2015 Update to Evidence: The Objection Method, 4th Edition

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Here are some developments that warrant mention and treatment in class. We did not believe that there is enough to justify the additional expenditure on a supplement. Feel free to use the materials below and to distribute them to your students.

General — Amendments to the Federal Rules of Evidence

1. Amendment to Rule 803(10), Effective December 1, 2013:

Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * *

(10) ***Absence of a Public Record.*** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if ~~the testimony or certification is admitted to prove that~~:

(A) the testimony or certification is admitted to prove that

(~~A~~ i) the record or statement does not exist; or

(~~B~~ ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection.

Committee Note

Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). The *Melendez-Diaz* Court declared that a testimonial certificate could be admitted if the accused is given advance notice and does not timely demand the presence of the official who prepared the certificate. The amendment incorporates, with minor variations, a "notice-and-demand" procedure that was approved by the *Melendez-Diaz* Court. See Tex. Code Crim. P. Ann., art. 38.41.

2. Amendment to Rule 801(d)(1)(B), effective December 1, 2014:

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

*** * ***

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

* * *

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

* * *

Committee Note

Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the Advisory Committee noted, "[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally."

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it cover consistent statements that would be probative to rebut a charge of faulty memory. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

The amendment retains the requirement set forth in *Tome v. United States*, 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication or improper influence or motive must have been made before the alleged fabrication or improper influence or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness — such as the charges of inconsistency or faulty memory.

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously — the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

3. Amendment to Rule 803(6), effective December 1, 2014:

Rule 803. Exceptions to the Rule Against Hearsay— Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.

*** * ***

(6) ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or the method or circumstances of preparation indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification — then the burden is on the opponent to show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose this burden on the opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable.

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party

without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

4. Amendment to Rule 803(7), effective December 1, 2014:

Rule 803. Exceptions to the Rule Against Hearsay— Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.

*** * ***

(7) ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) ~~neither~~ the opponent does not show that the possible source of the information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception ― set forth in Rule 803(6) ― then the burden is on the opponent to show that the possible source of the information or other circumstances indicate a lack of trustworthiness. The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

5. Amendment to Rule 803(8), effective December 1, 2014:

Rule 803. Exceptions to the Rule Against Hearsay— Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.

*** * ***

(8) ***Public Records.*** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established that the record meets the stated requirements of the exception ― prepared by a public office and setting out information as specified in the Rule ― then the burden is on the opponent to show that the source of information or other circumstances indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. Public records have justifiably carried a presumption of reliability, and it should be up to the opponent to "demonstrate why a time-tested and carefully considered presumption is not appropriate." *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984). The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

CHAPTER 3 – ADD TO THE DISCUSSION OF RULE 606(b) AT PAGE 67

The text states that Rule 606(b) could allow evidence of juror deliberations if the goal of the proof is to show that a witness lied on voir dire. This is no longer the case. In *Warger v. Shauers*, 135 S.Ct. 521, 525 (2014), the Court held that Rule 606(b) bars proof of a juror's statements during deliberations to prove that the juror lied on voir dire. *Warger* was a case involving a car accident; a juror was asked on voir dire whether she could be fair and impartial and she answered yes --- and then she allegedly stated during deliberations that her daughter had been involved in a car accident and if she had been sued, it would have ruined her life. The defendant, challenging the verdict, moved for a new trial on the ground that the juror had lied and that if she had told the truth on voir dire, she could have been challenged for cause. But the Court found that attempts to prove a lie on voir dire were barred by the text of Rule 606(b) --- that rule bars juror testimony about deliberations during any "inquiry into the validity of a verdict." And an attack on a juror for lying on voir dire is nothing other than an inquiry into the validity of a verdict. As Justice Sotomayor, writing for the Court, put it: "A postverdict motion for a new trial on the ground of *voir dire* dishonesty plainly entails 'an inquiry into the validity of [the] verdict': If a juror was dishonest during *voir dire* and an honest response would have provided a valid basis to challenge that juror for cause, the verdict must be invalidated."

The *Warger* Court rejected the defendant's argument that Rule 606(b) violated his right to an impartial jury. Justice Sotomayor explained that "a party's right to an impartial jury remains protected despite Rule 606(b)'s removal of one means of ensuring that jurors are unbiased. Even if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered." (So for example, if the claim is that the juror lied on *voir dire* when he said he had no relatives in law enforcement, that lie can be proved in a number of ways other than the juror's statement during deliberations that "my dad is a sheriff and . . ."). Justice Sotomayor did, however, state in a footnote that "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged. If and when such a case arises, the Court can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process."

CHAPTER 13 — ADD TO THE DISCUSSION OF PRESENT SENSE IMPRESSIONS AND EXCITED UTTERANCES—Judge Posner's critique.

Judge Posner, in an important concurring opinion in United States v. Boyce, 742 F.3d 792 (7th Cir. 2014), provided a stinging attack on the foundations of the exceptions for present sense impressions and excited utterances —arguing that they should be abrogated because they are without any empirical grounding. He argues more broadly, though briefly, that the existing construct of the hearsay rule and its exceptions should be replaced by a rule that permits hearsay to be admitted whenever the judge finds it reliable under the circumstances. The case involved the admissibility of a 911 call made by a victim, implicating the defendant.

Here are the pertinent parts of Judge Posner's concurring opinion:

> I agree that the district court should be affirmed—and indeed I disagree with nothing in the court's opinion. I write separately only to express concern with Federal Rules of Evidence 803(1) and (2), which figure in this case. * * * Portis's conversation with the 911 operator was a major piece of evidence of the defendant's guilt. What she said in the conversation, though recorded, was hearsay, because it was an out-of-court statement offered "to prove the truth of the matter asserted," Fed.R.Evid. 801(c)(2)—namely that the defendant (Boyce) had a gun * * *. But the government argued and the district court agreed that Portis's recorded statement was admissible as a "present sense impression" and an "excited utterance." No doubt it was both those things, but there is profound doubt whether either should be an exception to the rule against the admission of hearsay evidence.
>
> One reason that hearsay normally is inadmissible (though the bar to it is riddled with exceptions) is that it often is no better than rumor or gossip, and another, which is closely related, is that it can't be tested by cross-examination of its author. But in this case either party could have called Portis to testify, and her testimony would not have been hearsay. Neither party called her—the government, doubtless because Portis recanted her story that Boyce had had a gun after he wrote her several letters from prison asking her to lie for him and giving her detailed instructions on what story she should make up; Boyce, because her testimony would have been likely to reinforce the evidence of the letters that he had attempted to suborn perjury, and also because his sexual relationship with Portis began when she was only 15. * * *
>
> To get her recorded statement admitted into evidence, the government invoked two exceptions to the hearsay rule. One, stated in Rule 803(1) and captioned "present sense impression," allows into evidence "a statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." The other—the

"excited utterance" exception of Rule 803(2)—allows into evidence "a statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."

The rationale for the exception for a "present sense impression" is that if the event described and the statement describing it are near to each other in time, this "negate[s] the likelihood of deliberate or conscious misrepresentation." Advisory Committee Notes to 1972 Proposed Rules. I don't get it, especially when "immediacy" is interpreted to encompass periods as long as 23 minutes, as in *United States v. Blakey*, 607 F.2d 779, 785–86 (7th Cir.1979) * * * . Even real immediacy is not a guarantor of truthfulness. It's not true that people can't make up a lie in a short period of time. Most lies in fact are spontaneous. See, e.g., Monica T. Whitty et al., "Not All Lies Are Spontaneous: An Examination of Deception Across Different Modes of Communication," 63 J. Am. Society of Information Sci. & Technology 208, 208–09, 214 (2012), where we read that "as with previous research, we found that planned lies were rarer than spontaneous lies." Suppose I run into an acquaintance on the street and he has a new dog with him—a little yappy thing—and he asks me, "Isn't he beautiful"? I answer yes, though I'm a cat person and consider his dog hideous.

I am not alone in deriding the "present sense impression" exception to the hearsay rule. To the majority opinion's quotation from *Lust v. Sealy, Inc*., 383 F.3d 580, 588 (7th Cir.2004)—"as with much of the folk psychology of evidence, it is difficult to take this rationale [that immediacy negates the likelihood of fabrication] entirely seriously, since people are entirely capable of spontaneous lies in emotional circumstances"—I would add the further statement that "old and new studies agree that less than one second is required to fabricate a lie." Douglas D. McFarland, "Present Sense Impressions Cannot Live in the Past," 28 Fla. State U.L.Rev. 907, 916 (2001); see also Jeffrey Bellin, "Facebook, Twitter, and the Uncertain Future of Present Sense Impressions," 160 U. Pa. L. Rev. 331, 362–66 (2012); I. Daniel Stewart, Jr., "Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence," 1970 Utah L.Rev. 1, 27–29. Wigmore made the point emphatically 110 years ago. 3 John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law § 1757, p. 2268 (1904) ("to admit hearsay testimony simply because it was uttered at the time something else was going on is to introduce an arbitrary and unreasoned test, and to remove all limits of principle").

It is time the law awakened from its dogmatic slumber. The "present sense impression" exception never had any grounding in psychology. It entered American law in the nineteenth century, long before there was a field of cognitive psychology; it has neither a theoretical nor an empirical basis; and it's not even common sense—it's not even good folk psychology.

The Advisory Committee Notes provide an even less convincing justification for the second hearsay exception at issue in this case, the "excited utterance" rule. The proffered justification is "simply that circumstances *may* produce a condition of excitement

which temporarily stills the capacity of reflection and produces utterances free of *conscious* fabrication." The two words I've italicized drain the attempted justification of any content. And even if a person is so excited by something that he loses the capacity for reflection (which doubtless does happen), how can there be any confidence that his unreflective utterance, provoked by excitement, is reliable? "One need not be a psychologist to distrust an observation made under emotional stress; everybody accepts such statements with mental reservation." Robert M. Hutchins & Donald Slesinger, "Some Observations on the Law of Evidence: Spontaneous Exclamations," 28 Colum. L.Rev. 432, 437 (1928). (This is more evidence that these exceptions to the hearsay rule don't even have support in folk psychology.)

As pointed out in the passage that the majority opinion quotes from the McCormick treatise, "The entire basis for the [excited utterance] exception may ... be questioned. While psychologists would probably concede that excitement minimizes the possibility of reflective self-interest influencing the declarant's statements, they have questioned whether this might be outweighed by the distorting effect of shock and excitement upon the declarant's observation and judgement." 2 McCormick *802 on Evidence § 272, p. 366 (7th ed.2013).

The Advisory Committee Notes go on to say that while the excited utterance exception has been criticized, "it finds support in cases without number." I find that less than reassuring. Like the exception for present sense impressions, the exception for excited utterances rests on no firmer ground than judicial habit, in turn reflecting judicial incuriosity and reluctance to reconsider ancient dogmas.

I don't want to leave the impression that in questioning the present sense and excited utterance exceptions to the hearsay rule I want to reduce the amount of hearsay evidence admissible in federal trials. What I would like to see is Rule 807 ("Residual Exception") swallow much of Rules 801 through 806 and thus many of the exclusions from evidence, exceptions to the exclusions, and notes of the Advisory Committee. The "hearsay rule" is too complex, as well as being archaic. Trials would go better with a simpler rule, the core of which would be the proposition (essentially a simplification of Rule 807) that hearsay evidence should be admissible when it is reliable, when the jury can understand its strengths and limitations, and when it will materially enhance the likelihood of a correct outcome.

Chapter 15, Section D — The Right to Confrontation — Post-*Crawford* Attempts to Define Which Hearsay Statements Are "Testimonial"

Add the following case at the bottom of page 887, after *Michigan v. Bryant:*

OHIO v. CLARK

135 S.Ct. 2173 (2015)

Justice ALITO delivered the opinion of the Court.

Darius Clark sent his girlfriend hundreds of miles away to engage in prostitution and agreed to care for her two young children while she was out of town. A day later, teachers discovered red marks on her 3–year–old son, and the boy identified Clark as his abuser. The question in this case is whether the Sixth Amendment's Confrontation Clause prohibited prosecutors from introducing those statements when the child was not available to be cross-examined. Because neither the child nor his teachers had the primary purpose of assisting in Clark's prosecution, the child's statements do not implicate the Confrontation Clause and therefore were admissible at trial.

I

Darius Clark, who went by the nickname "Dee," lived in Cleveland, Ohio, with his girlfriend, T.T., and her two children: L.P., a 3–year–old boy, and A.T., an 18–month–old girl. Clark was also T.T.'s pimp, and he would regularly send her on trips to Washington, D.C., to work as a prostitute. In March 2010, T.T. went on one such trip, and she left the children in Clark's care.

The next day, Clark took L.P. to preschool. In the lunchroom, one of L.P.'s teachers, Ramona Whitley, observed that L.P.'s left eye appeared bloodshot. She asked him "what happened," and he initially said nothing. Eventually, however, he told the teacher that he "fell." . When they moved into the brighter lights of a classroom, Whitley noticed "red marks, like whips of some sort," on L.P.'s face. She notified the lead teacher, Debra Jones, who asked L.P., "Who did this? What happened to you?" According to Jones, L.P. "seemed kind of bewildered" and "said something like, Dee, Dee." Jones asked L.P. whether Dee is "big or little," to which L.P. responded that "Dee is big." Jones then brought L.P. to her supervisor, who lifted the boy's shirt, revealing more injuries. Whitley called a child abuse hotline to alert authorities about the suspected abuse.

When Clark later arrived at the school, he denied responsibility for the injuries and quickly left with L.P. The next day, a social worker found the children at Clark's mother's house and took

them to a hospital, where a physician discovered additional injuries suggesting child abuse. L.P. had a black eye, belt marks on his back and stomach, and bruises all over his body. A.T. had two black eyes, a swollen hand, and a large burn on her cheek, and two pigtails had been ripped out at the roots of her hair.

A grand jury indicted Clark on five counts of felonious assault (four related to A.T. and one related to L.P.), two counts of endangering children (one for each child), and two counts of domestic violence (one for each child). At trial, the State introduced L.P.'s statements to his teachers as evidence of Clark's guilt, but L.P. did not testify. Under Ohio law, children younger than 10 years old are incompetent to testify if they "appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." Ohio Rule Evid. 601(A). After conducting a hearing, the trial court concluded that L.P. was not competent to testify. But under Ohio Rule of Evidence 807, which allows the admission of reliable hearsay by child abuse victims, the court ruled that L.P.'s statements to his teachers bore sufficient guarantees of trustworthiness to be admitted as evidence.

Clark moved to exclude testimony about L.P.'s out-of-court statements under the Confrontation Clause. The trial court denied the motion, ruling that L.P.'s responses were not testimonial statements covered by the Sixth Amendment. The jury found Clark guilty on all counts except for one assault count related to A.T., and it sentenced him to 28 years' imprisonment. Clark appealed his conviction, and a state appellate court reversed on the ground that the introduction of L.P.'s out-of-court statements violated the Confrontation Clause.

In a 4–to–3 decision, the Supreme Court of Ohio affirmed. It held that, under this Court's Confrontation Clause decisions, L.P.'s statements qualified as testimonial because the primary purpose of the teachers' questioning "was not to deal with an existing emergency but rather to gather evidence potentially relevant to a subsequent criminal prosecution." The court noted that Ohio has a "mandatory reporting" law that requires certain professionals, including preschool teachers, to report suspected child abuse to government authorities. In the court's view, the teachers acted as agents of the State under the mandatory reporting law and "sought facts concerning past criminal activity to identify the person responsible, eliciting statements that 'are functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination.'" (quoting *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 310–311(2009)).

We granted certiorari, and we now reverse.

II

A

* * * In *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), we interpreted the [Confrontation] Clause to permit the admission of out-of-court statements by an unavailable witness, so long as the statements bore "adequate indicia of reliability." Such indicia are present, we held, if "the evidence falls within a firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." In *Crawford v. Washington*, 541 U.S. 36 (2004), we adopted a different

approach. We explained that "witnesses," under the Confrontation Clause, are those "who bear testimony," and we defined "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." The Sixth Amendment, we concluded, prohibits the introduction of testimonial statements by a nontestifying witness, unless the witness is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination."

[Justice Alito discusses the facts and holdings of *Davis v. Washington, Hammon v. Indiana*, and *Michigan v. Bryant*; see pages 872-887 of the text for these cases.]

Thus, under our precedents, a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial. Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause. But that does not mean that the Confrontation Clause bars every statement that satisfies the "primary purpose" test. We have recognized that the Confrontation Clause does not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the time of the founding. Thus, the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause.

B

In this case, we consider statements made to preschool teachers, not the police. We are therefore presented with the question we have repeatedly reserved: whether statements to persons other than law enforcement officers are subject to the Confrontation Clause. Because at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns, we decline to adopt a categorical rule excluding them from the Sixth Amendment's reach. Nevertheless, such statements are much less likely to be testimonial than statements to law enforcement officers. And considering all the relevant circumstances here, L.P.'s statements clearly were not made with the primary purpose of creating evidence for Clark's prosecution. Thus, their introduction at trial did not violate the Confrontation Clause.

L.P.'s statements occurred in the context of an ongoing emergency involving suspected child abuse. When L.P.'s teachers noticed his injuries, they rightly became worried that the 3–year–old was the victim of serious violence. Because the teachers needed to know whether it was safe to release L.P. to his guardian at the end of the day, they needed to determine who might be abusing the child. Thus, the immediate concern was to protect a vulnerable child who needed help. Our holding in *Bryant* is instructive. As in *Bryant*, the emergency in this case was ongoing, and the circumstances were not entirely clear. L.P.'s teachers were not sure who had abused him or how best to secure his safety. Nor were they sure whether any other children might be at risk. As a result, their questions and L.P.'s answers were primarily aimed at identifying and ending the threat. Though not as harried, the conversation here was also similar to the 911 call in *Davis*. The teachers' questions were meant to identify the abuser in order to protect the victim from future attacks. Whether the teachers thought that this would be done by apprehending the abuser or by some other means is irrelevant. And the circumstances in this case were unlike the interrogation in *Hammon*, where the police knew the identity of the assailant and questioned the victim after shielding her from potential harm.

There is no indication that the primary purpose of the conversation was to gather evidence for Clark's prosecution. On the contrary, it is clear that the first objective was to protect L.P. At no point did the teachers inform L.P. that his answers would be used to arrest or punish his abuser. L.P. never hinted that he intended his statements to be used by the police or prosecutors. And the conversation between L.P. and his teachers was informal and spontaneous. The teachers asked L.P. about his injuries immediately upon discovering them, in the informal setting of a preschool lunchroom and classroom, and they did so precisely as any concerned citizen would talk to a child who might be the victim of abuse. This was nothing like the formalized station-house questioning in *Crawford* or the police interrogation and battery affidavit in *Hammon*.

L.P.'s age fortifies our conclusion that the statements in question were not testimonial. Statements by very young children will rarely, if ever, implicate the Confrontation Clause. Few preschool students understand the details of our criminal justice system. Rather, "[r]esearch on children's understanding of the legal system finds that" young children "have little understanding of prosecution." Brief for American Professional Society on the Abuse of Children as Amicus Curiae 7, and n. 5 (collecting sources). And Clark does not dispute those findings. Thus, it is extremely unlikely that a 3–year–old child in L.P.'s position would intend his statements to be a substitute for trial testimony. On the contrary, a young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all.

As a historical matter, moreover, there is strong evidence that statements made in circumstances similar to those facing L.P. and his teachers were admissible at common law. See Lyon & LaMagna, *The History of Children's Hearsay: From Old Bailey to Post-Davis,* 82 Ind. L.J. 1029, 1030 (2007); see also id., at 1041–1044 (examining child rape cases from 1687 to 1788); J. Langbein, The Origins of Adversary Criminal Trial 239 (2003) ("The Old Bailey" court in 18th-century London "tolerated flagrant hearsay in rape prosecutions involving a child victim who was not competent to testify because she was too young to appreciate the significance of her oath"). And when 18th-century courts excluded statements of this sort, see, e.g., King v. Brasier, 1 Leach 199, 168 Eng. Rep. 202 (K.B. 1779), they appeared to do so because the child should have been ruled competent to testify, not because the statements were otherwise inadmissible. See Lyon & LaMagna, supra, at 1053–1054. It is thus highly doubtful that statements like L.P.'s ever would have been understood to raise Confrontation Clause concerns. Neither *Crawford* nor any of the cases that it has produced has mounted evidence that the adoption of the Confrontation Clause was understood to require the exclusion of evidence that was regularly admitted in criminal cases at the time of the founding. Certainly, the statements in this case are nothing like the notorious use of ex parte examination in Sir Walter Raleigh's trial for treason, which we have frequently identified as "the principal evil at which the Confrontation Clause was directed." *Crawford,* 541 U.S., at 50.

Finally, although we decline to adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment, the fact that L.P. was speaking to his teachers remains highly relevant. Courts must evaluate challenged statements in context, and part of that context is the questioner's identity. Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers. It is common sense that

the relationship between a student and his teacher is very different from that between a citizen and the police. We do not ignore that reality. In light of these circumstances, the Sixth Amendment did not prohibit the State from introducing L.P.'s statements at trial.

III

Clark's efforts to avoid this conclusion are all off-base. He emphasizes Ohio's mandatory reporting obligations, in an attempt to equate L.P.'s teachers with the police and their caring questions with official interrogations. But the comparison is inapt. The teachers' pressing concern was to protect L.P. and remove him from harm's way. Like all good teachers, they undoubtedly would have acted with the same purpose whether or not they had a state-law duty to report abuse. And mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution.

It is irrelevant that the teachers' questions and their duty to report the matter had the natural tendency to result in Clark's prosecution. The statements at issue in *Davis* and *Bryant* supported the defendants' convictions, and the police always have an obligation to ask questions to resolve ongoing emergencies. Yet, we held in those cases that the Confrontation Clause did not prohibit introduction of the statements because they were not primarily intended to be testimonial. Thus, Clark is also wrong to suggest that admitting L.P.'s statements would be fundamentally unfair given that Ohio law does not allow incompetent children to testify. In any Confrontation Clause case, the individual who provided the out-of-court statement is not available as an in-court witness, but the testimony is admissible under an exception to the hearsay rules and is probative of the defendant's guilt. The fact that the witness is unavailable because of a different rule of evidence does not change our analysis.

Finally, Clark asks us to shift our focus from the context of L.P.'s conversation with his teachers to the jury's perception of those statements. Because, in his view, the "jury treated L.P.'s accusation as the functional equivalent of testimony," Clark argues that we must prohibit its introduction. Our Confrontation Clause decisions, however, do not determine whether a statement is testimonial by examining whether a jury would view the statement as the equivalent of in-court testimony. The logic of this argument, moreover, would lead to the conclusion that virtually all out-of-court statements offered by the prosecution are testimonial. The prosecution is unlikely to offer out-of-court statements unless they tend to support the defendant's guilt, and all such statements could be viewed as a substitute for in-court testimony. We have never suggested, however, that the Confrontation Clause bars the introduction of all out-of-court statements that support the prosecution's case. Instead, we ask whether a statement was given with the primary purpose of creating an out-of-court substitute for trial testimony. Here, the answer is clear: L.P.'s statements to his teachers were not testimonial.

IV

We reverse the judgment of the Supreme Court of Ohio and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice SCALIA, with whom Justice GINSBURG joins, concurring in the judgment.

I agree with the Court's holding, and with its refusal to decide two questions quite unnecessary to that holding: what effect Ohio's mandatory-reporting law has in transforming a private party into a state actor for Confrontation Clause purposes, and whether a more permissive Confrontation Clause test—one less likely to hold the statements testimonial—should apply to interrogations by private actors. The statements here would not be testimonial under the usual test applicable to informal police interrogation.

L.P.'s primary purpose here was certainly not to invoke the coercive machinery of the State against Clark. His age refutes the notion that he is capable of forming such a purpose. At common law, young children were generally considered incompetent to take oaths, and were therefore unavailable as witnesses unless the court determined the individual child to be competent. The inconsistency of L.P.'s answers—making him incompetent to testify here—is hardly unusual for a child of his age. And the circumstances of L.P.'s statements objectively indicate that even if he could, as an abstract matter, form such a purpose, he did not. Nor did the teachers have the primary purpose of establishing facts for later prosecution. Instead, they sought to ensure that they did not deliver an abused child back into imminent harm. Nor did the conversation have the requisite solemnity necessary for testimonial statements. A 3–year–old was asked questions by his teachers at school. That is far from the surroundings adequate to impress upon a declarant the importance of what he is testifying to.

That is all that is necessary to decide the case, and all that today's judgment holds.

I write separately, however, to protest the Court's shoveling of fresh dirt upon the Sixth Amendment right of confrontation so recently rescued from the grave in *Crawford v. Washington*, 541 U.S. 36 (2004). For several decades before that case, we had been allowing hearsay statements to be admitted against a criminal defendant if they bore "indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). Prosecutors, past and present, love that flabby test. *Crawford* sought to bring our application of the Confrontation Clause back to its original meaning, which was to exclude unconfronted statements made by witnesses—i.e., statements that were testimonial. * * *

Crawford remains the law. But when else has the categorical overruling, the thorough repudiation, of an earlier line of cases been described as nothing more than "adopt[ing] a different approach" —as though *Crawford* is only a matter of twiddle-dum twiddle-dee preference, and the old, pre-*Crawford* "approach" remains available? The author unabashedly displays his hostility to *Crawford* and its progeny, perhaps aggravated by inability to muster the votes to overrule them. *Crawford* does not rank on the author of the opinion's top-ten list of favorite precedents—and the author could not restrain himself from saying (and saying and saying) so.

But snide detractions do no harm; they are just indications of motive. Dicta on legal points, however, can do harm, because though they are not binding they can mislead. Take, for example, the opinion's statement that the primary-purpose test is merely one of several heretofore

unmentioned conditions ("necessary, but not always sufficient") that must be satisfied before the Clause's protections apply. That is absolutely false, and has no support in our opinions. The Confrontation Clause categorically entitles a defendant to be confronted with the witnesses against him; and the primary-purpose test sorts out, among the many people who interact with the police informally, who is acting as a witness and who is not. Those who fall into the former category bear testimony, and are therefore acting as "witnesses," subject to the right of confrontation. There are no other mysterious requirements that the Court declines to name.

The opinion asserts that future defendants, and future Confrontation Clause majorities, must provide "evidence that the adoption of the Confrontation Clause was understood to require the exclusion of evidence that was regularly admitted in criminal cases at the time of the founding." This dictum gets the burden precisely backwards—which is of course precisely the idea. Defendants may invoke their Confrontation Clause rights once they have established that the state seeks to introduce testimonial evidence against them in a criminal case without unavailability of the witness and a previous opportunity to cross-examine. The burden is upon the prosecutor who seeks to introduce evidence over this bar to prove a long-established practice of introducing specific kinds of evidence, such as dying declarations, see *Crawford*, supra, at 56, n. 6, for which cross-examination was not typically necessary. A suspicious mind (or even one that is merely not naïve) might regard this distortion as the first step in an attempt to smuggle longstanding hearsay exceptions back into the Confrontation Clause—in other words, an attempt to return to *Ohio v. Roberts*.

But the good news is that there are evidently not the votes to return to that halcyon era for prosecutors; and that dicta, even calculated dicta, are nothing but dicta. They are enough, however, combined with the peculiar phenomenon of a Supreme Court opinion's aggressive hostility to precedent that it purports to be applying, to prevent my joining the writing for the Court. I concur only in the judgment.

Justice THOMAS, concurring in the judgment.

I agree with the Court that Ohio mandatory reporters are not agents of law enforcement, that statements made to private persons or by very young children will rarely implicate the Confrontation Clause, and that the admission of the statements at issue here did not implicate that constitutional provision. I nonetheless cannot join the majority's analysis. In the decade since we first sought to return to the original meaning of the Confrontation Clause, we have carefully reserved consideration of that Clause's application to statements made to private persons for a case in which it was squarely presented.

This is that case; yet the majority does not offer clear guidance on the subject, declaring only that "the primary purpose test is a necessary, but not always sufficient, condition" for a statement to fall within the scope of the Confrontation Clause. Ante, at 2180 – 2181. The primary purpose test, however, is just as much an exercise in fiction disconnected from history for statements made to private persons as it is for statements made to agents of law enforcement, if not more so. I would not apply it here. Nor would I leave the resolution of this important question in doubt.

Instead, I would use the same test for statements to private persons that I have employed for statements to agents of law enforcement, assessing whether those statements bear sufficient indicia of solemnity to qualify as testimonial. This test is grounded in the history of the common-law right to confrontation, which developed to target particular practices that occurred under the English bail and committal statutes passed during the reign of Queen Mary, namely, the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused. Reading the Confrontation Clause in light of this history, we have interpreted the accused's right to confront "the witnesses against him," as the right to confront those who "bear testimony" against him. And because "testimony" is a solemn declaration or affirmation made for the purpose of establishing or proving some fact, an analysis of statements under the Clause must turn in part on their solemnity.

I have identified several categories of extrajudicial statements that bear sufficient indicia of solemnity to fall within the original meaning of testimony. Statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions easily qualify. And statements not contained in such materials may still qualify if they were obtained in "a formalized dialogue"; after the issuance of the warnings required by *Miranda v. Arizona*; while in police custody; or in an attempt to evade confrontation. That several of these factors seem inherently inapplicable to statements made to private persons does not mean that the test is unsuitable for analyzing such statements. All it means is that statements made to private persons rarely resemble the historical abuses that the common-law right to confrontation developed to address, and it is those practices that the test is designed to identify.

Here, L.P.'s statements do not bear sufficient indicia of solemnity to qualify as testimonial. They were neither contained in formalized testimonial materials nor obtained as the result of a formalized dialogue initiated by police. Instead, they were elicited during questioning by L.P.'s teachers at his preschool. Nor is there any indication that L.P.'s statements were offered at trial to evade confrontation. To the contrary, the record suggests that the prosecution would have produced L.P. to testify had he been deemed competent to do so. His statements bear no resemblance to the historical practices that the Confrontation Clause aimed to eliminate. The admission of L.P.'s extrajudicial statements thus does not implicate the Confrontation Clause.
I respectfully concur in the judgment.

Add the following material at the end of the section on page 911:

[3] Information Relied Upon By an Expert: Is it Hearsay? And is it Testimonial?

Williams v. Illinois

132 S.Ct. 2221 (2012)

Justice ALITO announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice KENNEDY, and Justice BREYER join.

In this case, we decide whether *Crawford v. Washington*, 541 U.S. 36, 50 (2004), precludes an expert witness from testifying in a manner that has long been allowed under the law of evidence. Specifically, does *Crawford* bar an expert from expressing an opinion based on facts about a case that have been made known to the expert but about which the expert is not competent to testify? We also decide whether *Crawford* substantially impedes the ability of prosecutors to introduce DNA evidence and thus may effectively relegate the prosecution in some cases to reliance on older, less reliable forms of proof.

In petitioner's bench trial for rape, the prosecution called an expert who testified that a DNA profile produced by an outside laboratory, Cellmark, matched a profile produced by the state police lab using a sample of petitioner's blood. On direct examination, the expert testified that Cellmark was an accredited laboratory and that Cellmark provided the police with a DNA profile. The expert also explained the notations on documents admitted as business records, stating that, according to the records, vaginal swabs taken from the victim were sent to and received back from Cellmark. The expert made no other statement that was offered for the purpose of identifying the sample of biological material used in deriving the profile or for the purpose of establishing how Cellmark handled or tested the sample. Nor did the expert vouch for the accuracy of the profile that Cellmark produced. Nevertheless, petitioner contends that the expert's testimony violated the Confrontation Clause as interpreted in *Crawford*.

Petitioner's main argument is that the expert went astray when she referred to the DNA profile provided by Cellmark as having been produced from semen found on the victim's vaginal swabs. But both the Illinois Appellate Court and the Illinois Supreme Court found that this statement was not admitted for the truth of the matter asserted, and it is settled that the Confrontation Clause does not bar the admission of such statements. See *Tennessee v. Street*, 471 U.S. 409 (1985). For more than 200 years, the law of evidence has permitted the sort of testimony that was given by the expert in this case. Under settled evidence law, an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true. It is then up to the party who calls the expert to introduce other evidence establishing the facts assumed by the

expert. While it was once the practice for an expert who based an opinion on assumed facts to testify in the form of an answer to a hypothetical question, modern practice does not demand this formality and, in appropriate cases, permits an expert to explain the facts on which his or her opinion is based without testifying to the truth of those facts. See Fed. Rule Evid. 703. That is precisely what occurred in this case, and we should not lightly "swee[p] away an accepted rule governing the admission of scientific evidence." *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 330 (2009) (KENNEDY, J., dissenting).

We now conclude that this form of expert testimony does not violate the Confrontation Clause because that provision has no application to out-of-court statements that are not offered to prove the truth of the matter asserted. When an expert testifies for the prosecution in a criminal case, the defendant has the opportunity to cross-examine the expert about any statements that are offered for their truth. Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause. Applying this rule to the present case, we conclude that the expert's testimony did not violate the Sixth Amendment.

As a second, independent basis for our decision, we also conclude that even if the report produced by Cellmark had been admitted into evidence, there would have been no Confrontation Clause violation. The Cellmark report is very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach. The report was produced before any suspect was identified. The report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose. And the profile that Cellmark provided was not inherently inculpatory. On the contrary, a DNA profile is evidence that tends to exculpate all but one of the more than 7 billion people in the world today. The use of DNA evidence to exonerate persons who have been wrongfully accused or convicted is well known. If DNA profiles could not be introduced without calling the technicians who participated in the preparation of the profile, economic pressures would encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less reliable. The Confrontation Clause does not mandate such an undesirable development. This conclusion will not prejudice any defendant who really wishes to probe the reliability of the DNA testing done in a particular case because those who participated in the testing may always be subpoenaed by the defense and questioned at trial.

A

On February 10, 2000, in Chicago, Illinois, a young woman, L.J., was abducted while she was walking home from work. The perpetrator forced her into his car and raped her, then robbed her of her money and other personal items and pushed her out into the street. L.J. ran home and reported the attack to her mother, who called the police. An ambulance took L.J. to the hospital, where doctors treated her wounds and took a blood sample and vaginal swabs for a sexual-assault kit. A Chicago Police detective collected the kit, labeled it with an inventory number, and sent it under seal to the Illinois State Police (ISP) lab.

At the ISP lab, a forensic scientist received the sealed kit. He conducted a chemical test that confirmed the presence of semen on the vaginal swabs, and he then resealed the kit and placed it in a secure evidence freezer.

During the period in question, the ISP lab often sent biological samples to Cellmark Diagnostics Laboratory in Germantown, Maryland, for DNA testing. There was evidence that the ISP lab sent L.J.'s vaginal swabs to Cellmark for testing and that Cellmark sent back a report containing a male DNA profile produced from semen taken from those swabs. At this time, petitioner was not under suspicion for L.J.'s rape.

Sandra Lambatos, a forensic specialist at the ISP lab, conducted a computer search to see if the Cellmark profile matched any of the entries in the state DNA database. The computer showed a match to a profile produced by the lab from a sample of petitioner's blood that had been taken after he was arrested on unrelated charges on August 3, 2000.

On April 17, 2001, the police conducted a lineup at which L.J. identified petitioner as her assailant. Petitioner was then indicted for aggravated criminal sexual assault, aggravated kidnaping, and aggravated robbery. In lieu of a jury trial, petitioner chose to be tried before a state judge.

B

Petitioner's bench trial began in April 2006. In open court, L.J. again identified petitioner as her attacker. The State also offered three expert forensic witnesses to link petitioner to the crime through his DNA. First, Brian Hapack, an ISP forensic scientist, testified that he had confirmed the presence of semen on the vaginal swabs taken from L.J. by performing an acid phosphatase test. After performing this test, he testified, he resealed the evidence and left it in a secure freezer at the ISP lab.

Second, Karen Abbinanti, a state forensic analyst, testified that she had used Polymerase Chain Reaction (PCR) and Short Tandem Repeat (STR) techniques to develop a DNA profile from a blood sample that had been drawn from petitioner after he was arrested in August 2000. She also stated that she had entered petitioner's DNA profile into the state forensic database.

Third, the State offered Sandra Lambatos as an expert witness in forensic biology and forensic DNA analysis. On direct examination, Lambatos testified about the general process of using the PCR and STR techniques to generate DNA profiles from forensic samples such as blood and semen. She then described how these DNA profiles could be matched to an individual based on the individual's unique genetic code. In making a comparison between two DNA profiles, Lambatos stated, it is a “commonly accepted” practice within the scientific community for “one DNA expert to rely on the records of another DNA expert.” Lambatos also testified that Cellmark was an “accredited crime lab” and that, in her experience, the ISP lab routinely sent evidence samples via Federal Express to Cellmark for DNA testing in order to expedite the testing process and to “reduce [the lab's] backlog.” To keep track of evidence samples and preserve the chain of

custody, Lambatos stated, she and other analysts relied on sealed shipping containers and labeled shipping manifests, and she added that experts in her field regularly relied on such protocols.

Lambatos was shown shipping manifests that were admitted into evidence as business records, and she explained what they indicated, namely, that the ISP lab had sent L.J.'s vaginal swabs to Cellmark, and that Cellmark had sent them back, along with a deduced male DNA profile. The prosecutor asked Lambatos whether there was "a computer match" between "the male DNA profile found in semen from the vaginal swabs of [L.J.]" and "[the] male DNA profile that had been identified" from petitioner's blood sample.

The defense attorney objected to this question for "lack of foundation," arguing that the prosecution had offered "no evidence with regard to any testing that's been done to generate a DNA profile by another lab to be testified to by this witness."

The prosecutor responded: "I'm not getting at what another lab did." Rather, she said, she was simply asking Lambatos about "her own testing based on [DNA] information" that she had received from Cellmark. The trial judge agreed, noting, "If she says she didn't do her own testing and she relied on a test of another lab and she's testifying to that, we will see what she's going to say." The prosecutor then proceeded, asking Lambatos, "Did you compare the semen that had been identified by Brian Hapack from the vaginal swabs of [L.J.] to the male DNA profile that had been identified by Karen [Abbinanti] from the blood of [petitioner]?"

Lambatos answered "Yes." Defense counsel lodged an objection "to the form of the question," but the trial judge overruled it. Lambatos then testified that, based on her own comparison of the two DNA profiles, she "concluded that [petitioner] cannot be excluded as a possible source of the semen identified in the vaginal swabs," and that the probability of the profile's appearing in the general population was "1 in 8.7 quadrillion black, 1 in 390 quadrillion white, or 1 in 109 quadrillion Hispanic unrelated individuals." Asked whether she would "call this a match to [petitioner]," Lambatos answered yes, again over defense counsel's objection.

The Cellmark report itself was neither admitted into evidence nor shown to the factfinder [i.e., the trial judge]. Lambatos did not quote or read from the report; nor did she identify it as the source of any of the opinions she expressed.

On cross-examination, Lambatos confirmed that she did not conduct or observe any of the testing on the vaginal swabs, and that her testimony relied on the DNA profile produced by Cellmark. She stated that she trusted Cellmark to do reliable work because it was an accredited lab, but she admitted she had not seen any of the calibrations or work that Cellmark had done in deducing a male DNA profile from the vaginal swabs.

* * *

When Lambatos finished testifying, the defense moved to exclude her testimony "with regards to testing done by [Cellmark]" based on the Confrontation Clause. * * * Thus, while defense counsel objected to and sought the exclusion of Lambatos' testimony insofar as it

implicated events at the Cellmark lab, defense counsel did not object to or move for the exclusion of any other portion of Lambatos' testimony, including statements regarding the contents of the shipment sent to or received back from Cellmark.

The prosecution responded that petitioner's Confrontation Clause rights were satisfied because he had the opportunity to cross-examine the expert who had testified that there was a match between the DNA profiles produced by Cellmark and Abbinanti. * * * She further argued that any deficiency in the foundation for the expert's opinion "[d]oesn't go to the admissibility of [that] testimony," but instead "goes to the weight of the testimony."

The trial judge agreed with the prosecution and stated that "the issue is ... what weight do you give the test, not do you exclude it." Accordingly, the judge stated that he would not exclude Lambatos' testimony, which was "based on her own independent testing of the data received from [Cellmark]."

[The defendant was convicted and the Illinois appellate courts affirmed, reasoning that no statements from Cellmark were ever admitted against Williams for the truth of the matter asserted — rather they were used by the expert to come to her own conclusion — and therefore Cellmark was not a "witness against" the defendant within the meaning of the Confrontation Clause.]

II

A

* * * Before *Crawford*, this Court took the view that the Confrontation Clause did not bar the admission of an out-of-court statement that fell within a firmly rooted exception to the hearsay rule, see *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), but in *Crawford*, the Court adopted a fundamentally new interpretation of the confrontation right, holding that testimonial statements of witnesses absent from trial can be admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine. *Crawford* has resulted in a steady stream of new cases in this Court. *See Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011); *Michigan v. Bryant*, 131 S.Ct. 1143 (2011); *Melendez–Diaz*, 557 U.S. 305; *Giles v. California*, 554 U.S. 353 (2008); *Davis v. Washington*, 547 U.S. 813 (2006).

Two of these decisions involved scientific reports. In *Melendez–Diaz*, the defendant was arrested and charged with distributing and trafficking in cocaine. At trial, the prosecution introduced bags of a white powdery substance that had been found in the defendant's possession. The trial court also admitted into evidence three "certificates of analysis" from the state forensic laboratory stating that the bags had been "examined with the following results: The substance was found to contain: Cocaine."

The Court held that the admission of these certificates, which were executed under oath before a notary, violated the Sixth Amendment. They were created for "the sole purpose of providing evidence against a defendant," and were " quite plainly affidavits." * * * There was no

doubt that the certificates were used to prove the truth of the matter they asserted. * * *

In *Bullcoming*, we held that another scientific report could not be used as substantive evidence against the defendant unless the analyst who prepared and certified the report was subject to confrontation. The defendant in that case had been convicted of driving while intoxicated. At trial, the court admitted into evidence a forensic report certifying that a sample of the defendant's blood had an alcohol concentration of 0.21 grams per hundred milliliters, well above the legal limit. Instead of calling the analyst who signed and certified the forensic report, the prosecution called another analyst who had not performed or observed the actual analysis, but was only familiar with the general testing procedures of the laboratory. The Court declined to accept this surrogate testimony, despite the fact that the testifying analyst was a "knowledgeable representative of the laboratory" who could "explain the lab's processes and the details of the report." 564 U.S., at ---- (KENNEDY, J., dissenting). The Court stated simply: "The accused's right is to be confronted with the analyst who made the certification."

Just as in *Melendez–Diaz*, the forensic report that was introduced in *Bullcoming* contained a testimonial certification, made in order to prove a fact at a criminal trial. * * * Critically, the report was introduced at trial for the substantive purpose of proving the truth of the matter asserted by its out-of-court author—namely, that the defendant had a blood-alcohol level of 0.21.* * *

In concurrence, Justice SOTOMAYOR highlighted the importance of the fact that the forensic report had been admitted into evidence for the purpose of proving the truth of the matter it asserted. She emphasized that "this [was] not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence." (citing Fed. Rule Evid. 703). "We would face a different question," she observed, "if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence."

We now confront that question.

B

It has long been accepted that an expert witness may voice an opinion based on facts concerning the events at issue in a particular case even if the expert lacks first-hand knowledge of those facts.

[Justice Alito discusses the common law, which allowed an expert to "rely on facts that had already been established in the record" and also to testify in the form of a hypothetical question, the truth of which "could then be established through independent evidence, and the factfinder would regard the expert's testimony to be only as credible as the premises on which it was based."]

Modern rules of evidence continue to permit experts to express opinions based on facts about which they lack personal knowledge, but these rules dispense with the need for hypothetical

questions. Under both the Illinois and the Federal Rules of Evidence, an expert may base an opinion on facts that are "made known to the expert at or before the hearing," but such reliance does not constitute admissible evidence of this underlying information. Accordingly, in jury trials, both Illinois and federal law generally bar an expert from disclosing such inadmissible evidence.[1] In bench trials, however, both the Illinois and the Federal Rules place no restriction on the revelation of such information to the factfinder. When the judge sits as the trier of fact, it is presumed that the judge will understand the limited reason for the disclosure of the underlying inadmissible information and will not rely on that information for any improper purpose. * * *

This feature of Illinois and federal law is important because *Crawford*, while departing from prior Confrontation Clause precedent in other respects, took pains to reaffirm the proposition that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (citing *Tennessee v. Street*, 471 U.S. 409). In *Street*, the defendant claimed that the police had coerced him into adopting the confession of his alleged accomplice. The prosecution sought to rebut this claim by showing that the defendant's confession differed significantly from the accomplice's. Although the accomplice's confession was clearly a testimonial statement, the Court held that the jurors could hear it as long as they were instructed to consider that confession not for its truth, but only for the "distinctive and limited purpose" of comparing it to the defendant's confession, to see whether the two were identical.

III

A

In order to assess petitioner's Confrontation Clause argument, it is helpful to inventory exactly what Lambatos said on the stand about Cellmark. She testified to the truth of the following matters: Cellmark was an accredited lab; the ISP occasionally sent forensic samples to Cellmark for DNA testing; according to shipping manifests admitted into evidence, the ISP lab sent vaginal swabs taken from the victim to Cellmark and later received those swabs back from Cellmark; and, finally, the Cellmark DNA profile matched a profile produced by the ISP lab from a sample of petitioner's blood. Lambatos had personal knowledge of all of these matters, and therefore none of this testimony infringed petitioner's confrontation right.

[1] But disclosure of these facts or data to the jury is permitted if the value of disclosure "substantially outweighs [any] prejudicial effect," Fed. Rule Evid. 703, or "the probative value ... outweighs the risk of unfair prejudice." *People v. Pasch*, 152 Ill.2d 133, 223, 178 Ill.Dec. 38, 604 N.E.2d 294, 333 (1992). When this disclosure occurs, the underlying facts are revealed to the jury for the limited purpose of explaining the basis for the expert's opinion and not for the truth of the matter asserted.

Lambatos did not testify to the truth of any other matter concerning Cellmark. She made no other reference to the Cellmark report, which was not admitted into evidence and was not seen by the trier of fact. Nor did she testify to anything that was done at the Cellmark lab, and she did not vouch for the quality of Cellmark's work.

B

The principal argument advanced to show a Confrontation Clause violation concerns the phrase that Lambatos used when she referred to the DNA profile that the ISP lab received from Cellmark. This argument is developed most fully in the dissenting opinion, and therefore we refer to the dissent's discussion of this issue.

In the view of the dissent, the following is the critical portion of Lambatos' testimony * * * :

> "Q Was there a computer match generated of the male DNA profile *found in semen from the vaginal swabs of [L.J.]* to a male DNA profile that had been identified as having originated from Sandy Williams?
>
> "A Yes, there was."

According to the dissent, the italicized phrase violated petitioner's confrontation right because Lambatos lacked personal knowledge that the profile produced by Cellmark was based on the vaginal swabs taken from the victim, L.J. As the dissent acknowledges, there would have been "nothing wrong with Lambatos's testifying that two DNA profiles—the one shown in the Cellmark report and the one derived from Williams's blood—matched each other; that was a straightforward application of Lambatos's expertise." Thus, if Lambatos' testimony had been slightly modified as follows, the dissent would see no problem:

> "Q Was there a computer match generated of the male DNA profile *produced by Cellmark* to a male DNA profile that had been identified as having originated from Sandy Williams?
>
> "A Yes, there was." [2]

[2] The small difference between what Lambatos actually said on the stand and the slightly revised version that the dissent would find unobjectionable shows that, despite the dissent's rhetoric, its narrow argument would have little practical effect in future cases. Prosecutors would be allowed to do exactly what the prosecution did in this case so long as their testifying experts' testimony was slightly modified along the lines shown above. * * *

The defect in this argument is that under Illinois law (like federal law) it is clear that the putatively offending phrase in Lambatos' testimony was not admissible for the purpose of proving the truth of the matter asserted— i.e., that the matching DNA profile was "found in semen from the vaginal swabs." Rather, that fact was a mere premise of the prosecutor's question, and Lambatos simply assumed that premise to be true when she gave her answer indicating that there was a match between the two DNA profiles. There is no reason to think that the trier of fact took Lambatos' answer as substantive evidence to establish where the DNA profiles came from.

The dissent's argument would have force if petitioner had elected to have a jury trial. In that event, there would have been a danger of the jury's taking Lambatos' testimony as proof that the Cellmark profile was derived from the sample obtained from the victim's vaginal swabs. Absent an evaluation of the risk of juror confusion and careful jury instructions, the testimony could not have gone to the jury.

This case, however, involves a bench trial and we must assume that the trial judge understood that the portion of Lambatos' testimony to which the dissent objects was not admissible to prove the truth of the matter asserted. The dissent, on the other hand, reaches the truly remarkable conclusion that the wording of Lambatos' testimony confused the trial judge. Were it not for that wording, the argument goes, the judge might have found that the prosecution failed to introduce sufficient admissible evidence to show that the Cellmark profile was derived from the sample taken from the victim, and the judge might have disregarded the DNA evidence. This argument reflects a profound lack of respect for the acumen of the trial judge.

* * *

That Lambatos was not competent to testify to the chain of custody of the sample taken from the victim was a point that any trial judge or attorney would immediately understand. Lambatos, after all, had absolutely nothing to do with the collection of the sample from the victim, its subsequent handling or preservation by the police in Illinois, or its shipment to and receipt by Cellmark. No trial judge would take Lambatos' testimony as furnishing "the missing link" in the State's evidence regarding the identity of the sample that Cellmark tested.

[In addition] the admissible evidence left little room for argument that the sample tested by Cellmark came from any source other than the victim's vaginal swabs. This is so because there is simply no plausible explanation for how Cellmark could have produced a DNA profile that matched Williams' if Cellmark had tested any sample other than the one taken from the victim. If any other items that might have contained Williams' DNA had been sent to Cellmark or were otherwise in Cellmark's possession, there would have been a chance of a mix-up or of cross-contamination. But there is absolutely nothing to suggest that Cellmark had any such items. Thus, the fact that the Cellmark profile matched Williams—the very man whom the victim identified in a lineup and at trial as her attacker—was itself striking confirmation that the sample that Cellmark tested was the sample taken from the victim's vaginal swabs. For these reasons, it is fanciful to suggest that the trial judge took Lambatos' testimony as providing critical chain-of-custody evidence.

C

Other than the phrase that Lambatos used in referring to the Cellmark profile, no specific passage in the trial record has been identified as violating the Confrontation Clause, but it is nevertheless suggested that the State somehow introduced "the substance of Cellmark's report into evidence." (KAGAN, J., dissenting). The main impetus for this argument appears to be the (erroneous) view that unless the substance of the report was sneaked in, there would be insufficient evidence in the record on two critical points: first, that the Cellmark profile was based on the semen in the victim's vaginal swabs and, second, that Cellmark's procedures were reliable. This argument is both legally irrelevant for present purposes and factually incorrect.

As to legal relevance, the question before us is whether petitioner's Sixth Amendment confrontation right was violated, not whether the State offered sufficient foundational evidence to support the admission of Lambatos' opinion about the DNA match. In order to prove these underlying facts, the prosecution relied on circumstantial evidence, and the Illinois courts found that this evidence was sufficient to satisfy state-law requirements regarding proof of foundational facts. We cannot review that interpretation and application of Illinois law. Thus, even if the record did not contain any evidence that could rationally support a finding that Cellmark produced a scientifically reliable DNA profile based on L.J.'s vaginal swab, that would not establish a Confrontation Clause violation. If there were no proof that Cellmark produced an accurate profile based on that sample, Lambatos' testimony regarding the match would be irrelevant, but the Confrontation Clause, as interpreted in *Crawford*, does not bar the admission of irrelevant evidence, only testimonial statements by declarants who are not subject to cross-examination.

It is not correct, however, that the trial record lacks admissible evidence with respect to the source of the sample that Cellmark tested or the reliability of the Cellmark profile. As to the source of the sample, the State offered conventional chain-of-custody evidence, namely, the testimony of the physician who obtained the vaginal swabs, the testimony of the police employees who handled and kept custody of that evidence until it was sent to Cellmark, and the shipping manifests, which provided evidence that the swabs were sent to Cellmark and then returned to the ISP lab. In addition, as already discussed, the match between the Cellmark profile and petitioner's profile was itself telling confirmation that the Cellmark profile was deduced from the semen on the vaginal swabs.

This match also provided strong circumstantial evidence regarding the reliability of Cellmark's work. Assuming (for the reasons discussed above) that the Cellmark profile was based on the semen on the vaginal swabs, how could shoddy or dishonest work in the Cellmark lab have resulted in the production of a DNA profile that just so happened to match petitioner's? If the semen found on the vaginal swabs was not petitioner's and thus had an entirely different DNA profile, how could sloppy work in the Cellmark lab have transformed that entirely different profile into one that matched petitioner's? And without access to any other sample of petitioner's DNA (and recall that petitioner was not even under suspicion at this time), how could a dishonest lab technician have substituted petitioner's DNA profile? Under the circumstances of this case, it was surely permissible for the trier of fact to infer that the odds of any of this were exceedingly low.

This analysis reveals that much of the dissent's argument rests on a very clear error. The dissent argues that Lambatos' testimony could be "true" only if the predicate facts asserted in the Cellmark report were true, and therefore Lambatos' reference to the report must have been used for the purpose of proving the truth of those facts. But the truth of Lambatos' testimony, properly understood, was not dependent on the truth of any predicate facts. Lambatos testified that two DNA profiles matched. The correctness of this expert opinion, which the defense was able to test on cross-examination, was not in any way dependent on the origin of the samples from which the profiles were derived. Of course, Lambatos' opinion would have lacked probative value if the prosecution had not introduced other evidence to establish the provenance of the profiles, but that has nothing to do with the truth of her testimony.

The dissent is similarly mistaken in its contention that the Cellmark report "was offered for its truth because that is all such 'basis evidence' can be offered for." This view is directly contrary to the current version of Rule 703 of the Federal Rules of Evidence, which this Court approved and sent to Congress in 2000. Under that Rule, "basis evidence" that is not admissible for its truth may be disclosed even in a jury trial under appropriate circumstances. The purpose for allowing this disclosure is that it may "assis[t] the jury to evaluate the expert's opinion." Advisory Committee's 2000 Notes on Fed. Rule Evid. 703. The Rule 703 approach, which was controversial when adopted, is based on the idea that the disclosure of basis evidence can help the factfinder understand the expert's thought process and determine what weight to give to the expert's opinion. For example, if the factfinder were to suspect that the expert relied on factual premises with no support in the record, or that the expert drew an unwarranted inference from the premises on which the expert relied, then the probativeness or credibility of the expert's opinion would be seriously undermined. The purpose of disclosing the facts on which the expert relied is to allay these fears—to show that the expert's reasoning was not illogical, and that the weight of the expert's opinion does not depend on factual premises unsupported by other evidence in the record—not to prove the truth of the underlying facts.

Perhaps because it cannot seriously dispute the legitimate nonhearsay purpose of illuminating the expert's thought process, the dissent resorts to the last-ditch argument that, after all, it really does not matter whether Lambatos' statement regarding the source of the Cellmark report was admitted for its truth. The dissent concedes that "the trial judge might have ignored Lambatos's statement about the Cellmark report," but nonetheless maintains that "the admission of that statement violated the Confrontation Clause even if the judge ultimately put it aside." But in a bench trial, it is not necessary for the judge to stop and make a formal statement on the record regarding the limited reason for which the testimony is admitted. If the judge does not consider the testimony for its truth, the effect is precisely the same. Thus, if the trial judge in this case did not rely on the statement in question for its truth, there is simply no way around the proviso in *Crawford* that the Confrontation Clause applies only to out-of-court statements that are used to establish the truth of the matter asserted.

For all these reasons, we conclude that petitioner's Sixth Amendment confrontation right was not violated.

D

This conclusion is entirely consistent with *Bullcoming* and *Melendez–Diaz*. In those cases, the forensic reports were introduced into evidence, and there is no question that this was done for the purpose of proving the truth of what they asserted: in Bullcoming that the defendant's blood alcohol level exceeded the legal limit and in Melendez–Diaz that the substance in question contained cocaine. Nothing comparable happened here. In this case, the Cellmark report was not introduced into evidence. An expert witness referred to the report not to prove the truth of the matter asserted in the report, i.e., that the report contained an accurate profile of the perpetrator's DNA, but only to establish that the report contained a DNA profile that matched the DNA profile deduced from petitioner's blood. * * * The relevance of the match was then established by independent circumstantial evidence showing that the Cellmark report was based on a forensic sample taken from the scene of the crime.

Our conclusion will not open the door for the kind of abuses suggested by some of petitioner's amici and the dissent. In the hypothetical situations posited, an expert expresses an opinion based on factual premises not supported by any admissible evidence, and may also reveal the out-of-court statements on which the expert relied. [11] There are at least four safeguards to prevent such abuses. First, trial courts can screen out experts who would act as mere conduits for hearsay by strictly enforcing the requirement that experts display some genuine "scientific, technical, or other specialized knowledge [that] will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. Rule Evid. 702(a). Second, experts are generally precluded from disclosing inadmissible evidence to a jury. See Fed. Rule Evid. 703. Third, if such evidence is disclosed, the trial judges may and, under most circumstances, must, instruct the jury that out-of-court statements cannot be accepted for their truth, and that an expert's opinion is only as good as the independent evidence that establishes its underlying premises. See Fed. Rules Evid. 105, 703. And fourth, if the prosecution cannot muster any independent admissible evidence to prove the foundational facts that are essential to the relevance of the expert's testimony, then the expert's testimony cannot be given any weight by the trier of fact.

[11] Both Justice THOMAS and Justice KAGAN quote statements in D. Kaye, D. Bernstein, & J. Mnookin, The New Wigmore: Expert Evidence § 4.10.1, pp. 196–197 (2d ed.2011), that are critical of the theory that an expert, without violating the Confrontation Clause, may express an opinion that is based on testimonial hearsay and may, in some circumstances, disclose that testimonial hearsay to the trier of fact. The principal basis for this criticism seems to be the fear that juries, even if given limiting instructions, will view the disclosed hearsay as evidence of the truth of the matter asserted. This argument plainly has no application in a case like this one, in which a judge sits as the trier of fact.

IV

A

Even if the Cellmark report had been introduced for its truth, we would nevertheless conclude that there was no Confrontation Clause violation. * * * "[T]he principal evil at which the Confrontation Clause was directed," the Court concluded in *Crawford*, "was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." "[I]n England, pretrial examinations of suspects and witnesses by government officials 'were sometimes read in court in lieu of live testimony." The Court has thus interpreted the Confrontation Clause as prohibiting modern-day practices that are tantamount to the abuses that gave rise to the recognition of the confrontation right. But any further expansion would strain the constitutional text.

The abuses that the Court has identified as prompting the adoption of the Confrontation Clause shared the following two characteristics: (a) they involved out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct and (b) they involved formalized statements such as affidavits, depositions, prior testimony, or confessions. In all but one of the post-*Crawford* cases[13] in which a Confrontation Clause violation has been found, both of these characteristics were present. See *Bullcoming*, 564 U.S., at 308 (certified lab report having purpose of showing that defendant's blood-alcohol level exceeded legal limit); *Melendez–Diaz*, 557 U.S., at 308 (certified lab report having purpose of showing that substance connected to defendant contained cocaine); *Crawford*, supra, at 38 (custodial statement made after *Miranda* warnings that shifted blame from declarant to accused). The one exception occurred in *Hammon v. Indiana*, 547 U.S. 813 (2006), which was decided together with *Davis v. Washington*, but in Hammon and every other post- *Crawford* case in which the Court has found a violation of the confrontation right, the statement at issue had the primary purpose of accusing a targeted individual.

B

In *Hammon*, the one case in which an informal statement was held to violate the Confrontation Clause, we considered statements elicited in the course of police interrogation. We held that a statement does not fall within the ambit of the Clause when it is made "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." In *Bryant*, another police-interrogation case, we explained that a person who makes a statement to resolve an ongoing emergency is not acting like a trial witness because the declarant's purpose is not to provide a solemn declaration for use at

[13] Experience might yet show that the holdings in those cases should be reconsidered for the reasons, among others, expressed in the dissents the decisions produced. Those decisions are not challenged in this case and are to be deemed binding precedents, but they can and should be distinguished on the facts here.

trial, but to bring an end to an ongoing threat. We noted that "the prospect of fabrication ... is presumably significantly diminished" when a statement is made under such circumstances and that reliability is a salient characteristic of a statement that falls outside the reach of the Confrontation Clause. * * *

In *Melendez–Diaz* and *Bullcoming*, the Court held that the particular forensic reports at issue qualified as testimonial statements, but the Court did not hold that all forensic reports fall into the same category. Introduction of the reports in those cases ran afoul of the Confrontation Clause because they were the equivalent of affidavits made for the purpose of proving the guilt of a particular criminal defendant at trial. There was nothing resembling an ongoing emergency, as the suspects in both cases had already been captured, and the tests in question were relatively simple and can generally be performed by a single analyst. In addition, the technicians who prepared the reports must have realized that their contents (which reported an elevated blood-alcohol level and the presence of an illegal drug) would be incriminating.

C

The Cellmark report is very different. It plainly was not prepared for the primary purpose of accusing a targeted individual. In identifying the primary purpose of an out-of-court statement, we apply an objective test. We look for the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances.

Here, the primary purpose of the Cellmark report, viewed objectively, was not to accuse petitioner or to create evidence for use at trial. When the ISP lab sent the sample to Cellmark, its primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time. Similarly, no one at Cellmark could have possibly known that the profile that it produced would turn out to inculpate petitioner—or for that matter, anyone else whose DNA profile was in a law enforcement database. Under these circumstances, there was no "prospect of fabrication" and no incentive to produce anything other than a scientifically sound and reliable profile.

The situation in which the Cellmark technicians found themselves was by no means unique. When lab technicians are asked to work on the production of a DNA profile, they often have no idea what the consequences of their work will be. In some cases, a DNA profile may provide powerful incriminating evidence against a person who is identified either before or after the profile is completed. But in others, the primary effect of the profile is to exonerate a suspect who has been charged or is under investigation. The technicians who prepare a DNA profile generally have no way of knowing whether it will turn out to be incriminating or exonerating—or both.

It is also significant that in many labs, numerous technicians work on each DNA profile. See Brief for New York County District Attorney's Office et al. as Amici Curiae 6 (New York lab uses at least 12 technicians for each case); People v. Johnson, 389 Ill.App.3d 618, 627, 906 N.E.2d 70, 79 (2009) ("[A]pproximately 10 Cellmark analysts were involved in the laboratory work in this case"). When the work of a lab is divided up in such a way, it is likely that the sole

purpose of each technician is simply to perform his or her task in accordance with accepted procedures.

Finally, the knowledge that defects in a DNA profile may often be detected from the profile itself provides a further safeguard. In this case, for example, Lambatos testified that she would have been able to tell from the profile if the sample used by Cellmark had been degraded prior to testing. As noted above, moreover, there is no real chance that sample contamination, sample switching, mislabeling, or fraud could have led Cellmark to produce a DNA profile that falsely matched petitioner. At the time of the testing, petitioner had not yet been identified as a suspect, and there is no suggestion that anyone at Cellmark had a sample of his DNA to swap in by malice or mistake. And given the complexity of the DNA molecule, it is inconceivable that shoddy lab work would somehow produce a DNA profile that just so happened to have the precise genetic makeup of petitioner, who just so happened to be picked out of a lineup by the victim. The prospect is beyond fanciful.

In short, the use at trial of a DNA report prepared by a modern, accredited laboratory "bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate." Bryant, supra, at ––––, 131 S.Ct., at 1167 (THOMAS, J., concurring).

For the two independent reasons explained above, we conclude that there was no Confrontation Clause violation in this case. Accordingly, the judgment of the Supreme Court of Illinois is

Affirmed.

Justice BREYER, concurring.

This case raises a question that I believe neither the plurality nor the dissent answers adequately: How does the Confrontation Clause apply to the panoply of crime laboratory reports and underlying technical statements written by (or otherwise made by) laboratory technicians? * * * Because I believe the question difficult, important, and not squarely addressed either today or in our earlier opinions, and because I believe additional briefing would help us find a proper, generally applicable answer, I would set this case for reargument. In the absence of doing so, I adhere to the dissenting views set forth in *Melendez–Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011). I also join the plurality's opinion.

I

A

* * *

The Confrontation Clause problem lies in the fact that Lambatos did not have personal knowledge that the male DNA profile that Cellmark said was derived from the crime victim's vaginal swab sample was in fact correctly derived from that sample. And no Cellmark expert testified that it was true. Rather, she simply relied for her knowledge of the fact upon Cellmark's report. And the defendant Williams had no opportunity to cross-examine the individual or individuals who produced that report.

In its first conclusion, the plurality explains why it finds that admission of Lambatos' testimony nonetheless did not violate the Confrontation Clause. That Clause concerns out-of-court statements admitted for their truth. Lambatos' testimony did not introduce the Cellmark report (which other circumstantial evidence supported) for its truth. Rather, Lambatos used the Cellmark report only to indicate the underlying factual information upon which she based her independent expert opinion. Under well-established principles of evidence, experts may rely on otherwise inadmissible out-of-court statements as a basis for forming an expert opinion if they are of a kind that experts in the field normally rely upon. See Fed. Rule Evid. 703; Ill. Rule Evid. 703. Nor need the prosecution enter those out-of-court statements into evidence for their truth.* * *

The dissent would abandon this well-established rule. It would not permit Lambatos to offer an expert opinion in reliance on the Cellmark report unless the prosecution also produces one or more experts who wrote or otherwise produced the report. I am willing to accept the dissent's characterization of the present rule as artificial, but I am not certain that the dissent has produced a workable alternative.

Once one abandons the traditional rule, there would seem often to be no logical stopping place between requiring the prosecution to call as a witness one of the laboratory experts who worked on the matter and requiring the prosecution to call all of the laboratory experts who did so. Experts—especially laboratory experts—regularly rely on the technical statements and results of other experts to form their own opinions. The reality of the matter is that the introduction of a laboratory report involves layer upon layer of technical statements (express or implied) made by one expert and relied upon by another. Hence my general question: How does the Confrontation Clause apply to crime laboratory reports and underlying technical statements made by laboratory technicians?

B

The general question is not easy to answer. The California case described at the outset of the dissenting opinion helps to illustrate the difficulty. In that example, Cellmark, the very laboratory involved in this case, tested a DNA sample taken from the crime scene. A laboratory analyst, relying upon a report the laboratory had prepared, initially stated (at a pretrial hearing about admissibility) that the laboratory had found that the crime-scene DNA sample matched a sample of the defendant's DNA. But during the hearing and after reviewing the laboratory's notes, the laboratory analyst realized that the written report was mistaken. In fact, the testing showed only that the crime-scene DNA matched a sample of the victim's DNA, not the defendant's DNA. At some point during the writing of the report, someone, perhaps the testifying analyst herself, must have misread the proper original sample labeling. Upon discovering the error, the analyst corrected

her testimony.

The example is useful, not simply because as adapted it might show the importance of cross-examination (an importance no one doubts), but also because it can reveal the nature of the more general question before us. When the laboratory in the example received the DNA samples, it labeled them properly. The laboratory's final report mixed up the labels. Any one of many different technicians could be responsible for an error like that. And the testifying analyst might not have reviewed the underlying notes and caught the error during direct examination (or for that matter, during cross-examination).

Adapting the example slightly, assume that the admissibility of the initial laboratory report into trial had been directly at issue. Who should the prosecution have had to call to testify? Only the analyst who signed the report noting the match? What if the analyst who made the match knew nothing about either the laboratory's underlying procedures or the specific tests run in the particular case? Should the prosecution then have had to call all potentially involved laboratory technicians to testify? Six to twelve or more technicians could have been involved. Some or all of the words spoken or written by each technician out of court might well have constituted relevant statements offered for their truth and reasonably relied on by a supervisor or analyst writing the laboratory report. Indeed, petitioner's amici argue that the technicians at each stage of the process should be subject to cross-examination. See Brief for Innocence Network as Amicus Curiae 13–23 (hereinafter Innocence Network Brief).

* * *

Lower courts and treatise writers have recognized the problem. And they have come up with a variety of solutions. The New Wigmore, for example, lists several nonexclusive approaches to when testifying experts may rely on testing results or reports by nontestifying experts (i.e., DNA technicians or analysts), including: (1) "the dominant approach," which is simply to determine the need to testify by looking "the quality of the nontestifying expert's report, the testifying expert's involvement in the process, and the consequent ability of the testifying expert to use independent judgment and interpretive skill"; (2) permitting "a substitute expert to testify about forensic science results only when the first expert is unavailable" (irrespective of the lack of opportunity to cross-examine the first expert); (3) permitting "a substitute expert" to testify if "the original test was documented in a thorough way that permits the substitute expert to evaluate, assess, and interpret it"; (4) permitting a DNA analyst to introduce DNA test results at trial without having "personally perform[ed] every specific aspect of each DNA test in question, provided the analyst was present during the critical stages of the test, is familiar with the process and the laboratory protocol involved, reviews the results in proximity to the test, and either initials or signs the final report outlining the results"; (5) permitting the introduction of a crime laboratory DNA report without the testimony of a technician where the "testing in its preliminary stages" only "requires the technician simply to perform largely mechanical or ministerial tasks ... absent some reason to believe there was error or falsification"; and (6) permitting introduction of the report without requiring the technicians to testify where there is a showing of "genuine unavailability."

Some of these approaches seem more readily compatible with *Crawford* than others. Some seem more easily considered by a rules committee (or by state courts) than by this Court. Nonetheless, all assume some kind of *Crawford* boundary—some kind of limitation upon the scope of its application—though they reflect different views as to just how and when that might be done.

Answering the underlying general question just discussed, and doing so soon, is important. Trial judges in both federal and state courts apply and interpret hearsay rules as part of their daily trial work. The trial of criminal cases makes up a large portion of that work. And laboratory reports frequently constitute a portion of the evidence in ordinary criminal trials. Obviously, judges, prosecutors, and defense lawyers have to know, in as definitive a form as possible, what the Constitution requires so that they can try their cases accordingly.

The several different opinions filed today embody several serious, but different, approaches to the difficult general question. Yet none fully deals with the underlying question as to how, after *Crawford*, Confrontation Clause "testimonial statement" requirements apply to crime laboratory reports. Nor can I find a general answer in *Melendez–Diaz* or *Bullcoming*. While, as a matter of pure logic, one might use those cases to answer a narrowed version of the question presented here, those cases do not fully consider the broader evidentiary problem presented. I consequently find the dissent's response, "Been there, done that," unsatisfactory.

Under these circumstances, I would have this case reargued. I would request the parties and amici to focus specifically upon the broader "limits" question. And I would permit them to discuss, not only the possible implications of our earlier post-*Crawford* opinions, but also any necessary modifications of statements made in the opinions of those earlier cases.

II

In the absence of reargument, I adhere to the dissenting view set forth in *Melendez–Diaz* and *Bullcoming*, under which the Cellmark report would not be considered "testimonial" and barred by the Confrontation Clause. That view understands * * * the word "testimonial" as having outer limits and *Crawford* as describing a constitutional heartland. And that view would leave the States with constitutional leeway to maintain traditional expert testimony rules as well as hearsay exceptions where there are strong reasons for doing so and *Crawford '*s basic rationale does not apply.

In particular, the States could create an exception that presumptively would allow introduction of DNA reports from accredited crime laboratories. The defendant would remain free to call laboratory technicians as witnesses. Were there significant reason to question a laboratory's technical competence or its neutrality, the presumptive exception would disappear, thereby requiring the prosecution to produce any relevant technical witnesses. Such an exception would lie outside *Crawford 's* constitutional limits.

Consider the report before us. Cellmark's DNA report embodies technical or professional data, observations, and judgments; the employees who contributed to the report's findings were professional analysts working on technical matters at a certified laboratory; and the employees

operated behind a veil of ignorance that likely prevented them from knowing the identity of the defendant in this case. Statements of this kind fall within a hearsay exception that has constituted an important part of the law of evidence for decades. See Fed. Rule Evid. 803(6) ("Records of Regularly Conducted Activity"). And for somewhat similar reasons, I believe that such statements also presumptively fall outside the category of "testimonial" statements that the Confrontation Clause makes inadmissible.

As the plurality points out, the introduction of statements of this kind does not risk creating "the principal evil at which the Confrontation Clause was directed." *Crawford*, 541 U.S., at 50. That evil consists of the pre-Constitution practice of using " ex parte examinations as evidence against the accused." Ibid. Sir Walter Raleigh's case illustrates the point. State authorities questioned Lord Cobham, the key witness against Raleigh, outside his presence. They then used those testimonial statements in court against Raleigh. And when Raleigh asked to face and to challenge his accuser, he was denied that opportunity.

The Confrontation Clause prohibits the use of this kind of evidence because allowing it would deprive a defendant of the ability to cross-examine the witness. * * * But the need for cross-examination is considerably diminished when the out-of-court statement was made by an accredited laboratory employee operating at a remove from the investigation in the ordinary course of professional work.

For one thing, * * * alternative features of such situations help to guarantee its accuracy. An accredited laboratory must satisfy well-established professional guidelines that seek to ensure the scientific reliability of the laboratory's results. For example, forensic DNA testing laboratories permitted to access the FBI's Combined DNA Index System must adhere to standards governing, among other things, the organization and management of the laboratory; education, training, and experience requirements for laboratory personnel; the laboratory's physical facilities and security measures; control of physical evidence; validation of testing methodologies; procedures for analyzing samples, including the reagents and controls that are used in the testing process; equipment calibration and maintenance; documentation of the process used to test each sample handled by the laboratory; technical and administrative review of every case file; proficiency testing of laboratory; personnel; corrective action that addresses any discrepancies in proficiency tests and casework analysis; internal and external audits of the laboratory; environmental health and safety; and outsourcing of testing to vendor laboratories.

These standards are not foolproof. Nor are they always properly applied. It is not difficult to find instances in which laboratory procedures have been abused. Moreover, DNA testing itself has exonerated some defendants who previously had been convicted in part upon the basis of testimony by laboratory experts.

But if accreditation did not prevent admission of faulty evidence in some of those cases, neither did cross-examination. In the wrongful-conviction cases to which this Court has previously referred, the forensic experts all testified in court and were available for cross-examination. Similarly, the role of cross-examination is ambiguous in the laboratory example that the dissent describes. Apparently, the report's error came to light and was corrected after cross-examination

had concluded, and in any event all parties had received the correctly labeled underlying laboratory data.

For another thing, the fact that the laboratory testing takes place behind a veil of ignorance makes it unlikely that a particular researcher has a defendant-related motive to behave dishonestly, say, to misrepresent a step in an analysis or otherwise to misreport testing results. The laboratory here, for example, did not know whether its test results might help to incriminate a particular defendant.

Further, the statements at issue, like those of many laboratory analysts, do not easily fit within the linguistic scope of the term "testimonial statement" as we have used that term in our earlier cases. As the plurality notes, in every post- *Crawford* case in which the Court has found a Confrontation Clause violation, the statement at issue had the primary purpose of accusing a targeted individual. The declarant was essentially an adverse witness making an accusatory, testimonial statement—implicating the core concerns of the Lord Cobham-type affidavits. But here the DNA report sought, not to accuse petitioner, but instead to generate objectively a profile of a then-unknown suspect's DNA from the semen he left in committing the crime.

Finally, to bar admission of the out-of-court records at issue here could undermine, not fortify, the accuracy of factfinding at a criminal trial. Such a precedent could bar the admission of other reliable case-specific technical information such as, say, autopsy reports. Autopsies, like the DNA report in this case, are often conducted when it is not yet clear whether there is a particular suspect or whether the facts found in the autopsy will ultimately prove relevant in a criminal trial. Autopsies are typically conducted soon after death. And when, say, a victim's body has decomposed, repetition of the autopsy may not be possible. What is to happen if the medical examiner dies before trial? Is the Confrontation Clause " 'effectively' " to function " 'as a statute of limitations for murder' "? Melendez–Diaz, supra, at 335, 129 S.Ct. 2527 (KENNEDY, J., dissenting) (quoting Comment, Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement, 96 Cal. L.Rev. 1093, 1115 (2008)).

In general, such a holding could also increase the risk of convicting the innocent. The New York County District Attorney's Office and the New York City Office of the Chief Medical Examiner tell us that the additional cost and complexity involved in requiring live testimony from perhaps dozens of ordinary laboratory technicians who participate in the preparation of a DNA profile may well force a laboratory "to reduce the amount of DNA testing it conducts, and force prosecutors to forgo forensic DNA analysis in cases where it might be highly probative. In the absence of DNA testing, defendants might well be prosecuted solely on the basis of eyewitness testimony, the reliability of which is often questioned." I find this plausible. An interpretation of the Clause that risks greater prosecution reliance upon less reliable evidence cannot be sound.

Consequently, I would consider reports such as the DNA report before us presumptively to lie outside the perimeter of the Clause as established by the Court's precedents. Such a holding leaves the defendant free to call the laboratory employee as a witness if the employee is available. Moreover, should the defendant provide good reason to doubt the laboratory's competence or the validity of its accreditation, then the alternative safeguard of reliability would no longer exist and

the Constitution would entitle defendant to Confrontation Clause protection. Similarly, should the defendant demonstrate the existence of a motive to falsify, then the alternative safeguard of honesty would no longer exist and the Constitution would entitle the defendant to Confrontation Clause protection. Thus, the defendant would remain free to show the absence or inadequacy of the alternative reliability/honesty safeguards, thereby rebutting the presumption and making the Confrontation Clause applicable. No one has suggested any such problem in respect to the Cellmark Report at issue here.

Because the plurality's opinion is basically consistent with the views set forth here, I join that opinion in full.

[The appendix to Justice Breyer's concurring opinion indicates that "[a]s many as six technicians may be involved in deriving the [DNA] profile from the suspect's sample; as many as six more technicians may be involved in deriving the profile from the crime-scene sample; and an additional expert may then be required for the comparative analysis, for a total of about a dozen different laboratory experts. Each expert may make technical statements (express or implied) during the DNA analysis process that are in turn relied upon by other experts."]

Justice THOMAS, concurring in the judgment.

I agree with the plurality that the disclosure of Cellmark's out-of-court statements through the expert testimony of Sandra Lambatos did not violate the Confrontation Clause. I reach this conclusion, however, solely because Cellmark's statements lacked the requisite "formality and solemnity" to be considered " testimonial " for purposes of the Confrontation Clause. See *Michigan v. Bryant*, 131 S.Ct. 1143, 1167 (2011) (THOMAS, J., concurring in judgment). As I explain below, I share the dissent's view of the plurality's flawed analysis.

I

The threshold question in this case is whether Cellmark's statements were hearsay at all. As the Court has explained, the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. Here, the State of Illinois contends that Cellmark's statements—that it successfully derived a male DNA profile and that the profile came from L.J.'s swabs—were introduced only to show the basis of Lambatos' opinion, and not for their truth. In my view, however, there was no plausible reason for the introduction of Cellmark's statements other than to establish their truth.

A

Illinois Rule of Evidence 703 (2011) and its federal counterpart permit an expert to base his opinion on facts about which he lacks personal knowledge and to disclose those facts to the trier of

fact. Relying on these Rules, the State contends that the facts on which an expert's opinion relies are not to be considered for their truth, but only to explain the basis of his opinion.* * *

I do not think that rules of evidence should so easily trump a defendant's confrontation right. To be sure, we should not lightly sweep away an accepted rule of federal or state evidence law when applying the Confrontation Clause. Rules of limited admissibility are commonplace in evidence law. And, we often presume that courts and juries follow limiting instructions. But we have recognized that concepts central to the application of the Confrontation Clause are ultimately matters of federal constitutional law that are not dictated by state or federal evidentiary rules. Likewise, we have held that limiting instructions may be insufficient in some circumstances to protect against violations of the Confrontation Clause. See *Bruton v. United States*, 391 U.S. 123 (1968).

Of particular importance here, we have made sure that an out-of-court statement was introduced for a "*legitimate*, nonhearsay purpose" before relying on the not-for-its-truth rationale to dismiss the application of the Confrontation Clause. See *Street*, 471 U.S., at 417 (emphasis added). In *Street*, the defendant testified that he gave a false confession because police coerced him into parroting his accomplice's confession. On rebuttal, the prosecution introduced the accomplice's confession to demonstrate to the jury the ways in which the two confessions differed. Finding no Confrontation Clause problem, this Court held that the accomplice's out-of-court confession was not introduced for its truth, but only to impeach the defendant's version of events. Although the Court noted that the confession was not hearsay "under traditional rules of evidence" the Court did not accept that nonhearsay label at face value. Instead, the Court thoroughly examined the use of the out-of-court confession and the efficacy of a limiting instruction before concluding that the Confrontation Clause was satisfied "[i]n this context."

Unlike the confession in *Street*, 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 that 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. If the jury believes that the basis evidence is true, it will likely also believe that the expert's reliance is justified; inversely, if the jury doubts the accuracy or validity of the basis evidence, it will be skeptical of the expert's conclusions.

* * *

B

Those concerns are fully applicable in this case. Lambatos opined that petitioner's DNA profile matched the male profile derived from L.J.'s vaginal swabs. In reaching that conclusion, Lambatos relied on Cellmark's out-of-court statements that the profile it reported was in fact derived from L.J.'s swabs, rather than from some other source. Thus, the validity of Lambatos' opinion ultimately turned on the truth of Cellmark's statements. The plurality's assertion that Cellmark's statements were merely relayed to explain "the assumptions on which [Lambatos'] opinion rest[ed]," overlooks that the value of Lambatos' testimony depended on the truth of those

very assumptions.

It is no answer to say that other nonhearsay evidence established the basis of the expert's opinion. * * * Of course, evidence that Cellmark received L.J.'s swabs and later produced a DNA profile is some indication that Cellmark in fact generated the profile from those swabs, rather than from some other source (or from no source at all). But the only direct evidence to that effect was Cellmark's statement, which Lambatos relayed to the factfinder. In any event, the factfinder's ability to rely on other evidence to evaluate an expert's opinion does not alter the conclusion that basis testimony is admitted for its truth. The existence of other evidence corroborating the basis testimony may render any Confrontation Clause violation harmless, but it does not change the purpose of such testimony and thereby place it outside of the reach of the Confrontation Clause. I would thus conclude that Cellmark's statements were introduced for their truth.

C

The plurality's contrary conclusion may seem of little consequence to those who view DNA testing and other forms of "hard science" as intrinsically reliable. Today's holding, however, will reach beyond scientific evidence to ordinary out-of-court statements. For example, it is not uncommon for experts to rely on interviews with third parties in forming their opinions. See, e.g., *People v. Goldstein*, 6 N.Y.3d 119, 123–124, 810 N.Y.S.2d 100 (2005) (psychiatrist disclosed statements made by the defendant's acquaintances as part of the basis of her opinion that the defendant was motivated to kill by his feelings of sexual frustration).

It is no answer to say that "safeguards" in the rules of evidence will prevent the abuse of basis testimony. To begin with, courts may be willing to conclude that an expert is not acting as a "mere condui[t]" for hearsay as long as he simply provides some opinion based on that hearsay. In addition, the hearsay may be the kind of fact on which experts in a field reasonably rely. See Fed. Rule Evid. 703. Of course, some courts may determine that hearsay of this sort is not substantially more probative than prejudicial and therefore should not be disclosed under Rule 703. But that balancing test is no substitute for a constitutional provision that has already struck the balance in favor of the accused.

II

A

Having concluded that the statements at issue here were introduced for their truth, I turn to whether they were "testimonial" for purposes of the Confrontation Clause. * * * In light of its text, I continue to think that the Confrontation Clause regulates only the use of statements bearing "indicia of solemnity." This test comports with history because solemnity marked the practices that the Confrontation Clause was designed to eliminate, namely, the ex parte examination of witnesses under the English bail and committal statutes passed during the reign of Queen Mary. Accordingly, I have concluded that the Confrontation Clause reaches "formalized testimonial materials," such as depositions, affidavits, and prior testimony, or statements resulting from

"formalized dialogue," such as custodial interrogation.[5]

Applying these principles, I conclude that Cellmark's report is not a statement by a "witness" within the meaning of the Confrontation Clause. The Cellmark report lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact. Nowhere does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained. The report is signed by two "reviewers," but they neither purport to have performed the DNA testing nor certify the accuracy of those who did. And, although the report was produced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation.

The Cellmark report is distinguishable from the laboratory reports that we determined were testimonial in *Melendez–Diaz*, and in *Bullcoming v. New Mexico*. In *Melendez–Diaz*, the reports in question were "sworn to before a notary public by [the] analysts" who tested a substance for cocaine. In *Bullcoming*, the report, though unsworn, included a "Certificate of Analyst" signed by the forensic analyst who tested the defendant's blood sample. The analyst affirmed that the seal of the sample was received intact and broken in the laboratory, that the statements in the analyst's block of the report are correct, and that he had followed the procedures set out on the reverse of the report.

The dissent insists that the *Bullcoming* report and Cellmark's report are equally formal, separated only by such "minutia" as the fact that Cellmark's report "is not labeled a 'certificate.' " To the contrary, what distinguishes the two is that Cellmark's report, in substance, certifies nothing. That distinction is constitutionally significant because the scope of the confrontation right is properly limited to extrajudicial statements similar in solemnity to the Marian examination practices that the Confrontation Clause was designed to prevent. By certifying the truth of the analyst's representations, the unsworn *Bullcoming* report bore a striking resemblance, to the Marian practice in which magistrates examined witnesses, typically on oath, and certified the results to the court. And, in *Melendez–Diaz*, we observed that " 'certificates' are functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." 557 U.S., at 310–311. Cellmark's report is marked by no such indicia of solemnity.

Contrary to the dissent's suggestion, acknowledging that the Confrontation Clause is implicated only by formalized statements that are characterized by solemnity will not result in a prosecutorial conspiracy to elude confrontation by using only informal extrajudicial statements against an accused. As I have previously noted, the Confrontation Clause reaches bad-faith attempts to evade the formalized process. Moreover, the prosecution's use of informal statements

[5] In addition, I have stated that, because the Confrontation Clause "sought to regulate prosecutorial abuse occurring through use of ex parte statements," it "also reaches the use of technically informal statements when used to evade the formalized process." *Davis*, 547 U.S., at 838 (opinion concurring in judgment in part and dissenting in part). But, in this case, there is no indication that Cellmark's statements were offered in order to evade confrontation.

comes at a price. As the dissent recognizes, such statements are less reliable than formalized statements, and therefore less persuasive to the factfinder. But, even assuming that the dissent accurately predicts an upswing in the use of "less reliable" informal statements, that result does not "turn the Confrontation Clause upside down." The Confrontation Clause does not require that evidence be reliable, but that the reliability of a specific class of testimonial statements—formalized statements bearing indicia of solemnity—be assessed through cross-examination.

B

Rather than apply the foregoing principles, the plurality invokes its "primary purpose" test. * * * I agree 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. But this necessary criterion is not sufficient, for it sweeps into the ambit of the Confrontation Clause statements that lack formality and solemnity and is thus "disconnected from history." *Davis*, supra, at 838–842, 126 S.Ct. 2266 (opinion concurring in judgment in part and dissenting in part). In addition, a primary purpose inquiry divorced from solemnity is unworkable in practice. Statements to police are often made both to resolve an ongoing emergency and to establish facts about a crime for potential prosecution. The primary purpose test gives courts no principled way to assign primacy to one of those purposes. The solemnity requirement is not only true to the text and history of the Confrontation Clause, but goes a long way toward resolving that practical difficulty. If a statement bears the formality and solemnity necessary to come within the scope of the Clause, it is highly unlikely that the statement was primarily made to end an ongoing emergency.

The shortcomings of the original primary purpose test pale in comparison, however, to those plaguing the reformulated version that the plurality suggests today. The new primary purpose test asks whether an out-of-court statement has "the primary purpose of accusing a targeted individual of engaging in criminal conduct." That test lacks any grounding in constitutional text, in history, or in logic.

The new test first requires that an out-of-court statement be made "for the purpose of proving the guilt of a particular criminal defendant." Under this formulation, statements made "before any suspect was identified" are beyond the scope of the Confrontation Clause. There is no textual justification, however, for limiting the confrontation right to statements made after the accused's identity became known. To be sure, the Sixth Amendment right to confrontation attaches "[i]n ... criminal prosecutions," at which time the accused has been identified and apprehended. But the text of the Confrontation Clause does not constrain the time at which one becomes a "witness."

* * *

Historical practice confirms that a declarant could become a "witness" before the accused's identity was known. As previously noted, the confrontation right was a response to ex parte examinations of witnesses in 16th-century England. Such examinations often occurred after an accused was arrested or bound over for trial, but some examinations occurred while the accused

remained "unknown or fugitive." J. Langbein, Prosecuting Crime in the Renaissance 90 (1974) (describing examples, including the deposition of a victim who was swindled out of 20 shillings by a " 'cunning man' "); see also 1 J. Stephen, A History of the Criminal Law of England 217–218 (1883) (describing the sworn examinations of witnesses by coroners, who were charged with investigating suspicious deaths by asking local citizens if they knew "who [was] culpable either of the act or of the force").

There is also little logical justification for the plurality's rule. The plurality characterizes Cellmark's report as a statement elicited by police and made by Cellmark not "to accuse petitioner or to create evidence for use at trial," but rather to resolve the ongoing emergency posed by "a dangerous rapist who was still at large." But, as I have explained, that distinction is unworkable in light of the mixed purposes that often underlie statements to the police. The difficulty is only compounded by the plurality's attempt to merge the purposes of both the police and the declarant.

But if one purpose must prevail, here it should surely be the evidentiary one, whether viewed from the perspective of the police, Cellmark, or both. The police confirmed the presence of semen on L.J.'s vaginal swabs on February 15, 2000, placed the swabs in a freezer, and waited until November 28, 2000, to ship them to Cellmark. Cellmark, in turn, did not send its report to the police until April 3, 2001, over a year after L.J.'s rape. Given this timeline, it strains credulity to assert that the police and Cellmark were primarily concerned with the exigencies of an ongoing emergency, rather than with producing evidence in the ordinary course.

In addition to requiring that an out-of-court statement "targe[t]" a particular accused, the plurality's new primary purpose test also considers whether the statement is so "inherently inculpatory" that the declarant should have known that his statement would incriminate the accused. * * *

Again, there is no textual justification for this limitation on the scope of the Confrontation Clause. In *Melendez–Diaz*, we held that "[t]he text of the [Sixth] Amendment contemplates two classes of witnesses—those against the defendant and those in his favor." Thus, the distinction between those who make "inherently inculpatory" statements and those who make other statements that are merely "helpful to the prosecution" has no foundation in the text of the Amendment.

It is also contrary to history. The 16th-century Marian statutes instructed magistrates to transcribe any information by witnesses that "shall be material to prove the felony." Magistrates in the 17th and 18th centuries were also advised by practice manuals to take the ex parte examination of a witness even if his evidence was "weak" or the witness was "unable to inform any material thing against" an accused. J. Beattie, Crime and the Courts in England: 1660–1800, p. 272 (1986). Thus, neither law nor practice limited ex parte examinations to those witnesses who made "inherently inculpatory" statements.

This requirement also makes little sense. A statement that is not facially inculpatory may turn out to be highly probative of a defendant's guilt when considered with other evidence.

Recognizing this point, we previously rejected the view that a witness is not subject to confrontation if his testimony is "inculpatory only when taken together with other evidence." *Melendez–Diaz*, supra, at 313. I see no justification for reviving that discredited approach, and the plurality offers none.

———

Respondent and its amici have emphasized the economic and logistical burdens that would be visited upon States should every analyst who reports DNA results be required to testify at trial. These burdens are largely the product of a primary purpose test that reaches out-of-court statements well beyond the historical scope of the Confrontation Clause and thus sweeps in a broad range of sources on which modern experts regularly rely. The proper solution to this problem is not to carve out a Confrontation Clause exception for expert testimony that is rooted only in legal fiction. Nor is it to create a new primary purpose test that ensures that DNA evidence is treated differently. Rather, the solution is to adopt a reading of the Confrontation Clause that respects its historically limited application to a narrow class of statements bearing indicia of solemnity. In forgoing that approach, today's decision diminishes the Confrontation Clause's protection in cases where experts convey the contents of solemn, formalized statements to explain the bases for their opinions. These are the very cases in which the accused should "enjoy the right ... to be confronted with the witnesses against him."

Justice KAGAN, with whom Justice SCALIA, Justice GINSBURG, and Justice SOTOMAYOR join, dissenting.

Some years ago, the State of California prosecuted a man named John Kocak for rape. At a preliminary hearing, the State presented testimony from an analyst at the Cellmark Diagnostics Laboratory—the same facility used to generate DNA evidence in this case. The analyst had extracted DNA from a bloody sweatshirt found at the crime scene and then compared it to two control samples—one from Kocak and one from the victim. The analyst's report identified a single match: As she explained on direct examination, the DNA found on the sweatshirt belonged to Kocak. But after undergoing cross-examination, the analyst realized she had made a mortifying error. She took the stand again, but this time to admit that the report listed the victim's control sample as coming from Kocak, and Kocak's as coming from the victim. So the DNA on the sweatshirt matched not Kocak, but the victim herself. * * *

Our Constitution contains a mechanism for catching such errors—the Sixth Amendment's Confrontation Clause. That Clause, and the Court's recent cases interpreting it, require that testimony against a criminal defendant be subject to cross-examination. And that command applies with full force to forensic evidence of the kind involved in both the Kocak case and this one. In two decisions issued in the last three years, this Court held that if a prosecutor wants to introduce the results of forensic testing into evidence, he must afford the defendant an opportunity to cross-examine an analyst responsible for the test. Forensic evidence is reliable only when properly produced, and the Confrontation Clause prescribes a particular method for determining

whether that has happened. The Kocak incident illustrates how the Clause is designed to work: Once confronted, the analyst discovered and disclosed the error she had made. That error would probably not have come to light if the prosecutor had merely admitted the report into evidence or asked a third party to present its findings. Hence the genius of an 18th-century device as applied to 21st-century evidence: Cross-examination of the analyst is especially likely to reveal whether vials have been switched, samples contaminated, tests incompetently run, or results inaccurately recorded.

Under our Confrontation Clause precedents, this is an open-and-shut case. The State of Illinois prosecuted Sandy Williams for rape based in part on a DNA profile created in Cellmark's laboratory. Yet the State did not give Williams a chance to question the analyst who produced that evidence. Instead, the prosecution introduced the results of Cellmark's testing through an expert witness who had no idea how they were generated. That approach—no less (perhaps more) than the confrontation-free methods of presenting forensic evidence we have formerly banned—deprived Williams of his Sixth Amendment right to "confron[t] ... the witnesses against him."

The Court today disagrees, though it cannot settle on a reason why. Justice ALITO, joined by three other Justices, advances two theories—that the expert's summary of the Cellmark report was not offered for its truth, and that the report is not the kind of statement triggering the Confrontation Clause's protection. In the pages that follow, I call Justice ALITO's opinion "the plurality," because that is the conventional term for it. But in all except its disposition, his opinion is a dissent: Five Justices specifically reject every aspect of its reasoning and every paragraph of its explication. Justice THOMAS, for his part, contends that the Cellmark report is nontestimonial on a different rationale. But no other Justice joins his opinion or subscribes to the test he offers.

That creates five votes to approve the admission of the Cellmark report, but not a single good explanation. The plurality's first rationale endorses a prosecutorial dodge; its second relies on distinguishing indistinguishable forensic reports. Justice THOMAS's concurrence, though positing an altogether different approach, suffers in the end from similar flaws. I would choose another path—to adhere to the simple rule established in our decisions, for the good reasons we have previously given. Because defendants like Williams have a constitutional right to confront the witnesses against them, I respectfully dissent from the Court's fractured decision.

I

* * *

The report at issue here shows a DNA profile produced by an analyst at Cellmark's laboratory, allegedly from a vaginal swab taken from a young woman, L.J., after she was raped. That report is identical to the one in *Bullcoming* (and *Melendez–Diaz*) in all material respects. Once again, the report was made to establish some fact in a criminal proceeding—here, the identity of L.J.'s attacker. And once again, it details the results of forensic testing on evidence gathered by the police. Viewed side-by-side with the *Bullcoming* report, the Cellmark analysis has a comparable title; similarly describes the relevant samples, test methodology, and results; and likewise includes the signatures of laboratory officials. So under this Court's prior analysis, the

substance of the report could come into evidence only if Williams had a chance to cross-examine the responsible analyst.

But that is not what happened. Instead, the prosecutor used Sandra Lambatos—a state-employed scientist who had not participated in the testing—as the conduit for this piece of evidence. Lambatos came to the stand after two other state analysts testified about forensic tests they had performed. One recounted how she had developed a DNA profile of Sandy Williams from a blood sample drawn after his arrest. And another told how he had confirmed the presence of (unidentified) semen on the vaginal swabs taken from L.J. All this was by the book: Williams had an opportunity to cross-examine both witnesses about the tests they had run. But of course, the State still needed to supply the missing link—it had to show that DNA found in the semen on L.J.'s vaginal swabs matched Williams's DNA. To fill that gap, the prosecutor could have called the analyst from Cellmark to testify about the DNA profile she had produced from the swabs. But instead, the State called Lambatos as an expert witness and had her testify that the semen on those swabs contained Sandy Williams's DNA:

"Q Was there a computer match generated of the male DNA profile found in semen from the vaginal swabs of [L.J.] to a male DNA profile that had been identified as having originated from Sandy Williams?

"A Yes, there was.

"Q Did you compare the semen ... from the vaginal swabs of [L.J.] to the male DNA profile ... from the blood of Sandy Williams?

"A Yes, I did.

...

"Q [I]s the semen identified in the vaginal swabs of [L.J.] consistent with having originated from Sandy Williams?

"A Yes."

And so it was Lambatos, rather than any Cellmark employee, who informed the trier of fact that the testing of L.J.'s vaginal swabs had produced a male DNA profile implicating Williams.

Have we not already decided this case? Lambatos's testimony is functionally identical to the "surrogate testimony" that New Mexico proffered in *Bullcoming*, which did nothing to cure the problem identified in *Melendez-Diaz* (which, for its part, straightforwardly applied our decision in *Crawford*). Like the surrogate witness in *Bullcoming*, Lambatos "could not convey what [the actual analyst] knew or observed about the events ..., i.e., the particular test and testing process he employed." * * * Like the lawyers in *Melendez-Diaz* and *Bullcoming*, Williams's attorney could not ask questions about that analyst's "proficiency, the care he took in performing his work, and his

veracity." He could not probe whether the analyst had tested the wrong vial, inverted the labels on the samples, committed some more technical error, or simply made up the results. Indeed, Williams's lawyer was even more hamstrung than Bullcoming's. At least the surrogate witness in *Bullcoming* worked at the relevant laboratory and was familiar with its procedures. That is not true of Lambatos: She had no knowledge at all of Cellmark's operations. Indeed, for all the record discloses, she may never have set foot in Cellmark's laboratory.

* * *

II

The plurality's primary argument to the contrary tries to exploit a limit to the Confrontation Clause recognized in *Crawford*. "The Clause," we cautioned there, "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." The Illinois Supreme Court relied on that statement in concluding that Lambatos's testimony was permissible. On that court's view, "Lambatos disclosed the underlying facts from Cellmark's report" not for their truth, but "for the limited purpose of explaining the basis for her [expert] opinion," so that the factfinder could assess that opinion's value. The plurality wraps itself in that holding, similarly asserting that Lambatos's recitation of Cellmark's findings, when viewed through the prism of state evidence law, was not introduced to establish the truth of any matter concerning the Cellmark report. But five Justices agree, in two opinions reciting the same reasons, that this argument has no merit: Lambatos's statements about Cellmark's report went to its truth, and the State could not rely on her status as an expert to circumvent the Confrontation Clause's requirements.

To see why, start with the kind of case *Crawford* had in mind. In acknowledging the not-for-the-truth carveout from the Clause, the Court cited *Tennessee v. Street* as exemplary. There, Street claimed that his stationhouse confession of murder was a sham: A police officer, he charged, had read aloud his alleged accomplice's confession and forced him to repeat it. To help rebut that defense, the State introduced the other confession into the record, so the jury could see how it differed from Street's. This Court rejected Street's Confrontation Clause claim because the State had offered the out-of-court statement not to prove "the truth of [the accomplice's] assertions" about the murder, but only to disprove Street's claim of how the police elicited his confession. Otherwise said, the truth of the admitted statement was utterly immaterial; the only thing that mattered was that the statement (whether true or false) varied from Street's.

The situation could not be more different when a witness, expert or otherwise, repeats an out-of-court statement as the basis for a conclusion, because the statement's utility is then dependent on its truth. If the statement is true, then the conclusion based on it is probably true; if not, not. So to determine the validity of the witness's conclusion, the factfinder must assess the truth of the out-of-court statement on which it relies. * * * Unlike in *Street*, admission of the out-of-court statement in this context has no purpose separate from its truth; the factfinder can do nothing with it except assess its truth and so the credibility of the conclusion it serves to buttress.

Consider a prosaic example not involving scientific experts. An eyewitness tells a police

officer investigating an assault that the perpetrator had an unusual, star-shaped birthmark over his left eye. The officer arrests a person bearing that birthmark (let's call him Starr) for committing the offense. And at trial, the officer takes the stand and recounts just what the eyewitness told him. Presumably the plurality would agree that such testimony violates the Confrontation Clause unless the eyewitness is unavailable and the defendant had a prior opportunity to cross-examine him. Now ask whether anything changes if the officer couches his testimony in the following way: "I concluded that Starr was the assailant because a reliable eyewitness told me that the assailant had a star-shaped birthmark and, look, Starr has one just like that." Surely that framing would make no constitutional difference, even though the eyewitness's statement now explains the basis for the officer's conclusion. It remains the case that the prosecution is attempting to introduce a testimonial statement that has no relevance to the proceedings apart from its truth—and that the defendant cannot cross-examine the person who made it. Allowing the admission of this evidence would end-run the Confrontation Clause, and make a parody of its strictures.

And that example, when dressed in scientific clothing, is no different from this case. The Cellmark report identified the rapist as having a particular DNA profile (think of it as the quintessential birthmark). The Confrontation Clause prevented the State from introducing that report into evidence except by calling to the stand the person who prepared it. So the State tried another route—introducing the substance of the report as part and parcel of an expert witness's conclusion. In effect, Lambatos testified (like the police officer above): "I concluded that Williams was the rapist because Cellmark, an accredited and trustworthy laboratory, says that the rapist has a particular DNA profile and, look, Williams has an identical one." And here too, that form of testimony should change nothing. The use of the Cellmark statement remained bound up with its truth, and the statement came into evidence without any opportunity for Williams to cross-examine the person who made it. So if the plurality were right, the State would have a ready method to bypass the Constitution (as much as in my hypothetical case); a wink and a nod, and the Confrontation Clause would not pose a bar to forensic evidence.

The plurality tries to make plausible its not-for-the-truth rationale by rewriting Lambatos's testimony about the Cellmark report. According to the plurality, Lambatos merely "assumed" that Cellmark's DNA profile came from L.J.'s vaginal swabs, accepting for the sake of argument the prosecutor's premise. But that is incorrect. Nothing in Lambatos's testimony indicates that she was making an assumption or considering a hypothesis. To the contrary, Lambatos affirmed, without qualification, that the Cellmark report showed a "male DNA profile found in semen from the vaginal swabs of [L.J.]." Had she done otherwise, this case would be different. There was nothing wrong with Lambatos's testifying that two DNA profiles—the one shown in the Cellmark report and the one derived from Williams's blood—matched each other; that was a straightforward application of Lambatos's expertise. Similarly, Lambatos could have added that if the Cellmark report resulted from scientifically sound testing of L.J.'s vaginal swab, then it would link Williams to the assault. What Lambatos could not do was what she did: indicate that the Cellmark report was produced in this way by saying that L.J.'s vaginal swab contained DNA matching Williams's. * * *

The plurality also argues that Lambatos's characterization of the Cellmark report did not violate the Confrontation Clause because the case involved a bench trial. I welcome the plurality's

concession that the Clause might forbid presenting Lambatos's statement to a jury * * *. But the presence of a judge does not transform the constitutional question. In applying the Confrontation Clause, we have never before considered relevant the decisionmaker's identity. And this case would be a poor place to begin. Lambatos's description of the Cellmark report was offered for its truth because that is all such "basis evidence" can be offered for; as described earlier, the only way the factfinder could consider whether that statement supported her opinion (that the DNA on L.J.'s swabs came from Williams) was by assessing the statement's truth. That is so, as a simple matter of logic, whether the factfinder is a judge or a jury. And thus, in either case, admission of the statement, without the opportunity to cross-examine, violates the Confrontation Clause.

In saying that much, I do not doubt that a judge typically will do better than a jury in excluding such inadmissible evidence from his decisionmaking process. * * * Still, that point suggests only that the admission of Lambatos's statement was harmless—that the judge managed to put it out of mind. After all, whether a factfinder is confused by an error is a separate question from whether an error has occurred. So the plurality's argument does not answer the only question this case presents: whether a constitutional violation happened when Lambatos recited the Cellmark report's findings.

At bottom, the plurality's not-for-the-truth rationale is a simple abdication to state-law labels. Although the utility of the Cellmark statement that Lambatos repeated logically depended on its truth, the plurality thinks this case decided by an Illinois rule holding that the facts underlying an expert's opinion are not admitted for that purpose. But we do not typically allow state law to define federal constitutional requirements. * * * Indeed, in *Street*, we independently reviewed whether an out-of-court statement was introduced for its truth—the very question at issue in this case. And in *Crawford*, we still more firmly disconnected the Confrontation Clause inquiry from state evidence law, by overruling an approach that looked in part to whether an out-of-court statement fell within a "firmly rooted hearsay exception." That decision made clear that the Confrontation Clause's protections are not coterminous with rules of evidence. So the plurality's state-law-first approach would be an about-face.

Still worse, that approach would allow prosecutors to do through subterfuge and indirection what we previously have held the Confrontation Clause prohibits. Imagine for a moment a poorly trained, incompetent, or dishonest laboratory analyst. * * * Under our precedents, the prosecutor cannot avoid exposing that analyst to cross-examination simply by introducing his report. But under the plurality's approach, the prosecutor could choose the analyst-witness of his dreams (as the judge here said, "the best DNA witness I have ever heard"), offer her as an expert (she knows nothing about the test, but boasts impressive degrees), and have her provide testimony identical to the best the actual tester might have given ("the DNA extracted from the vaginal swabs matched Sandy Williams's")—all so long as a state evidence rule says that the purpose of the testimony is to enable the factfinder to assess the expert opinion's basis. (And this tactic would not be confined to cases involving scientific evidence. As Justice THOMAS points out, the prosecutor could similarly substitute experts for all kinds of people making out-of-court statements.) The plurality thus would countenance the Constitution's circumvention. If the Confrontation Clause prevents the State from getting its evidence in through the front door, then the State could sneak it in through the back. What a neat trick—but really, what a way to run a

criminal justice system. No wonder five Justices reject it.

III

The plurality also argues, as a "second, independent basis" for its decision, that *2273 the Cellmark report falls outside the Confrontation Clause's ambit because it is nontestimonial. The plurality tries out a number of supporting theories, but all in vain: Each one either conflicts with this Court's precedents or misconstrues this case's facts. Justice THOMAS rejects the plurality's views for similar reasons as I do, thus bringing to five the number of Justices who repudiate the plurality's understanding of what statements count as testimonial. Justice THOMAS, however, offers a rationale of his own for deciding that the Cellmark report is nontestimonial. I think his essay works no better. When all is said and done, the Cellmark report is a testimonial statement.

A

According to the plurality, we should declare the Cellmark report nontestimonial because "the use at trial of a DNA report prepared by a modern, accredited laboratory bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate." But we just last year treated as testimonial a forensic report prepared by a "modern, accredited laboratory"; indeed, we declared that the report at issue "fell within the core class of testimonial statements" implicating the Confrontation Clause. *Bullcoming*, 131 S.Ct., at 2717. And although the plurality is close, it is not quite ready (or able) to dispense with that decision. * * * So the plurality must explain: What could support a distinction between the laboratory analysis there and the DNA test in this case? [4]

As its first stab, the plurality states that the Cellmark report was "not prepared for the primary purpose of accusing a targeted individual." Where that test comes from is anyone's guess. Justice THOMAS rightly shows that it derives neither from the text nor from the history of the Confrontation Clause. And it has no basis in our precedents. We have previously asked whether 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. *Davis*, 547 U.S., at 822. None of our cases has ever suggested that, in addition, the statement must be meant to

[4] Justice BREYER does not attempt to distinguish our precedents * * * . He principally worries that under those cases, a State will have to call to the witness stand "[s]ix to twelve or more technicians" who have worked on a report. But none of our cases—including this one—has presented the question of how many analysts must testify about a given report. (That may suggest that in most cases a lead analyst is readily identifiable.) The problem in the cases—again, including this one—is that no analyst came forward to testify. In the event that some future case presents the multiple-technician issue, the Court can focus on "the broader 'limits' question" that troubles Justice BREYER. But the mere existence of that question is no reason to wrongly decide the case before us—which, it bears repeating, involved the testimony of not twelve or six or three or one, but zero Cellmark analysts.

accuse a previously identified individual * * * .

Nor does the plurality give any good reason for adopting an "accusation" test. The plurality apparently agrees with Justice BREYER that prior to a suspect's identification, it will be "unlikely that a particular researcher has a defendant-related motive to behave dishonestly." But surely the typical problem with laboratory analyses—and the typical focus of cross-examination—has to do with careless or incompetent work, rather than with personal vendettas. And as to that predominant concern, it makes not a whit of difference whether, at the time of the laboratory test, the police already have a suspect.

The plurality next attempts to invoke our precedents holding statements nontestimonial when made "to respond to an 'ongoing emergency,' " rather than to create evidence for trial; here, the plurality insists, the Cellmark report's purpose was "to catch a dangerous rapist who was still at large." But that is to stretch both our "ongoing emergency" test and the facts of this case beyond all recognition. We have previously invoked that test to allow statements by a woman who was being assaulted and a man who had just been shot. In doing so, we stressed the "informal [and] harried" nature of the statements, that they were made as, or "minutes" after, the events they described actually happened, by "frantic" victims of criminal attacks, to officers trying to figure out "what had ... occurred" and what threats remained. On their face, the decisions have nothing to say about laboratory analysts conducting routine tests far away from a crime scene. And this case presents a peculiarly inapt set of facts for extending those precedents. Lambatos testified at trial that "all reports in this case were prepared for this criminal investigation ... [a]nd for the purpose of the eventual litigation"—in other words, for the purpose of producing evidence, not enabling emergency responders. And that testimony fits the relevant timeline. The police did not send the swabs to Cellmark until November 2008—nine months after L.J.'s rape—and did not receive the results for another four months. That is hardly the typical emergency response.

Finally, the plurality offers a host of reasons for why reports like this one are reliable * * * But once again: Been there, done that. In *Melendez–Diaz*, this Court rejected identical arguments, noting extensive documentation of "[s]erious deficiencies ... in the forensic evidence used in criminal trials." Scientific testing is "technical," to be sure; but it is only as reliable as the people who perform it. That is why a defendant may wish to ask the analyst a variety of questions: How much experience do you have? Have you ever made mistakes in the past? Did you test the right sample? Use the right procedures? Contaminate the sample in any way? Indeed, as scientific evidence plays a larger and larger role in criminal prosecutions, those inquiries will often be the most important in the case.[6]

[6] Both the plurality and Justice BREYER warn that if we require analysts to testify, we will encourage prosecutors to forgo DNA evidence in favor of less reliable eyewitness testimony and so "increase the risk of convicting the innocent." Neither opinion provides any evidence, even by way of anecdote, for that view, and I doubt any exists. DNA evidence is usually the prosecutor's most powerful weapon, and a prosecutor is unlikely to relinquish it just because he must bring the right analyst to the stand. Consider what Lambatos told the factfinder here: The DNA in L.J.'s vaginal swabs matched Williams's DNA and would match only "1 in 8.7 quadrillion black, 1 in

And *Melendez-Diaz* made yet a more fundamental point in response to claims of the über alles reliability of scientific evidence: It is not up to us to decide, ex ante, what evidence is trustworthy and what is not. That is because the Confrontation Clause prescribes its own "procedure for determining the reliability of testimony in criminal trials." That procedure is cross-examination. And "[d]ispensing with [it] because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."

So the plurality's second basis for denying Williams's right of confrontation also fails. The plurality can find no reason consistent with our precedents for treating the Cellmark report as nontestimonial. That is because the report is, in every conceivable respect, a statement meant to serve as evidence in a potential criminal trial. And that simple fact should be sufficient to resolve the question.

B

Justice THOMAS's unique method of defining testimonial statements fares no better. On his view, the Confrontation Clause "regulates only the use of statements bearing indicia of solemnity." And Cellmark's report, he concludes, does not qualify because it is "neither a sworn nor a certified declaration of fact." But Justice THOMAS's approach grants constitutional significance to minutia, in a way that can only undermine the Confrontation Clause's protections.

To see the point, start with precedent, because the Court rejected this same kind of argument, as applied to this same kind of document, at around this same time just last year. In *Bullcoming*, the State asserted that the forensic report at issue was nontestimonial because—unlike the report in Melendez-Diaz—it was not sworn before a notary public. We responded that applying the Confrontation Clause only to a sworn forensic report "would make the right to confrontation easily erasable"—next time, the laboratory could file the selfsame report without the oath. We then held, as noted earlier, that in all material respects, the forensic report in *Bullcoming* matched the one in *Melendez-Diaz*. First, a law enforcement officer provided evidence to a state laboratory assisting in police investigations. Second, the analyst tested the evidence and prepared a certificate concerning the results. Third, the certificate was formalized in a signed document headed a report. * * *

Now compare that checklist of "material" features to the report in this case. The only differences are that Cellmark is a private laboratory under contract with the State (which no one

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390 quadrillion white, or 1 in 109 quadrillion Hispanic unrelated individuals." No eyewitness testimony could replace that evidence. I note as well that the Innocence Network—a group particularly knowledgeable about the kinds of evidence that produce erroneous convictions—disagrees with the plurality's and Justice BREYER's view. It argues here that "[c]onfrontation of the analyst ... is essential to permit proper adversarial testing" and so to decrease the risk of convicting the innocent. Brief for the Innocence Network as Amicus Curiae 3, 7.

thinks relevant), and that the report is not labeled a "certificate." That amounts to (maybe) a nickel's worth of difference: The similarities in form, function, and purpose dwarf the distinctions. Each report is an official and signed record of laboratory test results, meant to establish a certain set of facts in legal proceedings. Neither looks any more "formal" than the other; neither is any more formal than the other. The variances are no more (probably less) than would be found if you compared different law schools' transcripts or different companies' cash flow statements or different States' birth certificates. The difference in labeling—a "certificate" in one case, a "report of laboratory examination" in the other—is not of constitutional dimension.

Indeed, Justice THOMAS's approach, if accepted, would turn the Confrontation Clause into a constitutional geegaw—nice for show, but of little value. The prosecution could avoid its demands by using the right kind of forms with the right kind of language. (It would not take long to devise the magic words and rules—principally, never call anything a "certificate.").[7] And still worse: The new conventions, precisely by making out-of-court statements less "solemn," would also make them less reliable—and so turn the Confrontation Clause upside down. It is not surprising that no other Member of the Court has adopted this position. * * *

IV

Before today's decision, a prosecutor wishing to admit the results of forensic testing had to produce the technician responsible for the analysis. That was the result of not one, but two decisions this Court issued in the last three years. But that clear rule is clear no longer. The five Justices who control the outcome of today's case agree on very little. Among them, though, they can boast of two accomplishments. First, they have approved the introduction of testimony at Williams's trial that the Confrontation Clause, rightly understood, clearly prohibits. Second, they have left significant confusion in their wake. What comes out of four Justices' desire to limit *Melendez-Diaz* and *Bullcoming* in whatever way possible, combined with one Justice's one-justice view of those holdings, is—to be frank—who knows what. Those decisions apparently no longer mean all that they say. Yet no one can tell in what way or to what extent they are altered because no proposed limitation commands the support of a majority.

The better course in this case would have been simply to follow *Melendez-Diaz* and *Bullcoming*. Precedent-based decisionmaking provides guidance to lower court judges and predictability to litigating parties. Today's plurality and concurring opinions, and the uncertainty they sow, bring into relief that judicial method's virtues. I would decide this case consistently with, and for the reasons stated by, *Melendez-Diaz* and *Bullcoming*. And until a majority of this Court reverses or confines those decisions, I would understand them as continuing to govern, in every particular, the admission of forensic evidence.

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[7] Justice THOMAS asserts there is no need to worry, because "the Confrontation Clause reaches bad-faith attempts to evade the formalized process." I hope he is right. But Justice THOMAS provides scant guidance on how to conduct this novel inquiry into motive

I respectfully dissent.

D.J.C.
New York, N.Y., July 29, 2015

S.A.S.
Washington, D.C., July 29, 2015