. See *Bullcoming*, 131 S. Ct. at 2714–15.

certified its results. In finding that the results were “made for the purpose of establishing or proving some fact,” the Court was evaluating the statement’s “primary purpose.”¹⁶⁵ The Court in *Bullcoming* found the report to be testimonial because it was created solely for an “evidentiary purpose . . . made in aid of a police investigation.”¹⁶⁶

Yet Justice Alito departs from the guidelines of *Crawford* and its progeny and amends the primary purpose consideration by requiring that the statement be made with “the primary purpose of *accusing a targeted individual* of engaging in criminal conduct.”¹⁶⁷ The statement at issue involved the DNA comparison results of the defendant and the sample taken from the victim. According to Justice Alito, the DNA comparison was prepared before any suspect was identified and its contents were not prepared for the purpose of targeting the defendant or any specific person engaged in criminal conduct.¹⁶⁸

Five other justices rejected Justice Alito’s rationale.¹⁶⁹ His test does not derive from the text or history of the Confrontation Clause. None of the prior cases have suggested that the statement must accuse a previously identified suspect. It would be unrealistic to say the purpose of a DNA report is to “catch a dangerous rapist who was still at large,” as if to address an ongoing emergency.¹⁷⁰ The surrogate witness, Lambatos, testified that all the reports were prepared for criminal investigation and for the purpose of eventual litigation. The police did not send the samples to Cellmark until nine months after the rape. The results were received four months after the samples were sent. The timing of the statements establishes that they did not address an ongoing emergency.

Justice Alito also incorrectly suggested that testimony about the source of DNA samples and the laboratory’s methodology was not testimonial because it was not offered for its truth.¹⁷¹ Justice Alito reasoned that these out-of-court statements were offered merely to

165. *See id.* at 2717.

166. *Id.*

167. *Williams v. Illinois*, 132 S. Ct. 2221, 2225 (2012) (Alito, J., plurality) (emphasis added).

168. *See id.* at 2243.

169. *See id.* at 2273 (Kagan, J., dissenting).

170. *See id.* at 2274 (Kagan, J., dissenting).

171. *See id.* at 2228 (Alito, J., plurality).

explain the assumptions upon which the prosecution expert witness based his opinion.¹⁷²

The four dissenting justices—and even Justice Thomas in his concurrence—rejected this argument.¹⁷³ The report upon which an expert relies does not exist in a vacuum.¹⁷⁴ The report is prepared for a specific criminal trial for a specific defendant. The report contains statements which will be used to prove an essential part of a crime. Essentially, the expert would testify, “I conclude that the defendant is the perpetrator because a reliable lab says the perpetrator has a particular DNA profile, and the defendant has the identical DNA profile.” The statement has no purpose separate from its truth; its utility is dependent on its truth.¹⁷⁵ If the statement is true, then the conclusion based on it is true. If the statement is false, then the conclusion will necessarily be false. It is not as if the report must be activated by other evidence. Accordingly, one critic suggests, “when an expert’s basis evidence is testimonial, cross-examining the expert cannot be deemed a constitutionally adequate substitute under *Crawford* for being able to confront whoever actually issued the testimonial statements.”¹⁷⁶ The prosecution may not ignore the constitutional right of confrontation by introducing impermissible evidence through the guise of an expert’s basis evidence.¹⁷⁷

The Court in *Melendez-Diaz* saw through the attempt to introduce the forensic report by the overly simplistic characterization that it was innocuous by itself, and that it did not accuse the defendant of wrongdoing.¹⁷⁸ The Court saw the report’s testimonial character as it clearly showed that the substance at issue contained illegal narcotics, which, of course, supports a finding of guilty for the narcotics-related offense.¹⁷⁹ How do the jurors evaluate the drug analysis through the expert witness? The trial court should have permitted the jurors to assess the truth of the basis evidence, but

172. See *id.* at 2242–44.

173. See *id.* at 2256 (Thomas, J., concurring).

174. See Chou, *supra* note 97, at 460.

175. See *Williams*, 132 S. Ct. at 2268 (Thomas, J., concurring).

176. See Norris, *supra* note 106, at 408–409 (citing Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause after Crawford v. Washington*, 15 J.L. & POL’Y 791, 834 (2007)).

177. See Chou, *supra* note 97, at 460–61.

178. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 (2009).

179. See *id.*

could not because the author of the basis evidence avoided confrontation.

In California, the criminal jury instruction on expert witnesses clearly guides jurors to determine whether the information on which experts rely is true and accurate.¹⁸⁰ This instruction directs jurors to separate the reports or other basis evidence from the expert's live testimony. The weight given to the expert is dependent on the substance of the underlying information. Even if the prosecution introduced the analysis in the forensic report through an expert's opinion, it should still be independently presented to the jury.¹⁸¹

This practice makes sense because outside experts—unfamiliar with the procedures and customs of the particular lab—are unlikely to detect errors or provide information about whether the correct methodology was applied because they do not have direct knowledge of the actual performance of the examination that produced the result.¹⁸² Otherwise, experts would only presume the validity of the test results based on faith. Consequently, unsophisticated jurors would similarly presume validity of a report without a presentation by the original analyst. Unless the reports are separately presented, the information would go untested by cross-examination.

Even if the surrogate witness who testified in lieu of the original analyst is an analyst from the same lab as the original analyst, his testimony would not satisfy the confrontation requirement.¹⁸³ On the extreme end, the surrogate witness would not have any way of knowing if the original analyst fraudulently altered test results. Even if the original analyst was honest and possessed good intentions, there is no guarantee that she was competent and infallible.¹⁸⁴ The concern with laboratory witnesses typically may not involve personal agendas against suspects, but rather, issues of carelessness. A significant danger exists with the surrogate witness basing his decision on erroneous work by the original analyst.¹⁸⁵ It would be impossible to uncover any error because the surrogate would be testifying to

180. See JUD. COUNCIL OF CAL., CRIMINAL JURY INSTRUCTIONS § 332 (2013) (stating, “You must decide whether information on which the expert relied was true and accurate.”); see also Chou, *supra* note 97, at 460–61.

181. After *Lopez* and *Dungo*, at least one court of appeals characterizes such basis evidence as being introduced for its truth. See *People v. Westmoreland*, 213 Cal. App. 4th 602, 623–24 (2013).

182. See Norris, *supra* note 106, at 412.

183. See *id.* at 400.

184. See Price, *supra* note 96, at 559.

185. See *id.*

something he did not personally observe.¹⁸⁶ For example, in *Bullcoming*, the original analyst certified in the report that the sample was sealed until opened in the lab, that his statements were correct, that he had followed all procedures, and that no circumstance affected the validity of the analysis.¹⁸⁷ The Supreme Court stated that the original analyst did more than act as a “mere scrivener.”¹⁸⁸ A surrogate cannot testify about the original analyst’s knowledge of the events that his certification concerned, or expose any lapses in judgment or lies by the original analyst.¹⁸⁹

Even if the surrogate were the director of the laboratory—and familiar with the laboratory’s standard procedures and analysts—cross-examination of anyone other than the original analyst would not satisfy the right to confrontation.¹⁹⁰ Lab supervisors who act as surrogates have incentives to come to the same conclusion as the original analyst.¹⁹¹ When crime labs are funded and administered by a police agency, supervisors may be influenced by bias or fear of disfavor, and may be unwilling to depart from the original result when it is incriminating. More importantly, a supervisor’s dispute with the analyst’s work may necessitate an investigation of the entire lab’s competence. Numerous convictions may be reversed based on the loss of the lab’s integrity. A supervisor who trained the original analyst may be disinclined to admit errors in the analyst’s work because it would reflect negatively on her training. Moreover, because of the personal relationship the supervisor may have with the analyst, he may be less likely to apply a stringent standard to his analysis. Based on the multiple repercussions of a supervisor disputing the original analyst’s work, it is unlikely that he would ever arrive at a different conclusion.

Even if the laboratory supervisor were proficient in analysis, his surrogate testimony for the original analyst would fail to provide information needed to determine the accuracy of the test results. Typically, the supervisor merely reviews and approves the testing analyst’s report.¹⁹² In some cases, the supervisor may even only

186. *See id.*

187. *See Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2714 (2011).

188. *See id.*

189. *See Norris*, *supra* note 106, at 387.

190. *See id.* at 401.

191. *See id.* at 419–20.

192. *See id.* at 400–01.

rubber stamp the results.¹⁹³ *Melendez-Diaz* only allowed for the original analyst to satisfy the confrontation requirement.¹⁹⁴ The only time a supervisor could serve as a legitimate surrogate would be when he actually observed the entire test and would consequently be able to verify all of the analyst's representations.

Additionally, in those cases when a prosecutor deliberately chooses not to call the original analyst because of a problem with her qualifications, the surrogate would not be in the position to reveal such problems. Take the history of the pathologist in *Dungo*: Dr. Bolduc specifically had been fired from the agency that performed the autopsy in the case; he was forced to resign from another agency; he falsified his resume; and he faced accusations of incompetence.¹⁹⁵ Often, prosecutors will seek to use surrogate witnesses to avoid calling witnesses with tarnished records.¹⁹⁶ Courts should not allow prosecutors to call a substitute witness and deprive jurors from considering the original analyst's credibility. How is it fair for a prosecutor to conceal the truth about the original analyst by calling a surrogate witness who may claim ignorance about his predecessor's deficiencies?¹⁹⁷

B. The Errors of *Lopez* and *Dungo*

If *Williams* more clearly directed courts to evaluate statements for Confrontation Clause purposes, would *Lopez* and *Dungo* have resulted differently? The California Supreme Court lamented that the U.S. Supreme Court "has not agreed on a definition of 'testimonial.'"¹⁹⁸ Without proper guidance from the United States Supreme Court, the California Supreme Court focused primarily on the consideration of whether a statement was made with formality or solemnity. Implementing the formality consideration into the Confrontation Clause evaluation, the Court in *Lopez* swiftly dismissed the blood alcohol report as non-testimonial because it was not made with formality or solemnity. Similarly, the Court in *Dungo* did not see the autopsy report at issue as containing statements made with formality because it merely recorded objective facts, rather than

193. See *id.* at 419–20.

194. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009); Norris, *supra* note 106, at 400.

195. See *People v. Dungo*, 286 P.3d 442, 445 (Cal. 2012).

196. See Norris, *supra* note 106, at 396–97.

197. See *id.* at 404.

198. See *People v. Dungo*, 286 P.3d 442, 448 (Cal. 2012).

expert conclusions. As discussed above,¹⁹⁹ the focus on formality does not perfectly reflect the sort of statement that should trigger Confrontation Clause concern.

Even with these curious descriptions of the forensic reports at issue in *Dungo* and *Lopez*, the reports in both cases contain statements that have the primary purpose of being used for criminal prosecution. First, the Court in *Dungo* could not deny that the autopsy reports were prepared primarily for criminal prosecution (as is the case for all autopsy reports). It suggested other possible uses of autopsy reports, including use by a family deciding to file a wrongful death action or by an insurance company to determine if the death is covered by the terms of a policy. In California, the law regulates autopsies and the preparation of autopsy reports.²⁰⁰ While there may be multiple uses for an autopsy report after its completion, the primary purpose of an autopsy report is to determine whether a homicide occurred. That is, whether foul play occurred in the death of a human being. The later and ultimate decision to file a criminal case involving the death is immaterial to the original purpose of the autopsy.

The Court also conceded that several additional facts support the particular autopsy report was prepared for the purpose of criminal prosecution.²⁰¹ First, a detective was present when Bolduc, the pathologist, performed the autopsy. Second, the law required that Bolduc notify the police if he determined that there were reasonable grounds to suspect the death was a homicide. This particular instruction to the pathologist suggests that the autopsy's purpose is closely intertwined with a police investigation. Third, the case detective disclosed *Dungo*'s confession to Bolduc before he wrote the autopsy report. This disclosure suggests no other purpose than to influence Bolduc with his findings in favor of the criminal prosecution of *Dungo*. Each of these facts shows that the autopsy and its report are specifically connected to the police investigation and ultimate criminal prosecution of *Dungo*.

Similarly, in *Lopez*, the primary purpose of the blood alcohol analysis was undoubtedly for criminal prosecution. Peña, the non-testifying analyst, was an employee of the San Diego County Sheriff's Regional Crime Laboratory, a state-licensed forensic alcohol

199. See *supra* Section III.

200. See CAL. GOV'T. CODE § 27491 (2012) (requiring coroner to "inquire into and determine the circumstances, manner, and cause" of death).

201. See *Dungo*, 286 P.3d at 449–50.

laboratory under the control of the San Diego Sheriff's Department.²⁰² This government laboratory received Hernandez Lopez's blood sample from the California Highway Patrol, the state's primary law enforcement agency. The specific log sheet was produced purely with as much governmental involvement as the recorded interview at the police station at issue in *Crawford*.²⁰³ The government's involvement is apparent from the licensing requirements of the crime laboratory by California's Department of Public Health, the analyst's qualifications, the testing methodology, and the record keeping.²⁰⁴ Errors in the log sheet can be compared to mistaken statements or lies made to police officers. There are sanctions for errors by analysts just as there are sanctions for perjury by witnesses.

The majority in *Lopez* narrowed its decision to consider a single page of the report because the remaining pages (two through six) were machine printouts deemed to be non-testimonial. Yet courts should not automatically dismiss machine printouts as non-testimonial statements. The term "raw data" as contained on machine printouts is misleading.²⁰⁵ The generation of raw data is rarely dependent exclusively on a machine. The data is not self-automated, and certainly does not produce itself. In fact, humans are involved in the creation of most forensic data. When using machines to obtain results, analysts engage in a methodology involving multiple steps. An analyst must adhere to complex procedures for which he is required to be extensively trained.²⁰⁶ Typically, the machine must be calibrated by the analyst. Precautions must be taken by analysts to prevent contamination. Until the results are generated, the analyst would need to monitor the process. At the end of the process, the analyst would then need to annotate the results onto some document, and these annotations become a testimonial statement. If the data presents a particular result from a test, such a result would have to be construed as some kind of statement.²⁰⁷ Such results would include positive results from drug and blood alcohol concentration tests. The

202. See *People v. Lopez*, 286 P.3d 469, 472 (Cal. 2012).

203. See *id.* at 489 (Liu, J., dissenting).

204. See *id.* at 489.

205. See *Norris*, *supra* note 106, at 413.

206. See *id.*

207. See *id.* at 423.

data must be considered the analyst's statement, which is subject to review for confrontation purposes.²⁰⁸

Arguments have also been made to allow surrogates to testify when they reach independent conclusions based on the so-called "raw data," rather than relying exclusively on the original analyst's testing and conclusions.²⁰⁹ In situations where a surrogate witness reviews the "raw data," and claims to complete her own independent analysis, such an independent analysis will be superficial and cursory. The reality is that surrogates may review the original analyst's reasoning and claim it as their own with minimal effort.²¹⁰ Realistically, the so-called independent analysis will be a matter of "going through the motions" and merely duplicate the original analyst's conclusion.²¹¹ Any proficient surrogate would be able to reproduce an analyst's exact conclusion without devoting the independent effort.²¹² Surrogates can easily duplicate the original analyst's reasoning in their own words.²¹³ The surrogate witness will only serve as a mere conduit for the original analyst's testimonial statements.²¹⁴ Any naïve belief that the surrogate's independent analysis can never be a subterfuge for admitting testimonial hearsay ignores the fact that the underlying data is completely dependent on the original analyst's methodology. However, the "independent" analysis remains dependent on the reliability of the original underlying data, which is still a testimonial statement.²¹⁵ As discussed above, the validity of the underlying data is dependent on the performance and qualifications of the original analyst. Any time a surrogate depends on analyst-generated data to reach his independent conclusion, a confrontation issue exists. It does not make a difference if the surrogate relies on a number of sources or has significant expertise.²¹⁶

The problem with the independent analysis of "raw data" is that any sham would be nearly impossible to discover. One critic of surrogate testimony states, "If the [expert's] opinion is only as good as the facts on which it is based, and if those facts consist of

208. *See id.* at 423–24.

209. *See id.* at 406.

210. *See id.* at 407.

211. *See id.* at 412.

212. *See id.* at 412–13.

213. *See id.* at 415.

214. *See id.*

215. *See id.* at 424.

216. *See id.* at 407 (internal quotation marks omitted).

testimonial hearsay statements that were not subject to cross-examination, then it is difficult to imagine how the defendant is expected to demonstrate the underlying information [is] incorrect or unreliable.”²¹⁷ This is the same problem encountered with Justice Alito’s reasoning regarding the expert witness in *Williams*. Simply asking the surrogate on cross-examination would not force the surrogate to admit that he did not truly apply his own independent analysis. The defendant still will be deprived of the opportunity to challenge the source of those testimonial statements.²¹⁸ The defense will be unable to cross-examine the validity of the analyst-produced data without the presence of the original analyst at trial. Cross-examining the surrogate would rarely reveal flaws caused by the original analyst in preparation of the underlying data.²¹⁹ Typically, only the original analyst would know about such flaws. Without the ability to expose the errors or other problems, the right to confrontation is violated and convictions of innocent people could result.²²⁰

V. Practicality Concerns

Claims have been made that requiring confrontation in cases involving forensic lab reports would disrupt forensic investigations when a particular analyst could not appear at trial.²²¹ In high volume jurisdictions such as Los Angeles County, prosecutors may inevitably fail to have the original analyst of a forensic examination testify about his or her results. Often, the original analyst may not be available for testimony because she no longer works at the particular laboratory, or he is testifying at a different trial.

217. *Id.* at 408 (quoting Julie A. Seaman, *Triangular Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 GEO. L.J. 827, 847 (2008)); see also *Williams v. Illinois*, 132 S. Ct. 2221, 2256 (2012) (Thomas, J., concurring) (noting that “statements introduced to explain the basis of an expert’s opinion are not introduced for a plausible nonhearsay purpose. There is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert’s opinion and disclosing the statement for its truth. ‘To use the inadmissible information in evaluating the expert’s testimony, the jury must make a preliminary judgment about whether this information is true.’” (citing D. KAYE, D. BERNSTEIN & J. MNOOKIN, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EXPERT EVIDENCE* § 4.10.1, at 196 (2d ed. 2011))).

218. *See id.* at 379.

219. *See id.* at 408.

220. *See id.* at 378.

221. *See* Nicholas Klaiber, *Confronting Reality: Surrogate Forensic Science Witnesses Under the Confrontation Clause*, 97 VA. L. REV. 199, 229–35 (2011).

In the context of forensic testing in criminal prosecutions, when one of the pertinent witnesses is unavailable, what are a prosecutor's options? Rather than call a surrogate witness to testify about the original analyst's testing, the prosecution could simply have the testing repeated by another analyst who will be available for testimony.²²² While certain forensic analyses cannot be repeated—such as autopsies or breathalyzer tests—many tests *can* be repeated. Such repeated testing allows for the confrontation of an analyst who actually performed the test. The second test may confirm the original results. Such a confirmation may even encourage defendants to stipulate to test results and avoid the need for calling witnesses altogether. This second test may also reveal problems with the original results and potentially safeguard against false convictions.

Although the right to confrontation clearly creates inconvenience, practicality concerns should never limit constitutional protections.²²³ To protect the public and establish order in society, it is important that criminal offenders are prosecuted. Ideally, offenders should not be freed as a result of convenience or logistical dilemmas. However, the unique position of the accused guarantees him specific rights. The right to confrontation, among other constitutional rights, is sacred and necessary because prosecutions potentially take away the liberty, and sometimes life, of the accused. For the system to work properly, these rights must be uniformly applied to protect those wrongly accused, as well as those facing overwhelming evidence of guilt. These rights must never be abridged by concerns of convenience or practicality.

Conclusion

Despite the confusion generated by the plurality opinion in *Williams*, the U.S. Supreme Court has never abandoned the original definitions of testimonial statements set forth in *Crawford* and then again in *Melendez-Diaz*.²²⁴ Rather, in *Melendez-Diaz*, the Court demonstrated that *Davis*' primary purpose test did not displace the

222. See Norris, *supra* note 106, at 419.

223. Despite these concerns, only a small fraction of controlled substance analyses performed by state and federal laboratories actually proceed to trial. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325 (2009). In reality, the ten states that held that crime lab reports were testimonial after *Crawford* did not actually experience logistical repercussions. See *id.* at 326 n. 11 (citing cases from Florida, Colorado, Oregon, Montana, Washington, D.C., Minnesota, Nevada, Illinois, Georgia, and Mississippi).

224. See Keenan, *supra* note 17, at 808.

prior tests.²²⁵ In *Melendez-Diaz*, the Court appeared to rely on both the objective witness standard and the primary purpose test.²²⁶ However, as a result of the California Supreme Court's reliance on *Williams* in *Dungo* and *Lopez*, the California Courts of Appeal are presently struggling with U.S. Supreme Court guidelines.²²⁷ In Justice Goodwin Liu's words, the California Supreme Court's nine separate opinions of its latest Confrontation Clause cases have created a "muddled state" of Confrontation Clause doctrine.²²⁸

Unless and until the federal and state higher courts clarify the Confrontation Clause jurisprudence, enormous responsibility falls on all parties in a criminal trial. Prosecutors should not prevent disclosure of the truth by electing to call improper witnesses who lack the necessary knowledge to testify. The defense must challenge the introduction of evidence that cannot be fairly tested. Trial courts must conscientiously consider all circumstances surrounding contested statements and apply the constitutionally mandated principles, whether or not they agree with them, and whether or not it is inconvenient to do so.²²⁹ Only when each party fulfills its respective duty will the criminal trial achieve its goals of justice and fairness.

225. See *id.* at 804 (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009)).

226. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-311 (2009).

227. See *People v. Ellis*, 213 Cal. App. 4th 1551, 1561 (2013) (acknowledging that "[e]fforts by both the United States Supreme Court and our own Supreme Court to more precisely define the contours of the confrontation clause, and to determine what is testimonial hearsay have proven challenging and problematic, with no clear majority view in any of the recent United States Supreme Court decisions, and multiple concurring and dissenting opinions by our own Supreme Court justices). See also *People v. Holmes*, 212 Cal. App. 4th 431, 438 (2012) (declaring that it is compelled to follow the majority opinion in *Lopez*).

228. *People v. Lopez*, 286 P.3d 469, 483 (Cal. 2012) (Liu, J., dissenting).

229. See *People v. Dungo*, 286 P.3d 442, 469 (Cal. 2012) (Corrigan, J., dissenting).