No. 21508

IN THE CALIFORNIA COURT OF APPEAL

For the 4th Appellate District, Division 1

STATE OF CALIFORNIA,
Plaintiff/Appellee,
v.
WILLIAM ADAMS,
Defendant/Appellant

On Appeal from the Superior Court of California,
County of San Diego
The Honorable Barbara Oetting, Judge
Criminal No. 21508

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

This case is an appeal by William Adams, a defendant in a criminal prosecution, seeking relief for violations of his constitutional right "to be confronted with the witnesses against him," as is guaranteed by the Sixth Amendment. U.S. Const. Amend XI.

Mr. Adams was convicted of rape by a jury in the Superior Court of California, County of San Diego, after the trial judge allowed a surrogate witness to testify in lieu of an absent state witness, thereby introducing hearsay evidence into the courtroom. Furthermore, the surrogate witness was allowed to introduce testimonial out-of-court statements into the trial through her testimony.

Mr. Adams' defense entered its objections to each constitutional violation regarding this testimony. Therefore, these prejudicial errors have been preserved for appeal, and Mr. Adams seeks to have the jury's verdict overturned.

STATEMENT OF FACTS

On Friday, Feb. 1, 2013, Arlene James accused William Adams of sexually assaulting her. (AS 4.) The two acquaintances had been in a North Park hotel room. *Id.* Ms. James made her report at the nearby North Park sub-station of the San Diego Police Department. *Id.* At the suggestion of the police, Ms. James underwent a sexual assault exam, which included the gathering of DNA samples from her body. *Id.*

That same evening, police located Mr. Adams and questioned him. *Id.* Mr. Adams voluntarily provided a DNA sample. *Id.* The samples were sent to the Police Department's crime lab for analysis. Two different lab analysts performed tests on Adams' and James' DNA samples. *Id.* Sue Dillon, a supervising forensic analyst, conducted a DNA profile of the sample taken from James' body at the hospital. *Id.* Ms. Dillon recovered male DNA from the sample and entered the DNA profile into the state DNA database – which returned a positive match to Mr. Adams. *Id.*

Another forensic analyst, Jim Curran, ran a DNA profile of Mr. Adams' sample. *Id.* His test confirmed a positive match with the DNA sample taken from James. *Id.* Additionally, Curran calculated the probability of the DNA match by using a random sample from the population. *Id.* According to these calculations, the likelihood of a person chosen at random would have the same DNA as that found on Mr. Adams' body is one in 66 quintillion. *Id.* Mr. Curran produced two sworn laboratory certificates – one documenting the results of his DNA test, and the other regarding his population frequency analysis. *Id.*

Mr. Curran has since taken a four-week leave of absence from the crime lab to take part in the television show, "America's Got Talent." *Id.* at 5. Consequently, he was unavailable to testify at Mr. Adams' trial, nor was he available for any pre-trial conferences. Instead, Ms. Dillon, who is Mr. Curran supervisor at the lab, testified at trial regarding Mr. Curran's DNA test, his statistical analysis and his procedures and protocols. *Id.* Mr. Curran's DNA test was entered into evidence at trial, but his population frequency analysis was not. *Id.*

It is on the basis of Ms. Dillon's testimony regarding Mr. Curran's DNA testing, his statistical analysis and procedures that Mr. Adams's Sixth Amendment right to confrontation was violated.

STANDARD OF REVIEW

Mr. Adams requests that the California Court of Appeal review the Superior Court's judgment *de novo.* Applying the *de novo* standard, the appellate court examines independently the resolution of a pure question of law – as is the case here. *People v. Waidla,* 22 Cal. 4th 690, 730 (2000). The *de novo* standard is nondeferential to a trial court's granting or denial of a motion to exclude evidence or testimony. *Id.*

Here, the trial court committed a series of prejudicial errors when it permitted the surrogate witness to testify in the place of the absent witness and relay testimonial out-of-court statements into the courtroom. These errors present a federal constitutional issue regarding the Sixth Amendment's Confrontation Clause. U.S. Const. Amend XI.

When a federal constitutional issue is triggered, and the error "affects the substantial rights" of a party, then the court will consider the error harmful. *Chapman v. California,* 386 U.S. 18, 23-24 (1967). In this case, the trial court's constitutional errors were both necessary and sufficient to cause Mr. Adams' conviction. Therefore the appellate court should deem the trial court's constitutional errors harmful and overturn the conviction.

Introduction

This case concerns a man who was convicted of rape – the most heinous crime against a person short of taking another's life – and he was convicted based on impermissible hearsay evidence at three critical stages of his trial. In doing so, the state denied the defendant, William Adams, of his constitutional right "to be confronted with the witnesses against him." U.S. Const. Amend XI.

The technical issues in this case involving DNA evidence are part of a new area of law that is not yet settled, but the underlying issues of fairness and justice are as old as the common law. In 1603, Sir Walter Raleigh was tried and executed for treason against King James. During his trial, Raleigh was denied the right to confront – and be confronted – by his accuser. "'Call my accuser before my face … Let him be here, let him speak it.' The judges refused, and, despite Raleigh's protestations that he was being tried 'by the Spanish Inquisition,' the jury convicted, and Raleigh was sentenced to death. One of Raleigh's trial judges later lamented that 'the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.'" *Crawford v. Washington,* 541 U.S. 36, 44 (2004).

The United States Supreme Court revisited the Raleigh trial in the landmark *Crawford* case, and the Court frequently refers back to Raleigh's trial as a critical historical event that inspired America's Founders to draft the Sixth Amendment in order to guarantee that this type of abuse would never happen again. "Raleigh's trial informs our understanding of the Clause because it was, at the time of the framing, one of the most notorious instances of the abuse of witnesses out-of-court statements." *Melendez-*

Diaz v. Massachusetts, 557 U.S. 305, 344 (2009) (Kennedy, J. dissenting, quoting Scalia, J., from *Crawford).*

In modern times, with the introduction of highly sophisticated forensic evidence in the courtroom, the basic right of confrontation has come under threat when such evidence becomes, in effect, a surrogate for the actual testimony of a human being. A criminal defendant risks being convicted by a machine, through a mechanized process, without having any real ability to "confront" the machine or its data. *Bullcoming v. New Mexico,* 131 S. Ct. 2705, 2713 (2011).

Therefore, in such instances, it becomes even more important for the forensic analysts who calibrate and operate this machinery to be on hand at the trials of defendants implicated by this evidence. Thus, while the technology has advanced, the rule remains the same: "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford,* 541 U.S. at 59.

In the case at hand, the trial court violated this constitutional principle by allowing a surrogate witness to introduce the results of another's DNA tests and testify to the veracity of those tests. In so doing, Mr. Adams was placed back in the same unconscionable position Sir Walter Raleigh was placed more than 400 years ago: He was denied his right to be confronted with his accuser.

This appellate brief will review the current state of the law and demonstrate why this court should reverse the trial court's conviction against Mr. Adams.

ARGUMENT

This court should reverse the conviction against Mr. Adams because the trial court permitted prejudicial errors – violating Mr. Adams' constitutional right to be confronted by an adverse witness – at three critical junctures at his trial: (1) The court improperly allowed a surrogate, Ms. Dillon, to testify regarding Mr. Curran's sworn DNA test – admitted into evidence – in lieu of the analyst who actually performed the test; (2) the court improperly allowed Ms. Dillon to testify as an expert witness to Curran's sworn population frequency analysis – not admitted into evidence; and finally, (3) the court improperly allowed Ms. Dillon to testify regarding Mr. Curran's protocols and procedures. At each of these junctures, the court denied Mr. Adams his inalienable right to be confronted by an adverse witness, Mr. Curran, as is guaranteed by the Sixth Amendment. U.S. Const. Amend XI.

Perhaps even more chilling, by excusing Mr. Curran from testifying, the trial court effectively allowed the accused to be convicted by machinery – wholly absent the machine-operator's explanation of his processes and any assurances of accuracy. This kind of mechanized criminal conviction constitutes an abuse beyond even what the Founders imagined when they drafted the Sixth Amendment more than 200 years ago. As the Supreme Court noted recently, you cannot cross-examine a machine. *Bullcoming,* 131 S. Ct. at 2713 (Ginsburg, J., writing for the Court).

In the past ten years, the Supreme Court has reinvigorated the Sixth Amendment's Confrontation Clause in the context of forensic evidence and absent analysts. As Justice

Scalia succinctly put it, "The Confrontation Clause's ultimate goal is to ensure reliability of evidence … It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence, but about how reliability can best be determined." *Crawford,* 541 U.S. at 61.

Crawford and its progeny have produced a clear and consistent message in this context: Scientific testing is testimonial evidence, and the results of such testing require human testimony from whomever generated the testing results. See *Melendez-Diaz,* 557 U.S. at 309, and *Bullcoming,* 131 S. Ct. at 2709. As Justice Ginsburg stated plainly, "A forensic laboratory report ranks as testimonial for purposes of the Sixth Amendment's Confrontation Clause. … Absent stipulation, the prosecution may not introduce such a report without offering a live witness competent to testify to the truth of the statements made in the report." *Bullcoming,*131 S. Ct. at 2709. In that case, the surrogate testimony of a substitute analyst did not suffice, nor should it suffice here.

Despite the clear message spelled out *Crawford* and carried through the *Bullcoming* decision, the Court muddied the waters in its most recent decision on the issue, which backtracked from the bright-line rule against substitute testimony. In *Williams v. Illinois,* 132 S. Ct. 2221, 2228 (2012), the Court permitted a substitute analyst to testify "as an expert" regarding a forensic report that was not admitted into evidence. Since *Williams,* the Supreme Court has remanded at least five California cases: *Barba v. California,* 133 S. Ct. 609 (2012); *Mercado v. California,* 133 S. Ct. 65 (2012); *Hyun*

Kwon v. California, 133 S. Ct. 57 (2012); *Suen v. California,* 133 S. Ct. 57 (2012); and *Johnson v. California,* 133 S. Ct. 56, 57 (2012).

Although the Court has seemingly relaxed the rules regarding testimonial evidence and testifying witnesses, this brief will demonstrate that excluding Ms. Dillon's testimony may withstand a *Williams* analysis – and the California Supreme Court's interpretation of *Williams* thus far. See *People v. Lopez,* 55 Cal. 4th 569, 576 (2012).

I. THE COURT SHOULD EXCLUDE MS. DILLON'S SUBSTITUTE TESTIMONY REGARDING MR. CURRAN'S CERTIFIED DNA TEST BECAUSE MS. DILLON'S SURROGATE TESTIMONY VIOLATED MR. ADAMS' SIXTH AMENDMENT RIGHT TO BE CONFRONTED BY AN ADVERSE WITNESS.

The trial court should not have allowed Ms. Dillon to testify in Mr. Curran's place regarding this critical piece of evidence because Ms. Dillon could not speak directly to Mr. Curran's specific scientific process and reasoning that led him at that moment to conclude that his DNA test had definitively matched the defendant, Mr. Adams. Thus, Mr. Adams was denied his constitutional right "be confronted" with the most damning witness against him.

At this point, it is first useful to determine whether or not the underlying report to which Ms. Dillon testified was itself testimonial; and further, whether it is permissible for a substitute expert to testify regarding a testimonial report admitted into evidence.

Synthesizing the federal cases, the California Supreme Court set forth a two-part test to determine if an out-of-court statement is testimonial, and thus falling under the Confrontation Clause: First, to be testimonial, an out-of-court statement must have been

made with some degree of "formality" or "solemnity"; and second, an out-of-court statement is testimonial "only if its primary purpose pertains in some fashion to a criminal prosecution." *Lopez,* 55 Cal. 4th at 582.

Here, Mr. Curran's DNA profile of Mr. Adams was presented to the trial court as a sworn certificate – solemn and formalized, thus satisfying the first prong of the test. Second, Mr. Curran's DNA test pinpointed Mr. Adams specifically and had no purpose other than for use in Mr. Adams' prosecution. Therefore, it is clear that Mr. Curran's underlying report was testimonial and thus requiring of "a live witness competent to testify to the truth of the statements made in the report." *Bullcoming,* 131 S. Ct. at 2709. Whether or not the report should have been admitted into evidence in the first place is not a question before this court, although this fact is relevant to Ms. Dillon's testimony regarding the report.

In both *Melendez-Diaz* and *Bullcoming*, the underlying forensic reports, like Mr. Curran's report, were admitted into evidence; and in each case, the Court prohibited substitute testimony regarding the underlying reports. The rule could be boiled down thus: A scientific forensic report that is deemed testimonial requires direct supporting testimony from the analyst who produced the report.

In *Melendez-Diaz,* Justice Scalia explained precisely how such evidence triggers the Confrontation Clause: "The text of the Amendment contemplates two classes of witnesses – those against the defendant and those in his favor. The prosecution must produce the former; the defendant may call the latter. Contrary to respondent's assertion,

there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." *Id.* at 313.

In explaining why this rule is critical in the context of forensic evidence, Scalia debunked the notion of "neutral scientific testing" – the idea that a forensic test, by its nature, is entirely objective and reliable, and thus beyond the scope of the Confrontation Clause:

> "Forensic evidence is not uniquely immune from the risk of manipulation. … A forensic analyst responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution. … Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Respondent and the dissent may be right that there are other ways – and in some cases better ways – to challenge or verify the results of a forensic test. But the Constitution guarantees one way: confrontation. We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available." *Id.* at 318

In the case at hand, it is clear that Mr. Curran's presence at trial was necessary, and Ms. Dillon's substitute testimony was not sufficient. Mr. Curran needed to be on hand to answer any question and address any concerns by the defense. Mr. Curran may be a reputable and honest analyst, but he needed to be there to speak for himself directly. Ms. Dillon could only speak to the results after-the-fact, but she could not testify about each step of Mr. Curran's process – which when put together implicated Mr. Adams as a suspect and ultimately led to his conviction. There can be many intervening – and

possibly superseding events that take place in this complicated testing process, and only the analyst himself can speak to these.

The proper result in this circumstance is distinguished from the scenario presented in *Williams v. Illinois*, in which substitute testimony was permitted. In that case, the surrogate analyst testified regarding a report that was not admitted into evidence or admitted "for its truth." *Williams* at 2228. In the case at hand, Mr. Curran's DNA report was admitted into evidence "for its truth," and Ms. Dillon's testimony was intended specifically to bolster its "truth." These critical factual differences distinguish this case from the scenario in *Williams,* and therefore the *Williams* ruling should not apply.

It is striking that the *Williams* court went on to state that even if the underlying report had been admitted into evidence, there would have been no Confrontation Clause violation. *Id.* at 2228. Again, the critical facts are distinguished. The underlying report in *Williams* was a DNA profile that had been produced before any suspect was identified. *Id.* The report did not target the defendant, who was not under suspicion at the time, but instead served the purpose of ruling out others who did not match the profile. *Id.* Thus, the profile that the lab produced was "not inherently inculpatory." *Id.* The same cannot be said in this case, where the report specifically targeted Mr. Adams and was produced for no other purpose than to prosecute him. The legally operative facts in *Williams* do not line up with the case at hand, and thus the holding does not apply.

Even if the facts were parallel, attempting to apply the *Williams* ruling in any other setting presents a number of problems, as California Supreme Court Justice Goodwin Liu explained. *Lopez,* 55 Cal. 4th at 592. The *Williams* ruling presented no clear majority; the

case was decided by a fractured plurality in which the justices' opinions on particular issues overlapped with one another in the majority, concurring and dissenting opinions. In this scenario, the court's "ruling" cannot provide authoritative guidance beyond the result reached on the particular facts of that case, according to Liu. *Id.*

> "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds. When it is not possible to discover a single standard that legitimately constitutes the narrowest ground for a decision on that issue, there is then no law of the land because no one standard commands the support of a majority of the Supreme Court. The only binding aspect of such a splintered decision is its specific result. No published lower court decision, state or federal, that has examined Williams has identified a single standard or common denominator commanding the support of a five-justice majority. I, too, conclude that *Williams* is an example of a decision where the only binding aspect is its specific result." *Id.*

This "plurality problem" further bolsters the case that the *Crawford—Melendez-Diaz—Bullcoming* line of reasoning should apply to this this case and this particular issue – that Ms. Dillon's testimony regarding Mr. Curran's DNA test was impermissible hearsay that violated the Confrontation Clause.

II. THE COURT SHOULD EXCLUDE MS. DILLON'S 'EXPERT TESTIMONY' REGARDING MR. CURRAN'S DNA POPULATION FREQUENCY ANALYSIS – WHICH WAS OFFERED TO THE COURT FOR ITS 'TRUTH' AND THUS OFFENDS THE CONFRONTATION CLAUSE.

The trial court committed a prejudicial error when it allowed Ms. Dillon to testify as an expert regarding Mr. Curran's population frequency analysis because this information was presented to the court for no other reason but its truth, and thus would rightly require accompanying testimony from the report's author, Mr. Curran.

As set forth in *Williams,* 132 S. Ct. at 2228, statements admitted for their truth require confrontation in a trial setting, otherwise the Sixth Amendment is violated.

Here, the Court determined that Mr. Curran's report was an out-of-court statement offered for its truth: "So I guess it's hearsay in that the statement was made by somebody other than the witness and she is reporting what someone else said, and clearly it's being offered for its truth as a conclusion of this other person's work." (RT 917:12.) Despite the defense's objection at this point, the trial court allowed Ms. Dillion to proceed to testify regarding Mr. Curran's population frequency analysis, in addition to her immediately preceding testimony regarding Mr. Curran's DNA testing. Ms. Dillon's testimony both before and after the defense's objection thus constitute prejudicial errors under the *Williams* "truth of the matter" standard.

The split decision in *Williams*, however, presents a potential counter-conclusion to the case at hand. In *Williams,* a state lab technician testified as an expert witness regarding a DNA population frequency analysis conducted by an outside lab. *Id.* at 2228. This report was not admitted into evidence. *Id.* But there, the Court plurality determined

that the expert witness did not offer information from the underlying report for its truth, but merely based her opinion on the report, thus making her testimony permissible under the Confrontation Clause. *Williams,* 132 S. Ct. at 2224. As the Court attempted to state the principle, "an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true. It is then up to the party who calls the expert to introduce other evidence establishing the facts assumed by the expert. *Id.* at 2228 (Alito, J., writing for the Court plurality).

Therefore, based on this reasoning, if Ms. Dillon's testimony regarding Mr. Curran's population frequency analysis was not in fact "offered for its truth" – but instead merely information upon which Ms. Dillon based her testimony – would her testimony relaying these facts be permitted under the plurality's reasoning in Williams?

Both the concurring and dissenting justices in *Williams* found the plurality's rule and the reasoning to be circular. As Justice Thomas remarked in his concurrence, "The plurality's assertion that Cellmark's [lab] statements were merely relayed to explain 'the assumptions on which [the expert's] opinion rested' overlooks that the value of Lambatos' [expert] testimony depended on the truth of those very assumptions … The State contends that Cellmark's statements – that it successfully derived a male DNA profile and that the profile came from L.J.'s swabs – were introduced only to show the basis of Lambatos' opinion, and not for their truth. In my view, however, there was no plausible reason for the introduction of Cellmark's statements other than to establish their truth." *Id.* at 2256-7.

Or, as Justice Kagan noted in her dissent, the plurality's reasoning effectively allowed the prosecution to circumvent the Confrontation Clause by introducing hearsay evidence through the back door, via an expert witness. "The prosecutor used Sandra Lambatos – a state-employed scientist who had not participated in the testing – as the conduit for this piece of evidence … And so it was Lambatos, rather than any Cellmark employee, who informed the trier of fact that the testing of L. J.'s vaginal swabs had produced a male DNA profile implicating Williams … Under our case law, that is sufficient to resolve this case. When the State elected to introduce the substance of Cellmark's report into evidence, the analyst who generated that report became a witness whom Williams had the right to confront." *Id.* at 2267.

The bottom line, according to Thomas, follows this logic: "'If the jury believes that the basis evidence is true, it will likely also believe that the expert's reliance is justified; inversely, if the jury doubts the accuracy or validity of the basis evidence, it will be skeptical of the expert's conclusions.'" Id. at 2257 (quoting D. Kaye, D. Bernstein, and J. Mnookin, *The New Wigmore: A Treatise on Evidence: Expert Evidence* §4.10.1, p. 196 (2d ed. 2011). Thus, according to Thomas, "there is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth." *Id.*

As is plainly the case here, Ms. Dillon directly relayed the information from Mr. Curran's reports to the jury. It would be disingenuous – if not outright false – to say that she merely expressed an opinion or make an "assumption" based on the report, rather than offering the information for its truth. In reality, she relayed the non-testifying

analyst's actual statistical analysis and presented all of its contents to the court. (RT 920:21.) Ms. Dillon did not offer this information for any reason other than to establish its truth. This is clearly the kind of back-door introduction of hearsay evidence that Justice Kagan warns about.

Additionally, since Justice Kagan (dissenting) and Justice Thomas (concurring) agree on the "truth of the matter" issue, they actually form a binding majority for this particular issue, Kagan noted in *Williams. Id.* 2265. "In all except its disposition, his [Justice Alito's] opinion is a dissent." *Id.* at 2265 (quoted by Justice Liu in *Lopez,* 55 Cal. 4th at 592).

Thus, under the Kagan-Thomas "majority" in *Williams,* applied to the case at hand, even if Ms. Dillon's testimony were not expressly submitted for the truth of the matter, and merely offered under the auspices of "expert opinion," it still fails the Confrontation Clause and should not have been permitted.

III. THIS COURT SHOULD EXCLUDE MS. DILLON'S TESTOMONY REGARDING MR. CURRAN'S PROTOCOLS AND PROCEDURES BECAUSE ONLY MR. CURRAN COULD PROPERLY AND CONSTITUTIONALLY DESCRIBE EVERY STEP OF HIS PROCESS TO THE COURT.

The trial court should not have accepted Ms. Dillon's testimony regarding Mr. Curran's testing protocols and procedures, because only Mr. Curran could properly describe every step of his scientific process to the court. In the absence of Mr. Curran, the

defendant, Mr. Adams, was denied the right to be confronted with the state's witnesses against him, as the Sixth Amendment requires.

In *Bullcoming,* the Court ruled that one analyst from a state crime lab could not vouch for another in court, when the substitute analyst had not actually and contemporaneously witnessed the other's testing process. *Bullcoming*, 131 S. Ct. at 2708. The Court explained the rationale behind this rule:

> "Surrogate testimony … could not convey what [the analyst] knew or observed about the events he certified, nor expose any lapses or lies … More fundamentally, 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. Although the purpose of Sixth Amendment rights is to ensure a fair trial, it does not follow that such rights can be disregarded because, on the whole, the trial is fair. If a 'particular guarantee' is violated, no substitute procedure can cure the violation." *Id.* at 2708.

In the case at hand, Ms. Dillon conducted the technical review of Mr. Curran's work, and she testified that she was "satisfied that all of the proper protocols and procedures were followed in his testing and in his calculations." (RT 912:15-27.) Nonetheless, she did not actually see and observe Mr. Curran's work process; she only observed the results. Indeed, his report may have appeared neat and orderly, and all of the facts and figures may have appeared to be in order. Nonetheless, any potential unseen slip-up, any possible rounding-up of the numbers, or even an outright fabrication – these types of problems could only reliably be detected in the trial setting through

confrontation. Reiterating Scalia's parlance, there may be other ways to challenge or verify the results of a forensic test, "but the Constitution guarantees one way: confrontation." *Melendez-Diaz,* 557 U.S. at 318.

The case at hand is, however, distinguished from *Bullcoming* in two factual ways: (1) In *Bullcoming,* the substitute analyst was a colleague and not a supervisor, as is the case here; and (2) the analyst who produced the report in *Bullcoming* did not testify because he had been placed on unpaid leave for an undisclosed reason, as is not the case here. *Id.* 2707. As to the first issue, Justice Sotomayor noted in her concurrence, "It would be a different case if, for example, a supervisor **who observed** an analyst conducting a test testified about the results or a report about such results." *Id.* at 2722. (Emphasis added.) It is noteworthy that although Justice Sotomayor distinguishes between the testimony of colleague and supervisor, she does not dispense with the need for a testifying expert to actually observe the test. Thus, in the present case, although Ms. Dillon is Mr. Curran's supervisor, she did not contemporaneously observe Mr. Curran's testing, and therefore her substitute testimony does not suffice for Confrontation Clause purposes. As for the second distinguishing fact, Mr. Curran's good standing as an analyst does not excuse him of his duty to testify to work and subject himself to cross-examination, as does any other witness in a criminal trial. Because Mr. Curran is an apparently reputable analyst does not give his procedures and reports presumptive truth. As Justice Scalia noted in *Crawford*, "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Crawford*, 541 U.S. at 62.

Therefore, Ms. Dillon's testimony regarding Mr. Curran's protocols and procedures should be excluded.

CONCLUSION

The constitutional imperative of the Confrontation Clause is as relevant today as it was during the founding period as it was during the trial of Sir Walter Raleigh four centuries ago. All roads point to the same conclusion: Confrontation. Forensic evidence alone is no substitute, and surrogate testimony does not suffice.

As Justice Kagan summed up in her *Williams* dissent, "In response to claims of the *über alles* reliability of scientific evidence: It is not up to us to decide, *ex ante,* what evidence is trustworthy and what is not. That is because the Confrontation Clause prescribes its own procedure for determining the reliability of testimony in criminal trials. That procedure is cross-examination. And dispensing with it because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Williams,* 132 S. Ct. at 2275 (citing *Crawford,* 541 U.S. at 67).

Or, as Justice Liu concluded in his *Lopez* dissent, "As a result of ever more powerful technologies, our justice system has increasingly relied on *ex parte* computerized determinations of critical facts in criminal proceedings – determinations once made by human beings. … The allure of such technology is its infallibility, its precision, its incorruptibility … [But] that allure should prompt us to remain alert to constitutional concerns, lest we gradually recreate through machines instead of magistrates the civil law mode of *ex parte* production of evidence that constituted the

‘principal evil at which the Confrontation Clause was directed.’” *Lopez,* 55 Cal. 4th at 606 (citing *Crawford,* 541 U.S. at 50).

For the reasons stated herein, this court should reverse Mr. Adams’ conviction.

Dated April 13, 2013

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