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COMMENTS

SUMMARY EXHIBITS AND THE CONFRONTATION CLAUSE: LOOKING BEYOND THE HEARSAY RULE FOR EVIDENTIARY IMPLICATIONS OF *CRAWFORD'S* PROGENY

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I. INTRODUCTION

The Confrontation Clause provides, “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”¹ This right is afforded to defendants in criminal cases by giving them the opportunity to cross-examine the witnesses who testify against them. According to the U.S. Supreme Court, the purpose of the Confrontation Clause is to “ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”² However, before the Court’s 2004 decision in *Crawford v. Washington*, criminal defendants were not guaranteed an opportunity to cross-examine a witness’s out-of-court statement against them if the statement fell within a “firmly rooted hearsay exception” or was otherwise considered reliable.³ *Crawford* effectively severed the relationship between the Sixth Amendment’s Confrontation Clause and the hearsay rule, holding that a defendant’s right to confrontation can only be satisfied when the defendant has the opportunity to cross-examine the witnesses against him.⁴

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¹ U.S. CONST. amend. VI.

² *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

³ *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

⁴ *Id.* at 59.

After *Crawford*, the Court has made numerous attempts to categorically distinguish statements that trigger the confrontation right from statements that do not. Most of *Crawford*'s progeny have attempted to distinguish “testimonial” statements, which trigger Confrontation Clause protections under the new standard, from “non-testimonial” statements, which do not receive constitutional scrutiny.⁵ More recently, the Court has begun to address how and whether *Crawford*'s progeny dictate which witnesses the government must call when confronting criminal defendants with their accusers.⁶ The Supreme Court has yet to address whether charts, summaries, and calculations of voluminous data are testimonial. Such evidence is admissible under Federal Rule of Evidence (FRE) 1006. However, if this evidence is testimonial, the fact that it is admissible under FRE 1006 should not protect it from Sixth Amendment scrutiny. Under *Crawford*, the Confrontation Clause should prohibit the admission of a testimonial summary exhibit unless the defendant is given the opportunity to cross-examine the individuals whose assertions are contained in the summary evidence. To hold otherwise would be inconsistent with the Court's decision in *Crawford*, which effectively segregated the determination of evidentiary admissibility from the determination of constitutional admissibility.

As courts continue to define the contours of the Sixth Amendment, the same concerns that led the Court to sever the hearsay rule from the Confrontation Clause will eventually require it to address whether the admission of testimonial summary exhibits raises Confrontation Clause concerns when the defendant is not afforded the opportunity to confront the individuals who made the assertions contained in the summaries.

Part II of this Comment contains a brief history of our Confrontation Clause jurisprudence. Part II also provides a general overview of FRE 1006, which allows for the admissibility of summary exhibits. The right to confrontation can be traced back to long before the founding of this country. However, recent developments in Sixth Amendment jurisprudence have significantly expanded the scope of the right. Part III of this Comment explores the relationship between FRE 1006, the hearsay regime, and the Confrontation Clause. A summary exhibit can be testimonial in the same way certain hearsay statements are testimonial. This section of the

⁵ See, e.g., *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009); *Davis v. Washington*, 547 U.S. 813, 828–29 (2006).

⁶ *Bullcoming*, 131 S. Ct. at 2710 (holding that the Confrontation Clause is violated where the prosecution introduces a forensic lab report through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification).

Comment discusses why courts should subject testimonial summary exhibits to the same degree of constitutional scrutiny as testimonial hearsay evidence. In Part IV, this Comment explores how the Supreme Court's fractured decision in *Williams v. Illinois*⁷ has confounded the Court's otherwise steady Confrontation Clause jurisprudence, and how that decision could impact whether summary exhibits receive constitutional scrutiny. Part V provides a conclusion to this Comment, asserting that the admission of testimonial summary exhibits without the right to cross-examination violates the Confrontation Clause under *Crawford*.

II. BACKGROUND

A. THE CONFRONTATION CLAUSE BEFORE *CRAWFORD*

A defendant's right to face his accuser has its roots in Roman law. The Roman governor Porcius Festus famously said of his prisoner, Paul the Apostle, "[i]t is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him."⁸ In English common law, the tragic story of Sir Walter Raleigh is often cited to illustrate the importance of being able to face one's accusers.⁹

In the United States, the right to confrontation has been codified in the Sixth Amendment of the Constitution. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."¹⁰ The Roman and traditional English models differ from the Sixth Amendment in that the former provide only the right to face one's *accuser*, while the latter provides the right to face not only one's accuser, but also *any* adverse witnesses.¹¹ The Supreme Court held in *Pointer v. Texas* that the confrontation right applied to the states through the Fourteenth

⁷ 132 S. Ct. 2221 (2012).

⁸ *Acts* 25:16 (King James); *see also id.* at 23:35 ("I will hear thee, said he, when thine accusers are also come. And he commanded him to be kept in Herod's judgment hall.").

⁹ *See, e.g., Crawford*, 541 U.S. at 44. Sir Walter Raleigh was accused of treason by Lord Cobham, his alleged accomplice. Raleigh argued that Cobham lied to save himself and demanded that he be brought forth. The judges denied Sir Walter Raleigh the opportunity to confront Cobham, his accuser, and the jury convicted Raleigh, who was then sentenced to death. *Id.*

¹⁰ U.S. CONST. amend. VI.

¹¹ Another subtle but significant difference between Roman law and the Sixth Amendment is the Sixth Amendment's passive phrasing. *Id.* ("[T]he accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." (emphasis added)). The passive phrasing makes clear that the burden is on the prosecution to produce those witnesses.

Amendment.¹² Before *Crawford*, the Sixth Amendment and the hearsay rule “dealt with the problem of the reliability of second-hand evidence in much the same way.”¹³ Secondhand statements offered against criminal defendants were presumed reliable if they fell within a “firmly rooted hearsay exception.”¹⁴ If a firmly rooted hearsay exception applied, the confrontation right did not attach.¹⁵

The most recent articulation of this position was in the Supreme Court’s 1980 decision, *Ohio v. Roberts*.¹⁶ In *Roberts*, the Court held that a witness’s out-of-court statement may be admitted against a criminal defendant without opportunity for cross-examination if the statement bears adequate indicia of reliability.¹⁷ To meet that test, evidence had to either fall within a “firmly rooted hearsay exception” or bear “particularized guarantees of trustworthiness.”¹⁸

B. CRAWFORD AND ITS PROGENY

In *Crawford v. Washington*, the Supreme Court overruled *Roberts* and severed the Confrontation Clause from the hearsay rule,¹⁹ holding that the confrontation right will no longer be satisfied simply because a statement against the accused falls within a hearsay exception or bears “indicia of reliability.”²⁰ In *Crawford*, the defendant was tried for the assault and attempted murder of a man who allegedly raped his wife.²¹ At trial, the State played for the jury a tape-recorded statement that the defendant’s wife made to the police.²² The defendant did not have the opportunity to cross-examine his wife because Washington’s marital privilege rule barred a spouse from testifying without the other spouse’s consent.²³ However,

¹² 380 U.S. 400, 403 (1965).

¹³ G. Michael Fenner, *Today’s Confrontation Clause (After Crawford and Melendez-Diaz)*, 43 CREIGHTON L. REV. 35, 37 (2009).

¹⁴ *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 65 (“The Court has applied this ‘indicia of reliability’ requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the ‘substance of the constitutional protection.’” (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895))).

¹⁸ *Id.* at 66.

¹⁹ See *Crawford v. Washington*, 541 U.S. 36, 60 (2004) (“Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of reliability.” (internal quotation marks omitted)).

²⁰ *Id.* at 68.

²¹ *Id.* at 38.

²² *Id.*

²³ *Id.* at 40.

privilege did not extend to a spouse's out-of-court statements admissible under a hearsay exception.²⁴ This allowed the State to admit the tape-recorded conversation by invoking a hearsay exception for statements against penal interest.²⁵

The defendant argued that—notwithstanding the state marital privilege and evidence laws—admitting the taped statements would violate his Sixth Amendment right to be “confronted with the witnesses against him.”²⁶ Relying on the Supreme Court's decision in *Ohio v. Roberts*, the trial court admitted the statements over the defendant's objections on the basis that the defendant's wife's statements bore “particularized guarantees of trustworthiness.”²⁷ The jury convicted the defendant of assault.²⁸ On appeal, Washington's higher courts avoided the constitutional question, instead deciding the case on whether the statements bore guarantees of trustworthiness.²⁹

In a watershed opinion, the Supreme Court overturned its decision in *Ohio v. Roberts*, holding that while “the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence . . . it is a procedural rather than a substantive guarantee,”³⁰ which can only be satisfied by providing the accused an opportunity to cross-examine the witnesses against him, regardless of whether that witness's statement falls within a hearsay exception.³¹ Because the defendant in *Crawford* was not afforded the opportunity to cross-examine his wife, the Court held that this right was violated by the State when it played the tape-recorded account of the stabbing.³²

The result from *Crawford* was an “expanded . . . category of cases in which the hearsay rules will allow—but the Confrontation Clause will prohibit—the introduction of an out-of-court statement.”³³ Justice Scalia, who wrote the *Crawford* opinion, stated that it is not enough for the statement to be reliable, but that this “reliability [needed to] be assessed in a particular manner: by testing in the crucible of cross-examination.”³⁴

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 41.

²⁹ *Id.*

³⁰ *Id.* at 61.

³¹ *Id.* (“[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”).

³² *Id.* at 68–69.

³³ David A. Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 5.

³⁴ *Crawford*, 541 U.S. at 61.

According to *Crawford*, “the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”³⁵

While *Crawford* marked the beginning of a much broader construction of the Sixth Amendment, the Court placed an important limitation on the types of statements that would be inadmissible without confrontation. The defendant’s right to cross-examine applies only to “testimonial” statements offered against the accused in a criminal prosecution to prove the truth of the matter asserted.³⁶ In other words, the right is not implicated when: (1) the statement is being offered for a purpose other than to prove the truth of its contents;³⁷ (2) the statement is not offered in a criminal prosecution against the accused;³⁸ or (3) the statement is not testimonial.³⁹

Because *Crawford* failed to lay out a comprehensive definition of testimonial,⁴⁰ the most difficult challenge in the post-*Crawford* Confrontation Clause analysis has been the determination of whether a statement is testimonial.

The Court’s first attempt to define testimonial after *Crawford* came in the 2006 case of *Davis v. Washington*.⁴¹ In *Davis*, the Court articulated the “primary purpose” test for determining whether a statement is testimonial for Sixth Amendment purposes.⁴² Under this test, it does not matter who made the statement, through what medium the statement was transmitted, or to whom the statement was made.⁴³ Whether the statement is testimonial depends on *why* the statement was made. If the purpose of the statement was to respond to an ongoing emergency, then the statement is non-testimonial.⁴⁴ However, if the purpose of the statement was to further an

³⁵ *Id.* at 69.

³⁶ *Id.*

³⁷ *Id.* at 59 n.9 (“The Clause also 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, 414 (1985))). Examples include statements offered to demonstrate the effect upon the listener, to impeach a prior inconsistent statement, and to provide context to non-hearsay evidence.

³⁸ This limitation derives from the text of the Sixth Amendment itself: “In all *criminal prosecutions*, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. CONST. amend. VI (emphasis added).

³⁹ *Crawford*, 541 U.S. at 68.

⁴⁰ *Id.* at 68. (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”). The Court acknowledged that a refusal to articulate a comprehensive definition would cause uncertainty in the interim, but argued that such uncertainty could hardly be any worse than the status quo under *Roberts*. *Id.* at 68 n.10.

⁴¹ 547 U.S. 813 (2006).

⁴² *Id.* at 822.

⁴³ Fenner, *supra* note 13, at 49–50.

⁴⁴ *Davis*, 547 U.S. at 822.

investigation for criminal prosecution, the statement is testimonial and the declarant is subject to cross-examination.⁴⁵ Other circumstantial facts, such as the declarant, listener, and medium, are only relevant insofar as they shed light on the primary purpose of the statement.⁴⁶

Under this test, consecutive statements made by the same declarant to the same listener may receive different treatment under the Sixth Amendment if the purpose of the statement changes in the middle of the conversation.⁴⁷ In *Davis*, for example, statements made to a police officer over a 911 call were held to be non-testimonial because they were made under circumstances objectively indicating that the primary purpose of the statements was to enable the police to assist in an ongoing emergency.⁴⁸ Statements made minutes later to officers who secured the scene were held to be testimonial because the primary purpose had shifted from addressing the emergency to establishing or proving past events potentially relevant to later criminal prosecution.⁴⁹ *Davis* made clear that the Court would not rely on rigid classifications based on the identity of the speaker or listener, the timing, or the mode of transmission to determine whether a statement is testimonial.⁵⁰ Instead, it would rely on these attributes to provide context in order to determine the purpose of the statement.

In 2009, the Court's opinion in *Melendez-Diaz v. Massachusetts*⁵¹ marked a significant expansion in the scope of the Confrontation Clause. In *Melendez-Diaz*, the Supreme Court held that a crime lab analyst's certificates were testimonial and that the defendant's right to confrontation was violated because he did not have the opportunity to cross-examine the lab analyst.⁵² In *Melendez-Diaz*, the defendant was arrested for the possession of what appeared to be cocaine.⁵³ The seized substance was submitted to a state laboratory required by law to conduct chemical analysis upon police request.⁵⁴ At trial, the State submitted three "certificates of

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Fenner, *supra* note 13, at 52.

⁴⁸ *Davis*, 547 U.S. at 822.

⁴⁹ *Id.* There is still some debate as to *whose* primary purpose should be considered when determining whether a statement is testimonial. For an illuminating discussion on this, see Fenner, *supra* note 13, at 52–59.

⁵⁰ See *Davis*, 547 U.S. at 822 (reaching its holding “without attempting to produce an exhaustive classification of all conceivable statements”); see also *United States v. Summers*, 414 F.3d 1287, 1300 (10th Cir. 2005) (“[T]he Supreme Court declined to rigidly define what is meant by the term ‘testimonial.’”).

⁵¹ 129 S. Ct. 2527 (2009).

⁵² *Id.* at 2542.

⁵³ *Id.* at 2530.

⁵⁴ *Id.*

analysis” showing the results of the forensic analysis performed on the seized substances.⁵⁵ The certificates, which were sworn before a notary public, reported the weight of the bags and stated that the substance in the bags contained cocaine.⁵⁶ The defendant objected to the admission of the certificates, asserting that the Court’s decision in *Crawford* required the analyst to testify and be cross-examined.⁵⁷ The objection was overruled, the certificates were admitted into evidence, and a jury found the defendant guilty of distributing cocaine.⁵⁸

On appeal, the defendant contended that the admission of the certificates violated his Sixth Amendment right to be confronted with the witnesses against him.⁵⁹ After the Appeals Court of Massachusetts rejected the defendant’s claim and the Massachusetts Supreme Judicial Court denied review, the U.S. Supreme Court granted certiorari.⁶⁰ In a 5-to-4 decision, the Court held that the crime lab’s certificates were testimonial because they were prepared in anticipation of criminal prosecution and were “affidavits” against the defendant.⁶¹

Melendez-Diaz expanded the confrontation right by broadening the meaning of the phrase “witnesses against him” in the Sixth Amendment. The Court held that *anyone* providing testimonial evidence against the defendant, including a crime lab analyst, is a “witness against” the accused within the meaning of the Sixth Amendment.⁶² Now, in order to admit such certificates, the government must demonstrate the analyst’s unavailability

⁵⁵ *Id.* at 2531.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 2532. There is a potential conflict between the primary purpose test articulated in *Davis* and *Melendez-Diaz*. Many lab reports, autopsies, and DNA tests are not performed with litigation in mind, and are therefore non-testimonial, even if those records later come to be used in a criminal prosecution. *See, e.g., Sanders v. Commonwealth*, 711 S.E.2d 213, 214, 219–20 (Va. 2011) (holding that the admission of a lab report indicating the victim contracted sexually transmitted diseases did not violate the accused’s right to confrontation because the report was created for medical treatment purposes rather than forensic investigation purposes; the fact that the Commonwealth sought to use the report in a criminal prosecution later did not change its non-testimonial character). This leads to the arguably bizarre outcome of the same types of lab results, derived from the same set of tests, conducted by the same analyst, using the same set of procedures, and with the same chances of mistake, receiving different treatment even though the analyst is in both cases a “witness” against the defendant.

⁶² *Melendez-Diaz*, 557 U.S. at 2532.

and show that the defendant had a prior opportunity to cross-examine.⁶³ Otherwise, the defendant has the right to confront the analyst at trial.⁶⁴

In a lengthy dissenting opinion, Justice Kennedy—joined by Justice Alito, Justice Breyer, and Chief Justice Roberts—argued that crime lab analysts should not be considered witnesses for the purposes of the Confrontation Clause.⁶⁵ According to the dissent, crime lab analysts are not witnesses in the traditional sense for three reasons. First, they do not recall events they actually observed in the past, but instead make near-contemporaneous observations.⁶⁶ Second, crime lab analysts do not observe a crime or any human action related to it.⁶⁷ Third, they do not provide statements in response to interrogation.⁶⁸ The dissent also expressed practicability concerns, arguing that the decision will impose a significant burden on prosecutors while providing little substantive benefit to criminal defendants.⁶⁹ Critics of the *Melendez-Diaz* decision have echoed these concerns and gone further to make slippery slope arguments, questioning whether DNA analyses, breathalyzer tests, ballistic tests, and autopsies will all eventually be enveloped by such a broad construction of the confrontation right.⁷⁰

In a recent Confrontation Clause decision, *Bullcoming v. New Mexico*,⁷¹ the Supreme Court addressed the admissibility of testimonial assertions where the maker of the assertions is someone other than the person available for cross-examination by the defendant.⁷² In *Bullcoming*, the defendant, Donald Bullcoming, was charged with and convicted of

⁶³ *Id.* (“Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to be confronted with the analysts at trial.” (internal quotation marks omitted)).

⁶⁴ *Id.*

⁶⁵ *Melendez-Diaz*, 129 S. Ct. at 2550–51 (Kennedy, J., dissenting).

⁶⁶ *Id.* at 2551.

⁶⁷ *Id.* at 2552.

⁶⁸ *Id.*

⁶⁹ *See id.* at 2544. Justice Scalia responded to concerns over judicial economy in his majority opinion: “Perhaps the best indication that the sky will not fall after today’s decision is that . . . [m]any States have already adopted the constitutional rule we announce today . . . [yet] there is no evidence that the criminal justice system has ground to a halt in [these States].” *Id.* at 2540–41 (majority opinion).

⁷⁰ Deborah L. Meyer, *Melendez-Diaz v. Massachusetts: What the Expanded Confrontation Clause Ruling Means for Computer Forensics and Electronic Discovery*, 28 TEMP. J. SCI. TECH. & ENVTL. L. 243, 272–73 (2009); Amber N. Gremillion, Note, *I’ll Be Seeing You in Court: Melendez-Diaz v. Massachusetts’ Flawed Decision and Its Impact on Louisiana*, 37 S.U. L. REV. 255, 271 (2010).

⁷¹ 131 S. Ct. 2705 (2011), *rev’g* State v. Bullcoming, 226 P.3d 1 (N.M. 2010).

⁷² *Id.* at 2711.

driving while intoxicated (DWI).⁷³ The principal evidence against Bullcoming was a forensic laboratory report certifying that his blood-alcohol concentration (BAC) was well above the threshold for aggravated DWI.⁷⁴ Because the scientist who performed the laboratory tests, Cutis Caylor, was placed on unpaid leave before trial,⁷⁵ the State proposed to introduce Caylor's findings as a business record through the testimony of one of the lab's other scientists, Gerasimos Razatos.⁷⁶ Razatos had neither participated in, observed, nor reviewed Caylor's analysis.⁷⁷

At Bullcoming's trial, which took place before the Supreme Court decided *Melendez-Diaz*,⁷⁸ Bullcoming's counsel objected to the State's proposal, arguing that without an opportunity to cross-examine Caylor, the introduction of the lab report would violate Bullcoming's Sixth Amendment right to be confronted with the witnesses against him.⁷⁹ The trial court overruled the objection and admitted the report as a business record.⁸⁰ The jury convicted Bullcoming of aggravated DWI, and the New Mexico Court of Appeals affirmed.⁸¹ Bullcoming appealed to the New Mexico Supreme Court.⁸²

While the appeal was pending, the U.S. Supreme Court decided *Melendez-Diaz v. Massachusetts*.⁸³ In light of *Melendez-Diaz*, the New Mexico Supreme Court held the lab reports produced at Bullcoming's trial qualified as testimonial evidence because they were "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination."⁸⁴ Nevertheless the court found that for two reasons, the admission of the report did not violate the Confrontation Clause.⁸⁵ First, the court said that Caylor, the certifying analyst, was a "mere scrivener" who "simply transcribed the results generated by the [lab equipment]."⁸⁶ Second, the court found that although Razatos did not participate in testing

⁷³ *Id.* at 2709.

⁷⁴ *Id.*

⁷⁵ *Id.* at 2711–12.

⁷⁶ *Id.* at 2712.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* The trial judge noted that when he began practicing law, "there were no breath tests or blood tests. They just brought in the cop, and the cop said, 'Yeah, he was drunk.'" *Id.* at 2712 n.3.

⁸¹ *Id.* at 2712.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 2713 (quoting *State v. Bullcoming*, 226 P.3d 1, 8–9 (N.M. 2010)).

Bullcoming's blood, he "qualified as an expert witness with respect to the [lab equipment]." ⁸⁷ The New Mexico Supreme Court ultimately held that "Bullcoming's right of confrontation was preserved" because Razatos was able to serve as a "surrogate" for Caylor. ⁸⁸

The U.S. Supreme Court granted certiorari to address whether the Confrontation Clause permits the introduction of a testimonial forensic laboratory report through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification. ⁸⁹ Divided along essentially the same lines as the *Melendez-Diaz* Court, ⁹⁰ the *Bullcoming* Court held five to four that "[a]s a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness." ⁹¹

At the outset, the Court rejected the notion that surrogate testimony was adequate to satisfy Bullcoming's confrontation right simply because Caylor's work involved routine tasks and reading output from a machine. ⁹² According to the Court, the representations in Caylor's report—that he "received Bullcoming's blood sample intact with the seal unbroken, that he checked to make sure that the forensic report number and the sample number corresponded, . . . that he performed on Bullcoming's sample a particular test, adhering to a precise protocol," and that no circumstance or condition affected the integrity of the sample or the validity of the analysis—related to "past events and human actions [that are] not revealed in raw, machine-produced data . . ." ⁹³ Most witnesses, concluded the Court, "testify to their observations of factual conditions or events." ⁹⁴ This includes witnesses who relay the output of instruments and mechanical equipment. ⁹⁵ The Court concluded that to hold that a testimonial report

⁸⁷ *Id.* (quoting *Bullcoming*, 226 P.3d at 9).

⁸⁸ *Id.* (quoting *Bullcoming*, 226 P.3d at 10).

⁸⁹ *Id.*

⁹⁰ The prevailing opinion was joined by all of the Justices from the *Melendez-Diaz* majority plus Justice Sotomayor, who replaced Justice Stevens; Justice Stevens was a part of the majority in *Melendez-Diaz*. The same Justices who dissented in *Melendez-Diaz*—Justices Kennedy, Breyer, Alito, and the Chief Justice—also dissented in *Bullcoming*.

⁹¹ *Id.*

⁹² *Id.* at 2714–15.

⁹³ *Id.* at 2714.

⁹⁴ *Id.*

⁹⁵ The Court referred to observations such as "the light was green," "the hour was noon," or the reading from a radar gun as examples. To illustrate its concern, the Court asked, rhetorically, "[c]ould an officer other than the one who saw the number on the . . . [radar] gun present the information in court—so long as that officer was equipped to testify about

does not implicate the Sixth Amendment by virtue of it being drawn from machine-produced data would be flatly inconsistent with *Crawford*'s holding that "the obvious reliability of a testimonial statement does not dispense with the Confrontation Clause."⁹⁶

The Supreme Court also rejected the state court's second rationale for admitting the BAC report, that Razatos could substitute for Caylor because he qualified as an expert.⁹⁷ "[S]urrogate testimony of the kind Razatos was equipped to give," according to the Court, "could not convey what Caylor knew or observed about the events his certification concerned . . ."⁹⁸ Because Bullcoming's counsel never had the opportunity to cross-examine Caylor, Bullcoming was unable to probe the "particular test and testing process he employed" or "expose any lapses or lies on [his] part."⁹⁹ The Court also noted that Bullcoming's counsel was unable to ask "questions designed to reveal whether incompetence, evasiveness, or dishonesty" accounted for Caylor being placed on unpaid leave.¹⁰⁰ This, according to the Court, constituted a deprivation of Bullcoming's Sixth Amendment right to "be confronted with the witnesses against him."¹⁰¹ As the Court continues to define the scope and meaning of the Confrontation Clause, the focus of its inquiries has primarily been whether statements that would have been admissible under either a hearsay exception or statutory provision in the pre-*Crawford* era are now inadmissible due to confrontation concerns.¹⁰²

Though *Crawford* fundamentally transformed Confrontation Clause jurisprudence, it did not contemplate the type of witness who would present a summary exhibit. However, in light of *Melendez-Diaz* and *Bullcoming*, a challenge to the admissibility of testimonial summary exhibits without confrontation could be successful.

any technology the observing officer deployed and the police department's standard operating procedures?" *Id.* at 2714–15.

⁹⁶ *Id.* at 2715 (quoting *Crawford v. Washington*, 541 U.S. 36, 62 (2004)).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 2716.

¹⁰² See e.g., *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531 (2009) (concerning lab reports originally admissible pursuant to state law as "prima facie evidence of the composition, quality, and net weight of the narcotic . . . analyzed"); *Davis v. Washington*, 547 U.S. 813, 828 (2006) (holding that the admission of statements under the present sense impression exception was a violation of the defendant's confrontation right where the defendant did not have an opportunity to cross-examine the witness who made the statements).

C. SUMMARY EXHIBITS, GENERALLY

According to Federal Rule of Evidence 1006:

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.¹⁰³

The language of the rule sets forth four requirements for the admission of summaries. First, the materials underlying the summary must be voluminous; second, the summary itself must be accurate and authentic; third, the underlying materials must be admissible;¹⁰⁴ and fourth, the underlying materials must be made available to the opposing party within a reasonable amount of time. Additionally, courts are in agreement that summary exhibits may only be used to summarize evidence in the form of writings, recordings, and photographs, and that they may not be used to summarize testimony from the instant case in lieu of presenting the testimony itself.¹⁰⁵ A summary exhibit must also be properly introduced into evidence through a sponsoring witness who supervised its preparation.¹⁰⁶

Summary exhibits are used in a variety of cases, including fraud,¹⁰⁷ tax evasion,¹⁰⁸ drug conspiracy,¹⁰⁹ theft,¹¹⁰ murder,¹¹¹ and white-collar criminal cases,¹¹² among others.¹¹³ Summary exhibits are especially appropriate

¹⁰³ FED. R. EVID. 1006. The language of FRE 1006 was amended effective December 2011. Per the commentary to amendment, “[t]hese changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.”

¹⁰⁴ *See, e.g.*, *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1160 (11th Cir. 2004) (“Rule 1006 is not a back-door vehicle for the introduction of evidence which is otherwise inadmissible.”). The party offering the summary need not offer the underlying data into evidence. *See, e.g.*, *Air Safety, Inc. v. Roman Catholic Archbishop of Bos.*, 94 F.3d 1, 7 n.14 (1st Cir. 1996); *Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp.*, 41 F.3d 182, 189 (4th Cir. 1994) (citing *United States v. Bakker*, 925 F.2d 728, 736 (4th Cir. 1991)).

¹⁰⁵ *See, e.g.*, *United States v. Johnson*, 54 F.3d 1150, 1156 (4th Cir. 1995).

¹⁰⁶ *United States v. Moon*, 513 F.3d 527, 545 (6th Cir. 2008).

¹⁰⁷ *United States v. Loney*, 959 F.2d 1332, 1336–37 (5th Cir. 1992) (wire fraud); *United States v. Bentley*, 825 F.2d 1104, 1108–09 (7th Cir. 1987) (mail fraud); *United States v. Gold*, 743 F.2d 800, 816 (11th Cir. 1984) (Medicare fraud).

¹⁰⁸ *United States v. Howard*, 774 F.2d 838, 843–44 (7th Cir. 1985).

¹⁰⁹ *United States v. Possick*, 849 F.2d 332, 339 (8th Cir. 1988).

¹¹⁰ *United States v. Ollison*, 555 F.3d 152, 162 (5th Cir. 2009).

¹¹¹ *State v. Skatzes*, 819 N.E.2d 215, 250 (Ohio 2004).

¹¹² *United States v. Fullwood*, 342 F.3d 409, 413 (5th Cir. 2003); *United States v. Pelullo*, 964 F.2d 193, 204–05 (3d Cir. 1992).

where the underlying material is in the nature of financial records, accounts, business transactions, or other records of a detailed or complicated nature.¹¹⁴ Of course, the operation of FRE 1006 is not confined to such material and summaries have been admitted to explain other types of evidence as well.¹¹⁵

It is important to understand the difference between summary exhibits admitted under FRE 1006 and demonstrative or pedagogical summaries admitted under FRE 611(a).¹¹⁶ While some courts have acknowledged that the distinctions are not always clear,¹¹⁷ the Sixth Circuit has explained that there are three classes of summary exhibits: (1) FRE 1006 “primary evidence summaries,” which are exhibits where the summary itself, not the underlying documents, is evidence to be considered by the fact finder; (2) purely “pedagogical summaries” under FRE 611(a), which are intended to summarize, clarify, or simplify other evidence admitted in the case, but which are not themselves admitted; and (3) “secondary evidence summaries,” which are a combination of the first two, in that they are not prepared entirely for compliance with FRE 1006, but are more than mere pedagogical devices designed to simplify and clarify other evidence.¹¹⁸

¹¹³ See, e.g., *United States v. Whitfield*, 590 F.3d 325 (5th Cir. 2009) (bribery); *United States v. Leon-Reyes*, 177 F.3d 816 (9th Cir. 1999) (perjury); *United States v. Mass. Mar. Acad.*, 762 F.2d 157 (1st Cir. 1985) (asbestos litigation).

¹¹⁴ See, e.g., *United States v. Stoecker*, 215 F.3d 788, 792 (7th Cir. 2000) (admitting charts summarizing pledges of single groups of stock as security for loans from banks); *Fagiola v. Nat'l Gypsum Co. AC & S.*, 906 F.2d 53, 57 (2d Cir. 1990) (admitting summary of sales of asbestos products based on thirty-year-old fragmentary sales documents); *Kroll v. United States*, 433 F.2d 1282, 1289–90 (5th Cir. 1970) (admitting charts summarizing business records of a mortgage company).

¹¹⁵ See, e.g., *United States v. Atchley*, 699 F.2d 1055, 1059 (11th Cir. 1983) (invoking FRE 1006 in approving receipt in evidence of chart summarizing telephone toll records); *Nichols v. Upjohn Co.*, 610 F.2d 293, 293–94 (5th Cir. 1980) (admitting testimonial summary of investigative findings set out in 94,000-page new drug application).

¹¹⁶ FED. R. EVID. 611(a). The rule directs courts to “exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.” Though the rule does not address pedagogical summaries specifically, Rule 611(a) is considered the basis for their admission. See, e.g., *United States v. Johnson*, 54 F.3d 1150, 1157 (4th Cir. 1995).

¹¹⁷ *United States v. Swanquist*, 161 F.3d 1064, 1072–73 (7th Cir. 1998); *United States v. Wood*, 943 F.2d 1048, 1053–54 (9th Cir. 1991).

¹¹⁸ *United States v. Bray*, 139 F.3d 1104, 1112 (6th Cir. 1998); see also James Lockhart, Annotation, *Admissibility of Summaries or Charts of Writings, Recordings, or Photographs Under Rule 1006 of Federal Rules of Evidence*, 198 A.L.R. FED. 427, § 2(b) (2004) (“Courts have often stressed the need to distinguish Fed. R. Evid. 1006 ‘factual’ or ‘evidentiary’ summaries from ‘demonstrative’ or ‘pedagogical’ summaries; although they have also pointed out that the distinction is not always clear, since it is possible for the material actually proffered to be more in the nature of a ‘hybrid’ serving both functions.”).

FRE 1006 summaries are different from FRE 611(a) demonstrative aids not because of the contents of the exhibits themselves, but rather because of the purposes they are intended to serve.¹¹⁹ Exhibits intended to be evidentiary substitutes for voluminous materials are admissible under FRE 1006. Summaries designed to be only illustrative should be admitted under FRE 611(a).¹²⁰

Demonstrative aids under FRE 611(a) are not subject to the criteria listed in FRE 1006.¹²¹ This gives the proponents of demonstrative aids more latitude with the information they place in exhibits. Proponents of demonstrative aids need not establish the admissibility of the underlying data, and are usually provided more leeway to include inferences drawn from the underlying data that would be inadmissible under FRE 1006.¹²² Nevertheless, the proponent of a demonstrative aid is somewhat limited in the extent of the inferences that may be drawn and the amount of emphasis that can be placed on specific information.¹²³ Demonstrative aids are also limited in that they may not reflect evidence not admitted at trial.¹²⁴

In contrast, FRE 1006 summaries not only serve as vehicles to provide the jury with succinct presentations of otherwise complex evidence, they also are, unlike demonstrative exhibits under FRE 611(a), accepted as substantive evidence themselves.¹²⁵ While this distinction is important, there may admittedly be little difference, from the jury's perspective, between a summary admitted as substantive evidence under FRE 1006 and a demonstrative or pedagogical aid that summarizes and clarifies testimony. The court may provide a limiting instruction informing the jury that a demonstrative summary under FRE 611(a) is not itself evidence,¹²⁶ but there is doubt as to whether juries are able to cognitively make the distinction based on a limiting instruction.¹²⁷

¹¹⁹ *United States v. Winn*, 948 F.2d 145, 159 (5th Cir. 1991).

¹²⁰ *Id.* at 158.

¹²¹ *See Lockhart*, *supra* note 118, § 2(b).

¹²² *Id.*

¹²³ *United States v. Bakker*, 925 F.2d 728, 738 (4th Cir. 1991).

¹²⁴ *United States v. Pelullo*, 964 F.2d 193, 205 (3d Cir. 1992).

¹²⁵ *See Lockhart*, *supra* note 118, § 2(b).

¹²⁶ *Id.* (“It is necessary to give appropriate limiting instructions informing the jury that the summary [under 611(a)] itself is not evidence, and that it must disregard the summary to whatever extent it determines the summary to be inconsistent with, or not supported by, the actual evidence.”). *See, e.g., Daniel v. Ben E. Keith Co.*, 97 F.3d 1329, 1335 (10th Cir. 1996) (citing *Gomez v. Great Lakes Steel Div., Nat’l Steel Corp.*, 803 F.2d 250, 258 (6th Cir. 1986)).

¹²⁷ *See, e.g., Robert R. Calo, Joint Trials, Spillover Prejudice, and the Ineffectiveness of a Bare Limiting Instruction*, 9 AM. J. TRIAL ADVOC. 21, 25 (1985) (stating that “there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great and the consequences of failure so vital to the defendant, that the practical and human

III. ANALYSIS

A. FRE 1006 AND THE HEARSAY RULE

Inquiries under *Crawford* and its progeny have centered on confrontation issues related to otherwise admissible hearsay evidence.¹²⁸ For this reason, summary exhibits under FRE 1006 have yet to be scrutinized under the Confrontation Clause. Perhaps this should not come as a surprise since the purpose of *Crawford* was to sever the substantive guarantees of reliability embodied in the *hearsay* exceptions from the procedural guarantee to test that reliability secured by the Sixth Amendment. However, as Confrontation Clause jurisprudence develops, the Court will inevitably have to address whether summaries—specifically those that are testimonial—are themselves statements that implicate the confrontation right.

FRE 1006's location within the Federal Rules of Evidence deceptively suggests it is no more than one of a handful of exceptions to the "Best Evidence Rule," FRE 1002.¹²⁹ The Best Evidence Rule codifies the

limitations of the jury system cannot be ignored"). *But see* Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985) ("Absent . . . extraordinary situations . . . we adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions."); Parker v. Randolph, 442 U.S. 62, 73 (1979) (dictum) ("A crucial assumption underlying [the jury system] is that juries will follow the instructions given to them by the trial judge.").

Concerns about the limitations of jury instructions often relate to the admission of prior acts evidence used for the limited purpose of attacking a defendant's credibility as opposed to proving propensity. *See* Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 300 (2008). While the consequences of the jury drawing an improper inference in those cases are arguably greater than the jury drawing an improper inference from a demonstrative aid, the subtle nature of the difference between demonstrative aids and FRE 1006 summaries may make it *more* difficult for a jury to distinguish between the proper and improper use.

¹²⁸ *See, e.g.*, Giles v. California, 128 S. Ct. 2678, 2682 (2008) (addressing the application of the Confrontation Clause to statements admitted under a "provision of California law that permits admission of out-of-court statements describing the infliction or threat of physical injury on a declarant when the declarant is unavailable to testify at trial and the prior statements are deemed trustworthy); Davis v. Washington, 547 U.S. 813, 828 (2006) (finding the admission of statements under the present sense impression exception a violation of the defendant's confrontation right where the defendant did not have an opportunity to cross-examine the witness who made the statements).

¹²⁹ Rules 1001 through 1008 are codified in Article X of the Federal Rules of Evidence, titled "Contents of Writings, Recordings, and Photographs." FRE 1002 is titled "Requirements of the Original" and states that "[a]n original writing, recording, or photograph is required in order to prove its contents unless these rules or a federal statute provide otherwise." FED. R. EVID. 1002. With the exception of FRE 1008, which concerns the "Functions of the Court and Jury," the remaining rules provide for exceptions to FRE

principle that “[w]hen a writing, recording, or photograph is offered to prove its content, the chances are good that the original will be more trustworthy than a copy.”¹³⁰

Despite this codification, the rule acts in many ways as a hearsay exception. Both FRE 1006 summaries and the underlying documents are prepared out of court. They are also intended to be received as substantive evidence asserting the truth of the matters contained within them.¹³¹ If it were not for FRE 1006, these summaries would be hearsay under FRE 801(c) and FRE 802,¹³² and their admissibility would depend on whether there was an applicable exception. The reason summary exhibits do not demand a separate hearsay exception is because FRE 1006 already requires that all underlying data be proven admissible. Therefore, while the summary may be received as substantive evidence, it does not enable the “backdoor” admission of any new and otherwise inadmissible evidence.¹³³ Rather, summaries simply allow for the convenient presentation of information that has already been deemed admissible. The hearsay exceptions set forth in FRE 803 and FRE 804,¹³⁴ on the other hand, allow for the admission of evidence that would otherwise be inadmissible *but for* the exception. For example, but for the public records exception under FRE 803(8),¹³⁵ triers of fact would not be able to view records and data

1002’s requirement of originals. This placement makes it easy to overlook the significance of FRE 1006 in other contexts.

¹³⁰ RONALD J. ALLEN ET AL., *EVIDENCE: TEXT, PROBLEMS, AND CASES* 198 (4th ed. 2006).

¹³¹ Again, this is in contrast to pedagogical summaries admitted as demonstrative aids under FRE 611(a).

¹³² FED. R. EVID. 801(c), 802. Rule 801(c) defines hearsay as “a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.” Rule 802 states that “[h]earsay evidence is not admissible” unless a federal statute, the Federal Rules of Evidence, or the Supreme Court indicate otherwise.

¹³³ In evidence law, the term “backdoor” refers to the tactic of admitting a particular piece of evidence under the pretense that it is being offered for an admissible purpose when it is in fact being offered for a purpose prohibited by the rules of evidence. *See, e.g.*, Martin A. Schwartz, *Trial Evidence 2012: Advocacy Analysis, Illustrations*, 881 PLI/LIT 19, 271 (2012) (“The proponent of a Rule 1006 chart must lay a foundation showing . . . the underlying voluminous documents are admissible, *e.g.*, under the business records rule; in other words, Rule 1006 is not a backdoor way of getting inadmissible evidence before the jury.”).

¹³⁴ FED. R. EVID. 803, 804. FRE 803 lists “exceptions to the rule against hearsay—regardless of whether the declarant is available as a witness.” FRE 804 provides for exceptions “when the declarant is unavailable as a witness.”

¹³⁵ FED. R. EVID. 803(8). The rule allows for the admission of:

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

compilations of public agencies. The case is different for summaries. Even if the government chooses not to use the summary, every piece of information reflected in the summary may still make it to the trier of fact if it is otherwise admissible.¹³⁶

A question the Court has yet to address is whether this difference protects defendants' Sixth Amendment right to confrontation. After *Crawford* and *Melendez-Diaz*, prosecutors may no longer rely on "firmly-rooted hearsay exception[s]" or "particularized guarantees of trustworthiness" to offer testimonial evidence against a criminal defendant without affording him the opportunity for cross-examination.¹³⁷ If a summary exhibit is the product of testimonial statements, it may be time to consider whether it should be admitted under FRE 1006 without confrontation. *Crawford's* focus on separating *hearsay* from the Confrontation Clause does not preclude the possibility that other types of evidence, such as testimonial summary exhibits, could implicate confrontation concerns when the defendant is afforded no opportunity to cross-examine the preparer of the summary.

B. WHEN A SUMMARY IS MORE THAN JUST A SUMMARY

When received as substantive evidence, a summary is more than just a mere recapitulation of voluminous information. Depending on how the summary is presented, it is also a statement in and of itself. A summary exhibit reflects not only a set of underlying data, but also the subjective determinations of the preparer, her procedures for distilling the voluminous information, and her decision of how the data should be presented. Moreover, because juries rarely see the voluminous underlying data itself (which need not be entered into evidence), the summary is often the *only* evidence the trier of fact will see on the point at issue.¹³⁸

The procedures of a forensic accounting team conducting a fraud investigation illustrate how a summary exhibit might raise Confrontation Clause concerns. Certified fraud examiners, accountants, and auditors are often called upon to testify in criminal prosecutions where their testimony can be used to support charges such as fraud, embezzlement, misapplication

criminal case, factual findings from a legally authorized investigation; and (B) neither the source of the information nor other circumstances indicate a lack of trustworthiness.

¹³⁶ *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1160 (11th Cir. 2004).

¹³⁷ *Crawford v. Washington*, 541 U.S. 36, 42, 68–69 (2003).

¹³⁸ See *Lockhart*, *supra* note 118, § 3 (listing several cases where courts held either that it was not necessary to have the underlying materials admitted into evidence or that it was not error to admit summaries without admitting underlying materials).

of funds, or improper accounting practices.¹³⁹ Lawyers often rely on these financial experts to “help crystallize the judge and/or jury’s comprehension” of complex cases.¹⁴⁰ Fraud examiners analyze large amounts of data, conduct interviews, and ultimately produce reports detailing the findings of their investigations.¹⁴¹ Forensic accountants pore through thousands of documents and electronic files during the course of an investigation.¹⁴² Often, each individual document requires the forensic accountant to make a determination of whether the document is relevant or irrelevant, and whether it should be flagged for any particular reason.¹⁴³ The accountant might record his or her findings using either a database or a “key document” file, which keeps track of the documents determined by the investigator to be the most relevant.¹⁴⁴

The criteria used to determine whether a document should be flagged vary with each investigation. In some instances, the forensic accountant’s determinations are objective and similar to those of an auditor. Examples include marking whether an invoice is signed, whether the dollar amounts total correctly, or whether a transaction was approved before a particular date. In other instances, however, a fraud examiner may be searching for attributes that require more judgment, such as whether a document appears forged, fabricated, or manipulated, or whether signatures appear to match.¹⁴⁵ Although not expected to be documents experts, fraud examiners are also required to make subjective determinations that involve comparing papers and inks, determining whether two sheets of paper came from the same tablet or pad of paper, comparing torn or cut paper edges, identifying whether two photocopies came from the same copy machine, determining the resealing of sealed documents, and examining adhesives, among other things.¹⁴⁶

To the extent that subjective determinations are required to distill large amounts of information into a summary exhibit, the summary exhibit is more than just a mere reduction of voluminous data. It becomes an exhibit

¹³⁹ ASS’N OF CERTIFIED FRAUD EXAM’RS, FRAUD EXAMINERS MANUAL § 2.701 (2010) [hereinafter FRAUD EXAMINERS MANUAL].

¹⁴⁰ *Id.* § 2.701.

¹⁴¹ *Id.* § 2.704 (discussing the preparation of the expert report); *id.* § 3.101 (discussing document examination); *id.* § 3.201 (discussing interviews related to a fraud investigation).

¹⁴² *Id.* § 3.101.

¹⁴³ *Id.*

¹⁴⁴ *Id.* § 3.103. Fraud examiners will often utilize spreadsheet software to organize their efforts. While the organizational method will vary with each investigation, a classic example of a tracking file would be a spreadsheet where each row lists a “relevant” document and each column reflects a specific attribute of that document.

¹⁴⁵ *Id.* §§ 3.104–.105.

¹⁴⁶ *Id.* §§ 3.105–.106.

that embodies dozens, if not hundreds, of subjective appraisals of documents offered as evidence against the accused.

Moreover, the relevance of documents cannot be easily ascertained early in an investigation.¹⁴⁷ For this reason, the *Fraud Examiners Manual* recommends that “all possible relevant documents be obtained.”¹⁴⁸ The decision of which specific criteria should be tested in the first place is subjective and made early in the investigation by the forensic accounting team, often with the help of documents experts.¹⁴⁹ The substance and presentation of the summary exhibit produced and used at trial would undoubtedly be affected by the accountant’s initial determinations regarding what is and is not relevant.

By not allowing a defendant to cross-examine the individuals who determined which criteria would be tested and how it would be tested, the defendant is deprived of a crucial opportunity to probe and dissect the weaknesses of summary exhibits offered against him under FRE 1006. In fact, the *Fraud Examiners Manual* acknowledges that “documents can either help or hurt a case, *depending on which ones are presented and how they are presented.*”¹⁵⁰

The subjectivity involved in creating a summary exhibit does not end there. While documents are being analyzed, or immediately thereafter, fraud examiners use software to employ a variety of techniques in order to illuminate suspicious patterns and anomalies.¹⁵¹ These techniques include sorting, filtering, duplicate searches, and vertical and horizontal ratio analysis, among others.¹⁵² Again, the specific manner by which this process takes place could be based on a combination of individual experience, standard protocol, or specific information gleaned in that particular investigation. Then, once the data has been sorted and the accountant has extracted information he deems pertinent to the investigation, a more senior forensic accountant might collaborate with the rest of the team to prepare a report of the findings of the investigation. This report will also describe the nature of the engagement and the procedures employed during the course of the investigation.¹⁵³

¹⁴⁷ *Id.* §§ 3.101, 3.103.

¹⁴⁸ *Id.* § 3.101.

¹⁴⁹ *Id.* § 3.105.

¹⁵⁰ *Id.* (emphasis added).

¹⁵¹ *Id.* § 3.601.

¹⁵² *Id.*

¹⁵³ The *Fraud Examiners Manual* neither mandates nor suggests a specific manner of dividing responsibility among the members of a forensic accounting team. There is no rule requiring senior-level accountants to contribute to the preparation of the report, nor is there a rule prohibiting staff accountants from preparing reports. The specific division of labor will

If the forensic accountant's findings are used in a trial, the jury may be presented with only a summary exhibit that provides a snapshot of the findings. The summary exhibit could come in various forms, including graphs, charts, tables with figures, or any other format the proponent of the summary exhibit deems effective in illustrating investigation findings to the jury and that the court does not find unfairly prejudicial.¹⁵⁴

This process of synthesizing raw documents and data into a summary exhibit involves subjective decisionmaking at almost every step.¹⁵⁵ When reviewing documents, the decision of which attributes should be tested is a subjective one, or at the very least involves subjective elements. The determinations of whether a particular signature is fraudulent, whether an expense is reasonable, or whether the ink on two separate documents is identical requires a judgment call. In the analysis phase, the determination of how the prevalence of each "flag" should be analyzed across the entire population of documents is also subjective. Finally, the accountant's decision of how to present the data most effectively in the form of a summary exhibit is subjective.¹⁵⁶

The multiple layers of discretionary decisionmaking that separate the underlying information from the summary exhibit are what make a summary exhibit more than just a "summary." Rather, a summary exhibit created through processes analogous to the one described above should be viewed as a collection of separate, independent statements. Every time the forensic accountant makes a subjective determination as to the meaning or implication of a particular document, the accountant is in essence making an out-of-court statement against the defendant, which then appears or is reflected in a summary exhibit. When offered against a defendant as substantive evidence under FRE 1006 in a criminal prosecution, the Confrontation Clause demands that the defendant have the opportunity to cross-examine the maker of that statement.

Courts have expressed concern about the admission of summary exhibits, suggesting that summaries are more than just restatements that highlight certain information.¹⁵⁷ One concern is that summary exhibits give

likely be driven by practical considerations, such the team's level of experience, areas of competency, and staffing constraints.

¹⁵⁴ See Lockhart, *supra* note 118, § 4(a) (listing cases where courts have admitted summary exhibits taking a variety of forms, including graphs, charts, and tables); FRAUD EXAMINERS MANUAL, *supra* note 139, §§ 27, 29–30 (discussing cases where courts have refused to admit summary exhibits on the basis that they would be unfairly prejudicial under FRE 403).

¹⁵⁵ FRAUD EXAMINERS MANUAL, *supra* note 139, §§ 3.104–.106.

¹⁵⁶ *Id.* § 3.101.

¹⁵⁷ See, e.g., *United States v. Lemire*, 720 F.2d 1327, 1348 (D.C. Cir. 1983) (stating that there are "obvious dangers" posed by summary exhibits, including the possibility that the

the prosecution the opportunity to make two closing arguments.¹⁵⁸ The fear is that jurors will perceive the proponent's arguments as more convincing because they will have one side of the case summarized for them twice—once from the witness who presents the summary and again during closing arguments and rebuttal.¹⁵⁹ Another danger is that jurors will simply be unduly grateful to one party for presenting them with a coherent and succinct summary of the evidence in a complex case.¹⁶⁰ Admittedly, these issues are addressed by a different rule, FRE 403, which allows judges to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.¹⁶¹ Nevertheless, these concerns suggest that courts consider summary exhibits separate statements, not just recapitulative learning tools for the jury.

While not discussed in the context of the Confrontation Clause, Mueller and Kirkpatrick's treatise on federal evidence law addresses the concern that summaries "may include conclusions or interpretations suggested by competent witnesses that in effect sum up the entries in the summary itself."¹⁶² The treatise acknowledges that "[t]o some extent . . . summary evidence necessarily involves selecting some things and leaving out others, and necessarily it involves interpreting and drawing conclusions, for these processes are inherent in the task of condensing a mass of material into a form that is shorter and more readily understandable."¹⁶³ Because

jury will "treat the summary as additional evidence or as corroborative of the truth of the underlying testimony"); *United States v. Means*, 695 F.2d 811, 817 (5th Cir. 1983) (recognizing "the powerful impression which charts can make upon a jury, vesting the charts with 'an air of credibility' independent of the evidence purported to be summarized" (citing *Steele v. United States*, 222 F.2d 628, 630 (5th Cir. 1955))).

¹⁵⁸ Pamela H. Bucy, *The Poor Fit of Traditional Evidentiary Doctrine and Sophisticated Crime: An Empirical Analysis of Health Care Fraud Prosecutions*, 63 *FORDHAM L. REV.* 383, 420 (1995) ("[A]uthentication of summaries may allow their proponent the equivalent of an additional closing argument through the summary."); Lauren Weiser, Note, *Requirements for Admitting Summary Testimony of Government Agents in Federal White Collar Cases*, 36 *AM. J. CRIM. L.* 179, 181 (2008); see also *United States v. Fullwood*, 342 F.3d 409, 414 (5th Cir. 2003) ("[S]ummary witnesses are not to be used as a substitute for, or a supplement to, closing argument.").

¹⁵⁹ *Means*, 695 F.2d at 817 ("[W]e recognize the powerful impression which charts can make upon a jury, vesting the charts with 'an air of credibility' independent of the evidence purported to be summarized." (quoting *Steele*, 222 F.2d at 630)).

¹⁶⁰ Bucy, *supra* note 158, at 420–21.

¹⁶¹ *FED. R. EVID.* 403.

¹⁶² CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 5 *FEDERAL EVIDENCE* § 10:34, at 836 (3d ed. 2007).

¹⁶³ *Id.*; see, e.g., *United States v. Gold*, 743 F.2d 800, 816 (11th Cir. 1984) (admitting a forty-page chart consisting of fifteen columns in a Medicare fraud trial where the charts were "derived either from other exhibits received into evidence or from oral testimony," and the

conclusions drawn from the underlying voluminous information “are one step further removed from otherwise admissible evidence, and while summary proof necessarily entails hearsay risks (summaries restate, even as they condense, although *this hearsay point is usually overlooked*), interpretive conclusions seem to increase the hearsay risks (the conclusions are a restater’s restatement of his own restatement).”¹⁶⁴ This overlooking of the hearsay issue when admitting a summary exhibit that not only condenses but also restates the underlying evidence in the form of an interpretive conclusion is flatly inconsistent with *Crawford*. Under *Crawford*, a defendant should have the opportunity to cross-examine the witnesses against him, regardless of whether the statements fall within an evidentiary rule that otherwise allows for their admission.¹⁶⁵

C. SUMMARIES ARE TESTIMONIAL

For a summary to implicate the Confrontation Clause, it must also be testimonial.¹⁶⁶ That is, it must be a summary that satisfies the primary purpose test articulated in *Davis* and reaffirmed in *Bullcoming*.¹⁶⁷ The definition and scope of what is testimonial currently rests on Justice Clarence Thomas’s construction of the term.¹⁶⁸ Justice Thomas’s concurring opinion in *Melendez-Diaz* construes the term more narrowly than the rest of the *Melendez-Diaz* majority. According to Justice Thomas, “the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.”¹⁶⁹ With Justice Thomas carrying the deciding vote in *Melendez-Diaz*, this narrower definition of testimonial controls. The difference between Justice Thomas’s

last two columns reflected conclusions by a Health and Human Services Special Agent, who was qualified as an expert).

¹⁶⁴ MUELLER & KIRKPATRICK, *supra* note 162, § 10:34, at 836 (emphasis added).

¹⁶⁵ *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

¹⁶⁶ *Davis v. Washington*, 547 U.S. 813, 821 (2006).

¹⁶⁷ *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2714, n.6 (2011); *Davis*, 547 U.S. at 822.

¹⁶⁸ It should be noted that to the extent that there have been changes on the Supreme Court since *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), was decided, those changes do not weigh in favor of broadening the scope of the opinion. The four dissenting Justices with the narrowest construction of the Confrontation Clause (Chief Justice Roberts and Justices Kennedy, Breyer, and Alito) remain on the Court. Justice Thomas, who sided with the majority but wrote a concurring opinion limiting its scope, also remains on the Court.

¹⁶⁹ *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring).

construction and the rest of the majority's is the addition of the word "formalized."¹⁷⁰

While the examples Justice Thomas lists—affidavits, depositions, prior testimony, and confessions—suggest that most formalized testimonial materials must be sworn or provided under oath, *Bullcoming* makes it clear that this is not the case. Under *Bullcoming*, the fact that assertions are unsworn does not remove them from the ambit of the Sixth Amendment.¹⁷¹ The State, attempting to distinguish *Bullcoming*'s case from *Melendez-Diaz*, pointed to the fact that the lab analyst's findings in that case were sworn before a notary public while Caylor's report was unsworn.¹⁷² The Court agreed with the New Mexico Supreme Court on this point, stating "the absence of an oath is not dispositive in determining if a statement is testimonial."¹⁷³ Justice Sotomayor elaborated that though unsworn, "[t]he formality [of the BAC report] derive[d] from the fact that the analyst [was] asked to sign his name and 'certify' to both the result and the statements on the form."¹⁷⁴

Bullcoming also reinforces the primary purpose test articulated in *Davis v. Washington*.¹⁷⁵ Whether an assertion is testimonial does not hinge on the status of the person who makes it but rather on its "evidentiary purpose."¹⁷⁶ In *Bullcoming*, the State maintained that the unavailable witness's affirmations were non-testimonial because they were neither "adversarial" nor "inquisitorial," but rather "simply observations of an 'independent scientist' made according to a non-adversarial public duty."¹⁷⁷ The proponent of a testimonial summary exhibit could make a similar argument—that the individuals who made the assertions reflected in the summary are, in the forensic accounting context for example, "independent investigators" and not accusatory witnesses against the defendant. *Bullcoming* suggests that such an argument would be unavailing. Reaffirming its adherence to the primary purpose test, the Court held that "[a] document created solely for an evidentiary purpose . . . , made in aid of

¹⁷⁰ Fenner, *supra* note 13, at 39.

¹⁷¹ *Bullcoming*, 131 S. Ct. at 2717.

¹⁷² *Id.*

¹⁷³ *Id.* (internal quotation marks omitted). Though this may appear to be an expansion of the holding in *Melendez-Diaz*, the Court did not see this as breaking new ground, stating that "[i]ndeed, in *Crawford*, this Court rejected as untenable any construction of the Confrontation Clause that would render inadmissible only sworn *ex parte* affidavits, while leaving admission of formal, but unsworn statements perfectly okay." *Id.* (internal quotation marks omitted).

¹⁷⁴ *Id.* at 2721 (Sotomayor, J., concurring).

¹⁷⁵ *Id.* at 2714, n.6 (majority opinion).

¹⁷⁶ *Id.* at 2717.

¹⁷⁷ *Id.*

a police investigation, ranks as testimonial.”¹⁷⁸ It would be difficult for the proponent of a testimonial summary to find a meaningful distinction between an investigation led by the police with the aid of a crime lab and a criminal investigation led by the SEC with the aid of a forensic accounting team. In neither case, under *Bullcoming*, would the proponent of a summary be able to rely on the witness’s independent status to avoid the Sixth Amendment mandate.

Justice Sotomayor wrote a separate concurrence to detail how the primary purpose test applied to *Bullcoming*’s case.¹⁷⁹ Some of the language from this concurrence might help illuminate how the test could apply to summary exhibits.

According to Justice Sotomayor, a statement is testimonial if “it has ‘a primary purpose of creating an out-of-court substitute for trial testimony.’”¹⁸⁰ Absent confrontation, such statements are inadmissible, notwithstanding the fact that they may fall within a hearsay exception.¹⁸¹ Therefore courts should look to whether a summary exhibit was derived from assertions intended to be used as evidence in a criminal prosecution when determining whether the Confrontation Clause applies. In the forensic accounting context, if the primary purpose of an investigation is not to produce evidence for criminal prosecution, confrontation would not be required. Justice Sotomayor specifically noted that *Bullcoming* did not present a case where “the State suggested an alternate purpose, much less an alternate *primary* purpose, for the BAC report.”¹⁸² This notation suggests that assertions made during an internal fraud investigation would not be testimonial, even if those same assertions were eventually used by the government to create a summary exhibit in a criminal prosecution.¹⁸³

Otherwise, if a summary exhibit is being offered, if it was prepared in anticipation of litigation, and if the statements contain the results of subjective determinations of what is important and how it should be

¹⁷⁸ *Id.* at 2717.

¹⁷⁹ *Id.* at 2719 (Sotomayor, J., concurring).

¹⁸⁰ *Id.* at 2720 (quoting *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011)).

¹⁸¹ *Id.* (stating that because the purpose of the certificates in *Melendez-Diaz* was use at trial, they were not properly admissible as business or public records under the hearsay rules).

¹⁸² *Id.* at 2721.

¹⁸³ In this hypothetical, the summary exhibit itself should still be testimonial under the primary purpose test. While the assertions reflected in the summary may not have been made with an eye toward litigation, the same could not be said about the summary exhibit derived from them. However if the summary exhibit is testimonial evidence but the underlying assertions are not, the only individual who would need to be confronted would be the preparer of the summary. As mentioned earlier, the testifying expert and preparer of the summary are often the same person.

presented, then the Confrontation Clause demands that the defendant be given the opportunity to cross-examine the preparer of the summary.

D. “THE ONLY INDICIUM OF RELIABILITY . . . THE CONSTITUTION ACTUALLY PRESCRIBES”¹⁸⁴

In a pre-*Crawford* era, one could justify “overlooking” the hearsay problem inherent in summaries that are a step (or in the case of our forensic accountant, several steps) removed from the underlying voluminous information. The information contained within the summary, whether objective or conclusory, must be based on information that is admissible. Under *Roberts*, this meant the information underlying the summary would have to fall within a “firmly rooted hearsay exception or bear particularized guarantees of trustworthiness.”¹⁸⁵ So long as this was the case, admitting a testimonial summary exhibit did not offend FRE 1006 or pre-*Crawford* Confrontation Clause jurisprudence.¹⁸⁶

Furthermore, FRE 1006 requires that the underlying voluminous information be provided to opposing counsel within a reasonable time period.¹⁸⁷ This requirement gives defendants an opportunity to dissect the raw information, identify instances of poor judgment or partisan zeal, cross-examine the expert, and perhaps even prepare a separate summary exhibit to counter the prosecution’s summary. However, the question remains: Will defendants have been adequately afforded the right to confront their accusers if given access to the underlying data, or does the Confrontation Clause mandate an opportunity to cross-examine those who made the statements reflected in the summary?

While the protections built into FRE 1006 undoubtedly place defendants in a better position than they would be otherwise, they are simply not sufficient in a post-*Crawford* world. If a statement is being offered for the truth of the matter asserted, the proponent of that statement can no longer, under *Crawford*, claim that the confrontation right has been satisfied because it is reliable or admissible under the rules of evidence.¹⁸⁸ *Crawford* made very clear that “the only indicium of reliability sufficient to

¹⁸⁴ *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004).

¹⁸⁵ *Id.* at 40 (internal quotation marks omitted) (explaining the rule established in *Ohio v. Roberts*, 448 U.S. 56 (1980)).

¹⁸⁶ *Roberts*, 448 U.S. at 66.

¹⁸⁷ *Square Liner 360, Inc. v. Chisum*, 691 F.2d 362, 376 (8th Cir. 1982); *White Indus., Inc. v. Cessna Aircraft Co.*, 611 F. Supp. 1049, n.10. (W.D. Mo. 1985) (“Ordinarily that ‘reasonable time’ will be at some point before trial, since the object is to give opposing counsel a meaningful opportunity to prepare challenges to the materials; although it would be within the trial court’s discretion to permit the matter to be dealt with during trial.”).

¹⁸⁸ *Crawford*, 541 U.S. at 61 (“Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.”).

satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”¹⁸⁹ Summaries already carry the inherent risk that “important details may be overlooked because they are buried or perhaps hidden by accident or partisan zeal.”¹⁹⁰ There is also the risk that “inadmissible evidence will creep in unnoticed, or that suggested conclusions will be accepted uncritically because the mass of underlying data are complex, and perhaps technical and forbidding.”¹⁹¹ To overlook the hearsay problem inherent in summary exhibits, the contents of which are layers of discretion removed from the underlying information, and therefore are separate statements themselves, would deprive defendants of the *procedural* right to highlight “partisan zeal” on the part of the government or probe the credibility of subjective determinations reflected in the summary through cross-examination.

The availability of underlying documents fails to satisfy the confrontation right for one simple reason. As Justice Scalia stated in *Crawford*, the only way to satisfy the constitutional right to confrontation is confrontation.¹⁹² Other provisions of FRE 1006, such as the right to request underlying documents,¹⁹³ may help remedy the detriment to the defendant of being unable to cross-examine the preparer of the summary, but it is not the procedural provision the Constitution and *Crawford*’s progeny mandate. Allowing for the admission of a summary exhibit without confrontation of the individuals who analyzed the data reflected in the summaries would be going back to the reasoning of *Roberts* that was explicitly rejected in *Crawford*. Rule 1006’s compensating protections notwithstanding, *Crawford* and its progeny demand the opportunity for cross-examination.

Confrontation in the summary exhibit context is especially important because not all criminal defendants have the legal resources to take full advantage of the protections afforded in FRE 1006. A defendant with limited resources at his disposal will likely be unable to sort through the underlying voluminous records, analyze them in depth, retain an expert, and produce a summary or set of summary exhibits to counter the prosecution’s summary exhibit. Confrontation in the form of cross-examination remains the only fair, relatively resource-neutral, and constitutionally mandated method of appraisal.

Another danger of admitting summaries without providing the right to confrontation is that the information underlying the summary may be based

¹⁸⁹ *Id.* at 69.

¹⁹⁰ MUELLER & KIRKPATRICK, *supra* note 162, § 10:34.

¹⁹¹ *Id.*

¹⁹² *Crawford*, 541 U.S. at 69.

¹⁹³ FED. R. EVID. 1006 (“The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place.”).

on out-of-court statements made during the course of interviews or other investigative activities.¹⁹⁴ The preparer's perspective and decisionmaking may be affected by his preexisting biases regarding particular transactions, people, and entities involved in the investigation. In *United States v. Lemire*, the D.C. Circuit acknowledged the "obvious dangers" in summarizing evidence and the danger of "subtle introduction of otherwise inadmissible evidence" because witnesses relied on out-of-court statements to understand some transactions.¹⁹⁵ The court stated in dicta that a "summary should not draw controversial inferences."¹⁹⁶ The summary in that case was held admissible because it "involved only routine computations and culling through of documents to eliminate confusing and extraneous evidence."¹⁹⁷

The problem is that summaries often contain more than just routine computations of mathematical data.¹⁹⁸ Returning to our forensic accounting investigation example, not only does the summary contain several layers of subjective interpretation, but this interpretation is usually based at least in part on information gleaned from interviews. Depending on how broadly the term testimonial is to be construed, it could be argued that the statements from these interviews, if intended to be used in criminal proceedings and later embodied in the summary exhibit, may be open to confrontation as well.¹⁹⁹ According to Mueller and Kirkpatrick, "if the author of interpretive conclusions prepared the summary entries themselves, and if the author testifies in court and is available for cross-examination, the added risks should not be enough to warrant exclusion."²⁰⁰ But what happens when the author or preparer of the summary does not testify in court? What if the witness sponsoring the summary exhibit only supervised, or worse, only reviewed the process that led to the creation of the summary exhibit? While this may be enough to satisfy the foundation for the exhibit for evidentiary purposes under FRE 703, it hardly seems sufficient to satisfy the defendant's right to confrontation for constitutional purposes. The two may have been one and the same under *Roberts*, but

¹⁹⁴ FRAUD EXAMINERS MANUAL, *supra* note 139, § 3.201.

¹⁹⁵ 720 F.2d 1327, 1348 (D.C. Cir. 1983).

¹⁹⁶ *Id.* at 1350.

¹⁹⁷ *Id.*

¹⁹⁸ Lockhart, *supra* note 118, § 28 (discussing the dangers of argumentative or conclusory summaries).

¹⁹⁹ This view does not currently command the majority of the Court, but barely perhaps. Justices Sotomayor's and Thomas's concurrences in *Bullcoming* and *Melendez-Diaz*, respectively, advocate for a higher bar for a statement to be considered testimonial. Justices Ginsburg, Kagan, and Scalia have not written separately to express how broadly the term testimonial should be construed.

²⁰⁰ MUELLER & KIRKPATRICK, *supra* note 162, § 10:34.

they are not under *Crawford*. Under *Crawford*, confrontation is a procedural right that can only be satisfied if the reliability of the statement is tested “in the crucible of cross-examination.”²⁰¹

Not all summary exhibits under FRE 1006 are in conflict with the Confrontation Clause. Not all summaries are the products of the heavy distillation process described in the above forensic accountant example. In some cases, the summary exhibit may contain nothing more than a simple set of arithmetic totals or averages from the underlying data.²⁰² In another hypothetical situation, a summary may be nothing more than a list of transactions from multiple documents. The fewer discretionary judgment calls required to go from the voluminous data to the summary exhibit, the more objective the resulting summary exhibit. If a summary is truly a simple aggregation of data or information, criminal defendants should find it difficult to argue the summary exhibit is a separate statement.

Therefore, the adoption of this Comment’s position would not result in Confrontation Clause violations for all testimonial summary exhibits. In order to determine whether the admission of an FRE 1006 summary runs afoul of the Sixth Amendment, a court should first determine whether the summary is a purely objective aggregation of the underlying information or whether it reflects the proponent’s subjective understanding and conclusions about that information. If the former is true, the summary should not be considered a statement separate from the underlying data. In such cases, cross-examination of the sponsoring witness would sufficiently allow the defendant to confront the testimony against him. Because the sponsoring witness is usually the same person who supervised the analysis of the underlying information and the preparation of the summary, a summary that is nothing more than an objective reduction of the voluminous information that underlies it should not raise confrontation concerns so long as the defendant has the opportunity to cross-examine a witness who has knowledge of how the summary was created. The logic of this position lies in the fact that there are no new “statements” or “determinations” embodied in a purely objective summary that only repackages admissible evidence. In deriving such a summary from the underlying data, the only new contributions may be, for example, an application of agreed-upon mathematical principles. Choosing to display some transactions while leaving out others in a summary is also unlikely to warrant exclusion.²⁰³

²⁰¹ *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

²⁰² *See, e.g., United States v. Jennings*, 724 F.2d 436, 443 (5th Cir. 1984) (admitting a summary exhibit containing simple calculations).

²⁰³ *See, e.g., United States v. Bentley*, 825 F.2d 1104, 1108–09 (7th Cir. 1987) (admitting charts in a mail fraud trial showing the company’s net position in silver and copper futures).

In our forensic accountant example, the partner who oversaw the investigation would usually testify as an expert witness.²⁰⁴ While *Melendez-Diaz* did not involve a summary exhibit or forensic accountants, the relationship between the testimonial exhibit and the underlying evidence was similar. The evidence at issue in *Melendez-Diaz* was a white powder suspected to be cocaine.²⁰⁵ The testimonial exhibits in question were certificates of state laboratory analysts stating that the substance was cocaine.²⁰⁶ Similar to our forensic accountant example, the Court held that the methodology used in generating the reports “require[d] the exercise of judgment and present[ed] a risk of error that might be explored on cross-examination.”²⁰⁷ The degree of subjective decisionmaking required of a forensic accountant when analyzing a voluminous amount of underlying information and then using that information to create a summary exhibit is arguably much greater than the degree of judgment required of a lab analyst when using technical devices to determine whether a particular substance is in fact cocaine. This is why allowing for cross-examination of the preparer of the summary is crucial.

E. EXPERT TESTIMONY AND THE CONFRONTATION CLAUSE

If several subjective determinations were necessary to create a summary and those determinations are reflected in that summary, the right to confrontation cannot be satisfied by simply allowing the defendant to cross-examine the sponsoring witness. Under *Crawford*, the Court should hold that the defendant’s right to confront the witnesses against him is not satisfied unless the defendant has the opportunity to cross-examine the witnesses who actually made those determinations. Though an expert who supervised the preparation of a summary exhibit may be able to lay the appropriate foundation to introduce the summary into evidence, it does not necessarily follow that a cross-examination of that expert will allow the defendant to probe the reliability and accuracy of that summary, or the credibility of the assertions contained therein.

Furthermore, appellate courts rarely find reversible error for admitting a summary exhibit under FRE 1006, even where a lower court’s admission prompts the appellate court to give a strongly worded warning regarding

every twenty days, and rejecting the claim that the charts were improper because they did not show other days because “charts need not be encyclopedic,” defendants could show that the company was properly hedged at other times, and the data sample on the chart was deemed large enough to be statistically valid).

²⁰⁴ FRAUD EXAMINERS MANUAL, *supra* note 139, § 2.701.

²⁰⁵ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2529 (2009).

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 2537.

unfair prejudice.²⁰⁸ For this reason, cross-examination may be the defendant's only recourse to help mitigate the damage caused by a prejudicial summary exhibit.²⁰⁹ Through cross-examination, the defendant may address the accuracy of the summaries, methods used to prepare summaries, underlying factual assumptions, and patterns of selectivity that may reflect bias.²¹⁰ If the summary is to be considered an independent statement (as it should be), the defendant must be given the opportunity to cross-examine the person who actually made the assertions reflected in the summary.

Testimonial assertions reflected in a summary exhibit may yet avoid constitutional scrutiny. This is because under FRE 703, an expert witness may testify to extrinsic facts and data in order to aid the trier of fact in understanding the expert's testimony.²¹¹ The testifying expert does not have to be the same expert who performed the analysis. She also does not have to be the individual who prepared the report, so long as the expert has formed a relevant and independent conclusion based on underlying facts and data that are reasonably relied upon by experts in that field.²¹² This allows one expert to testify to the work of several individuals, and reflects a compromise between preventing experts from becoming conduits of inadmissible evidence and allowing the jury to hear testimony that would facilitate a better understanding of the testimony.²¹³ For exhibits that summarize complex and voluminous information, this means that there is an evidentiary basis for allowing a forensic accounting expert to testify to the work of her subordinates. What the court would have to determine,

²⁰⁸ See, e.g., *United States v. Fullwood*, 342 F.3d 409, 413–14 (5th Cir. 2003) (cautioning strongly against the use of summary witnesses as a “substitute for, or supplement to, closing argument,” but still finding no reversible error despite the fact that the summary witness was used in this fashion).

²⁰⁹ Weiser, *supra* note 158, at 203.

²¹⁰ See, e.g., *United States v. Baker*, 10 F.3d 1374, 1412 (9th Cir. 1993) (“The defense had full opportunity to cross-examine [the testifying government agent] about her methods of preparing the summaries, her alleged selectivity, and her partiality.”).

²¹¹ FED. R. EVID. 703. Federal Rule of Evidence 703 allows “facts or data otherwise inadmissible” to be presented to the jury if “their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.” *Id.*

²¹² See, e.g., *United States v. Richardson*, 537 F.3d 951, 959–60 (8th Cir. 2008) (holding that an expert forensic scientist may testify, without violating the defendant's right to confrontation, about DNA evidence linking the defendant to a firearm even though the expert did not perform any tests of her own and did not personally receive the evidence, but instead relied solely on her peer review of the lab technician's report).

²¹³ Ian Volek, Note, *Federal Rule of Evidence 703: The Back Door and the Confrontation Clause, Ten Years Later*, 80 *FORDHAM L. REV.* 959 (2011) (asserting that FRE 703 may carry its own Confrontation Clause concerns because the rule could be used to mask confrontation violations).

however, is whether this evidentiary basis for admission should be separated, as it was in *Crawford*, from the constitutional basis for admission under the Sixth Amendment.

The *Melendez-Diaz* Court recognized the importance of having the actual preparer of the testimonial evidence available for cross-examination, especially where the preparer has exercised his judgment in creating the exhibit.²¹⁴ That case, however, did not decide whether the right to confrontation could be satisfied by giving the defendant an opportunity to cross-examine an expert witness who is familiar with the process through which an exhibit was created. In many cases involving summary exhibits, the testimony of the witness who prepares a summary exhibit is indispensable as a practical matter.²¹⁵ However, it is common for a witness who supervised the preparation of the summary to testify in lieu of the individual who actually prepared the exhibit.²¹⁶ There is no explicit requirement that the witness who testifies must be the witness who prepared the exhibit.²¹⁷

Bullcoming dealt with a lab report admitted under the business records exception.²¹⁸ The Court did not address the issue of whether summary exhibits ought to be admissible without confrontation of the individuals who made the assertions reflected in the exhibit. However, the Court's reasoning does provide insight into how it would approach the question. First, *Bullcoming* suggests the Court would not allow summarized testimonial assertions to escape Sixth Amendment scrutiny simply because they are derived from a set of routine procedures. The Court recognized the value of confrontation even where procedures are seemingly routine, noting that cross-examination would nevertheless enable a defendant to probe the testing process, expose lapses and lies, and highlight a witness's potential bias or lack of experience.²¹⁹

This recognition also speaks to a second, more practical concern that applies in the summary exhibit context: witnesses who perform routine analyses are unlikely to be able to recount a particular test by the time they

²¹⁴ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2537 (2009) (“[A]n analyst’s lack of proper training or deficiency in judgment may be disclosed on cross-examination.”).

²¹⁵ MUELLER & KIRKPATRICK, *supra* note 162, § 10:34.

²¹⁶ *See, e.g., United States v. Bray*, 139 F.3d 1104, 1110 (6th Cir. 1998) (holding that in order to lay a proper foundation for a summary to be admitted into evidence under FRE 1006, the proponent should present the testimony of the witness who supervised its preparation).

²¹⁷ *See, e.g., United States v. Bertoli*, 854 F. Supp. 975, 1055 (D.N.J. 1994) (admitting summary exhibits authenticated by a person able to attest that they accurately summarized the underlying material rather than by someone who actually prepared the exhibits).

²¹⁸ *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2712 (2011).

²¹⁹ *Id.* at 2715.

are called to testify, diminishing any benefit that could be derived from cross-examination. Similarly, a forensic accountant who has pored through thousands of documents months or even years before trial may not remember specific details at a trial or deposition. The *Bullcoming* Court recognized these challenges but stated that the defendant's attorney could still have "raise[d] before a jury questions concerning [the analyst's] proficiency, the care he took in performing his work, and his veracity."²²⁰ More fundamentally, the Court held that "the [Confrontation] Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination."²²¹

Apparently recognizing the potential impact *Bullcoming* may have on the admissibility of expert testimony, Justice Sotomayor wrote separately to "emphasize the limited reach of the Court's opinion" in this regard.²²² First, she noted that *Bullcoming* was "not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue."²²³ Justice Sotomayor found significant the fact that "Razatos conceded . . . that he played no role in producing the BAC report and did not observe any portion of Curtis Caylor's conduct of the testing."²²⁴ She went on to state that "[i]t would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the result or a report about such results."²²⁵

The concurrence gives a hint, but no details on exactly how the Court should analyze such a case. Justice Sotomayor closes the discussion by stating "[w]e need not address what degree of involvement [by the expert] is sufficient because here Razatos had no involvement whatsoever in the relevant test and report."²²⁶ Because Justice Sotomayor provided the fifth and final vote in the *Bullcoming* majority, the constitutionality of admitting a testimonial summary exhibit through an expert witness may turn on the expert's "degree of involvement" with the analysis underlying the summary. It remains to be seen what degree of involvement would be necessary for the expert's testimony to avoid constitutional scrutiny.

The forensic accounting hypothetical described above illustrates the importance of allowing criminal defendants to confront the individuals who actually make the assertions against them. In a forensic accounting

²²⁰ *Id.* at 2715 n.7.

²²¹ *Id.* at 2716.

²²² *Id.* at 2719 (Sotomayor, J., concurring).

²²³ *Id.* at 2722.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

investigation, the partner managing the engagement would be most likely to testify in court should the case go to trial.²²⁷ While this partner may have planned the overall engagement strategy and is likely to know more about the investigation at a macro level than anyone else, it is usually the partner's subordinates (staff accountants, senior staff accountants, managers, etc.) who make most of the document-specific judgment calls that eventually lead to the creation of a summary exhibit. The following hypothetical illustrates how the various tasks associated with a fraud investigation may be divided among the members of a forensic accounting team: The staff-level accountant may be the one to determine whether a signature appears fraudulent, or whether the expense was "reasonable" or "necessary." A senior staff accountant or manager may conduct interviews with employees and later determine how the staff accountants' results should be sorted, filtered, and presented. The manager may then prepare a draft copy of a report summarizing the investigation. The supervising partner then reviews the draft report and any potential summary charts or tables and communicates with the staff accountants and managers in order to gain an understanding of how they were put together. This understanding would serve as the basis for the partner's testimony if she were to be called to testify in court as an expert witness.²²⁸

This process raises the question of whether the right to confrontation requires giving the defendant the opportunity to cross-examine the person who actually made the decisions that led to the information contained within the summary, or whether it is sufficient that the defendant was allowed to cross-examine the partner who supervised the overall investigation. The members of the forensic accounting team involved in the creation of a summary exhibit are clearly accusatory witnesses against the defendant under *Melendez-Diaz* and *Bullcoming*. To the extent that their subjective determinations throughout the investigation are reflected in a summary exhibit, they certainly "provide[] testimony *against* [the defendant], proving [facts] necessary for . . . conviction."²²⁹ *Melendez-Diaz* made clear that "there is not a . . . category of witnesses, helpful to the prosecution, but somehow immune from confrontation."²³⁰ It is also important to point out that this is not a chain-of-custody issue. *Melendez-*

²²⁷ See FRAUD EXAMINERS MANUAL, *supra* note 139, §§ 2.701, 2.707.

²²⁸ It is worth reiterating that this hypothetical division of responsibility is neither mandated or suggested in the *Fraud Examiners Manual*. The hypothetical is intended to serve as an example of how multiple individuals play an integral role in developing the testimonial assertions reflected in a summary exhibit. The exact division of labor may vary with each investigation.

²²⁹ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2533 (2009).

²³⁰ *Id.* at 2534.

Diaz made clear that it is not necessary for every individual who handled a piece of evidence to come to court to testify against a defendant.²³¹ In the case of a summary exhibit, the danger is that different individuals made separate, often subjective determinations related to the investigation, and that these determinations are reflected in the summary exhibit admitted at trial without the defendant having the opportunity to cross-examine those individuals.

Cases before *Crawford* and *Melendez-Diaz* suggested that it would be sufficient to have only the partner who managed the investigation testify to the summary exhibit. In *United States v. Behrens*, the court admitted a summary exhibit over objections that the chart lacked foundation, holding that foundation can be laid through the testimony of a witness who supervised the preparation of the exhibit.²³² *Behrens*, however, was decided long before *Crawford* (and, in fact, in the shadow of *Roberts*), and admitted the summary on the basis that there was a sufficient foundation for evidentiary purposes.²³³ *Behrens* did not decide whether there was any constitutional impediment to the admission of a summary exhibit when the defendant was not afforded the opportunity to cross-examine its preparer.²³⁴ The holding in *Behrens*, therefore, while allowing for the admission of a summary through a witness other than the preparer of the summary, does not foreclose the exclusion of a similar summary today on Sixth Amendment grounds.

Similarly, *United States v. Moon*, which was decided after *Crawford* but before *Melendez-Diaz* and *Bullcoming*, concerned a doctor who was charged with fraud arising from billing Medicaid and other insurance programs for full doses of chemotherapy while administering only partial doses.²³⁵ The prosecution introduced summary charts, which compared the drugs the defendant purchased with the amount she claimed to administer, and then estimated her resultant profits from the demonstrated discrepancy.²³⁶ The Sixth Circuit held that such charts were accurate, not unfairly prejudicial, and admissible if introduced by an agent who supervised preparation.²³⁷

Moon, like *Behrens*, held that there was adequate foundation for admission without addressing any constitutional issues related to

²³¹ *Id.* at 2532 n.1.

²³² 689 F.2d 154, 161 (10th Cir. 1982).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *United States v. Moon*, 513 F.3d 527, 532 (6th Cir. 2008).

²³⁶ *Id.* at 545.

²³⁷ *Id.* at 546.

confrontation.²³⁸ There are two reasons why *Moon* should not foreclose the existence of constitutional problems inherent in the use of this evidence, notwithstanding the fact that it was decided after *Crawford*. First, no Sixth Amendment challenge was made in *Moon*.²³⁹ Second, *Moon* was decided before *Melendez-Diaz*, where the Court held that the “witnesses against him” phrase in the Sixth Amendment means all witnesses who provide testimony against the petitioner.²⁴⁰ When *Moon* was decided, “witnesses against” the accused was understood to mean traditional witnesses of the type Justice Kennedy discussed in the *Melendez-Diaz* dissent.²⁴¹

IV. THE POTENTIAL IMPACT OF *WILLIAMS V. ILLINOIS*

In *Williams v. Illinois*,²⁴² the Supreme Court addressed whether the Sixth Amendment bars the admission against a criminal defendant of assertions made by an out-of-court declarant that are offered through the testimony of an expert witness. Because summary exhibits under FRE 1006 are commonly offered through the testimony of an expert witness,²⁴³ the Court’s decision in *Williams* will undoubtedly affect how summary exhibits derived from testimonial assertions will be treated under the Sixth Amendment. However, because the *Williams* plurality reached its conclusion through a questionable and previously discredited analysis, it is unclear exactly *how* the decision will influence constitutional scrutiny of summary exhibits.

In *Williams*, the defendant was convicted of two counts of aggravated criminal sexual assault, one count of aggravated kidnapping, and one count of aggravated robbery.²⁴⁴ The victim, L.J., was taken to the emergency room where a physician treated her and took vaginal swabs.²⁴⁵ The vaginal swabs were sealed, placed in a criminal sexual assault kit, and sent to the Illinois State Police (ISP) crime lab for testing and analysis.²⁴⁶ A forensic biologist at the lab, Brian Hapack, received the kit and performed an acid phosphatase test that confirmed the presence of semen.²⁴⁷ Hapack testified

²³⁸ *Id.* at 545–46; *Behrens*, 689 F.2d at 161.

²³⁹ 513 F.3d 527.

²⁴⁰ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2533–34 (2009).

²⁴¹ *Id.* at 2551–52 (Kennedy, J., dissenting). According to Justice Kennedy, traditional witnesses are those witnesses who (1) recall events they actually observed in the past instead of making near-contemporaneous observations, (2) observe a crime or “any human action related to it,” or (3) provide statements in response to interrogation. *Id.*

²⁴² 132 S. Ct. 2221 (2012).

²⁴³ MUELLER & KIRKPATRICK, *supra* note 162, § 10:34.

²⁴⁴ *People v. Williams*, 939 N.E.2d 268, 269 (Ill. 2010).

²⁴⁵ *Williams*, 132 S. Ct. at 2229.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

that after performing the test, he resealed the evidence and left it in a secure freezer at the ISP lab.²⁴⁸ Hapack “guaranteed the accuracy of his results by working in a clean environment free from contamination and by ensuring the tests functioned properly.”²⁴⁹ The ISP lab sent those samples to Cellmark Diagnostic Laboratory in Maryland for DNA analysis.²⁵⁰ Cellmark derived a DNA profile of the person whose semen was recovered from the victim and sent the profile back to the ISP lab.²⁵¹ At this point in time, Williams, the eventual defendant, was not under suspicion for L.J.’s rape.²⁵²

An ISP forensic specialist, Sandra Lambatos, ran a computer search comparing the Cellmark profile against entries in the state DNA database.²⁵³ It matched a profile produced from a blood sample taken from the defendant after he was arrested for an unrelated offense.²⁵⁴ At a police lineup a little over a year later, L.J. identified the defendant as her assailant.²⁵⁵ The defendant was indicted for aggravated criminal sexual assault, aggravated kidnapping, and aggravated robbery.²⁵⁶

At trial, the court accepted Lambatos as an expert witness in forensic biology and forensic DNA analysis.²⁵⁷ Lambatos described the process of analyzing and comparing DNA. She testified that having one DNA expert rely on another DNA expert’s records in order to complete her work is a “commonly accepted” practice within the relevant scientific community.²⁵⁸ She further testified that Cellmark was an “accredited crime lab,” and that the ISP lab routinely sent evidence to Cellmark.²⁵⁹

When the prosecutor attempted to ask Lambatos for her expert opinion regarding the DNA profiles, Williams’s counsel objected, asserting that Lambatos could not rely on testing performed by another lab.²⁶⁰ The trial court judge allowed Lambatos to testify that the DNA profile received from Cellmark matched the defendant’s DNA profile from the blood sample in the ISP database.²⁶¹ While the Cellmark report was never introduced into

²⁴⁸ *Id.*

²⁴⁹ *Williams*, 939 N.E.2d at 269.

²⁵⁰ *Williams*, 132 S. Ct. at 2229.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 2229–30.

²⁵⁹ *People v. Williams*, 939 N.E.2d 268, 272 (Ill. 2010).

²⁶⁰ *Williams*, 132 S. Ct. at 2230.

²⁶¹ *Id.*

evidence, Lambatos was allowed to testify to her conclusions, which were informed by the report.²⁶² Lambatos confirmed during cross-examination that her testimony depended on the profile produced by Cellmark and that she personally did not perform or observe the testing of the vaginal swabs.²⁶³ Cellmark's status as an accredited lab gave Lambatos confidence that its work was reliable, even though she did not see any of the work that Cellmark put in to produce the DNA profile from the vaginal swabs.²⁶⁴

When Lambatos finished testifying, the defense moved to exclude her testimony on Confrontation Clause grounds insofar as that testimony implicated events at the Cellmark lab.²⁶⁵ The prosecution, relying on Illinois Rule of Evidence 703, argued that even if an expert is not competent to testify to the facts on which his opinion is based, he is permitted to disclose those underlying facts.²⁶⁶ The trial judge agreed with the prosecution and admitted the evidence.²⁶⁷ Williams was found guilty on all counts.²⁶⁸

On appeal, the defendant argued that allowing Lambatos to testify to the testing completed by Cellmark violated his Sixth Amendment right to confront the witnesses against him.²⁶⁹ The Illinois Appellate Court disagreed, stating that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."²⁷⁰ The Cellmark report, according to the court, was only offered to provide a basis for Lambatos's opinion.²⁷¹ The conviction was affirmed and the defendant appealed to the Illinois Supreme Court.²⁷² The Illinois Supreme Court upheld Williams's conviction, also finding no Sixth Amendment violation because the Cellmark report was not being offered for the truth of its contents, but for the purpose of explaining the basis for Lambatos's opinion.²⁷³ According to the Court, the only statement that the prosecution offered for the truth of the matter asserted was Lambatos's own

²⁶² *Williams*, 939 N.E.2d at 272.

²⁶³ *Williams*, 132 S. Ct. at 2230.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 2231.

²⁶⁶ *Id.* (footnote omitted).

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *See id.*

²⁷⁰ *People v. Williams*, 895 N.E.2d 961, 969 (Ill. App. Ct. 2008) (quoting *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004)).

²⁷¹ *Williams*, 132 S. Ct. at 2231.

²⁷² *Id.*

²⁷³ *Id.* at 2231–32.

opinion, making unnecessary the presentation of the person who prepared the DNA profile at Cellmark.²⁷⁴

A plurality of the United States Supreme Court affirmed, holding the defendant's right to confrontation was not violated because (1) the Cellmark findings used against him were offered only to explain the basis for Lambatos's expert opinion and not to prove the truth of the matters asserted therein, and (2) the Cellmark report, even if admitted into evidence (which it was not) was "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."²⁷⁵ For the reasons discussed below, *Williams* leaves our Confrontation Clause jurisprudence more confused than ever before. It also offers few answers to the question of how the Court would treat a summary exhibit offered against a criminal defendant to prove the truth of the contents reflected within it.

A. A FLAWED AND FRACTURED DECISION

Williams is problematic for several reasons. First, the decision takes the Court's otherwise consistently (albeit rapidly) developing Confrontation Clause jurisprudence and turns it on its head with a mishmash of partially overlapping opinions that leave everyone guessing how to determine when the confrontation right applies and when it does not. The plurality, comprised of precisely the same Justices who so vehemently dissented in *Melendez-Diaz* and *Bullcoming*, purports to uphold those decisions yet offends their reasoning at every step of its analysis. Even worse, five Justices—including Justice Thomas, who concurred only in the judgment—completely disagree with the plurality's reasoning and analysis.²⁷⁶

The Court's conclusion that the Cellmark lab's findings were not offered for their truth ignores the reality of so-called "basis evidence." If an expert testifies to a conclusion, and states that the conclusion is based on the assumption that a particular set of underlying facts is true, then the jury must accept those underlying assertions for their truth in order to agree with the expert's conclusion.²⁷⁷ In *Williams*, since the validity of Lambatos's

²⁷⁴ *People v. Williams*, 939 N.E.2d 268, 278 (Ill. 2010).

²⁷⁵ *Williams*, 132 S. Ct. at 2228.

²⁷⁶ *Id.* at 2265 (Kagan, J., dissenting) ("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.")

²⁷⁷ See DAVID H. KAYE, DAVID E. BERNSTEIN & JENNIFER L. MNOOKIN, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EXPERT EVIDENCE* § 4.10.1, at 196 (2d ed. 2011) ("If the jury believes that the basis evidence is true, it will likely also believe that the expert's

conclusion ultimately turned on the truth of Cellmark's statements, it is difficult to conceive how those statements could be considered to be offered for any other purpose.²⁷⁸

Justice Thomas, who joined the plurality's holding but rejected its reasoning, highlighted this flaw, stating "there was no plausible reason for the introduction of Cellmark's statements other than to establish their truth."²⁷⁹ Justice Thomas went on to refute the plurality's suggestion that such an approach would undermine longstanding historical practice with respect to expert witnesses, noting that it was not until the Federal Rules of Evidence were adopted in 1975 that "the universe of facts upon which an expert could rely was expanded to include facts of the case that the expert learned out of court by means other than his own perception."²⁸⁰ Today, the principal treatise on evidence calls the idea that "basis evidence" comes in not for its truth, but only to help the fact-finder evaluate an expert's opinion, "very weak," "factually implausible," "nonsense," and "fictional."²⁸¹

To illustrate the logical shortcomings of the plurality's position, the dissent poses a hypothetical involving a lay witness rather than an expert.²⁸² In this example, an eyewitness tells a police officer that the perpetrator had an unusual star-shaped birthmark over his left eye.²⁸³ If the police officer were to testify at trial about what the eyewitness told him, there would be no doubt that the testimony would violate the Confrontation Clause unless the eyewitness were unavailable and the defendant had a prior opportunity to cross-examine her. The dissent then asks whether anything should

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.")

²⁷⁸ Indeed the trial court, in announcing its verdict, expressly concluded that the defendant's DNA matched the DNA in the semen recovered from the victim. *Williams*, 132 S. Ct. at 2258 n. 4. (Thomas, J., concurring). Justice Thomas correctly points out that "[a]bsent other evidence, it would have been impossible for the trial court to reach that conclusion without relying on the truth of Cellmark's statement that its test results were based on the semen from L.J.'s swabs." *Id.*

²⁷⁹ *Id.* at 2256.

²⁸⁰ *Id.* at 2257. Prior to the adoption of the federal rules, "an expert could render an opinion based only on facts that the expert had personally perceived or facts that the expert learned at trial, either by listening to the testimony of other witnesses or through a hypothetical question based on facts in evidence." *Id.* Justice Thomas points out that in such situations, "there was little danger that the expert would rely on testimonial hearsay . . . because the expert and the witnesses on whom he relied were present at trial." *Id.*

²⁸¹ KAYE, BERNSTEIN & MNOOKIN, *supra* note 277, § 4.10.1, at 196–98. "One can sympathize with a court's desire to permit the disclosure of basis evidence that is quite probably reliable, such as a routine analysis of a drug, but to pretend that it is not being introduced for the truth of its contents strains credibility." *Id.*

²⁸² *Williams*, 132 S. Ct. at 2269 (Kagan, J., dissenting).

²⁸³ *Id.*

change if the officer were to reword his testimony in the form of a conclusion: “I concluded that [the defendant] was the assailant because a reliable eyewitness told me that the assailant had a star-shaped birthmark and, look, [the defendant] has one just like that.”²⁸⁴ Obviously, couching the same testimony in the form of a conclusion would make no constitutional difference because “[i]t remains the case that the prosecution is attempting to introduce a testimonial statement that has no relevance to the proceedings apart from its truth.”²⁸⁵

Even Justice Breyer, who joined in the plurality, wrote separately that he was “willing to accept the dissent’s characterization of the present rule as artificial,”²⁸⁶ leaving only three Justices clinging to the fiction that out-of-court statements relied upon by an expert witness in forming his conclusion, when admitted at trial, are not being offered for the truth of the matter asserted.

The plurality’s reasoning is also problematic because it would allow prosecutors to easily circumvent the Sixth Amendment requirement. Where the declarant of a testimonial assertion against the defendant is unavailable, the government can avoid allowing the defendant to cross-examine the declarant by simply calling an expert witness to testify to conclusions based on the declarant’s findings. Suddenly, statements that would otherwise be testimonial hearsay assertions against the defendant would become “underlying facts and data,” so long as the government can demonstrate that the testifying expert relied on the assertions to form her conclusions. The testifying expert essentially becomes a conduit for testimonial hearsay evidence.²⁸⁷

While the prosecutors in *Williams* may not have intentionally sought to circumvent the Sixth Amendment requirement, that is effectively what happened. Lambatos did not perform her own tests on the samples.²⁸⁸ She merely “agreed with Cellmark’s results” and “made her own visual and interpretive comparisons of [Cellmark’s report] . . . to conclude there was a match to the defendant’s genetic profile.”²⁸⁹ The process of actually

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Williams*, 132 S. Ct. at 2246 (Breyer, J., concurring).

²⁸⁷ Williams’s counsel made the argument that Lambatos was “merely a conduit for Cellmark’s report,” but the Illinois Supreme Court was unconvinced, finding that “[h]er testimony consisted of *her* expert comparison of the DNA profile in the ISP database with the DNA profile from the kit prepared by Cellmark.” *People v. Williams*, 939 N.E.2d 268, 280 (Ill. 2010) (emphasis added) (internal quotation marks omitted).

²⁸⁸ *See id.* at 272.

²⁸⁹ *Id.* Even Justice Freeman, who concurred in the judgment of the court, appears to be skeptical about whether Lambatos did more than simply read results and compare them. *Id.* at 283 (Freeman, J., concurring) (“Lambatos’ ‘testing’ in this case consisted of her own

constructing the DNA profile was performed by Cellmark.²⁹⁰ According to Lambatos, this process involved (1) isolating and extracting DNA from a sample; (2) amplifying the extraction to form a more workable sample; (3) measuring the length of an individual strand using a process called electrophoresis; and (4) using a computer to translate this measurement into a graph that represents the subject's DNA.²⁹¹ Lambatos did not perform or supervise these processes.²⁹² She could attest to little more than the fact that Cellmark is an accredited lab and that she has never had a chain of custody or contamination problem with them in the past.²⁹³ Justice Freeman, who concurred in the judgment of the Illinois Supreme Court, wrote that "Lambatos' opinion regarding whether Cellmark followed proper guidelines at the time the DNA material was extracted and amplified was not based on anything other than her rank speculation that it 'had to have been done' solely because Cellmark was an accredited lab."²⁹⁴ Justice Freeman also noted that "Lambatos admitted that Cellmark used procedures and standards that were different from those used by her own employer."²⁹⁵ While she testified that she "helped develop . . . proficiency tests to be administered to analysts at Cellmark,"²⁹⁶ "nothing in her testimony revealed that the analysts who performed the DNA extraction and amplification in this case had taken, let alone passed, the tests she had developed . . ."²⁹⁷ Nor could she testify that Cellmark ran the tests on Williams's sample in accordance with the standards preferred by her employer, the ISP lab.²⁹⁸

This is troubling because without an opportunity to cross-examine the lab analysts at Cellmark who actually constructed the DNA profile, Williams's counsel was unable to probe the credibility or expertise of those analysts, or the veracity of the process employed in this particular test. The prosecution had the opportunity to use the contents of the Cellmark report to bolster its case against Williams, but Williams could not even delve into whether Cellmark was accredited at the time the tests were performed. Nor

reading to match up the numbers generated on the computer charts, which was derived from Cellmark's underlying scientific processes.").

²⁹⁰ *Id.* at 271 (majority opinion).

²⁹¹ *Id.*

²⁹² *See id.* at 272.

²⁹³ *Id.*

²⁹⁴ *Id.* at 284 (Freeman, J., concurring). Justice Freeman ultimately joined the majority's holding despite the fact that he "believe[d] the circuit court abused its discretion by admitting Lambatos' testimony without proper foundation" because "the error . . . was harmless." *Id.* at 287.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

was Williams able to ascertain whether the lab analysts who constructed Williams's DNA profile had passed the proficiency test developed by Lambatos. By implying, as Justice Breyer does in his concurrence, that "perception, memory, narration, and sincerity" are the primary targets of cross-examination,²⁹⁹ the Court ignores the actual reasons a criminal defendant might want to cross-examine a lab analyst—credibility and competence. Because Lambatos had no definite knowledge of Cellmark's operations outside of the fact that it was an "accredited lab," Williams's attorneys had no opportunity to expose any lapses on Cellmark's part, ask questions about Cellmark's analysts' proficiencies, or probe whether the analysts at Cellmark had tested the wrong vial, mislabeled the samples, or committed some other technical error.

The plurality's reasoning also offends *Crawford* and its progeny in a more fundamental way. It collapses the constitutional inquiry under the Sixth Amendment into the evidentiary inquiry under FRE 703 (and Illinois's equivalent). The Court's reasoning suggests that once the hearsay hurdle has been overcome, the right of confrontation does not apply because there is an evidentiary basis for admitting the testimony. *Crawford* and its progeny make clear, however, that admissibility under the rules of evidence does not automatically satisfy the constitutional right to confrontation. Recognizing the plurality's departure from the Court's precedent, Justice Thomas warned that the rules of evidence should not "so easily trump a defendant's confrontation right," and reminded the Court that it has "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."³⁰⁰ The dissent echoed, "we do not typically allow state law to define federal constitutional requirements."³⁰¹ While the rules governing expert testimony allow experts to testify to evidence that would otherwise be inadmissible hearsay,³⁰² it does not follow that the Constitution allows the same without confrontation. *Crawford* "made clear that the Confrontation Clause's protections are not coterminous with rules of evidence."³⁰³

The remainder of the plurality's reasoning is no sounder. The Court goes on to hold that even if the Cellmark report were entered for its truth, it would not be testimonial because a DNA report "bears little if any resemblance to the historical practices that the Confrontation Clause aimed

²⁹⁹ *Williams v. Illinois*, 132 S. Ct. 2221, 2249 (2012) (Breyer, J., concurring).

³⁰⁰ *Williams*, 132 S. Ct. at 2256 (Thomas, J., concurring).

³⁰¹ *Id.* at 2272 (Kagan, J., dissenting).

³⁰² *Williams*, 939 N.E.2d at 287.

³⁰³ *Williams*, 132 S. Ct. at 2272 (Kagan, J., dissenting).

to eliminate.”³⁰⁴ In support of this argument, the plurality submits that the Cellmark report is not testimonial because it was “not prepared for the primary purpose of accusing a targeted individual.”³⁰⁵ The origins of this test are unknown, even to the dissent.³⁰⁶ What it appears to be is a slightly mutated version of the “primary purpose test” articulated in *Davis*—that a statement offered against the accused is testimonial if the purpose of the statement was to further an investigation for criminal prosecution.³⁰⁷ Thus, the plurality ruled that the statements made against Williams were admissible by injecting a new requirement that the individual against whom the testimony is offered must have been specifically targeted for potential prosecution at the time the statement was made. The plurality reasoned that a lab analyst processing DNA before a suspect has been identified has little motive to behave dishonestly.³⁰⁸ Again, this argument misses the point. As the dissent notes, “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.”³⁰⁹

Lastly, the Court points to the following safeguards that it believes would prevent prosecutors from abusing its expert carve-out to the confrontation right: (1) the ability of trial courts to “screen out experts who would act as mere conduits of hearsay by strictly enforcing the requirement that experts display some genuine scientific, technical, or other specialized knowledge that will help the trier of fact”;³¹⁰ (2) the ability to “preclude[] [experts] from disclosing inadmissible evidence to a jury”;³¹¹ (3) the use of limiting instructions to explain to 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”;³¹² and (4) triers of fact may not give any weight to an expert’s testimony “if the prosecution cannot muster any independent admissible

³⁰⁴ *Id.* at 2244 (plurality opinion) (quoting *Michigan v. Bryant*, 131 S. Ct. 1143, 1167 (2011)).

³⁰⁵ *Id.* at 2243.

³⁰⁶ *Id.* at 2273 (Kagan, J., dissenting) (“Where that test comes from is anyone’s guess.”).

³⁰⁷ *Davis v. Washington*, 547 U.S. 813, 822 (2006).

³⁰⁸ See *Williams*, 132 S. Ct. at 2243–44.

³⁰⁹ *Id.* at 2274 (Kagan, J., dissenting).

³¹⁰ *Id.* at 2241 (plurality opinion).

³¹¹ *Id.*

³¹² *Id.*

evidence to prove the foundational facts that are essential to the relevance of the expert's testimony."³¹³

The court fails to explain how this is relevant to the Sixth Amendment inquiry. The problem with this reasoning is that it attempts to safeguard the reliability of expert testimony, but ignores the Court's precedent that the *only* constitutionally acceptable safeguard is Confrontation.³¹⁴ Allowing admissibility under the Sixth Amendment to turn on whether the court believes cross-examination is necessary appears to be a throwback to the very reasoning the Supreme Court has rejected since *Crawford*.³¹⁵ Regardless of whether a court finds an expert's testimony reliable, the Sixth Amendment demands that "that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."³¹⁶

B. WILLIAMS'S RELEVANCE TO THE SUMMARY EXHIBIT INQUIRY

Even assuming the Court's fragile holding withstands the test of time, it is hard to tell how Williams may impact the admissibility of summary exhibits under the Confrontation Clause. Neither basis for the plurality's decision applies in the summary exhibit context. Summary exhibits, unlike underlying facts relied upon by expert witnesses (according to the plurality), are by definition offered to prove the truth of their contents. This is what distinguishes summary exhibits under FRE 1006 from demonstrative exhibits offered under FRE 611(a).³¹⁷ Unless the Court were to find a way to take its reasoning a step further, the expert testifying to a summary exhibit could not present the contents of a summary exhibit under the guise of "underlying facts and data." The exhibit would have to be entered into evidence, leaving a trial court to decide whether the maker of the assertions contained within that statement should be cross-examined.

The second basis for the plurality's decision—that even if admitted, the Cellmark lab report is not testimonial—also does not apply squarely to the case of summary exhibits. A summary exhibit created during an investigation of a particular set of individuals with an eye toward possible litigation—as may often be the case in the forensic accounting context—

³¹³ *Id.*

³¹⁴ *Crawford v. Washington*, 541 U.S. 36, 61 (2004) ("[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.").

³¹⁵ *Id.* at 61 ("Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule [allowing for confrontation]. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.").

³¹⁶ *Id.* at 61.

³¹⁷ *See infra* Part II.C.

would survive the plurality's modified primary purpose test. If the target of the investigation is identified before or during the course of the investigation, the plurality's concerns with dishonesty, misreporting, and intentionally faulty analysis would apply in full force. And of course, the dissent's concerns with incompetence, inexperience, and carelessness would also apply.

Indeed, the grounds upon which the plurality attempted to distinguish its holding from *Melendez-Diaz* and *Bullcoming* suggest that *Williams* does not preclude the exclusion of summary exhibits on confrontation grounds. The Court stated that "in [*Melendez-Diaz* and *Bullcoming*], 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."³¹⁸ The Court went on to explain that "nothing comparable happened" with the Cellmark report because its relevance only became apparent after the suspect had been arrested and his profile compared by the ISP lab.³¹⁹ If this is where the Court seeks to draw the line, then summary exhibits offered against a criminal defendant seem to fall into the same category as *Bullcoming* and *Melendez-Diaz*.³²⁰

The ultimate determination of whether summary exhibits receive constitutional scrutiny may turn on whether the Court finds the exhibit sufficiently "formal" to constitute a testimonial statement.

V. CONCLUSION

Crawford and its progeny have fundamentally transformed our Sixth Amendment jurisprudence. Most of the Court's post-*Crawford* Confrontation Clause cases have focused on either fleshing out whether a particular type of hearsay evidence is testimonial or determining whether the defendant had the opportunity to cross-examine the appropriate witness to guarantee his right to confrontation. This is not surprising in light of the fact that *Crawford*'s most immediate effect was the separation of the procedural right to confrontation from the substantive guarantees of reliability and trustworthiness in FRE 803. However, the scope of *Crawford*, especially in light of the Court's decisions in *Melendez-Diaz* and *Bullcoming*, should not be confined to its effect on the hearsay rule. It

³¹⁸ *Williams*, 132 S. Ct. at 2240.

³¹⁹ *See id.*

³²⁰ It is not inconceivable that a summary exhibit could be prepared without a set purpose or targeted individual in mind. This Comment only presumes that it is more likely than not that such an exhibit would be created in a criminal case only after a purpose and defendant(s) have been identified.

should also demand confrontation where other forms of testimonial evidence are concerned, notwithstanding their admissibility under the Federal Rules of Evidence.

Though FRE 1006 does not appear in the federal rules as a hearsay exception, it allows for the admission of out-of-court statements being offered for the truth of their contents. Such summaries are admissible because: (1) they serve the practical purpose of allowing the proponent to educate the jury on facts and evidence that would be too voluminous and complex without a summary, and (2) the requirement that the underlying voluminous information be admissible protects the opponent from the admission of otherwise inadmissible hearsay evidence. However, the differences between FRE 1006 and the hearsay exceptions should not be considered relevant for confrontation purposes.

Testimonial summary exhibits, such as the one that would result from the forensic accounting investigation described in Part II, are more than mere recapitulations of voluminous data. They are statements that reflect the subjective determinations and discretionary judgment exercised by an investigator or forensic accountant. The accountant determines which attributes are important, how the presence or absence of those attributes should be determined, and how the information should be organized, compiled, and presented in a compelling way. Each layer of subjective interpretation and decisionmaking that goes into making this type of summary removes it further from the underlying data. Refusing to allow a defendant the opportunity to cross-examine the individual or individuals who made the judgment calls reflected in such a summary would constitute a deprivation of the defendant's Sixth Amendment right to confront the witnesses against him.

Under *Crawford*, the fact that a piece of evidence is categorically admissible because the Federal Rules of Evidence deem that category of evidence trustworthy and reliable does not obviate the defendant's right to cross-examine the proponent of that evidence if it is testimonial.³²¹ *Crawford* and its progeny do not limit testimonial evidence to statements that come from what most would consider traditional "witnesses" against a defendant;³²² instead, testimonial evidence can come from any individual whose statement is being offered against a criminal defendant so long as that statement satisfies *Davis*'s "primary purpose" test;³²³ the primary

³²¹ *Crawford*, 541 U.S. 36, 61, 68–69 (2004) (“[W]e decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”).

³²² *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2534 (2009).

³²³ *Davis v. Washington*, 547 U.S. 813, 822 (2006).

purpose must be to “establish or prove past events potentially relevant to later criminal prosecution.”³²⁴ Summary exhibits, like many hearsay statements that fall within a “firmly-rooted” hearsay exception, fall into both of these categories. Under *Melendez-Diaz*, they are deemed admissible because the underlying voluminous information is admissible, and they are prepared by witnesses for use against the accused. Under modern Confrontation Clause jurisprudence, neither should be sufficient to deprive the defendant of the right to confront the preparer of the statement through cross-examination.

In most cases, a summary exhibit is offered by its proponent through the testimony of a sponsoring witness. This witness may have prepared the summary exhibit himself or, at the very least, would have a macro-understanding of how the exhibit was derived from the underlying voluminous information. However, oftentimes the witness who testifies is someone other than the individual who performed the investigative work that led to the creation of the summary. If subjective decisionmaking is involved at the ground level, where the voluminous information is analyzed, these decisions are usually made by subordinates of the testifying witness who are not available for cross-examination by the defendant. While this is not fatal to the admission of summary exhibits insofar as the Federal Rules of Evidence are concerned, it raises serious constitutional concerns in light of *Crawford*, *Melendez-Diaz*, and *Bullcoming*.

The Court will undoubtedly have to address the issue of whether testimonial summary exhibits, especially those that are created after the preparer exercises significant judgment in order to get from the underlying voluminous information to the summaries, are statements against a defendant that require the defendant to have the opportunity to cross-examine the individual who prepared them. *Williams v. Illinois* has muddied the Court’s Confrontation Clause jurisprudence, specifically with respect to the intersection of the Sixth Amendment and rules of evidence. The decision also offers few hints as to how the Court would decide a case involving a testimonial summary exhibit admitted for the truth of its contents. Regardless, however, summaries are independent statements that exist apart from the underlying data, they are usually made with an eye toward litigation, they are offered as substantive evidence if admitted under Federal Rule of Evidence 1006, and they are often created after a potential defendant has been targeted. Therefore, the dangers the Confrontation Clause was designed to prevent apply in full force. For these reasons, if and when faced with an appropriate case, the Court should hold that the individual who made the decisions embodied in the summary exhibit should

³²⁴ *Id.*

be made available for cross-examination in order to afford the defendant his Sixth Amendment right to confront the witnesses against him.

