

UNRAVELING *WILLIAMS V. ILLINOIS*

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This Essay addresses one of the key evidentiary problems facing courts today: the treatment of forensic reports under the Confrontation Clause. Forensics are a staple of modern criminal trials, yet what restrictions the Confrontation Clause places on forensic reports is entirely unclear. The Supreme Court's latest decision on the issue, Williams v. Illinois, sowed widespread confusion among lower courts and commentators, and during the 2018 Term, Justices Gorsuch and Kagan dissented to the denial of certiorari in Stuart v. Alabama, a case that would have revisited (and hopefully clarified) Williams.

Our Essay dispels the confusion in Williams v. Illinois. We argue that Williams involved three difficult and intertwined evidentiary questions: i) when experts may use inadmissible evidence as the basis of their opinions under Rule 703; ii) whether Rule 703 itself is consistent with the Confrontation Clause; and iii) whether reports that arise out of rigorous scientific processes implicate the Confrontation Clause at all. Along the way, we show that the answers to these questions help predict the future of the Confrontation Clause and offer a potential tool for improving forensic science.

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INTRODUCTION

Over the last quarter century, two evidentiary issues have bedeviled the Supreme Court and the American legal system as a whole. The first, embodied in *Daubert v. Merrell Dow Pharmaceuticals*,¹ has been the problem of experts and scientific reliability, an issue still hotly debated by courts and commentators today. The second, embodied in *Crawford v. Washington*,²

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¹ 509 U.S. 579 (1993).

² 541 U.S. 36 (2004).

has been the proper interpretation of the Confrontation Clause.³ Ever since Justice Scalia led the charge to reframe Confrontation as a matter of procedural right rather than substantive reliability,⁴ understanding precisely what statements are inadmissible (and why) has been a work in progress.

Unsurprisingly, then, where scientific evidence meets Confrontation—namely, in the area of forensic reports—the case law has become a morass.⁵ *Williams v. Illinois*, the Supreme Court’s latest word on the matter,⁶ has baffled the evidence community as well as courts around the country.⁷ The Second Circuit has described *Williams* as “intractable,”⁸ and one court has compared interpreting the case law in this area to an exercise in “tasseomancy,” or divination through reading tea leaves.⁹ As a consequence, lower courts have treated *Williams* inconsistently,¹⁰ with some effectively confining it to its facts.¹¹

Yet, how the legal system handles forensics—and how the Confrontation Clause constrains it—is a big deal. Forensic analysis is a staple of modern criminal cases, and how the law ensures the reliability of forensic analysis impacts accuracy, costs, and procedural fairness.¹² The combination of

³ U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”).

⁴ *Crawford*, 541 U.S. at 61.

⁵ *Stuart v. Alabama*, 139 S. Ct. 36, 36 (2018) (Gorsuch, J., dissenting from denial of certiorari) (“To be fair, the problem appears to be largely of our creation. This Court’s most recent foray in this field, *Williams v. Illinois*, yielded no majority and its various opinions have sown confusion in courts across the country.” (citation omitted)).

⁶ 567 U.S. 50 (2012).

⁷ Consider, for example, some evidence listserv postings from two evidence professors. James Duane noted that “it is devilishly difficult to extricate a succinct and accurate summary of the bewildering collection of inconsistent opinions in *Williams v. Illinois*, . . . which has naturally left lower courts (like everyone else) in a state of fairly significant confusion as to exactly what that case held and what it changed, if anything.” Posting of James Duane, jamedua@regent.edu, to evid-fac-l@chicagokent.kentlaw.edu (Nov. 5, 2013) (on file with authors). Clifford S. Fishman wrote: “My one-sentence summary: Like the final episode of *The Sopranos*, *Williams* ended without anyone knowing for sure exactly what happened or what it all meant; like the season finale of many TV series, it ended with everyone wondering what’s going to happen next.” Posting of Clifford S. Fishman, fishman@law.edu, to evid-fac-l@chicagokent.kentlaw.edu (Aug. 31, 2012) (on file with authors).

⁸ *United States v. James*, 712 F.3d 79, 95 (2d Cir. 2013).

⁹ *People v. Barba*, 155 Cal. Rptr. 3d 707, 740 (Ct. App. 2013).

¹⁰ *See, e.g.*, Christine Chambers Goodman, *Confrontation’s Convolutions*, 47 LOY. U. CHI. L.J. 817, 817 (2016) (“[L]ower courts vary widely in interpreting when the Confrontation Clause applies.”).

¹¹ *James*, 712 F.3d at 95–96; *see also* *Young v. United States*, 63 A.3d 1033, 1043 (D.C. 2013) (taking an intermediate position on *Williams*’s precedential weight); Taryn Jones, Note, *Confronting Williams: The Confrontation Clause and Forensic Witnesses in the Post-Williams Era*, 67 HASTINGS L.J. 1087, 1108 (2016) (describing lower courts’ varied responses to *Williams*).

¹² *See Williams v. Illinois*, 567 U.S. 50, 92 (2012) (Breyer, J., concurring). *See generally* Catherine L. Bonventre, *The Implementation of Judicial Policy by Crime Laboratories: An*

poor guidance in *Williams*, doctrinal confusion, and high policy import practically guarantees future Supreme Court action. Indeed, during the 2018 Term, Justices Gorsuch and Sotomayor dissented from a denial of certiorari in *Stuart v. Alabama*, a case that would have squarely revisited *Williams* and the Confrontation jurisprudence surrounding forensic reports.¹³ The question seems to be not whether the Supreme Court will take up another forensics case, but when.

To aid this process of clarification, in this Essay we argue that the confusion over *Williams* stems from several underappreciated complexities. *Williams* in fact involved several difficult and intertwined evidentiary questions. One is what kind of information an expert may use in constructing his or her opinion under Rule 703.¹⁴ The text of Federal Rule of Evidence 703 and its state counterparts initially seems to answer this question easily, but it actually does not. Another is whether Rule 703's statutory framework coheres with the Confrontation Clause, which as a constitutional doctrine could simply reject it.¹⁵ And finally, there is the question whether reports produced by proper scientific processes trigger the Confrontation Clause at all. This last question may initially appear settled by the two forensic cases prior to *Williams*, *Melendez-Diaz v. Massachusetts*¹⁶ and *Bullcoming v. New Mexico*,¹⁷ since there, the Court found drug analysis and blood-alcohol test reports to violate the Confrontation Clause. But this last question too remains controversial because the cases are subtly distinguishable. Both Justice Breyer and Justice Thomas, writing separately in *Williams*, suggested that certain forensic reports might not implicate the Confrontation Clause.¹⁸ We agree, though for slightly (but importantly) different reasons.

In sum, the solution to the *Williams* puzzle lies in teasing these questions apart analytically and then giving each its due. Only then can we fully understand forensic reports in the Confrontation context and chart a path forward. The remainder of this Essay proceeds as follows. Part I lays out an "expert shield" perspective on *Williams*. It explains that the rules governing the proper bases of an expert's opinion are not simply resolved by the text of

Examination of the Impact of *Melendez-Diaz v. Massachusetts* (2015) (unpublished Ph.D. dissertation, University at Albany, State University of New York) (on file with authors).

¹³ *Stuart v. Alabama*, 139 S. Ct. 36 (2018) (Gorsuch, J., dissenting from denial of certiorari).

¹⁴ FED. R. EVID. 703.

¹⁵ Indeed, *Williams* involved Illinois Rule of Evidence 703, so proper interpretation of the federal Rule 703 was not even within the ambit of the Supreme Court. The only question presented was whether application of Illinois Rule 703 violated the Confrontation Clause.

¹⁶ 557 U.S. 305 (2009).

¹⁷ 564 U.S. 647 (2011).

¹⁸ See *Williams v. Illinois*, 567 U.S. 50, 97 (2012) (Breyer, J., concurring) (emphasizing that the DNA analyst in *Williams* operated under a "veil of ignorance" unlike the analysts in *Melendez-Diaz* and *Bullcoming*); *id.* at 111 (Thomas, J., concurring) (emphasizing that the DNA report in *Williams* lacked "indicia of solemnity").

Rule 703. Once properly understood, the structure of Rule 703 can help sharpen our understanding of the Confrontation Clause and how it meshes with Rule 703.

Part II offers an alternative “nontestimonial process” perspective on *Williams*, building on the plurality’s alternative holding.¹⁹ It argues that reports generated by proper scientific processes do not implicate the Confrontation Clause under *Crawford* at all. It also observes that interpreted in this way, the Confrontation Clause can become a valuable tool for addressing longstanding concerns about the reliability of forensic testimony under *Daubert*.²⁰

With these two perspectives in mind, Part III decodes the *Williams* puzzle and looks toward the future. Because both perspectives independently explain the outcome in *Williams*, we have an underdetermined system—that is why courts have struggled to determine what *Williams* stands for. Having unraveled the puzzle, Part III offers some paths forward for the Supreme Court when the next forensic-confrontation case appears on its docket. Part IV briefly concludes.

I

EXPERT SHIELDS

Rule 703 states that expert witnesses may base their opinions on inadmissible materials, so long as those materials are reasonably relied on by other experts in the field.²¹ *Williams* presented facts precisely along these lines: An independent laboratory, Cellmark Diagnostics, generated a suspect DNA profile based on semen swabs collected from a rape victim.²² At trial, the prosecution offered Sandra Lambatos, a forensic specialist at the Illinois State Police Laboratory (“ISP”). Lambatos testified that laboratories like the ISP commonly relied on reports generated by other labs like Cellmark to expedite their processes. Then, relying on the Cellmark report, she concluded that the sample taken from the vaginal swab matched the defendant’s DNA.²³

No Cellmark analyst ever testified, and the Cellmark report was never

¹⁹ *Id.* at 58 (plurality opinion).

²⁰ See generally NAT’L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 90–110 (2009) [hereinafter NAS REPORT], <https://www.nap.edu/read/12589/chapter/2> (illustrating the failures of admitting scientific evidence under *Daubert*).

²¹ See ILL. R. EVID. 703 (“If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data [an expert relies on] need not be admissible in evidence.”); see also FED. R. EVID. 703 (substantially similar language).

²² *Williams*, 567 U.S. at 56–57.

²³ *Id.* at 60–62.

introduced into evidence.²⁴ Lambatos only referenced the report as a source used for forming her expert opinion under Rule 703. This procedure contrasted sharply with the Supreme Court's two previous forays into forensic reports, *Melendez-Diaz* and *Bullcoming*.²⁵ In both of those cases, the trial court admitted the actual lab reports into evidence in what was later determined to be a violation of the Confrontation Clause.²⁶

The innovation in *Williams* can thus be described as an “expert shield”: an expert who—through operation of Rule 703—shields otherwise inadmissible evidence from Confrontation scrutiny, providing a path by which it can reach the factfinder. To be sure, Rule 705 strongly inhibits the expert from revealing the inadmissible information to the jury unless the opposing party allows the expert.²⁷ But ultimately, damage is done. The information influences the expert's opinion, which in turn influences the factfinder.²⁸

Are such expert shields legitimate? From the plain language of Rule 703, the answer seems a straightforward yes. As long as the information is reasonably relied upon by experts in the field, the expert may base his or her opinion on it, effectively allowing the expert to launder the previously inadmissible information. But there are two immediate problems: First, does the rationale behind Rule 703 justify such a broad end-run around the evidence rules? And second, does this *statutory* evidentiary structure cohere with the Confrontation Clause? Can the prosecution use an expert shield to evade not just an evidentiary rule, but also the Confrontation Clause?²⁹

Why does evidence law allow experts to inject inadmissible information

²⁴ *Id.* at 62 (“The Cellmark report itself was neither admitted into evidence nor shown to the factfinder. Lambatos did not quote or read from the report; nor did she identify it as the source of any of the opinions she expressed.”).

²⁵ *Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

²⁶ *See Bullcoming*, 564 U.S. at 665; *Melendez-Diaz*, 557 U.S. at 329.

²⁷ *See* FED. R. EVID. 705 (“Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.”).

²⁸ In the plurality opinion, Justice Alito emphasized that because mention of the Cellmark report was only used to assess the expert's basis, it was not offered for its truth and therefore did not implicate the Confrontation Clause. *Williams*, 567 U.S. at 72–73. The Court's analysis, however, oversimplifies the problem. The problem was not that Lambatos mentioned the existence of the Cellmark report to prove that she had a proper basis for her opinion. Used in that way, the report is not used for “its truth.” Instead, the problem is that Lambatos's opinion substantively incorporated the (inadmissible) information found in the Cellmark report. Justice Kagan's dissent seemed to intuitively grasp this problem with the “not for the truth” argument. *Id.* at 125–27 (Kagan, J., dissenting).

²⁹ Indeed, *Williams* involved Illinois Rule of Evidence 703, and so the Supreme Court could only decide the case based on the Confrontation Clause and not the contours of Rule 703. *Id.* at 75 (plurality opinion).

into the factfinding process through Rule 703 in the first place³⁰ The most probable explanation involves deference to expertise. Evidence law typically shields juries from information when it fears that juries will mishandle it. For example, Rule 403 excludes evidence due to the danger of unfair prejudice.³¹ Rule 802 excludes hearsay because the declarant is untested by cross-examination and therefore the hearsay testimony may be unreliable.³² But Rule 703 presumes that experts do not raise the same concerns as lay decisionmakers. Rule 703 trusts expert practitioners to handle suspect evidence and to give the evidence its proper weight.³³ When an expert's field routinely relies on such evidence, the expert is competent to assess and weigh it, even though the average layperson may not be. The expert shield in a sense "cures" or mitigates the danger associated with the suspect evidence.

But this line of reasoning only applies if the underlying motivation for the evidence rule is accuracy.³⁴ If the evidentiary rule reflects non-accuracy-based policy reasons, then allowing an expert shield makes no sense. For example, Rule 407 excludes evidence of subsequent remedial measures (SRMs) to encourage would-be defendants to make post-accident repairs.³⁵

³⁰ See generally Robert H. Rhode, Note, *The Scope of the Reasonable Reliance Requirement of Federal Rule of Evidence 703*, 1988 U. ILL. L. REV. 1069 (describing the history and purposes of Rule 703).

³¹ FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

³² See FED. R. EVID. 802 ("Hearsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court."); see also, e.g., Eustace Seligman, *An Exception to the Hearsay Rule*, 26 HARV. L. REV. 146, 147 (1912) ("The modern rational explanation of the rule, according to Professor Wigmore, is the desirability of testing all testimony by cross-examination." (citing JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 1362, 1367 (1904))). But see generally Justin Sevier, *Testing Tribe's Triangle: Juries, Hearsay, and Psychological Distance*, 103 GEO. L.J. 879 (2015) (offering empirical evidence of jury competence in weighing hearsay evidence).

³³ FED. R. EVID. 703 advisory committee's note on proposed rules ("In this respect the rule is designed . . . to bring the judicial practice into line with the practice of the experts themselves when not in court. . . . The physician makes life-and-death decisions in reliance upon [various types of evidence]. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.").

³⁴ The term "reliability" has an unfortunate ambiguity, especially when dealing with scientific evidence. As used in evidence law, reliable evidence is evidence that is accurate or tends to produce an accurate result. In science, a reliable process is a process that produces consistent (but not necessarily accurate) results. Accuracy is instead termed "validity." In this Essay, we will use reliability and accuracy interchangeably, with reliability primarily meaning "tending to produce an accurate result."

³⁵ See FED. R. EVID. 407 ("When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: negligence; culpable conduct; a defect in a product or its design; or a need for a warning or instruction. But the court may admit this evidence for another purpose . . ."); see also *Flaminio v.*

If an accident reconstruction expert could use a defendant's SRM as the basis for her opinion—something textually permissible under Rule 703—that would severely hamper the policy goals of Rule 407.³⁶ Or take professional privileges, which exclude confidential communications to encourage certain professional relationships.³⁷ Allowing an expert to use privileged communications as the basis for her opinion would impede those relationships. And if an expert could use statements made during compromise negotiations—normally barred under Rule 408—settlements would become much more difficult to negotiate.³⁸

So under a proper understanding of Rule 703, expert shields should only be permissible when the evidentiary rule being circumvented is accuracy-based. What about Confrontation? Can the prosecution use an expert shield with evidence otherwise inadmissible under the Confrontation Clause? If Confrontation is about reliability, then the answer is *potentially* yes for two reasons. First, the expert would be permissible under Rule 703, since Confrontation would be an accuracy-based rule. Second, the expert would arguably be permissible under the Confrontation Clause because the structure and rationale of Rule 703 ensure the evidence's reliability. Recall that a jury might need cross-examination in order to properly weigh the evidence, but an expert might not. So having the inadmissible evidence pre-processed by the expert shield may be sufficient for Confrontation purposes.

By contrast, if Confrontation is a formal procedural right, then the answer is flatly no—again for two reasons. First, under Rule 703, expert shields are impermissible when the rule being circumvented is not accuracy-based. If Confrontation is a procedural right, then it would be more like Rule 407, Rule 408, and privileges. Second, under a procedure-based interpretation of Confrontation, mere proof of expert reliability would be insufficient to satisfy the defendant's formal procedural right to confront the witnesses against him.

Viewed in this light, the holding in *Williams* is potentially momentous. *Williams* held that the expert shield was valid, implicitly declaring that Confrontation is an accuracy-based rule. That result is completely at odds with *Crawford*, which had recast Confrontation as a procedural right.³⁹ Justice

Honda Motor Co., 733 F.2d 463, 469 (7th Cir. 1984) (stating that the incentive to take remedial safety measures would be reduced if evidence of such measures were admissible to prove liability).

³⁶ See Rhode, *supra* note 30, at 1076.

³⁷ See generally EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES* § 6.2 (Wolters Kluwer, 3d ed. 2020).

³⁸ The rationale of Rule 703 also breaks down where constitutional policy rules are at play. For example, an expert presumably cannot violate equal protection merely because racial data is reasonably relied upon by others in the field.

³⁹ *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (“To be sure, the Clause’s ultimate goal is

Scalia’s entire purpose in *Crawford* was to overrule *Ohio v. Roberts*⁴⁰ and jettison its focus on “particularized guarantees of trustworthiness.”⁴¹ At first glance, *Williams* appears to undo all of that.

In a sense, if this is the lesson of *Williams*, it should come as little surprise. A number of Justices have shown a remarkable affinity toward a return to reliability,⁴² so *Crawford* may not be long for this world anyway. But as it turns out, we cannot necessarily read *Williams* as an implicit overruling of *Crawford*. That inference is only valid if the Cellmark report in *Williams* was indeed substantively inadmissible under the Confrontation Clause, and that is far from clear. Why it is not clear is explored in the next Part.

II

NONTESTIMONIAL PROCESSES

The Cellmark report in *Williams* fundamentally differed from the lab reports in *Melendez-Diaz* and *Bullcoming*. *Melendez-Diaz* featured a sworn certification from a government lab verifying that the substance seized was cocaine.⁴³ *Bullcoming* featured a sworn certification from a government lab reporting the results of a blood alcohol test.⁴⁴ In both cases, there were (i) formal certifications; (ii) from government actors; (iii) where the inquirer’s identity and “desired” outcome were known. Given *Crawford*’s concerns about formal, testimonial, and accusatory statements, one can see how these lab reports could run afoul of the Confrontation Clause.

The Cellmark report in *Williams*, however, was a bird of a different feather. It involved (i) an unsworn lab report; (ii) from a private, non-governmental actor; and (iii) the request to Cellmark was effectively blind, because Cellmark had no idea what the inquirer’s desired outcome was.⁴⁵ Cellmark’s job was to take the sample, accurately produce a DNA profile, and return the profile to the inquirer.⁴⁶ Cellmark did not make the match against Williams—that job was left to Lambatos, the testifying expert.

to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”).

⁴⁰ 448 U.S. 56 (1980).

⁴¹ *Crawford*, 541 U.S. at 60.

⁴² See, e.g., *Michigan v. Bryant*, 562 U.S. 344, 361–62 (2011) (drawing parallels between the trustworthiness of statements made during ongoing emergencies and the trustworthiness of statements admitted under the excited utterance hearsay exception); *id.* at 390–92 (Scalia, J., dissenting) (accusing the *Bryant* Court of resurrecting the reliability analysis).

⁴³ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 308 (2009).

⁴⁴ *Bullcoming v. New Mexico*, 564 U.S. 647, 652–53 (2011).

⁴⁵ *Williams v. Illinois*, 567 U.S. 50, 97 (2012) (Breyer, J., concurring) (emphasizing that the analyst operated under a “veil of ignorance”).

⁴⁶ *Id.* at 59 (plurality opinion).

Consequently, the Cellmark report was arguably nontestimonial.⁴⁷ While the report was ultimately potent evidence for the prosecution, it was not an accusatory instrument against the defendant when Cellmark produced it—indeed, the defendant had not even been a suspect at that point.⁴⁸ Cellmark merely ran its standard DNA profiling process, much like any other ordinary business process. Such DNA reports are thus similar to phone records, which are nontestimonial not only because they are automated, but also because they are not collected for accusatory purposes.⁴⁹

Even if Cellmark had made a match determination itself, one can imagine conditions under which the report might still have remained nontestimonial. For example, suppose that the laboratory had an intake system that blinded the samples so that analysts had no information about the requester and therefore no idea whether the desired outcome was a match or a non-match. Further, suppose the laboratory routinely inserted known test samples into its workstream to ascertain the proficiency of analysts and to calculate error rates, so that analysts never knew when a sample was real or a test. Under those conditions, matches are arguably not accusatory statements. They are merely the output of a standardized, anonymized process, much like phone records.⁵⁰

These observations offer an alternative “nontestimonial process” perspective through which to view the holding in *Williams*. From this perspective, Lambatos’s testimony was admissible not because Lambatos was an expert shield, but rather because her evidentiary basis, the Cellmark report, resulted from a process that did not implicate the Confrontation Clause at all.

⁴⁷ To be sure, *Williams* gave two other reasons why Cellmark’s report was nontestimonial: (1) the report was never offered for “the truth of the matter asserted,” *id.* at 79, and (2) there was an ongoing emergency, *id.* at 84. Both, however, are specious. For the problem with the “truth” argument, see *supra* note 28. As for the emergency argument, to say there was an ongoing emergency would prove far too much. There was a rapist at large, but Cellmark received the vaginal swab nine months after the rape occurred. *Id.* at 137 (Kagan, J., dissenting). Under that definition, any criminal investigation would remain an “emergency” until the perpetrator was apprehended.

⁴⁸ *Williams*, 567 U.S. at 59.

⁴⁹ See, e.g., *United States v. Yeley-Davis*, 632 F.3d 673, 679 (10th Cir. 2011) (ruling that cell phone records are nontestimonial because they were created to administer the phone company’s affairs “and not for the purpose of establishing or proving some fact at trial” (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009))); *United States v. Green*, 396 F. App’x 573, 575 (11th Cir. 2010) (unpublished opinion) (“[B]ecause the [cell phone] records were generated for the administration of Metro PCS’s business, and not for the purpose of proving a fact at a criminal trial, they were non-testimonial, and the district court did not violate [the defendant’s] constitutional right [to Confrontation] by admitting them into evidence.”). Similarly, business records do not qualify as testimonial and are therefore not subject to the Confrontation Clause. See *Crawford v. Washington*, 541 U.S. 36, 56 (2004) (“Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy.”).

⁵⁰ See Edward K. Cheng & G. Alexander Nunn, *Beyond the Witness: Bringing a Process Perspective to Modern Evidence Law*, 97 TEX. L. REV. 1077, 1107 (2019) (making this argument).

Under this nontestimonial process perspective, we cannot make inferences about whether the Confrontation Clause remains a procedural right or has returned to a reliability-focused inquiry. But the perspective does provoke a different discussion about the relationship between Confrontation and forensics.

Williams suggests that if produced under certain stringent conditions—namely, those that comply with sound scientific practice—forensic reports do not violate the Confrontation Clause, and the analyst need not testify. Scientific processes aim to be objective, standardized, and anonymous, and scientific laboratories focus intensively on calibration and proficiency testing. Unfortunately, as the National Academy of Sciences noted over a decade ago, many forensic disciplines and laboratories lack such practices.⁵¹

Consider what interpreting *Williams* through the nontestimonial process lens might do to forensic practice. Forensic labs would in essence face a choice. They could continue their traditional practices with subjective determinations, non-blinded samples, and a lack of blinded proficiency testing, but the Confrontation Clause would then extract a price. Because the traditional forensic analyst is effectively an accusatory witness (and not just a cog in a standardized process), the Confrontation Clause would require that the analyst testify in court. Testifying means lost work time and consequently added costs to the laboratory's bottom line.⁵² In the alternative, forensic labs could adopt more modern scientific processes and procedures, such as those advocated by the National Academy. If so, the Confrontation Clause would absolve analysts of the need to testify, providing laboratories with savings that may balance the costs associated with the new procedures. The much-noted Houston Crime Lab provides an illustrative example. Houston blinds incoming samples, uses standardized processes, and routinely inserts known test samples into its workstream for quality control.⁵³ Under a nontestimonial process interpretation of *Williams*, the Confrontation Clause would not require in-court testimony from Houston forensic analysts. Certifications would suffice.

III

THE *WILLIAMS* PUZZLE AND THE FUTURE

So which of these two perspectives—the expert shield perspective or the nontestimonial process perspective—explains the outcome in *Williams*? That question is underdetermined. Either perspective is sufficient to explain

⁵¹ NAS REPORT, *supra* note 20, at 23–24.

⁵² *But see* Bonventre, *supra* note 12, at 109 (finding that courts and labs adjusted to the requirement).

⁵³ Sandra G. Thompson & Nicole B. Cásarez, *Solving Daubert's Dilemma for the Forensic Sciences Through Blind Testing*, 57 HOUS. L. REV. 617 (2020).

the outcome. If process-based forensic reports do not infringe on the Confrontation Clause, then Lambatos's testimony based on the Cellmark report is admissible. If process-based reports do infringe on the Confrontation Clause, then Lambatos's testimony may still be admissible as an expert shield, but only if Confrontation returns to a reliability-based doctrine.

Resolving this indeterminacy will require another case in the *Melendez-Diaz/Bullcoming/Williams* line, carefully selected to press the issues. For example, if in the next case, a Cellmark-type report is offered for its substantive truth (and not just as the basis of an expert shield), we can test the validity of the nontestimonial process perspective. Or if in the next case the expert shield relies on a less process-based report, such as the subjective impressions of an out-of-court toolmark analyst, then we can test the expert shield perspective.⁵⁴ But until then, the import of *Williams* and the future of the Confrontation Clause in the forensic sphere will remain in limbo.

So far, our emphasis has been on analytics and what *Williams* might mean. In what direction *should* the law go? We have several normative thoughts. On the issue of expert shields, the doctrine surrounding Rule 703 should restrict expert use of inadmissible evidence to only when the evidence was inadmissible due to an accuracy-based rule.⁵⁵ This restriction is inherent in the logic of Rule 703, but it is not in the text, and so far as we can tell, not yet definitively part of the case law.

Whether the Confrontation Clause should be about procedure or reliability ultimately depends on one's jurisprudential preferences. An originalist following Justice Scalia's originalist interpretation of the Confrontation Clause might prefer it as a procedural right, while a pragmatist might focus on the underlying goal of accuracy and reliability.

Finally, on the issue of nontestimonial processes, as a matter of legal theory and practical policy, the Supreme Court should make clear that the output of certain scientific processes does not implicate the Confrontation Clause. From the standpoint of theory, as one of us has argued at length,⁵⁶ the Confrontation Clause as interpreted in *Crawford* is fundamentally about testimonial *witnesses*.⁵⁷ Confrontation prohibits the use of accusatory documents or hearsay witnesses when the source of the information (and its

⁵⁴ *Stuart v. Alabama* was a missed opportunity along these lines. *Stuart* involved a blood-alcohol test but, so far as we can discern from available materials, did not involve any type of blinding process. *Stuart v. Alabama*, 139 S. Ct. 36, 36 (2018) (Gorsuch, J., dissenting from denial of certiorari).

⁵⁵ This proposal was first articulated in an insightful student note by Robert H. Rhode. Rhode, *supra* note 30, at 1080–81.

⁵⁶ See Cheng & Nunn, *supra* note 50, at 1077 (arguing that the focus of traditional evidentiary rules is on witnesses and witness reliability).

⁵⁷ *Crawford v. Washington*, 541 U.S. 36, 59 (2004) (focusing its analysis on the testimonial nature of "statements of witnesses").

reliability) is an out-of-court declarant—a person who should be confronted in court. But the evidence that results from a scientific process is different. Its reliability does not stem primarily from the human actors. It comes from the process itself, which is a mix of machines, policies, and human actors operating under those policies.⁵⁸ With regard to process-based evidence, a meaningful right of Confrontation, whether characterized as a procedural right or a guarantee of reliability, does not rest with a talking head in court. A meaningful right in this context involves the ability to probe, investigate, and challenge the processes that produced the evidence.⁵⁹

From a policy standpoint, recognizing nontestimonial processes might also be one way to deal with the crisis in forensics. The flaws in forensics identified by the National Academy may have been troubling, but the lack of progress addressing those flaws over the last decade has been downright embarrassing.⁶⁰ Two explanations for the stagnation are a lack of incentives and a lack of available resources. Interpreting the Confrontation Clause as proposed would create incentives to improve forensic analysis by establishing a safe harbor for the outputs of rigorous scientific processes. We should emphasize that this safe harbor is fully justified by evidentiary theory; it also turns out to be practically expedient.

CONCLUSION

As the old adage goes, hard cases make bad law, and so it was with *Williams v. Illinois*. At stake was one of the most theoretically and practically important evidentiary questions today—the restrictions placed on forensic reports by the Confrontation Clause. But the facts of *Williams* made success virtually impossible for the Supreme Court. The combination of a process-based Cellmark report, an expert shield, and shifting theoretical foundations in the Confrontation doctrine created a perfect storm for confusion.

But having unraveled the *Williams* puzzle, we can now see a way from confusion to clarity. It will take another Supreme Court case (or two) but, properly analyzed and understood, the issues raised in *Williams* can lead to a clear articulation of the role of expert shields, as well as the nature of the Confrontation right. They can lead courts to treat process-based evidence

⁵⁸ *Bullcoming v. New Mexico*, 564 U.S. 647, 676 (2011) (Kennedy, J., dissenting).

⁵⁹ See Cheng & Nunn, *supra* note 50, at 1105–08 (proposing reforms to address process-based evidence).

⁶⁰ Jessica D. Gabel, *Realizing Reliability in Forensic Science from the Ground Up*, 104 J. CRIM. L. & CRIMINOLOGY 283, 286 (2014) (“Regardless of the root causes of the forensic flaws, the NAS Report clearly issued a ‘call to arms’ to reform forensic science from the top down by proposing the creation of a centralized National Institute of Forensic Science. Little has been done, however, to achieve reform.”).

more thoughtfully. And they can also encourage forensic laboratories to develop more rigorous and more scientific processes. Viewed in this light, *Williams* in time may indeed become a seminal case—quite a far cry from the morass from which it began.