The Reinvigorated Confrontation Clause

A New Basis to Challenge the Admission of Evidence From Nontestifying Forensic Experts In White Collar Prosecutions

I. Introduction

Federal and state prosecutors have increasingly resorted to using forensic expert testimony against defendants in white collar criminal cases. Forensic accountants testify in cases involving financial fraud, including securities, tax and money laundering violations. In environmental prosecutions, the government engages geologists, chemists, and microscopists to gather and analyze evidence of spills and releases of hazardous pollutants and chemicals. Prosecutors use forensic computer experts to prove a host of computer-related crimes, such as Internet fraud, unlawful access, and identity theft. They also recover electronic data and testify on spoliation of evidence in obstruction of justice cases. In both white and blue collar cases, however, the prosecution has sought to admit evidence from nontestifying forensic experts through surrogate witnesses, summary witnesses, other experts, and even documents to prevent the defense from cross-examining the experts.

Beginning in 2009, the Supreme Court issued a trilogy of opinions examining the reach of the Confrontation Clause of the Sixth Amendment in cases in which the prosecution sought to admit evidence and opinions of nontestifying forensic experts to prove essential elements of the crimes charged. The rulings in two of the cases — Melendez-Diaz v. Massachusetts and Bullcoming v. New Mexico — have paved a new path for the defense to challenge the admission of evidence and opinions of nontestifying forensic experts. The third case, Williams v. Illinois, resulted in a plurality opinion favoring the prosecution, but has limited precedential impact because a sharply divided Court could not agree on the basis for the result and the ruling may be limited to bench trials. While the trilogy of cases involved traditional blue collar crimes, white collar practitioners nonetheless can rely on the holdings of Melendez-Diaz and Bullcoming in cases when the prosecution attempts to admit expert testimony through the back door.

This article first examines the trilogy of Confrontation Clause cases in detail. It next discusses similar Confrontation Clause issues that arose in two recent white collar prosecutions, and how they were addressed at trial. The first case, United States v. W.R. Grace, was a high-profile environmental prosecution charging W.R. Grace and several company executives with violating the knowing endangerment provision of...
the Clean Air Act and defrauding the United States. The Grace verdict, an across-the-board acquittal of all defendants, occurred less than two months before the Court decided Melendez-Diaz, the first case of the trilogy. The second case, United States v. Ignasiak, was a health care fraud prosecution in which a physician was charged with illegally dispensing controlled substances to patients. The Eleventh Circuit’s opinion in Ignasiak, reversing the defendant’s convictions, was issued shortly after the Court decided Bullcoming, the second case in the trilogy. Through the framework of these cases, the article then provides some practical suggestions on how white collar practitioners may rely on the reinvigorated Confrontation Clause to preclude the admission of certain forensic evidence of nontestifying witnesses at trial.

II. The Supreme Court’s Current Formulation of the Confrontation Clause

The Confrontation Clause of the Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” It guarantees a defendant’s right to confront those who bear testimony against him. This “bedrock procedural guarantee” applies to federal and state prosecutions. While the text of the Confrontation Clause could plausibly be read to apply only to “witnesses against” the defendant who testify at trial, the Court has rejected that limitation, and held that the Confrontation Clause also applies to certain out-of-court statements offered at trial. However, “not all hearsay implicates the Sixth Amendment’s core concerns.”

A. Crawford v. Washington

The Court’s current interpretation of the scope of the Confrontation Clause is set forth in its seminal decision Crawford v. Washington. Under Crawford, criminal defendants have a constitutional right to cross-examine witnesses who make “testimonial” statements against them. Testimonial statements are admissible only if (1) the defendant has the opportunity to cross-examine the declarant or (2) the declarant is unavailable but the defendant had an adequate prior opportunity to cross-examine the declarant. The admission of nontestimonial statements does not violate the Sixth Amendment.

Crawford made clear that the admissibility of hearsay statements against criminal defendants depends mainly on whether a statement is “testimonial.” While the Court held that statements taken by police officers during interrogations are testimonial, it declined to frame a comprehensive definition of a “testimonial” statement. The Court, however, recognized that “various formulations” of a “core class” of “testimonial” statements exist, including the following three categories:

1. (1) ex parte in-court testimony or its functional equivalent, including affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine or similar pre-trial statements that declarants would reasonably expect to be used prosecutorially;
2. (2) extra-judicial testimonial statements contained in formalized testimonial materials such as affidavits, depositions, prior testimony or confessions, and
3. (3) statements made under circumstances that would lead an objective witness reasonably to believe that statements would be available for use at a later trial.

After Crawford, numerous lower courts wrestled with the issue whether a particular statement was “testimonial.” In its recent Confrontation Clause trilogy, the Court addressed the issue of testimonial statements in the context of the admission of opinions and evidence from nontestifying forensic experts.

B. The Court’s Recent Confrontation Clause Trilogy


Five years after Crawford, the Court decided Melendez-Diaz v. Massachusetts. The issue in Melendez-Diaz was whether laboratory reports and certificates of analysis prepared in connection with a narcotics investigation were testimonial under Crawford, thereby implicating the defendant’s Sixth Amendment confrontation rights. Up until Melendez-Diaz, lower courts were divided on this issue, with the majority holding that such reports and analyses were nontestimonial. In Melendez-Diaz, the Court embraced the minority position, holding that “affidavits reporting the results of forensic analysis” were testimonial.

Luis Melendez-Diaz was convicted of distributing and trafficking cocaine. As allowed by Massachusetts law, the prosecution offered in evidence three “certificates of analysis” that described the results of the forensic analysis of the substance seized from Melendez-Diaz and its weight. The certificates were signed under oath by the state laboratory analysts. Defense counsel objected to the admission of the certificates, arguing that, under Crawford and the Confrontation Clause, the certificates were testimonial and analysts were required to testify in person. The Court granted certiorari to determine whether the certificates were testimonial, rendering the affiants “witnesses” subject to the defendant’s right of confrontation.

In a 5-4 opinion authored by Justice Scalia, the Court agreed with the defense and reversed the convictions. The Court held that “[t]here is little doubt” that the certificates were in actuality affidavits and thus testimonial in nature, pointing out that Crawford mentioned affidavits twice in its description of the “core class of testimonial statements.” In the Court’s view, the certificates were “functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’” The Court determined that the “sole purpose of the affidavits was to provide prima facie evidence of the composition, quality, and the net weight’ of the analyzed substance.” “Absent a showing that the analysts were unavailable to testify at trial and that the [defendant] had a prior opportunity to cross-examine them,” the Court held that the defendant was entitled to “be confronted with the analysts at trial.”

The majority opinion rejected several arguments raised by the prosecution and the dissent. First, the prosecution argued that the analysts were not subject to confrontation because they were not “accusatory” witnesses, as they did not accuse the defendant of wrongdoing. The Court disagreed, concluding that the analysts “certainly provided testimony against” the defendant—that is, they provided evidence proving
that the substance seized was cocaine, which was an essential element of the crime — and thus triggered the Sixth Amendment’s guarantee of the defendant’s right “to be confronted with the witnesses against him.”

The prosecution and the dissent next argued that the analysts should not be subject to confrontation because they were not “conventional” witnesses of the type “whose ex parte testimony was most notoriously used at the trial of Sir Walter Raleigh.” The Court similarly stated that the purported distinctions between the analysts and so-called “conventional” witnesses did not survive scrutiny.

The Court then addressed the prosecution’s contention that there is a difference, for Confrontation Clause purposes, between testimony recounting historical events, which is prone to distortion and manipulation, and testimony that is the result of neutral, scientific testing, such as that of the analysts. The Court rejected the premise of the argument: that the “neutral scientific testing” was either neutral or reliable. The Court observed that a study conducted by the National Academy of Sciences discussed the pressure on forensic scientists to sacrifice appropriate methodology for the sake of expediency. The Court further commented that a forensic analyst responding to law enforcement also may feel pressure or have an incentive to alter evidence in a manner favorable to the prosecution.

Confrontation, the Court emphasized, was a means of (1) assuring accurate forensic analysis, (2) deterring fraudulent analysis, (3) identifying fraudulent and incompetent analysts, and (4) highlighting deficiencies in the evidence. In the Court’s view, “there is little reason to believe that confrontation will be useless in testing analysts’ honesty, proficiency, and methodology — the features that are commonly the focus in the cross-examination of experts.”

The prosecution further argued that the analysts’ affidavits were admissible because they were akin to official and business records admissible at common law. The Court disagreed, holding that the affidavits were specifically produced for use at a defendant’s criminal trial, thus making them fundamentally different from business records under Fed. R. Evid. 803(6). Thus, the analysts’ statements — much like police reports, for the very same reason — were subject to confrontation.

In a sharp dissent, Justice Kennedy wrote that the Court’s “wooden application” of Crawford and Davis would dramatically increase the number of court appearances of witnesses involved in the testing of drugs in each case, including various analysts, laboratory technicians, laboratory directors and those involved in the chain of custody. As a result of the Court’s ruling, the dissent predicted that “uncertainty and disruption” would ensue along with “heavy societal costs,” all of which grant an unjustified “windfall to defendants.”

In an equally pointed response, the majority stressed that it had no authority to adopt a relaxed interpretation of the Confrontation Clause, just as it had no authority to relax the burdens added onto the prosecution by the right to trial by jury and the privilege against self-incrimination. The Court declared that the “best indication that the sky will not fall after today’s decision is that it has not done so already,” observing that many states previously had adopted the rule announced by the Court in Melendez-Diaz. The Court concluded that “there is little reason to believe that our decision today will commence the parade of horribles respondent and the dissent predict.”

In his concurring opinion, Justice Thomas stated that he wrote separately to continue to emphasize his view that the Confrontation Clause is implicated by extrajudicial statements only when they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony and confessions. While the concurrence by Justice Thomas was brief, his position on this issue laid the foundation for his deciding vote in favor of the plurality’s outcome in Williams v. Illinois.


Just two years after Melendez-Diaz, the Court decided Bullcoming v. New Mexico, the second case in the trilogy. In Bullcoming, the prosecution attempted to admit a blood-alcohol report against Donald Bullcoming on charges of driving under the influence. However, instead of calling Curtis Caylor, the analyst who conducted the blood-alcohol testing, the prosecution introduced Caylor’s report though another state laboratory scientist, Gerasimos Razatos, who had neither observed nor reviewed Caylor’s analysis. Defense counsel objected, arguing that the admission of the report would violate the defendant’s confrontation rights. The trial court admitted the report, and Bullcoming was convicted.

While the case was pending on appeal, the Court decided Melendez-Diaz. Despite the apparent applicability of Melendez-Diaz, the New Mexico Supreme Court nevertheless upheld the trial court’s admission of the report for two reasons. First, the court characterized Caylor as a “mere scrivener” who simply transcribed the results generated by the gas chromatograph machine. Second, the court determined that while the second scientist, Razatos, did not participate in the blood testing, he was qualified as an expert with respect to gas chromatography and was available for cross-examination. The Court granted certiorari to address the question: “Does the Confrontation Clause permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification?”

Writing for a 5-4 majority, Justice Ginsburg reversed the New Mexico Supreme Court’s affirmation of the conviction, holding that the trial court’s admission of Caylor’s report through the in-court testimony of another state laboratory scientist violated Bullcoming’s Sixth Amendment confrontation right. In doing so, the Court asserted that Crawford and Melendez-Diaz weighed heavily in Bullcoming’s favor because the state neither asserted that Caylor was unavailable nor provided Bullcoming the opportunity to cross-examine Caylor, thereby triggering Bullcoming’s confrontation rights.

Rejecting both lines of the New Mexico Supreme Court’s reasoning, the Court first determined that Caylor was not a “mere scrivener,” but rather made perceptive observations, certified the integrity of the blood sample and the accuracy of the chain of custody of the sample, and performed the blood-alcohol test in adherence to a precise protocol. The Court noted that Caylor’s representations about these actions were prime subjects for cross-examination. Moreover, the Court reiterated that the purported reliability of an analyst’s testimonial report drawn from machine-produced data did not overcome the Sixth Amendment bar, a point settled in Crawford. In that regard, the Court stressed that “analysts who write reports that the prosecution introduces must be made available for confronta-
tion even if they possess ‘the scientific acumen of Mme. Curie and the veracity of Mother Teresa.’”

The Court then held that the appearance by Razatos did not satisfy the Confrontation Clause because the “surrogate testimony of the kind that Razatos was equipped to give could not convey what Caylor knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed.” The Court stated that Razatos had no knowledge of why Caylor had been placed on unpaid leave, and that Bullcoming was unable to ask questions designed to reveal whether Caylor’s incompetence, evasiveness, or dishonesty may have caused his removal.

The Court held that “the 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.”

Justice Sotomayor authored a significant concurring opinion. In highlighting the testimonial nature of the expert report and articulating the limited reach of the Court’s ruling, Justice Sotomayor provided several potential paths for a nontestifying expert’s report to escape the reach of the Confrontation Clause. And in doing so, the concurrence established the foundation for the plurality holding in Williams v. Illinois.

Justice Sotomayor wrote that to determine whether a statement is testimonial, a court must decide whether it has “a primary purpose of creating an out-of-court substitute for trial testimony.” In this case, she concluded that the blood-alcohol report and Caylor’s certification met the test.

Justice Sotomayor then went on to identify four scenarios that were not present in Bullcoming, ostensibly to suggest that Bullcoming may not control the outcome of a future case should any of these scenarios appear. The four alternative fact patterns that Justice Sotomayor found were not present in Bullcoming were: (1) the state suggesting that an alternate purpose existed for the blood-alcohol report; (2) the testifying witness being a supervisor, reviewer or someone with a personal connection to the scientific test at issue; (3) the state asking an expert witness for his independent opinion about underlying testimonial reports that were not admitted in evidence; or (4) the state introducing only machine-generated results, such as a printout from a gas chromatograph.

However, Justice Sotomayor concluded that “[i]t his case does not present, and thus the Court’s opinion does not address, any of these factual scenarios.”


Justice Sotomayor’s concurrence in Bullcoming foreshadowed several unsettled boundaries regarding the reach of the Confrontation Clause. In particular, her concurrence raised the issue whether the prosecution could introduce a nontestifying expert’s report through another expert witness’s independent opinion. This was precisely the issue that the Court adjudicated in the third case of the trilogy, Williams v. Illinois. In Williams, the former dissenters in Melendez-Díaz and Bullcoming now formed the core of the plurality decision upholding the admission of evidence from a nontestifying expert’s report as consistent with the Sixth Amendment concerns addressed in Melendez-Díaz and Bullcoming.

In Williams, the defendant was charged with the abduction and rape of a young woman in Chicago. After the incident, doctors took a blood sample and vaginal swabs from the victim for a sexual assault kit. The Illinois State Police sent the kit to Cellmark Diagnostics Laboratory for DNA testing. Cellmark prepared a report containing a male DNA profile produced from semen taken from the swabs. At that time, Sandy Williams was not a suspect. A forensic specialist at the State Police lab, Sandra Lambatos, later conducted a computer search to determine whether the Cellmark profile matched any entries in the state DNA database. The computer showed a match to a profile produced by the lab from a blood sample that had been taken from Williams after an arrest in 2000 on unrelated charges.

At a bench trial before a state judge, the state called three forensic experts to link Williams to the crime through his DNA. The first expert testified that his analysis of the rape kit indicated the presence of DNA evidence. The second expert testified concerning how she created a DNA profile from Williams’ blood after his arrest for the unrelated offense. Finally, over the defense’s objection, the third expert, Lambatos, testified that there was a computer match between the DNA profile returned by Cellmark from the rape kit and the DNA profile from the defendant’s blood. The Cellmark report itself was never introduced into evidence.

On cross-examination, Lambatos confirmed that she did not conduct or observe any of the testing on the swabs, and that her testimony relied on Cellmark’s analysis. The defense then moved to strike her testimony regarding the testing done by Cellmark on the ground that it violated the Confrontation Clause. The state, in opposition, argued that the evidence was admissible under Illinois Rule of Evidence 703, which permits an expert to disclose the facts on which the expert’s opinion is based. The trial court denied the defense’s motion, and convicted Williams.

The Court’s plurality decision, written by Justice Alito on behalf of the four dissenters in Melendez-Díaz and Bullcoming, affirmed the conviction on two bases: (1) the statements in Cellmark’s report were not offered for their truth, but rather in the context of disclosing the underlying facts of another expert’s opinion; and (2) even if Cellmark’s report were introduced into evidence, it was nontestimonial and was not subject to the Confrontation Clause.

As to the first ground, Justice Alito wrote that “[i]t has long been accepted that an expert witness may voice an opin-
ion based on facts concerning the events at issue in a particular case even if the expert lacks firsthand knowledge of those facts.” Like Fed. R. Evid. 703, the Court observed, the equivalent Illinois rule permits “an expert [to] base an opinion on facts that are ‘made known to the expert at or before the hearing[,]’” But such reliance, the Court noted, “does not constitute admissible evidence of this underlying information.” Significantly, the Court explained that under both the federal and Illinois rules, “in jury trials ... expert[s] [are prohibited] from disclosing such inadmissible evidence.” Since no such restriction existed in bench trials, Justice Alito observed, the judge presumably understood the limited reason for the disclosure of the underlying information and did not rely on that information for an improper purpose.

The plurality opinion stressed that, under Crawford, the Confrontation Clause “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” Thus, the plurality opinion concluded that Lambatos did not testify to the truth of any matter concerning Cellmark, as she made no reference to the Cellmark report other than the DNA profile it contained, and did not testify to anything that was done at the Cellmark lab.

The plurality acknowledged that a controversial aspect of Lambatos’ testimony was her assertion that the Cellmark DNA profile was “generated [from] the male DNA profile found in semen from the vaginal swabs of [the victim].” The plurality remarked that a confrontation challenge to the admission of this evidence would have had force in a jury trial, as the jury may have erroneously accepted Lambatos’ testimony as proof that the Cellmark profile was derived from the sample obtained from the victim’s rape kit. However, the plurality concluded, the danger was simply not present in a bench trial due to “the acumen of the trial judge, who would understand that Lambatos’ statement was not offered for its truth, but merely made as a premise of the prosecutor’s question.” In Justice Alito’s view, the decision in Williams was “entirely consistent” with the holdings of Melendez-Diaz and Bullcoming. In both of the earlier cases, Justice Alito noted, the forensic reports were introduced into evidence to prove the truth of what they asserted.

Justice Alito’s second basis for affirming the conviction was that the Cellmark report was nontestimonial because it was not prepared for the primary purpose of accusing a targeted individual; instead, it was prepared to “catch a dangerous rapist who was still at large.” Given this, there was no “prospect of fabrication or reason to distrust the report.” Justice Thomas concurred with the plurality on this ground. In his view, Cellmark’s report “lacked the requisite ‘formality and solemnity’ to be considered ‘testimonial’ for the purposes of the Confrontation Clause.” Justice Thomas, however, notably adopted the “dissent’s view of the plurality’s flawed analysis.”

The theme of Justice Kagan’s dissent was scathing but simple: “Under our Confrontation Clause precedents, this is an open-and-shut case. The state prosecuted Sandy Williams for rape based in part on a DNA profile created in Cellmark’s laboratory. Yet the state did not give Williams a chance to question the analyst who produced that evidence” despite the fact that, for the dissenters, “Lambatos’s testimony is functionally identical to the ‘testimonial’ that New Mexico proffered in Bullcoming. ...” Likewise, the dissent rejected the plurality’s reliance on the “basis evidence” provision of Fed. R. Evid. 703, which Justice Kagan maintained simply trumped form over substance and dressed up a conclusion based on an out-of-court statement in the guise of science. Finally, the dissent rejected the assertion of the plurality and Justice Thomas that the Confrontation Clause did not apply to the testimony because it was nontestimonial. According to the dissent, Cellmark’s report was nontestimonial because it was produced by a modern lab, noting that the same was true of the blood-alcohol report in Bullcoming.

A close look at Williams reveals the deep division within the Court. Justice Kagan’s dissent, joined by Justice Scalia, Justice Ginsburg, and Justice Sotomayor, protested that the result of the case was “who knows what” and warned that “[t]he five justices who control the outcome of today’s case agree on very little” and have “left significant confusion in their wake.” And indeed, while Justice Thomas voted with Chief Justice Roberts, Justice Kennedy, Justice Breyer and Justice Alito to allow the admission of the challenged expert testimony in this case, he wrote separately in his concurrence that he actually “share[d] the dissent’s view of the plurality’s flawed analysis,” writing that the plurality opinion “[made] little sense” and contained no logical, textual, nor historical justification. Thus, while five justices voted for the ultimate judgment, another majority of the Court entirely rejected the reasoning justifying the judgment itself. As Justice Kagan wrote, “no one can tell in what way or to what extent the precedents in Melendez-Diaz and Bullcoming are altered “because no proposed limitation commands the support of a majority.”

4. Summary of the Confrontation Clause Trilogy

In Melendez-Diaz, Bullcoming, and Williams, the Court attempted to clarify the boundaries of a defendant’s confrontation rights when faced with the admission of opinions and evidence from nontestifying expert witnesses offered by the prosecution through surrogates, other experts, and documents. The decisions are sharply split, and the opinions and dissents are strident in tone, with the Melendez-Diaz and Bullcoming majorities ultimately finding themselves in the dissent to a fractious plurality opinion in Williams. Now that the dust has settled, Melendez-Diaz and Bullcoming provide defense counsel with a basis to challenge the admission of evidence from nontestifying experts as well as a ground to compel the prosecution to call such witnesses during its case-in-chief, thereby providing the defense with the opportunity to cross-examine. Yet dicta in Bullcoming and the plurality opinion in Williams suggest safe harbors under which the prosecution can still offer evidence from nontestifying experts, including through a different testifying expert under Fed. R. Evid. 703. However, the force of the Williams plurality may be narrowly confined to bench trials, a fact that Justice Alito appeared to acknowledge. While Williams injected uncertainty in the Court’s approach to resolving confrontation issues, it clearly signaled that the battle within the Court regarding the scope and application of the Confrontation Clause will continue.

III. Confrontation Clause Challenges Involving Forensic Experts In White Collar Prosecutions

As demonstrated by the trilogy, most cases involving Confrontation Clause issues relating to forensic experts concern blue collar, as opposed to white collar, crimes: drug distribution in Melendez-Diaz, rape in Williams, and...
driving under the influence in Bullcoming. But with the increased use of forensic experts in white collar cases, Confrontation Clause issues inevitably will arise.

To date, there have been at least two significant white collar criminal cases in which the defense challenged the prosecution’s admission of opinion and evidence from a nontestifying forensic expert on the ground that it violated the Confrontation Clause. The first case, the landmark environmental prosecution of United States v. W.R. Grace, involved the government’s unsuccessful attempt to admit the opinions of several nontestifying forensic experts through summary witnesses. Although the Court had not yet decided Melendez-Diaz, the district court declined to permit the government to circumvent confrontation by offering opinions of nontestifying experts through summary witnesses. In the second case, United States v. Ignasiak, the district judge permitted the government to admit autopsy reports through a witness who had not performed the autopsies, resulting in the defendant’s conviction on charges of unlawfully dispensing controlled substances to patients. Relying on Melendez-Diaz and Bullcoming, the Eleventh Circuit concluded that this violated the defendant’s rights under the Confrontation Clause, and vacated the conviction. Grace and Ignasiak provide defense counsel in white collar cases with guidance in addressing Confrontation Clause issues.

A. United States v. W.R. Grace

While Melendez-Diaz was pending before the Court, defense counsel in the “largest criminal environmental case in history” were grappling with a similar, but far more complex, Confrontation Clause issue in United States v. W.R. Grace. The Grace prosecution stemmed from Grace’s operation of a vermiculite mine outside of Libby, Mont. The vermiculite was contaminated with various fibrous minerals known as amphiboles, including two types of asbestos. Almost a decade after the mine was closed, national attention was called to the issue of the health of miners and their family members after a series of news articles described Libby as “a town left to die.” The articles reported that hundreds of Lincoln County residents had died or become ill from asbestos exposure caused by Grace’s mining operations. The media accused the federal government of having knowledge of the asbestos contamination in Libby for decades, but doing nothing to protect the residents.

Facing harsh public criticism, the Environmental Protection Agency (EPA) immediately dispatched a team to investigate possible asbestos contamination in Libby caused by the mining operations. Within three months, the government contemplated criminal proceedings against Grace. During the ensuing multi-year investigation, EPA collected over 100,000 air, soil, and dust samples from the Libby area to determine the presence of asbestos that could be attributed to the Grace mine. Scores of government personnel, consultants, and contractors participated in the sample collection. The samples were shipped to government laboratories, where they were analyzed by a bevvy of government experts, including geologists, mineralogists, chemists, and microbiologists. Results of the sampling analyses were entered into a government database that was compiled for use at trial.

Over five years after the investigation commenced, a federal grand jury returned an indictment charging all defendants with conspiracy to violate the knowing endangerment provision of the Clean Air Act and conspiracy to defraud the United States and obstruction of justice. Prosecutors charged three defendants with substantive counts of knowing endangerment. Also, prosecutors charged Grace with obstruction of justice. To prove that the defendants had violated the knowing endangerment provision of the Clean Air Act, the government had the burden to prove, beyond a reasonable doubt, that they had knowingly released a “hazardous air pollutant” into the ambient air with knowledge that it would place another person in imminent danger of death or serious bodily injury. Asbestos is a “hazardous air pollutant” under the Clean Air Act.

Before trial, the government disclosed its intention to call Paul Peronard, the EPA on-site coordinator who led the Libby investigation, as an expert who would testify that releases of asbestos in Libby from Grace’s mining operations placed Lincoln County residents in imminent danger of death or serious bodily injury. To support his opinion, Peronard planned to rely on information in the EPA’s sampling database.

The defense filed a motion in limine to preclude Peronard from relying on the sampling data, arguing that the sampling reports prepared by EPA scientists were “testimonial” evidence and subject
to the Confrontation Clause. The defense maintained that the sampling database was prepared for use against Grace in litigation, including the criminal action. More importantly, the defense asserted, the sampling information contained the expert opinions of multiple EPA scientists and contractors from the field and in the lab. The analysis and ultimate conclusion that a fiber contained asbestos was dependent upon the analysts’ skill, judgment, and discretion; the Confrontation Clause guaranteed the defendants’ right to challenge this application of discretion through cross-examination. Under the Confrontation Clause, the defense argued that the government was required to call each EPA scientist involved in compiling the information.

The motion also identified a fundamental flaw with the government’s sampling data, which further demonstrated the need for cross-examination of the experts who analyzed the samples. Whether the amphibole fibers from the mining operation constituted asbestos was a hotly disputed issue at trial. According to the U.S. Geological Survey (USGS), which worked in conjunction with the EPA at the Libby site, 95 percent of the amphiboles from the samples were winchite and richterite, neither of which has ever been classified as asbestos. The USGS concluded that less than six percent of the amphiboles were recognized forms of asbestos. The motion asserted that the government failed to differentiate the various amphibole fibers in its sampling data. As a result, the defense argued, the government could not prove the proportion of amphiboles in the samples that were “hazardous air pollutants” under the Clean Air Act. Consequently, the government also could not prove (1) the release of asbestos, (2) the amount of any asbestos released, and (3) a causal connection between the release of asbestos and imminent danger of death or serious bodily injury to another person. Thus, scrutiny of the results of the sampling analyses had a direct impact on whether the government could prove several essential elements of the knowing endangerment charges under the Clean Air Act. Recognizing this crucial weakness in their case, the government sought to preclude the defense from cross-examining the experts who performed the sampling analyses by having Peronard — who had become an active spokesperson and local celebrity hero for the EPA’s actions in Libby — introduce and rely on the information in the EPA sampling database.

Chief Judge Donald Molloy of the District of Montana permitted the defense to conduct an extensive voir dire examination of Peronard at trial to address whether he would be permitted to testify as an expert on endangerment and to rely on the information in the sampling database. Defense counsel forcefully argued that the Confrontation Clause prohibited Peronard from providing a “phantom analysis” of the samples, and that the government was required to call the experts who had conducted the sampling analyses so that they could be cross-examined. After the voir dire, Judge Molloy concluded that Peronard was “not a scientist in any of the relevant fields,” and that his opinion, based on studies done by toxicologists, epidemiologists or other scientists, was “not a scientific opinion under [Federal] Rule [of Evidence] 702.” Judge Molloy ruled that “[t]he government is not allowed to offer Mr. Peronard as a conduit through which to synthesize all of the government’s various scientific testimony and to offer an over-arching opinion on the question of endangerment.” Judge Molloy added that “the Constitution and the Rules of Evidence required that we not put evidence in by summary witnesses.” Judge Molloy made clear that Peronard could not rely on the sampling data. While similar to the situation in Melendez-Díaz, the issues raised in Grace foreshadowed that the Court would later wrestle with in Bullcoming and Williams involving the prosecution’s use of surrogate witnesses or other expert witnesses to admit the opinions of non-testifying experts.

Undaunted by the Judge Molloy’s ruling, the government later attempted to admit the sampling reports by calling an EPA chemist, Mary Goldade, to testify as a summary witness. Goldade oversaw the laboratories where the samples were analyzed, performing field and laboratory audits; she did not personally analyze any samples. Defense counsel argued that the government was “attempting to get around calling an expert who actually looked at the samples under a microscope, …” Judge Molloy agreed, ruling that Goldade also could not testify about sample results. Judge Molloy’s ruling was in line with the Court’s subsequent opinion in Bullcoming, though Justice Sotomayor’s concurrence suggested that the government may have been able to admit the contents of the sampling reports if it called Goldade as an expert witness.

In yet a final attempt to admit the sampling data and reports, the government offered them in evidence as business records under Fed. R. Evid. 803(6). Just as the Court in Melendez-Díaz rejected the respondent’s argument that the certificates qualified as business records, Judge Molloy excluded the sampling data and report, ruling that they did not meet the business records exception because the sampling was done for purposes of litigation. Judge Molloy ruled that “[i]n the absence of a properly disclosed expert to testify as to the sampling procedure … the evidence is not admissible.”

During this three-month trial, the government never called a single expert witness to testify about the sampling data. The defense successfully argued that the sampling reports were testimonial and subject to confrontation under the Sixth Amendment. Even without the benefit of the Court’s decision in Melendez-Díaz, the defense successfully precluded the government’s attempts to use laboratory reports to prove several essential elements of the Clean Air Act. In the end, all defendants were acquitted.

**B. United States v. Ignasiak**

The defendant in Ignasiak was a Florida physician charged with health care fraud and multiple counts of dispensing controlled substances in violation of the Controlled Substances Act. The government’s theory of the case for both sets of charges was that the defendant had prescribed unnecessary or excessive quantities of controlled substances without a legitimate medical purpose and outside the usual course of professional practices.

Dr. Andrea Minyard, the chief medical examiner and records custodian for the Office of the Medical Examiner, was a key witness at trial for the prosecution. During Dr. Minyard’s testimony, the government admitted autopsy reports for seven of the defendant’s patients who were not referenced in the indictment. In each instance, the autopsy reports concluded that the cause of death was pharmaceutical drug overdoses. Although two medical examiners testified about the autopsies that they had performed, Dr. Minyard testified about the other five autopsies performed by non-testifying medical examiners, including testimony that each medical examiner had concluded that the cause of death was drug overdose for each patient. In addition, Dr. Minyard testified that she agreed with the conclusions of the nontestifying medical examiners regarding the cause of death. The defendant objected to the
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IV. Practice Tips for White Collar Practitioners

White collar defense lawyers need to understand the scope of the rulings in Melendez-Diaz, Bullcoming and Williams, as two of these decisions provide the defense with a basis to preclude the prosecution from admitting damaging testimony of forensic experts in a manner that shields them from cross-examination. In addition, defense counsel in white collar cases seeking to exclude forensic reports from nontestifying experts should consider the possible use of the following strategies and tactics.

A. Early Request for Pretrial Discovery of Government’s Experts

At the outset of a matter, defense counsel should seek comprehensive dis-
covery of all of the prosecution’s expert witnesses, and specifically request discovery of non-testifying experts if the prosecution intends to rely on their opinions or any evidence prepared by them. Fed. R. Crim. P. 16(a)(1)(E) permits the defense to obtain discovery of documents, data, and things if they are material to the defense, or if the government intends to use the item in its case-in-chief at trial. Upon notice that the prosecution intends to rely on expert reports, defense counsel should request the underlying documents and data, including documents relating to collection, chain of custody, methodology, and quality control.

Careful scrutiny of the discovery produced by the government may reveal whether the government is relying on opinions of non-testifying experts who have not been identified, which can pose Confrontation Clause issues. This occurred in the Grace case, where defense counsel filed a successful motion to compel the government to produce documents underlying its air and soil sampling, including results of tests performed, procedures used to collect and preserve samples, and documents relating to the chain of custody. Analysis of the discovery revealed that the EPA had evidence that commingled nonregulated and regulated fibers in its sampling reports. Armed with this information, defense attorneys were able to argue that the expert reports were not admissible through a summary witness who could not be cross-examined on the actual testing that produced the questionable results. Were it not for this, the prosecution’s representation of the case was fully prepared to admit the sampling results reflecting inflated “asbestos” figures, while shielding their forensic experts from cross-examination.

B. Establish That the Non-testifying Expert’s Report Was ‘Testimonial’: Primary Purpose And Formality

The Court’s Confrontation Clause trilogy deals with the applicability of the Sixth Amendment in situations in which the government seeks to admit opinions and conclusions of non-testifying experts through affidavits, surrogate witnesses, and testifying experts. In each case, the Court’s analysis began with the purpose of the non-testifying expert’s report. If litigation was the “primary purpose” for which the report was prepared, then it likely will be deemed “testimonial.” In most white collar criminal cases, the defense should contend that all expert analyses performed for the prosecution after the government has commenced an investigation were done for the purpose of litigation.

Thus, as in Grace, defense counsel may consider requesting a voir dire examination of the case agent and the surrogate witness to establish the purpose of the opinions and evidence from the non-testifying expert. The examination should also seek to establish when the expert was engaged, the timing of the investigation, and the methodology employed by the expert to provide a factual basis to argue that the primary purpose of the non-testifying expert’s report is testimonial.

C. Establish That the Purpose of the Non-testifying Expert’s Opinions and Evidence Is to Prove an Essential Element of the Crime

Where applicable, defense counsel should argue that the purpose of the non-testifying expert’s opinions and evidence is to prove an essential element of the crime. A central tenet of criminal law is that the prosecution must prove each and every element of the crime beyond a reasonable doubt. If defense counsel can show that a non-testifying expert’s report is necessary to the prosecution to prove an essential element of the crime, this should heighten the trial court’s concern that confrontation is warranted.

This has been a common thread through the Confrontation Clause cases discussed so far. For instance, the state in Melendez-Diaz had the burden of proving, through the “certificates of analysis,” that the seized materials were controlled substances and that the amount of the substance satisfied the “trafficking” element. Similarly, in Bullcoming, the state was required to prove that the defendant was intoxicated while he was driving by showing that his blood-alcohol level exceeded the legal limit. And, in Williams, the DNA evidence was central to proving the identity and criminal act of the perpetrator. Finally, in Grace, the government sought to use the non-testifying experts’ reports to prove the release of a hazardous air pollutant and imminent danger, both of which are essential elements of the knowing endangerment crime. As the opinions in the non-testifying expert’s reports are central to proving the prosecution’s case, defense counsel must vigorously challenge the prosecution’s attempt to admit crucial evidence through the backdoor without cross-examination.

D. Challenge the Purposed Neutrality or Mechanical Nature of Non-testifying Expert’s Report

A consistent concern of the dissenting justices throughout Melendez-Diaz and Bullcoming was the “crushing burden” that the broadened Sixth Amendment rights would impose on the state. Such a burden was unjustified, the justices reasoned, where the expert witnesses at issue were inherently likely to be more objective, more accurate, and less adversarial to the defendant due to their being removed from the crime and the identity of the defendant, in addition to being bound by scientific protocols.

Trial judges, already overburdened with full dockets, may be particularly anxious to expedite their cases and thus find the Melendez-Diaz dissenters’ disdains for this “formalistic” requirement of confrontation persuasive. Defense counsel should not hesitate to use real-life examples of demonstrated misconduct, fraud, mistake, or impropriety by experts with similar backgrounds to bolster their arguments that confrontation and cross-examination of the non-testifying expert will be necessary to proceed.

The recent and ongoing crime lab scandal in Massachusetts, where one chemist is accused of violating testing and logging protocol in over 50,000 drug samples across 34,000 cases, serves as a reminder that cross-examination of the forensic experts responsible for providing evidence against defendants may very well unearth their weaknesses, if not their invalidity. On Aug. 30, 2012, approximately three years after the Court issued Melendez-Diaz, Gov. Deval L. Patrick issued a public statement concerning the suspension of two supervisors at a Massachusetts crime lab where a chemist was accused of mishandling drug evidence. The alleged mishandling of evidence spanned the years 2003 to 2012. In his press release, Gov. Patrick found the possible corruption at the crime lab so disturbing that he directed the State Police to close the lab:

This is deeply troubling information. No breach this serious can or will be tolerated. The State Police will continue their
investigation to determine what happened and who is responsible so that we can hold those accountable. We have also reached out to District Attorneys, the United States Attorney and the Public Defenders’ Office to inform them and to enlist their help to ensure the fair administration of justice. Meanwhile, I have directed the State Police to close the lab until they can ensure me, the judicial system and the public of the integrity of its work.134

As a result of alleged misconduct at a state crime lab that may have resulted in prosecutions and convictions based on tainted evidence, an estimated 34,000 cases are now being reviewed at considerable cost, time, and effort.135 As of Sept. 24, 2012, Massachusetts courts already had released at least a dozen defendants facing drug charges because the evidence in their cases had been compromised by an alleged rogue chemist in the state crime lab. Counsel can use this and other examples to rebut the assumption in the Melendez-Diaz dissent that immunizing forensic experts from testimony and cross-examination causes little to no prejudice to the defendant.

E. Seek to Use Crawford, Melendez-Diaz, and Bullcoming to Exclude Evidence Beyond Nontestifying Forensic Experts’ Reports

After the Court issued its decision in Melendez-Diaz in June 2009, defense counsel in several white collar prosecutions sought to rely on the opinion to challenge the admission of a variety of types of evidence on confrontation grounds. While victories for the defense have been limited, defense counsel nonetheless should consider how the reasoning of Crawford and its progeny may be successfully applied in situations beyond forensic expert reports.

For example, in two cases defense counsel relied on the Confrontation Clause to challenge the admission of documentary evidence when the prosecution sought to have evidence admitted by filing a certification of records made by a document custodian under Fed. R. Evid. 902(11). One was successful; the other was not. Fed. R. Evid. 902 provides that “[c]ertified copies of books, papers, telephone records, and documents, regularly kept in business records of the party presenting them, and not lost or destroyed, may be admissible in evidence if the custodian or other qualified person who has possession or control of the books, papers, telephone records, and documents testifies that—

5. The court in State v. Alvarez-Amador136 reversed the defendant’s conviction for identity theft on confrontation grounds. At trial, the state offered a certification from a custodian of records of the Social Security Administration (SSA), which stated that social security numbers furnished by the defendant did not belong to him. A police officer testified that he had asked the SSA to provide verification of the social security numbers. On appeal, the court held that under Melendez-Diaz, the admission of the certification violated the defendant’s Sixth Amendment right to confrontation.137 The court reasoned that the SSA certification, which was prepared in response to a police officer’s request for information about the defendant, was not an admissible official record.138

V. Conclusion

With the increased use of forensic evidence in white collar cases, confrontation issues will arise. The Court’s decisions in Melendez-Diaz and Bullcoming have reinvigorated the Confrontation Clause and provided white collar practitioners with a sound basis to challenge the prosecution’s admission of forensic reports from non-testifying experts through the back door. White collar practitioners should explore and test the unsettled boundaries of the Confrontation Clause in appropriate cases.

Notes

3. U.S. CONST. AMEND. VI.
5. Id. at 42.
6. Id. at 50-51.
7. Id. at 51.
8. Id. at 36.
9. Id. at 51.
10. Id. at 53-54; Davis v. Washington, 547 U.S. 813, 821 (2006).
13. Id. at 52.
14. Id. at 68.
15. Id. at 51-52.
17. Id. at 312-13.
20. Justice Scalia was joined by Justices Stevens, Souter, Thomas, and Ginsburg. Justice Thomas also filed a concurring opinion. Justice Kennedy filed a dissenting opinion, and was joined by Chief Justice Roberts, Justice Alito, and Justice Breyer.
22. Id. at 310 (quotations omitted) (“The documents at issue here, while denominated by Massachusetts law ‘certificates,’ are quite plainly affidavits: declarations of fact[s] written down and sworn to by the declarant before an officer authorized to administer oaths.”).
23. Id. at 310-11 (quoting Davis v. Washington, 547 U.S. 813, 830 (2006)).
26. Id. at 313.
27. Id.
28. Id. at 315.
29. Id.
30. Id. at 317.
31. Id. at 318.
33. Id.
34. Id. at 318-19.
35. Id. at 321.
36. Id.
37. Id.
38. Id. The Court also summarily dismissed the prosecution’s assertion that there should be no Confrontation Clause violation because the defendant had the ability to subpoena the analysts. Id. at 324. Noting that the power to subpoena witnesses was based on the Compulsory Process Clause, the Court opined that the Compulsory Process Clause is no substitute for the right of confrontation, which imposes a burden on the prosecution to present its witnesses. Id.
39. Id. at 332-37 (Kennedy, J., dissenting).
40. Id. at 337, 343.
41. Id. at 325 (majority opinion).
42. Id. at 325-26.
43. Id. at 328.
44. Id. at 329 (Thomas, J., concurring).
ring). In both cases, the police provided the seized evidence to the state laboratory for analysis, and the analysts were required by law to assist the police.

45. See infra Section II.B.3 (discussing Williams v. Illinois, 132 S. Ct. 2221 (2012)).
47. Id. at 2712.
48. Id. at 2713 (quotations omitted).
49. Id.
50. Id.
51. Id.
52. Id. at 2714.
53. Id. at 2714-15.
54. Id. at 2714.
55. Id. at 2715.
56. Id. (quoting Melendez-Diaz, 557 U.S. at 319 n.6).
57. Id. at 2715.
58. Id.
59. Id. at 2716. The Court also rejected, as foreclosed by Melendez-Diaz, the state’s contention that the blood-alcohol report was nontestimonial and did not implicate the Confrontation Clause. Id. at 2717. The Court held that the laboratory report resembled the certificates of analysis in Melendez-Diaz in all material respects. Id. In both cases, the police provided the seized evidence to the state laboratory for analysis, and the analysts were required by law to assist the police.

60. Id. at 2719 (Sotomayor, J., concurring).
61. Id. at 2720 (quoting Michigan v. Bryant, 131 S. Ct. 1143, 1155 (2011)).
62. Id.
63. Id. at 2722.
64. Id.
65. Id. at 2723.
67. Id. at 2229-30 (plurality opinion) (quotations omitted).
68. Id. at 2228.
69. Id. at 2233.
70. Id. at 2234 (quoting FED. RULE EVID. 703).
71. Id.
72. Id.
73. Id.
74. Id. at 2235 (quoting Crawford v. Washington, 541 U.S. 36, 59-60, n.9 (2004)).
75. Id.
76. Id. at 2236; see also id. at 2267 (Kagan, J., dissenting).
77. Id. at 2236 (plurality opinion).
78. Id. at 2237.
79. Id. at 2240.
80. Id.
81. Id. at 2243.
82. Id. at 2244 (quotations omitted).
83. Id. at 2255 (Thomas, J., concurring).
84. Id. (quoting Michigan v. Bryant, 131 S. Ct. 1143, 1167 (2011)).
85. Id.
86. Id. at 2265 (Kagan, J., dissenting).
87. Id. at 2267.
88. Id. at 2272-75.
89. Id. at 2277 (Kagan, J., dissenting).
90. Id. at 2255, 2263 (Thomas, J., concurring).
91. Id. at 2277 (Kagan, J., dissenting).
94. Id. at 1239.
98. Id. at 5-9.
99. Id. at 6.
100. Id. at 6-7.
101. Id. at 8-9.
the Asbestos Hazard and Emergency Response Act, 15 U.S.C. § 2642(3) (2002). None of these definitions include winchite or richterite. In United States v. W.R. Grace, 504 F.3d 745, 755 (9th Cir. 2007), the Ninth Circuit endorsed a dictionary definition of asbestos as a “grayish noncombustible material that ‘consists primarily of impure magnesia silicates.’” Neither winchite nor richterite is gray. See John W. Anthony et al., Handbook of Mineralogy (2001) (winchite is colorless, cobalt blue to bluish violet; richterite is brown, yellow, green, and brownish red).


105. Id. at 672.

106. Id. Judge Molloy’s ruling was in accord with the Court’s reasoning in Melendez-Diaz. In Melendez-Diaz, the Court recognized that “[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. … [A]n analyst’s lack of proper training or deficiency in judgment may be disclosed in cross-examination.” 557 U.S. 305, 319-320 (2009).


108. Trial Transcript 2/25/09, supra note 104, at 673.


110. Id. at 5165:22-24.

111. In Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011), Justice Sotomayor acknowledged that “[i]t would have been a different case if … a supervisor who observed an analyst conducting a test testified about the result or a report about such results.” Id. at 2722 (Sotomayor, J., concurring).


114. Id. at 1229-34.

115. Id. at 1229-32.

116. Id. at 1232.

117. Id.

118. Id. at 1233.

119. Id.

120. Id. at 1234-37.


126. Williams, 132 S. Ct. at 2227-29.


128. Id. at 345-46.

129. Id. at 341.

130. See also Williams v. Illinois, 132 S. Ct. 2221, 2264 (Kagan, J., dissenting).


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