tions about whether a sanction is predominantly punitive, the resolution of such a case would depend upon a simple determination by a court, with a healthy amount of deference to legislative purpose. So far, many of the courts that have decided whether a defendant is entitled to a jury during restitution or forfeiture proceedings have responded in the negative.[86] However, by extending *Apprendi* to a characteristically regulatory sanction imposed against an institutional defendant, *Southern Union* suggests that if the defendant is entitled to a jury for the underlying conviction, then he should be entitled to a jury on facts that determine all accompanying penalties. In *In re Winship*,[87] which canonized the reasonable-doubt standard, Justice Brennan asserted that that high barrier was interposed between a defendant and the state in order to protect him from loss of liberty and the stigma of conviction.[88] By opting for mathematical rigor and simplicity, *Southern Union* strays from the core concerns of criminal procedure articulated in *Winship*.

2. Confrontation Clause — Forensic Evidence. — In 2004, the Supreme Court gave the Sixth Amendment's Confrontation Clause new life, independent of the rules of evidence, in *Crawford v. Washington*.[1] *Crawford*'s interpretation of the Confrontation Clause bars admission of out-of-court testimonial statements unless the out-of-court witness is unavailable to testify and the defendant had a previous opportunity to cross-examine the witness.[2] In 2009, in *Melendez-Diaz v. Massachusetts*,[3] the Supreme Court held that forensic lab reports are testimonial statements subject to the Confrontation Clause. And more recently, in *Bullcoming v. New Mexico*,[4] the Court held that cross-examination of a surrogate witness — in lieu of cross-examination of the analyst who signed the lab report or conducted the forensic testing — is insufficient to satisfy the Confrontation Clause.

Last Term, in *Williams v. Illinois*,[5] the Supreme Court ruled that, in certain circumstances, the Confrontation Clause does not bar an expert witness from testifying on the basis of a forensic lab report prepared by another analyst, even when the defendant was never given

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pose punishment"), *with* Austin v. United States, 509 U.S. 602, 622 (1993) (holding that a civil forfeiture procedure was "punishment" within the context of the Excessive Fines Clause).

86 *E.g.*, United States v. Alamoudi, 452 F.3d 310, 315 (4th Cir. 2006) (refusing to extend the Sixth Amendment to forfeiture orders); Dohrmann v. United States, 442 F.3d 1279, 1281 (11th Cir. 2006) (refusing to extend the Sixth Amendment to restitution orders).

87 397 U.S. 358 (1970).

88 *Id.* at 363–64. *See also* sources cited *supra* note 64.

1 541 U.S. 36 (2004).

2 *See id.* at 68.

3 129 S. Ct. 2527 (2009).

4 131 S. Ct. 2705 (2011).

5 132 S. Ct. 2221 (2012).

an opportunity to cross-examine the analyst who prepared the report or conducted the forensic testing.[6] No opinion garnered the support of a majority of the Court. The lack of either a majority opinion or a clear holding, in addition to the internal flaws of the various opinions, deeply muddles Confrontation Clause doctrine, leaving the clause's application to forensic evidence in question.

On February 10, 2000, a twenty-two-year-old woman, L.J., was abducted and raped in Chicago.[7] Samples from a sexual assault kit containing vaginal swabs from L.J. were sent to Cellmark Diagnostic Laboratory on November 29, 2000.[8] Cellmark conducted DNA analysis and, on April 3, 2001, delivered a report (the Cellmark Report) containing the attacker's DNA profile to the Illinois State Police (ISP) lab.[9] Meanwhile, on August 3, 2000, Sandy Williams had been arrested for an unrelated crime; pursuant to a court order, the police then took a blood sample from Williams.[10] The ISP lab subsequently entered the DNA profile derived from Williams's blood sample into the Illinois state DNA database.[11] After receiving the Cellmark Report, ISP forensic biologist Sandra Lambatos conducted a search of the DNA database, revealing a match to Williams's DNA profile.[12] L.J. then identified Williams in a lineup, at which time the police arrested him.[13]

A bench trial began in April 2006, during which L.J. identified Williams as her assailant.[14] To introduce the forensic evidence, the prosecution called Lambatos to testify as an expert witness in forensic biology and DNA analysis.[15] She testified about the standard techniques used to derive DNA profiles and described how matches between two DNA profiles are made.[16] She also testified that Cellmark was an accredited lab to which the ISP routinely sent samples for DNA testing.[17] Based on shipping manifests admitted into evidence as business records, Lambatos testified that samples from L.J.'s vaginal swabs had been sent to Cellmark, which had then returned the associated DNA profile.[18] Lambatos further testified that her comparison of the DNA

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6 *See id.* at 2228 (plurality opinion).
7 *Id.* at 2229; People v. Williams, 939 N.E.2d 268, 270 (Ill. 2010).
8 *Williams*, 939 N.E.2d at 270.
9 *Id.* at 271.
10 *Id.* at 270.
11 *Id.* at 270–71.
12 *Williams*, 132 S. Ct. at 2229 (plurality opinion).
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.* at 2229–30.
17 *Id.* at 2230.
18 *Id.*

profile "from the vaginal swabs of [L.J.]"[19] with the DNA profile from Williams's blood resulted in a match and that the probability of such a match within the general population was no higher than 1 in 8.7 quadrillion.[20] The Cellmark Report itself was neither admitted into evidence nor quoted.[21] On cross-examination, Lambatos acknowledged that she had not conducted the forensic testing personally, nor was she familiar with Cellmark's specific procedures.[22] After Lambatos's testimony, the defense objected on confrontation grounds, seeking to exclude Lambatos's testimony "insofar as it implicated events at the Cellmark lab."[23] The judge ruled that Illinois Rule of Evidence 703 permits experts to disclose basis facts — facts that form the basis of the expert's opinion — even when the expert is not competent to testify to those facts; the judge characterized the issue as one of weight and not admissibility.[24] The judge ultimately convicted Williams.[25]

Williams appealed and the Illinois Appellate Court affirmed in relevant part.[26] Relying on the Supreme Court's statement in *Crawford* that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted,"[27] the court held that basis facts disclosed by an expert witness are disclosed only for the purpose of explaining the basis for the expert's opinion, and *not* for the truth of the matter asserted.[28]

The Supreme Court of Illinois affirmed in relevant part.[29] The court adopted the appellate court's reading of *Crawford*, emphasizing that expert witnesses' disclosure of basis facts and data is not hearsay at all because such evidence is not admitted for the truth of what it asserts.[30] The court also distinguished *Melendez-Diaz*, noting that the evidence in that case was a "bare-bones" certificate that only stated the results of the forensic tests and did not inform the defendant of what tests were performed or what the forensic analyst's judgment and skills were.[31] In contrast, in this case, Lambatos testified regarding

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[19] *Id.* (alteration in original) (quoting Joint Appendix at 56, *Williams*, 132 S. Ct. 2221 (No. 10-8505), 2011 WL 3873378, at *56).

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* at 2231.

[24] *Id.*

[25] *Id.*

[26] *See* People v. Williams, 895 N.E.2d 961, 971 (Ill. App. Ct. 2008).

[27] *Id.* at 969 (quoting Crawford v. Washington, 541 U.S. 36, 60 n.9 (2004)).

[28] *Id.* at 969–70.

[29] *See* People v. Williams, 939 N.E.2d 268, 282 (Ill. 2010).

[30] *Id.* at 278.

[31] *Id.* at 281 (quoting Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2537 (2009)) (internal quotation mark omitted).

her general familiarity with the forensic DNA tests performed and her expertise, judgment, and skill at forensic analysis.[32]

The Supreme Court affirmed.[33] Writing for a four-Justice plurality, Justice Alito[34] advanced two alternative arguments for the Court's holding. First, Justice Alito endorsed the Illinois courts' not-for-truth rationale.[35] In doing so, Justice Alito repeatedly emphasized that this case involved a bench trial and not a jury trial.[36] Relying on this fact, he responded to the dissent's argument that the factfinder might have mistakenly taken Lambatos's testimony as proof of what the Cellmark Report asserted: Justice Alito reasoned that the trial judge was unlikely to have been confused since under Illinois law "it is clear that the putatively offending phrase in Lambatos' testimony was not admissible for the purpose of proving . . . that the matching DNA profile was 'found in semen from the vaginal swabs.'"[37] Rather, the judge would have known that Lambatos's answers implicitly relied on the prosecution's disputed premises, especially since the judge in fact stated that it was only a question of weight and not admissibility.[38] Justice Alito noted that any defect with the testimony would easily be fixed if it were rephrased from a statement that the DNA profile was "found in semen from the vaginal swabs" to one that the profile was "produced by Cellmark."[39] Justice Alito also argued that the dissent had confused the requirements of the Confrontation Clause with the evidentiary requirement to provide sufficient foundational evidence.[40] He further noted that there *was* sufficient foundational evidence, in the form of chain-of-custody evidence and the fact that the DNA profile resulted in a match to Williams.[41] Finally, Justice Alito concluded that this result accorded with *Melendez-Diaz* and *Bullcoming* because no forensic report was ever introduced into evidence in this case and because any facts contained in the report and disclosed by the expert were considered not for their truth "but only for the 'distinctive and limited purpose' of seeing whether [they] matched something else."[42]

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[32] *Id.*

[33] *Williams*, 132 S. Ct. at 2244 (plurality opinion).

[34] Chief Justice Roberts and Justices Kennedy and Breyer joined Justice Alito's opinion.

[35] *See Williams*, 132 S. Ct. at 2235–41 (plurality opinion).

[36] *See id.* at 2234–35, 2236–37, 2240.

[37] *Id.* at 2236.

[38] *Id.* at 2236–37.

[39] *Id.* at 2236 (emphasis omitted).

[40] *Id.* at 2238. Justice Alito thus concluded that "even if the record did not contain any evidence that could rationally support a finding that Cellmark produced a scientifically reliable DNA profile based on L.J.'s vaginal swab, that would not establish a Confrontation Clause violation." *Id.*

[41] *Id.* at 2239.

[42] *Id.* at 2240 (quoting Tennessee v. Street, 471 U.S. 409, 417 (1985)).

As a second argument, Justice Alito reasoned that, even if the Cellmark Report had been admitted for its truth, the statements therein differed from those in past cases in which the Supreme Court had found confrontation violations because the Cellmark Report did not have "the primary purpose of accusing a targeted individual of engaging in criminal conduct."[43] Justice Alito then applied this primary purpose test: analogizing this case to prior cases holding that statements elicited to "bring an end to an ongoing threat" are nontestimonial,[44] he found that the primary purpose of the Cellmark Report was "to catch a dangerous rapist . . . , not to obtain evidence for use against [Williams], who was neither in custody nor under suspicion at that time."[45] He also noted that there was little risk of fabrication, as forensic scientists often do not know whether reports they produce will incriminate or exonerate a suspect, and that there was little risk of mistake, as scientists work according to accepted standards, and problems with their work can often be found in the DNA profiles themselves.[46] Therefore, "the use at trial of a DNA report prepared by a modern, accredited laboratory 'bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate,'" meaning that there was no Confrontation Clause violation.[47]

Justice Breyer concurred.[48] He joined the plurality but would also have ordered reargument to determine as a general matter who must testify regarding a forensic report, and under what circumstances, in order to satisfy a defendant's confrontation rights.[49] Absent reargument, Justice Breyer would have held that forensic reports are presumptively exempt from being subject to the Confrontation Clause.[50]

Justice Thomas concurred in the judgment only.[51] He explicitly rejected the plurality's not-for-truth argument, reasoning that "[t]here is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth."[52] He also argued that whether other nonhearsay evidence provided a basis for Lambatos's expert opinion was irrelevant.[53] Instead, Justice Thomas analyzed the Cellmark Report

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[43] *Id.* at 2242.

[44] *Id.* at 2243 (citing Michigan v. Bryant, 131 S. Ct. 1143, 1155, 1157 (2011)).

[45] *Id.*

[46] *Id.* at 2244.

[47] *Id.* (quoting *Bryant*, 131 S. Ct. at 1167 (Thomas, J., concurring)).

[48] *Id.* (Breyer, J., concurring).

[49] *See id.* at 2245–48.

[50] *Id.* at 2251. In support of this position, Justice Breyer reiterated the arguments of the *Melendez-Diaz* and *Bullcoming* dissents. *Id.* at 2248–51.

[51] *Id.* at 2255 (Thomas, J., concurring in the judgment).

[52] *Id.* at 2257.

[53] *Id.* at 2258.

for its formality and solemnity, found it lacking in those respects, and thus concluded that the Cellmark Report was nontestimonial.[54] He criticized the primary purpose test as impractical and derided the plurality's new formulation of the test — requiring a *particular* individual to be under suspicion before the Confrontation Clause may apply — as unmoored from the constitutional text, which "does not constrain the time at which one becomes a 'witnes[s].'"[55]

Justice Kagan dissented.[56] She argued that Lambatos's testimony was "functionally identical to the 'surrogate testimony'" in *Bullcoming* and that *Bullcoming* thus controlled the outcome of this case.[57] Rejecting the not-for-truth rationale, Justice Kagan distinguished *Tennessee v. Street*,[58] on which the plurality relied, on the ground that the truth of the admitted statement in *Street* was immaterial, whereas the validity of Lambatos's testimony was completely dependent on the truth of the Cellmark Report.[59] Justice Kagan also argued that, in abdicating to state law not-for-truth labels, the plurality retreated from *Crawford* in a way that undermined the criminal justice system by "allow[ing] prosecutors to do through subterfuge and indirection what . . . the Confrontation Clause prohibits."[60]

Finally, Justice Kagan rejected both the plurality's version of the primary purpose test and Justice Thomas's solemnity-based test.[61] She first argued that the plurality's emphasis on accusing a particular suspect in its primary purpose test was misplaced, since whether the police had a suspect at the time the lab conducted its forensic testing "makes not a whit of difference."[62] She also criticized the plurality's analogy to statements made to address an ongoing emergency, noting that the police waited nine months to send L.J.'s vaginal swabs to Cellmark — "hardly the typical emergency response."[63] She dismissed the plurality's other arguments as having already been rejected by *Melendez-Diaz* and *Bullcoming*.[64] Also dismissing Justice Thomas's

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[54] *Id.* at 2259–61. In reaching this conclusion, Justice Thomas contrasted the notary-sworn report in *Melendez-Diaz* and the signed-and-sealed report in *Bullcoming* with the Cellmark Report, which "certifie[d] nothing." *Id.* at 2260.

[55] *Id.* at 2262 (alteration in original).

[56] *Id.* at 2264 (Kagan, J., dissenting). Justices Scalia, Ginsburg, and Sotomayor joined Justice Kagan's dissent.

[57] *Id.* at 2267; *see also id.* at 2266 ("That [Cellmark] report is identical to the one in *Bullcoming* (and *Melendez-Diaz*) in 'all material respects.'" (quoting Bullcoming v. New Mexico, 131 S. Ct. 2705, 2717 (2011))).

[58] 471 U.S. 409 (1985).

[59] *Williams*, 132 S. Ct. at 2268 (Kagan, J., dissenting).

[60] *Id.* at 2272.

[61] *See id.* at 2272–77.

[62] *Id.* at 2274.

[63] *Id.*

[64] *See id.* at 2274–75.

test, Justice Kagan found no material differences between the reports in *Melendez-Diaz* and *Bullcoming* and the one here; she concluded that "Justice Thomas's approach grants constitutional significance to minutia" and would eviscerate the Confrontation Clause in practice.[65]

In failing to issue a majority opinion, the Supreme Court deeply muddled Confrontation Clause doctrine. Furthermore, the outcome-controlling opinions fail to adequately justify the result. The plurality employed tortured logic to constrain *Melendez-Diaz* and *Bullcoming*: first, by undermining *Crawford*'s severance of Confrontation Clause doctrine from rules of evidence, in the process embracing a not-for-truth rationale that was promptly and categorically rejected by five Justices; and, second, by making arbitrary distinctions that splinter a previously understandable primary purpose test into two versions supported by four Justices each. Justice Thomas failed to provide any guidance on his singular test, while potentially laying the groundwork for the states' evisceration of the Confrontation Clause as it applies to forensic evidence.

The Court's failure to issue a majority opinion is *Williams*'s principal fault, leaving doctrinal confusion in the wake of its 4–1–4 vote. By their very nature, plurality opinions are already problematic, often leaving lower courts guessing as to which opinion is binding precedent.[66] Large parts of the plurality and Justice Thomas's concurrence may further constitute "illegitimate plurality decision[s]": decisions that amount to "a particularly extreme example of judicial indulgence" by allowing the Justices to "reach the result [they] wish[] to see" while "neither chang[ing] existing law nor provid[ing] guidance for the future."[67] The lack of guidance in the opinions leaves lower courts with incredible difficulty in deciding which parts of the opinions to follow; lower courts are thus likely to look to the various arguments made in each opinion, whether technically binding or merely dicta, for

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[65] *Id.* at 2276.

[66] *See, e.g.*, Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127, 1128 (1981) [hereinafter Note, *Plurality Decisions*] ("[W]ithout a majority rationale for the result, the Supreme Court abdicates its responsibility to the institutions and parties depending on it for direction."). The Court attempted to address the problem posed by plurality opinions in *Marks v. United States*, 430 U.S. 188 (1977), declaring that "the holding of the [fragmented] Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)) (internal quotation marks omitted). However, when lower courts disagree on which opinion is controlling, the Supreme Court often ignores *Marks* and decides the question anew. *See* W. Jesse Weins, Note, *A Problematic Plurality Precedent: Why the Supreme Court Should Leave* Marks *over* Van Orden v. Perry, 85 NEB. L. REV. 830, 840 (2007) (discussing *Nichols v. United States*, 511 U.S. 738 (1994), as a problematic case in which the Court simply ignored *Marks*).

[67] Note, *Plurality Decisions*, *supra* note 66, at 1133.

guidance in interpreting *Williams*.[68] The flaws in *each* opinion thus become important, since they will inevitably add to the doctrinal confusion in the wake of *Williams*.

To begin, the plurality's not-for-truth reasoning intermingles Confrontation Clause doctrine with principles of state and federal evidence law, precisely the evil that *Crawford* helped to remedy.[69] This flaw is most clearly reflected in the plurality's deference to the Illinois rules of evidence[70] in finding that the Cellmark Report was only a basis fact not admitted for the truth of what it asserted.[71] As a consequence of this deference, the plurality's argument intermingles the Confrontation Clause with state rules of evidence, thus amounting to an unacknowledged departure from *Crawford* itself.[72] Justice Thomas or the dissent should have made this point more forcefully in order to limit the impact of the plurality's flawed reasoning.[73]

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[68] Although under *Marks* the narrowest grounds supporting the outcome in *Williams* are technically binding precedent, it may be nearly impossible to determine *which* arguments are the narrowest here. *See* Kent Scheidegger, *Making Sense of* Williams v. Illinois, CRIME & CONSEQUENCES BLOG (June 18, 2012, 10:08 AM), http://www.crimeandconsequences.com/crimblog/2012/06/making-sense-of-williams-v-ill.html. For practical purposes, it is thus safest to assume that courts will look to every argument in *Williams* — with one exception — as dicta, feeling free to disregard some of the arguments in order to follow others. The one exception is the plurality's not-for-truth argument. Because that argument is clearly and explicitly rejected by Justice Thomas and the dissent, the rejection of the not-for-truth argument is the only actual "holding" in *Williams*, in the sense that it amounts to binding precedent.

[69] *See, e.g.*, Richard D. Friedman, *The Confrontation Right Across the Systemic Divide*, *in* CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT 261, 263–66 (John Jackson et al. eds., 2008) (tracing the history of both the Confrontation Clause and the hearsay rules of evidence and noting that tethering the confrontation right to hearsay "left the Confrontation Clause almost completely limp, as little more than an easily evaded constitutionalisation of the hearsay rule," *id.* at 265).

[70] *See, e.g.*, *Williams*, 132 S. Ct. at 2236 (plurality opinion) ("[U]nder Illinois law . . . it is clear that the putatively offending phrase in Lambatos' testimony was not admissible for the purpose of proving the truth of the matter asserted . . . ."); *see also, e.g.*, *id.* at 2272 (Kagan, J., dissenting) ("At bottom, the plurality's not-for-the-truth rationale is a simple abdication to state-law labels.").

[71] Indeed, as both Justice Thomas and the dissent accurately noted, the only plausible use of those statements was to assess their truth. *See id.* at 2258 (Thomas, J., concurring in the judgment); *id.* at 2268 (Kagan, J., dissenting). The very relevance of the expert's opinion here turned on the truth of the forensic report. If the report had turned out to be false, the expert's opinion — the comparison of two sets of DNA — simply would have lost all relevance. In contrast, the truth of many other basis facts, such as aggregates of data or learned treatises, would not have been nearly as critical to the expert's opinion: if some basis facts had turned out to be false, the expert's opinion certainly should have been given less weight, but it would not necessarily have been utterly irrelevant.

[72] This departure from *Crawford* may not be the Court's first. Notably, Justice Scalia, dissenting in *Michigan v. Bryant*, 131 S. Ct. 1143 (2011), accused the Court of intending "to resurrect [the pre-*Crawford* Confrontation Clause] by a thousand unprincipled distinctions without ever explicitly overruling *Crawford*." *Id.* at 1175 (Scalia, J., dissenting). The same criticism seems equally apt here.

[73] In addition to the flaw outlined in this paragraph, another major flaw with the not-for-truth rationale is its reliance on the identity of the factfinder, as the Confrontation Clause's language in

Unfortunately, the plurality's second rationale, based on a new primary purpose test that requires that there be a *particular* suspect, is just as flawed: it is arbitrary and serves only to further muddle Confrontation Clause doctrine. The plurality's second rationale serves only to splinter into two versions the primary purpose test to which eight Justices had previously adhered.[74] Each version of the primary purpose test is now only supported by four Justices: the plurality's test requires testimonial statements to have "the primary purpose of accusing a targeted individual of engaging in criminal conduct,"[75] while the dissent's test requires testimonial statements to have only the primary "purpose of providing evidence."[76] And it is impossible to determine exactly *which* primary purpose test applies, leaving lower courts guessing.[77] It thus becomes clear that the plurality could have limited the harmful impact of this case by foregoing its second rationale; the plurality should instead have argued simply that *Melendez-Diaz* and *Bull-*

this respect is crystal clear: "[i]n *all* criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI (emphasis added); *see, e.g.*, Akhil Reed Amar, Foreword, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 647 (1996) ("[T]he words and grammar of the Confrontation Clause are emphatically rule-ish . . . [with] no ifs, ands, or buts."). Given that trial judges already apply rules of evidence less strictly when they are the factfinders than when there is a jury, *see* Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 175–80 (2006), this flaw may lead judges to use *Williams* as license to apply the Confrontation Clause in the same inconsistent manner.

The plurality could defend its position as a prophylactic rule to prevent juries from being confused into considering the truth of basis facts admitted only for a limited purpose that therefore finds no application at a bench trial. However, there is already a tool to help take account of such *practical* issues surrounding the application of the Confrontation Clause: harmless error analysis. *See* David H. Kwasniewski, Note, *Confrontation Clause Violations as Structural Defects*, 96 CORNELL L. REV. 397, 414–15 (2011). Furthermore, factfinder identity–dependent application of the Confrontation Clause may be inherently incompatible with *Crawford*. *Cf., e.g.*, *id.* at 423 (arguing that harmless error analysis brings back pre-*Crawford* "judicial-reliability determinations" and threatens the "expanded protections *Crawford* may have granted defendants").

[74] *See* Davis v. Washington, 547 U.S. 813, 822 (2006) ("[Statements] are testimonial when the circumstances objectively indicate . . . that the primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution."). Eight Justices — all but Justice Thomas — signed on to the *Davis* majority opinion, adopting the primary purpose test. *See id.* at 815.

[75] *Williams*, 132 S. Ct. at 2242 (plurality opinion).

[76] *Id.* at 2273 (Kagan, J., dissenting). The Justices also have not resolved the question of *whose* primary purpose matters, thereby further fracturing the primary purpose test. *Compare Bryant*, 131 S. Ct. at 1160 ("[T]he statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation."), *with id.* at 1169 (Scalia, J., dissenting) ("A declarant-focused inquiry is . . . the only inquiry that would work in every fact pattern . . . ."), *and id.* at 1176 (Ginsburg, J., dissenting) ("[T]he declarant's intent is what counts." (quoting *id.* at 1168 (Scalia, J., dissenting)) (internal quotation marks omitted)).

[77] Thinking of hypotheticals — with facts slightly different from those in *Williams* — in which the two versions of the primary purpose test might lead to different outcomes is not hard: for example, what happens when the police have a defined group of suspects and conduct a DNA test to identify which individual among the group committed the crime?

coming were wrongly decided and should be overruled.[78] The plurality may already have been thinking that way: tellingly, Justice Breyer, while joining the plurality's opinion in full, wrote separately to indicate just as much.[79]

The doctrine becomes even more muddled when one considers Justice Thomas's solemnity-based test. Although Justice Thomas's test is not binding precedent in light of the plurality and dissent's adherence to some form of the *Davis v. Washington*[80] primary purpose test,[81] Justice Thomas added to the confusion by asserting that "the Confrontation Clause reaches bad-faith attempts to evade the formalized process."[82] This assertion does nothing but raise more unanswered questions: Does the Confrontation Clause apply if a forensic analyst jots down the results of a test on a napkin?[83] Does it apply if a state, wanting to take advantage of *Williams*, mandates that forensic analysts *not* prepare signed certifications and that they instead produce informal reports akin to those Cellmark produced here?[84] This latter ambiguity also has the potential to completely undermine *Melendez-Diaz* and *Bullcoming*: states may be able to avoid the Confrontation Clause, insofar as it applies to forensic evidence, simply by making — in good faith — forensic reports as informal as possible.[85]

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[78] Admittedly, doing so would render this second part of the plurality opinion an "illegitimate plurality decision" that neither "change[s] existing law nor provide[s] guidance for the future." Note, *Plurality Decisions*, *supra* note 66, at 1133. However, in the context of a badly splintered Court, the fact that such an opinion would not have changed existing law would have been preferable to the confusion that is bound to ensue from *Williams*.

[79] *See Williams*, 132 S. Ct. at 2248–52 (Breyer, J., concurring). The other plurality members' reluctance to join Justice Breyer's concurrence may have been linked to a desire to avoid signing on to what would amount to an "illegitimate plurality decision."

[80] 547 U.S. 813 (2006).

[81] The essential, outcome-controlling part of Justice Thomas's opinion — everything but his rejection of the plurality's not-for-truth rationale — is thus akin to an "illegitimate plurality decision," providing little guidance for lower courts. Note, *Plurality Decisions*, *supra* note 66, at 1133. The only discernible guidance provided by Justice Thomas is his implicit instruction to compare the particular piece of evidence to clearly solemn statements such as depositions or affidavits. *See Williams*, 132 S. Ct. at 2260 (Thomas, J., concurring in the judgment).

[82] *Williams*, 132 S. Ct. at 2261 (Thomas, J., concurring in the judgment).

[83] *See* Ronald J. Coleman & Paul F. Rothstein, *Grabbing the Bullcoming by the Horns: How the Supreme Court Could Have Used* Bullcoming v. New Mexico *to Clarify Confrontation Clause Requirements for CSI-Type Reports*, 90 NEB. L. REV. 502, 532 (2011).

[84] *See* Jeffrey Fisher, *The Holdings and Implications of* Williams v. Illinois, SCOTUSBLOG (June 20, 2012, 2:20 PM), http://www.scotusblog.com/2012/06/the-holdings-and-implications-of-williams-v-illinois.

[85] Interestingly, Justice Thomas's opinion also raises the alternate possibility that the Confrontation Clause will apply differently in different states. If Justice Thomas eventually decides that states' intentionally avoiding the Confrontation Clause in this manner constitutes bad-faith evasion, and that the Confrontation Clause therefore applies notwithstanding the informality of forensic reports, the application of the Confrontation Clause in states like Massachusetts and in those like Illinois will differ. The former — with laws requiring forensic evidence to be in the form of formal certifications, *see* Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2531 (2009) —

Justice Thomas and the dissent compounded the problems of *Williams* through their categorical and unqualified rejection of the plurality's not-for-truth rationale[86] — a rejection that is the only true "holding" in *Williams*.[87] Categorically holding that basis facts are always introduced for their truth goes too far, because there are circumstances in which such facts may truly be introduced only for a "legitimate nonhearsay purpose"[88]: for example, when an expert witness discloses the basis for his opinion only in general terms and without relying on a key piece of inadmissible hearsay evidence.[89]

To some extent, all the Justices thus contributed to the confusion likely to result from *Williams*. The Court could have avoided such a confusing outcome, if only a single additional Justice had either joined the Justices in the plurality to write a majority opinion overruling *Melendez-Diaz* and *Bullcoming* or joined the dissent and thereby strengthened and clarified the requirements of *Melendez-Diaz* and *Bullcoming*.

E. Eighth Amendment

Mandatory Juvenile Life Without Parole. — The twenty-first-century Supreme Court has issued a flurry of juvenile Eighth Amendment opinions. In *Roper v. Simmons*[1] and *Graham v. Florida*,[2] the Supreme Court declared that two *categories* of punishments (first the death penalty, and then juvenile life without parole (JLWOP) for nonhomicide offenders) amounted to Eighth Amendment "cruel and unusual punishment" when imposed on minors.[3] Last Term, in *Miller v. Alabama* and *Jackson v. Hobbs*,[4] the Court extended the Eighth

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will be barred, under *Melendez-Diaz* and *Williams*, from changing their laws to allow presenting even informal forensic evidence without a testifying analyst; the latter, as illustrated by *Williams*, will not. Under this view, Justice Thomas's opinion, like the plurality's, works as a retreat from *Crawford*, by tying Confrontation Clause doctrine to state (and federal) rules of evidence.

86 *See Williams*, 132 S. Ct. at 2256–57 (Thomas, J., concurring in the judgment) ("[S]tatements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose."); *id.* at 2268 (Kagan, J., dissenting) ("[W]hen a witness, expert or otherwise, repeats an out-of-court statement as the basis for a conclusion, . . . the statement's utility is then dependent on its truth.").

87 "Holding" is used in the sense that five Justices affirmatively agreed on this point.

88 *Williams*, 132 S. Ct. at 2240 (plurality opinion).

89 *See* Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After* Crawford v. Washington, 15 J.L. & POL'Y 791, 826–27 (2007) ("When only the general nature of the sources is described, the argument that the information is introduced strictly to help the factfinder assess the expert's testimony is stronger, especially when the expert has relied on an array of different kinds of sources, only some of which are even arguably testimonial.").

1 543 U.S. 551 (2005).

2 130 S. Ct. 2011 (2010).

3 *Simmons*, 543 U.S. at 568; *Graham*, 130 S. Ct. at 2033.

4 132 S. Ct. 2455 (2012). The Court issued a joint opinion, referred to here as *Miller v. Alabama*.