WILLIAMS v. ILLINOIS

AN ANALYSIS

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Updated November 2012 in light of People v. Lopez and People v. Dungo

In *Williams v. Illinois* (2012) ___ U.S. ___ [132 S.Ct. 1221], a fractured United States Supreme Court found that the Confrontation Clause is not violated when an expert witness uses and testifies about the results from tests she did not perform herself as the basis of her opinion.

The plurality opinion authored by Justice Alito (132 S.Ct. at pp. 2227-2244) and joined by Chief Justice Roberts, and Justices Kennedy and Breyer, determined such test results were not testimonial statements within the meaning of the Confrontation Clause for two independent reasons. First, the plurality reasoned the statements at issue were not admitted for the truth of the matter asserted but to explain the assumptions on which the testifying witness's opinion is based. (*Id.* at pp. 2228, 2233-2241.) Second, the plurality decided the statements at issue did not have the primary purpose of being used against defendant. Instead, they were made before any perpetrator had been identified and for the purpose of catching an at-large rapist. (*Id*. at pp. 2228, 2242-2244.)

Justice Thomas's opinion (132 S.Ct. at pp. 2255-2265) provided the fifth vote to affirm the underlying conviction and reasoned the test results at issue were not testimonial statements within the meaning of the Confrontation Clause because they did not bear "indicia of solemnity" (*id*. at pp. 2259-2260) such as an affidavit or deposition, and were not "formalized testimonial materials,"such as prior testimony or statements elicited during a custodial interrogation. (*Id*. at p. 2260.) In this concurrence, Justice Thomas rejects the "primary purpose" test – whether the primary purpose of the statement at issue is to prove the guilt of a particular defendant – formulated by the plurality (*id*. at p. 2262), because there is no justification in the text of the Constitution to adopt such a limiting interpretation of Confrontation Clause and because such a formula is illogical – a statement may be testimonial even before a suspect is identified and may have the dual purpose of dealing with an on-going emergency and producing evidence which can be used in trial. (*Id*. at pp. 2262-2263.)

Because "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 judgments on the narrowest grounds...' [Citation.]" *Marks v. United States* (1977) 430 U.S. 188, 193; see generally *Johnson v. Bd. of Regents of the Univ. of Ga.* (11th Cir. 2001) 263 F.3d 1234, 1247 [narrowest grounds test defines the opinion which relies on the "less far-reaching-common ground," most narrowly tailored to the facts at hand]; *King v. Palmer* (D.C.Cir. 1991) 950 F.2d 771, 781 [narrowest grounds test

means the common position which commands a five justice assent].) Arguably, because of the significantly divergent rationales underlying the affirmation of Williams's conviction, the holding is limited to the precise factual scenario at hand: a bench trial wherein DNA evidence developed by a non-testifying expert is admitted to show the basis of the testifying expert's opinion.

Significantly different form the scenario in *Williams* is the typical jury trial in California where such evidence is admitted. In these cases, CALCRIM No. 332 is often given and specifically tells the jury, inter alia: "You must decide whether the information on which the expert relied was true and accurate." This circumstance is exactly that noted in the plurality, which would give credence to the dissent's position – that the contested evidence was admitted for the truth of the matter asserted: "The dissent's argument would have force if petitioner had elected to have a jury trial." (*Williams v. Illinois, supra*, 132 S.Ct. at p. 2236.)

On October 15, 2012, the California Supreme Court issued opinions in two cases that shed light on how to apply the various approaches of *Williams v. Illinois* in light of the prior United States Supreme Court cases considering similar confrontation clause issues: *Crawford v. Washington* (2004) 541 U.S. 36, *Melendez-Diaz v. Massachusetts* (2009) 577 U.S. 305, and *Bullcoming v. New Mexico* (2011) 564 U.S. ___ [131 S.Ct. 2705]. In both *People v. Lopez* (2012) 55 Cal.4th 569 and *People v. Dungo* (2012) 55 Cal.4th 608, the court set forth a two-part test to determine whether a statement is testimonial and must be subject to confrontation to be admissible: "First, to be testimonial the out-of-court statement must have been made with some degree of formality or solemnity." "Second, all nine high court justices agree that an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution, but they do not agree on what the statement's primary purpose must be."

This approach may solve the difficulty of harmonizing the divergent opinions of *Williams v. Illinois*. But if the case ultimately proves unworkable, *Williams v. Illinois* may be ripe for reconsideration. (See *Seminole Tribe of Florida v. Florida* (1996) 517 U.S. 44, 64, 66 [reconsideration and overruling of *Pennsylvania v. Union Gas Co.* (1989) 491 U.S. 1 because plurality decision "created confusion among the lower courts that have sought to understand and apply the deeply fractured decision"]; *Nichols v. United States* (1994) 511 U.S. 738 [re-evaluation of *Baldasar v. Illinois* (1980) 446 U.S. 222 after it generated conflicts in federal and state courts].)