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# NOTE

## SCIENCE, *CRAWFORD*, AND TESTIMONIAL HEARSAY: APPLYING THE CONFRONTATION CLAUSE TO LABORATORY REPORTS

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### INTRODUCTION

The popularity of high-tech television crime drama demonstrates how scientific laboratory evidence influences popular culture, juries, and ultimately the criminal justice system.<sup>1</sup> How crucial is the prosecution witness who can

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<sup>1</sup> For example, the CBS drama “C.S.I.,” portraying a group of Las Vegas crime scene investigators, draws 60 million viewers a week and exerts noticeable influence over juries. See Kit R. Roane, *The C.S.I. Effect*, U.S. NEWS & WORLD REPORT, Apr. 25, 2005, at 48. The power of forensic evidence induces many defendants to plead guilty, but this

explain how the defendant's blood or hair was identified at a crime scene?<sup>2</sup> What about precise measurements in drug prosecutions, in which slight variations can add years to a prison sentence?<sup>3</sup> In some cases, this crucial evidence is not presented in the form of witness testimony, but through a laboratory analysis, a drug certificate, or an autopsy report.<sup>4</sup> Even when the prosecution presents this evidence through a live witness, the testimony may rely (at least in part) on the work of others in the field. While these scenarios may satisfy a jurisdiction's rules of evidence, they appear inconsistent with a criminal defendant's constitutional right "to be confronted with the witnesses against him."<sup>5</sup> Defendants have raised this challenge for decades, with only mixed success.<sup>6</sup> The U.S. Supreme Court has given new legs to these constitutional arguments, however, with the landmark decision *Crawford v.*

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phenomenon may also hurt prosecutors when jurors expect more evidence than scientists can deliver. *Id.* (describing how television exaggerates the accuracy and extent of scientific proof).

<sup>2</sup> DNA identification, for example, is so powerful that most criminal defendants simply accept it as accurate and instead base their defenses around alternative explanations, such as attributing semen to consensual sexual intercourse. *See, e.g.,* HARLAN LEVY, AND THE BLOOD CRIED OUT 187-190 (1996) (describing how O.J. Simpson's defense team confronted the prosecution's DNA evidence by arguing that it was planted).

<sup>3</sup> For example, a Massachusetts defendant whose cocaine weighed 99 grams would face a mandatory minimum of five years in state prison, whereas 100 grams would carry a mandatory minimum of ten years. *See* MASS. GEN. LAWS ch. 94C, § 32(E)(b) (2002) (establishing penalties for drug trafficking based on increments of quantity). Accurate drug measurements may carry even higher stakes in the federal system, with its tough sentencing guidelines. For example, a federal criminal defendant with an extensive criminal history who crosses the Level 38 threshold by possessing more than 1.5 kilograms of crack cocaine faces a base sentence of thirty years to life in prison. *See* Sentencing Guidelines for the United States Courts, 18 U.S.C.S. app. § 2D1.1(c)(1) (2005) (setting out base offense levels for sentencing purposes according to the quantity and type of controlled substance sold); Sentencing Guidelines for the United States Courts, 18 U.S.C.S. App. § 5A (2003) (requiring lower quantities of a controlled substance if other circumstances warrant an upward adjustment in the guidelines).

<sup>4</sup> This practice has been described as a frequent substitute for expert testimony and "the most expedient way to introduce scientific evidence at trial." Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 OHIO ST. L.J. 671, 672 (1988) [hereinafter Giannelli, *Reliability*] (discussing the admissibility of police crime laboratory reports under the Federal Rules of Evidence and Confrontation Clause "reliability" analysis).

<sup>5</sup> U.S. CONST. amend. VI.

<sup>6</sup> *See, e.g.,* United States v. Roulette, 75 F.3d 418, 422 (8th Cir. 1996) (holding that a drug analysis report was admissible as a business record); Miller v. State, 472 S.E.2d 74, 80 (Ga. 1996) (declaring unconstitutional a statute that permitted the introduction of a certified drug analysis accompanied by affidavit); Commonwealth v. Slavski, 140 N.E. 465, 467-468 (Mass. 1923) (upholding the constitutionality of a statute that allowed prosecutors to introduce a certificate to identify the defendant's "moonshine" as alcohol).

*Washington*.<sup>7</sup>

*Crawford*, which overruled nearly a quarter-century of precedent, forced a sweeping change to the law surrounding criminal procedure and evidence.<sup>8</sup> The case re-invigorated the constitutional right of confrontation, creating a *per se* bar to out-of-court statements that are “testimonial” in nature when the defendant has no opportunity to cross-examine.<sup>9</sup> The majority opinion, written by Justice Scalia, traced the origins of the Sixth Amendment’s Confrontation Clause<sup>10</sup> and concluded that the Constitution’s Framers sought to avoid a civil law practice in which judicial officers conducted examinations outside of court and then introduced those statements at trial.<sup>11</sup> The Framers included the Confrontation Clause to ensure that criminal defendants would face their accusers.<sup>12</sup>

Under an earlier line of precedent stemming from the Court’s decision in *Ohio v. Roberts*, a defendant’s right of confrontation was deemed preserved if the out-of-court statement was firmly rooted in a traditional hearsay exception, or otherwise met standards of trustworthiness.<sup>13</sup> But in *Crawford*, the Court held that confrontation was the only way to establish the reliability of testimonial hearsay – the “principal evil” at which the Confrontation Clause was aimed.<sup>14</sup>

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<sup>7</sup> 541 U.S. 36 (2004) (holding that testimonial statements offered by the government violated the Confrontation Clause of the Sixth Amendment to the United States Constitution).

<sup>8</sup> See discussion *infra* Part I.C.

<sup>9</sup> *Id.*

<sup>10</sup> The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI (emphasis added). The Confrontation Clause was later extended to the states, through the Fourteenth Amendment, in *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (“[T]he Sixth Amendment’s right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment.”). Many states also guarantee a right of confrontation under their respective state constitutions. See *Crawford*, 541 U.S. at 48 (citing the constitutions of Virginia, Pennsylvania, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire).

<sup>11</sup> See discussion *infra* Part I.B.

<sup>12</sup> *Crawford*, 541 U.S. at 48-49 (describing controversies at the ratifying conventions and in the Anti-Federalist press arising out of the Constitution’s failure to protect confrontation rights, and observing that the Bill of Rights soon rectified this problem).

<sup>13</sup> 448 U.S. 56, 66 (1980) (stating that “certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the ‘substance of the constitutional protection’”).

<sup>14</sup> *Crawford*, 541 U.S. at 50, 61 (“The Clause . . . reflects a judgment, not only about the

The *Crawford* Court specifically declined to provide a definition of what constitutes testimonial hearsay.<sup>15</sup> During the past year, criminal courts in every jurisdiction have struggled to determine when statements are testimonial, and when recognized hearsay exceptions must bow to the right of confrontation. The Supreme Court wanted to reduce confusion and inconsistency arising from the *Roberts* test,<sup>16</sup> but the emerging case law demonstrates that *Crawford* itself will take time to sort out.<sup>17</sup>

The late Chief Justice Rehnquist, concurring in the judgment but dissenting from the decision to overrule *Roberts*, criticized the majority's failure to provide further guidelines regarding testimonial statements.<sup>18</sup> By leaving that question "for another day," thousands of prosecutors were left without crucial answers to help them apply the new rules.<sup>19</sup> "They need them now, not months or years from now," Rehnquist wrote.<sup>20</sup> "Rules of criminal procedure are applied every day in courts throughout the country, and parties should not be left in the dark in this manner."<sup>21</sup>

This Note seeks answers to Rehnquist's questions in one particular area of the law – the admissibility of scientific evidence in the form of laboratory reports. For example, could prosecutors introduce a laboratory report identifying a substance as an illegal drug without providing defense counsel an opportunity to cross-examine the person who prepared it?<sup>22</sup> Could an ink analyst testify about certain tests when other participating technicians are not available for cross-examination?<sup>23</sup> Could a testimonial laboratory report, otherwise inadmissible, instead be used as the basis of a witness's expert opinion?<sup>24</sup> Could a medical examiner's testimony rest entirely on an autopsy conducted by an absent colleague?<sup>25</sup>

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desirability of reliable evidence . . . but about how reliability can best be determined.”).

<sup>15</sup> *Id.* at 68 (establishing that, at a minimum, the term covers prior testimony at a judicial proceeding and police interrogations).

<sup>16</sup> *See infra* Part I.C.

<sup>17</sup> *See infra* Part II.

<sup>18</sup> *See Crawford*, 541 U.S. at 75-76 (Rehnquist, C.J., concurring) (commenting on the court's blatant failure to provide a "comprehensive definition of 'testimonial'").

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *See infra* Part II.A.

<sup>23</sup> *See United States v. Stewart*, 323 F. Supp. 2d 606 (S.D.N.Y. 2004) (allowing a supervising analyst to explain tests performed by a colleague during the high-profile investigation of Martha Stewart and her stock broker).

<sup>24</sup> *Cf. United States v. Stone*, 222 F.R.D. 334, 339 (E.D. Tenn. 2004) (allowing an IRS agent to base expert opinion testimony on the out-of-court questioning of defendant's employees in a tax evasion case).

<sup>25</sup> *Smith v. State*, 898 So. 2d 907, 908-909 (Ala. Crim. App. 2004) (finding that the admission of evidence regarding a victim's autopsy through the testimony of two medical examiners who did not themselves perform the autopsy violated the Confrontation Clause,

Some legal commentators, notably Professor Paul Giannelli, have examined similar questions in light of *Crawford*.<sup>26</sup> The purpose of this Note, however, is to propose methods to flush out Confrontation Clause violations in cases that appear, at first glance, to fall outside the bright line testimonial approach of *Crawford*.<sup>27</sup> To accomplish this goal, Part I examines the analytical framework established by *Crawford*. Part II examines how different jurisdictions are distinguishing “testimonial” hearsay in laboratory reports, focusing chiefly on formalized statements generated with an eye toward prosecution.<sup>28</sup> The Note then advocates an additional factor for courts to consider: whether the hearsay laboratory report directly establishes an element of the crime.<sup>29</sup> This inquiry can resolve conflicts when the report might appear non-testimonial, but nevertheless should be subject to cross-examination under the principles of *Crawford*.<sup>30</sup> Finally, Part III discusses the special consideration given to laboratory reports that form the basis of expert testimony, focusing on the independence of the opinion’s basis and potential prejudice to the defendant.<sup>31</sup> This Note concludes that *Crawford*’s descriptions of testimonial hearsay cannot resolve Confrontation Clause problems in every case, especially where scientific evidence is concerned. Without completely reverting to the amorphous reliability test of the *Roberts* era, this Note proposes that courts move toward a more flexible, fact-specific approach when applying the Confrontation Clause to laboratory reports. This approach would bend *Crawford*’s ostensibly bright line test, but only in a direction that satisfies the spirit of the Confrontation Clause.

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but upholding defendant’s manslaughter conviction because the error was harmless).

<sup>26</sup> See, e.g., Paul C. Giannelli, *Admissibility of Lab Reports: The Right of Confrontation Post-Crawford*, CRIM. JUSTICE, Fall 2004, at 26 [hereinafter Giannelli, *Right of Confrontation*] (examining the constitutional question under the testimonial approach along with hearsay and authentication); Bruce Kapsack & Steven Oberman, *Crawford v. Washington: The DUI Defense Practitioners’ Perspective*, THE CHAMPION, Sept. - Oct. 2004, at 25 (arguing that blood and breath tests are testimonial evidence); Robert L. Farb, *Constitutionality of G.S. 20-139.1(e1) (Use of Chemical Analyst’s Affidavit in District Court) After Crawford v. Washington* 2-3 (Inst. of Gov’t Faculty Conference Paper, 2004), available at <http://www.iog.unc.edu/programs/crimlaw/crawford.pdf> (re-examining North Carolina case law involving drug/alcohol analyses in light of *Crawford*).

<sup>27</sup> This Note focuses on confrontation. For an overview of hearsay objections, authentication, and confrontation together, see Giannelli, *Right of Confrontation*, *supra* note 26.

<sup>28</sup> See *infra* Parts I.C, II.A.

<sup>29</sup> See *infra* Parts II.B, III.

<sup>30</sup> *Id.* (proposing that courts consider such reports testimonial, or subject them to alternative confrontation analysis for non-testimonial statements).

<sup>31</sup> See *infra* Part III.

I. THE SHIFT IN CONFRONTATION CLAUSE JURISPRUDENCE FROM  
“RELIABILITY” TO “TESTIMONIAL” ANALYSIS

A. *The Focus on Firmly Rooted Hearsay Exceptions or Particularized  
Guarantees of Trustworthiness*

*Crawford*'s impact on the criminal justice system has been described as “monumental,” casting doubt on nearly every hearsay exception that has developed over recent decades.<sup>32</sup> But it is important to mentally separate the law of hearsay and the right of confrontation.<sup>33</sup> One commentator paints a useful picture of the Confrontation Clause locked in a twenty-five year dance with hearsay rules, when *Crawford* suddenly arrives to breaks up the romance.<sup>34</sup>

This dance arguably reached its zenith with *Ohio v. Roberts*, an innocuous case involving check forgery and stolen credit cards.<sup>35</sup> The defendant, Herschel Roberts, called the victims' daughter, Anita Isaacs, to testify at a preliminary hearing.<sup>36</sup> The defendant's attorney tried unsuccessfully to make Isaacs admit that she had supplied Roberts with the check and credit cards, and that she had misled Roberts into believing he had permission to use them.<sup>37</sup> The defendant then testified to this version of events at trial.<sup>38</sup>

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<sup>32</sup> Ira Mickenberg, ‘Blakely’ and ‘Crawford’, NAT'L L.J., Aug. 2, 2004, at S8 (“During the past 20 years, courts and legislatures have carved out so many exceptions to the hearsay rule under *Roberts* that prosecutors have become used to proving many important types of cases with little other than hearsay testimony.”).

<sup>33</sup> Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, CRIM. JUSTICE, Summer 2004, at 5, 7 [hereinafter Friedman, *Adjusting*] (“The rule against hearsay and the Confrontation Clause are separate sources of law – and *Crawford* stops the tendency to meld them.”). In the federal system, Article VIII of the Federal Rules of Evidence governs hearsay, along with the general hearsay prohibition found in Rule 802. See FED. R. EVID. art. VIII.

<sup>34</sup> Warren Moise, *Beyond the Bar: The Confrontation Clause and Justice Scalia: Everything Old is New Again*, 16 S. CAROLINA LAWYER 11 (2004).

<sup>35</sup> 448 U.S. 56 (1980). The Supreme Court's early leading Confrontation Clause decision was *Mattox v. United States*, 156 U.S. 237, 240-244 (1895), which allowed a deceased witness's testimony at an earlier trial to be admitted at a second trial because the defendant had a prior opportunity to cross-examine. However, the Supreme Court began to develop its doctrine further after the Confrontation Clause was extended to the states in 1965. See Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1014-15 (1998) [hereinafter Friedman, *Confrontation*] (describing how some early decisions described the Clause as distinct from hearsay doctrine, but other decisions seemed to meld them together); see also *Lilly v. Virginia*, 527 U.S. 116, 140 (1998) (Breyer, J., concurring) (“The Court's effort to tie the [Confrontation] Clause so directly to the hearsay rule is of fairly recent vintage . . .”).

<sup>36</sup> *Roberts*, 448 U.S. at 58.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 59

Isaacs, however, left her parents' home and could not be found for trial.<sup>39</sup> The trial court nevertheless admitted her prior testimony, which undercut the defense.<sup>40</sup> The appellate court reversed, holding that the prosecution had not established its good faith effort to secure Isaacs's availability.<sup>41</sup> The Ohio Supreme Court affirmed on different grounds, holding instead that the trial court had violated the defendant's rights under the Confrontation Clause.<sup>42</sup>

The U.S. Supreme Court examined its prior Confrontation Clause cases and attempted to develop a test to "restrict the range of admissible hearsay."<sup>43</sup> The first prong was a rule of necessity, requiring that the declarant meet the definition of unavailability before a court would consider admitting the out-of-court statement.<sup>44</sup> This unavailability requirement in *Roberts* applied in the case of former testimony of the witness,<sup>45</sup> though in later cases, the Court did not require a demonstration of the declarant's unavailability when statements were qualified as spontaneous utterances, statements for medical treatment or statements in furtherance of a conspiracy.<sup>46</sup>

The more crucial *Roberts* test was a requirement that the extrajudicial statement bear adequate "indicia of reliability."<sup>47</sup> Reliability would be inferred

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<sup>39</sup> *Id.* at 59-60.

<sup>40</sup> *Id.* at 59 (observing that an Ohio statute permitted the use of preliminary examination testimony from a witness who could not "for any reason be produced at trial").

<sup>41</sup> *Id.* at 60 (recalling that "the State had done nothing . . . to show the Court that Anita would be absent because of unavailability").

<sup>42</sup> *State v. Roberts*, 378 N.E.2d 492, 496-497 (Ohio 1978). The Ohio Supreme Court believed *Roberts*'s attorney had little incentive to attempt a cross-examination of Isaacs at the preliminary hearing when the only issue was probable cause. *Id.* at 496.

<sup>43</sup> *Ohio v. Roberts*, 448 U.S. 56, 65 (1980).

<sup>44</sup> *Id.* (citing *Mancusi v. Stubbs*, 408 U.S. 204 (1972) and *Barber v. Page*, 390 U.S. 719 (1968)).

<sup>45</sup> *Id.* at 64.

<sup>46</sup> See Friedman, *Confrontation*, *supra* note 35, at 1016-17 (giving examples of cases in which the Court has "cut back drastically on the unequivocal application of the unavailability requirement"); see also *White v. Illinois*, 502 U.S. 346, 348-49 (1992) (holding that the Confrontation Clause did not require a finding of unavailability, or the production of the witness at trial, before the witness's statement could be admitted as a spontaneous declaration or medical examination exception). The witness – a child sexual abuse victim – experienced emotional difficulties in the courtroom and never testified at trial, though the court never made a finding of unavailability. *Id.* at 350; see also *United States v. Inadi*, 475 U.S. 387, 395-96 (1986) (refusing to require the production of a witness, or a finding of unavailability, to admit a co-conspirator's statement in furtherance of a conspiracy). For evidentiary purposes, the Federal Rules would not require the declarant's unavailability under these circumstances either. See FED. R. EVID. 801(d)(2) (exempting statements in furtherance of a conspiracy from hearsay law); FED. R. EVID. 803(2), (4) (including excited utterances and statements for medical treatment among the hearsay exceptions for which the availability of the declarant is immaterial).

<sup>47</sup> *Roberts*, 448 U.S. at 65-66 (explaining that the "indicia of reliability" test is the determinative factor when deciding whether evidence can be entered despite a lack of

when the evidence fell “within a firmly rooted hearsay exception.”<sup>48</sup> Otherwise, evidence would be excluded without some showing of “particularized guarantees of trustworthiness.”<sup>49</sup> Applying these rules to the facts in *Roberts*, the Court held that the defendant’s questioning of Isaacs at the preliminary hearing constituted cross-examination in form and purpose, if not in name.<sup>50</sup> This de facto cross-examination gave the transcript of Isaacs’s testimony sufficient indicia of reliability, thereby preserving the defendant’s confrontation rights.<sup>51</sup>

The Court recognized that it had articulated a rule to reconcile the Confrontation Clause with various hearsay exceptions, a subject that had provoked an “outpouring” of scholarly commentary in preceding decades.<sup>52</sup> The Court described its test as consistent with nearly a century of Confrontation Clause jurisprudence, and confidently noted, “[n]or has any commentator demonstrated that prevailing analysis is out of line with the intentions of the Framers of the Sixth Amendment.”<sup>53</sup> Before long, academic commentators and other Supreme Court Justices would make precisely this argument.

B. *The Search for the Original Meaning of the Confrontation Clause and the Testimonial Approach*

In a preview to the *Crawford* decision, Justices Thomas and Scalia criticized the application of a “reliability” test in their concurring opinion in *White v. Illinois*.<sup>54</sup> Justice Thomas wrote that the Confrontation Clause incorporated a common-law confrontation right, which developed in response to abusive sixteenth century English practices.<sup>55</sup> English magistrates would conduct interrogations before trial, developing a body of evidence that was used against the defendant without the calling of witnesses.<sup>56</sup> The most infamous case was

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confrontation with the declarant).

<sup>48</sup> *Id.* at 66. The Court described the Confrontation Clause and hearsay rules together as generally intended to “protect similar values” and stemming from “the same roots.” *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 70-71 (noting that defense counsel asked leading questions, which are the “hallmark” of cross-examination). The Court was also persuaded that the prosecution carried its burden of demonstrating unavailability through a good faith effort to locate Isaacs for trial. *Id.* at 74-77. Justices Brennan, Marshall and Stevens dissented on this threshold question of unavailability. *Id.* at 77-82.

<sup>51</sup> *Id.* at 73 (citing *Mancusi v. Stubbs*, 408 U.S. 204, 216 (1972)).

<sup>52</sup> *Id.* at 66 n.9 (citing more than a dozen articles on the subject).

<sup>53</sup> *Id.*

<sup>54</sup> 502 U.S. 346, 363 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment).

<sup>55</sup> *Id.* at 361.

<sup>56</sup> *Id.* The *Crawford* opinion’s historical analysis describes these practices in greater detail. *Crawford v. Washington*, 541 U.S. 36, 42-46 (2004). Out-of-court examinations

the 1603 treason trial of Sir Walter Raleigh, whose conviction and death sentence were based on the confession of an alleged co-conspirator.<sup>57</sup> In his own defense, Raleigh argued unsuccessfully to have his accuser brought before him.<sup>58</sup> In response to the injustices Raleigh faced, English treason statutes were eventually amended to allow defendants to confront their accusers.<sup>59</sup> Justice Thomas found no evidence in the historical record, or in the text of the Confrontation Clause itself, that the Framers intended to “constitutionalize the hearsay rule and its exceptions.”<sup>60</sup> Notwithstanding the test set forth in *Roberts*, Justice Thomas wrote that the Confrontation Clause “makes no distinction based on the reliability of the evidence presented.”<sup>61</sup>

So if reliability was an inadequate test for Confrontation Clause analysis, what was the alternative? After all, no one was arguing that the Confrontation Clause barred *all* out-of-court statements.<sup>62</sup> The Supreme Court would have to come up with a new test, keeping in mind the history behind the Confrontation Clause and its limitation to “witnesses against” the defendant.<sup>63</sup> Because a witness is “one who gives testimony,”<sup>64</sup> reformers advocated a “testimonial”

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were common in civil law countries on the European continent, although England adopted some of these practices during the reign of Queen Mary. *Id.* Many of these examinations were conducted by justices of the peace, whose roles included both the investigation and prosecution of crimes. *Id.* at 53.

<sup>57</sup> *White*, 502 U.S. at 361 (commenting that the confession was “repudiated before trial and probably had been obtained by torture”).

<sup>58</sup> *Crawford*, 541 U.S. at 44.

<sup>59</sup> *Id.* at 44-45 (“Through a series of statutory and judicial reforms, English law developed a right of confrontation that limited these abuses.”).

<sup>60</sup> *White*, 502 U.S. at 366 (Thomas, J., concurring).

<sup>61</sup> *Id.* at 363 (Thomas, J., concurring). Thirty-two years before *Crawford*, Justice William Grimes of the New Hampshire Supreme Court provided an eloquent criticism of the merger of confrontation and hearsay analyses when he dissented from a decision to admit blood alcohol results without cross-examination:

The right to confrontation is one of the basic safeguards of liberty. If it had not been intended that it should provide greater protection than that given by the hearsay rule as a mere rule of evidence subject to change or even elimination, there would have been no need to enshrine it in the Bill of Rights of both [the federal and state] Constitutions. And yet under the rule adopted . . . by this court in the case before us, this right to confrontation can be wiped out by unlimited exceptions to the hearsay rule so long as a majority of the court decides that the evidence possesses sufficient “indicia of reliability.” This is an amorphous test indeed. Such a view, it seems to me, substitutes a rule of men for one of law and reduces a great safeguard to dependence on the whims of judges.

*State v. Larochelle*, 297 A.2d 223, 228-29 (N.H. 1972).

<sup>62</sup> See *White*, 502 U.S. at 359 (recognizing that the Confrontation Clause only applied to “witnesses against” the defendant, a phrase that would not include every hearsay declarant).

<sup>63</sup> U.S. CONST. amend. VI.

<sup>64</sup> See *Maryland v. Craig*, 497 U.S. 836, 864 (1990) (Scalia, J., dissenting) (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). Justice Scalia would emphasize this point again in *Crawford*. 541 U.S. at 51 (providing additional

approach to Confrontation Clause analysis.<sup>65</sup> This “bright-line” rule would apply to all out-of-court statements that closely resembled testimony, such as formal statements to police or other statements intended to aid in criminal prosecution.<sup>66</sup> If the defendant had no opportunity to cross-examine the declarant, the Confrontation Clause would bar admission of the testimonial statement.<sup>67</sup>

C. *New Rules Articulated in Crawford v. Washington*

Against this background, a majority of the Court was ready to adopt the testimonial approach in *Crawford v. Washington*.<sup>68</sup> In that case, Michael Crawford was charged with stabbing a man who had allegedly tried to rape Crawford’s wife, Sylvia.<sup>69</sup> Sylvia had witnessed the stabbing, and gave a tape-recorded interview at the police station.<sup>70</sup> Her version of events differed from the defendant’s, and undercut her husband’s self-defense claim.<sup>71</sup> Sylvia did not testify at trial because of Washington’s marital privilege rule, but this privilege did not extend to her earlier tape-recorded statement.<sup>72</sup> Sylvia’s recorded statement described how she facilitated the assault by leading her husband to the victim’s apartment, so the trial court admitted the statement as a declaration against penal interest.<sup>73</sup>

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definitions of a witness); see also BLACK’S LAW DICTIONARY 1596 (7th ed. 1999) (defining a witness as “[o]ne who sees, knows or vouches for something. . . . One who gives testimony under oath or affirmation (1) in person, (2) by oral or written deposition, or (3) by affidavit”).

<sup>65</sup> Friedman, *Confrontation*, *supra* note 35, at 1012-13 (proposing an approach focusing on adverse witnesses who make testimonial statements).

<sup>66</sup> *Id.* at 1030, 1038-39 (arguing that the Confrontation Clause “should be viewed as creating a bright-line rule” and that statements made by those who have no expectation the statements will play a role in any litigation are not testimonial).

<sup>67</sup> See *Lilly v. Virginia*, 527 U.S. 116, 143 (1999) (Scalia, J., concurring) (describing a co-defendant’s untested, tape-recorded, custodial statement to police as a “paradigmatic” Confrontation Clause violation). The plurality in *Lilly* instead found that the co-defendant’s declaration against penal interest neither fit within a firmly rooted hearsay exception nor possessed particularized guarantees of trustworthiness as required by *Roberts*. *Lilly*, 527 U.S. at 142.

<sup>68</sup> 541 U.S. 36 (2004). While the Court did not provide a clear-cut definition of testimonial hearsay in *Crawford*, it did offer some guidance as to the term’s meaning. See *infra* notes 81-83 and accompanying text.

<sup>69</sup> *Id.* at 38.

<sup>70</sup> *Id.* at 38-40.

<sup>71</sup> *Id.* (quoting the transcript of the interrogation during which Sylvia said the victim did not have a weapon).

<sup>72</sup> *Id.* at 40 (explaining that a state’s marital privilege, codified at WASH. REV. CODE § 5.60.060(1) (1994), generally does not allow a spouse to testify without first obtaining the other spouse’s consent).

<sup>73</sup> *Crawford*, 541 U.S. at 40.

Three Washington state courts, looking at the same statement, came to different conclusions using the *Roberts* test for “particularized guarantees of trustworthiness.”<sup>74</sup> First, the trial court found the statement trustworthy because Sylvia was an eyewitness to recent events, she was attempting to corroborate her husband’s story, and she was questioned by a “neutral” police officer.<sup>75</sup> Next, the Washington Court of Appeals used nine factors to determine that the statement was not trustworthy, including the fact that Sylvia contradicted herself; that police elicited her responses with specific questions; and that she admitted to closing her eyes during the stabbing.<sup>76</sup> Finally, the Washington Supreme Court determined that Sylvia’s statement was trustworthy because it virtually interlocked with the defendant’s.<sup>77</sup>

According to the *Crawford* Court, this tortured procedural history exemplified the failings of the *Roberts* test.<sup>78</sup> By shifting to the testimonial approach, the U.S. Supreme Court was attempting to ensure greater consistency, predictability, and compliance with the original meaning of the Confrontation Clause and thereby eliminate the failings of the *Roberts* test.<sup>79</sup> Sylvia’s tape-recorded interrogation by police was testimonial, and was therefore barred because the defendant lacked an opportunity to cross-examine her.<sup>80</sup>

Although *Crawford* provides no clear-cut definition of testimonial hearsay, the opinion provides some guidance by describing the “various formulations” to include:

- “ex parte in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,”<sup>81</sup>

<sup>74</sup> See *id.* at 40-42 (citing *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)). The Washington courts did not rest their decisions on the other part of the *Roberts* test, which would have required that the declaration fall within a “firmly rooted” hearsay exception. *Id.*

<sup>75</sup> *Id.* at 66 (describing how the trial court buttressed its reliability finding by explaining that police had no incentive to advance Sylvia’s interests or compromise those of the defendant).

<sup>76</sup> *Id.* at 41.

<sup>77</sup> *Id.* at 41-42 (explaining that *Crawford*’s conviction was reinstated because Sylvia’s statements “bore guarantees of trustworthiness”).

<sup>78</sup> *Id.* at 63-66 (providing examples of inconsistencies in other jurisdictions, including one court’s finding that a statement against interest was more reliable because the declarant was in custody, while another court found such statements more reliable because the declarant was neither in custody nor a suspect).

<sup>79</sup> *Id.* at 67-68 (remarking that by “replacing categorical constitutional guarantees with open-ended balancing tests, [the Court] do[es] violence to [the Framers’] design”).

<sup>80</sup> *Id.* at 68-69 (holding that these facts alone established a Sixth Amendment violation, and declining to “mine the record in search of indicia of reliability”).

<sup>81</sup> *Id.* at 51 (citing the Brief for the Petitioner at 23).

- “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,”<sup>82</sup>
- “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”<sup>83</sup>

The Court also explained that unsworn “[s]tatements taken by police officers in the course of interrogations are testimonial under even a narrow standard,” because they bear an extremely close resemblance to examinations by justices of the peace in England.<sup>84</sup>

This is the new legal landscape facing the courts, but it is important to note that Confrontation Clause violations are still subject to harmless error analysis and will not result in automatic reversal.<sup>85</sup> *Crawford* is clear in some respects. For example, if an out-of-court statement is testimonial, it is only admissible if the declarant is unavailable and there was a prior opportunity for cross examination.<sup>86</sup> If, however, an out-of-court statement is not testimonial, *Crawford* is unclear on how courts should proceed. Some parts of the opinion suggest that non-testimonial statements are exempt from Confrontation Clause

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<sup>82</sup> *Id.* at 51-52 (citing *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment)).

<sup>83</sup> *Id.* at 52 (citing Brief for Nat’l Ass’n of Criminal Def. Lawyers et al. as Amici Curiae, at 3).

<sup>84</sup> *Id.* at 52.

<sup>85</sup> *Id.* at 76 (Rehnquist, C.J., concurring) (remarking that the Court implicitly “[recognizes] that the mistaken application of its new rule by courts which guess wrong as to the scope of the rule is subject to harmless-error analysis”); see also *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (stating that “[t]he Constitution entitles a criminal defendant to a fair trial, not a perfect one”). A court will uphold the conviction if it finds the error was harmless beyond a reasonable doubt. *Id.* at 684. It is also important to note that several courts have declined to apply *Crawford* retroactively. See, e.g., *Evans v. Luebbers*, 371 F.3d 438, 444 (8th Cir. 2004) (commenting that *Crawford* did not appear to meet the test of *Teague v. Lane*, 489 U.S. 288, 311 (1989), which applies new rules retroactively only when they decriminalize certain kinds of conduct or represent “watershed rules of criminal procedure”); see also *Garcia v. United States*, 2004 U.S. Dist. LEXIS 14984, at \*\*7-10 (N.D.N.Y. Aug. 4, 2004) (stating that *Crawford* does not represent a watershed rule within the meaning of *Teague* and “does not apply retroactively”). A “watershed rule” is defined narrowly, in the nature of *Gideon v. Wainwright*’s guarantee of the right to counsel. *United States v. Mandanici*, 205 F.3d 519, 528-29 (2d Cir. 2000) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). One can even argue that *Crawford* did not announce a new rule at all, but remained faithful to the traditional handling of testimonial statements. *Murillo v. Frank*, 316 F. Supp. 2d 744, 749-750 n.4 (E.D. Wis. 2004) (refusing to apply *Crawford* to an earlier state court conviction). But see Tom Perotta, *Taking a Different Stand, Justice Applies ‘Crawford’ Retroactively*, 231 N.Y. L.J. 1, 1 (2004) (describing one Manhattan judge’s ruling that *Crawford* represents a watershed rule in criminal procedure and should be applied retroactively).

<sup>86</sup> See *Crawford*, 541 U.S. at 68.

scrutiny altogether<sup>87</sup> (leaving them to regulation under hearsay rules), while other parts suggest that the *Roberts* test may still be applicable for non-testimonial statements.<sup>88</sup> In fact, one passage in particular exemplifies the Court's ambiguity. The Court states, "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether."<sup>89</sup>

## II. LABORATORY REPORTS AS TESTIMONIAL HEARSAY

### A. *Determining Whether the Document Was Prepared for Trial in an Adversarial Fashion*

Turning to the subject of laboratory evidence, a *Crawford*-type analysis will likely be necessary to determine when live witnesses must be available for cross-examination.<sup>90</sup> History and tradition might not be as helpful here as they were in *Crawford*: for all of the Supreme Court's emphasis on the original meaning of the Confrontation Clause, the Framers probably never envisioned the pervasive role that science would play in our modern criminal justice system.<sup>91</sup> Instead, courts may want to ask whether the evidence is similar to the "various formulations" of testimonial statements described in the *Crawford* opinion.<sup>92</sup> Was the extrajudicial statement prepared for prosecution purposes?

<sup>87</sup> See *id.* at 60 (criticizing the *Roberts* test as too broad because it applied constitutional scrutiny to hearsay that did not consist of ex parte testimony).

<sup>88</sup> See *id.* at 61 (suggesting that earlier cases that rejected the idea of leaving non-testimonial statements to regulation by hearsay law may be in doubt after *Crawford*).

<sup>89</sup> *Id.* at 68. The case law on this subject is understandably in conflict. Compare *State v. Dedman*, 102 P.3d 628, 636 (N.M. 2004) ("A close reading of *Crawford* indicates that *Roberts* still applies to non-testimonial hearsay evidence, though the Court appears split on whether it should."), with *People v. Compan*, 100 P.3d 533, 538 (Colo. Ct. App. 2004) ("Thus, *Crawford* suggests that there is no longer any reason to examine nontestimonial hearsay under the federal constitution . . .").

<sup>90</sup> Friedman, advocate for the testimonial approach and second-chair at the *Crawford* oral argument, believes laboratory reports (when they are a critical piece of evidence) will be testimonial in most circumstances. See Friedman, *Adjusting*, *supra* note 33, at 11.

<sup>91</sup> The Anglo-American system was still more than a century away from widely-accepted use of fingerprint identification. See, e.g., *In re Castleton's Case*, 3 Crim. App. 74, 74 (1909) (upholding the use of fingerprint identification in Great Britain). The Framers were only a century removed from the use of "spectral" evidence in Salem witch trials. See Martha M. Young, Comment, *The Salem Witch Trials 300 Years Later: How Far Has the American Legal System Come? How Much Further Does It Need to Go?*, 64 TUL. L. REV. 235, 242-46 (1989) (describing how judges would examine adolescent "victims" who claimed they were being bitten by the specters of accused witches in the courtroom).

<sup>92</sup> *Crawford*, 541 U.S. at 51-52 (explaining that "[v]arious formulations of this core class of 'testimonial' statements exist").

Is it contained in formalized material such as an affidavit – or is it the “functional equivalent” of in-court testimony?<sup>93</sup> Whatever rules are applied, they should promote *Crawford*’s goals of consistency and predictability, as well as the liberty interests behind the Confrontation Clause itself.

One of the more common *Crawford* challenges involves a situation where a laboratory report is introduced by itself to establish the composition or presence of drugs or alcohol.<sup>94</sup> A record of such tests must not only satisfy the Confrontation Clause, it must first be authenticated and qualify as a hearsay exception under the jurisdiction’s rules of evidence.<sup>95</sup> To get over the evidentiary hurdle, prosecutors may be aided by statutes that make such evidence admissible without the need for live, in-court testimony from laboratory personnel.<sup>96</sup> The laboratory reports may also be admissible as business records or public records, depending on the circumstances.<sup>97</sup>

At this point, the Confrontation Clause analysis takes over and a court must decide if the report is testimonial.<sup>98</sup> A court could consider laboratory reports to be routine documentary evidence, and thus non-testimonial by their very nature. This was the approach in *People v. Johnson*, a California decision involving the laboratory identification of rock cocaine.<sup>99</sup> In its interpretation

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<sup>93</sup> See *supra* Part I.C (discussing *Crawford*’s various formulations of testimonial statements).

<sup>94</sup> See, e.g., Brief for Defendant-Appellant, *State v. English*, 614 S.E.2d 405 (N.C. Ct. App. 2004), 2004 WL 1870050 (challenging the admission of a laboratory identification of cocaine through the testimony of the investigating police officer who had nothing to do with the testing itself). Of course, laboratory reports could concern any number of forensic evaluations such as fingerprint or DNA identification, ballistics, cause of death, etc. I have chosen to begin with drug and alcohol tests since they have generated a substantial amount of early post-*Crawford* case law.

<sup>95</sup> See *Giannelli, Right of Confrontation, supra* note 26, at 27 (stating that if a document does not fall into a hearsay exception, the constitutional question is moot).

<sup>96</sup> See, e.g., MASS. GEN. LAWS ch. 138, §36 (2002) (allowing a certificate of analysis as prima facie evidence of the composition and quality of alcohol); MASS. GEN. LAWS ch. 111, §13 (2002) (allowing a certificate of analysis as prima facie evidence of the composition, quality and net weight of drugs, chemicals, or poisons).

<sup>97</sup> For a useful analysis of laboratory reports under hearsay law, see *Giannelli, Right of Confrontation, supra* note 26, at 27-29 (discussing the admissibility of laboratory reports under hearsay exceptions for official records and business records). Some courts have excluded crime laboratory reports on the basis that they qualify as police records, which are specifically excluded from many public record hearsay exceptions, or that they were prepared for litigation, which compromises their reliability. *Id.*; see also FED. R. EVID. 803(8) (excluding from the public records hearsay exception, “in criminal cases[,] matters observed by police officers and other law enforcement personnel”).

<sup>98</sup> See *supra* notes 81-83 and accompanying text.

<sup>99</sup> 18 Cal. Rptr. 3d 230, 231 (Cal. Ct. App. 2004) (reviewing a lower court’s decision in a probation revocation hearing to “admit[] a report from the . . . [c]rime [l]aboratory analyzing the rock that was the subject of the [illegal] transaction”). Because probation hearings are not “criminal prosecutions,” the court held that the Sixth Amendment was not implicated

of *Crawford*, the court held that the report “[did] not ‘bear testimony,’ or function as the equivalent of in-court testimony.”<sup>100</sup> The court suggested that the report was evidence in itself, and if the preparer of the report had testified, “he or she would merely have authenticated the document.”<sup>101</sup> Although California precedent considered a jury’s opportunity to see the witness’s demeanor to be an important factor in evaluating testimonial statements, demeanor was unimportant for documentary evidence such as a laboratory report.<sup>102</sup> In a similar decision, the Massachusetts Supreme Judicial Court observed that drug test results are non-discretionary and present a “primary fact” rather than opinion.<sup>103</sup> Therefore, the court concluded that these documents bear little resemblance to ex parte examinations and are “akin to a business or official record.”<sup>104</sup>

Dicta in *Crawford* suggests that these decisions may be correct. The Court’s opinion explains that business records, like statements in furtherance of a conspiracy, are not testimonial.<sup>105</sup> At first glance, these passages suggest a quick answer to the Confrontation Clause analysis with respect to laboratory reports.<sup>106</sup>

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and that the defendant was only entitled to protection under the Due Process Clause of the Fourteenth Amendment. *Id.* at 232. Nevertheless, the court looked to *Crawford* for guidance when determining the defendant’s confrontation rights on due process grounds. *Id.* at 232-36 (stating that “Sixth Amendment cases, however, may provide helpful examples in determining the scope of the more limited right of confrontation held by probationers under the due process clause”).

<sup>100</sup> *Id.* at 233 (quoting *Crawford* for the proposition that the Framers’ design affords states flexibility in their hearsay law when non-testimonial hearsay is involved).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* (citing *People v. Arreola*, 875 P.2d 736 (Cal. 1994)).

<sup>103</sup> *Commonwealth v. Verde*, 2005 Mass. LEXIS 219, at \*\*8-9 (Mass. May 19, 2005) (holding that a drug certificate establishing the weight and purity of the defendant’s cocaine was not testimonial).

<sup>104</sup> *Id.* at \*10.

<sup>105</sup> See *Crawford v. Washington*, 541 U.S. 36, 55-56 (2004). In response to Chief Justice Rehnquist’s observation that U.S. courts have long recognized exceptions to the hearsay rule without invoking the Confrontation Clause, Justice Scalia wrote for the majority, “[m]ost of the hearsay exceptions covered statements that by their very nature were not testimonial – for example, business records or statements in furtherance of a conspiracy.” *Id.* at 56. Chief Justice Rehnquist agreed in his concurrence that business records are not testimonial. See *id.* at 76.

<sup>106</sup> Indeed, the Fifth Circuit has interpreted *Crawford* to be inapplicable to both business records and non-testimonial public records during an illegal immigration prosecution. *United States v. Rueda-Rivera*, 396 F.3d 678, 680 (5th Cir. 2005) (explaining that the court “recently wrote that because the items in the defendant’s immigration file were non-testimonial, the Confrontation Clause did not bar their admission”). In *Rueda-Rivera*, the prosecutor was permitted to introduce a certificate showing that a check of immigration records revealed that the defendant had no permission to enter the country, despite the defendant’s argument that the record was created for prosecution purposes only. *Id.* at 679.

Despite the Court's "sweeping" reference to business records as non-testimonial, however, certain laboratory reports do seem to fit within the "various formulations" of testimonial evidence described in *Crawford*.<sup>107</sup> In many cases, tests are conducted at the request of police or prosecutors, giving the preparer of the laboratory report a reasonable expectation that the results will be used at trial.<sup>108</sup> This factor was important to a New York state court when it held that a report on an alleged rape victim's blood alcohol level was testimonial; the report was initiated by the prosecution to establish lack of the victim's consent.<sup>109</sup> Indeed, the Court in *Crawford* recognized that the

[i]nvolvement of government officers in the *production of testimony with an eye toward trial* presents unique potential for prosecutorial abuse – a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony *happens to fall within some broad, modern hearsay exception*, even if that exception might be justifiable in other circumstances.<sup>110</sup>

Again, a simple solution appears within reach: make all laboratory reports subject to Confrontation Clause analysis if they are prepared for trial. One can make a plausible argument, however, that technicians performing tests in the laboratory are not always making "statements" that they would "reasonably expect to be used prosecutorially." Technicians often have no knowledge of the defendant or of the facts of the case; they are more likely focused on matching up faceless samples of physical evidence.<sup>111</sup>

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<sup>107</sup> See Neil P. Cohen & Donald F. Paine, *Crawford v. Washington: Confrontation Revolution*, 40 TENN. BAR J. 22, 24 (2004) (suggesting that a chemist's analysis in a drug prosecution might qualify as both a business record and a testimonial statement).

<sup>108</sup> Cf. *Crawford*, 541 U.S. at 51 (referring to "pretrial statements that declarants would reasonably expect to be used prosecutorially"). When adopting the public records exception to the federal hearsay rule, the Advisory Committee recognized that *evaluative* reports used against a defendant in a criminal case would result in "almost certain collision" with the defendant's confrontation rights. FED. R. EVID. 803(8)(c) advisory committee's note.

<sup>109</sup> *People v. Rogers*, 780 N.Y.S.2d 393, 397 (N.Y. App. Div. 2004) (reversing as prejudicial error defendant's conviction because "[a]dmission of the blood test results without the ability to cross-examine the report's preparer was a violation of defendant's rights under the 6th Amendment's Confrontation Clause"). The court also ruled that it was improper to admit this litigation-generated report under the business record hearsay exception. *Id.* at 396-397. Other jurisdictions may admit such tests as business records, even if initiated by police, if it is a routine practice for police to initiate such tests. See Giannelli, *Right of Confrontation*, *supra* note 26, at 27-28 (discussing jurisdictional conflicts in allowing drug identifications as business records and commenting that "other courts adopt[] a more flexible approach, holding that the police records exclusion does not apply to all police records").

<sup>110</sup> *Crawford*, 541 U.S. at 56-57 n.7 (emphasis added).

<sup>111</sup> See 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 398.1 (2d ed. 1999 & Supp. 2004) (contending that *Crawford* seems not to have touched on

In *State v. Dedman*, the Supreme Court of New Mexico concluded that blood alcohol tests on suspected drunken drivers were not testimonial when conducted by state laboratory technicians.<sup>112</sup> The technicians were employees at a government laboratory, but were not law enforcement officers themselves.<sup>113</sup> Though their reports were generated for trial, “the process [of conducting blood alcohol tests] is routine, non-adversarial, and made to ensure an accurate measurement.”<sup>114</sup> The New Mexico Court evidently believed that the non-adversarial nature of the reports would allay the Court’s concern that government involvement provided a “unique potential for prosecutorial abuse.”<sup>115</sup>

The “non-adversarial” distinction in *Dedman* sounds suspiciously similar to the trial court’s reasoning in *Crawford* that Sylvia’s statement was made to a police officer who was “neutral” to her. *Dedman* is just one illustration of the conflicts inherent in the effort to distinguish laboratory reports based on whether they are “adversarial.”<sup>116</sup> For example, a seemingly non-adversarial report could run afoul of *Crawford* if it merely took the form of an affidavit. In *City of Las Vegas v. Walsh*, prosecutors in a drunk driving case sought to admit an affidavit from a nurse who drew the defendant’s blood.<sup>117</sup> The affidavit identified the nurse and her occupation; stated the date, time and method of drawing the blood; established the chain of custody until the blood was turned over to law enforcement for testing; and verified that no alcohol swabs were used in collecting the sample.<sup>118</sup> The Nevada Supreme Court held that the affidavit was testimonial, and could not be introduced unless the defendant had a prior opportunity to cross-examine the nurse.<sup>119</sup> Not only was the affidavit prepared solely for prosecutors’ use at trial, but the *Crawford* opinion specifically describes affidavits as testimonial statements.<sup>120</sup> In fact, the United States Supreme Court explicitly recognized that affidavits could be

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this area of “obvious importance”).

<sup>112</sup> 102 P.3d 628, 636 (N.M. 2004) (observing also that a blood alcohol report is “very different” from other forms of testimonial evidence described in *Crawford*, such as prior testimony or police interrogations).

<sup>113</sup> *Id.* at 636 (explaining that the “blood alcohol report was generated by [state laboratory] personnel, not law enforcement”).

<sup>114</sup> *Id.*

<sup>115</sup> *See id.* (citing *Crawford*, 541 U.S. at 56-57 n.7).

<sup>116</sup> *See Crawford*, 541 U.S. at 66 (asserting that “[t]he Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by ‘neutral’ government officers”).

<sup>117</sup> 91 P.3d 591, 592 (Nev. 2004) (affirming a decision to deny prosecutors’ request for a writ of mandamus after municipal court excluded the affidavit). The affidavit had been authorized by NEV. REV. STAT. 50.315(4) (2003).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 596 (holding that the “Confrontation Clause test was not satisfied in this instance”).

<sup>120</sup> *Id.* at 594 (citing *Crawford* for the proposition that affidavits are testimonial).

the functional equivalent of ex parte testimony, or formalized extrajudicial statements that one could expect to be used prosecutorially.<sup>121</sup>

The legal uncertainty becomes even more apparent when one considers that *Walsh* is hardly distinguishable from the situation in *Dedman*, except for the fact that the nurse signed an affidavit instead of an unsworn report. While both documents were produced for trial, neither was prepared by a law enforcement officer, and neither appears to have been produced in an adversarial setting. The document in *Walsh* may even be less adversarial than the one in *Dedman*, because the nurse's affidavit concerned only the method of drawing the sample, not the test results themselves.<sup>122</sup> Furthermore, as Professor Giannelli points out, "[i]f, as the Court says [in *Crawford*], the Confrontation Clause was primarily concerned with the use of ex parte affidavits at trial, [then] it can be argued that a lab report is nothing but the affidavit of an expert" and should be subject to cross-examination.<sup>123</sup> Therefore, since the nurse's affidavit was testimonial in *Walsh*, the unsworn report in *Dedman* should probably have been inadmissible too.

B. *Resolving Conflicts with an Elements-Based Inquiry: Smith v. State and State v. Perkins*

To resolve some of these conflicts, it may help to step back and look at the larger picture in *Crawford*. The history behind the Confrontation Clause demonstrates that the Framers did not want a criminal defendant to be convicted by ex parte substitutes for witness testimony.<sup>124</sup> In fact, some opinions previously rendered under the *Roberts* test have voiced concerns over the introduction of laboratory reports to directly establish an essential element of a crime,<sup>125</sup> though this specific point is absent from *Crawford*. If a laboratory report directly establishes an element, perhaps even serving as the sole piece of evidence in some cases, is there any reason why a court should

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<sup>121</sup> *Crawford*, 541 U.S. at 51 (stating that "[v]arious formulations of this core class of 'testimonial' statements exist: 'ex parte in-court testimony or its functional equivalent . . . such as affidavits'").

<sup>122</sup> See *Walsh*, 91 P.3d at 592. Furthermore, there is no mention of the nurse in *Walsh* being a government employee. See *id.* (stating only that the nurse "delivered [the blood sample] to law enforcement"). In *Dedman*, the blood alcohol report was generated by a laboratory in the state's Department of Health. 102 P.3d 628, 636 (N.M. 2004).

<sup>123</sup> Giannelli, *Right of Confrontation*, *supra* note 26, at 33 (observing that the Supreme Court encouraged vigorous cross-examination of scientific evidence in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993)).

<sup>124</sup> See *Crawford*, 541 U.S. at 47-50 (describing early American concerns about the use of "interrogatories" or "written evidence").

<sup>125</sup> See, e.g., *Kettle v. State*, 641 So. 2d 746, 749-50 (Miss. 1994) (holding that the introduction of a drug analyst's certificate, when it was the sole proof of an essential element and was admitted through the testimony of a witness who did not conduct the test, violated both the Confrontation Clause and the constitutionally-required burden of proof upon the state).

not consider it the “functional equivalent” of ex parte in-court testimony described in *Crawford*?<sup>126</sup> One option to implement this proposal would be to allow a report to be considered testimonial because of the particular circumstances in the case. A second option would be to subject the report to a reliability test for non-testimonial statements (provided that this aspect of *Roberts* survives *Crawford*).<sup>127</sup>

1. Should Courts Apply the Confrontation Clause to Non-Testimonial Statements?

The Court of Criminal Appeals of Alabama handed down a pair of post-*Crawford* decisions that are instructive. In *Smith v. State*, the defendant was charged with murder by asphyxiation.<sup>128</sup> The indictment specified the cause of death, which was necessary to refute the defendant’s claim that he killed the victim in self-defense.<sup>129</sup> Dr. Hermann, the medical examiner who conducted the autopsy on the victim, did not testify at trial.<sup>130</sup> The prosecution instead called Dr. Hermann’s colleague, Dr. Beaver, who could account for the chain of custody for the photographs, autopsy report and other material used in Dr. Hermann’s examination of the victim.<sup>131</sup> The autopsy evidence was admitted, with Dr. Beaver testifying in agreement with Dr. Hermann’s opinion that the victim had died of asphyxiation.<sup>132</sup> The prosecution also called Dr. Embry, who reviewed Dr. Hermann’s autopsy materials independently and testified as to his own opinion that the victim had died of asphyxiation.<sup>133</sup>

With little discussion, the appellate court stated that *Crawford* did not appear implicated because Dr. Hermann’s findings were properly admitted

<sup>126</sup> See *Crawford*, 541 U.S. at 51-52 (citing *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment)).

<sup>127</sup> See *supra* notes 87-89 and accompanying text.

<sup>128</sup> 898 So. 2d 907, 909 (Ala. Crim. App. 2004).

<sup>129</sup> The defendant claimed that he struck the victim in self-defense, and that the victim was dead before the defendant wrapped the body in plastic for disposal. *Id.* at 908-09.

<sup>130</sup> *Id.* at 915 (stating that defendant argued that “the admission of the autopsy . . . , without the testimony of the medical examiner who performed the autopsy, violated [defendant’s] Sixth Amendment right to confrontation”).

<sup>131</sup> *Id.* at 915 (stating that “at trial, the State presented the testimony of Dr. Thomas Beaver . . . [because] Dr. Herrmann had left the medical examiner’s office”).

<sup>132</sup> *Id.* at 916.

<sup>133</sup> *Id.* (recounting Dr. Embry’s testimony that “he could form an opinion as to the cause of death without relying on Dr. Herrmann’s written opinion”). The *Smith* decision apparently deals with the admission of Hermann’s reports as substantive evidence through these other medical examiners. See *id.* at 915 (allowing another expert to testify even though the defendant claimed “the autopsy evidence should not have been admitted because . . . [the] medical examiner who [actually] performed the autopsy . . . was available to testify”). There was no mention of the reports as the basis for an expert opinion. Instead, the decision dealt with the problem of establishing the truth of the reports. See discussion *infra* Part III.

under the business record exception and were therefore non-testimonial.<sup>134</sup> The court observed, however, that the prosecution was attempting to prove a crucial element of the crime, and would have failed in this regard without the medical examiner's findings to negate the claim of self-defense.<sup>135</sup> Specifically, the Court recognized that "[b]y use of certified copies of business documents and official records under special statutes providing for such, . . . the State could prove some offenses without the necessity of calling any witnesses at all, except for the guarantees of our state and federal constitutions."<sup>136</sup> As such, the court concluded, that "[u]nder the facts of this case, the *Confrontation Clause* [should preclude] the prosecution from proving an essential element of its case by hearsay evidence alone."<sup>137</sup> Despite the confrontation violation, however, the admission of the autopsy report was deemed harmless error because the remaining evidence contradicted the self-defense claim and supported the defendant's conviction on the lesser charge of manslaughter.<sup>138</sup> Thus, instead of looking solely at the testimonial nature of the disputed evidence, the court in *Smith* focused on the circumstances of the case to resolve the Confrontation Clause question.

*Perkins v. State*, another decision issued on the same day, reached a different result.<sup>139</sup> The same court considered another homicide case in which an assistant to Dr. Embry testified about one of Dr. Embry's autopsies.<sup>140</sup> In this case, the court again determined that the autopsy report was a business record and non-testimonial, but it also determined that the admission of such evidence did not violate the Confrontation Clause.<sup>141</sup> The court reasoned that since the report was non-testimonial, its status as a business record gave it enough reliability to satisfy both the hearsay exception and the *Roberts* test.<sup>142</sup> Also, the cause of death was not in dispute because the defendant claimed he was innocent by reason of mental defect.<sup>143</sup> Just as in *Smith*, the Alabama court chose to look at the circumstances of the case (i.e., the elements

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<sup>134</sup> *Id.* at 916.

<sup>135</sup> *Id.* at 917 (holding that "[b]y introducing the records of the autopsy without providing [the defendant] with the opportunity to cross-examine . . . the prosecution was [erroneously] permitted to prove an essential element of the crime") (citing *Madden v. State*, 112 So. 2d 796 (Ala. Ct. App. 1959)).

<sup>136</sup> *Id.* (quoting *Lowery v. State*, 317 So. 2d 365, 371 (Ala. Crim. App. 1975)).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 918.

<sup>139</sup> 897 So. 2d 457, 466 (Ala. Crim. App. 2004) (concluding that the Confrontation Clause is satisfied because "the hearsay at issue in this case is nontestimonial in nature").

<sup>140</sup> *Id.* at 464.

<sup>141</sup> *Id.* (holding that the results of the "autopsy and the supporting materials are business records" and observing that even if the evidence was erroneously admitted, it would be harmless error).

<sup>142</sup> *Id.* (finding that the "autopsy and the supporting materials [were] business records, which bear the earmark of reliability").

<sup>143</sup> *Id.* at 464-65.

necessary for the prosecution to prove its case) to answer the Confrontation Clause question, rather than at the testimonial quality of the challenged evidence.

The end results of these Alabama decisions appear contradictory on their face, but they can be reconciled in different ways.<sup>144</sup> If an autopsy report is truly non-testimonial, and *Roberts* is still good law for non-testimonial statements, then one could argue that the never-cross-examined report in *Smith* was not reliable enough to serve as the sole evidence establishing a crucial element to the crime. This would explain why the report in *Perkins* did not violate the Confrontation Clause, as the cause of death was not in dispute and the report's trustworthiness was unlikely to be questioned.<sup>145</sup> While the *Smith* decision provides little explanation for finding a Confrontation Clause violation, the *Perkins* decision suggests that the Alabama court still believed a *Roberts*-type reliability test applied to non-testimonial hearsay.<sup>146</sup> Several commentators have observed that expert reports, while qualifying as non-testimonial, "can nevertheless be so untrustworthy and rely on such subjective interpretive standards, that it makes sense to apply the Confrontation Clause and pressure the prosecution to produce the expert as a trial witness subject to cross-examination."<sup>147</sup>

While *Crawford* creates uncertainty as to whether the *Roberts* test survives for non-testimonial hearsay, state courts could also choose to analyze non-testimonial hearsay in this fashion by using the confrontation clauses of their respective state constitutions. The Montana Supreme Court, for example, held that its state confrontation clause afforded greater protection than the Federal Constitution because the Montana confrontation clause specifically guarantees a defendant's right "to meet witnesses against him face to face."<sup>148</sup>

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<sup>144</sup> After all, the *Smith* court believed that the Confrontation Clause prevented the prosecution's use of the autopsy report, while the *Perkins* court found that prosecutorial use of a similar autopsy report posed no affront to the Confrontation Clause.

<sup>145</sup> *Id.* at 465 (failing to see how cross-examination of Dr. Embry would have added to the fact-finding process when Perkins admitted he shot and killed the victim).

<sup>146</sup> *See id.* at 464 (finding that the report was non-testimonial, then citing earlier U.S. Supreme Court decisions for the proposition that the Confrontation Clause is satisfied when the hearsay comes within a firmly rooted hearsay rule).

<sup>147</sup> *See* Edward J. Imwinkelried, *The Treatment of Prosecution Hearsay Under Crawford v. Washington: Some Good News But . . .*, THE CHAMPION, Fall 2004, at 18. Another commentator, addressing this same reliability issue under the law existing before *Crawford*, concluded that prosecution laboratory reports in general lack sufficient reliability to become admissible without confrontation. *See* Giannelli, *Reliability*, *supra* note 4, at 688-695.

<sup>148</sup> *See* State v. Clark, 964 P.2d 766, 771 (Mont. 1998) (declaring unconstitutional a state's evidentiary rule that made drug analysis reports admissible as a hearsay exception). The Colorado Supreme Court has agreed to decide whether its state constitution affords confrontation rights for non-testimonial hearsay. *See* *Compan v. People*, 2004 Colo. LEXIS 849, at \*2 (Colo. Oct. 25, 2004) (granting certiorari for a lower court decision that applied state confrontation analysis, based on the *Roberts* reliability test, to hearsay it deemed non-

## 2. Loosening the Conception of Testimonial Statements

Alternatively, the Alabama court could have chosen a route that would align *Smith* more closely with *Crawford*, by finding that the autopsy report was testimonial. This analysis is more difficult because, at first glance, an autopsy report appears to be a perfect example of non-testimonial hearsay. In many cases, an autopsy report is mandated by statute rather than initiated by police or prosecutors.<sup>149</sup> The medical examiner is not a law enforcement officer in an adversarial relationship with the defendant and is typically conducting routine examinations in the ordinary course of business.<sup>150</sup> Justice Scalia may have envisioned similar arguments when he described business records as non-testimonial in *Crawford*.<sup>151</sup>

Even though an autopsy report may appear non-testimonial, it seems (at least intuitively) that the Confrontation Clause should allow a defendant to confront the crucial piece of hearsay that directly establishes an element of the crime – testing it in the “crucible of cross-examination.”<sup>152</sup> These circumstances evidently concerned the Alabama court in *Smith*, when it noted that the autopsy report was the prosecutors’ only way to prove an element in its indictment, such that the “defendant’s confrontation rights *superseded* the evidentiary rule that would have permitted the State to rely solely on hearsay evidence to establish a necessary element of the crime.”<sup>153</sup> It is as if the Alabama court found *Crawford*’s description of testimonial hearsay to be excessively narrow, so that circumstances favoring confrontation (i.e., the danger of allowing the prosecution to convict via certified documents alone) outweighed the autopsy report’s resemblance to non-testimonial hearsay.<sup>154</sup>

*Crawford*’s description of testimonial hearsay<sup>155</sup> does not foreclose the possibility that a document employed under the circumstances of *Smith* will qualify as testimonial.<sup>156</sup> Although some courts have drawn a rather narrow

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testimonial). For a discussion on whether the post-*Crawford* treatment of non-testimonial hearsay will actually benefit prosecutors, see Leonard Post, *Prosecutors Feel Broad Wake of ‘Crawford’; Child Abuse Cases, 911 Calls Affected*, NAT’L L.J., Dec. 13, 2004, at 1.

<sup>149</sup> See Giannelli, *Right of Confrontation*, *supra* note 26, at 28, 30 (noting that medical examiners perform duties for “nonadvocacy reasons” and that “[t]hey are charged by law with the job of producing public documents relating to deaths”).

<sup>150</sup> See *id.* at 28; see also *People v. Miller*, 2004 Mich. App. LEXIS 3085, at \*11 (Mich. Ct. App. Nov. 9, 2004) (holding that an “autopsy report documenting the doctor’s medical observations” was not testimonial).

<sup>151</sup> See *supra* note 105 and accompanying text.

<sup>152</sup> See *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

<sup>153</sup> *Smith v. State*, 898 So. 2d 907, 914 n.3 (Ala. Crim. App. 2004) (emphasis added).

<sup>154</sup> See *supra* notes 141-143 and accompanying text.

<sup>155</sup> See *supra* notes 81-84 and accompanying text.

<sup>156</sup> For purposes of this elements-based analysis, we should set aside arguments, discussed *supra* Part II.A, that the report is initiated by police or that the declarant reasonably expects it to be used prosecutorially.

definition of testimonial hearsay from *Crawford*,<sup>157</sup> the opinion itself describes only a “core class” of testimonial statements.<sup>158</sup> Hence, some hearsay outside of this “core class” may still qualify as testimonial, and lower courts need not limit their analysis to language in *Crawford* itself. The Supreme Court clearly avoided any attempt to develop a “comprehensive definition of ‘testimonial’” hearsay.<sup>159</sup>

Furthermore, an autopsy report under the circumstances of *Smith* bears at least some resemblance to *Crawford*’s description of testimonial hearsay. The *Crawford* Court began its description of testimonial hearsay with “*ex-parte* in-court testimony or its functional equivalent.”<sup>160</sup> A laboratory report is arguably the functional equivalent of live testimony when it serves as the sole evidence directly establishing an element of the crime, and scholars have suggested that whether a report serves this purpose should at least be a factor in considering such reports testimonial.<sup>161</sup> Considering the Framers’ view toward the admission of extrajudicial witness statements,<sup>162</sup> it is not a stretch to argue that the Framers would bear similar suspicions toward extrajudicial witness observations and evaluations of evidence. By using an approach that asks if the report directly establishes an element of the crime, a court would necessarily engage in a fact-specific inquiry, as promoted by *Smith*.<sup>163</sup> For example, conclusory documents could be problematic, especially when the issue is a major point of contention at trial.<sup>164</sup> This approach also raises

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<sup>157</sup> Some courts have seized on *Crawford*’s unequivocal conclusion that the term “testimonial” applies “at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Crawford*, 541 U.S. at 68. Therefore, courts may decline to extend *Crawford* to evidence that bears little resemblance to these proceedings. See, e.g., *Denoso v. State*, 156 S.W.3d 166 (Tex. App. 2005) (holding that a certified autopsy report was non-testimonial).

<sup>158</sup> See *Crawford*, 541 U.S. at 51.

<sup>159</sup> See *id.* at 68.

<sup>160</sup> *Id.* at 51 (emphasis added). The Court described these functional equivalents as affidavits, custodial examinations, prior unopposed testimony, or similar pre-trial statements that one would reasonably expect to be used prosecutorially. See *id.* These descriptions, however, are not comprehensive. See *supra* note 159 and accompanying text.

<sup>161</sup> See Farb, *supra* note 26, at 2-3 (arguing that a report establishing the element of an offense should be a factor in considering such a report testimonial). Another commentator observes that “[a] ‘nontestimonial’ out-of-court statement is one that does not directly prove the identity of the accused or an element of the offense.” See Thomas J. Reed, *Crawford v. Washington and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule*, 56 S.C. L. REV. 185, 225 (2004).

<sup>162</sup> See *supra* note 124 and accompanying text.

<sup>163</sup> See *Smith v. State*, 898 So. 2d 907, 914 n.3 (Ala. Crim. App. 2004) (emphasizing that the Confrontation Clause violation was rooted in the “particular circumstances” and “facts of [the] case”).

<sup>164</sup> See *Rollins v. State*, 866 A.2d 926, 946 (Md. Ct. Spec. App. 2005) (“Conclusions and conclusory findings susceptible to different interpretations that are critical to a central issue

questions of practicality, which the next section addresses.

C. *Policy and Doctrinal Reasons for Adopting an Analysis Drawn from Smith and Perkins*

Any further strengthening of the Confrontation Clause may have the practical effect of imposing serious burdens on prosecutors. Effective prosecution of crimes may suffer if courts are routinely forced to throw out valuable scientific evidence generated by unavailable witnesses. As far back as *Mattox v. United States*, the Supreme Court has recognized that the Confrontation Clause does not provide an absolute right to face every person who becomes a source of evidence.<sup>165</sup> The Court commented that “general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case.”<sup>166</sup> A flexible Confrontation Clause analysis, based on the particular circumstances of the case and the elements of the offense, may allow the Clause to function better in the real world.

Adopting the elements-based approach proposed here should not limit the admissibility of laboratory reports in large numbers (at least not much more than *Crawford* itself). Using this test, courts would first turn to *Crawford*'s description of testimonial statements to determine whether the Confrontation Clause is implicated.<sup>167</sup> The approach drawn from *Smith* will simply serve as an additional factor for courts to consider, providing another layer of protection when a laboratory report appears non-testimonial but serves as the prosecutor's sole evidence to establish an element of the crime. Courts will need to apply the Confrontation Clause only in those circumstances where it is necessary to prevent the prosecution from “proving an essential element of its case by hearsay evidence alone.”<sup>168</sup> As previously mentioned, at least some courts found this argument persuasive before *Crawford*.<sup>169</sup>

When a laboratory report is testimonial, there are still measures available to avoid many confrontation problems. Professor Richard Friedman, an advocate

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in the case are ‘testimonial’ and subject to scrutiny under cross-examination.”). The court allowed a medical examiner's observations to be admitted through an autopsy report, but information on the cause of death was redacted. *See id.* at 953.

<sup>165</sup> *See* 156 U.S. 237, 242-43 (1895) (observing that one could reasonably argue that a deceased witness's former testimony should be barred from a second trial since the defendant cannot face him, but nevertheless admitting a transcript because the defendant had an opportunity to cross-examine the witness in the first trial).

<sup>166</sup> *See id.* at 243.

<sup>167</sup> *See* discussion *supra* Part I.C.

<sup>168</sup> *See Smith*, 898 So. 2d at 917 (stating that by introducing a certified record to establish an element regarding cause of death, without an opportunity for cross-examination, prosecutors could unconstitutionally shift the burden to the defendant to disprove its findings).

<sup>169</sup> *See supra* note 125.

of the testimonial approach, proposes a relaxation of the rules of criminal procedure to allow a prosecutor to arrange for the deposition of the appropriate laboratory technician who is likely to be unavailable at trial.<sup>170</sup> If the declarant should become unavailable, the testimony would pass constitutional muster because the defendant was given adequate “opportunity” to cross-examine.<sup>171</sup> Alternatively, the prosecutor could notify the defendant that he intended to introduce laboratory reports as evidence, and the defendant’s failure to demand a deposition of the preparer could constitute a waiver of the defendant’s right of confrontation.<sup>172</sup> This second alternative is similar to several existing statutes, which force a defendant to take affirmative action if he or she wants the prosecution to call a chemist as a witness.<sup>173</sup>

More important than the policy considerations, the elements-based inquiry is necessary to uphold the spirit of the Confrontation Clause. The burden on scientific experts, with increased workloads and more court appearances, does not make the experts “unavailable” for Confrontation Clause purposes.<sup>174</sup> Furthermore, the value of testing physical evidence through cross-examination can hardly be disputed when one considers the number of high-profile cases in which defendants have been convicted on questionable – if not patently false – evidence.<sup>175</sup> Even as Massachusetts considered reinstating a death penalty

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<sup>170</sup> See Friedman, *Adjusting*, *supra* note 33, at 11 (observing that current rules of criminal procedure only permit depositions under exceptional circumstances). Both the Federal Rules of Criminal Procedure and some state rules permit pre-trial deposition of witnesses under “exceptional circumstances” when required in the “interest of justice.” See FED. R. CRIM. P. 15; MASS. R. CRIM. P. 35. The Massachusetts high court has permitted a deposition when a witness feared for his life and was unwilling to testify at trial. See *Commonwealth v. Tanso*, 583 N.E.2d 1247, 1251-1252 (Mass. 1992) (approving the deposition but reversing the conviction because the lower court erroneously concluded that defendant waived his right to cross-examine at the proceedings).

<sup>171</sup> See Friedman, *Adjusting*, *supra* note 33, at 11; see also *Ohio v. Roberts*, 448 U.S. 56, 73 (1980) (allowing hearsay because there was an “adequate opportunity to cross-examine”).

<sup>172</sup> See Friedman, *Adjusting*, *supra* note 33, at 11 (wondering whether the defense would be deemed to have waived the confrontation right if the defendant did not make the demand and the prosecution offered the statement at trial).

<sup>173</sup> See Giannelli, *Right of Confrontation*, *supra* note 26, at 31-32. The constitutionality of such statutes has been in dispute. State courts in Kansas, Iowa, Maine, New Hampshire, New Jersey, and Oregon have upheld the constitutionality of these statutes, although the Illinois Supreme Court concluded that defendants should not have to take action to invoke their Sixth Amendment rights. *Id.* Crawford leaves this question unanswered. *Id.*

<sup>174</sup> See *Miller v. State*, 472 S.E.2d 74, 79 (Ga. 1996) (remarking that “[t]he constraints which impede the ability of the State’s experts to fulfill their laboratorial duties as well as their ability to provide in-court expert testimony is remediable by increased funding of the State Crime Lab”).

<sup>175</sup> See Giannelli, *Right of Confrontation*, *supra* note 26, at 30-31 (listing newspaper accounts of an FBI biologist who falsified DNA reports, a Houston toxicologist who failed competency tests, and a lawyer who was arrested for terrorism based on an erroneous

based on irrefutable scientific evidence,<sup>176</sup> the Commonwealth experienced a number of embarrassing public scandals involving scientific mistakes. Massachusetts Governor Mitt Romney complained of inheriting a “mess” at the state medical examiner’s office, which botched an autopsy by sending the wrong set of eyeballs out for testing, and wrongly identified a fire victim’s body, which was later cremated.<sup>177</sup> Erroneous fingerprint evidence helped convict a man of shooting a Boston police officer, and he spent six years in prison before new tests showed the fingerprint was not his.<sup>178</sup> Thus, scrutiny of such scientific evidence is all the more crucial because of the enormous weight it carries.<sup>179</sup>

The elements-based test also has doctrinal support. It can be grounded in a *Roberts*-type confrontation analysis for non-testimonial hearsay, raising the reliability threshold to prevent the prosecution from proving a crucial element by hearsay documents alone,<sup>180</sup> lest these same circumstances transform the laboratory report into the functional equivalent of testimonial evidence.<sup>181</sup> Recall the conflict between a nurse’s affidavit describing how blood was drawn (held testimonial), and an unsworn report showing a defendant’s blood alcohol level (held non-testimonial).<sup>182</sup> Under the approach advocated here, if the results of the test were the prosecution’s chief source of evidence, and directly established a necessary element for drunken driving, the defendant must be afforded an opportunity for cross-examination. Accordingly, this

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fingerprint match). *See also* Jonathan Saltzman, *New Trial Sought in Couple’s Slaying: Former FBI Agent Challenges Evidence*, BOSTON GLOBE, Feb. 10, 2005, at B1 (quoting a retired FBI metallurgist who criticized the Bureau’s ballistics technology and charged that a former colleague exaggerated the accuracy of a bullet match at a first-degree murder trial).

<sup>176</sup> *See* Beth Daley, *Foolproof Forensics? Even Science May Not Make Verdicts Infallible*, BOSTON GLOBE, June 8, 2001, at E1.

<sup>177</sup> *See* Sean P. Murphy, *Medical Office Reexamined, Romney Seeks Funds for Troubled Agency*, BOSTON GLOBE, Jan. 13, 2004, at B3.

<sup>178</sup> *See* Daley, *supra* note 176 (blaming the mix-up on “human error”). The two fingerprint analysts who testified at trial were later cleared in a perjury investigation, but the controversy caused Boston police to begin outsourcing fingerprint analysis to a state laboratory. *See* Suzanne Smalley, *Police Shutter Print Unit, Identification Error, Critical Report Cited*, BOSTON GLOBE, Oct. 14, 2004, at B1.

<sup>179</sup> Stephan Cowans, exonerated in the Boston police shooting, says he would have voted to convict himself, had he been on the jury, because of the scientific evidence the State proffered. Even after DNA tests on the physical evidence failed to match Cowans’s profile, prosecutors continued to defend the conviction based on the fingerprint match, until this too was refuted upon re-examination. *See* Jack Thomas, *‘I Was Not The Man Who Did This,’ Cleared of Shooting Charge, Stephan Cowans Looks Back at Six Lost Years in Prison*, BOSTON GLOBE, Apr. 28, 2004, at F1. *See also supra* note 1 (describing the “C.S.I. Effect” on jurors).

<sup>180</sup> *See* discussion *supra* Part II.B.1.

<sup>181</sup> *See* discussion *supra* Part II.B.2.

<sup>182</sup> *See supra* notes 112-123 and accompanying text.

approach may help resolve some of the practical, evidentiary, and constitutional problems arising in case law post-*Crawford*.

### III. SPECIAL CONSIDERATION FOR LABORATORY REPORTS THAT FORM THE BASIS OF EXPERT OPINION

#### A. *For What Purpose Is the Report Admitted?*

Aside from the question of which *evidence* requires confrontation, post-*Crawford* case law is also tackling the question of which *witnesses* the defendant is entitled to confront. A laboratory report may not always stand on its own; many cases involve a live witness who explains scientific test results to a jury, even though the witness has little or no personal involvement with administering the tests.<sup>183</sup> A different analysis is required when a laboratory report, or some other type of hearsay, forms the basis for an expert opinion.<sup>184</sup> In this scenario, the defendant is able to cross-examine the expert on the stand but is unable to confront the hearsay declarants (e.g., laboratory technicians) who formed the basis of this witness's opinion. If the hearsay is established as testimonial, the defendant has grounds to argue that *Crawford* should prevent the expert from testifying.<sup>185</sup> Courts appear to have accepted this argument in at least two recent homicide cases.<sup>186</sup>

However, post-*Crawford* case law largely suggests that the Confrontation Clause will only rarely restrict the admissibility of expert witness testimony. One such case, *United States v. Stone*, held that an expert witness for the Internal Revenue Service could form her opinions based on statements that the defendants' employees gave to criminal investigators.<sup>187</sup> These statements were arguably testimonial, but the court did not subject them to the *Crawford*

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<sup>183</sup> See cases cited *infra* notes 191-192, and 194.

<sup>184</sup> See generally FED. R. EVID. 702-706; *Daubert v. Merrell Dow Pharm., Inc.* 509 U.S. 579 (1993) (establishing federal standards for expert opinion testimony).

<sup>185</sup> See Ronald Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577, 584 (1986) (arguing that confrontation and hearsay concerns "would seem minimal when an expert simply identifies a background document as a basis for his opinion, [but] reporting fully to the jury from the conclusions of nontestifying experts is improper").

<sup>186</sup> A New York judge prevented the prosecution's psychiatric expert from testifying because he had partly relied on the deceased victim's allegations of prior abuse, which she relayed to the grand jury, police, and doctors. See Post, *supra* note 148, at 1 (discussing *People v. Diaz*, No. 4735/2001 (Kings Co., N.Y., Sup. Ct. 2001)). A Michigan court also applied the *Crawford* analysis when a medical pathologist relied on non-witness laboratory reports to form an opinion on cause of death, only to find that such reports were not testimonial. See *People v. Miller*, 2004 Mich. App. LEXIS 3085, at \*\*9-12 (Mich. Ct. App. Nov. 9, 2004) (observing that it is "well-established" under Michigan evidence law that an expert may base an opinion on hearsay or opinions of other experts, but the court "must now closely scrutinize the admission of hearsay evidence" in relation to a post-*Crawford* confrontation claim).

<sup>187</sup> 222 F.R.D. 334 (E.D. Tenn. 2004).

analysis.<sup>188</sup> Instead, the court observed that the statements had been introduced for the purpose of evaluating the merits of the expert opinion.<sup>189</sup> *Crawford* clearly holds that the Confrontation Clause does not bar the use of testimonial statements for purposes other than for the truth of the matter asserted.<sup>190</sup> This holding has led courts to rule that a psychiatric expert could rely on hearsay reports and interviews to form an opinion with respect to a defendant's sanity,<sup>191</sup> and a medical examiner could rely on hearsay witness statements to form an opinion with respect to a victim's cause of death.<sup>192</sup>

The *Stone* rationale also allows a court to side-step the argument that a laboratory report is testimonial hearsay.<sup>193</sup> In one such case, an agent at a drug chemistry laboratory was permitted to cite tests conducted by another agent under her supervision, and to issue an opinion that the substance was cocaine.<sup>194</sup> Prosecutors responded to the defendant's Confrontation Clause argument by asserting that the laboratory reports were business records.<sup>195</sup> The appellate court upheld the conviction on different grounds, finding *Crawford* inapplicable because the laboratory report was admitted for the limited purpose of evaluating the witness's opinion, and the opinion itself was subject to cross-examination.<sup>196</sup> In a nearly identical case involving an expert chemist who relied on non-witness laboratory tests, the court held that any challenge "would affect the weight of the evidence, rather than its admissibility."<sup>197</sup> The court

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<sup>188</sup> See *id.* at 339 (stating that "[d]espite the changes to hearsay analysis wrought by the Court's decision in *Crawford*, the Court in *Crawford* explicitly stated 'the [Confrontation] Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted,'" and bypassing the question of whether the employees were "unavailable").

<sup>189</sup> *Id.* (commenting that "the statements may nevertheless be used [by the expert] in forming her expert opinions because they would not be used to establish the truth of the matters . . . asserted . . . [but] for evaluating the merit of the opinions").

<sup>190</sup> *Crawford v. Washington*, 541 U.S. 36, 59-60 n.9 (2004) (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)).

<sup>191</sup> *People v. Goldstein*, 786 N.Y.S.2d 428, 432 (N.Y. App. Div. 2004) (upholding the murder conviction of a schizophrenic who shoved a commuter in front of a subway, and concluding that "*Crawford* do[es] not preclude admission of the prosecution's forensic psychiatrist's testimony regarding the background information upon which she relied in arriving at her expert opinion as to defendant's sanity").

<sup>192</sup> *Howard v. Walker*, 2004 U.S. Dist. LEXIS 14425, at \*\*35-36 (W.D.N.Y. July 28, 2004) (denying a writ of habeas corpus and declining to extend *Crawford* to prevent an expert from reviewing non-testimonial statements in forming an opinion).

<sup>193</sup> See discussion *supra* Part II.

<sup>194</sup> See *State v. Jones*, 2004 N.C. App. LEXIS 1655, at \*4 (N.C. Ct. App. Sept. 7, 2004).

<sup>195</sup> See *id.* at \*6.

<sup>196</sup> See *id.* at \*\*8-11 (commenting that the expert opinion itself is the substantive evidence in question, not its factual basis).

<sup>197</sup> See *United States v. Gaines*, 105 F. App'x 682, 696 (6th Cir. 2004) (allowing a laboratory technician to render an expert opinion that a substance was crack cocaine,

reasoned that the opportunity to cross-examine the chemist on the witness stand is “all the Confrontation Clause requires.”<sup>198</sup> These cases might suggest that a prosecutor could make an end-run around *Crawford* by supplying a token witness for cross-examination, but courts already provide tools (discussed in the next section) to minimize such abuse.

B. *Another Fact-Specific Solution, Based on Rules of Evidence and Prejudicial Effects*

Confrontation Clause protection should not be completely lacking for defendants when an expert witness is on the stand. The New York Court of Appeals has recognized that the policy of allowing experts to rely on inadmissible evidence must yield, “in a proper case,” to the defendant’s confrontation rights.<sup>199</sup> For purposes of Confrontation Clause analysis, the Supreme Court of Wisconsin has likewise recognized a critical distinction “between an expert who forms an opinion based in part on the work of others and an expert who merely summarizes the work of others. In short, one expert cannot act as a mere conduit for the opinion of another.”<sup>200</sup> Despite *Crawford*’s emphasis on separating the Confrontation Clause from evidentiary hearsay rules, it appears that in the context of expert opinion, the defendant’s constitutional attack may actually run parallel to the rules of evidence.<sup>201</sup>

For example, while Federal Rule 703 permits an expert to base her opinion (wholly or in part) on otherwise inadmissible evidence, the witness must not merely serve as a “conduit” for placing hearsay before the jury.<sup>202</sup> The deciding factor is whether the witness assists the trier of fact by “bring[ing] his own expertise to bear.”<sup>203</sup> When an expert purports to give an opinion that a substance is cocaine, based solely on another’s laboratory test results

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although the tests had actually been conducted by a colleague who was absent from trial), *vacated on other grounds by* *Gaines v. United States*, 125 S. Ct. 1090 (2005).

<sup>198</sup> See *Gaines*, 105 F. App’x at 696.

<sup>199</sup> See *People v. Sugden*, 323 N.E.2d 169, 172 (N.Y. 1974).

<sup>200</sup> See *State v. Williams*, 644 N.W.2d 919, 926 (Wis. 2002).

<sup>201</sup> See, e.g., FED. R. EVID. 703, stating:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.

<sup>202</sup> See *United States v. Stone*, 222 F.R.D. 334, 341 (E.D. Tenn. 2004) (citing *United States v. Lundy*, 809 F.2d 392, 395 (7th Cir. 1987)). A court must consider other factors under Federal Rule 703, including whether others in the field rely upon the inadmissible facts or data, and whether the expert’s reliance is itself reasonable. See *id.* at 340-41.

<sup>203</sup> See *id.* at 341.

identifying the substance as cocaine, the defendant can argue that the testimony is not really expert opinion. Without bringing to bear an independent basis for the opinion, the expert witness could become a “subterfuge” for admitting testimonial hearsay, which would violate both the rules of evidence *and* the Confrontation Clause.<sup>204</sup> As one commentator contends, “[t]his back door introduction of the contents of a nontestifying expert’s report, without producing the author of the material, impinges on the criminal defendant’s sixth amendment rights.”<sup>205</sup> Therefore, a court must necessarily undertake a fact-specific analysis to reach the conclusion that purported expert testimony will violate the Confrontation Clause.<sup>206</sup>

This analysis, however, is no more onerous than that imposed by the evidentiary requirements related to admitting expert opinions. If an expert brings independent analysis to bear, and thereby assists the fact-finder, the expert will never be a subterfuge for admitting testimonial hearsay. If, however, a purported expert witness is merely resting his or her conclusions on the findings of someone else, a defendant can argue that the evidence is testimonial and has been presented, thereby implicating *Crawford*.

Courts already analyze the facts and circumstances of a case before allowing a jury to hear otherwise inadmissible evidence as the basis for expert opinion – the probative value of such evidence must substantially outweigh its prejudicial effect.<sup>207</sup> At least one commentator has argued that a probative versus prejudicial determination also has a role in Confrontation Clause

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<sup>204</sup> See Defendant-Appellant’s Brief, *State v. Lyles*, 615 S.E.2d 890, 2005 WL 1802255 (N.C. Ct. App. 2004) (No. COA04-969), 2004 WL 2107771 at \*22 [hereinafter *Lyles* Defendant-Appellant’s Brief] (challenging the expert testimony of a chemist, whose opinion was based on a technical review of his colleague’s work).

<sup>205</sup> See Carlson, *supra* note 185, at 585 (arguing against wholesale introduction of a non-witness expert report through the testimony of another expert).

<sup>206</sup> See *State v. Williams*, 644 N.W.2d 919, 926-928 (Wis. 2002) (finding no Confrontation Clause violation when an expert testified as to tests on suspected cocaine that were conducted by a colleague under her supervision, based on the supervisor’s high qualifications, close connection with the tests and procedures used, and independent peer review). *But see Lyles* Defendant-Appellant’s Brief at 17, 22 (asserting a Confrontation Clause violation “on the particular facts of this case” where witness had no supervisory role over the non-witness test results and could only describe the usual procedures). See also Ross Andrew Oliver, Note, *Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After Crawford v. Washington*, 55 HASTINGS L.J. 1539, 1560 (2004) (suggesting a “continuum of situations in the analysis of whether an expert opinion based on testimonial hearsay violates the Confrontation Clause,” the most extreme example being the expert who bases an opinion almost entirely on testimonial hearsay).

<sup>207</sup> See, e.g., FED. R. EVID. 703 (stating in pertinent part that “[f]acts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect”).

analysis.<sup>208</sup> Using this rationale, testimony that relied heavily on a non-witness laboratory report could be curtailed if the underlying report's impact on the jury would eclipse the testifying expert's own opinion despite any limiting instruction.<sup>209</sup> Admitting such evidence would be unfairly prejudicial because the defendant would be left to cross-examine a "mouthpiece" for another person's scientific evaluation of the evidence.<sup>210</sup>

Although some might prefer a bright line rule to prevent expert opinion witnesses from relaying testimonial statements to a jury, the case-specific test advocated here seems most consistent with Supreme Court jurisprudence. It is the "literal right to confront" a witness that forms the core value of the Confrontation Clause,<sup>211</sup> and *Crawford* does not appear to enlarge this right at all.<sup>212</sup> An expert who relies on hearsay sources will certainly be subject to vigorous cross-examination where the defendant can probe the authenticity, accuracy, and reasonable reliance on these sources.<sup>213</sup> Because no amount of cross-examination can "unring the bell" and persuade jurors to disregard inappropriate evidence they have already heard, however, a court will have to

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<sup>208</sup> In response to the potential difficulty of prosecuting child sexual abuse cases post-*Crawford*, Reed advocates a "sliding scale" test. Reed argues for a constitutional inquiry in which the probative value of the statement must be substantially greater than the unfairness to the accused. See Reed, *supra* note 161, at 227-228. Reed bases his formula on *Bruton v. United States*, in which the Court ruled that the Confrontation Clause could bar admissible hearsay when the danger of misuse by the jury was too great. 391 U.S. 123, 135-136 (1968) (finding a limiting instruction inadequate to counter the prejudicial effect where the defendant was unable to cross-examine his co-defendant's damaging statements during a joint trial).

<sup>209</sup> See Carlson, *supra* note 185, at 585 (reasoning that "permitting the expert to go beyond this point and recite extensively from another person's report significantly damages the confrontation clause of the Constitution").

<sup>210</sup> See Lyles Defendant-Appellant's Brief, *supra* note 204, at 17, 19 (claiming that the non-testifying expert report carried more weight than the testifying witness's opinion that lacked personal knowledge). The court in *In Re Civil Commitment of E.S.T.* found plain error where expert testimony was based on non-witness examinations to determine if a prison inmate should be committed as a sexually dangerous person. 854 A.2d 936, 942-944 (N.J. Super. Ct. App. Div. 2004). While *E.S.T.* was actually a civil proceeding, the court cited *Crawford* when it determined that the lack of effective cross-examination made the civil commitment proceedings fundamentally unfair. See *Id.* at 944.

<sup>211</sup> See *California v. Green*, 399 U.S. 149, 157 (1970); see also *Mattox v. United States*, 156 U.S. 237, 242-43 (1895) (describing the opportunity for cross-examination as a chance to test the witness's recollection, conscience, and demeanor).

<sup>212</sup> See *Crawford v. Washington*, 541 U.S. 36, 54 (2004) (citing *Mattox*, 156 U.S. at 243, in holding that the Confrontation Clause "is most naturally read as a reference to the right of confrontation at common-law").

<sup>213</sup> See, e.g., *United States v. Williams*, 447 F.2d 1285, 1289-1290 (5th Cir. 1971) (finding that the Sixth Amendment was satisfied when defendant cross-examined a witness on the basis of his opinion regarding the fair market value of defendant's securities, even though this opinion was based on business records not in evidence).

be mindful of the potential for prejudice to the defendant.<sup>214</sup>

#### CONCLUSION

The only clear theme emerging from post-*Crawford* case law is the lack of clarity provided by *Crawford* itself. While the testimonial approach articulated in *Crawford* avoids many of the inconsistencies arising out of the *Roberts* reliability test, there are always cases that will not fit the mold. This is especially true in the context of laboratory and forensic reports, which in some cases bear hallmarks of non-testimonial evidence, but nevertheless seem to cry out for application of the Confrontation Clause.<sup>215</sup>

This Note proposes that courts adopt a more flexible approach when considering laboratory reports. *Crawford*'s testimonial framework appears to adequately apply the Confrontation Clause to laboratory reports initiated by law enforcement in an adversarial context, or when the analyst reasonably expects that the report will eventually be used in a prosecution.<sup>216</sup> Yet even when a laboratory report does not fit neatly within *Crawford*'s descriptions of testimonial hearsay, the Confrontation Clause should prevent the prosecution from using such a report as the only proof to establish an element of the crime. Finally, a laboratory report otherwise barred by the Confrontation Clause should nevertheless be admitted if its purpose is to support the opinion of a testifying expert witness. Confrontation will be necessary when the purported expert witness brings little or no independent analysis to bear, and merely serves as a conduit for testimonial hearsay. Admission of such evidence would otherwise result in unfairness to the defendant, who could not effectively cross-examine the ultimate source of the evidence.<sup>217</sup>

While these proposals are flexible and fact-specific, they pose little danger of reverting to the inconsistencies of *Roberts*, in which any hearsay evidence satisfied the Confrontation Clause so long as a judge found it sufficiently reliable. Rather than looking at the reliability of the evidence, these proposals consider the circumstances of the defendant's case, principles of fairness, and the underlying purpose of the Confrontation Clause. Therefore, these proposals would merely clarify and augment the Confrontation Clause analysis outlined in *Crawford*. After all, there is plenty of room to modify the "various formulations" of testimonial evidence described in *Crawford*.<sup>218</sup> Indeed, the Supreme Court clearly acknowledged that it had not provided a "comprehensive definition of 'testimonial'" statements – leaving that task "for

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<sup>214</sup> See *supra* notes 204-207 and accompanying text. See also *United States v. Bradshaw*, 281 F.3d 278, 284 (1st Cir. 2002) (commenting that under some circumstances a court cannot "unring the bell" when the evidence is so inflammatory that, once aired, no reasonable juror could be expected to disregard it).

<sup>215</sup> See *supra* notes 177-179 and accompanying text.

<sup>216</sup> See *supra* notes 107-110 and accompanying text.

<sup>217</sup> See *supra* notes 200-201 and accompanying text.

<sup>218</sup> See *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004).

another day.”<sup>219</sup>

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<sup>219</sup> *See id.* at 68 & n.10 (stating that “[w]e leave for another day any effort to spell out a comprehensive definition of ‘testimonial,’” and acknowledging that Chief Justice Rehnquist’s dissenting opinion argues that “our refusal to articulate a comprehensive definition in this case will cause interim uncertainty”).