2011

Williams v. Illinois and the Confrontation Clause: Does Testimony by a Surrogate Witness Violate the Confrontation Clause?

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Georgetown Public Law and Legal Theory Research Paper No. 12-007

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Williams v. Illinois and the Confrontation Clause: Does Testimony by a Surrogate Witness Violate the Confrontation Clause?

December 6, 2011
Originally published by PublicSquare.net

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Editor’s Note: This debate is on Williams v. Illinois, a Supreme Court case that involves the Confrontation Clause, which entitles a criminal defendant to confront an accusing witness in court. The issue at hand is whether said clause is infringed when a report not introduced into evidence at trial is used by an expert to testify about the results of testing that has been conducted by a non-testifying third party.
Part 1

Dexter’s Dilemma: Rule 703 Does Not Violate the Confrontation Clause

Ronald J. Coleman

Imagine that Dexter Morgan, of the hit Showtime series *Dexter*, was called to testify at a criminal trial. Assume that Dexter is a qualified DNA expert and will testify based on his independent DNA analysis, but he wishes to also tell the jury that his opinion is supported not only by his experience, qualifications, and knowledge but also in part on the DNA lab report compiled by an outside lab (in which Dexter had played no role). If the analyst who prepared the report for the outside lab does not appear to testify at trial, would it violate the constitutional rights of the defendant in the case if Dexter is permitted to nevertheless disclose the result of the DNA report?

The answer to this question begins with the right of an accused to confront an adverse witness. The right to confront an accusatory witness has a lengthy common law history and is ensured by the Sixth Amendment’s Confrontation Clause: “In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him[.]” Although the Confrontation Clause grants the defendant a clear right to confront, much less clear is the exact scope and contours of that right. In recent years, the Supreme Court has had occasion to discuss the applications of the Confrontation Clause to forensic report cases. One issue that the Court will soon need to consider, in the case of *Williams v. Illinois*, is the extent to which a criminal defendant’s Confrontation Clause rights are violated where a court allows an expert witness (like Dexter) to testify regarding the results of forensic testing conducted by a separate analyst who did not appear to testify at trial. In the following debate, I will argue that the criminal defendant’s Confrontation Clause rights are not violated by allowance of such a disclosure.

Confrontation Clause Background

In order to better determine whether Dexter’s disclosure violates the criminal defendant’s rights, a very brief discussion of modern Confrontation Clause jurisprudence is helpful.

In determining whether the protections of the Confrontation Clause apply in a given case, the current Supreme Court (after *Crawford* and its progeny) appears to favor a form of statement analysis. Thus, the Supreme Court’s view appears to be that in a given case, a lower court should determine whether the statement itself is made for the primary purposes of providing the equivalent of in-court testimony (in short, is the statement itself “testimonial”). If the court determines that a given statement is “testimonial,” then the protections of the Confrontation Clause will attach to it (and admission of the statement would normally require the person

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making the statement to be present at trial for cross-examination, absent certain discrete circumstances). Under the Court’s form of statement analysis, the protections of the Confrontation Clause would apply to a statement made by any category of individual so long as the statement itself is deemed testimonial.

Some have argued for an alternative Confrontation Clause paradigm predicated upon the type of witness making the statement (rather than the form of the statement itself). One who favors a type-of-witness analysis might argue that the proper role of the Confrontation Clause is to permit the criminal defendant to confront a traditional accusatory witness (for instance, one who states that she saw defendant cross the street and go into the shop with a gun or that she noticed blood on the defendant’s clothes). A type of witness analysis would also permit a court to determine that scientific analysts were not the type of witnesses with which the Confrontation Clause is concerned because the reports they prepare are purportedly neutral (so the statements are not being made “against” the criminal defendant). If the Court had adopted a type of witness analysis, then Dexter would certainly have no trouble disclosing the results of the report (and in fact the report itself could even be admitted into evidence). However, the Court’s consistent majority position, especially after Melendez-Diaz, Michigan v. Bryant and Bullcoming, appears to be that the form-of-statement analysis governs and that scientific analysts are not exempt from the Confrontation Clause.

Thus, a somewhat crude statement of the present state of Confrontation Clause jurisprudence in forensic cases might be that in order to introduce a forensic report in a criminal case, the prosecution will normally need to produce the preparing analyst in order to support introduction of the forensic report (absent, of course, unavailability and a prior opportunity to cross-examine).

The Current Debate Background

The prosecution in Dexter’s case, however, is not attempting to introduce the report itself into evidence. Instead, Dexter is merely attempting to orally disclose the results of the report in an effort to support his opinion in the case. Unlike a “lay witness,” an expert witness like Dexter is generally entitled to offer an opinion on matters of which the expert may not have personal knowledge. The idea is that the expert’s testimony will help aid the jury or judge in understanding complex issues. With the guidance of the expert, the jury will be better placed to exercise its own independent judgment in determining guilt or innocence.

In order for the jury to evaluate the credibility of the expert’s testimony, the jury (or judge) must understand the reasons why the expert has come to a certain opinion as to the case. In that connection, Rule 703 of the Federal Rules of Evidence (and similar state rules) permits an expert to disclose the underlying data and information that form the basis of her expert opinion (even where such underlying information itself is inadmissible) if certain criteria are met and if the disclosure’s probative value (in helping to explain the basis for the opinion of the expert) substantially outweighs the prejudicial effect of the disclosure (that is, the jury’s tendency to rely on the underlying data for its “truth”).

It is in the context of this Rule 703 disclosure of underlying data (which Dexter was attempting to employ) that the issue of the present debate arises. As discussed above, the Court has previously found that forensic reports prepared by purportedly neutral analysts are testimonial statements and that in order to introduce those statements the prosecution must comply with the safeguards of the Confrontation Clause (which normally requires presenting the preparing analyst for in-court cross-examination). This means that if the preparing analyst does not appear to support the report, the court violates the rights of the criminal defendant under the Confrontation Clause if the court admits the report and it is used against the criminal defendant. At the same time, pursuant to Rule 703 and similar state rules, a separate independently qualified expert may appear at trial and testify as to her independent opinion and then in certain circumstances may also disclose the very same data through oral testimony that the Confrontation Clause would otherwise appear to prohibit. For the reasons discussed below, I do not believe that use of Rule 703, subject to some reasonable restrictions, violates a criminal defendant’s rights under the Confrontation Clause.

**Rule 703 and the Confrontation Clause**

If properly interpreted, Rule 703 disclosure is wholly consistent with the rights of criminal defendants under the Confrontation Clause (and Dexter could disclose the results of the report in his testimony).

The central purpose of the Confrontation Clause is to grant the criminal defendant a right to face and cross-examine her accuser. Rule 703 (or an analogous state rule) does not prevent the cross-examination of a sufficient witness. First, the accusatory statement should be viewed as being made by the testifying expert rather than by the disclosed report (or the analyst who prepared the report). Unlike in a case where the prosecution attempts to admit the actual report itself (which the Court has found violates the Confrontation Clause), in a Rule 703 disclosure case the actual report is never admitted and the disclosed information should not be used for its truth. Instead, what is admitted is the opinion of the expert and the underlying data that helps to explain why the expert holds the independent opinion that she holds. Thus, the proper witness to confront in a Rule 703 disclosure case is the testifying expert, not the preparing analyst of the disclosed report. Second, even if one is concerned that the underlying data could persuade the jury as to truth, the expert is available for cross-examination as to the common problems associated with DNA and other forensic tests. In fact, the expert should be sufficiently qualified with regard to the specific tests, machines, and procedures involved in the case and thus would be in an excellent position to answer questions regarding the accuracy of such tests and machines on cross-examination. The right to confront is procedural (and does not necessarily ensure that the evidence presented is credible). The testifying expert can sufficiently afford the defendant her procedural right.

Further, the residual concern regarding inappropriate uses of the disclosed underlying data by the jury may be alleviated with a properly crafted jury instruction. The court could (and should) make explicitly clear the reasons for allowing disclosure of the underlying data, the permissible uses of such data, and the uses for which the jury should not use the data. Although there is certainly a concern that jury instructions may not be wholly effective, jury instructions are pervasively used in the laws of evidence and, in any event, an evaluation of the efficacy of jury instructions is best left for a separate debate.
Finally, Rule 703 disclosure strikes a proper balance between the rights of the criminal accused and the modern reality of law enforcement technology. Although law enforcement policy concerns should not trump the clear Confrontation Clause rights of a criminal defendant, law enforcement concerns are far from irrelevant (especially where the scope of the right is so unclear). In modern forensic tests (such as DNA), multiple individuals are involved in the analyses and tests, and labs are relied upon to facilitate tests for numerous cases. Although after *Bullcoming* the prosecution may not enter the report of DNA analysis itself into evidence (absent compliance with the Confrontation Clause), it would prove perhaps an even greater burden upon criminal prosecutions (and the victims of criminal conduct) if an expert could not even support her independent opinion with the facts and data from forensic reports (unless the prosecution could locate an analyst to support each report upon which the expert bases her opinion in part). Who could be available to conduct the required DNA and forensic tests while the preparing analysts are appearing in court? What if the testimony stretched over multiple days? What if the expert relies, in part, on each of fifteen external reports? The effects on law enforcement policy would be substantial and should not be wholly ignored.

**Rights Are Not Violated**

For the reasons above, the criminal defendant’s Confrontation Clause rights are not violated where a court allows an expert witness to testify regarding the results of forensic testing conducted by a separate analyst who did not appear to testify at trial. Dexter should be allowed to disclose.

*Note: The opinions expressed in this article are solely the personal views of the author and constitute neither legal advice nor the opinions of Cleary Gottlieb.*
Part 2

Surrogate Witnesses Just Won’t Cut It: A Response to Ronald Coleman

Paul Rothstein

The hypothetical case based on the popular TV series *Dexter*, presented by Ronald Coleman, is essentially the case of *Williams v. Illinois*, which will be heard by the Supreme Court on December 6 and decided by the end of June. Coleman argues for one resolution of that case, I another (irrespective of what the Supreme Court will actually do). I have great respect for Coleman. His arguments are presented, reasoned, and documented extremely well, and they may well carry the day in the Supreme Court. But I believe, nevertheless, that he is wrong on this occasion.

Coleman’s Argument at Bottom

Coleman’s argument boils down to this: A particular witness should be able to testify in court that another person told him something highly incriminating about the criminal defendant on trial. That other person, Coleman argues, should not have to come forward and take the witness stand and be cross-examined under oath and penalty for perjury.

This kind of second-hand incriminating of a defendant has been anathema to the Anglo-American legal system ever since the sixteenth century, when England realized that an injustice had been done to Sir Walter Raleigh. He had been convicted and executed for treason on just such second-hand testimony—the report of what a person had said about him out of court. That person later recanted, saying that if called to the witness stand, he would have told the truth. But it was too late.

English law was changed as a result to ban such second-hand evidence. And America included in its Constitution a clause providing that a criminally accused person shall have the right “to be confronted [in open court] with the witnesses against him” so that the witness can be cross-examined, so that his demeanor can be scrutinized by the jury, so that he is under oath, so that a penalty attaches if he perjures himself, and so that he has to look the accused the eye. In addition to exposing his biases and exposing or preventing conscious fabrication, this procedure reveals and makes less likely errors and mistakes of the witness. If we allow a testifying witness to report what another person said, as Coleman wants, that other person is escaping this courtroom confrontation. He is essentially an absent, invisible witness whose words are incriminating the defendant, untested by courtroom safeguards.

Coleman Tries to Limit His Argument to Forensic Scientists/Analysts

Coleman limits his argument to the situation where the absent invisible witness is a *forensic scientist* who had told the courtroom witness the incriminating information by means of a *written report*, and the courtroom witness is himself an “expert”.

But should this make any difference? Is it really any different than a witness in a murder case testifying that someone told him that he saw the defendant throwing a gun into a lake or burying a body or that he saw the defendant at the scene of the murder moments before the murder? Surely that would not be allowed. In either case, it is a witness testifying to a terribly incriminating fact that someone else told him.

Why should a forensic scientist be treated any differently? In fact, the situation argued for by Coleman is worse. Both the witness on the stand and the person he says told him the incriminating information (the “forensic scientist”) work for the prosecutor and police and derive a major part of their income from them. In other words, they have a real bias.

Coleman suggests that what a forensic scientist says is more trustworthy because he is a professional and is reporting merely objective science.

Is Forensic Science “Objective”?  

But science is not so objective. “Scientific” tests frequently involve judgment in resolving ambiguities. Not only are such tests subject to biases; they are peculiarly prone to genuine errors even when competently and honestly done. They can be extremely skewed by even a tiny lack of competence. They depend very much not only on often subjective interpretations of the test data but also on the care with which the samples were handled, kept uncontaminated, and segregated; on precise calibration of the equipment; on scrupulous compliance with detailed protocols; etc. And the results can be consciously or subconsciously influenced by what the police or prosecutor wants to hear. The National Academy of Sciences recently found that some of the most frequently used forensic techniques are not nearly as objective and reliable as is commonly believed. The academy pointed out multiple sources of inaccuracy. Moreover, of 250 false

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1 “Administrative errors are far more common in a busy lab than anyone would understand who has not been in a busy lab [as I have, repeatedly]. Leaving aside obvious sample-contamination issues, NOBODY runs a single sample through a mass spectrometer that is designed to automate a run of 25 or 30 different samples—it’s too expensive, too time consuming, and puts too much wear on the machines. In turn, that means that (a) the machine needs to be accurately matching sample input with output, (b) the samples need to be properly identified before going into the machine, (c) the test results need to be properly matched with the samples used to create them, (d) the samples need to be properly handled and identified before getting into the laboratory, and (e) the test results need to be properly identified on their way out of the laboratory. All of these problems are relevant to the particular laboratory technician who runs a test. Last, and far from least, there’s lab technique. One does not throw that sample scraped from under a victim’s fingernails into a machine and magically get The Answer. There’s a lot of human preprocessing that has to be done, especially—but not only—if one is dealing with a mixture… which is the natural state of things in the real world (as opposed to on TV). Here is where examining the lab technician is most valuable to both the prosecutor (whose job, after all, is to do justice—not obtain a conviction, not get reelected or promoted) and the defense. Returning to that sample scraped from under a victim’s fingernails for a moment, that sample would need different treatment before throwing it into a multimillion-dollar gas chromatography machine if the victim had been found floating in a back-yard chlorinated pool, pulled out of a saltwater harbor, or walked into an emergency room. Unless one ensures that the sample was treated properly, the “science” doesn’t mean a whole lot. (Then there’s the issue of what that kind of sample treatment will do to anything testing for concentrations, and whether environmental factors brought in similar substances… but that’s for another time.) In summary, science is in the results; getting the results is messy; and examining the getting of the results will often—perhaps too often—raise reasonable doubt.” C.E. Petit, ABA Journal Law News Now, On-Line Posting #11, Dec. 1, 2011, following the article “The Latest Test on the Confrontation Clause.”

convictions as proven by subsequent DNA analysis, approximately 50 percent of them involved faulty forensic evidence. Every several months we read in the newspaper about some unscrupulous “forensic scientist” hell-bent on providing false information to please the prosecution and obtain a conviction. Now is not the time to loosen safeguards involving forensic evidence.

Thus, cross-examination of the analyst could reveal a lot. It should not be dispensed with. Cross-examining the person who takes the stand (whom we may designate a “surrogate” expert) to report what the analyst—but not the analyst himself—found will not do the same job. That person is unlikely to have all the facts pertinent to inaccuracy or fabrication. If the law dispenses with calling the analyst to the stand and says there can be a substitute expert witness like Coleman wants, a class of slick professional testifying surrogate “experts” will arise to report the findings of the analyst. They will be adroit at parrying the thrusts of cross-examination.

But Would It Be Good Enough to Have a Well-Qualified Surrogate Witness?

Coleman suggests that we can safeguard against all this by insisting on requirements that the testifying expert who testifies to what the analyst reported be a well-qualified expert familiar with the general scientific technique employed, though not necessarily with the particular test performed in this case. He suggests that this would provide an adequate basis for evaluating the quality and veracity of the other analysts’ work.

But the testifying expert is too far removed from the actual test performed. We would not allow cross-examination of one who overheard someone’s story of seeing the accused dump a gun in the lake to substitute for cross examination of the person originally telling the story. Such cross-examination would be insufficient in many important respects.

Does the Confrontation Clause Allow for Different Regimes for Different Kinds of Witnesses?

The literal language of the constitutional Confrontation Clause makes no distinction between types of witnesses who must be presented for court confrontation, such as the distinction suggested by Coleman between forensic analysts who do not need to be cross-examined and “ordinary” witnesses, who do. Indeed, there is no coherent basis upon which such a distinction could be made. The Supreme Court says that if information provided by the person is testimonial in nature, the person must be presented at trial. In the case under discussion, the statement of the out-of-court forensic scientist that the blood found at the scene has certain features (that match defendant’s blood) is surely testimonial in nature, just as it would be if a witness said of a watch

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found at the scene that it had defendant’s initials on it. It is even more incriminating than the initials and more in need of cross-examination.

**Is the Only Witness for Purposes of the Confrontation Clause the Witness Who Actually Testifies?**

Coleman suggests that we should look at the situation under discussion as one in which the only real witness testifying is the testifying expert and that as to her we do have confrontation and cross-examination—she is here in court and her veracity and care can be thoroughly explored. He suggests that the non-testifying analyst, whose report the testifying expert is including in her testimony, is not really the evidence. He says that, since the analyst’s report itself is not being introduced in evidence, it is only the basis upon which the testifying expert bases her testimony that the blood matches the defendant’s. Thus, the only witness who needs cross examining is the testifying expert. As she is being cross examined, there is no Confrontation Clause violation.

This seems to me to be mere sophistry. The lynchpin of the testifying expert’s testimony—indeed of the whole trial—is the accuracy of the report by the non-testifying expert that the DNA on the victim has such-and-such features (which turn out to be the same features as defendant’s). If that is false, the whole case fails. The non-testifying expert has provided critical, incriminatory, testimonial information about which he could be lying, mistaken, or worse. Shouldn’t he be cross-examined? In effect, it is the same thing as if the report of the non-testifying expert is introduced into evidence, which Coleman concedes would require cross examination of the analyst who wrote the report. What difference does it make how the jury is apprised of what the report said—by the introduction of the report itself or by the testifying expert telling the jury what the report said? In either case, it is the finding of the non-testifying expert that speaks loudly and clearly to the jury. The purported distinction is a distinction without a difference. It should make no difference to the need for cross-examination of the non-testifying expert that the testifying expert says, “I looked at his work, and I found it to be sound and competently done, and I am therefore using it to base my conclusion on as well.” While this adds something, it certainly does not add enough to obviate the need to cross-examine the lynchpin, especially since the motivations of both experts are not above questioning.

**The Rule 703 Principle**

Coleman adds, to the last argument, that a well-recognized principle of evidence (Rule 703 of the Federal Rules of Evidence and state and common-law analogues thereof) permits an expert to incorporate, as part of her opinion testimony, reliance on what other non-testifying experts have found, if that is reasonable, and that, *if the judge finds that it is not too prejudicial*, the findings

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5 In the cases cited, the Supreme Court said that to be “testimonial” a statement has to have the purpose of use in a criminal investigation or trial. In the case we are discussing, obviously that is the sole purpose of both the non-testifying lab analyst and the law enforcement personnel to whom he reported.

6 In *Williams*, the case under discussion, the testifying expert testified that the DNA found on the victim was defendant’s. She testified that she did the DNA test on defendant and that an expert in an independent private lab (i.e., the non-testifying analyst) did the test on the DNA found on the victim. The testifying expert compared these two DNA profiles and concluded that they matched.

of the other experts can be told to the jury as part of the basis of the testifying expert’s testimony. But the jury will then be instructed by the judge that it may consider the non-testifying experts’ findings only as they help the jury to evaluate the testifying expert’s opinion and cannot be considered as being true. Coleman relies heavily on this last point—that because the jury will not be taking the non-testifying expert’s findings as true (here, that the DNA on the victim had certain features, that were then matched up with defendant’s), the veracity and accuracy of the non-testifying expert need not be tested by confrontation and cross-examination.

But isn’t it a fiction that the jury can make any sense out of such an instruction in this kind of case? It is clear to them that (and the prosecution intends that) the case hinges on whether the jury believes that the DNA on the victim had such-and-such features as found by the non-testifying expert as related in the testifying expert’s testimony. The prosecution’s whole chain of argument of guilt depends on this being true and accurate. The testifying expert’s opinion comes to nothing if this lynchpin is not true. It is exactly as if the report of the non-testifying expert itself were introduced into evidence, in which case Coleman concedes that controlling precedent requires that the writer of the report be in court for cross-examination.8

I am not condemning the principle of Rule 703. Its principle may be more acceptable in civil cases, for which it was primarily designed, or cases where on the facts the distinction between the jury using the out-of-court material for its truth and for evaluating the testifying expert’s opinion may be wider and more tenable. Further, it is not entirely clear that the Rule 703 principle would be applicable in this case to permit what Coleman wants. The rule gives the judge power to disallow recounting of the basis if it is too prejudicial (as I am arguing here). Any constitutional provisions like the Confrontation Clause trump rules of evidence.

**Burdens on Law Enforcement**

Coleman points to the “burden” on law enforcement if the analyst(s) doing the testiing and report had to come to the stand rather than a testifying “surrogate” expert in place of the analyst.

I would point out that a testifying surrogate expert will also cost money, and his courtroom duties will similarly divert him from lab duties. Eventually, perhaps, a group of testifying experts who specialize in parrying cross-examination will emerge, far divorced from real lab work. This would be an undesirable result.

When the Supreme Court held that indigents had a right to counsel at state expense,9 the states complained vehemently that the expense and burden of providing counsel would be ruinous. The Supreme Court, however, was of the view that important constitutional rights cannot be compromised by consideration of expense and inconvenience to government. And the predictions of ruination by the burden did not come to pass.

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8 *Melendez-Diaz* and *Bullcoming*, cited supra.
Several things mitigate the burden on law enforcement.10

One burden mentioned by Coleman is that the original analyst might be long gone or dead by the time of trial, and a requirement that he appear would mean that the prosecution must be dropped. A solution might be for law enforcement to preserve samples so they could be tested again by a new analyst who could testify. In some cases this may not be feasible. One example would be autopsies. But in many other cases it would be feasible. Perhaps a rule requiring that the analyst testify could have an exception if the analyst is genuinely unavailable and preservation of samples was not possible.

Some states do require the analyst to testify, and the burden has not been ruinous.

The vast majority of criminal cases are settled with plea bargains, so the occasion for supplying analysts to testify would not be as great as is pretended. While requiring analysts to testify instead of surrogate witnesses may change somewhat the balance of power in plea bargaining, it is not expected that the effect would be too significant.

States could enact notice and demand statutes, which the Supreme Court seems to have approved.11 Several states have them, and several more are considering adopting them. Under this and similar procedures, a defendant must request that the analyst appear, or his right to such appearance is waived. It could be required that defendant file this request considerably in advance of trial, giving the state time to plan and assign workloads allowing for the fact the particular analysts must appear.

Defendants can waive their rights, either by not giving the notice and demand under such a statute, or, if there is no statute, by an affirmative waiver. Waiver would reduce the occasions on which the state must supply an analyst for testimony. Why would a defendant waive? Because judges, particularly in sentencing, go harder on defendants who seem “un-co-operative.”12 While this is regrettable, it is so. Thus, defendants will waive if there would be no genuine grounds for challenging the analyst. Nothing would aggravate judges more than a request that the analyst

10 Justices Ginsburg and Scalia in Bullcoming, supra, downplayed to burdens on law enforcement of requiring testimony by the analyst preparing the report.
11 Melendez-Diaz, supra.
12 “There are many incentives pushing both lawyers and defendants toward plea bargains. An important one is that most defendants are guilty and know it. Especially if they are repeat players in the criminal justice system, they won’t take the chance of the analyst showing up; they’ll take the plea on a somewhat reduced charge. The innocent defendants are the ones most likely to insist on trial—and that’s exactly when we’d want the analyst to be in court. A second constraint is what many defense lawyers call the ‘trial penalty.’ Judges set most sentences, for both pleas and trial convictions. A judge will penalize a defendant who rejects a sensible plea and insists on going to trial. I.e., even if the plea deal is for the charged crime, the sentence will be lighter pursuant to plea (partly because of the prosecutor’s recommendation and partly because the judge will reward the pleading defendant) than after trial. The third constraint is that attorneys necessarily charge defendants higher fees to go to trial than to settle a case by plea. Contingent fees are unethical in criminal defense practice, so attorneys have to charge by the hour or by the stage of the case (i.e., so much for a plea, so much if we go to trial, so much if you want an appeal after trial….) Defendants won’t want to pay a whole lot more for a trial that will likely result in conviction and irritate the judge to boot. And even among public defenders, who aren’t paid by the defendants, there will be strong pressures to continue pleading cases. The defendants struggle to represent the current case load; they couldn’t possibly handle the type of go-to-trial posturing that’s a worst case scenario here.” Deborah Merritt, ABA Journal Law News Now, On-Line Posting #16, following the article “The Latest Test on the Confrontation Clause,” Dec. 1, 2011.
appear and then nothing helpful to the defendant emerges when he does appear. Or worse, all kinds of new bad stuff against the defendant emerges. Sometimes it can be worse for the defendant to insist on an appearance by a witness when the witness is articulate. Sometimes the cold report is better for the defendant.
In Part 2 of this debate, Professor Paul Rothstein presents a multitude of serious and justifiable concerns (both constitutional and policy-based) with finding that the disclosure of underlying data by a testifying expert does not violate the Confrontation Clause rights of a criminal defendant. I also have a great deal of respect for Rothstein, but my good faith interpretation of the issues involved is somewhat different from his.

My response to his concerns comes in four parts. First, in my view the only relevant “witness” for the Confrontation Clause analysis is the testifying expert. Second, I believe that the testifying expert is a sufficient witness to be cross-examined as to the matters with which Rothstein is concerned. Third, it may be that the laws of evidence occasionally draw fine lines, and it may be that juries have trouble following the rules prescribed for them, but juries and fine lines appear to be the basis of our legal system. Finally, although judicial efficiency and law enforcement policy concerns should not trump clear constitutional rights, law enforcement policy may be relevant where the scope of the granted right is unclear. Requiring the appearance of any analyst who prepares any data that forms even a small part of an expert’s testimony will pose too great a threat to law enforcement.

The Only Relevant “Witness” Is the Testifying Expert

Rothstein is concerned by my suggestion that in cases such as Williams, the only witness of relevance to the Confrontation Clause analysis is the testifying expert herself. Rothstein argues that the information that forms the basis of the expert’s opinion should be considered a testimonial statement for Confrontation Clause purposes because it will speak loudly to the jury. I respectfully disagree.

To begin, consider a simple hypothetical situation (based on Williams) in which there is a relatively small amount of external information that forms the basis of the testifying expert’s opinion. The testifying expert has conducted DNA analysis on a criminal defendant. A non-testifying analyst in a different lab has conducted DNA analysis on the victim. The testifying expert then uses her experience and judgment, views the results of both analyses, decides that there is a DNA match, and testifies to that match in court. In this hypothetical, the only relevant witness is the testifying expert, because she is the one who presents her opinion to the court. The external analyst’s report is never entered into evidence and should be considered irrelevant to the analysis (so long as the results are disclosed only for credibility purposes). If the prosecution wanted to introduce the report itself, then the external analyst may become a Confrontation Clause witness. However, an expert should be able to discuss the basis of her opinion (including why her opinion is credible) without transforming that basis into the testimonial statements of a second person. Alternatively, if the expert merely attempted to parrot the results of an external report, without any substantial independent analysis, then I might agree with Rothstein that introducing the results through a mere conduit witness may violate the Confrontation Clause. But
that is not the case here. As long as the expert is using her independent judgment, then it is the expert who delivers the lynchpin in the case, not the person who prepared some of the data upon which the lynchpin testimony is based.

Also consider that the finding of the Supreme Court on this issue will not be limited to situations where only one (or a few) external reports are involved. If we accept Rothstein’s idea that all compilers of data that form the basis of an expert’s opinion are actually Confrontation Clause witnesses, then some lengthy trials will result. Consider a more extreme scenario than Williams in which the testifying expert offers her opinion and bases her independent judgment (primarily) but also in part on twenty external forensic reports that were conducted by outside labs. Would Rothstein really require the prosecution to produce the preparing analyst for each and every small piece of data upon which the expert’s testimony rests in part? Would it really aid the interests of justice to have the court’s time wasted in such a manner? Rothstein is concerned that the jury will have difficulty differentiating between the issues that it should be considering and those that it should not be considering. One thing that would concern me is that if the jury were made to sit through such lengthy and potentially excruciating testimony, the jury might become confused or bored and would not be focusing on the important issues in the case.

The Testifying Expert Is a Sufficient Confrontation Clause Witness

Rothstein is concerned with the fact that forensic science is not always objective and that a testifying expert who relies in part on the forensic analysis of another cannot afford the criminal defendant a sufficient means of cross-examination. Again, I must respectfully disagree.

Rothstein is wholly correct to argue that mistakes occur in the scientific context in the same way as they occur in other contexts. Although science attempts to be as objective as possible, individuals are careless, machines are not calibrated properly, or other human error occurs. This does not necessarily mean, however, that the defendant needs the non-testifying analyst in court to make this point. As discussed in my first article, the testifying expert may be cross-examined on a multitude of issues: the number of false convictions based on DNA evidence, the fact that analysts may occasionally be less careful, the fact that certain tests require human analysis and are subject to human error, the fact that certain tests rely on the calibration of machines and the competence to use them, and the fact that even a perfect analysis does not ensure a perfect result. If the testifying expert were not qualified with regard to the specific machines, procedures, and general testing conditions involved in the case, then I might be persuaded by Rothstein’s argument that the testifying expert is insufficient. It may well be that there would be some marginal benefit to cross-examining all analysts who prepared anything that formed the basis of an expert’s opinion, but that does not mean that failing to produce such people should be deemed a constitutional violation.

Moreover, although the Supreme Court may not find it relevant to the constitutional analysis, at least at a policy level it is noteworthy that the defense may still subpoena the external analyst who actually conducted the test. As Rothstein notes in his discussion of notice-and-demand statutes, there are very few cases in which a defendant actually believes that a mistake has been made. On the occasions where there is a serious concern with the accuracy of data, the defendant

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1 See generally Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011).
may subpoena the analyst. Although this may not alone satisfy the Constitution in all contexts, it certainly mitigates Rothstein’s concern as to the mistakes of forensics science.

**Juries and Fine Distinctions Are a Reality of Our Justice System**

Rothstein suggests that the distinction between admitting evidence for its truth as opposed to as the basis for ones opinion, and the introduction of a report into evidence as opposed to an expert giving his opinion predicated in part upon the results of that report, will not be meaningful because a jury will be unable to understand and comply with such rules. While Rothstein may in fact be correct about this, such a concern appears to be better directed at the system of jury trial generally rather than at the permissible scope of the Confrontation Clause specifically.

There is certainly a valid concern that a jury will not understand the finer rules of evidence. Our system uses different rules in the laws of evidence predicated upon things that the jury may not always fully understand. We expect the jury to be able to use different forms of evidence (oral testimony in court, documentary evidence, admitted hearsay, etc.) and we expect the jury to understand when it may consider information for truth and when it should only consider evidence for another purpose, such as showing bias. It is probably true that jury members often fail to properly make these fine distinctions. In fact, there is a quite large and growing body literature to suggest that humans make mistakes, act on the basis of biases, and may not always be able to properly understand and employ empirical and other information. However, the moment we accept that juries are unable to make meaningful distinctions between the types of evidence that they should be considering and the types of information that they should ignore, we would probably have to seriously reconsider a system based on jury trial. The potential of a juror to convict on the basis of the results of a report that is not admitted is much less concerning to me than the potential for a juror to vote to convict because the defendant looks like an ex-girlfriend. As long as we have a system that draws fine distinctions and relies on the discretion, independence, and intelligence of the jury, we should not reinterpret the Constitution to reduce the likelihood for the jury to make a mistaken use of evidence in this one discrete area.

Finally, although I do not believe that allowing Rule 703 disclosures is in fact bad policy, I would certainly be willing to entertain an argument on policy grounds about why the jury should not get to hear such evidence. If Rule 703 disclosures will seriously bias or confuse the jury (and the balancing test in Rule 703 is itself insufficient to eradicate such concerns), then perhaps Rule 703 should be amended. But bad policy alone does not make a constitutional violation.

**Law Enforcement Revisited**

Rothstein argues that, as was the case with the right to counsel, law enforcement efficiency and public resources concerns should not override the rights of a criminal defendant. As I mentioned in Part 1, if I was convinced that Confrontation Clause rights attached to the disclosure of underlying data, then I would agree that the clear constitutional rights of a defendant must not be infringed. However, because I do not believe that the Confrontation Clause was intended to (nor

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should be read to) apply to such disclosures, the law enforcement burden is properly considered. There are a few additional points on this issue that I wish to make.

To begin, consider a hypothetical situation similar to Williams but with several facts changed. Analyst 1 (the testifying analyst) conducts DNA analysis on a defendant who has allegedly killed a victim. Analyst 2 conducts analysis on the victim’s DNA. By the time of trial, Analyst 2 has also died, the victim has been cremated, and the lab no longer has the sample. If Analyst 1 could not disclose the fact that he based his opinion as to the match, in part, on the results of Analyst 2’s report (and we assume that such inability to disclose will seriously injure the prosecution’s case), then the Confrontation Clause would be acting as an unanticipated form of statute of limitations on murder.³

Moreover, while Rothstein is correct that the public will need to bear the cost of the actual testifying expert, he must agree that the cost of producing the expert and the potentially twenty other analysts who produced information that formed the basis of the analyst’s opinion would cost the public substantially more. I am also less persuaded than Rothstein that a criminal defendant would choose to waive his right to cross-examine a potential witness (under a notice-and-demand regime) simply to remain in the judge’s good graces. I could certainly imagine that a criminal defendant may wish to demand that all the analysts appear in an effort to confuse the jury or make the jury so tired of hearing scientific testimony that the jury chooses instead to ignore the boring scientific information wholesale.

Notwithstanding the very important concerns highlighted by Rothstein, I am still convinced that the Confrontation Clause is not violated in the present context.

Note: The opinions expressed in this debate are solely the personal views of the author and constitute neither legal advice nor the opinions of Cleary Gottlieb.

Part 4

*Williams v. Illinois*: Responses to Coleman’s Arguments

Paul Rothstein

I will address Coleman’s points set forth in Part 3, in sequence, using his headings.

The Only Relevant “Witness” Is the Testifying Expert

His first point under this is that the analyst who did the test, drew the conclusions, and prepared the report that is fed to the testifying witness does not need to be cross-examined, because the testifying expert is applying her own expertise to what the analyst has supplied her and she can be cross-examined. I fail to see how that obviates the fact that there might be errors or purposeful deception in the analyst’s work that would render erroneous not only the analyst’s work but also the testifying expert’s opinion based thereon. It is true that the testifying expert may be able to spot some of the shoddy or dishonest things in the analyst’s work. But a quick re-read of my list in Part 2, of the kinds of inaccuracies that may infect the analyst’s work, will reveal that it is unlikely that the testifying expert will be able to answer questions about most of them. The most frequent answer, if the testifying witness is honest, will be “I don’t know.”

Coleman’s second point under this heading is that my position would be impracticable in a case involving multiple underlying analysts. He says the logic of my position is that every analyst who participated in any way in the chain of events that led to the report that is relied on by the testifying expert, needs to be produced for cross-examination in court.

This is Coleman’s strongest point, and it may well be the one that, expressly or *sub silentio*, inclines the Supreme Court to rule in his favor. (As I made clear in Part 2 above, I am not sanguine that my position will carry the day in the current Supreme Court.)

But I think his point here has an answer. There will be some analysts in the chain whom I feel would not need to be cross-examined. Some “analysts” perform only ministerial steps. For example, they may be mere conduits for getting materials to a device. Or mere scriveners who read and record machine-generated results. There will be other such minor participants. These do not present as substantial credibility issues as the analysts whom I argue should be cross-examined.

The Testifying Expert Is a Sufficient Confrontation Clause Witness

Here Coleman argues that the testifying expert is a sufficient witness to cross examine, because the testifying expert may be cross-examined on a multitude of issues: the number of false convictions based on DNA evidence, the fact that analysts may occasionally be less careful, the fact that certain tests require human analysis and are subject to human error, the fact that certain tests rely on the calibration of machines and the competence to use them, and the fact that even a perfect analysis does not ensure a perfect result.
But these all appear to a jury as theoretical “maybes.” Without showing what specific errors did occur, this kind of talk is just hypothetical and has no teeth. We would not be satisfied, for example, to allow a witness to testify that some person told him he saw defendant murder the victim, and then say that we do not have to cross-examine the purported eyewitness because it is enough to inform the jury of the possibility that people can lie or be mistaken.

Coleman’s final point under this heading is that we do not need to require the prosecution to produce the analyst, because if there is something wrong with his analysis, the defendant can call him to the witness stand. There are several replies to this:

- As Coleman recognizes, the Supreme Court has clearly said that this right (the right to “compulsory process” to produce witnesses for the defense) is not sufficient to obviate the right to have the prosecution present witnesses.

- Coleman would put the expense and difficulty of finding and producing the analyst, and the risk of the analyst being dead or unavailable, on the defendant rather than the state.

- The defendant is not likely to know whether there are specific errors in the analyst’s work that would justify the defendant expending his usually limited resources on finding and calling the analyst to the stand.

**Juries and Fine Distinctions Are a Reality of Our Justice System**

Coleman misconstrues my argument here, and perhaps it is my fault.

My argument here is not that the jury will find it difficult to follow an instruction not to consider the report for its truth (but to consider it only for its value in evaluating the testifying expert’s opinion). My argument is that both purposes are the same in a case like this. There is no difference between the two uses. The instruction is incoherent nonsense in the present case. Using the report to evaluate the testifying expert’s opinion that the blood samples are a match necessarily involves deciding whether the report is true. It is the report that says the DNA on the victim had the features that the defendant’s DNA turns out to have had. The testifying expert’s opinion that it is a match is utterly and completely dependent on the truth of the underlying report.

Even if the law of evidence has relied on the fiction that these two purposes can be kept separate, should a life and death constitutional right depend on such irrationality? The Supreme Court in *Crawford* took great pains to de-link the rules of evidence from the Confrontation Clause. At this point in the argument, Coleman expressly concedes that the jury may not be able to make the separation, but he says it is no worse than many other similar instances where the jury cannot understand their instructions—and that the proper remedy would be to reform the law of evidence. I fail to see how this supports further exacerbating the situation by introducing the flaw into constitutional jurisprudence. Just because there are other things just as bad does not mean that this is good.
Law Enforcement Revisited

Here Coleman first attacks my analogy to the right to counsel. I had said that law enforcement always predicts catastrophe when new rights are recognized and did so when an indigent criminal defendant’s right to counsel at state expense was first announced in the *Gideon* case. I further said that the catastrophe did not come to pass. I said that inconvenience and expense to law enforcement should not trump constitutional rights. Coleman agrees.

But Coleman says the distinction here is that the constitutional right is not clear and that, where there is lack of clarity, it is appropriate to consider expense and inconvenience to law enforcement. I am not sure why that should be so, but in any event, the right of indigents to be supplied counsel at state expense was not clear when *Gideon* was handed down.

Coleman next posits a case where the underlying DNA analyst has died by the time of trial and the state has not preserved the specimen for testing anew by a new analyst for purposes of trial. Coleman says that under my view, which requires cross-examination of the original analyst, there could be no trial, because he is dead. In effect, there would be an unwritten statute of limitations on the crime imposed by my requirement of cross-examination of the analyst.

My answer to this is that the state should have preserved the specimen for retesting by a new, live analyst who could be cross-examined. The impossibility of trial and the *de facto* statute of limitations in Coleman’s hypo is the fault of the state.

Finally, Coleman returns to the practical problem of the state having to call multiple analysts in a case where many may have been involved in the chain of analysis. I stated that there were disincentives in the trial process to a defendant always insisting on his rights in this regard and incentives to waive calling analysts—even if this burden on the prosecution were a proper consideration in constitutional analysis. Coleman disagrees that there are these incentives/disincentives to any appreciable degree. This is a disagreement over the realities of what goes on in criminal defense work. I doubt that we can resolve this disagreement between us.

Nevertheless, I think the Supreme Court in *Williams* may well go with Coleman on the issue under discussion in this debate because of the perceived infeasibility of calling multiple analysts in multiple-analyst cases. The Court may well allow a properly qualified expert surrogate witness to testify based on the underlying report and disclose to the jury what the report concluded without requiring the testimony of the underlying analyst(s). To do otherwise might get the Court into what it might think will be too difficult or result in too many Supreme Court appeals: that is, into either requiring all contributing analysts to testify or distinguishing between those who are necessary and those who are not. I think the Court will find permitting a surrogate witness to be the easiest answer. Hopefully they will impose some stringent requirements on the surrogate witness regarding her expertise, knowledge of the pertinent processes and apparati, and at least partial involvement in the particular process that led to her testimony.