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"THIS IS LIKE DÉJÀ VU ALL OVER AGAIN"¹: THE THIRD, CONSTITUTIONAL, ATTACK ON THE ADMISSIBILITY OF POLICE LABORATORY REPORTS IN CRIMINAL CASES

EDWARD J. IMWINKELRIED*

Some commentators have asserted that in the United States, trial by jury is becoming trial by expert.² A survey conducted in the 1970s found that a third of the cases of the responding attorneys involved scientific evidence.³ In contrast, a report of California jury trials found that 86 percent of trials in the early 1990s involved expert testimony.⁴

The high incidence of the use of expert testimony in criminal trials can place a severe strain on the resources of police laboratories. Many laboratories are already understaffed, and crime laboratory technicians have heavy workloads.⁵ To relieve that strain, prosecutors often attempt to introduce the technician's report without calling the technician to give live testimony. In some jurisdictions, state statutes permit the prosecutor to use an affidavit to lay the foundation for the report and completely dispense with live testimony.⁶ In other cases, rather than calling the technician and forcing the technician to spend time away from the laboratory, the prosecutor presents the testimony of a laboratory supervisor to establish the foundation for the report.⁷

In 1912 the United States Supreme Court stated in dictum that the Sixth Amendment Confrontation Clause prohibited the prosecution from introducing an autopsy report "without the consent of the accused."⁸ Given that dictum, it was predictable that the criminal defense bar would resist prosecution efforts to introduce police laboratory reports without the sponsoring testimony of the technician who authored the report. Over the years the defense bar has mounted three waves of attacks on the admissibility of such reports.

The first wave consisted of arguments that police laboratory reports do not fall within the common-law hearsay exceptions for business entries and official records.⁹ In particular, defense attorneys argued that the trustworthiness of police laboratory reports is suspect because they are prepared with a view to litigation.¹⁰

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1. Things People Said: Yogi Berra Quotes, <http://www.rinkworks.com/said/yogiberra.shtml> (last visited Apr. 27, 2008).

2. See, e.g., William T. Pizzi, *Expert Testimony in the U.S.*, 145 NEW L.J. 82 (1995).

3. Oliver Schroeder, Jr., *A Legal Study Concerning the Forensic Sciences Personnel*, in 3 ASSESSMENT OF THE FORENSIC SCIENCES PERSONNEL 19 (1977), cited in Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 OHIO ST. L.J. 671, 672 n.7 (1988).

4. SAMUEL R. GROSS, SOME DATA ON THE USE OF EXPERT WITNESSES IN CALIFORNIA CIVIL TRIALS (1990), cited in Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1119 n.18.

5. Craig M. Cooley, *Forensic Science and Capital Punishment Reform: An "Intellectually Honest" Assessment*, 17 GEO. MASON U. CIV. RTS. L.J. 299, 306-14 (2007); see *Crime Labs Received an Estimated 2.7 Million Cases in 2005*, <http://www.ojp.usdoj.gov/bjs/pub/press/cpffs105pr.htm>.

6. See, e.g., FLA. STAT. § 316.1934(5) (1996).

7. See, e.g., *Commonwealth v. Carter*, 932 A.2d 1261 (Pa. 2007).

8. *Diaz v. United States*, 223 U.S. 442, 450 (1912).

9. See generally Edward J. Imwinkelried, *The Constitutionality of Introducing Evaluative Laboratory Reports Against Criminal Defendants*, 30 HASTINGS L.J. 621, 624-26 (1979).

10. *Id.* at 628.

While these arguments gained some judicial adherents,¹¹ the clear majority of courts rejected these attacks.¹² In doing so, the courts invoked a variety of rationales: The forensic analyst's determination is intrinsically neutral and could just as easily exculpate as inculcate;¹³ the technician is a scientist, not a law enforcement official;¹⁴ the analyst's finding is objective, approximating the reporting of a fact;¹⁵ requiring the technician's court appearance for cross-examination would serve little purpose because it is unlikely that the technician will remember the specific test described in the report;¹⁶ and, such a requirement would impose an undue burden on police laboratory staffs.¹⁷

The second wave of attacks was led by a statutory argument based on the wording of a number of provisions in the Federal Rules of Evidence.¹⁸ The Federal Rules of Evidence took effect in 1975¹⁹ and, importantly, forty-one states followed suit by adopting evidence codes patterned more or less directly after the Federal Rules.²⁰ While Rule 803(6) of the Federal Rules of Evidence sets out a version of the business entry hearsay exception,²¹ Rule 803(8) codifies the official record hearsay exception.²² The text of Rule 803(8)(B) reads that in a criminal case the prosecution may not offer reports of "matters observed by police officers and other law enforcement personnel."²³ Subsection 8(C) adds that in a criminal case the prosecution may not offer "findings resulting from an investigation made pursuant to authority granted by law."²⁴ In a 1977 decision interpreting Rule 803(8), *United*

11. *Id.* (citing *State v. Henderson*, 554 S.W.2d 117 (Tenn. 1977); *State v. Rhone*, 555 S.W.2d 839 (Mo. 1977)).

12. *Id.* at 629. *See also* *United States v. Parker*, 491 F.2d 517 (8th Cir. 1973); *Hardy v. State*, 297 So. 2d 399 (Ala. Crim. App. 1974); *Seals v. State*, 213 So. 2d 645 (Ala. 1968); *State v. Reardon*, 376 A.2d 65 (Conn. 1977); *State v. Forbes*, 310 So. 2d 569 (La. 1975); *State v. Snider*, 541 P.2d 1204 (Mont. 1975); *People v. Porter*, 362 N.Y.S.2d 249 (N.Y. App. Div. 1974); *Thomas v. State*, 493 S.W.2d 832 (Tex. Crim. App. 1973); *State v. Kreck*, 542 P.2d 782 (Wash. 1975).

13. *Imwinkelreid*, *supra* note 9, at 629.

14. *Id.*

15. *Id.* at 627-28.

16. *Id.* at 644.

17. *Id.* at 643.

18. *See generally* Giannelli, *supra* note 3, at 675-85.

19. RONALD L. CARLSON, EDWARD J. IMWINKELRIED, EDWARD J. KIONKA & KRISTINE STRACHAN, *EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES* 20 (6th ed. 2007).

20. *Id.* at 21.

21. FED. R. EVID. 803(6). In pertinent part, Rule 803(6) reads:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation.

22. *Id.* at 803(8). Rule 803(8) reads:

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

23. *Id.*

24. *Id.*

States v. Oates,²⁵ the Court made a number of controversial rulings, in part to moot any concerns that the statutory provisions ran afoul of the Confrontation Clause. The Court held that: A crime laboratory technician is "law enforcement personnel" under 803(8)(B); the technician's determination is a "finding[]" under 803(8)(C); and, to prevent the prosecution from evading those restrictions, laboratory reports inadmissible under 803(8) must also be excluded under 803(6).²⁶

However, just as most courts rejected the common-law attacks on the introduction of crime laboratory reports, others have brushed aside the statutory attack. A number of published opinions reject the *Oates* court's reading of Rules 803(6) and (8).²⁷ These opinions apply the statutory restrictions only to police reports of "adversary" confrontations such as arrests and lineups.²⁸ Reading these opinions creates a sense of déjà vu because the courts reprise many of the same rationales used as the basis for rejecting the common-law attacks: The expert's determination is intrinsically neutral;²⁹ the technician is a scientist, not an advocate for the prosecution;³⁰ and, the technician's conclusion is trustworthy because it is in the nature of an objective fact.³¹

We are now witnessing the third wave of attacks on the admissibility of police laboratory reports. In 2004 the Supreme Court handed down a landmark decision, *Crawford v. Washington*.³² The *Crawford* Court overturned its 1980 precedent, *Ohio v. Roberts*,³³ which had announced that the Confrontation Clause countenanced the introduction of prosecution hearsay so long as the testimony was reliable. More specifically, the testimony was deemed sufficiently reliable if the testimony fell "within a firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness."³⁴ In *Crawford*, writing for the majority, Justice Scalia repudiated that mode of analysis.

Revisiting the history of the Confrontation Clause, Justice Scalia concluded that the core concern inspiring the Confrontation Clause was the Founding Fathers' abhorrence of the civil law practice of admitting testimony that has not been "subject to adversarial testing" by cross-examination.³⁵ The Clause targets "testimonial" hearsay.³⁶ The Justice wrote:

25. 560 F.2d 45 (2d Cir. 1977).

26. *Id.* at 67–80.

27. 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE § 6.02[b] (4th ed. 2007); Giannelli, *supra* note 3, at 676, 679. Courts have rejected the *Oates* approach as an unduly broad reading of the legislative history materials. For example, in *United States v. Orozco*, 590 F.2d 789, 793 (9th Cir. 1979), the court reviewed some of the same material relied on by *Oates* but concluded that those materials manifest a special concern for adversary confrontations "at the scene of the crime or the apprehension of the defendant." *Id.* at 793 (quoting S. Rep. No. 93-1277, 93d Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. & Admin. News 7051, 7064). See also *State v. Smith*, 323 S.E.2d 316, 327 (N.C. 1984).

28. Giannelli, *supra* note 3 at 679.

29. *Id.*

30. See *id.*

31. *Id.* at 677, 679.

32. 541 U.S. 36 (2004). For an analysis of *Crawford*'s effects, see Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & POL'Y 791 (2007).

33. 448 U.S. 56 (1980).

34. *Id.* at 66.

35. *Crawford*, 541 U.S. at 43.

36. *Id.* at 51.

Various formulations of this core class of “testimonial” statements exist: “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”; “extrajudicial statements...contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions”; “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.”³⁷

If a hearsay statement is “testimonial,” the prosecution may not introduce the evidence unless the accused had a prior opportunity to question the declarant and the declarant is unavailable at the time of trial. However, the Justice cautioned that “[m]ost of the hearsay exceptions [invoked in prior Court precedents to justify the admission of prosecution hearsay] covered statements that by their nature were not testimonial—for example, business records.”³⁸

Predictably, *Crawford* triggered this third, constitutional, wave of attacks on the admissibility of police laboratory reports in criminal cases. As Yogi Berra would say, “This is like déjà vu all over again.”³⁹ In the case of the common-law and statutory attacks, the courts are once again badly split, as Part II of this article explains. Some courts reason that the crime laboratory technician reasonably understands that he or she is producing a report to be used prosecutorially. Other courts counter that the laboratory report qualifies as the type of business record that Justice Scalia classified as nontestimonial. Moreover, as Part III demonstrates, the courts rejecting the constitutional attack under *Crawford* have resurrected many of the very same arguments that were invoked to brush aside the previous common-law and statutory attacks. The courts are harking back to the arguments that: The expert’s determination is intrinsically neutral; the expert is an impartial scientist rather than a law enforcement officer; the opinion is objective in nature; cross-examination would have little value; and, the opportunity to question the laboratory supervisor satisfies any demands of the Confrontation Clause.

Recycling these arguments is an inadequate response to the new constitutional attack on the admissibility of crime laboratory reports. Those arguments arguably met the basic thrust of the common-law and statutory attacks on the reliability of crime laboratory reports. However, post-*Crawford*, most of those arguments miss the mark. *Crawford* ushers in a new era in which the constitutional analysis no longer turns on the reliability of the prosecution hearsay.

Part I of this article reviews the *Crawford* line of authority, including the Supreme Court’s more recent decisions in *Davis v. Washington*,⁴⁰ *Whorton v. Bockting*,⁴¹ and *Missouri v. March*.⁴² Part II describes the current split of authority by surveying the lower court decisions applying *Crawford* to crime laboratory

37. *Id.* at 51–52 (internal citations omitted).

38. *Id.* at 56.

39. See Berra, *supra* note 1.

40. 547 U.S. 813 (2006).

41. 127 S. Ct. 1173 (2007).

42. 128 S. Ct. 1441 (2007).

reports. Part III is a critical evaluation of the extent, if any, to which *Crawford* restricts the introduction of police laboratory reports. The article concludes that, unlike the earlier common-law and statutory attacks, the latest, constitutional attack, mandates the exclusion of a crime laboratory report finding that rests on the analyst's application of an interpretive standard with a significant element of subjectivity.

I. THE *CRAWFORD* LINE OF SUPREME COURT AUTHORITY

A. *Crawford v. Washington* (2004)

Michael Crawford was charged with stabbing Kenneth Lee.⁴³ Crawford claimed that before the stabbing, Lee had attempted to rape Crawford's wife, Sylvia.⁴⁴ However, Crawford's denied that he acted out of anger or vengeance; rather, he claimed self-defense.⁴⁵ In particular, he asserted that he had seen Lee "'go in' for something'" before he stabbed Lee.⁴⁶ When the police learned of the stabbing, they arrested both Michael and Sylvia. After receiving *Miranda* warnings, Sylvia gave the police a tape-recorded statement.⁴⁷ Her statement seemed to contradict Michael's claim that there had been something in Lee's hand before Michael stabbed him.⁴⁸ At trial, Michael invoked the state marital privilege, barring Sylvia from testifying without his consent.⁴⁹ The trial judge admitted Sylvia's tape-recorded statement as a declaration against penal interest.⁵⁰

In both the trial court and on appeal, Michael's defense counsel argued that the admission of Sylvia's statement violated the Confrontation Clause. The trial judge rejected the defense argument and asserted that Sylvia's statement was sufficiently reliable to pass muster under *Ohio v. Roberts*.⁵¹ The trial judge emphasized that Sylvia was an eyewitness with firsthand knowledge, she was recounting recent events, and it did not appear that she was endeavoring to shift blame. After hearing Sylvia's statement, the jury convicted Michael. The intermediate state appellate court reversed because it disagreed with the trial judge's assessment of the reliability of Sylvia's statement.⁵² However, the state supreme court concurred with the trial judge and reinstated the conviction.⁵³

As the introduction indicated, when the *Crawford* case reached the Supreme Court, the majority used the case as a vehicle for fundamentally changing the understanding of the Confrontation Clause. Writing for the majority, Justice Scalia acknowledged that *Roberts* had been the controlling law for almost a quarter of a

43. *Crawford v. Washington*, 541 U.S. 36, 38 (2004).

44. *Id.*

45. *Id.* at 38–40.

46. *Id.* at 38.

47. *Id.* at 38–40.

48. *Id.* at 39–40.

49. *Id.* at 40.

50. *Id.*

51. *Id.*

52. *Id.* at 41.

53. *Id.* at 41–42.

century. However, he criticized the *Roberts* reliability test as "amorphous"⁵⁴ and "manipulable."⁵⁵ In his mind, the disagreement between the state intermediate and supreme courts over the application of the test to Sylvia's statement illustrated the unpredictability of the test.⁵⁶

More importantly, Justice Scalia repudiated the reliability test because it was inconsistent with the history of the Confrontation Clause.⁵⁷ The Justice marshaled historical authorities and argued that the inspiration for the Clause was the opposition of both English law and the Founding Fathers to "continental civil law"⁵⁸ practices permitting the admission of hearsay testimony without cross-examination.⁵⁹ In stark contrast, the "common-law tradition is one of live testimony in court subject to adversarial testing."⁶⁰ The Justice recognized that in England there had been deviations from the tradition; for a period, written records of pretrial examinations conducted under the Marian bail and committal statutes had been considered admissible.⁶¹ However, the sharp backlash against the use of uncross-examined testimony "in the great political trials of the 16th and 17th centuries,"⁶² notably the 1603 prosecution of Sir Walter Raleigh,⁶³ established the intensity of the resistance to reliance on "written evidence"⁶⁴ in England. The records of the debates over the Declarations of Rights in the various states demonstrated that the same sentiment was widespread in America at the time of the Revolution.⁶⁵

Justice Scalia noted that the "founding-era rhetoric decried...the civil-law mode of" trial⁶⁶ and stated that at an American criminal trial, the Sixth Amendment "prescribes" cross-examination as "a procedure for determining the reliability of" the prosecution's testimony.⁶⁷ After this historical account, Justice Scalia concluded that when a hearsay statement is "testimonial" in character, the Sixth Amendment generally⁶⁸ demands that the statement be admitted only if the accused has had a prior opportunity to question the declarant and the declarant is shown to be unavailable to appear at trial.

Of course, in light of *Crawford*, the key issue becomes defining the category of "testimonial" hearsay.⁶⁹ Justice Scalia provided some insight into the meaning of the term:

54. *Id.* at 61, 63.

55. *Id.* at 68.

56. *Id.* at 62-63.

57. *Id.* at 63.

58. *Id.* at 43.

59. *Id.*

60. *Id.*

61. *Id.* at 43-44.

62. *Id.* at 44.

63. *Id.* at 44-45.

64. *Id.* at 49.

65. *Id.* at 48-49.

66. *Id.* at 50.

67. *Id.* at 67.

68. In dictum, Justice Scalia stated that prior Supreme Court precedent suggested that there is an exception for statements falling within the dying declaration hearsay exception. *Id.* at 56 n.6. However, he added that "[i]f this exception must be accepted on historical grounds, it is *sui generis*." *Id.*

69. *Id.* at 61.

The text of the Confrontation Clause...applies to “witnesses” against the accused—in other words, those who “bear testimony.” “Testimony,” in turn, is typically “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.⁷⁰

Justice Scalia then cited the various “formulations” previously mentioned in the introduction to this article.⁷¹ Yet he stopped short of attempting to “spell out a comprehensive definition” of the term “testimonial.”⁷²

B. *Davis v. Washington* (2006)

Since the *Crawford* Court declined to undertake the task of providing a comprehensive definition of the term “testimonial,” it was virtually inevitable that the Court would have to revisit the issue. The Court did so in *Davis v. Washington*,⁷³ a 2006 decision. The opinion applied the *Crawford* doctrine to two fact situations: *Davis*, a Washington case involving statements made to a 911 emergency operator,⁷⁴ and *Hammon*, an Indiana case in which the statements were given to a police officer at the suspected crime scene.⁷⁵ Once again, Justice Scalia wrote for the majority. As he commented, the facts of these two cases “require[d] [the Court] to determine more precisely” the meaning of “testimonial” hearsay.⁷⁶

In *Davis*, Michelle McCottry placed a 911 call. In sentences using primarily present tense verbs, she explained that Adrian Davis, her boyfriend, was “jumpin’ on”⁷⁷ her and “usin’ his fists.”⁷⁸ She added that Davis had “just r[un] out the door.”⁷⁹ Michelle’s statements were admitted at Adrian’s trial for violation of a domestic no-contact order. The Supreme Court ruled that McCottry’s statements were nontestimonial and thus admissible without violating the Confrontation Clause.⁸⁰

In *Hammon*, the police responded to a “reported domestic disturbance at the home of Hershel and Amy Hammon.”⁸¹ When they arrived, Amy initially denied that there was anything wrong.⁸² The police, however, noticed that the glass front of a heater in the living room was broken and that there were flames emitting from the heater.⁸³ An officer then questioned Amy outside Hershel’s presence.⁸⁴ During

70. *Id.* at 51 (internal citations omitted).

71. *Id.* at 51–52.

72. *Id.* at 68.

73. 547 U.S. 813 (2006).

74. *Davis*, 547 U.S. 817–18.

75. *Id.* at 819–21.

76. *Id.* at 822.

77. *Id.* at 817.

78. *Id.*

79. *Id.* at 818 (alteration in original).

80. *Id.* at 828.

81. *Id.* at 819 (internal quotation marks omitted).

82. *Id.*

83. *Id.*

84. *Id.* at 820.

the questioning, in sentences using primarily past tense verbs, she stated that Hershel had "[b]roke" the heater and then "shoved me down on the floor into the broken glass."⁸⁵ She also asserted that he had "[h]it" me, "[t]ore up my van," and "[a]ttacked my daughter."⁸⁶ After hearing these statements, the officer had Amy sign "a battery affidavit"⁸⁷ reflecting that Hershel had committed these acts. Amy's statements and the affidavit were received into evidence at Hershel's trial for domestic battery. In this case, the Supreme Court held that the statements were testimonial, and that their introduction amounted to constitutional error.⁸⁸

Justice Scalia discussed the distinction between the statements in the two cases. He elaborated on *Crawford*:

Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.⁸⁹

The Justice asserted that given this standard, the difference between the two cases was "apparent."⁹⁰ In her statements, Michelle McCottry "was speaking about events as they were actually happening."⁹¹ She was frantically⁹² making "a call for help."⁹³ "No 'witness' goes into court to proclaim an emergency and seek help."⁹⁴ However, just as Sylvia Crawford described events that had occurred "hours" before,⁹⁵ Amy Hammon's "narrative of past events was delivered at some remove in time from the danger she described."⁹⁶ Amy's statements "were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation."⁹⁷

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 834.

89. *Id.* at 813–14.

90. *Id.* at 827.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 828.

95. *Id.* at 817.

96. *Id.* at 832.

97. *Id.*

C. *Whorton v. Bockting* (2007)

The third decision in this line of authority is *Whorton v. Bockting*,⁹⁸ rendered in early 2007. *Whorton* presented the question of the retroactivity of the *Crawford* decision. More precisely, the issue was whether *Crawford* applies to cases that became final on direct review before the rendition of the *Crawford* decision. Writing for a unanimous Court, Justice Alito answered the question in the negative.⁹⁹

At the beginning of his opinion, Justice Alito cited the leading Supreme Court precedent on retroactivity, *Teague v. Lane*.¹⁰⁰ Justice Alito stated that under *Teague*, a new precedent deserves retroactive application if the precedent banned a practice that “implicat[es] the fundamental fairness and accuracy of the criminal proceeding.”¹⁰¹ Additionally, the practice in question must pose “an ‘impermissibly large risk’ of an inaccurate conviction.”¹⁰² Justice Alito concluded by stating that *Crawford* does not meet this criterion:

To be sure, the *Crawford* rule reflects the Framers’ preferred mechanism (cross-examination) for ensuring that inaccurate out-of-court testimonial statements are not used to convict an accused. But in order for a new rule to meet the accuracy requirement..., “[i]t is...not enough...to say that [the] rule is aimed at improving the accuracy of trial”...or that the rule “is directed toward the enhancement of reliability and accuracy in some sense.”¹⁰³

Justice Alito reaffirmed that after *Crawford*, reliability is no longer the end-all and be-all of the Confrontation Clause. Justice Alito explained that *Crawford* is likely to have a mixed effect. While *Crawford* erects a higher barrier against the admission of inaccurate testimonial statements, it eliminates constitutional protection “against the admission of unreliable out-of-court nontestimonial statements.”¹⁰⁴ For that reason, it was “unclear” to Justice Alito whether “on the whole” *Crawford* “decreased or increased the number of unreliable out-of-court statements that may be admitted in criminal trials.”¹⁰⁵

D. *State v. March* (2007)

Like the Supreme Court’s *Whorton* decision, the Missouri Supreme Court’s decision was handed down in early 2007.¹⁰⁶ In *March*, the court addressed the question of whether a crime laboratory report prepared for the prosecution is a testimonial statement under *Crawford*. In a 1972 decision, *State v. Taylor*, the Missouri Supreme Court had held that a reliable crime laboratory report was an

98. 127 S. Ct. 1173 (2007).

99. *Id.*

100. 489 U.S. 288 (1989).

101. *Whorton*, 127 S. Ct. at 1180.

102. *Id.* at 1182 (citing *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004)).

103. *Id.* (quoting *Sawyer v. Smith*, 497 U.S. 227, 242, 243 (1990)).

104. *Id.* at 1183.

105. *Id.*

106. *State v. March*, 216 S.W.3d 663 (Mo. 2007) (en banc), *cert. denied*, 76 U.S.L.W. 3023 (Oct. 5, 2007) (No. 06-1699).

admissible business record in a criminal trial.¹⁰⁷ In *March*, the Missouri court asserted that that prior holding was defensible under *Roberts*.¹⁰⁸ However, in Judge Russell's words, "*Crawford* divorced the hearsay exceptions from the Confrontation Clause analysis."¹⁰⁹ She then opined that post-*Crawford* cases in other jurisdictions upholding the result reached in *Taylor* "incorrectly focus on the reliability of such reports. The reliability of the reports, once paramount under *Roberts*, is now irrelevant."¹¹⁰

Judge Russell proceeded to analyze whether a crime laboratory report should be deemed testimonial under the *Crawford* line of Supreme Court authority. She stressed that the report was "prepared at the request of law enforcement for March's prosecution," the contents of the report were "offered to prove an element of the charged crime," and the report took the form of a "formal statement offered in lieu of testimony" by the laboratory technician.¹¹¹ To Judge Russell's mind, *Davis* required that the report be characterized as testimonial. She argued that the report fell squarely within the language of the *Davis* opinion, noting that "a statement made in response to police interrogation is testimonial when its 'primary purpose' is not to respond to an ongoing emergency but 'to establish or prove past events potentially relevant to later criminal prosecution.'"¹¹²

The State of Missouri sought review of the Missouri Supreme Court's decision. Ultimately, on October 5, 2007, the United States Supreme Court dismissed certiorari in the case.¹¹³ Although the *March* opinion undoubtedly put the Court on notice that the lower courts are divided over the question, the Supreme Court refused to intervene to resolve the split of authority.

II. A DESCRIPTION OF THE SPLIT OF AUTHORITY OVER THE APPLICATION OF THE CRAWFORD LINE OF AUTHORITY TO CRIME LABORATORY REPORTS

There is now a sharp, three-way split of authority over the question of whether *Crawford* bars the prosecutorial use of police laboratory reports. A number of jurisdictions have addressed the question and acknowledged the division of sentiment among the courts.¹¹⁴ One court went on to describe the split as "significant."¹¹⁵

At one end of the spectrum are decisions such as *March*, which have treated *Crawford* as a constitutional barrier to the introduction of crime laboratory reports.

107. 486 S.W.2d 239 (Mo. 1972), *abrogated by* State v. March, 216 S.W.3d 663 (Mo. 2007) (en banc).

108. *March*, 216 S.W.3d at 665.

109. *Id.*

110. *Id.* at 665–66.

111. *Id.* at 666.

112. *Id.* (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

113. State v. March, 216 S.W.3d 663 (Mo. 2007) (en banc), *cert. denied*, 76 U.S.L.W. 3023 (Oct. 5, 2007) (No. 06-1699).

114. State v. Laturner, 163 P.3d 367, 374 (Kan. Ct. App. 2007) ("There is a significant split between various courts in the various states on the testimonial nature of these lab reports...."); *March*, 216 S.W.3d at 665–66 n.1 (Mo. 2007); State v. O'Maley, 932 A.2d 1, 10, 15 (N.H. 2007) (disagreement between the justices, noting the split of authority); State v. Crager, 879 N.E.2d 745 (Ohio 2007).

115. *Laturner*, 163 P.3d at 374.

These decisions include jurisdictions such as Colorado,¹¹⁶ the District of Columbia,¹¹⁷ Florida,¹¹⁸ Kansas,¹¹⁹ Michigan,¹²⁰ Minnesota,¹²¹ Missouri,¹²² New Jersey,¹²³ New York,¹²⁴ Ohio,¹²⁵ and Oregon.¹²⁶ The *March* string of decisions all rely on essentially the identical, simple argument that the admission of such reports offends the Confrontation Clause, as construed in *Crawford*. The starting point of the argument is the observation that the police are the ones who request that their crime laboratory colleagues conduct the test.¹²⁷ Given the nature and source of the request, the technician knows that the test is being conducted to generate evidence that can be used in a prosecution.¹²⁸ The very purpose for the preparation of the report is the creation of evidence for litigation,¹²⁹ whether it be plea bargaining or trial.¹³⁰ This line of argument is both straightforward and sensible.

For its part, Maryland has staked out a position in the middle of the spectrum. The Maryland Court of Appeals did so in the *Rollins* decision, which involved an autopsy report prepared by a medical examiner's office.¹³¹ In examining the autopsy report, the court, while referring to *People v. Durio*,¹³² first noted that the medical examiner's office "is not a law enforcement agency and is...not subject to the control of the office of the prosecutor."¹³³ Even then, according to the court, only some passages in an autopsy report may be classified as nontestimonial.¹³⁴ Essentially "descriptive"¹³⁵ passages reflecting "objectively observed findings"¹³⁶ are nontestimonial. In particular, the examiner's findings that there were "fresh" bruises and that the victim's corneas were "cloudy" were sufficiently objective to

116. *Hinojos-Mendoza v. State*, 169 P.3d 662 (Colo. 2007).

117. *Thomas v. United States*, 914 A.2d 1 (D.C. 2006).

118. *State v. Johnson*, 982 So. 2d 672 (Fla. 2008).

119. *Laturner*, 163 P.3d 367.

120. *People v. Lonsby*, 707 N.W.2d 610 (Mich. Ct. App. 2005).

121. *State v. Johnson*, 756 N.W.2d 883 (Minn. Ct. App. 2008); *State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006).

122. *State v. March*, 216 S.W.3d 663 (Mo. 2007) (en banc), *cert. denied*, 76 U.S.L.W. 3023 (Oct. 5, 2007) (No. 06-1699).

123. *State v. Renshaw*, 915 A.2d 1081 (N.J. Super. Ct. App. Div. 2007); *State v. Berezansky*, 899 A.2d 306 (N.J. Super. Ct. App. Div. 2006), *cert. granted*, 923 A.2d 231 (N.J. 2007).

124. *People v. Hernandez*, 794 N.Y.S.2d 788 (N.Y. Sup. Ct. 2005); *People v. Rogers*, 780 N.Y.S.2d 393 (N.Y. App. Div. 2004).

125. *State v. Crager*, 844 N.E.2d 390 (Ohio Ct. App. 2005), *rev'd*, 879 N.E.2d 745 (Ohio 2007).

126. *State v. Miller*, 144 P.3d 1052 (Or. Ct. App. 2006).

127. *State v. Laturner*, 163 P.3d 367, 375 (Kan. Ct. App. 2007); *State v. March*, 216 S.W.3d 663, 666 (Mo. 2007) (en banc), *cert. denied*, 76 U.S.L.W. 3023 (Oct. 5, 2007) (No. 06-1699) ("The laboratory report was prepared at the request of law enforcement.").

128. *Laturner*, 163 P.3d at 376 (The expert "knew when preparing her report that it would be used by the State at Laturner's trial to prove that he committed the crime.").

129. *Thomas v. United States*, 914 A.2d 1, 13 (D.C. 2006); *State v. Renshaw*, 915 A.2d 1081, 1088 (N.J. Super. Ct. App. Div. 2007). See also Thomas F. Burke III, *The Test Results Said What? The Post-Crawford Admissibility of Hearsay Forensic Evidence*, 53 S.D. L. Rev. 1 (2008).

130. John M. Spires, Note, *Testimonial or Nontestimonial? The Admissibility of Forensic Evidence After Crawford v. Washington*, 94 KY. L.J. 187, 207 (2005-06).

131. *Rollins v. State*, 897 A.2d 821 (Md. 2006).

132. 794 N.Y.S.2d 863 (N.Y. Sup. Ct. 2005).

133. *Rollins*, 897 A.2d at 832 (quoting *People v. Durio*, 794 N.Y.S.2d 863, 868-69 (N.Y. Sup. Ct. 2005)).

134. *Id.* at 839.

135. *Id.* at 840.

136. *Id.*

qualify for admission. However, “subjective”¹³⁷ or “analytical”¹³⁸ “opinions, speculations, or conclusions”¹³⁹ must be redacted as testimonial. The court added that a psychiatric diagnosis would have to be classified as testimonial, since “psychiatry is not an exact science and...opinions as to mental condition vary widely.”¹⁴⁰

The last view is at the other polar extreme and has attracted judicial adherents in the federal ranks¹⁴¹ and states such as California,¹⁴² Massachusetts,¹⁴³ New Hampshire,¹⁴⁴ North Carolina,¹⁴⁵ and Pennsylvania.¹⁴⁶ In addition, some of the most recent decisions adopt this view.¹⁴⁷ As previously stated, the opinions extending *Crawford* to crime laboratory reports tend to rely on some variation of the straightforward argument described above. In contrast, the opinions holding *Crawford* inapplicable invoke multiple grounds for doing so. In many cases those grounds essentially resurrect the theories for rejecting the previous common-law and statutory attacks on the admissibility of crime laboratory reports. Part III both surveys and critiques those arguments.

III. A CRITICAL EVALUATION OF THE QUESTION OF WHETHER CRIME LABORATORY REPORTS ARE “TESTIMONIAL” STATEMENTS UNDER *CRAWFORD*

As Part II noted, courts refusing to apply *Crawford* to police laboratory reports have advanced a variety of alternative arguments to justify their refusal. At the risk of oversimplification, these arguments relate to the type of report; the kind of statement in the report; the type of declarant, cross-examination policy; and the practical impact of a contrary ruling.

A. The Type of Report

Argument 1: Crime laboratory reports are exempt from scrutiny under Crawford because they are business records. In *Crawford*, Justice Scalia stated that “by their nature,” some statements—“for example, business records”—are not testimonial.¹⁴⁸

137. *Id.* at 834.

138. *Id.* at 841, 845–46.

139. *Id.* at 834, 839.

140. *Id.* at 842 (citations omitted). One New York court has developed another compromise view. *See People v. Rawlins*, 2008 N.Y. Slip Op. 1420 (Ct. App. Feb. 19, 2008) (holding that an expert report may be testimonial if the findings in effect accuse a defendant of wrongdoing, as when the report matches crime scene fingerprints to those of the defendant).

141. *United States v. Richardson*, 537 F.3d 951 (8th Cir. 2008); *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007), *petition for cert. filed* (Dec. 14, 2007) (No. 07-8291); *United States v. Feliz*, 467 F.3d 227 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1323 (2007).

142. *People v. Geier*, 161 P.3d 104 (Cal. 2007), *petition for cert. filed* (Nov. 14, 2007) (No. 07-7770).

143. *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005).

144. *State v. O'Maley*, 932 A.2d 1 (N.H. 2007), *petition for cert. filed* (Nov. 7, 2007) (No. 07-7577).

145. *State v. Forte*, 629 S.E.2d 137 (N.C. 2006), *cert. denied*, *Forte v. North Carolina*, 127 S. Ct. 557 (Nov. 6, 2006) (No. 06-6282).

146. *Commonwealth v. Carter*, 932 A.2d 1261 (Pa. 2007).

147. *People v. Geier*, 161 P.3d 104 (Cal. 2007); *Carter*, 923 A.2d 1261.

148. *Crawford v. Washington*, 541 U.S. 36, 56 (2004).

Some courts have seized on that statement¹⁴⁹ and treated it as a basis for automatically exempting from *Crawford* any document falling within the ambit of the business entry hearsay exception.¹⁵⁰

Despite the reliance on this argument, the rationale is flawed. To begin with, the scope of the business entry exception does not apply to litigation documents. Admittedly, that limitation emerged before the adoption of the Federal Rules of Evidence. The Supreme Court fashioned that limitation in the leading 1943 case of *Palmer v. Hoffman*.¹⁵¹ Federal Rule of Evidence 803(6) codifies a statutory version of the business entry exception.¹⁵² Although the text of Rule 803(6) does not expressly exclude litigation reports from the scope of the exception, the accompanying Advisory Committee Note approvingly cites *Palmer*.¹⁵³

In *Palmer*, an accident at a railroad crossing triggered an action against the railroad's trustees. Two days after the accident, a railroad representative interviewed the train engineer. The engineer signed a statement setting out his version of the accident. At trial, the railroad offered the statement as a business entry because it was the railroad's regular practice to solicit such statements from employees involved in accidents. The Supreme Court held that the statement was inadmissible, explaining that "[t]heir primary utility is in litigating, not in railroading."¹⁵⁴ When a crime laboratory technician prepares a report at the request of the investigating officers or the prosecutors, the technician is not generating the report for the internal administration of the police department as a business entity. Nor is the technician creating a property accountability inventory of the chemicals in the laboratory storage cabinets. Rather, like the engineer in *Palmer*, the technician knows good and well that the primary use of his or her report will be in plea bargaining or at trial—in other words, in litigation.

More fundamentally, though, this argument misconceives the mandate of *Crawford*.¹⁵⁵ It is true that Justice Scalia, in the passage cited by courts refusing to extend *Crawford* to business entries, refers to the "nature" of business entries. However, on balance, *Crawford* should be construed as requiring the trial court to eschew reliance on categorical hearsay exceptions and instead focus ad hoc on the circumstances surrounding the specific statement. In footnote six of his opinion, the Justice remarks that "many" dying declarations are not testimonial.¹⁵⁶ Again, in footnote seven the Justice asserts that the risk of prosecutorial abuse "does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances."¹⁵⁷

149. *Rollins v. State*, 897 A.2d 821, 831 (Md. 2006). The most recent decision in this line of authority is *United States v. Morgan*, 505 F.3d 332, 339 (5th Cir. 2007).

150. *Rollins*, 897 A.2d at 831.

151. 318 U.S. 109 (1943). See also 2 MCCORMICK, EVIDENCE § 288, at 310–12 (6th ed. 2006); Imwinkelried, *supra* note 9, at 628.

152. FED. R. EVID. 803(6).

153. *Id.* advisory committee's note. See *CSI Inv. Partners II, L.P. v. Cendant Corp.*, 507 F. Supp. 2d 384, 419–20 (S.D.N.Y. 2007).

154. *Palmer*, 318 U.S. at 114.

155. Edward J. Imwinkelried, *The Treatment of Prosecution Hearsay Under Crawford v. Washington: Some Good News, But...*, THE CHAMPION, Sept.–Oct. 2004, at 18; Spire, *supra* note 130, at 198–99.

156. *Crawford v. Washington*, 541 U.S. 36, 56 n.6 (2004).

157. *Id.* at 56–57 n.7.

Tellingly, in *Crawford*, *Davis*, and *Hammon* the Court went to the length of examining the specific circumstances surrounding the particular statements introduced against the accused. In none of those cases was the Court content to generalize that present sense impressions, excited utterances, or declarations against interest are “always” or “never” testimonial. The Court’s mode of analysis in all those cases undermines the contention that as business entries, crime laboratory reports are categorically exempt from *Crawford* scrutiny.

B. The Type of Statement

The next cluster of arguments relates to the nature of the specific statement rather than the general character of the report. These arguments claim that *Crawford* is inapplicable to a passage in a crime laboratory report if the passage records facts contemporaneously observed by the technician or “neutral” or “objective” facts. None of these arguments, however, is able to withstand closer scrutiny.

Argument 2: A statement in a crime laboratory report is nontestimonial if it records facts contemporaneously observed by the technician. In its decision on this issue, *People v. Geier*,¹⁵⁸ the California Supreme Court relied heavily on the argument that a crime laboratory report represents the “contemporaneous” recordation of the facts observed during the forensic analysis.¹⁵⁹ The court pointed out that in *Davis*, the United States Supreme Court had stressed that Michelle McCottry used present tense verbs in her 911 call to describe events that were then in progress.¹⁶⁰ The court reasoned that like Ms. McCottry’s statements, crime laboratory reports recording contemporaneous observations are nontestimonial.¹⁶¹ This argument suffers from several fallacies.

First, the argument reflects a misunderstanding of the operation of crime laboratories. In this author’s experience, the report itself is rarely prepared at the time of the analysis. During the analysis at the laboratory bench, the technician records observations in a notebook. The formal report is prepared later—which is precisely why the prosecutor offers the report under the business entry exception rather than as a present sense impression.¹⁶² Research reveals no case in which any federal or state court has upheld the introduction of a crime laboratory report under the latter exception.

Second, it is misguided to accord talismanic significance to the tense of the verb.¹⁶³ The California Supreme Court’s reading of *Davis* is facile. The *Davis* court did not sustain the admission of Ms. McCottry’s statements simply because they were cast in the present tense. It is true that the Court devoted an entire paragraph to the careful, facial analysis of her statements. That paragraph noted that “McCottry was speaking about events as they were actually happening, rather than

158. 161 P.3d 104 (Cal. 2007).

159. *Id.* at 139–40.

160. *Id.* at 139.

161. *Id.* at 140.

162. FED. R. EVID. 803(1).

163. *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917) (“The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman.”).

'describing past events.'"¹⁶⁴ However, the *Geier* court takes that paragraph out of context. The very first sentence of the next paragraph of *Davis* begins, "We conclude from...this that the circumstances of McCottry's interrogation objectively indicate that its primary purpose was to enable police assistance to meet an ongoing emergency."¹⁶⁵ The purpose of the statement is dispositive, and the verb tense is merely evidentiary.

Other courts have had the good sense to reject *Geier's* simplistic interpretation of *Davis*. The Washington Supreme Court, for example, has ruled that a victim's statement is not automatically testimonial simply because the victim used past tense verbs.¹⁶⁶ Even when a victim is attempting to verbalize a current emergency, the victim may still have to resort to a past tense verb. Notably, even in her nontestimonial statement, Michelle McCottry employed at least one past tense verb.¹⁶⁷ Thus, the victim's purpose in making a statement, not the specific verb tense of that statement, is controlling.

Conversely, it is wrong-minded to treat a statement as nontestimonial merely because the declarant used present tense verbs. Any realistic court would say that an informant's statement to the police is likely to be testimonial.¹⁶⁸ Suppose that just as Ms. McCottry placed a call to the 911 dispatcher, an informant calls the police department to calmly describe a drug sale that he claims to be observing from a safe vantage point across the street. Unlike Ms. McCottry, however, the informant is not making a plea for assistance. Rather, the informant may be attempting to provide evidence that she hopes may lead to either a financial reward or a more favorable disposition of charges she then has pending. It would be absurd to characterize the informant's statements as nontestimonial merely because of the verb tense she uses. Indeed, if the informant is savvy, the informant may realize that her use of present tense verbs is more likely to render her statements admissible—as present sense impressions qualifying under Federal Rule of Evidence 803(1).¹⁶⁹ If the statements in *Crawford* and *Hammon* must be classified as testimonial because the declarant should have objectively realized that they well might be put to evidentiary use, the informant's statements must be categorized as testimonial—even if every verb coming out of the informant's mouth is in the present tense.

Argument 3: A statement in a crime laboratory report about the result of a forensic test is nontestimonial because it is "neutral." This is one of the more curious grounds for overruling *Crawford* objections to the introduction of crime laboratory reports, and it is one of the theories that have been recycled from the prior case law rejecting the common-law and statutory challenges to the admission of such reports. The cases brushing aside the common-law hearsay attack sometimes

164. *Davis v. Washington*, 547 U.S. 813, 827 (2006).

165. *Id.* at 828.

166. *See State v. Ohlson*, 168 P.3d 1273 (Wash. 2007).

167. *Davis*, 547 U.S. at 818 (the accused had "[un] out the door").

168. *See United States v. Powers*, 500 F.3d 500, 508 (6th Cir. 2007).

169. FED. R. EVID. 803(1). Some courts would exclude the statement if the witness were the police officer who received the call but did not observe the drug sale. Some courts have added a percipient witness restriction as a gloss on the statute. 1 EDWARD J. IMWINKELRIED ET AL., *COURTROOM CRIMINAL EVIDENCE* § 1202, at 462–63 (4th ed. 2007).

asserted that the analyst's determination was "intrinsically neutral."¹⁷⁰ If the drug analyst finds that the unknown is cocaine, the finding is inculpatory, but if she finds that it is a lawful compound, the finding is exculpatory.¹⁷¹ During the second wave of cases in which defense counsel relied on statutory attacks, once again the courts occasionally rejected the attack for the stated reason that the analyst's finding was intrinsically neutral.¹⁷² The courts elaborated that the report was not the product of an adversarial confrontation between the accused and the police.¹⁷³ "This is like déjà vu all over again" because today the identical argument is being urged as a ground for refusing to extend *Crawford* to crime laboratory reports.¹⁷⁴ The courts utilize language that echoes the earlier decisions. For instance, in *Geier*, the California Supreme Court declared that the statement is "neutral"¹⁷⁵ in character because the result might be exculpatory.¹⁷⁶ Like the courts rejecting the statutory attacks on the introduction of crime laboratory reports, the California court described such reports as the product of a "non-adversary process."¹⁷⁷ For its part, the Pennsylvania Supreme Court added that the expert's finding could lead to a decision not to prosecute at all.¹⁷⁸

While this language is familiar, it is unpersuasive. To analyze the argument, we must first clarify which fact is being referred to—the fact mentioned at trial, the fact previously reported, or the fact observed still earlier.

1. The Fact Mentioned at Trial

If a laboratory report introduced at trial states that the unknown was cocaine, it cannot be seriously contended that the fact itself is "neutral." A fact is neutral if it is equally consistent with two sides in a dispute.¹⁷⁹ In this setting, the fact is not neutral by any stretch of the imagination. The prosecution would not offer evidence of the fact at trial—and there would be no occasion for a *Crawford* objection—unless the prosecution thought that the evidence was not neutral. At this point in the chronology, the prosecution offers the evidence—and the defense objects—because the evidence is inculpatory and tends to prove an essential element of the crime for which the accused is standing trial.¹⁸⁰

2. The Fact Reported

Not only is the fact not neutral at the time that the report is offered at trial, but the fact is not even neutral when the report is prepared. Even by that earlier point

170. Imwinkelried, *supra* note 9, at 629 (citing *United States v. Evans*, 21 C.M.A. 579, 582, 45 C.M.R. 353, 356 (1972)).

171. *Id.* See also *State v. Crager*, 879 N.E.2d 745, 754 (Ohio 2007) (the testing is not intended to arrive at a predetermined result).

172. Giannelli, *supra* note 3, at 679.

173. *Id.* at 678–79 (citing *United States v. Orozco*, 590 F.2d 789, 793 (9th Cir. 1979)).

174. Spires, *supra* note 129, at 202–03.

175. *People v. Geier*, 161 P.3d 104, 140 (Cal. 2007).

176. *Id.*

177. *Id.*

178. *Commonwealth v. Carter*, 932 A.2d 1261, 1268 (Pa. 2007).

179. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 795 (1991).

180. FED. R. EVID. 401.

in the timeline, the accused has almost always been either arrested or both arrested and charged. If the report states that the unknown is cocaine, that statement tends to prove an element of the pending charge, and it makes it more probable that there will be litigation—either plea bargaining or trial.

3. The Fact Observed

Perhaps, though, the courts relying on this argument mean that the fact is neutral when it was originally observed. At that point in time, the observer does not know whether the fact will later prove to be incriminating or exculpatory. However, even that limited meaning of “neutral” cannot pass muster under *Crawford*, *Davis*, and *Hammon*. Neutrality in that sense is insufficient to exempt a statement from the scope of *Crawford*.

As previously stated, while the *Davis* Court characterized Michelle McCottry’s statements to the 911 operator as nontestimonial, the Court ruled that Amy Hammon’s statements to the investigating police officer were testimonial. The latter ruling included her statements explaining why there was broken glass on the floor. Suppose that Ms. Hammon had added that she had earlier locked Hershel out of the house and that some of the glass on the floor was due to the fact that he used a hammer to smash a window to reenter the house. There cannot be any doubt that the Court would have characterized that statement as just as testimonial as her other statements about the incident. The Court would have classified the statement in that fashion even though Amy, the alleged victim, had no testimonial motivation when she initially observed Hershel breaking the glass window.

Assume now that Amy is not the alleged victim. Rather, Amy Hammon is a crime laboratory expert specializing in the analysis of glass fractures.¹⁸¹ As in the preceding paragraph, the victim told the police that the assailant shattered a window to enter the house. At the scene, the police collect glass fragments as trace evidence and ask Amy the expert to evaluate the fractures in the fragments to determine whether they are consistent with the hypothesis that the window was shattered by a hammer.¹⁸² If the statement of Amy the victim about the glass fracture would have to be deemed testimonial, the statement by Amy the expert is also testimonial. The statement of Amy the victim is testimonial even though, when she earlier observed Hershel break the window, it might not have occurred to her that she would later have to testify about that fact. The difference between Amy the victim and Amy the expert is that when Amy the expert makes her observations about the nature of the fractures in the glass fragments, she knows that her statement may well be put to testimonial use. If the statement by Amy the victim is testimonial, *a fortiori* the statement by Amy the expert ought to be classified in the same manner.

Argument 4: A statement in a crime laboratory report about the result of a forensic test is nontestimonial if the statement records a relatively objective finding rather than an opinionated conclusion. This theory is another argument that the

181. 2 GIANNELLI & IMWINKELRIED, *supra* note 27, § 24.08.

182. *Id.*

courts employed as a basis for rejecting the earlier common-law¹⁸³ and statutory¹⁸⁴ attacks on the admissibility of crime laboratory reports. The same argument has become one of the most popular grounds for overruling *Crawford* objections to the introduction of such reports. In a given case, a court relying on this theory is likely to reason that although the expert's finding is technically an expert opinion, the finding is largely "descriptive"¹⁸⁵ and "objective."¹⁸⁶ For example, the Maryland court held that a medical examiner's findings as to "fresh" bruises and "cloudy" corneas were essentially factual, objective observations.¹⁸⁷ Those findings are neither recitations of fact¹⁸⁸ nor opinions¹⁸⁹ that a layperson would be entitled to testify to, but the court considered the findings to be so objective and trustworthy that the court treated them as factual testimony. These courts distinguish "analytical"¹⁹⁰ conclusions and speculations.¹⁹¹ Thus, the same Maryland court required the redaction of the medical examiner's opinions as to cause and manner of death.¹⁹² In dictum, the court added that it would treat a mental diagnosis in the same manner and generally require the expert's personal appearance for cross-examination.¹⁹³

There is certainly an element of truth in this argument. One court declared that *Crawford* ought not to reach "raw data" produced by scientific instrumentation.¹⁹⁴ If the court meant that *Crawford* should not extend to computer-generated data such as the printout of a breathalyzer instrument, the court is correct:

Distinguish between computer-generated statements and printouts of human statements stored in computers. The former are not hearsay because the computer is not a person capable of being cross-examined. To be sure, there is a scientific evidence problem. The proponent must establish the validity of the computer program that generated the statement. For example, the proponent may have to lay a *Daubert*¹⁹⁵ foundation for the formula embedded in the software or demonstrate that the validity of the formulae is judicially noticeable under [Federal] Rule [of Evidence] 201. However, there is no hearsay objection when the statement is generated by an instrument.¹⁹⁶

183. Imwinkelried, *supra* note 9, at 627, 638–40.

184. Giannelli, *supra* note 3, at 679.

185. Rollins v. State, 897 A.2d 821, 841 (Md. 2006). See Comment, *Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 90 CAL. L. REV. 1093 (2008).

186. State v. Laturner, 163 P.3d 367, 375 (Kan. Ct. App. 2007); Commonwealth v. Carter, 932 A.2d 1261, 1268 (Pa. 2007).

187. Rollins, 897 A.2d at 840–41. See also People v. Salinas, 53 Cal. Rptr. 3d 302, 304, 306 (Cal. Ct. App. 2007), *depublished by* People v. Salinas, 154 P.3d 1002 (Cal. 2007) (finding that the unknown substance was methamphetamine should not be deemed opinion evidence; the finding was so factual in nature that the finding was not testimonial); Laturner, 163 P.3d at 375 ("nontestimonial objective facts").

188. FED. R. EVID. 602.

189. FED. R. EVID. 701.

190. Rollins, 897 A.2d at 841–42; Laturner, 163 P.3d at 375.

191. Rollins, 897 A.2d at 840–41.

192. *Id.* at 827.

193. *Id.* at 842.

194. Laturner, 163 P.3d at 376.

195. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) (construing FED. R. EVID. 702).

196. IMWINKELRIED ET AL., *supra* note 169, § 1005, at 405–06.

However, when the statement is made by a human declarant such as a forensic expert, the courts' reliance on the supposed objectivity of the findings as a justification for exempting the finding from *Crawford* is frequently misplaced. In the first place, the courts tend to underestimate the element of subjectivity in forensic analysis. In a 2007 decision, a California intermediate appellate court ruled that a statement that an unknown substance was methamphetamine was an objective, factual determination, "not opinion evidence."¹⁹⁷ While the opinion indicates that there was evidence that the analyst had run some "tests,"¹⁹⁸ the opinion does not specify the tests. A myriad of drug testing procedures exists¹⁹⁹ and there is a considerable element of subjectivity in the interpretation of the results of some procedures, such as morphological tests²⁰⁰ and color change tests.²⁰¹ Similarly, there is a good deal of room for interpretation when a crime laboratory analyst is relying on microscopic comparison to determine whether there is a "match" between crime scene samples and trace evidence such as hair,²⁰² fiber,²⁰³ and soil²⁰⁴ associated with an accused. For that matter, there is inherent subjectivity in match determinations in fingerprint examination.²⁰⁵ In the initial *Llera Plaza* decision in early 2002, Judge Pollak was struck by the lack of objectivity in fingerprint analysis.²⁰⁶ As his opinion indicates, "there is no agreement" on the number of points of similarity required "to declare a match" and no population frequency data as to the occurrence of particular types of fingerprint details.²⁰⁷ In that decision, Judge Pollak barred all opinion testimony on the question of whether a fingerprint impression is attributable to a certain person's finger. Concededly, in his later decision in the case, Judge Pollak reversed himself and ruled opinion testimony admissible.²⁰⁸ However, he did so only after his review of other federal expert testimony decisions convinced him that other courts routinely accept expert opinions that rest on subjective "ingredients" and interpretation.²⁰⁹

More fundamentally, this argument misses the point of *Crawford*. The argument hit the mark during the previous common-law and statutory attacks because the essential thrust of those attacks was that these scientific findings are of suspect

197. *People v. Salinas*, 53 Cal. Rptr. 3d 302, 306 (Cal. Ct. App. 2007), *depublished* by *People v. Salinas*, 154 P.3d 1002 (Cal. 2007).

198. *Id.*

199. *See generally* 2 GIANNELLI & IMWINKELRIED, *supra* note 27, § 23.

200. *Id.* § 23.02[a].

201. *Id.* § 23.02[b].

202. *Id.* § 24.02.

203. *Id.* § 24.04.

204. *Id.* § 24.11.

205. *Id.* §§ 16.07, 16.10[d]. *See also* Cooley, *supra* note 5, at 353, 369–71.

206. *United States v. Llera Plaza*, 179 F. Supp. 2d 492 (E.D. Pa. 2002) (withdrawn). *See also* James E. Starrs, *Fingerprinting Denied Its Day in Maryland Trial Court*, 31 SCI. SLEUTHING REV. Fall 2007, at 1, 3 (In a pretrial hearing in *State v. Rose* (K06-545 Cir. Ct. Baltimore, Md. 2007), Circuit Court Judge Susan Souder excluded fingerprint opinion testimony. She rejected the prosecution expert's claim that there are "objective universal standards that govern" fingerprint examination and concluded that the procedure is "subjective" in nature. Judge Souder noted that even the prosecution expert conceded that "the individualization is left up to each individual examiner:").

207. *Llera Plaza*, 179 F. Supp. 2d at 517; *but see* *United States v. Llera Plaza*, 188 F. Supp. 2d 549, 550–52 (E.D. Pa. 2002).

208. *Llera Plaza*, 188 F. Supp. 2d 549.

209. *Id.* at 575–76.

reliability. The common law developed the restrictions on opinion testimony in large part because it embraced the premise that factual testimony is more reliable than opinionated evidence.²¹⁰ However, after *Crawford*, reliability is no longer the litmus test for the admissibility of prosecution hearsay. A moment's reflection on the facts in *Crawford* and *Davis* exposes this argument as inapposite. In *Crawford*, the Court excluded Sylvia's statements even though they were factual in nature. Similarly, in the *Hammon* case joined with *Davis*, the Court held that Amy's statements were testimonial and inadmissible even though they were factual in character. There is no language in the Supreme Court's decisions even faintly suggesting that a statement is immune from *Crawford* analysis simply because it is factual rather than opinionated.

C. The Type of Declarant

Argument 5: A finding by an analyst in a crime laboratory report is nontestimonial because the analyst is primarily an impartial scientist rather than a potentially biased police officer.

In the cases rejecting the common-law²¹¹ and statutory²¹² attacks on crime laboratory reports, the courts frequently resorted to the argument that the analyst viewed himself or herself primarily as a scientist rather than an advocate for the police. The same argument is now surfacing in opinions overruling *Crawford* objections to the introduction of such reports.²¹³ However, *Crawford* robs that argument of its validity.

As previously stated, it seems clear that *Crawford* would apply to a statement by an informant observing a crime and reporting the observations to the police.²¹⁴ Assume that during the report of a drug transaction, the informant states that he or she is an experienced methamphetamine user and recognizes the drug the accused just handed to the buyer as methamphetamine. If the informant appeared as a witness at trial, the informant's extensive experience with the drug well might qualify the informant to give opinion testimony that the drug was methamphetamine.²¹⁵ Despite the potential admissibility of the statement at trial under the opinion rules, the statement should be characterized as testimonial for *Crawford* purposes. Again, if the informant is describing the transaction from a safe vantage point, the informant is not describing an ongoing emergency she is experiencing; rather, in the statement she is providing information that she realizes may be of use to the police in a prosecution.

Compare that to a statement by a police chemist finding that an unknown substance is methamphetamine. While it is true that the chemist's finding may be

210. See CARLSON, IMWINKELRIED, KIONKA & STRACHAN, *supra* note 19, at Ch. 23; see also Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227 (1988).

211. Imwinkelried, *supra* note 9, at 629.

212. Giannelli, *supra* note 3, at 680–81.

213. See, e.g., *Rollins v. State*, 897 A.2d 821, 832 (Md. 2006).

214. *United States v. Powers*, 500 F.3d 500 (6th Cir. 2007).

215. See 2 GIANNELLI & IMWINKELRIED, *supra* note 27, § 23.05, at 547–48 n.212 (citing, *inter alia*, *State v. Yelton*, 623 S.E.2d 594 (N.C. App. 2006); Michael D. Blanchard & Gabriel Chin, *Identifying the Enemy in the War on Drugs: A Critique of the Developing Rule Permitting Visual Identification of Indescript White Powder in Narcotics Prosecutions*, 47 AM. U. L. REV. 557, 562–65 (1998)).

more reliable than the informant's opinion, it bears repeating that reliability is no longer the test. If the informant's statement is testimonial, the chemist's statement must also be categorized as testimonial.

Depending on the extent of the police control over the informant's activities, the informant may be a private citizen.²¹⁶ The police chemist is typically a government employee, as 80 percent of the crime laboratories in the United States are formally part of a police department.²¹⁷ In *Crawford*, the Court stated that the Confrontation Clause was inspired by the Founding Fathers' concern about the "involvement of government officers in the production" of evidence.²¹⁸ When a police officer or prosecutor requests a forensic analysis from a crime laboratory, there are government employees on both sides of the conversation—the government agent requesting the analysis and the government agent conducting the analysis. There is even more government involvement in the production of the statement than there was in the statements excluded in *Crawford* and *Hammon*.

Further, the crime laboratory analyst has more reason to realize that his or her statement will be put to prosecutorial use. In *Crawford* and *Hammon*, the police posed their questions to Sylvia and Amy before any formal charges had been lodged against the accused. In the typical scenario in which there is an official request for a crime laboratory report, charges have been filed.

In addition, the typical crime laboratory analyst, as a trained professional who may frequently be called to testify, is likely to be more conscious of the evidentiary requirements than declarants such as Sylvia and Amy. The analyst is far more likely to produce a statement that satisfies those requirements and can be used as evidence at trial. This is especially true under the amended version of Federal Rule of Criminal Procedure 16.²¹⁹ Under amended Rule 16(a)(1)(G), "[a]t the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial."²²⁰ The referenced provisions in the Federal Rules of Evidence are some of the key statutes governing the admissibility of expert opinion testimony. If the expert has previously prepared such a report, he or she will be quite familiar with the governing evidentiary standards. If the expert believes that there is a good possibility that the prosecution in question will go to trial, the expert will realize that he or she has to prepare a report that satisfies the evidentiary requirements.

Finally, a close reading of *Davis* points strongly to the conclusion that *Crawford* applies to statements by government agents such as crime laboratory analysts. At one point, the *Davis* Court cites *Dowdell v. United States*,²²¹ providing a parenthetical description of *Dowdell*: "facts regarding conduct of prior trial certified to by the judge, the clerk of court, and the official reporter did not relate to

216. See *United States v. Pannell*, 510 F. Supp. 2d 185 (E.D.N.Y. 2007).

217. Giannelli, *supra* note 3, at 681. See also Spires, *supra* note 130, at 195, 207.

218. *Crawford v. Washington*, 541 U.S. 36, 53 (2004); see Richard D. Friedman, *Crawford, Davis, and Way Beyond*, 15 J.L. & POL'Y 553 (2007).

219. FED. R. CRIM. P. 16.

220. *Id.*

221. *Davis v. Washington*, 547 U.S. 813, 825 (2006) (citing *Dowdell v. United States*, 221 U.S. 325 (1911)).

defendants' guilt or innocence and hence were not statements of 'witnesses' under the Confrontation Clause."²²² The *Davis* Court's language indicates that the Court considered the statements admissible because the content of the statements "did not relate to defendants' guilt or innocence."²²³ The Court did not state or imply that the Clause is inapplicable to statements by government agents. In contrast to the statements in *Dowdell*, the crime laboratory analyst's statements undeniably "relate to defendants' guilt or innocence."²²⁴ Indeed, the laboratory report may furnish the crucial evidence on the pivotal, essential element of the charged offense.

Hence, while the crime laboratory analyst's background may make his or her findings more reliable than the informant's statement that the substance in the accused's hand was methamphetamine, the analyst's finding is no less testimonial.

D. Cross-Examination Policy

Argument 6: There is no justification for applying Crawford to crime laboratory reports because there is little or no utility to requiring the analyst to appear for cross-examination.

This is another recycled argument. The courts relied on the same argument as a basis for fending off the previous common-law²²⁵ and statutory²²⁶ attacks on the introduction of police laboratory reports. In a concurrence in a 1970 Confrontation Clause decision,²²⁷ "Justice Harlan cited the business and public records exception, including a case admitting laboratory reports, as examples of hearsay exceptions in which the production of the declarant would be 'of small utility to a defendant.'"²²⁸ The argument runs that in the typical case, it is ordinarily pointless to mandate the analyst's personal appearance.²²⁹ The analyst may have conducted hundreds or thousands of similar tests, and if the analyst testifies at trial, the analyst may have no independent recollection of this particular test.²³⁰ Consequently, the analyst will have to rely on the contents of the report. Many lower courts are now resurrecting this argument as a ground for overruling *Crawford* objections to the introduction of crime laboratory reports.²³¹

222. *Id.*

223. *Id.*

224. *Id.*

225. Imwinkelried, *supra* note 9, at 644.

226. Giannelli, *supra* note 3, at 695-96.

227. *Dutton v. Evans*, 400 U.S. 74 (1970) (Harlan, J., concurring).

228. Giannelli, *supra* note 3, at 695-96 n.198 (citing *Kay v. United States*, 255 F.2d 476 (4th Cir. 1958)).

229. Imwinkelried, *supra* note 9, at 644.

230. *Id.*

231. *People v. Geier*, 161 P.3d 104, 134-35 (Cal. Ct. App. 2007) ("[T]he author, signator, or custodian of the document ordinarily would be unable to recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his or her own action." Given the passage of time, "medical examiners who regularly perform hundreds of autopsies are unlikely to have any independent recollection of the autopsy at issue in a particular case and in testifying invariably rely entirely on the autopsy report."); *People v. Salinas*, 53 Cal. Rptr. 3d 302, 306 (Cal. Ct. App. 2007), *depublished by* *People v. Salinas*, 154 P.3d 1002 (Cal. 2007) ("It is highly unlikely that Fagundes, the criminalist who actually ran the test, would have testified any differently. Fagundes would most likely have been required to rely upon the document itself to recount the test results; it is highly unlikely that he would have an independent recollection of the test performed on this particular sample."); *Thomas v. United States*, 914 A.2d 1, 10 (D.C. 2006) ("the utility of trial confrontation" would be "remote"); *Rollins v. State*, 897 A.2d 821, 832 (Md. 2006) ("[M]edical examiners who regularly perform hundreds

On the one hand, unlike many of the recycled arguments previously discussed, this argument at least meets the thrust of a *Crawford* objection. Unlike many of those arguments, this contention does not rely on the supposed reliability of crime laboratory reports. Rather, the argument contends that in this context, it does not serve cross-examination policy to mandate the analyst's appearance. In *Whorton v. Bockting*,²³² the Supreme Court made it clear that the *Crawford* line of authority rests on the premise that cross-examination was "the Framers' preferred mechanism...for ensuring that inaccurate out-of-court testimonial statements are not used to convict an accused."²³³ If as a practical matter, cross-examination would serve little purpose in a particular context, it makes little sense to extend *Crawford* to that context.

On the other hand, this argument was invalid when it initially surfaced in the cases adjudicating the common-law and statutory attacks, and it is even weaker today. Cross-examination will often be profitable in this setting.

First, cross-examination can be useful to explore the specific credentials of the analyst.²³⁴ Proof that the opposing expert lacks specialized expertise is a well-accepted method of challenging the weight of the expert's testimony.²³⁵ For example, the cross-examiner can force the expert to concede that although she has a Bachelor of Science degree in Chemistry, none of the expert's coursework related to the methodology employed in the instant case.²³⁶ This cross-examination tack can be potent:

The beauty of this attack is that although you formally impeach the expert, in reality you are impeaching the opposing attorney. During a trial, jurors make a decision as to which attorney is the more reliable source of information. The jury is likely to suspect the opposing attorney's candor if, on the expert's direct examination, the attorney seemingly attempted to foist largely irrelevant credentials on the jury.²³⁷

After *Daubert*²³⁸—the Supreme Court's celebrated 1993 scientific evidence decision—this attack is even weightier than it was when the courts were passing on the common-law and statutory attacks. Before *Daubert*, the courts often ruled a witness qualified as an expert so long as he or she was a generalist in the field to which the opinion relates.²³⁹ However, in *Daubert* and its subsequent scientific evidence decisions,²⁴⁰ the Supreme Court emphasized that the expert must be

of autopsies are unlikely to have any independent recollection of the autopsy at issue in a particular case."); *Commonwealth v. Carter*, 932 A.2d 1261, 1267 (Pa. 2007) ("[C]ross-examining the chemist about the specifics of one test out of perhaps hundreds of identical tests would have been of little utility;...any testimony regarding the likelihood of error in the test procedure would have concerned general practices and probabilities in the lab, about which the lab's manager was qualified to testify.").

232. 127 S. Ct. 1173 (2007).

233. *Id.* at 1182.

234. See *Cooley*, *supra* note 5, at 411 (the technician's training may consist solely of short courses rather than formal educational experiences).

235. EDWARD J. IMWINKELRIED, *THE METHODS OF ATTACKING SCIENTIFIC EVIDENCE* § 9-11 (4th ed. 2004).

236. *Id.* § 9-11[b].

237. *Id.* § 9-11[b].

238. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

239. See Edward J. Imwinkelried, *Expert Witness: An Unheralded Change*, NAT'L L.J., Feb. 5, 2001, at A10.

240. See, e.g., *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141, 152-53 (1999); see generally D. Michael

competent to perform the specific "task at hand,"²⁴¹ that is, to draw the precise inference that the expert proposes testifying to. As a result of that emphasis, many lower courts are now more insistent that the witness possess specialized expertise.²⁴² Hence, the opportunity to explore the analyst's specific credentials is more valuable now than it was previously.

Second, the opportunity to cross-examine the analyst is useful to highlight the subjectivity of the expert's interpretive standard.²⁴³ Although on direct examination the expert may purport to be relying on an objective scientific technique, the cross-examination can reveal that in reality the expert has made a subjective evaluation of the data.²⁴⁴ The jury may well discount the expert's opinion if, during cross-examination, the expert is unable to precisely verbalize the interpretive standard.²⁴⁵ The cross-examination helps the jury appreciate that the standard is experiential and idiosyncratic, not objective and experimentally validated. In the past, this has been a favorite prosecution tactic for cross-examining defense psychiatrists and psychologists.²⁴⁶ What is sauce for the goose is sauce for the gander. In the final analysis, many findings in crime laboratory reports in such fields as pathology and firearms identification rest on subjective interpretive standards.²⁴⁷ As the courts begin to realize the extent to which subjectivity pervades interpretive standards in forensic science, they will see that cross-examination in this context has far more than the minimal utility claimed by the opponents of applying *Crawford* to crime laboratory reports.

Argument 7: Even if there is a need for cross-examination, that need is satisfied by the opportunity to question the laboratory supervisor; there is no justification for mandating the personal appearance of the specific analyst who prepared the crime laboratory report.

This argument is closely tied to the previous argument. The courts relying on this argument point out that in many cases in which the analyst does not appear, the prosecution calls the laboratory manager²⁴⁸ or the analyst's supervisor²⁴⁹ to lay the foundation for the admission of the report. These courts reason that the chance to question that witness about laboratory procedures satisfies cross-examination policy and obviates any necessity to call the analyst himself or herself. In the words of one court, the defense counsel has an ample opportunity to question the manager or supervisor "regarding samples, procedures, safeguards, and results."²⁵⁰ This "live

Risinger, *Defining the "Task at Hand": Non-Science Forensic Science After Kumho Tire Co. v. Carmichael*, 57 WASH. & LEE L. REV. 767 (2000).

241. Risinger, *supra* note 240.

242. See, e.g., *In re Zyprexa Prods. Liab. Litig.*, 489 F. Supp. 2d 230 (E.D.N.Y. 2007); *Early v. Toyota Motor Corp.*, 486 F. Supp. 2d 633, 637 (E.D. Ky. 2007); *Botnick v. Zimmer, Inc.*, 484 F. Supp. 2d 715, 719–20 (N.D. Ohio 2007); 1 MCCORMICK, EVIDENCE § 13, at 71 (6th ed. 2006); Imwinkelried, *supra* note 239, at A10.

243. Imwinkelried, *supra* note 235, § 10-3-5; Imwinkelried, *supra* note 9, at 645.

244. Giannelli, *supra* note 3, at 691; see also Cooley, *supra* note 5, at 353, 369–71.

245. Imwinkelried, *supra* note 9, at 645.

246. *Id.*

247. Giannelli, *supra* note 3, at 691.

248. See *Commonwealth v. Carter*, 932 A.2d 1261, 1262 (Pa. 2007).

249. See *People v. Salinas*, 53 Cal. Rptr. 3d 302, 304 (Cal. Ct. App. 2007), *depublished* by *People v. Salinas*, 154 P.3d 1002 (Cal. 2007).

250. *Carter*, 932 A.2d at 1268 (citing *State v. Kennedy*, 7 S.W.3d 58 (Tenn. Crim. App. 1999)).

in-court testimony...subject to full cross-examination" allows the defense attorney to probe about "how samples are handled in the laboratory and how the tests are run."²⁵¹ This argument, though, suffers from several weaknesses.

Initially, the argument assumes that the prosecution will call a live witness to establish the foundation. In some jurisdictions, that is unnecessary. In several jurisdictions, the evidence code permits the prosecution to lay the foundation with an affidavit or certificate rather than live testimony.²⁵² By way of example, that result is possible in federal practice. Since the time of their original enactment, the Federal Rules of Evidence have treated official records as self-authenticating if the correct types of certificates are attached to the record.²⁵³ The Rules were amended in 2000 to permit the authentication of business records in a similar fashion.²⁵⁴

However, even when the laboratory manager or supervisor appears, the opportunity to question them will often fall short of satisfying the need to cross-examine the analyst. As previously stated, cross-examination challenging the analyst's specific credentials can be highly useful to the defense. Of course, to some extent that problem could be solved by requiring that the laboratory attach a copy of the analyst's detailed résumé to the report.²⁵⁵ However, even that step would not satisfy the defense's need to expose the subjectivity of the expert's interpretive standard. In many forensic disciplines, the expert relies on personal, subjective standards to draw the inference.²⁵⁶ Substituting the appearance by the manager or supervisor effectively shields those standards from inquiry or challenge.

E. Pragmatic or Practical Considerations

Argument 8: Extending Crawford to crime laboratory reports will place an undue burden on police laboratories.

This is another recycled argument that courts sometimes invoked as the basis for rejecting the common-law attacks on the admissibility of crime laboratory reports.²⁵⁷ In the current wave of constitutional attacks, the argument has materialized again. According to one court, the Confrontation Clause cannot be applied mechanically without weighing "pragmatic"²⁵⁸ or "practical"²⁵⁹ considerations. In that court's view, extending *Crawford* to crime laboratory reports will place an undue strain on

251. *Salinas*, 53 Cal. Rptr. 3d at 306.

252. See, e.g., *Rollins v. State*, 897 A.2d 821, 833 (Md. 2006) (citing Florida practice). But see *Thomas v. United States*, 914 A.2d 1, 7 (D.C. 2006) (a "Certified Report of Controlled Substance Analysis").

253. FED. R. EVID. 902(1)–(4).

254. *Id.* 902(11)–(12). See also *id.* 803(6) (cross-referencing the amendment adding Federal Rules of Evidence 902(11)–(12)).

255. But see Marcy Ressler Harris, *Getting Wise About Résumé Lies*, LITIGATION, Summer 1999, at 21 ("Employment experts estimate that one-third of all people with résumés lie on them.").

256. Giannelli, *supra* note 3, at 691; see also Cooley, *supra* note 5, at 353, 369–71; Paul C. Giannelli, *Bite Mark Analysis*, 43 CRIM. L. BULL. 930, 936–37 (2007); Roger Koppl, REASON FOUND. POL'Y STUDY, CSI FOR REAL: HOW TO IMPROVE FORENSICS SCIENCE 10 (2007), http://www.reason.org/ps364_forensics.pdf. Experts often rely on essentially subjective standards to determine whether there is a "match" in the microscopic analysis of trace evidence such as hair, fiber, and soil. See 2 GIANNELLI & IMWINKELRIED, *supra* note 27, §§ 24.02, 24.04, 24.10.

257. Imwinkelried, *supra* note 9, at 643.

258. *State v. Renshaw*, 915 A.2d 1081, 1085, 1088 (N.J. Super. Ct. App. Div. 2007).

259. *Id.* at 1088.

the expert professions.²⁶⁰ In its 2007 decision, *Geier*,²⁶¹ the California Supreme Court was similarly impressed by the “practical difficulties”²⁶² that would result from an extension of *Crawford*. The court explained that it refused to issue a holding carrying “the practical implication[]” that analysts must appear to “testify in every criminal proceeding.”²⁶³ Should this argument carry the day?

For several reasons, the argument is overstated. The thesis of this article is that *Crawford* should apply to a crime laboratory report conclusion if, in that forensic discipline, experts customarily rely on subjective interpretive standards. As the preceding analysis of Argument 4 establishes, the courts should not extend *Crawford* to reports that merely document raw data yielded by an instrumental analysis. Likewise, *Crawford* is arguably inapplicable if, on its face, the report shows that the analyst employed an objective decisional criterion such as the “quantitative rule” that “all [DNA] fragments must lie within 2% of one another.”²⁶⁴ Alternatively, the record might establish that the accused had validly waived his or her right to demand the analyst’s appearance.²⁶⁵ If the defense believes that the prosecution is determined to go to trial and the defense knows that the analyst is a convincing, effective witness, tactically it would be foolish for the defense not to waive, since the analyst’s live testimony would make the prosecution’s case more persuasive to the jury. Thus, it is exaggerated to sweepingly generalize that analysts will have to testify in “every” trial.

Quite apart from the possibility of waiver or *Crawford*’s inapplicability to certain types of reports, there may be constitutionally permissible procedural solutions short of requiring that the analyst leave the laboratory and physically appear at trial.²⁶⁶ Several states have adopted legislation permitting telephonic testimony by experts.²⁶⁷ In addition, some jurisdictions are now experimenting with two-way closed circuit television, which “more closely approximates face-to-face confrontation.”²⁶⁸ The state of the case law on this issue is admittedly “in flux.”²⁶⁹ However, it is by no means a foregone conclusion that the application of *Crawford* to crime

260. *Id.* at 1086 (citing *State v. DeFrank*, 826 A.2d 773 (N.J. Super. Ct. App. Div. 2003)).

261. *People v. Geier*, 161 P.3d 104, 135–36 (Cal. 2007).

262. *Id.*

263. *Id.* at 136 (quoting *State v. Lackey*, 120 P.3d 332 (Kan. 2005)).

264. COMM. ON DNA TECH. IN FORENSIC SCI., NAT’L RESEARCH COUNCIL, DNA TECHNOLOGY IN FORENSIC SCIENCE 61 (1992).

265. *Thomas v. United States*, 914 A.2d 1, 19 (D.C. 2006); *State v. Laturner*, 163 P.3d 367, 377 (Kan. App. 2007); 1 GIANNELLI & IMWINKELRIED, *supra* note 27, § 6.04[c], at 381–83.

266. Imwinkelried, *supra* note 9, at 643–44.

267. See Michael J. Weber, Annotation, *Permissibility of Testimony by Telephone in State Trial*, 85 A.L.R. 4th 476 (1991); Jori K. Mandelman, Comment, *Telephonic Testimony: Talking with the Experts*, 29 U.C. DAVIS L. REV. 413, 414 (1996).

268. *United States v. Gigante*, 166 F.3d 75, 80 (2d Cir. 1999) (the *Craig* test is inapplicable to two-way videoconferencing, which preserves rather than infringes on face-to-face confrontation). See also *Horn v. Quarterman*, 508 F.3d 306, 320 (5th Cir. 2007) (holding that testimony via two-way closed-circuit television was constitutional in light of *Craig*); Aaron Harmon, *Child Testimony via Two-Way Closed Circuit Television: A New Perspective on Maryland v. Craig* in *United States v. Turning Bear and United States v. Bordeaux*, 7 N.C. J.L. & TECH. 157 (2005); Matthew J. Tokson, Comment, *Virtual Confrontation: Is Videoconference Testimony by an Unavailable Witness Constitutional?*, 74 U. CHI. L. REV. 1581 (2007).

269. 1 IMWINKELRIED ET AL., *supra* note 169, § 109, at 25.

laboratory reports will invariably require the analyst to travel to the courthouse to testify.²⁷⁰

There is another, more fundamental rebuttal to Argument 8. This argument is quite similar to an argument advanced—and squarely rejected by the Supreme Court—in *Davis v. Washington*.²⁷¹ Both cases consolidated in *Davis* involved domestic violence. In Part IV of his opinion, Justice Scalia wrote:

Respondents in both cases, joined by a number of their *amici*, contend that the nature of the offenses charged in these two cases—domestic violence—requires greater flexibility in the use of testimonial evidence. This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall. We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free.²⁷²

In one of the leading cases extending *Crawford* to crime laboratory reports, the District of Columbia Court of Appeals relied on similar reasoning to rebut the argument that pragmatic considerations preclude the application of *Crawford* to these reports. The court stated tersely that “[t]his plea of administrative convenience ... cannot justify abrogating a defendant’s right of confrontation.”²⁷³ If the compelling interest in the prosecution of domestic violence does not trump *Crawford*, neither should a plea of administrative burden.

IV. CONCLUSION

This article discusses three bodies of case law: a group of decisions adjudicating common-law hearsay attacks on the admissibility of crime laboratory reports, a set of opinions ruling on statutory attacks on the introduction of such reports, and the latest spate of decisions analyzing constitutional *Crawford* objections to the receipt of these reports. Any objective reader would be struck by the common denominators among the three groups of cases. All of them attack the same type of prosecution evidence. In each set, the numerical majority of the opinions appears to reject the attack. And, even more surprisingly, in rejecting these disparate attacks, the courts tend to rely on the very same repertoire of arguments.

In the final analysis, within this repertoire, three of the clusters of arguments relate to the reliability of the prosecution hearsay. The argument runs that the general kind of record is trustworthy, the specific passage is reliable, or the type of declarant is credible. Whatever their weaknesses, these clusters of arguments at least met the common-law and statutory attacks head-on: The accused pressing those arguments contended that the crime laboratory report was too unreliable to be admissible, and the argument countered that for one reason or another, the report was reliable. As we have seen, each argument suffers from major flaws, but at least it was a direct parry to the thrust of the earlier attack.

270. See *Thomas v. United States*, 914 A.2d 1, 17 (D.C. 2006).

271. 547 U.S. 813 (2006).

272. *Id.* at 832–33.

273. *Thomas*, 914 A.2d at 17.

However, *Crawford* has overtaken those arguments. Those arguments are largely irrelevant to the new, constitutional objection to the introduction of police laboratory reports. *Crawford* makes it patent that reliability is no longer the name of the game under the Confrontation Clause. Thus, while as a general proposition the factual character of testimony may make it more reliable, the factual nature of the evidence provides no exemption from *Crawford*. In both *Crawford* and *Davis*, the Court barred testimony that was factual rather than opinionated. Given the facts in those cases, it is specious to argue that a finding in a crime laboratory report is admissible simply because it is so reliable that it approximates factual testimony.

The fourth and fifth clusters of arguments are the only ones that squarely meet the *Crawford* objection. They represent a constitutional cost-benefit analysis. The arguments in the fourth cluster minimize the benefit that would result from extending *Crawford* to police laboratory reports. These arguments assert that *Crawford* rests on cross-examination policy and that in the typical case, it does not promote that policy to any significant degree to apply *Crawford* to these reports. After all, if called at trial, the analyst is unlikely to remember the specific test documented in the report, and the defense may cross-examine the laboratory manager or supervisor to challenge the laboratory's customary procedures and protocols. As we have seen, these arguments should have been ruled wanting during the earlier phases of common-law and statutory litigation, and they are even weaker now. Today the courts are more insistent that to be competent to perform the specific "task at hand," the witness must possess some specialized expertise relevant to the conclusion he or she contemplates drawing. In line with this modern approach, the defense ought to be permitted to question the analyst to expose, for instance, his or her lack of relevant coursework. Even more importantly, there is a growing realization that many forensic scientists rely on subjective interpretive standards to evaluate the facts in the case. Cross-examination is highly useful in exposing such reliance as a basis for an argument that despite his or her impressive credentials, the witness's opinion represents *ipse dixit*. In short, in these situations there can be meaningful, valuable cross-examination and, hence, there is a considerable benefit to extending *Crawford* to these situations.

The fifth cluster of arguments concerning "pragmatic considerations" relates to the cost part of the calculus. Here the argument runs that the result of extending *Crawford* will be untoward: The extension will require the analyst to travel to court to give live testimony in virtually every trial, and that will cripple already overburdened crime laboratories. We have seen that the supposed impact of extending *Crawford* is exaggerated. In some cases, it may be possible to solicit a waiver of the Confrontation Clause from the accused; and even when the accused does not waive, there may be constitutionally permissible substitutes such as two-way closed circuit television for live testimony in court.

Nevertheless, it would be dishonest to deny that the application of *Crawford* to police laboratory reports will exact a cost. Some accused will not waive, and the courts may find the proposed technological substitutes unacceptable. Thus, the extension of *Crawford* is likely to impose an added strain on already burdened

crime laboratories.²⁷⁴ Congress and the legislatures may have to provide further funding for hiring additional crime laboratory staff because staff members will have to spend more time testifying.

If the extension of *Crawford* will yield genuine benefit but impose real costs, the question becomes how should the cost-benefit balance be struck. Justice Scalia answered that question in *Davis*.²⁷⁵ In *Davis*, he faced a similar argument that the rigorous application of *Crawford* in domestic violence prosecutions would exact too high a cost, creating an impediment to the effective prosecution of offenders guilty of that serious offense. Justice Scalia frankly admitted that the application of the Confrontation Clause does not come cost free.²⁷⁶ However, he concluded that the Founding Fathers struck the balance by mandating a constitutional preference for cross-examination of “witnesses against” the accused.²⁷⁷ Crime laboratory analysts realize that they are functioning as witnesses, generating evidence against accused; and at least when they employ interpretive standards with a significant element of subjectivity, their trial cross-examination can be useful and illuminating. Most of the arguments previously relied on to defeat the common-law and statutory attacks on the admissibility of police laboratory reports made sense when the crucial issue was the reliability of the prosecution hearsay. However, those arguments have been recycled once too often. Given the sea change effected by *Crawford*, today those arguments are as flawed as they are familiar.

274. Cooley, *supra* note 5, at 309–11.

275. *Davis v. Washington*, 547 U.S. 813, 832–33 (2006).

276. *Id.*

277. U.S. CONST. amend. VI.