

FALL, 2012 UPDATE TO

*A Student's Guide to Hearsay*¹

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¹ Copyright 2012 by Clifford S. Fishman. This update of my book, *A Student's Guide to Hearsay* (revised 4th edition, Lexis/Nexus, 2011), is available at http://law.cua.edu/Fac_Staff/FishmanC/studentguidetohearsay.cfm.

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§ 6.8 SUBSEQUENT SUPREME COURT CONFRONTATION CLAUSE DECISIONS

Add at the end of the section:

7. In *Williams v. Illinois*, 132 S.Ct.2221 (2012), the Court, for a third time, addressed the question of forensic lab reports. A majority of the Court upheld the state's use of a DNA profile prepared by a private laboratory at police request, even though no one from the laboratory testified. The Court divided so sharply, however, that there was no majority opinion, no "holding," and the law applying the Clause to such reports is murkier than ever. *Williams* is discussed in §§ 9.53.1 to 9.53.6.

§ 9.36 THE BUSINESS RECORD EXCEPTION AND THE CONFRONTATION CLAUSE

Replace the final paragraph with:

Melendez-Diaz, and two subsequent lab report decisions, *Bullcoming v. New Mexico* and *Williams v. Illinois*, are discussed in §§ 9.50 to 9.53.6, *infra*.

§ 9.37 INTERPLAY WITH OTHER RULES

Add at the end of the section:

The interplay between the Sixth Amendment Confrontation Clause, the business record or public record exception, and Fed. R. Evid. 703, are discussed in §§ 9.53.5 & 9.53.6.

§ 9.51 WHO DOES THE PROSECUTOR HAVE TO CALL AS A WITNESS?

Add at the end of the section:

In 2012, in *Williams v. Illinois*, this question emerged again as a potentially decisive issue – which the Court did not resolve. See § 9.53.3, *infra*.

§ 9.52 MUST THE PROSECUTOR CALL THE ANALYST, OR MERELY MAKE HIM AVAILABLE TO THE DEFENSE?

Add at the end of the section:

In 2012, In *Williams v. Illinois*, four Justices again suggested, indirectly, that, at least regarding forensic lab reports, it should satisfy the Confrontation Clause if the defendant could subpoena the analyst and call him or her as a witness. But five Justices rejected that proposition. *Williams* is discussed in considerable detail in §§ 9.53.1 to 9.53.6, *infra*.

§ 9.53.1 WILLIAMS V. ILLINOIS: THE FACTS AND A SUMMARY

In 2012, the Supreme Court decided *Williams v. Illinois*,³ episode 3 in its long-running series, “*Application of Crawford to Forensic Lab Reports*.” Like the final episode of *The Sopranos*, *Williams* ended without anyone knowing for sure exactly what happened or what it all meant; like

³ *Williams v. Illinois*, 132 S Ct 2221 (2012).

the season finale of many TV series, it ended with everyone wondering what's going to happen next.

* * *

The preceding paragraph is an attempt to describe, (I hope) in a humorous way, how the *Williams* decision took a body of law that was already murky, and made it even more so. There is nothing at all humorous, however, about the crime Williams was convicted of committing.

In February 2000, L.J., a woman in her twenties, was abducted by a stranger as she walked home from work; he forced her into his car and raped her. A rape kit vaginal swab was taken shortly after the crime, and kept in a secure evidence freezer until November 2000, when it was shipped by the Illinois State Police (ISP) crime lab to Cellmark, a DNA research company in Maryland. In April 2001, Cellmark returned the swab to ISP together with a report of a DNA profile⁴ which, according to Cellmark, was the result of its analysis of the semen on the L.J. swab. At this point there were no identifiable suspects in the case; indeed, at that point, L.J. and the police investigating the case apparently did not even know that a man named Sandy Williams existed.

Sandra Lambatos, a forensic scientist at the ISP lab, conducted a computer search comparing the DNA profile she received from Cellmark to profiles in the state DNA database. The computer showed a match with DNA derived by ISP from a blood sample taken from Williams (and analyzed by the ISP lab) after Williams was arrested on unrelated charges on August 3, 2000. Lambatos then did her own comparison of the two profiles, and confirmed the match. On April 17, two weeks after Cellmark sent the rape kit DNA profile to the Illinois authorities, L.J. attended a lineup and identified Williams as her assailant. Williams was indicted.⁵

At trial, after the state properly introduced and authenticated Williams' DNA profile from the blood sample taken after his August 2000 arrest, Lambatos testified that the DNA profile from Williams' August 2000 blood sample and the Cellmark DNA profile were "a match." The state did not call any witness from Cellmark to testify, and thus did not offer any direct evidence (a) that the DNA profile was in fact derived from the semen on the L.J. swab, nor (b) that Cellmark technicians had followed correct procedures in analyzing the DNA and preparing the report. Williams was convicted. After state appellate courts affirmed his conviction, the Supreme Court granted cert. The issues before the Court were: (1) was the Cellmark report testimonial; and (2) if so, was it nevertheless admissible over a Confrontation Clause objection.

⁴ The Cellmark profile consists of a cover letter; a second page, basically reporting what was done, what was found (DNA from one male and one female); and twelve pages of charts and diagrams that only someone reasonably well-versed in DNA could understand. Professor Richard Friedman, of the University of Michigan Law School, has posted a copy of the DNA report at <http://www-personal.umich.edu/~rdfrdman/Cellmark.Report.pdf>.

⁵ This summary of the facts is derived from Justice Alito's plurality opinion, *Williams v Illinois*, 132 S Ct 2221, 2229; the intermediate appellate court decision, *State v Williams*, 896 NE2d 961, 963; and Justice Kagan's dissenting opinion, *Williams v Illinois*, 132 S Ct 2221, 2262-2263.

The Supreme Court's decision included four opinions totaling more than 29,000 words. Four justices ("the plurality") argued that for a variety of reasons, the circumstances surrounding the preparation of the profile, and the manner in which it was used at trial, did not violate Williams' Confrontation Clause rights. Five justices – the four dissenting justices ("the dissent") and Justice Thomas – completely rejected each of the plurality's reasons. (The four dissenters plus Thomas adds up to five Justices – a majority.) Yet Justice Thomas voted to affirm the conviction because in his opinion the report Cellmark sent to the ISP was not a "formal" enough document to be classified as testimonial.

The dissent aptly summarized where this leaves us:

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. ... [T]hey 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.⁶

If I write a law review article about the decision, the title might be: *Williams v. Illinois: a Tale, Told by the Supreme Court, Full of Sound and Fury, Signifying Very Little.*⁷

§ 9.53.2 WILLIAMS V. ILLINOIS: ANALYSIS

The single most important things to realize about the result in *Williams v. Illinois*⁸ are: (1) there is no majority opinion; (2) there is no "holding" (other than: Williams' conviction is affirmed). Therefore, (3) no rule emerges from it on which anyone can rely with any degree of confidence (unless, I suppose, another case comes along with pretty much exactly the same facts). Instead, there are 3 different factions on the Court.

⁶ *Williams v. Illinois*, 132 S Ct 2221, 2277 (Kagan, J., dissenting), citing *Melendez-Diaz v. Massachusetts*, 129 S Ct 2527 (2009) and *Bullcoming v. New Mexico*, 131 S Ct 2705 (2011).

⁷ If you are familiar with the line from Shakespeare which this title paraphrases, congratulations. If not, check out *Macbeth*, Act V, sc. v, lines 26-28. You can also find the line by Googling the phrase "full of sound and fury." — Actually, maybe that wouldn't be so hot a title after all. Unless a reader was already familiar with *Williams*, that title wouldn't tell the reader what the article was about. Second, why would a law review publish an article whose title proclaims that it's not important? Maybe I'll call it something like *The Confrontation Clause, Forensic Reports, and Williams v. Illinois: Much Ado About ... What?*

⁸ *Williams v. Illinois*, 132 S Ct 2221 (2012).

1. The “rejectionists.” First, there is the *Williams* plurality: four Justices (Roberts, Kennedy, Breyer and Alito) who dissented in *Melendez-Diaz v. Massachusetts*,⁹ dissented against the application of the *Melendez-Diaz* rule in *Bullcoming v New Mexico*,¹⁰ and argued in *Williams* that even if *Melendez-Diaz* was good law – which they did not really concede – it should not apply in *Williams*. I call this faction the “rejectionists,” because in all three cases they rejected the idea that forensic lab reports should be considered testimonial.

2. The *Melendez-Diaz* “purists.” This four-member faction that has consistently argued, in all three cases, that forensic reports *are* testimonial: Justices Scalia, Ginsberg, Sotomayor and Kagan.¹¹ I call this faction the “purists,” because in all three cases, they insist: by all logic, forensic reports are testimonial, and if that causes problems to prosecutors or lab directors, they will simply have to figure out a way to solve those problems.¹²

3. Justice Thomas. Justice Thomas insists that a forensic report is “testimonial” – and therefore has voted with the purists – where the report was a formal document, such as an affidavit (as in *Melendez-Diaz*) or a “certification” (as in *Bullcoming*). But if the report was a less formal document (such as the DNA profile Cellmark sent to the ISP in *Williams*), then, in his view, it is not testimonial – and in *Williams* he voted with the rejectionists.

One way to make sense of this case is to compare the facts in *Williams* to the facts in *Melendez-Diaz* and *Bullcoming*, and explain which facts which judges relied on in voting the way they did.

a. Similarities

Williams is similar to *Melendez-Diaz* and *Bullcoming* in the following ways.

1. In *Williams*, as in *Melendez-Diaz* and *Bullcoming*, a laboratory analyzed evidence and prepared a report of the results, with the expectation that eventually it might be used as evidence in a criminal prosecution.
2. In *Williams*, as in *Melendez-Diaz* and *Bullcoming*, the state used the contents of the report at trial without calling any witness who participated in the forensic analysis of the underlying evidence or the preparation of the report.

⁹ *Melendez-Diaz v. Massachusetts*, 129 S Ct 2527 (2009).

¹⁰ *Bullcoming v New Mexico*, 131 S Ct 2705 (2011).

¹¹ In *Melendez-Diaz*, the four Justices voting this way were Scalia, Ginsberg, Stevens and Souter. By the time *Bullcoming* was decided, Justices Stevens and Souter had left the Court and were replaced by Justices Sotomayor and Kagan, each of whom has joined the Scalia-Ginsberg “purist” faction.

¹² This overstates the case somewhat. In *Bullcoming*, Justice Sotomayor wrote a concurrence, which Justice Kagan joined, suggesting they had some flexibility on some issues. See § 9.53. But they stayed solid with Justices Scalia and Ginsberg in *Williams*.

These similarities, according to the *Williams* dissent – Justice Kagan, writing also for Justices Scalia, Ginsberg and Sotomayor – were the only significant facts in the case, and mandated the conclusion, consistent with *Melendez-Diaz* and *Bullcoming*, that the state had violated Williams' right to confront the technicians who conducted the Cellmark analysis.

b. Differences

Williams differs from *Melendez-Diaz* and *Bullcoming* in the following ways.

1. In *Melendez-Diaz* and *Bullcoming*, the defendant had already been arrested and charged when the evidence in those cases was analyzed. At the time Cellmark did the DNA profile in *Williams*, by contrast, no suspect had been identified, let alone arrested and charged. Thus, the *initial* use that was made of the Cellmark profile in *Williams* was to attempt to identify the perpetrator; only if that succeeded could it be used at a trial.
2. It is (supposedly, anyhow) much easier to determine whether a DNA sample (as in *Williams*) has become contaminated, than most other kinds of forensic evidence, such as an analysis to determine whether a powder contains drugs (*Melendez-Diaz*), or to determine the percentage of alcohol in a blood sample (*Bullcoming*).
3. Circumstantial evidence strongly corroborated the likelihood that Cellmark had in fact analyzed the semen in the L.J. swab (as opposed to accidentally analyzing a different sample and mistakenly reporting it as coming from the L.J. swab), and had done so correctly.¹³
4. In *Melendez-Diaz* and *Bullcoming*, the lab reports were prepared by state crime laboratories which were affiliated with the police. In *Williams*, the DNA test of the semen presumably found on the swab was performed by Cellmark, a company unaffiliated with any law enforcement agency.
5. The state did not formally introduce the Cellmark DNA profile into evidence.
6. Williams was tried before a judge, not a jury.
7. The Cellmark report was neither an "affidavit," nor a "certification."

The plurality (i.e., the "rejectionists") – Justice Alito, writing also for Chief Justice Roberts and Justices Kennedy and Breyer – cited the first "difference factor" in arguing that the Confrontation Clause did not apply because the Cellmark DNA profile was not a "witness against" Williams, as

¹³ The plurality emphasized that there is no evidence to suggest that Cellmark had ever received any prior sample of Williams' DNA; thus, Cellmark could not have accidentally analyzed a sample of Williams DNA from a different case and mistakenly attributed it to the L.J. swab. The plurality also emphasized that after ISP lab scientist Lambatos found that the swab DNA matched the Williams blood sample DNA, L.J. identified Williams at a lineup.

the term “witness against” is used in the Confrontation Clause. But a majority of the Court – the four dissenting Justices and Justice Thomas – were unimpressed: in essence, these five Justices responded, “We rejected that argument in *Melendez-Diaz*, and we reject it again here.”¹⁴ Since 5 of the 9 justices rejected the plurality’s “not-a-witness-against” reasoning, that reasoning cannot be the “holding” in the case.

The plurality cited the first three “difference factors” to support their conclusion that the Cellmark DNA profile was so reliable that it should not be considered “testimonial,” for Confrontation Clause purposes.¹⁵ But a majority of the Court – the four dissenting Justices, and Justice Thomas – were unimpressed: “Been there, done that.”¹⁶ In other words: “We rejected that argument in *Melendez-Diaz*, and we reject it again here.”¹⁷ Since 5 of the 9 justices rejected the plurality’s “so-reliable-it’s-not-testimonial” reasoning, that reasoning cannot be the “holding” in the case.

The plurality cited the fifth and sixth “difference factors” to support their conclusion that, even if the Cellmark DNA profile was “testimonial,” it was not offered for a hearsay purpose (see § 6.4), and therefore did not violate Williams’ rights under the Confrontation Clause. (The plurality conceded that this reasoning would be more problematic in a jury trial, but insisted that it worked just fine in a non-jury trial.) This aspect of the plurality opinion – and the other five Justices’ response to it – may be the most difficult for a law student to understand, particularly if you haven’t studied Fed. R. Evid. 703. I’ll explain this – and as a bonus, explain Rule 703, too – in § 9.53.5 and § 9.53.6. But the most important thing you should understand about this aspect of the plurality’s reasoning is that a majority of the Court – the four dissenting Justices and Justice Thomas – rejected it, insisting that the Cellmark DNA report *had been* offered for a hearsay purpose, and therefore (all other things being equal¹⁸), the Confrontation Clause *should* apply. Since 5 of the 9 justices rejected the plurality’s “not-for-a-hearsay-purpose” reasoning, that reasoning cannot be the “holding” in the case.

Justice Thomas cited the seventh “difference factor” to support his conclusion that the Cellmark DNA report was not testimonial. Starting with *Crawford* and in virtually every Confrontation Clause decision since, Justice Thomas, alone among the nine Justices, has insisted that statements are

¹⁴ To be precise, the majority in *Melendez-Diaz* insisted that *any* witness who testifies for the prosecution is a “witness against” the defendant for Confrontation Clause purposes, and the same is true for any hearsay declarant whose “testimonial” statement is offered against a defendant to prove the truth of the matter asserted in the statement.

¹⁵ The fourth factor also implicitly supports this argument: that Cellmark is an independent, private company (located several states away from Illinois) presumably makes it less vulnerable to potential police pressure to report the results that the police want to see.

¹⁶ Williams at 2275 (Kagan, J., dissenting). (These are Justice Kagan’s actual words.)

¹⁷ This is my paraphrase of Justice Kagan’s discussion of the issue.

¹⁸ We haven’t gotten to difference number 7 yet.

“testimonial” only if they were marked by “solemnity and formality” – such as testimony, responses to “formal” police interrogation, affidavits, and formal “certifications.” Since the Cellmark DNA report was none of these,¹⁹ according to Justice Thomas, it was not “testimonial”; therefore using it as evidence did not violate Williams’ rights under the Confrontation Clause.

None of the other eight Justices in *Williams* endorsed Justice Thomas’ reasoning. Justice Kagan, for the four dissenting Justices (the “purists”), protested that the Thomas approach to the Confrontation Clause “grant[ed] constitutional significance to minutia, in a way that can only undermine the Confrontation Clause’s protection.”²⁰ It would permit prosecutors to avoid the demands of the Confrontation Clause “by using the right kind of forms with the right kind of language,” and added, parenthetically: “(It would not take long to devise the magic words and rules — principally, never call anything a ‘certificate.’)”²¹ Justice Thomas replied, “the Confrontation Clause reaches bad-faith attempts to evade the formalized process.”²² Justice Kagan replied, in essence, “Oh, yeah? How?”²³

The plurality (the “rejectionists”), understandably, said nothing in criticism of Justice Thomas’ concurring opinion. Why would they? Justice Thomas’ vote gave the plurality the fifth vote they needed to affirm Williams’ conviction and to prevent the dissenting Justices from expanding the scope and application of *Melendez-Diaz*. Unless and until they are able to overturn *Melendez-Diaz* completely, they’ll settle for what they can get.

The bottom line is this: so long as the rest of the Court remains evenly split between the four *Melendez-Diaz* “purists” vs. the four *Melendez-Diaz* “rejectionists,” the outcome of Confrontation Clause cases involving forensic reports *may* depend on whether Justice Thomas considers the report “solemn” and “formal” enough to be testimonial. But who knows? Change one of the “differences” on which the plurality relied, and maybe one or more rejectionists will join the purists. Or maybe a case will come along which will persuade a purist or two to join the rejectionists in some circumstances.²⁴

¹⁹ Remember, you can view the Cellmark profile at <http://www-personal.umich.edu/~rdfrdman/Cellmark.Report.pdf>.

²⁰ *Williams*, 132 S Ct 2221, 2276 (Kagan, J., dissenting). She also complained that the features of the Cellmark report Justice Thomas relied upon “amount to (maybe) a nickel’s worth of difference,” because “[t]he similarities of form, function and purpose dwarf the distinctions.”

²¹ *Id.*

²² *Williams* at 2261 (Thomas, J., concurring in the result).

²³ This is my paraphrase of what of what Justice Kagan said. *Williams* at 2276 n 7 (Kagan, J., dissenting).

²⁴ The “purist” faction may not be as solid as the three lab report cases make them appear. For example, in *Michigan v. Bryant*, which concerned statements a shooting victim made during “informal” police questioning, Justice Sotomayor voted with the “rejectionists” and Justice Thomas, and against Justices Scalia and Ginsberg; in fact, Justice Sotomayor wrote the majority opinion in that case. *Bryant* is discussed

§ 9.53.3 JUSTICE BREYER'S CONCURRENCE: THE "GHOSTBUSTERS QUESTION"

So far I've described three of the opinions written by Justices in *Williams* – Justice Alito's plurality opinion, Justice Kagan's dissent, and Justice Thomas' "concurring only in the result." Justice Breyer, who signed Justice Alito's plurality decision, also filed a separate concurrence, which deserves a look, because Breyer's concurrence continues a dialogue which began with *Melendez-Diaz*. That dialogue in *Melendez-Diaz* and *Bullcoming* can be summed up as follows:²⁵

- M-D* purists:²⁶ If the government wants to introduce the results of a forensic examination of evidence, it must call the "analyst" who performed the tests recorded in the lab report.
- Rejectionists:²⁷ You purists talk about calling 'the analyst.' But you never specify who that might be. Suppose four people were involved in different steps of an analysis, or six, or even more. By your logic, the prosecutor might have to call every single one of them – which would take up hours of trial time and would require lab technicians and scientists to spend more time in court than they do in the lab. That's a waste of time, money and resources and serves no real purpose.

In essence, the rejectionists demand to know: "Who you going to require the prosecutor's to call?" I call this the "*Ghostbusters* question."²⁸

Justice Breyer's concurrence²⁹ and Justice Kagan's dissent in *Williams* continued the dialogue:³⁰

in § 8.13 and 8.14.

²⁵ To make sure everyone understands: nothing in this section is an actual quote from any judicial opinion. This is my brief, informal summary of the conflicting positions.

²⁶ That is, Justices Scalia, Ginsberg, Sotomayor and Kagan, the four Justices who have voted in favor of the *Melendez-Diaz* rule in all three cases.

²⁷ That is, the four Justices who voted against this rule in *Melendez-Diaz* and *Bullcoming*, and comprised the plurality in *Williams* that refused to apply *Melendez-Diaz* in that case: Chief Justice Roberts and Justices Kennedy, Breyer and Alito.

²⁸ In the 1984 movie *Ghostbusters*, various paranormal ghosties and beasties invade New York City; an intrepid group of men form a company – which they named "Ghostbusters" – to rid the city of the invasion. In the movie, the company runs advertisements asking, in essence: if your home or office is polluted with paranormal activity, "*Who you gonna call? – Ghostbusters!*" This phrase also was used in advertising the movie. *Ghostbusters* is very funny, and definitely worth seeing – even if you have to cut a class or two to find the time (so long as the class is not Evidence).

²⁹ You may be wondering: "Breyer concurred in *Williams*, but he's still part of the plurality; Thomas concurred in *Williams*, too, but he's *not* part of the plurality. How come? What's the difference?" The difference is that Breyer, in essence said, "I agree with the plurality opinion – *Williams*' conviction should

Breyer: You still haven't answered the question: which analyst(s) does the government have to call? In a typical DNA case, for example, anywhere from 6 to 12 technicians and scientists participate in the preparation and analysis of the evidence and the preparation of the report of the results. Does the prosecutor have to call all of them? This will be so impractical and so expensive that many prosecutors simply won't be able to use DNA or other hi-tech forensic evidence anymore. – And if the government doesn't have to call them all, what's the principle that defines who it *does* have to call?"

Kagan: OK, that's a legitimate question, and I agree, we'll have to address it – when we get a case in which at least *one* of the technicians who participated in the testing actually testified at trial. But why do you harp on it in *Williams*? In *Williams*, like *Melendez-Diaz* and *Bullcoming*, *nobody* who participated in the analysis testified. You should decide *Williams* on the merits, and leave the "Ghostbuster question" aside until we take a case that actually requires us to decide it!

Breyer: We rejectionists are afraid you purists will back the Court into a corner that will make it almost impossible for prosecutors to use DNA evidence and other evidence requiring multiple-step, multiple-participant analyses.

It's impossible to know how this will turn out; but if the Court grants cert on a case in which some participants in the analysis testified, the purists will have a chance to satisfy Justice Breyer's concerns (and maybe some of the other purists' concerns, too) – in which case, Justice Thomas may no longer be the swing vote.

§ 9.53.4 "SO WHAT DO I NEED TO KNOW FOR THE EXAM?"

Each professor chooses what to ask about and what to expect as an answer. If (when?) I test my students about *Williams*, I might do so in one of two ways.

First, I might ask questions to test whether they understand that none of the theories put forth by the plurality or Justice Thomas is the "holding" in the case; in fact, that a majority of the Court rejected each of those theories.

be upheld for the reasons spelled out in the plurality opinion. I'm just adding these extra thought of my own." Thomas, on the other hand, in essence said, "Even though I agree with the plurality that *Williams*' conviction should be upheld, the plurality's reasoning is bogus, and I reject it. I'm voting to uphold based on my own, superior reasoning." That's why the Breyer concurrence is captioned, "Justice Breyer, concurring," while the Thomas concurrence is captioned, "Justice Thomas, concurring in the judgment" – i.e., *only* in the judgment, not in the plurality's reasoning.

³⁰ What follows are not actual quotations from any judicial opinion, but my own brief, informal summary of the Breyer and Kagan opinions.

Second, I might give my students a set of facts similar but not identical to those in *Williams* – for example, a pattern which duplicates most but not all of the 7 “differences” I discussed in §9.53.2 subsection *b*. I’d expect my students to recognize that my fact pattern differs from that in *Williams* in this or that way, and then discuss how an attorney might plausibly argue that the particular difference or differences might change the outcome of the case.

Question 1. *Williams* holds that if a forensic report is reliable enough and is corroborated by other evidence, it is not subject to a Confrontation Clause objection. True or false?

Ans. False. Although four Justices endorsed this principle *Melendez-Diaz* and endorsed it again in *Williams*, a majority of the Court rejected it in both cases.

* * *

The next two sections are the “bonus sections” I referred to earlier. § 9.53.5 is a general explanation of Fed. R. Evid. 703. § 9.53.6 briefly describes how (according to five justices currently on the Supreme Court, and many evidence scholars) Fed. R. Evid. 703 and the Confrontation Clause intersect.

§ 9.53.5 FED. R. EVID. 703

Fed. R. Evid. 703 provides:

Rule 703. Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Break the rule down into its three sentences.

a. The first sentence: “made aware of or personally observed”

The first sentence reads:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed.

If the expert has “personally observed” something, no problems arise: all things being equal, a witness is permitted to testify about matters on which he or she has personal knowledge. See Fed. R. Evid. 602. Issues arise with regard to “facts or data” that the expert “has been made aware of.”

There are two ways an expert may be “made aware of” facts or data. One is the hypothetical question. Suppose we are trying a toxic tort case. Plaintiff became sick and his health is permanently impaired. He alleges the cause was exposure to a toxic product or substance released by TS [“Toxic Substance”] Corp., the defendant. Plaintiff’s lawyer might call Dr. MD as an expert and, after eliciting testimony about her qualifications and experience, ask: “Dr. MD, assume the following facts. [The attorney then spells out the facts favorable to his case, which he hopes he has proven or will prove to the jury’s satisfaction.] Based on these facts, do you have an opinion, to a reasonable degree of medical certainty, as to the cause of the plaintiff’s condition, and its permanency?”

The second way an expert may be “made aware of” facts or data in the case is for the expert to do her own homework. Suppose a defendant is charged with destruction of property; while in Owner’s home, he slashed and tore and threw acid on a painting hanging on Owner’s wall. Assume that the severity of the crime depends on the value of the property destroyed – destroying something worth \$10,000 or more carries a much heavier penalty than something worth less than \$500. The property in this case is a painting called *Maid in Mauve* that some believe was done by Pablo Picasso in 1899, with a value far in excess of \$10,000; but others believe it is a clever forgery by an unknown imitator worth, perhaps, a few hundred dollars at most.

As proof that the painting was worth more than \$10,000, the prosecutor calls Henrietta Mathis, a professional art dealer and appraiser. After stating her experience and qualifications, direct examination proceeds:

- Q1 Ms Mathis, did you, at my office’s request, study *Maid in Mauve* and form an opinion as to what its value was before it was destroyed?
- A1 Yes, I did.
- Q2 How did you undertake that study?
- A2 I did several things. [a] First, I learn what I can about what we call a painting’s “provenance”: its history. Where did it first appear, who sold it, who bought it. [b] I examined photographs that had been taken of it before it was destroyed, to evaluate whether it has the general appearance of the work Picasso did at various stages of his career. [c] Then I examined what was left of the painting itself. For example, I studied the surface of what was left of the painting to determine if the brush strokes were similar to that in Picasso’s work. [d] I consulted several learned treatises of art history, particularly those which focused on Picasso and his contemporaries. [e] And I consulted several well-respected art dealers and art appraisers.³¹
- Q3 Are these things that you regularly do when you are asked to appraise a painting?
- A3 Yes, although (thank goodness!) it’s the first time I’ve been asked to do so for a great work of art that has been destroyed.

³¹ In the real world, an expert would do much, much more than what I’ve outlined here; but this is a hearsay book, for law students, not a treatise on the science and art of art authentication and appraisal. (If you want to know more, when you’ve got a spare moment – hah! – see Elizabeth Williams, *Liability for Sale of Forged Antique or Work of Art*, 50 Am. Jur. Proof of Facts 3d 371 (originally published in 1999; updated 2012).

- Q4 And the steps that you've outlined – are these the things that someone in your profession would normally do when called upon to appraise a work of art?
- A4 Oh, yes. We all do these things. We are trained to do it, we study how to do it.
- Q5 Based on all of this, do you have an opinion of whether *Maid in Mauve* was an original Picasso?
- A5 Yes. I am convinced that *Maid in Mauve* is an original by the master, painted in 1899 during his very brief “mauve period.”
- Q6 And do you have an opinion as to what *Maid in Mauve* was worth on the open market, before it was destroyed?
- A6 An original mauve period Picasso? Of this size and brilliant simplicity? Many tens of thousands of dollars. \$50,000 at least. I can think of dozens of serious collectors who would have gladly paid that much for it; many fine museums, as well.
- Q7 And what is it worth now?
- A7 The frame might go for a hundred dollars. The painting itself has been so utterly destroyed that it is worthless.

Some of what Ms Mathis did in forming her opinion (see A2) is clearly admissible:

[b] An art expert can certainly testify directly about what she “personally observed” (in the language of Rule 703) when she examined a pre-destruction photograph.³²

[c] Similarly, Ms Mathis can certainly testify directly about what she “personally observed” when she examined what is left of *Maid in Mauve*.

[d] Under properly structured direct or cross-examination of an expert witness such as Ms Mathis, an attorney may introduce relevant passages from learned literature. See Fed. R. Evid. 803(18), covered in §§ 10.9.

But Ms Mathis also acquired “facts or data” that are not, independently, admissible.

[a] How did she study the painting's “provenance”? Let's assume that (among other things) she talked to Owner and to the dealer who sold it to Owner, if the dealer is still alive and willing to speak to her; and so on. What Owner and the dealer told her would probably be inadmissible hearsay, if offered to prove what they told Ms Mathis was true.

[e] What other experts told Ms Mathis likewise would be inadmissible hearsay if she sought to repeat them as proof that what they said was true.

Is it permissible for her to base her opinion, in part, on inadmissible evidence?

b. The second sentence: the “facts or data” relied on “need not be admissible”

³² The prosecutor would probably also introduce the photograph and have Ms Mathis explain to the jury why it supports her theory that *Maid in Mauve* is a genuine Picasso.

The second sentence of Fed. R. Evid. 703 provides:

If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

Even though Ms Mathis relied (in part) on “facts or data” – [a] and [e] – which are inadmissible hearsay, it is permissible for her to base her opinion, in part, on such information, so long as art experts “would reasonably rely on those kinds of facts or data in forming an opinion on the subject.” How do we know that art experts “would reasonably rely,” etc.? Q3-A3 and Q4-A4 of Ms Mathis’ direct examination lay the necessary foundation.

c. Third sentence: disclosing those “facts or data” at trial

Suppose Ms Mathis testifies, “I relied in particular on the judgment of Professor Guggenheim Tate, the highly respected English art historian, who told me that he is firmly convinced that *Maid in Mauve* was an original Picasso worth at least a hundred thousand dollars.” Defendant’s lawyer immediately objects: “Objection! Hearsay! Confrontation Clause!” The prosecutor responds: “Your Honor, I’m not offering what Professor Tate said to Ms Mathis to prove the truth of the matter asserted; I’m only offering it to help the jury evaluate Ms Mathis’ opinion.”³³ Is this a valid response to defendant’s objection?

Consider the third sentence of Fed. R. Evid. 703, which was added by the Advisory Committee in 2000:

But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Two features of this sentence merit inspection.

First, the rule directs that “helping the jury evaluate the [expert’s] opinion” does *not* generally justify allowing such testimony. We know this because the third sentence reverses the normal balancing test between probative value and the risk of unfair prejudice:

Fed. R. Evid. 403 directs that “relevant evidence” should be *excluded only if* “its probative value is substantially outweighed by a danger of ... unfair prejudice.” In other words, the improper impact of the evidence must substantially outweigh the legitimate impact, in order to justify exclusion under Rule 403.

³³ You might wonder: why doesn’t the prosecutor call Tate as a witness, too? Tate could testify and give his own opinion from the witness stand, thus eliminating the hearsay issue. There are, however, two problems: Tate might not be willing to fly in from London to testify, and even if he was willing, the prosecutor might be reluctant to pay Tate’s expert witness fee and travel and living expenses.

Rule 703, by contrast, reverses the assumption: evidence relevant to explain the expert's opinion *is admissible only if* its probative value for that purpose "substantially outweighs" the improper ("prejudicial") effect. (The "prejudice" here is the likelihood that the jury will use the evidence for its inadmissible hearsay purpose.)

In other words, where Rule 403 weighs the balance heavily *in favor* of admissibility, Rule 703, as amended, weighs the balance heavily *against* admissibility. Applying this balance, the judge probably should not allow Ms Mathis to repeat, on direct examination, what Professor Tate said to her.³⁴

Well, then, when *would* it be proper to allow Ms Mathis to repeat to the jury what Professor Tate said to her about the painting?

Suppose, after Ms Mathis testified on direct as is set out in the Q & A in subsection *a*, defense counsel asks on cross-examination:³⁵

Q1 Are you familiar with *The International Journal of Art Appraisal*?

A1 Yes, I am.

Q2 Is that considered to be a respected authority in the field of art appraisal?

A2 Yes, it is.

Q3 And do you accept it as authoritative?

A3 Yes, I do. Whatever they publish is worth serious attention.

Q4 And what about Professor Guggenheim Tate. Is he considered an expert in the field of art history and appraising?

A4 Yes, very much so.

Q5 And do you consider him an expert and authority?

A5 Absolutely.

Q6 Are you familiar with an article by Professor Tate published in the Fall, 2008 edition of *The International Journal of Art Appraisal*, entitled "Picasso's so-called 'Mauve Period': Myths, Misconceptions and Mistakes"?

A6 Yes, I am.

Q7 In it, Professor Tate rejects the very idea that Picasso had what you referred to as his "mauve period," right?

A7 He makes a very strong argument in support of that view, yes.

Defense counsel here is creating the impression that Prof. Tate disagrees with Ms Mathis's conclusion that *Maid in Mauve* is in fact a Picasso. Thus, on redirect, the prosecutor should be permitted conduct the following redirect of Ms Mathis:

Q Ms Mathis, is Professor Tate one of the experts you consulted in preparing to form an

³⁴ Some courts might still allow Ms Mathis to repeat Dr. Tate's testimony during her direct examination, despite the third sentence of Fed. R. Evid. 703. What can I say? It's an imperfect world.

³⁵ This cross-examination is of a kind permitted by Fed. R. Evid. 803(18). See § 10.9.

opinion about *Maid in Mauve*?

A Yes, he is.

Q What was Professor Tate's opinion about *Maid in Mauve*?

A He wrote to me – I have his letter right here –

[The prosecutor properly authenticates the letter and offers it into evidence, and then asks:]

Q Please read what Professor Tate wrote.

A He wrote: "I still think you are barking up the wrong tree about a 'mauve period'; there was no such thing. And I'd date *Maid in Mauve* closer to 1897, not 1899. But there is no doubt in my mind: *Maid in Mauve* is a genuine, original Picasso. Had it not been destroyed, its value on the open market would be in the neighbourhood of £65,000."³⁶

This should be permitted, to allow the prosecutor to correct the impression that defense counsel created on cross. (The defense would be entitled to a limiting instruction: "What Prof. Tate wrote to Ms Mathis is not admissible to prove that *Maid in Mauve* was in fact painted by Picasso; you are to consider it only in evaluating whether Ms Mathis had a valid basis for her own opinion.")

The second noteworthy feature of the third sentence of Fed. R. Evid. 703 is that the Rule 703's concern over the balance between relevance and prejudice applies only in jury trials ("may disclose them *to the jury* only if ..."). Explanation: even if a judge gives a jury a limiting instruction, a *jury* may not be able to understand that instruction and may use what Professor Tate said to Ms Mathis as direct evidence that *Maid in Mauve* is a genuine Picasso. Because *judges* (presumably) don't make that kind of mistake, there's no reason for concern about misuse of Professor Tate's statements by a judge hearing the case without a jury.³⁷

§ 9.53.6 FED. R. EVID. 703 AND THE CONFRONTATION CLAUSE

The *Williams* plurality argued that when Lambatos compared the Williams blood sample DNA profile produced by the ISP with the Cellmark rape-kit swab DNA profile (see §9.53.1), she simply did what DNA analysts frequently do: they rely on DNA profiles produced by other, certified DNA-qualified laboratories. Thus it was permissible per Fed. R. Evid. 703 for her to testify that the two profiles were a match. And since Williams waived a jury and the case was tried by a judge, there was no concern about a jury's misuse of her testimony about the Cellmark profile.³⁸

³⁶ £ is the symbol for the British pound sterling. A pound is currently (in 2012) worth roughly 1.6 U.S. dollars. (By the way, "neighbourhood" is how the British, and many countries in their former Empire, spell it.)

³⁷ In cases involving an expert forensic report, defense attorneys may be much less likely to waive a jury trial as a result of the *Williams* plurality's reliance on the absence of a jury as justifying Lambatos' testimony about the Cellmark DNA profile.

³⁸ Williams was tried in state court, not federal court, so Illinois R. Evid. 703, not the federal rule, applied, but the plurality concluded that state courts interpreted the state rule consistently with the federal rule, and proceeded as if the federal rule had applied to the case.

This may sound plausible at first, but a majority of the Court (the four dissenters, and Justice Thomas) rejected it as bogus. They maintained that, properly understood, Fed. R. Evid. 703 allows an expert witness (such as Ms Mathis, in the previous section) to testify to the otherwise inadmissible bases on which she based her opinion, only if it is relevant for the *non-hearsay* purpose of allowing the fact-finder to evaluate her opinion. Many – though perhaps not all -- evidence scholars agree.³⁹

Re-read the description of *Tennessee v. Street* in § 6.4. Once Street testified that the officers who interrogated him forced him to repeat statements made earlier in his codefendant Peele's confession, what Peele said in *his* confession became relevant for the *non-hearsay* purpose of comparing the two confessions to see if Street's allegation was true. In other words, the contents of Peele's confession were relevant even if Peele's confession was not altogether accurate.⁴⁰

Now consider the Cellmark DNA profile of the semen found in the rape kit swab. It is relevant *only if the Cellmark DNA profile was in fact taken from the semen in the L. J. swab, and only if Cellmark conducted the DNA profile properly and reported the results accurately*. In other words, the Cellmark profile is relevant only if it is "true"; and therefore, five Justices concluded, the state's use of the report in *Williams* cannot be justified by citing Rule 703.

³⁹ Whichever position your evidence professor takes on this issue is of course absolutely correct, at least until after the exam.

⁴⁰ Similarly, given defense counsel's cross-examination of Ms Mathis, what Professor Tate wrote to her after she consulted him is now relevant, *whether or not Professor Tate's opinion was accurate*, to correct the mis-impression created by that cross-examination.