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THE RIGHT TO CONFRONT WITNESSES, BUT NOT NECESSARILY AT TRIAL: PREDICTING A JUDGE-FOCUSED REMEDY IN *WILLIAMS V. ILLINOIS*

Scott A. Anderson[1]

In a recent New York Times op-ed piece, Stanford Law Professor Jeffrey Fisher predicted the outcome of *Williams v. Illinois*, a case pending in the Supreme Court of the United States.[2] Professor Fisher has argued that "a logical application of the law produces an easy answer" in *Williams*. The Confrontation Clause of the United States Constitution's Sixth Amendment requires all persons who are "witnesses against" a criminal defendant, including lab analysts whose reports are not being offered into evidence at trial, to testify in court.[3] We should trust Professor Fisher's analysis of *Williams*. After all, his argument in *Crawford v. Washington* was the genesis for the string of United States Supreme Court cases that give criminal defendants expanded rights under the Confrontation Clause.[4]

Professor Fisher claims that those who argue against his easy answer are inappropriately smuggling cost-benefit analyses into otherwise pristine constitutional determinations.[5] Government officials (or dissenting Justices) who mention "scarce state resources" parrot Chicken Little: their claims that the criminal justice system will grind to a halt if more witnesses must be confronted are both exaggerated and demonstrably false.[6] A small fraction of criminal defendants - about 5% in the federal and state systems - force the prosecution to prove its case at a jury trial.[7] Because most defendants do not exercise their right to a jury trial, most defendants will not create Confrontation Clause problems. Moreover, similar financially motivated claims have been proven false. In the landmark case of *Gideon v. Wainwright*, when the Court granted all criminal defendants the right to counsel, States adapted their criminal justice systems to allow indigent persons access to legal

[1] Capital University Law School. J.D., Case Western Reserve University, Ph.D. (Philosophy), The Ohio State University.
[2] Williams v. Illinois, No. 10-8505 (U.S. argued Dec. 6, 2011).
[3] *See* Jeffrey L. Fisher, *The Bill of Rights Doesn't Come Cheap*, N.Y. TIMES, December 2, 2011, at A39.
[4] Crawford v. Washington, 541 U.S. 36 (2004).
[5] Fisher, *supra* note 3.
[6] *See id.*
[7] *See* Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2540 (2009).

representation in criminal cases.[8] The legal sky did not fall. Likewise, as Professor Fisher argues, it will not fall if the *Williams* Court decides that the Confrontation Clause requires live testimony of all persons who prepare documents to be used against criminal defendants at trial.[9]

However, one might wonder why Professor Fisher reached back 48 years to present *Gideon v. Wainwright* as an example of how States should adapt old criminal procedures to suit new constitutional protections. In the same year that Professor Fisher argued *Crawford v. Washington*, he also argued a landmark Sixth Amendment case before the Supreme Court: *Blakely v. Washington*.[10] Unfortunately for Professor Fisher, and for criminal defendants nationwide, *Blakely*'s utility as a defendants' rights case is limited. Indeed, the protections offered under *Blakely* were diluted by the Court's decision in *United States v. Booker*;[11] which implemented the *Blakely* protections in the federal system.[12] In contrast with *Gideon*, *Booker* did not alter criminal procedures to protect defendants' new Sixth Amendment rights.[13] Instead, *Booker* altered sentencing provisions to protect judicial discretion in sentencing criminal defendants.[14]

As Professor Fisher has forcefully argued, the logical application of the law to the *Williams* case is quite simple.[15] However, as Oliver Wendell Holmes Jr. famously warned, experience, not logic, is the life of the law;[16] and experience with the Court's recent Sixth Amendment jurisprudence is telling. The Court sidestepped a criminal defendant's right to a jury trial by imposing the *Booker* remedy for applying the *Blakely* right. The crucial question in *Williams*, then, is not whether the Confrontation Clause will require cross-examination of all lab analysts who have prepared reports for trial. The answer is that it will. Instead, the question now is whether the Court will sidestep the right to confront witnesses by imposing a new *Williams* remedy for applying the *Crawford* right.

Part I of this article traces the Court's Sixth Amendment analysis of the criminal defendant's right to a jury trial and demonstrates how the Court's judge-focused remedy in *Booker* undercut its own decision in *Blakely*. Part II traces the Court's Sixth Amendment analysis of the criminal defendant's right to confront witnesses and demonstrates how the Court could apply the law to expand defendants' confrontation rights while adopting a judge-focused remedy that, like *Booker*, restricts the very right it grants.

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[8] Gideon v. Wainwright, 372 U.S. 335 (1963).
[9] *See* Fisher, *supra* note 3.
[10] Blakely v. Washington, 542 U.S. 296 (2004).
[11] United States v. Booker, 543 U.S. 220 (2005).
[12] The *Booker* remedy has not only diluted the *Blakely* solution, it has poisoned it. As implemented by the State of Ohio, for example, the *Booker* remedy for the *Blakely* right has resulted in longer prison stays for upper-level felony offenders and a burgeoning prison population. *See* BRIAN MARTIN, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, OFFICE OF POLICY AND OFFENDER REENTRY, BUREAU OF RESEARCH, *OHIO PRISON POPULATION PROJECTIONS AND INTAKE ESTIMATES: FY 2010 – FY 2018* (July 2009), http://www.drc.ohio.gov/web/Reports/proj_july2009.pdf, pp. 6-9.
[13] *See Booker*, 543 U.S. at 291.
[14] *Id.*
[15] *See* Fisher, *supra* note 3.
[16] OLIVER WENDELL HOLMES, JR. THE COMMON LAW 5 (1970) (Mark DeWolfe Howe, ed., Belknap Press 1963) (1881).

I. The Sixth Amendment Right to a Jury Trial: Juries versus Judges

A criminal defendant cannot be convicted unless there is proof beyond a reasonable doubt of every fact necessary to constitute a crime.[17] Typically, a jury determines whether the defendant is guilty of every element of the crime charged.[18] In making this determination, juries often decide mixed questions of fact and law.[19] Examples of questions a jury might decide are whether an alleged false statement is material to a government agency's activities,[20] whether and to what extent a victim was harmed under a carjacking statute,[21] and whether an alleged hate crime was motivated by racial hatred.[22]

Judges, not juries, typically determine sentencing issues such as whether and to what extent a prior conviction should increase a defendant's sentence.[23] However, judges do not have unbounded discretion in imposing sentences, and their sentencing decisions may be constrained by legislatively imposed requirements.[24] Nevertheless, at the bottom of prescribed sentencing ranges trial judges are given great discretion. [25] Indeed, under the Sixth Amendment a judge may determine any fact that increases the "statutory minimum" prescribed by the criminal statute under which the defendant is charged.[26]

A. The Defendant-focused *Blakely* Right

The Sixth Amendment forbids a judge from determining any fact (other than the fact of a prior conviction) that increases the "statutory maximum" prescribed by the criminal statute under which the defendant is charged.[27] The Sixth Amendment requires juries, and not judges, to decide any fact that could increase a defendant's statutorily authorized punishment.[28] In short, if the finding of a certain fact could increase the "statutory maximum" sentence a defendant could serve when convicted, the same defendant's Sixth Amendment right to a jury trial is infringed if a jury cannot make the same finding.[29]

However, the "statutory maximum" for purposes of the Sixth Amendment is not necessarily the maximum specified in the criminal statute.[30] This was *Blakely*'s addition to the Court's right–to-jury-trial jurisprudence.[31] In jurisdictions that had instituted a prescribed range of sentences lower

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[17] *See* In re Winship, 397 U.S. 358 (1970).
[18] *See* Sullivan v. Louisiana, 508 U.S. 275 (1993).
[19] *See* United States v. Gaudin, 515 U.S. 506 (1995).
[20] *Id.*
[21] *See* Jones v. United States, 526 U.S. 227 (1999).
[22] *See* Apprendi v. New Jersey, 530 U.S. 466 (2000).
[23] *See* Almendez-Torres v. United States, 523 U.S. 224 (1998) (The post-*Blakely* case of Oregon v. Ice, 555 U.S. 160 (2009) also illustrates this point. In *Ice*, the Court permitted judges, as consistent with their historical role as sentence-imposers, the discretion to impose consecutive sentences on criminal defendants).
[24] For example, a State statute requiring judges to impose "mandatory minimum" sentences is constitutional. *See, e.g.*, McMillan v. Pennsylvania, 477 U.S. 79 (1986).
[25] *See* Harris v. United States, 536 U.S. 545 (2002).
[26] *Id.*
[27] *See Apprendi*, 530 U.S at 466.
[28] *See* Ring v. Arizona, 536 U.S. 584 (2002).
[29] *See id.*
[30] *See Blakely*, 542 U.S. at 303-305.
[31] *Id.*

than the announced maximum sentence, the "statutory maximum" became the maximum sentence in the lower prescribed range.[32]

The *Blakely* facts provide an example. Mr. Blakely pled guilty to second-degree kidnapping under the Washington State criminal statutes.[33] The statutory maximum for that offense was 10 years; however, the Washington criminal code directed judges to sentence offenders to 49-53 months absent findings that would support a longer sentence.[34] The trial judge found that Mr. Blakely had acted with "deliberate cruelty" in kidnapping his wife and imposed a sentence of 90 months, well below the statutory maximum of 10 years. [35]

The *Blakely* Court found a Sixth Amendment violation.[36] The judge had to make a finding of "deliberate cruelty" to impose the "exceptional" sentence of 90 months and, in doing so, he invaded the jury's purview of deciding every fact that increases the defendant's sentence beyond "what was authorized."[37] The Court found that what was authorized by the statute was the maximum sentence under the presumed statutory range: 53 months.[38] Because the judge made a finding of fact that increased the defendant's sentence beyond the "statutory maximum" of 53 months, the trial judge infringed the defendant's Sixth Amendment right to a jury trial.[39]

Note that the Court in *Blakely* could have upheld Mr. Blakely's Sixth Amendment rights by categorizing "deliberate cruelty" as one of those mixed questions of fact and law that juries, not judges, traditionally decide. However, it elected not to do so, and instead struck down sentencing schemes (like Washington's) that guide judges toward sentences less than the statutory maximum when the circumstances so require. [40]

B. The Judge-focused B*ooker* Remedy

It appeared, immediately following the *Blakely* decision, that criminal defendants sentenced under the most determinate sentencing schemes were poised to recover a windfall.[41] The "statutory maximum" for purposes of sentencing was effectively reduced to the maximum sentence prescribed by their jurisdiction's presumptive range of sentences. Even defendants who had knowingly and voluntarily waived their Sixth Amendment right to a jury trial based on the understanding that they could receive the specified maximum sentence (*a la* Mr. Blakely's 10 years) were clamoring to receive what was rightly theirs under the Constitution: the maximum (and typically much lower) *presumptive* sentence.

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[32] *See id.*
[33] *Id.* at 299.
[34] *Id.* at 300.
[35] *Id.*
[36] *Id.* at 313.
[37] *Id.*
[38] *Id.* at 304.
[39] *Id.* at 305.
[40] Including one adopted in California. *See*, *e.g.*, Cunningham v. California, 549 U.S. 270 (2007).
[41] Indeterminate sentencing schemes provide broad ranges of prison time—say, 5 to 25 years—for a particular crime. Such schemes survive under *Blakely* (as Justice Scalia explicitly stated) but give the ultimate authority of the release decision to the executive branch—typically, a parole board—not to the sentencing judge. *See Blakely*, 542 U.S. at 324-26.

In its next case, however, the Court dashed these defendants' hopes.[42] Although the Court in *Booker* decided that the federal sentencing scheme was sufficiently similar to Washington's scheme to be held unconstitutional, it nonetheless decided to "fix" it.[43] The Court reasoned that if criminal sentencing provisions did not have presumptive sentencing ranges - that is, ranges that the judge must consider prior to sentencing the defendant - then there would be no *Blakely* problem.[44]

Unconstitutional sentencing schemes require a judge to make a finding of fact to increase a sentence beyond the prescribed presumptive range. Presumably, if the judge were not locked into the presumptive range in the first place, then he or she would not have to make a finding of fact to increase the sentence beyond that range. As such, the Court decided the way to fix the constitutional problem was to make the sentencing guidelines advisory, rather than mandatory.[45] In this new sentencing scheme, a trial court would not be obligated to provide a sentence in the presumptive range.[46] As such, the trial court would not be inappropriately increasing a sentence beyond the presumptive range (for example, beyond Washington State's 49-53 months for a typical second-degree felony) if it chose a greater sentence (like Mr. Blakely's 90-month sentence) so long as that sentence was not beyond the announced statutory maximum (such as Washington's 10-year maximum).[47]

The *Booker* remedy shifts the *Blakely* perspective from a defendant-focused trial right to a judge-focused sentencing privilege.[48] The defendant has the right for the jury to determine every fact necessary to convict him of the crime, including any that might increase his penalty beyond that prescribed by the legislature. But the legislature cannot prescribe any sentence for a crime lower than a single statutory maximum.[49] Although the legislature may advise trial courts about what sentences may be appropriate for particular criminal offenders, the courts are not bound by that advice. Because a trial court has the discretion to sentence up to the single statutory maximum, it cannot infringe upon the defendant's right to have a jury find every fact that would increase his sentence beyond that statutory maximum. In short, under the constitutionally approved sentencing scheme, it is impossible for a court to make a finding of fact that would increase a defendant's sentence beyond the statutory maximum. In this manner (and somewhat counter-intuitively) unfettered judicial discretion to sentence a criminal defendant protects that defendant's Sixth Amendment right to a jury trial.

II. **The Sixth Amendment Right to Confrontation: Prosecutors vs. Judges**

Much like the right to a jury trial, the right to confront witnesses protects the defendant's right to have the prosecution prove each material element - each "fact" - of the criminal case against him. In particular, the Confrontation Clause forbids the prosecution from presenting any in-court testimony about a lab report "made for the purpose of proving a particular fact."[50] The Court's

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[42] *See Booker*, 543 U.S. at 226-27.
[43] *See id.* at 234-35.
[44] *Id.*
[45] *Id.* at 245.
[46] *See id.*
[47] *See Booker*, 543 U.S. at 232.
[48] *Id.* at 245.
[49] As opposed to prescribing a "mandatory minimum" sentence for an aggravating circumstance under which a crime was committed, such as brandishing a weapon.
[50] Bullcoming v. New Mexico, 131 S. Ct. 2705, 2710 (2011).

Confrontation Clause analysis is not limited to lab reports, however: "[t]he Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits."[51]

The impermissible prosecutorial behavior at issue, then, is submitting affidavits to the trial court to determine their reliability (and, therefore, admissibility) as evidence, unsupported by live testimony.[52] So, in *Crawford* and its progeny, the Court is not only restricting the type of evidence a prosecutor may present to prove a criminal case, but is also limiting the trial court's discretion to admit certain kinds of evidence.[53] As in *Blakely*, the court is expanding the scope of a criminal defendant's Sixth Amendment rights to curtail the authority of trial judges to make essential determinations of fact.[54] In essence, *Blakely* removed the authority of trial court judges to determine any fact necessary to increase a criminal defendant's maximum sentence. *Crawford* similarly removed the authority of trial court judges to determine any fact necessary to prove the reliability of testimony offered against the defendant.

A. The Defendant-focused *Crawford* Right

The Confrontation Clause gives criminal defendants the right to confront "witnesses against" them.[55] The Clause promotes reliable testimony of those witnesses by requiring them to be subject to cross-examination by the defendant.[56] As the Court stated in *Crawford,* "the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands . . . that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[57]

Therefore, if the government produces a witness whose testimony was taken for the purpose of prosecuting the defendant, then the prosecution must permit that witness to be cross-examined.[58] As an example, the prosecution must present the defendant's wife - not just her recorded statement to police officers - as a witness against the defendant.[59] Similarly, a laboratory analyst who has certified his findings concerning a material element in the prosecution's case must also be presented for cross-examination - the analyst's report, by itself, will not suffice.[60] Additionally, the analyst who performed the test must be cross-examined regardless of whether the report was a sworn affidavit or an unsworn certification.[61]

Indeed, it is the nature of the anticipated testimony, not the nature of the underlying record, which is dispositive. A lab report made for purposes of prosecuting a defendant cannot be presented as a "business record" under the rules of evidence without testimony.[62] This general usage of the rules of evidence would inappropriately circumvent the defendant's Sixth Amendment right to

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[51] *Melendez-Diaz*, 129 S. Ct. at 2542.
[52] Admissibility of evidence, not the weight of evidence, is the crucial factor here. *See Melendez-Diaz*, 129 S. Ct. at 2540.
[53] *See generally*, *Crawford*, 541 U.S. 36.
[54] *See Blakely*, 524 U.S. at 296.
[55] U.S. CONST. amend. VI.
[56] *Id.*
[57] *Crawford*, 541 U.S. at 36.
[58] *See id.*
[59] *Id.* at 54.
[60] *Melendez-Diaz*, 129 S. Ct at 2542.
[61] *Bullcoming*, 131 S. Ct. at 2716.
[62] *See id.*

confront the witnesses - the persons responsible for generating those reports - against him. If the prosecution plans to use a lab report for purposes of proving a material element against a criminal defendant, then the defendant has the right to cross-examine the person who generated that report.[63]

If the Confrontation Clause requires live testimony of lab analysts, then the Clause might be satisfied by experts testifying to lab analyses, even those they have not performed, so long as the lab report itself is not introduced against the defendant. On these facts, the expert analyst is subject to cross-examination and the lab report will not be introduced against the defendant. Because the lab report is not evidence at all, the analyst need not be confronted and the expert whose testimony is offered into evidence is subject to cross-examination. As a result, in cases such as these, the defendant's right to confront witnesses against him would seem to be upheld.

This is the issue in the upcoming case of *Williams v. Illinois*.[64] The respondents argue that providing live expert testimony about a subject contained in a lab report gives defendants sufficient opportunity to cross-examine witnesses against them.[65] Unfortunately for the respondents, however, their argument will not prevail.

As mentioned previously, the Sixth Amendment provides a defendant with the right to cross-examine any witness against him.[66] For example, a person who has generated a DNA test has generated that test "against" the defendant, because the prosecution will be using those results to prove a material element of its case.[67] Therefore, the analyst who has performed the test must be subject to cross-examination. The prosecution cannot use the hearsay rules to argue that the underlying, but not admitted, DNA test is not offered to prove the truth of the matter asserted by the expert; namely, his expert opinion within a reasonable degree of medical certainty that the person identified by the test is the defendant.[68] Indeed, this usage of the rules of evidence to circumvent the requirements of the Confrontation Clause is the primary evil the Supreme Court has been trying to prevent since *Crawford*.

The Confrontation Clause does not require cross-examination of "witnesses about" the defendant's case, it requires cross-examination of "witnesses *against*" the defendant.[69] Because the prosecution in *Williams* did not offer the primary laboratory witness against the defendant – the DNA analyst - for cross-examination, Mr. Williams's Sixth Amendment right to confrontation was infringed.

B. A Judge-focused *Williams* Remedy

Because court-generated rules do not grant fundamental rights, the rules of evidence must accordingly bow to the provisions of the Confrontation Clause in the Bill of Rights. As such, where courts have generated rules, even when based upon long-standing practices and traditions, they cannot be used to infringe a criminal defendant's constitutional rights. If a guarantee under the Sixth

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[63] As Justice Ginsburg put it, "when the State elected to introduce [Lab Analyst] Caylor's certification, Caylor became a witness [Defendant] Bullcoming had the right to confront." *Bullcoming*, 131 S. Ct. at 2716.
[64] *Williams*, No. 10-8505.
[65] *See id.*
[66] U.S. CONST. amend. VI.
[67] *Williams*, No. 10-8505.
[68] *Id.*
[69] U.S. CONST. amend. VI. (emphasis added)

Amendment is violated, then no substitute procedure - such as the trial court's otherwise appropriate usage of the rules of evidence - can cure the constitutional violation.[70]

Although the relation between procedural rules and constitutional rights may be clear, the rules-versus-rights discussion obscures what some might view as an "anti-trial judge" bias.[71] The constitutional rule overturned by the Supreme Court in *Crawford* - the so-called *"Roberts* rule" - was discredited as being "based on a mere judicial determination of reliability,"[72] a determination subject only to an "unpredictable and inconsistent application."[73] We are told that the Framers themselves "were loath to leave too much discretion in judicial hands"[74] and they would not mean "to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"[75] Indeed, the proper method of interpreting the Constitution is "in a way that secures its intended constraint on judicial discretion."[76] The Court also provided the rationale for limiting judicial discretion: "the Framers knew that judges . . . could not always be trusted to safeguard the rights of the people."[77]

Even given these sentiments, the Court's decisions in *Crawford, Melendez-Diaz,* and *Bullcoming* cannot convincingly be attributed to anti-trial judge bias. Justices are not biased against judges. Yet, the Court's Confrontation Clause jurisprudence has restricted the trial court's discretion to make a class of decisions that have, until recently, been within the sole purview of the trial court: to decide what evidence may be admitted at trial. In this manner, *Crawford* and its progeny have invaded the historical role of the trial court. With its expansion of the protections provided to criminal defendants under the Confrontation Clause, the Court has curtailed the power of judges to apply the rules of evidence to determine the admissibility of out-of-court testimony.

1. Judicial Discretion Regained

Crawford and its progeny restrict a judge's discretion on evidentiary matters in criminal cases.[78] Similarly, *Blakely* restricted judges' discretion to sentence criminal defendants.[79] The *Booker* remedy corrected *Blakely*'s restriction of judicial authority to sentence by making sentencing provisions advisory rather than mandatory.[80] The *Williams* remedy could correct *Crawford*'s restriction of judicial authority by permitting judges to decide admissibility issues prior to trial, even those that might trigger Confrontation Clause problems.[81] In this manner, as in *Booker,* the constitutional problem could be dissolved by granting judges more authority under a new procedural regime.

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[70] *See Bullcoming*, 131 S. Ct. at 2716.
[71] The dissenting justices in *Melendez-Diaz* sensed this bias, prompting Justice Scalia to retort in footnote 13 of the majority opinion: "Contrary to the dissent's suggestion…we do not cast aspersions on trial judges." *Melendez-Diaz*, 129 S. Ct. at 2561.
[72] *Crawford*, 541 U.S. at 62.
[73] *Id.* at 66.
[74] *Id.* at 61.
[75] *Id.* at 61.
[76] *Id.* at 67.
[77] *Id.*
[78] *See id.* at 36.
[79] *See Blakely*, 542 U.S. at 294.
[80] *See Booker*, 543 U.S. at 220.
[81] *See* Fisher, *supra* note 3, at A39.

Before outlining such a regime, an immediate objection should be addressed. Some might argue that the focuses of *Blakely* and *Crawford* were saliently different. *Blakely* sought to directly limit the trial judges' power to sentence a defendant.[82] As such, it makes sense that the *Booker* corrective addresses judicial power by expanding it under a new sentencing scheme.[83] *Crawford*, on the other hand, seeks to limit prosecutorial power to provide testimonial evidence, not the trial court's ability to determine admissibility issues.[84] Therefore, *Williams* should not be used to expand the trial court's power, but rather, to further restrict prosecutorial authority.

This argument lies at the heart of Professor Fisher's argument against counting the costs of applying the *Crawford* right more broadly.[85] The Court should not concern itself with increasing the prosecutorial cost of bringing in more live witnesses to testify at trial. If the Constitution guarantees a right to the defendant, then the prosecution must bear the cost of affording that right. Indeed, as Professor Fisher reminds us in the title of his editorial, a protection guaranteed under the Bill of Rights "doesn't come cheap."[86]

The primary justification for restricting the application of *Crawford* and its progeny will not be the financial concerns of implementing the new constitutional provisions, as Professor Fisher has argued.[87] In fact, a more pervasive and systemic consideration must be addressed: the traditional role of the trial judge. The Court will feel pressure to address the concerns of its fellow members of the judicial branch in applying the *Crawford* right more broadly. As in *Booker*, the Court may provide a procedural remedy that affirms the authority of trial judges, while upholding a criminal defendant's procedural rights under the Sixth Amendment.[88]

2. A Procedural Guarantee of Confrontation

The proposed procedural correction under *Williams* acknowledges the source of the defendant's Confrontation Clause problems: the prosecution.[89] By waiting until trial to present testimony subject to cross-examination, the government creates *Crawford* problems for both the defendant and the court. If the court could make determinations about proposed testimonial evidence pre-trial, then there would be no Confrontation Clause problems. The criminal defendant would be apprised of all the "witnesses against" him and could then be given the opportunity to confront those witnesses via cross-examination.

Under this system, the prosecution would not be given the opportunity to create Confrontation Clause problems at trial because the trial court would render decisions on the admissibility of testimonial evidence before trial. The Court in *Williams* could require the government to present all testimonial evidence, including all witnesses who have generated reports of testimonial evidence, well before the trial date, or run the risk of infringing the defendant's Confrontation Clause rights at trial.

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[82] *Blakely*, 542 U.S. at 304-305.
[83] *See Booker*, 543 U.S. at 232.
[84] *See Crawford* 541 U.S. at 68-69.
[85] *See* Fisher, *supra* n3 at A39.
[86] *Id.*
[87] *Id.*
[88] *Booker* 543 U.S. at 268.
[89] *Williams*, No. 10-8505.

Here is how the system might be structured: the criminal defendant would have the right to cross-examine all witnesses against him, including lab technicians who create reports to prove material elements at trial. Presumably the government knows who these persons are, or it would not be able to prove its case beyond a reasonable doubt. For instance, if DNA evidence is crucial to determining the identification of the defendant, then the government cannot indict, much less convict, the defendant without proof of that fact. Similarly, if the substance the defendant is charged with trafficking is not proved to be cocaine then the defendant cannot be indicted. Therefore, at some stage between indictment and trial, the government should be compelled to produce in discovery a list of all witnesses and documents that it intends to present at trial to prove its case. If the government is unable to produce all "witnesses against" the defendant prior to trial, then it would be infringing the defendant's rights under *Crawford* for all such witnesses, present or absent.[90]

By following this procedure, defendants would be provided with notice of all the witnesses who are subject to cross-examination. The defendant would then be given the opportunity to demand access to the tests and the witnesses. If the defendant is given a reasonable time to interview or depose the witnesses against him and does not do so, then he would waive his Sixth Amendment right to confrontation of those witnesses *at trial*.[91] The right to confront witnesses is not an "unwaivable" right. By understanding what the right is and what must be done before trial to execute that right, the defendant would be provided with sufficient information to waive the right to confrontation if he so chooses.

Under such a system, the prosecution would meet its burden under the Confrontation Clause to apprise the defendant of all "witnesses against" him. The trial court would then offer the defendant the opportunity to confront those witnesses in a pre-trial proceeding. This would provide the criminal defendant with all of the rights permitted under the Confrontation Clause. If the criminal defendant does not choose to exercise his Confrontation Clause rights, then the defendant will have demonstrated a waiver of those rights.

This procedure of "notice-and-demand" is already present in some states and should be explicitly acknowledged by the *Williams* Court as the preferred constitutional means for meeting Confrontation Clause requirements. Moreover, the Court should explicitly find that the prosecutor's notice-and-demand triggers the defendant's obligation either to confront or to waive the right to confront (within a reasonable time) all witnesses presented against him.[92]

The anticipated result in *Williams* would uphold the criminal defendant's right to confront witnesses before trial, rather than at trial.[93] The trial court, of course, would be in charge of setting

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[90] *Crawford*, 541 U.S. at 51.

[91] The defendant could appeal the issue of the "reasonableness" at the time a judge permitted him to confront witnesses pre-trial. This would align *Williams*' remaining right of appeal under the Sixth Amendment with *Booker*'s right to appeal the "reasonableness" of a judge's sentence.

[92] Justice Scalia has already noted the constitutional sufficiency of such notice-and-demand statutes and has stated, more broadly, that "[t]here is no conceivable reason why [a criminal defendant] cannot…be compelled to exercise his Confrontation Clause rights before trial." *Melendez-Diaz*, 129 S. Ct. at 2541. Moreover, Justice Scalia and the four dissenters in *Melendez-Diaz* and *Bullcoming* could form a majority for this new remedy. Indeed, a similar majority was formed in *Booker* when Justice Ginsburg switched sides from the "rights" majority to the "remedy" majority. *Booker* 543 U.S. at 225.

[93] *Williams*, No. 10-8505.

the discovery schedule and the pre-trial hearings. Prior to trial the court would also make any evidentiary hearings, subject to later Confrontation Clause challenges. For example, a defendant might confront certain witnesses in a pre-trial motion *in limine*. The court could make its findings concerning the admissibility of the witnesses' testimony and proceed to trial, subject to the defendants' right to appeal the trial court's findings. This would align pre-trial *in limine* hearings to determine whether witness testimony should be admitted with pre-trial hearings to determine whether physical evidence should be suppressed. In this manner, the Court in *Williams* could affirm the trial court's authority to render decisions on admissibility while preserving the criminal defendant's right to confront witnesses.