

4-1-2008

## How to Deal with Laboratory Reports under *Crawford v. Washington*: A Question with No Good Answer

Cyrus P.W. Rieck

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Cyrus P.W. Rieck, *How to Deal with Laboratory Reports under Crawford v. Washington: A Question with No Good Answer*, 62 U. Miami L. Rev. 839 (2008)

Available at: <https://repository.law.miami.edu/umlr/vol62/iss3/9>

This Note is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# NOTES

## How To Deal with Laboratory Reports Under *Crawford v. Washington*: A Question with No Good Answer

CYRUS P.W. RIECK\*

### I. A "MIASMA OF UNCERTAINTY"<sup>1</sup>

In what would later turn out to be a complete abandonment of twenty-four years of Confrontation Clause<sup>2</sup> jurisprudence, the Supreme Court, in *Crawford v. Washington*,<sup>3</sup> "discovered" for the first time in over two hundred years the true meaning of the Sixth Amendment. In so discovering, the Court, led by Justice Antonin Scalia, created a "miasma of uncertainty."

It can be argued that, in *Crawford*, Justice Scalia set out to, and succeeded in, precluding the "admissibility of grand jury testimony, interlocking confessions, and collateral incriminating statements against penal interest."<sup>4</sup> This article focuses, however, not on the intended effects of *Crawford* and its Supreme Court progeny, *Davis v. Washington*<sup>5</sup> and *Whorton v. Bockting*,<sup>6</sup> but on their unintended effects; namely, the cases' effects on the admissibility of government-created or requested laboratory reports and the like in state-court criminal proceedings<sup>7</sup> in lieu of live, in-court testimony by the preparer of such reports. As the decisions documented in this article demonstrate, in regard to

---

\* J.D. Candidate 2008, University of Miami School of Law. The author extends special thanks to Professor Michael H. Graham. Without Professor Graham's critique, insight, and guidance, this note would not have been possible.

1. United States v. Brito, 427 F.3d 53, 55 (1st Cir. 2005) (describing the Supreme Court's failure to define the parameters of testimonial hearsay in *Crawford v. Washington*, 541 U.S. 36 (2004), as producing a "miasma of uncertainty").

2. U.S. CONST. amend. VI, cl. 2 ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .") (emphasis added).

3. 541 U.S. 36 (2004).

4. Michael H. Graham, *Special Report: Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004), 42 CRIM. L. BULL. 58, 77 (2006) [hereinafter Graham, *Special Report*].

5. 547 U.S. 813 (2006) (Scalia, J.).

6. 127 S. Ct. 1173 (2007).

7. This article focuses on *Crawford*'s effects on the admissibility of laboratory reports under the Confrontation Clause in state courts. Federal courts, of course, have been presented with the

such reports, the miasma of uncertainty turns from a haze to an insufferable smog.

## II. A BRIEF HISTORY OF THE CONFRONTATION CLAUSE: 1980 THROUGH THE PRESENT

Confrontation Clause cases can be separated into two broad categories: those involving "the admission of out-of-court statements"<sup>8</sup> and those "involving restrictions imposed by law or by the trial court on the scope or extent of cross-examination face to face with the accused."<sup>9</sup> *Crawford* and this article are concerned with the former category. Before *Crawford*, *Ohio v. Roberts* governed the admissibility of out-of-court statements under the Confrontation Clause.<sup>10</sup> *Roberts* stated that

when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.<sup>11</sup>

Upon a cursory glance at *Roberts*, the above quotation would appear to make unavailability the sine qua non of admissibility of hearsay statements in criminal proceedings. But several factors apparent at the time of *Roberts* and borne out in subsequent cases demonstrated that such was not the case.<sup>12</sup> To make a long story short, from 1980 through 2004 and *Crawford*, the relationship between the admissibility of hearsay in criminal proceedings and the Confrontation Clause could be summarized by the following: "If it was good enough for the Federal Rules of Evidence, it was good enough for the confrontation clause."<sup>13</sup>

The ease of application notwithstanding, at least one practical result of the *Roberts* standard irked Justice Scalia and a majority of the Court enough to overrule twenty-four years of precedent and completely reformulate how the Confrontation Clause is understood. That result being the admissibility of collateral incriminating statements against

---

same issue, but the issue has been addressed far less frequently and often in less depth. For an overview of federal-court application of *Crawford* to laboratory reports, see *infra* note 86.

8. 4 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 802:2, at 6–8 (6th ed. 2006) [hereinafter GRAHAM, HANDBOOK].

9. *Id.* at 8 (footnote omitted).

10. 448 U.S. 56 (1980).

11. *Id.* at 66.

12. See 4 GRAHAM, HANDBOOK, *supra* note 8, § 802:2, at 20–23 (describing the several factors that suggested that the Supreme Court did not intend such a stringent unavailability requirement as well as later cases substantiating such a view).

13. *Id.* at 46.

penal interests offered against the criminal defendant.<sup>14</sup> Despite an attempt in *Lilly v. Virginia* to prevent the use of such statements,<sup>15</sup> the Court's failure, among other things, to reach a single majority opinion left "ample wiggle room for lower courts to permit a custodial statement to law enforcement personnel into evidence if so inclined in spite of the clear tenor of a majority of the justices to the contrary."<sup>16</sup> This "wiggle room" seems to be what ultimately precipitated the Court's decision in *Crawford*. Although the Court's distaste for the use of collateral incriminating statements against penal interests offered against the criminal defendant is certainly justified, the means used in *Crawford* to ensure, once and for all, that such statements would not be admitted into evidence leaves much to be desired.

*Crawford* involved an in-custody and post-*Miranda* statement to the police by the defendant's wife in an assault and attempted murder prosecution. The wife's statement tended to show that the defendant was the first aggressor, despite his claim of self-defense. The wife did not testify in court because of a claim of privilege. The out-of-court testimony, however, was admissible under Washington privilege law. The wife's tape-recorded statement was admitted under the Washington exception to the hearsay rule for statements against penal interests.<sup>17</sup> In response, the Supreme Court turned to the "historical background of the Clause to understand its meaning"<sup>18</sup> and found that the admission of the wife's statement violated the defendant's Sixth Amendment Confrontation rights. After a historical overview of the rationale for the Confrontation Clause stretching back to, and focusing on, the 1603 trial of Sir

---

14. The "collateral inculpatory statement" exception to the hearsay rule, as the exception is alternatively known, can be found in FED. R. EVID. 804(b)(3). The rule reads:

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is *unavailable* as a witness:

. . . .

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or *so far tended to subject the declarant to civil or criminal liability . . .* that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

*Id.* (emphasis added). An example of such a collateral inculpatory statement would be an assertion that "Josh and I robbed the liquor store" admitted at Josh's trial for robbery of the liquor store. See generally MICHAEL H. GRAHAM, EVIDENCE: AN INTRODUCTORY PROBLEM APPROACH 189-94 (2002).

15. 527 U.S. 116 (1999).

16. 4 GRAHAM, HANDBOOK, *supra* note 8, § 802:2, at 33-34 (explaining why such "wiggle room" remained).

17. *Crawford v. Washington*, 541 U.S. 36, 40 (2004) (citing WASH. R. EVID. 804(b)(3)). The trial court deemed the wife's statement to be self-inculpatory because she led the defendant to the victim's apartment. *Id.*

18. *Id.* at 43.

Walter Raleigh for treason,<sup>19</sup> Justice Scalia and the Court concluded that history “supports two inferences about the meaning of the Sixth Amendment.”<sup>20</sup> The first inference is that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”<sup>21</sup> From this initial inference, the Court rejected the proposition that the application of the Confrontation Clause to out-of-court statements introduced in a criminal trial turned on the law of evidence.<sup>22</sup> To accept such a proposition, the Court noted, would “render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.”<sup>23</sup> As a corollary, the Court found that “not all hearsay implicates the Sixth Amendment’s core concerns.”<sup>24</sup> The Court stated:

An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.<sup>25</sup>

The text of the Confrontation Clause, the Court reasoned, reflects such a focus. Using definitions from the 1828 version of Webster’s Dictionary,<sup>26</sup> the Court set out to define the meaning of “witnesses” and “testimony.” “Witnesses” against the accused, said the Court, applies to those who “bear testimony.”<sup>27</sup> “Testimony” was defined as typically “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”<sup>28</sup> It was therefore clear to the Court that the text of the Constitution, in accord with the history underlying the common-law right of confrontation, “reflects an especially acute concern with a specific type of out-of-court statement.”<sup>29</sup> Thus, in 2004, the primary concern of the Confrontation Clause became those hearsay statements that are “testimonial” in nature.<sup>30</sup>

---

19. See Raleigh’s Case, 2 How. St. Tr. 1 (1603).

20. *Crawford*, 541 U.S. at 50.

21. *Id.*

22. See *id.* at 50–51.

23. *Id.* at 51.

24. *Id.*

25. *Id.*

26. The Sixth Amendment was ratified in 1791.

27. *Crawford*, 541 U.S. at 51 (quoting 2 NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

28. *Id.* (quoting WEBSTER, *supra* note 27) (alteration in original) (internal quotation marks omitted).

29. *Id.*

30. *Id.* at 53.

According to the Court, the Confrontation Clause's history supports a second inference, "that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."<sup>31</sup> In sum, when testimonial statements are involved, they may be admitted only when the declarant is unavailable and when the defendant has had a prior opportunity to cross-examine him. In *Crawford*, the unavailability requirement, which had not been the sine qua non under *Roberts*, became such, at least in regard to testimonial hearsay, and in addition there needed to have been afforded a prior opportunity to cross.

The category of hearsay statements within the purview of the Confrontation Clause was, to put it gently, not as meticulously defined. It was clear that the Confrontation Clause was "primarily" concerned with testimonial hearsay. Just what this term encompassed, however, was far from certain. The Court "[le]ft for another day any effort to spell out a comprehensive definition of 'testimonial.'"<sup>32</sup> It stated, however, that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a formal trial; and to police interrogations."<sup>33</sup> At the same time, the Court noted three various formulations of the core class of testimonial statements that "all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it."<sup>34</sup> Additionally, the Court refused to decide whether the Confrontation Clause applied solely to testimonial hearsay,<sup>35</sup> and it seemed as if the Court was considering retaining *Roberts* in regard to nontestimonial hearsay. The Court stated, "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such

---

31. *Id.* at 53–54.

32. *Id.* at 68.

33. *Id.*

34. *Id.* at 52. These three formulations, which have led to much confusion over the Court's intended meaning of "testimonial" and will be discussed later in this article, are

*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; [and] 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.

*Id.* at 51–52 (ellipsis in original) (citations and internal quotation marks omitted).

35. *Id.* at 53 ("[E]ven if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object . . .").

statements from Confrontation Clause scrutiny altogether.”<sup>36</sup>

The Court’s refusal to offer a “comprehensive definition” of “testimonial” led lower courts to employ “a plethora of interpretations” of the term, often leading to conflicting results.<sup>37</sup> After *Crawford*, however, and despite two of the three formulations offered for the definition of testimonial referring to expectations of the declarant, the true focus of the Confrontation Clause was “solely upon government conduct in acquiring evidence against the accused.”<sup>38</sup> Formality also appeared to be the key to discovering the true meaning of “testimonial.” Yet under *Davis*, it is clear that only governmental conduct is in fact significantly involved in determining whether a statement is testimonial.

In *Davis v. Washington*,<sup>39</sup> the Supreme Court consolidated two cases on Writs of Certiorari to the supreme courts of Washington and Indiana in *State v. Davis*<sup>40</sup> and *Hammon v. State*.<sup>41</sup> Both cases were precipitated by domestic disputes resulting in statements made by the defendant’s significant others (the putative victims) to law-enforcement officers.<sup>42</sup> Neither declarant testified at trial. The Court, “[w]ithout attempting to produce an exhaustive classification of all conceivable statements”<sup>43</sup> that are testimonial or nontestimonial, held:

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 the *primary purpose* of the interrogation is to *establish or prove past events potentially relevant to later criminal prosecution*.<sup>44</sup>

In a footnote, the Court noted that although interrogations in some circumstances tend to generate testimonial responses, this does not imply that “statements made in the absence of any interrogation are necessarily

---

36. *Id.* at 68. In *Davis*, the Court chose the latter approach, overruling *Roberts* and holding that the Confrontation Clause is only concerned with testimonial hearsay.

37. 4 GRAHAM, HANDBOOK, *supra* note 8, § 802:2.1, at 3 (Supp. 2008).

38. Graham, *Special Report*, *supra* note 4, at 108 (emphasis omitted); *see also id.* at 107–09 (explaining why the reference to the “reasonable” expectations of the declarant is an example of an antinomy and that the history offered by the Court supports only the two inferences referenced in *Crawford*, which in turn support a definition of testimonial limited to a focus on such governmental conduct).

39. 547 U.S. 813 (2006).

40. 111 P.3d 844 (Wash. 2005).

41. 829 N.E.2d 444 (Ind. 2005).

42. In *Davis*, the defendant’s girlfriend’s statement was to a 911 operator. The Court treated the operator’s acts to be those of the police for purposes of the opinion but stated that “our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are ‘testimonial.’” 547 U.S. at 823 n.2.

43. *Id.* at 822.

44. *Id.* (emphasis added).

nontestimonial.”<sup>45</sup>

In *State v. Davis*, the declarant’s statements to a 911 operator were deemed nontestimonial to the extent they referred to “events *as they were actually happening*, rather than describ[ing] past events.”<sup>46</sup> The operator received the declarant’s statements regarding ongoing violence and threats of violence by the defendant not to prove a past fact but to enable the operator to respond to current circumstances necessitating police assistance.<sup>47</sup> The “primary purpose” of the interrogation, viewed objectively, was to “meet an ongoing emergency.”<sup>48</sup> Therefore, the statements’ admission at trial as an excited utterance was not a violation of the Confrontation Clause.

By contrast, in *Hammon v. State*, the police, responding to a domestic-disturbance report, found the declarant who was also the defendant’s wife sitting on the front porch looking “somewhat frightened.”<sup>49</sup> Despite her appearance, the declarant told the police that “nothing was the matter.”<sup>50</sup> Upon entering the house, the police found a broken furnace and glass on the floor.<sup>51</sup> The police approached the defendant in the kitchen where he informed the police “that he and his wife had been in an argument but everything was fine now and the argument never became physical.”<sup>52</sup> The police again approached the declarant who was now inside and asked her what had happened. The police rebuffed the defendant’s several attempts to involve himself in the conversation. The declarant eventually told the officer what had occurred and, on the officer’s request, filled out and signed a battery affidavit that was admitted at trial as a present-sense impression. Noting that determinating the statement’s character in *Hammon* was “a much easier task,”<sup>53</sup> the *Davis* Court found it to be testimonial. The Court stated that “[i]t is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct—

45. *Id.* n.1.

46. *Id.* at 827 (quoting *Lilly v. Virginia*, 527 U.S. 116, 137 (1999)) (alteration in original) (internal quotation marks omitted).

47. *Id.*

48. *Id.* at 828. The Court was careful to note that despite the declarant’s initial statements being nontestimonial—largely because the defendant who had just beaten the declarant was still in close proximity—this did not mean that the interrogation could not “evolve into testimonial statements.” *Id.* (quoting *Hammon v. State*, 829 N.E.2d 444, 457 (Ind. 2005)). In fact, this seems to be exactly what occurred once the defendant fled and the operator told the declarant “to be quiet, and proceeded to pose a battery of questions.” *Id.*

49. *Id.* at 819 (quoting *Hammon*, 829 N.E.2d at 446).

50. *Id.* (quoting *Hammon*, 829 N.E.2d at 447).

51. *Id.*

52. *Id.* (internal quotation marks omitted).

53. *Id.* at 829.



as, indeed, the testifying officer expressly acknowledged.”<sup>54</sup> In sum, the critical difference between the nontestimonial statements in *State v. Davis* and the testimonial ones in *Hammon v. State* was that, viewed objectively, the primary purpose of the interrogation in the former was to determine “what is happening” as opposed to in the latter where such purpose was to determine “what happened.”<sup>55</sup>

*Davis* and its self-proclaimed narrow holding,<sup>56</sup> while certainly far from remedying the “miasma of uncertainty” created by *Crawford*, did make certain aspects of the newfound Confrontation Clause clearer.<sup>57</sup> First, consistent with the two historical inferences described in *Crawford*, “the confrontation clause focuses solely upon conduct by government officials.”<sup>58</sup> Second, the Confrontation Clause applies *only* to testimonial statements.<sup>59</sup> Third, and related to the preceding point, *Crawford* did in fact overrule *Roberts*.<sup>60</sup> And finally, though not explicit in *Crawford* or *Davis*, it appears as if the theory underlying the decisions is

that police officers, other law enforcement personnel, and judicial officers in the process of eliciting statements from witnesses act improperly through intimidation, coercion, bribery, deceit, etc., and also that such government officials under oath at trial fabricate and distort statements actually received from the witness. Moreover, in this context *alone* for the first time *Crawford* and *Davis* also clearly imply that oath, demeanor, and cross-examination, the traditional common law methods for evaluating the truth of in-court testimony, are not up to the task; i.e., the jury will misevaluate the government

---

54. *Id.* (citation omitted).

55. *Id.* at 830.

56. *Id.* n.5 (“We have acknowledged that our holding is not an ‘exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation,’ but rather a resolution of the cases before us and those like them.”) (citation omitted). But see Michael H. Graham, *The Davis Narrowing of Crawford: Is the Primary Purpose Test of Davis Jurisprudentially Sound, “Workable,” and “Predictable”?*, 42 CRIM. L. BULL. 604, 610 (2006) [hereinafter Graham, *The Davis Narrowing*] (“In short, while *Davis* expressly states that it is not presenting a comprehensive definition of ‘testimonial,’ *Davis* may nevertheless in fact have done so or come very close to having done so and thus be the ‘another day’ referred to in *Crawford*.”).

57. The adjective “clearer” is used intentionally and in juxtaposition to the word “clear,” for there is little in either *Crawford* or *Davis* that can properly be regarded as “clear.”

58. Graham, *The Davis Narrowing*, *supra* note 56, at 612.

59. *Davis*, 547 U.S. at 823–24. In response to whether the Confrontation Clause applies only to testimonial hearsay, the Court states that the testimonial limitation “so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its ‘core,’ but its perimeter.” *Id.* at 824; see also *Whorton v. Bockting*, 127 S. Ct. 1173, 1183 (2007) (“But whatever improvement in reliability *Crawford* produced in this respect must be considered together with *Crawford*’s elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements.”).

60. *Davis*, 547 U.S. at 825 n.4 (“We overruled *Roberts* in *Crawford* by restoring the unavailability and cross-examination requirements.”).

official's testimony to the detriment of the criminal defendant.<sup>61</sup>

Unfortunately, as shown by what is generally a complete lack of consistency by state courts in the treatment of laboratory reports, the Court's definition of testimonial in *Crawford* and the Confrontation Clause in general is still utterly lacking and seems to provide no answer to the question whether such reports are testimonial.

Under *Teague v. Lane*<sup>62</sup> and its progeny, a unanimous Court in *Wharton v. Bockting*<sup>63</sup> held that the rule set forth in *Crawford* is not retroactive and does not apply to cases already final on direct review.<sup>64</sup> Offering essentially no further guidance as to when statements will be testimonial, the Court held that *Crawford* set forth a "new" procedural rule because "[t]he *Crawford* rule is flatly inconsistent with the prior governing precedent, *Roberts*, which *Crawford* overruled."<sup>65</sup> Further, the Court held that *Crawford* "did not alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding."<sup>66</sup> Rather, "*Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause, not because the court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of fact finding in criminal trials."<sup>67</sup> The Court reiterated that the Confrontation Clause is concerned solely with testimonial hearsay—"nontestimonial hearsay [is] not governed by that Clause."<sup>68</sup> The Court again reiterated that "the *Roberts* test was too 'malleable' in permitting the admission of *ex parte* testimonial statements."<sup>69</sup> Thus, while it is clear that the Confrontation Clause's "procedural" guarantee applies solely to testimonial statements, the breadth of this guarantee is still woefully uncertain.

### III. THE ADMISSIBILITY OF LABORATORY REPORTS<sup>70</sup> BEFORE CRAWFORD

*Crawford* did not create the uncertainty regarding the admissibility

---

61. Graham, *The Davis Narrowing*, *supra* note 56, at 612.

62. 489 U.S. 288 (1989).

63. 127 S. Ct. 1173 (2007).

64. *Id.* at 1177.

65. *Id.* at 1181.

66. *Id.* at 1183 (internal quotation marks omitted).

67. *Id.* at 1182–83.

68. *Id.* at 1179.

69. *Id.*

70. The cases in this article generally involve reports of the results of tests of substances presumed to be narcotics; blood, urine, and breath testing; breath-test machine maintenance and calibration; autopsies; and fingerprint analysis. For ease of communication, these sorts of reports will generically be referred to as "laboratory reports" despite not always being performed in a laboratory per se. If the analysis turns on a specific type of report, such will be called to the reader's attention.

of laboratory reports in lieu of the preparer's in-court testimony under the Confrontation Clause. The case, however, has thrown the proverbial "rock into a hornet's nest." To understand the confusion surrounding the admissibility of laboratory reports after *Crawford*, it is useful to understand how such reports were treated in the past.

Before *Roberts*, courts were split about whether the admission of laboratory reports without testimony of the preparer of the report violated the Confrontation Clause.<sup>71</sup> After *Roberts* this lack of uniformity persisted.<sup>72</sup> The three most prevalent rationales<sup>73</sup> for admitting laboratory reports in lieu of the preparer's testimony were as follows.<sup>74</sup> First, many courts found that because the utility of cross-examining the person who actually performed the tests and prepared the report was remote, admission of the report without the testimony of the preparer was not a violation of the Confrontation Clause.<sup>75</sup> As a corollary, many courts were willing to admit laboratory reports through the testimony of supervisors of the preparer of the report. These courts generally believed that an opportunity to cross-examine the supervisor was adequate given the limited utility in cross-examining the person who ran the tests.<sup>76</sup> Courts also considered the practical ramifications of requiring in-court testimony of the preparer of the report whenever such a report was sought to be admitted.<sup>77</sup> Second, many courts asserted that because laboratory

---

71. See 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, *SCIENTIFIC EVIDENCE* § 6.04[a], at 365–66 (4th ed. 2007) (listing cases both finding and not finding a constitutional violation).

72. *Id.* at 366.

73. Courts used a number of rationales to find laboratory reports admissible under *Roberts*. The three listed were the most common and most other rationales were the logical descendents of those listed here.

74. It should be noted that the rationales for admitting laboratory reports were not exclusive before *Crawford* nor are they following the case. Courts often cite a number of different rationales as to why laboratory reports are or are not admissible.

75. *E.g.*, *Price v. State*, 498 S.E.2d 262, 264 (Ga. 1998) (report admissible because "the utility of cross examination is so remote"); *State v. Smith*, 323 S.E.2d 316, 324 (N.C. 1984) (report admissible; "It is unlikely in cases such as the case before us that cross-examination of the chemical analyst at trial could successfully call into question the declaration's apparent meaning or the declarant's sincerity, perception or memory. Rather, to require every analyst to testify in such cases would be unduly inconvenient and of small utility.") (citation and internal quotation marks omitted); *State v. Sosa*, 800 P.2d 839, 842 (Wash. Ct. App. 1990) (report admissible; persons preparing the report are "unlikely to recall the details of the transaction or event in question") (internal quotation marks omitted).

76. See *Williams v. State*, 734 So. 2d 1149 (Fla. 5th Dist. Ct. App. 1999) (concurring opinion) (laboratory report admitted under state business-records hearsay exception through the testimony of laboratory supervisor did not violate the Confrontation Clause); *State v. Christian*, 895 P.2d 676, 682–83 (N.M. Ct. App. 1995) (laboratory supervisor lays foundation for report; preparer of report does not testify; no Confrontation Clause violation).

77. See *Smith*, 323 S.E.2d at 319 (admitting laboratory report; "[A]lthough the right of confrontation is a fundamental right, it 'must occasionally give way to considerations of public policy and the necessities of the case.'" (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895))); *Commonwealth v. Kravontka*, 558 A.2d 865, 868 (Pa. Super. Ct. 1989) (admitting

reports do not involve the rendering of “opinions” or drawing inferences by the preparer of the report, admission into evidence would not violate the Confrontation Clause.<sup>78</sup> Finally, and most prevalently, many courts deemed laboratory reports to bear adequate “indicia of reliability” under *Roberts* either by falling within a “firmly rooted hearsay exception”<sup>79</sup> or by a “showing of particularized guarantees of trustworthiness”<sup>80</sup> and thus admissible under the Confrontation Clause.<sup>81</sup>

Not all courts, however, were willing to admit laboratory reports without the preparer’s in-court testimony.<sup>82</sup> For instance, when the laboratory report was crucial to the prosecution and the utility of cross-examining the preparer was not remote, some courts found admission of the report absent the preparer’s in-court testimony to violate the Confrontation Clause.<sup>83</sup> At times, other courts found that lab reports did not contain adequate “indicia of reliability” under *Roberts*.<sup>84</sup>

laboratory report without testimony of preparer; “A rule requiring production of available witnesses would significantly curtail development of the law of evidence to eliminate the necessity for production of declarants where production would be *unduly inconvenient* and of small utility to a defendant.”) (emphasis added) (quoting *Dutton v. Evans* 400 U.S. 74, 96–97 (1970) (Harlan, J., concurring)).

78. See *Bowers v. State*, 468 A.2d 101, 112 (Md. 1983) (autopsy report admissible in lieu of testimony of preparing physician; “[R]eport here merely stated findings as to the physical condition of the victim.”); *Smith*, 323 S.E.2d at 324 (no Confrontation Clause violation; “The analyst is at no time called upon to render an opinion or to draw conclusions.”).

79. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

80. *Id.*

81. See *People v. Clark*, 833 P.2d 561, 628 (Cal. 1992) (autopsy report admitted under state official record exception; no Confrontation Clause violation as “[t]he contents of [the doctor’s] report were admitted under a ‘firmly rooted’ exception to the hearsay rule that carries sufficient indicia of reliability”); *Ealy v. State*, 685 N.E.2d 1047, 1055 (Ind. 1997) (autopsy report admissible without testimony of preparing physician under the Confrontation Clause because it contains sufficient “particularized guarantees of trustworthiness” and the preparing physician did not know whether the particular case would result in trial or whom the potential defendant might be); *Kravontka*, 558 A.2d at 870 (blood-alcohol tests and records thereof bear “overwhelming” indicia of reliability and are admissible under the Confrontation Clause without testimony of the preparer); *State v. Sosa*, 800 P.2d 839, 843 (Wash. Ct. App. 1990) (report admitted under state statutory hearsay exception for certified copies of laboratory reports is reliable evidence because (1) the lab expert is particularly worthy of belief and (2) the statute admitting the report is “at least as reliable as a ‘firmly rooted’ hearsay exception”).

82. See 1 GIANNELLI & IMWINKELRIED, *supra* note 71, § 6.04[a], at 364–70.

83. See *Grantham v. State*, 580 So. 2d 53, 57 (Ala. Crim. App. 1991) (finding a Confrontation Clause violation where the prosecutor did not show the toxicologist to be unavailable and “[u]nder the facts of this particular case . . . the utility of confronting the absent toxicologist was not remote . . . the report was both ‘crucial’ to the prosecution and ‘devastating’ to [the defendant]”).

84. See *People v. McClanahan*, 729 N.E.2d 470, 475 (Ill. 2000) (finding statute calling for admissibility of laboratory reports to be unconstitutional, noting “lab reports admissible pursuant to [the statute] neither contain particularized guarantees of trustworthiness nor fall within a firmly established hearsay exception”); *In re J.H.*, 581 A.2d 1347, 1351 (N.J. Super. Ct. App. Div. 1990) (finding Confrontation Clause violation where lab report admitted under statute allowing certificate of forensic laboratory employee to show composition of substance because trial court did not refer to evidence rules and “did not require the State to satisfy the tests of reliability”).

Many of the rationales offered under the *Roberts* regime for either finding or not finding a Confrontation Clause violation with the admission of laboratory reports without the preparer's in-court testimony survive today. It seems clear, however, that given the drastic change in the theory underlying the Confrontation Clause,<sup>85</sup> theories regarding under what circumstances lab report are admissible should have changed as well. But just *how* the arguments for or against the admissibility of lab reports should have changed after *Crawford* is unclear because the theoretical underpinnings of the case are vague, and, when taken to their logical conclusions, lead to perverse and illogical results. Courts attempting to cope with the testimonial–nontestimonial dichotomy set forth in *Crawford* have also created a number of new rationales. But the lack of any coherent theory regarding whether and why such laboratory reports are admissible is a manifestation of the fact that *Crawford* and *Davis* are incompetent to answer the question adequately.

#### IV. THE MIASMA THICKENS: STATE COURT RATIONALES<sup>86</sup> FOR THE ADMISSIBILITY (OR INADMISSIBILITY) OF LABORATORY REPORTS IN LIEU OF THE TESTIMONY OF THE PREPARER UNDER *CRAWFORD* AND *DAVIS*<sup>87</sup>

##### A. *Business Records: Nontestimonial or Perhaps Nontestimonial; Holding or Dicta?*

In the context of considering the Confrontation Clause's history,

---

85. The change in theory being in essence one from *Roberts* and a concern for "reliability" to *Crawford/Davis* and an abhorrence of "*ex parte* examinations" by government officials coupled with a belief that juries cannot properly evaluate the testimony of government officials.

86. Using many of the same rationales as state courts, though many times with much less depth of analysis, federal courts have more often than not found laboratory reports to be nontestimonial. See *United States v. Washington*, 498 F.3d 225, 232 (4th Cir. 2007) (raw data created by machine operated by technician is not hearsay and is nontestimonial; "[T]he supposed 'hearsay statements' made by the machines were not 'testimonial' in that they did not involve the relation of a past fact of history as would be done by a witness."); *United States v. Earle*, 488 F.3d 537, 543, 545 (1st Cir. 2007) (testimonial issue not resolved; but certificate of nonexistence of a record ("CNR") may be testimonial; defendant presents a strong argument that "the CNR qualifies as testimonial under all three of the formulations provided in *Crawford*"); *United States v. Henry*, 472 F.3d 910, 914 (D.C. Cir. 2007) (the rules of evidence governing expert testimony were left unaffected by *Crawford*; "[W]hile the Supreme Court in *Crawford* altered Confrontation Clause precedent, it said nothing about the Clause's relation to Federal Rule of Evidence 703."); *United States v. Feliz*, 467 F.3d 227, 236 (2d Cir. 2006) (autopsy report is nontestimonial; "[W]e hold that where a statement is properly determined to be a business record as defined by FED. R. EVID. 803(6), it is not testimonial within the meaning of *Crawford*, even where the declarant is aware that it may be available for later use at trial."); *United States v. Ellis*, 460 F.3d 920, 926–27 (7th Cir. 2006) (medical records establishing the presence of narcotics are nontestimonial; "[W]hen these professionals made those observations, they—like the declarant reporting an emergency in *Davis*—were 'not acting as . . . witness[es],' and were 'not testifying.'" (alterations in original); *United States v. Adams*, No. 03-2108, 2006 U.S. App. LEXIS 17291, at \*8 (3d Cir. July 10, 2006) (no Confrontation Clause violation where expert permitted to testify to results of laboratory report

the *Crawford* majority states, “[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records . . . .”<sup>88</sup> This seemingly innocuous statement has led to a potpourri of interpretations by state courts grappling with the issue whether laboratory reports are admissible in lieu of in-court testimony by the preparer.

# 1. THE ABOVE-QUOTED BUSINESS-RECORDS REFERENCE IN *CRAWFORD* IS A HOLDING

Faced with the question whether a proffered laboratory report is testimonial, a number of courts have regarded the business-records reference in *Crawford* as a holding, finding the report to be nontestimonial.<sup>89</sup>

---

he did not perform; “[B]ecause appellants fail to show (or even argue) that they were somehow prevented from calling these ‘actual’ witnesses themselves, their reliance on *Crawford* is untenable.”); *United States v. Rahamin*, No. 04-1982, 2006 U.S. App. LEXIS 4695, at \*14 (3d Cir. Feb. 23, 2006) (“[T]he DEA laboratory report appears to be a testimonial statement since it was offered to prove the weight and substance of the 20,000 confiscated pills.”); *United States v. Gaines*, No. 02-4378, 2004 U.S. App. LEXIS 14168, at \*37 (6th Cir. July 7, 2004) (ability to cross-examine expert who did not prepare laboratory report satisfies the Confrontation Clause; “[The defendant] received the opportunity to cross examine [the testifying expert] regarding the laboratory reports, the tests performed, and the test results. That is all the Confrontation Clause requires.”); *Ellington v. Grams*, No. 07-C-136, 2007 U.S. Dist. LEXIS 85016, at \*13-14 (E.D. Wis. Nov. 8, 2007) (victim’s medical records are nontestimonial; “Medical records documenting the victim’s hospital treatment here were not made under circumstances which would lead an objective witness reasonably to believe that the[y] would be available for later use at a later trial.”) (alteration in original) (internal quotation marks omitted); *United States v. De La Cruz*, No. 01-10118-JLT, 2007 U.S. Dist. LEXIS 65172, at \*8 (D. Mass. Aug. 30, 2007) (expert witness permitted to testify based on laboratory reports he did not prepare; “No *Crawford* violation occurred here because [the testifying expert’s] statements were not testimonial hearsay.”); *United States v. James*, No. 02-CR-0778 (SJ), 2007 U.S. Dist. LEXIS 67538, at \*5 (E.D.N.Y. June 21, 2007) (toxicology report prepared by nontestifying medical examiner employed by the medical examiner’s office is nontestimonial; “There is no indication that [the nontestifying medical examiner] was employed by a law enforcement agency or was responsible for enforcing any laws.”); *United States v. Krieger*, No. 06-cr-40001-JPG, 2007 U.S. Dist. LEXIS 37941, at \*8 (S.D. Ill. May 24, 2007) (“While the court is inclined to agree that the admission of [the] autopsy report would be impermissible under *Crawford*, it finds that the introduction of the physical products of that investigation will not present a *Crawford* issue.”); *Tavares v. O’Brien*, No. 04-40059-FDS, 2007 U.S. Dist. LEXIS 73983, at \*21 (D. Mass. Mar. 7, 2007) (“Hospital records . . . are nontestimonial and therefore, if they otherwise comply with the rules of evidence, may be admitted at trial.”).

87. The rationales described below are treated separately for ease of analysis. A vast majority of the cases, however, do not rely on any one theory but instead apply various rationales in their attempt to admit or exclude the report. The use of numerous rationales further exemplifies the lack of clarity regarding the admissibility of laboratory reports under *Crawford*. Often it seems as if the courts, unable to find a satisfactory reason for their decision to admit a report, merely list as many rationales as they can, seemingly saying, “I don’t know why I am right, but one of these reasons must be valid.”

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

89. See *Abyo v. State*, 166 P.3d 55, 59 (Alaska Ct. App. 2007) (calibration documents for breathalyzer machine are nontestimonial; “The Supreme Court did not explicitly define the term

Some courts go so far as to assert that reports admissible under any

---

'testimonial' in *Crawford*, but it did state that business records are, by their nature, not testimonial."); *Bohsancurt v. Eisenberg*, 129 P.3d 471, 475 (Ariz. Ct. App. 2006) (maintenance and calibration records for Intoxilyzer breath-testing machine are nontestimonial records that fall within the "clearly delineated exception to *Crawford*—business records"); *Rackoff v. State*, 621 S.E.2d 841, 845 (Ga. Ct. App. 2005) (signed inspection certificate of breath-test machine admitted pursuant to state statute is nontestimonial; *Crawford* court indicated "business records by their nature are not testimonial statements"); *People v. Kim*, 859 N.E.2d 92, 93 (Ill. App. Ct. 2006) (affidavit of officer who certified Breathalyzer machine is nontestimonial; "*Crawford* specifically deemed statements admissible under traditional hearsay exceptions to be nontestimonial . . ."); *People v. Jambor*, 729 N.W.2d 569, 574 (Mich. Ct. App. 2007) (notation on fingerprint card written at the scene by nontestifying technician is nontestimonial and admissible as a business record is nontestimonial under the *Crawford* Court's observation; "business records are not testimonial"); *State v. Godshalk*, 885 A.2d 969, 973 (N.J. Super. Ct. Law Div. 2005) (breathalyzer-operator certificate and breathalyzer-machine inspection certificates are nontestimonial "business records (and official records) of the New Jersey State Police, and thus are admissible [under state business- and official-record exceptions]"); *People v. Grogan*, 816 N.Y.S.2d 93 (App. Div. 2006) (DNA report created from complainant's rape kit prepared by independent laboratory offered though testimony of Office of Chief Medical Examiner criminalist and private lab director is nontestimonial business records under *Crawford*); *People v. Meekins*, 828 N.Y.S.2d 83 (App. Div. 2006) (report created by independent private lab containing DNA test results of sample from complainant's rape kit, offered through testimony of lab technician and Medical Examiner's officer forensic biologist, is nontestimonial as business records by their nature are nontestimonial); *People v. Durio*, 794 N.Y.S.2d 863, 867 (Sup. Ct. 2005) (autopsy report created by the Office of the Chief Medical Examiner is a business record and admissible because "[u]nder *Crawford* business records are specifically exempted from challenge because they are outside the 'core testimonial statements that the Confrontation Clause plainly meant to exclude'") (quoting *Crawford*, 541 U.S. at 63); *People v. Kanhai*, 797 N.Y.S.2d 870 (Crim. Ct. 2005) (inspection report of breath-test machine is nontestimonial, tracing the history of the New York business-records exception back to Dutch Colonial courts and finding the New York State Police Laboratory to qualify as a business, therefore report admissible under the *Crawford* reference to business records); *People v. Fisher*, No. 04-1556, 2005 WL 2780686 (N.Y. City Ct. Oct. 25, 2005) ("breath test documents" including calibration certificate and certification of analysis of stimulator solution are nontestimonial and admissible pursuant to state statute without testimony of preparer, business records are nontestimonial); *State v. Windley*, 617 S.E.2d 682 (N.C. Ct. App. 2005) (fingerprint card created on defendant's arrest in state computer database is a nontestimonial business record); *State v. Crager*, 879 N.E.2d 745, 753 (Ohio 2007) (DNA report is nontestimonial in part because "business records are, by their nature, not testimonial") (internal quotation marks omitted); *State v. Norman*, 125 P.3d 15 (Or. Ct. App. 2005) (certificates of accuracy of Intoxilyzer machine are nontestimonial official records); *State v. Warlick*, No. M2005-01477-CCA-R3-CD, 2007 Tenn. Crim. App. LEXIS 394, at \*10 (Crim. App. May 17, 2007) (laboratory results from hospital indicating blood-alcohol level are nontestimonial; "[B]usiness records are non-testimonial in nature and do not violate the defendant's right of confrontation."); *In re J.R.L.G.*, No. 11-05-00002-CV, 2006 Tex. App. LEXIS 3344, at \*6 (App. Apr. 27, 2006) (laboratory report containing results of defendant's urinalysis screen is nontestimonial because the reports are "more akin to general business records, which the Supreme Court has characterized as non-testimonial"); *Mitchell v. State*, 191 S.W.3d 219, 222 (Tex. App. 2005) (autopsy report is nontestimonial and admissible via the testimony of physician from county medical examiner's office who did not prepare the report, autopsy report is a public or business record and "business records are nontestimonial"); *Commonwealth v. Williams*, No. 04-451, 2005 WL 3007781, at \*3 (Va. Cir. Ct. Nov. 10, 2005) (certificate of analysis from the Virginia Department of Forensic Science reporting the result of chemical testing is nontestimonial, admissible as a business record, which the *Crawford* court "explicitly stated . . . was not within its ruling").

“traditional” hearsay exception are nontestimonial under *Crawford*.<sup>90</sup> There are a number of problems with this approach. First, the reference to business records in *Crawford* must be to business records as business records, not to public records as business records for the purported exception to make any theoretical sense given the underlying concern of *Crawford* and *Davis*, i.e., concern with the behavior of government and law-enforcement officials.<sup>91</sup> In *State v. Godshalk*, however, the Camden County Superior Court of New Jersey upheld, over the defendant’s Confrontation Clause objection in a driving-while-intoxicated prosecution, the admission of an officer’s “breathalyzer operator certificate” as well as “breathalyzer machine inspection certificates for the Pennsauken Police Department breathalyzer machine” from before and after the defendant’s arrest.<sup>92</sup> The court held that the records were “not within the ‘testimonial evidence’ category of *Crawford* because they are business records (and official records) of the New Jersey State Police, and thus are admissible under [the state exceptions for records of regularly conducted activity and public records].”<sup>93</sup> In theory, of course, a public record may at times qualify as a business record. But to give the reference to business records in *Crawford* such an expansive definition is untenable.

This problem sheds light on one of *Crawford*’s severe weaknesses. On the one hand the case does, whether in dicta or not, say that business records are nontestimonial.<sup>94</sup> On the other hand, the Court emphatically states that “[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of

---

90. See *Kim*, 859 N.E.2d at 93 (“Courts have also recognized that *Crawford* specifically deemed statements admissible under traditional hearsay exceptions to be nontestimonial . . . .”) (citing *Bohsancurt*, 129 P.3d at 476, and *Rackoff*, 621 S.E.2d at 845).

91. See *supra* Part III.

92. 885 A.2d at 970.

93. *Id.* at 973; see also N.J. R. EVID. 803(c)(6) (“Records of regularly conducted activity”); *id.* 803(c)(8) (“Public records, reports, and findings”). Other cases have also held that public records created by law-enforcement and governmental agencies to be “business records” and thus nontestimonial under *Crawford*. E.g., *Durio*, 794 N.Y.S.2d 863; *Kanhai*, 797 N.Y.S.2d 870; *Norman*, 125 P.3d 15; *Mitchell*, 191 S.W.3d 219.

94. Admittedly without defining what exactly the Court means by “business record,” though, the context in which the statement was made, as well as Justice Scalia’s originalist view of the Constitution, strongly imply a definition of business records as understood by the Framers. Such an understanding was that of records admissible at time under the “shop book” exception to the hearsay rule, a much more limited exception compared to modern day business-records exceptions. At least one court, however, was lead to the conclusion that the Court was speaking of “the present day business record exception as codified in Federal Rules of Evidence 803(6).” *Durio*, 794 N.Y.S.2d at 867. Such a distinction, however, should be immaterial because in the context of *Crawford* neither exception would include so-called business records created by governmental agencies.



'reliability.'"<sup>95</sup> Yet regarding business records as nontestimonial does exactly this. This is particularly so given the differing standards of state business-records exceptions. All hearsay exceptions are based on a belief that a particular type of out-of-court statement is reliable. Thus, deeming certain exceptions nontestimonial is placing the Confrontation Clause at the whim of a *substantive*-reliability standard provided for in *Roberts* and shunned by the Court in *Crawford*. Under *Crawford*, where testimonial hearsay is concerned, reliability is to be tested *procedurally* by "the crucible of cross-examination,"<sup>96</sup> not by an a priori determination that certain types of records are reliable.

Very importantly, it is not clear how a public record, whether treated as a business record or not, is to be analyzed under *Crawford*. Both *Crawford* and *Davis* involve out-of-court statements by witnesses to law-enforcement officers. Laboratory reports, however, are usually created *within* a law-enforcement agency.<sup>97</sup> The intra-law-enforcement hearsay statements contained in the laboratory report do not fit neatly within the framework of *Crawford* and *Davis*. One can argue that if statements to police officers by out-of-court witnesses are testimonial then, a fortiori, statements made by law enforcement in laboratory reports without an opportunity to cross the preparer must be testimonial because such statements pose an even greater risk of law-enforcement misfeasance. One could argue that the report is even more repugnant than the letter admitted into evidence against Sir Walter Raleigh written by Lord Cobham (Raleigh's alleged accomplice in treason)<sup>98</sup> in that it is akin to a letter written by a peace officer stating "Sir Walter Raleigh is a traitor" offered to prove Raleigh guilty of treason. The logic, however, does not hold up when faced with the reality that a criminal defendant's admission to a crime made to a police officer is admissible in evidence for the truth of the matter asserted. The inconsistency is even more apparent when one considers that the statement in *Crawford* found to be testimonial and inadmissible was recorded. It is clear that simply because the risk of "flagrant inquisitorial practices"<sup>99</sup> is greater (the situation, to put it crudely, is "worse-er") does not necessarily mean that a

---

95. *Crawford v. Washington*, 541 U.S. 36, 61 (2004); *see also id.*, 541 U.S. at 51 ("Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.").

96. *Id.* at 61.

97. Not all reports are created by law enforcement per se. Some are created by governmental agencies arguably not part of law enforcement and yet others are created by independent laboratories at the request of law enforcement. The analytical effects of such distinctions are discussed *infra* Part IV.C.4. For purposes of this discussion, the author assumes the report is created by a law-enforcement agency.

98. *Crawford*, 541 U.S. at 44.

99. *Id.* at 51.

statement is testimonial. For if a *recorded* statement to the police is testimonial and therefore inadmissible and yet an *unrecorded* statement purportedly made by the very person the government is attempting to prove committed a crime is nontestimonial and admissible through the testimony of the police officer to whom the statement was allegedly made, the “worse-er” logic completely fails.<sup>100</sup>

It is true that an admission of a party-opponent is *defined* as not hearsay under the Federal Rules of Evidence and many state-evidence rules.<sup>101</sup> This definition, however, is completely artificial, and there is no doubt such an admission would fit the definition of hearsay as the Framers understood the term. The traditional rationale for admitting admissions of a party opponent is “because he [the party-opponent] himself is in that case the only one to invoke the hearsay rule and because he *does not need to cross-examine himself*.”<sup>102</sup> But, given the novel underlying premise of *Crawford* that in-court police testimony given under oath cannot be properly evaluated by a jury,<sup>103</sup> and given the overarching fear of abusive governmental tactics, the rationale for admissions of party opponents being treated as not hearsay and admissible is undermined. If the police lie about what a defendant told them, the jury will likely overvalue the officer’s testimony. In such a case, the criminal defendant would be faced with quite the Hobson’s choice: either hope the jury will not overvalue the officer’s testimony (which *Crawford* presumes they will) or take the stand and waive his Fifth Amendment right against self-incrimination, which is unlikely to help because the

---

100. This problem is not unique to laboratory reports admitted as business records. This logical inconsistency undermines any analysis of laboratory reports whether the court finds such reports to be testimonial or nontestimonial.

101. FED. R. EVID. 801(d)(2).

102. 4 JOHN HENRY WIGMORE, ON EVIDENCE § 1048(2), at 4 (James H. Chadbourne rev. 1972). Wigmore further explains:

The theory of the hearsay rule is that an extrajudicial assertion is excluded unless there has been sufficient opportunity to test the grounds of assertion and the credit of the witness, by cross-examination by the party against whom it is offered . . . . [A party] cannot complain of lack of opportunity to cross-examine himself before his assertion is admitted against him. Such a request would be absurd. Hence the objection of the hearsay rule falls away, because the very basis of the rule is lacking, viz, the need and prudence of affording an opportunity of cross-examination.

In other words, the *hearsay rule is satisfied*; [the party] has already had an opportunity to cross-examine himself or (to put it another way) he now as the opponent has the full opportunity to put himself on the stand and explain his former assertion.

*Id.* at 4–5 (citation omitted). The above statement itself shows that *Crawford* is untenable when extended to its logical conclusion. If admissions of party opponents are admissible based on the *hearsay* rule under *Crawford*, they must still past muster under Confrontation Clause analysis, which as shown in the text above is not a forgone conclusion.

103. See *supra* Part III.

jury will still overvalue the officers testimony. Such a choice results in a de facto stripping of the defendant's Fifth Amendment rights, as all he can do is take the stand and try to negate the deceitful officer's testimony that is *presumed* to be overvalued by the jury. Thus, one has two options when confronted with the logical breakdown of *Crawford* in the face of admissions of party-opponents: either admit that admissions of a party-opponent are testimonial under *Crawford* and thus inadmissible or find some necessarily artificial limit to the logic of *Crawford* in order to save admissions of party-opponents from Confrontation Clause analysis. If forced to make such a choice, it is extremely likely that the Supreme Court will choose the latter.<sup>104</sup> It is also likely that the *Crawford* majority did not intend to require the preparer of breath-test-machine certifications to have to testify in every driving-while-intoxicated case like *Godshalk* or to give the defendant an opportunity to demand the preparer of the report to testify.<sup>105</sup> This, however, creates a serious line drawing problem. In cases where the laboratory report is a central feature, like with DNA analysis, or where there is a great likelihood of mistake or fabrication, it seems prudent to require the person who performed the test to testify. The problem is that *Crawford* does not lend itself to subtle line drawing—at least if such lines are to retain any semblance of logical consistency with the rationale of the case. It is easy to see why many courts faced with the practical implications of *Crawford* are eager to take the easy way out of this complex conundrum and find laboratory reports nontestimonial as business records.

Another problem presented by the business-records language in *Crawford* is that, even if business records are treated as purely business records as opposed to public records, which are also business records, under what category do reports prepared by private laboratories at the request of law enforcement fall? The question becomes even more convoluted when a private laboratory prepares the report at the request of a governmental agency that is arguably not part of law enforcement. This, of course, begs the question: Which governmental agencies are within the purview of *Crawford*?

In *People v. Meekins*, the defendant was charged with and con-

---

104. See *Torres v. Roberts*, No. 06-3237-KHV, 2007 U.S. Dist. LEXIS 41198, at \*28 (D. Kan. June 5, 2007) ("After *Crawford*, most courts addressing this issue have found that a party's own admission offered against him can be admitted without the right to cross-examination."); see also *id.* (collecting cases).

105. A number of statutes afford the defendant a right to subpoena the preparer of laboratory reports to be cross-examined as an adverse witness. See, e.g., *Commonwealth v. Williams*, No. 04-451, 2005 WL 3007781 (Va. Cir. Ct. Nov. 10, 2005). An analysis of validity of such procedures as applied to situations where the report would otherwise be testimonial hearsay and inadmissible absent unavailability and a prior opportunity to cross under *Crawford* is beyond the scope of this paper.

victed of sodomy and sexual abuse.<sup>106</sup> At trial, a report containing the results of DNA testing conducted on samples from the complainant's rape kit created by an independent private laboratory was admitted over the defendant's Confrontation Clause objection. The report was offered through the testimony of a DNA analysis expert employed by the private laboratory and a DNA expert employed by the Medical Examiner's Office of the City of New York. Although the private laboratory expert supervised the employees who performed the tests, she was not personally involved in the testing. The city employee testified that the report was "prepared in the regular course of business of the medical examiner's office and its contracted agencies" and that it was "the regular course of business for the medical examiner's office, as well as its contracted agencies, to make and keep such records."<sup>107</sup> In finding the report to have been properly admitted under the New York business-records exception to the hearsay rule and a purported business-records exception to the Confrontation Clause, the court held that "[a]lthough neither [of the above-mentioned witnesses] performed the testing, their testimony revealed their familiarity with the business practices and procedures of the private laboratory, and thus they properly set forth a foundation for admission of the records."<sup>108</sup>

Although private laboratories certainly are "businesses" within the narrow definition of the term presumably intended by the *Crawford* majority, their relationship with the government and law enforcement provides cause for concern. Under the *Crawford* rationale, not only is there a fear of influence by the government on the putatively "independent" laboratory, there is also a monetary incentive for such private laboratories to acquiesce to governmental and law-enforcement requests. Given *Crawford*'s fear of governmental, or, at least, of law-enforcement overreaching, to allow the government to avoid the strictures of *Crawford* by simply contracting out laboratory testing should not be permitted. Yet on a strictly definitional level, private laboratories are "private" as opposed to "governmental" and one can reasonably argue that their

---

106. 828 N.Y.S.2d 83, 84 (App. Div. 2006).

107. *Id.* (internal quotation marks omitted). One should note that the approach of having a supervisor testify to the reliability of a report was a tactic used under *Roberts* to admit laboratory reports in lieu of the preparer's testimony. This was more palatable when the question was not whether the report was testimonial but rather whether it was reliable. Under *Crawford*, a court admitting a laboratory report through supervisor testimony needs first to find the report to be nontestimonial because if the report is testimonial presumably the testimony of the person who performed the tests and prepared the report is necessary. See, e.g., *People v. Grogan*, 816 N.Y.S.2d 93 (App. Div. 2006) (admitting as a business record a laboratory report through testimony of supervisor).

108. 828 N.Y.S.2d at 84-85 (citations omitted).

nongovernmental status exempts them from *Crawford* despite their working relationship with, and pecuniary connection to, the government.

In *People v. Durio*, the defendant was convicted of murder.<sup>109</sup> At trial, an autopsy report prepared by a medical examiner employed by the Office of the Chief Medical Examiner was admitted as a business record through the testimony of another assistant medical examiner.<sup>110</sup> The defendant moved to vacate the conviction on Confrontation Clause grounds. Denying the motion, the court held that “[a] public agency such as the Office of the Chief Medical Examiner (OCME) constitutes a ‘business’ for purposes of CPLR 4518.”<sup>111</sup> The court noted the language in *Crawford* that business records are nontestimonial. In response to the lack of a definition in *Crawford* regarding what constitutes a business record, the court found that “[the Court’s] use of the phrase, ‘by their nature’ leads to the conclusion that the Court was speaking of the present day business record exception as codified in Federal Rules of Evidence 803(6).”<sup>112</sup> This approach not only runs counter to Justice Scalia’s originalist outlook but also seems to fly in the face of common-sense statutory construction. Federal Rule of Evidence 803(8) applies to

---

109. 794 N.Y.S.2d 863 (Sup. Ct. 2005).

110. *Id.* at 865; see also N.Y. C.P.L.R. 4518(a) (Consol. 2005) (“Business records”).

111. 794 N.Y.S.2d at 868 (citations omitted).

112. *Id.* at 867; see also FED. R. EVID. 803(6), which defines “Records of Regularly Conducted Activity” as:

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, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

A number of courts have come to another conclusion regarding the definition of business record as used in *Crawford*. These courts find that the business-records reference was to business records as would be familiar to the Framers. Such records are not akin to modern business records or FED. R. EVID. 803(6). See, e.g., *Thomas v. United States*, 914 A.2d 1, 13 (D.C. 2006) (commenting on the court business-records reference in *Crawford*; “[T]his observation about the historical business records exception does not mean that everything qualifying as a ‘business record’ now is automatically non-testimonial for Confrontation Clause purposes. . . . Traditionally, the historical business records exception did not encompass records prepared for use in litigation, let alone records produced *ex parte* by government agents for later use in criminal prosecutions.”); *State v. Miller*, 144 P.3d 1052, 1058 (Or. Ct. App. 2006) (finding a laboratory report testimonial; “[S]uch a record [would] not fit the common-law exception for business records that would have been familiar to the framers of the Sixth Amendment.”), *reconsideration allowed, former opinion adhered to* 149 P.3d 1251 (Or. Ct. App. 2006).

“Public Records and Reports.”<sup>113</sup> Given the inclusion in the Federal Rules of Evidence of a rule pertaining solely to Public Records, one would assume that the drafters intended all records created by public offices or agencies to be analyzed under the exception pertaining to them.<sup>114</sup> *Crawford* states that “[t]he involvement of government officers

---

113. FED. R. EVID. 803(8), the hearsay exception for “Public Records and Reports,” 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.

114. This would seem to be the approach that the Rules’ drafters intended. But regarding the approach taken to laboratory reports in Federal courts under the Federal Rules of Evidence, Professor Michael H. Graham notes that

[a] particular problem arises with respect to forensic laboratory reports. The plain meaning of the exclusions in Rule 803(8) incorporates such reports, i.e., makes them inadmissible when offered by the government. However, where the laboratory technician who personally conducted the tests testifies on personal knowledge, subject to cross-examination, it seems reasonable to also permit introduction of the forensic laboratory report itself. A much more difficult situation arises when the person actually conducting the test is unavailable. A proposal to admit forensic laboratory reports under such circumstances was made as part of the legislative process leading up to the enactment of the Federal Rules of Evidence but not included in the final version. Faced with such circumstances, some courts have sanctioned admissibility upon the testimony of the supervisor of the unavailable laboratory technician as an “other qualified witness” pursuant to Rule 803(6).

4 GRAHAM, *HANDBOOK*, *supra* note 8, § 803.8, at 348 (footnotes omitted). The rejected proposal to admit laboratory reports was offered by the Senate Committee on the Judiciary and would have been included in the Rules as FED. R. EVID. 804(b)(5). It read:

(5) Criminal Law Enforcement Records and Reports.—Records, reports, statements or data compilations in any form, of police and other law enforcement personnel where such officer or person is unavailable, as unavailability is defined in subparts (a) (4) and (a) (5) of this Rule.

S. REP. NO. 93-1277, at 4 (1974). This proposal was rejected in a Joint Explanatory Statement of the Committee of Conference, which reads:

*C. Rule 804(b) (5)—Criminal Law Enforcement Records and Reports*

The Senate amendment adds a new hearsay exception, not contained in the House bill, which provides that certain law enforcement records are admissible if the officer-declarant is unavailable to testify or be present because of (1) death or physical or mental illness or infirmity or (2) absence from the proceeding and the proponent of the statement has been unable to procure his attendance by process or other reasonable means.

The Conference *does not* adopt the Senate amendment, preferring instead to leave the bill in the House version, which contained no such provision.

H.R. REP. NO. 93-1597, at 12 (1974) (Conf. Rep.) (emphasis added). This rejection strongly implies that Congress did not intend to allow “police and other law enforcement personnel” reports to be admissible under 803(6). Such admission clearly usurps the legislative intent to require such evidence to be offered through the testimony of the person who prepared such a record. This, however, begs the question whether reports prepared by “public offices or agencies”

in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.”<sup>115</sup> Whether “government officers” in juxtaposition to the latter part of the above-quoted sentence is meant to include governmental agencies such as the medical examiner’s office is less than clear. The *Crawford* majority, however, points out that “England did not have a professional police force until the 19th century, so it is not surprising that other government officers performed the investigative functions now associated primarily with the police.”<sup>116</sup> It is reasonable to assume that governmental agencies, including medical examiner’s offices, are within the purview of *Crawford* at least to the extent they perform “investigative functions” such as determining cause of death.<sup>117</sup> Despite the *Durio* court’s assertion that the Office of the Chief Medical Examiner is “not a law enforcement agency and is ‘by law, independent of and not subject to the control of the office of the prosecutor,’ ”<sup>118</sup> such a distinction would not have been made in seventeenth-century England.

The government is the government. Under *Crawford*, the citizenry must be protected from its “flagrant inquisitorial practices.” That “by law” an agency is independent does not mean that it is not susceptible to committing abuse on its own accord or in aid of fellow governmental agencies.

---

(as opposed to “police and other law enforcement personnel”) and inadmissible under 803(8)(B) and (C) were intended to be treated similarly. Given the clear distinction between “Records of Regularly Conducted Activity” and “Public records and Reports” it is very reasonable to assume that if a report is inadmissible under 803(8) (B) or (C) the government should not be able to use 803(6) as a back door to admissibility.

115. *Crawford v. Washington*, 541 U.S. 36, 53 (2004).

116. *Id.* (citation omitted).

117. Under the Federal Rules of Evidence, such “factual findings” should be analyzed according to the principles of FED. R. EVID. 803(8) (B) and (C), not FED. R. EVID. 803(9), which provides a hearsay exception for “Records of Vital Statistics.” See 4 GRAHAM, HANDBOOK, *supra* note 8, § 803.9, at 378. Additionally, Professor Graham has noted:

Justice Scalia in *Crawford* thus sought to formulate a theoretical construct of the Confrontation Clause that at a minimum encompasses its primary objective of barring the admissibility of formal statements arising from *ex parte* judicial examination or police interrogation of witnesses initiated by *government officials* in anticipation or in aid of potential criminal litigation whenever the out-of-court declarant of such statement fails to testify at the criminal trial subject to cross-examination.

Graham, *Special Report*, *supra* note 4, at 74 (emphasis added) (footnote omitted).

118. *People v. Durio*, 794 N.Y.S.2d 863, 868 (Sup. Ct. 2005); see also *People v. Brown*, 801 N.Y.S.2d 709, 711 (Sup. Ct. 2005) (“The notes and records of the laboratory technicians who tested the DNA samples . . . were not made for investigative or prosecutorial purposes but rather were made for the routine purpose of ensuring the accuracy of the testing done in the laboratory and as a foundation for formulating the DNA profile.”).

## 2. THE ABOVE-QUOTED BUSINESS-RECORDS REFERENCE IN *CRAWFORD* IS DICTUM

When faced with the question whether a laboratory report is testimonial, a number of courts have determined that the reference to business records in *Crawford* is dictum and yet admit the report as a nontestimonial business record.<sup>119</sup> These courts necessarily tend to rely more heavily on other justifications for finding a report to be nontestimonial than courts finding the *Crawford* reference to be a holding. That the report is deemed a business record is often used to bolster other arguments that laboratory reports are nontestimonial. Yet when a court relies on the business-records reference, even as dictum, it runs into the same problems described in Part I.<sup>120</sup>

In *Rollins v. State*, the defendant was convicted of murder.<sup>121</sup> The medical examiner who performed an autopsy on the victim and prepared a report was unavailable. The report was admitted through the testimony of another deputy medical examiner with the Office of the Chief

---

119. See *Rollins v. State*, 897 A.2d 821, 835 (Md. 2006) (autopsy report redacted to contain only routine, descriptive, and not analytical hearsay is nontestimonial; “[T]he Supreme Court indicated in *Crawford* that the hearsay exceptions, such as the business records exception, can exempt evidence from scrutiny under the Confrontation Clause.”); *Commonwealth v. Verde*, 827 N.E.2d 701, 705 (Mass. 2005) (lab technician drug-analysis report is nontestimonial; “[*Crawford*] suggest[s] in dictum that . . . business or official record[s] would not be subject to its holding as this exception was well established in 1791. . . . One acknowledged exception to the confrontation clause is a public record, ‘an ancient principle of the common law, recognized at the time of the adoption of the Constitution.’”); *State v. Forte*, 629 S.E.2d 137, 143 (N.C. 2006) (State Bureau of Investigation DNA Report is nontestimonial; “[T]he Supreme Court in *Crawford* indicated in dicta that business records are not testimonial.”); *State v. Cao*, 626 S.E.2d 301, 304 (N.C. Ct. App. 2006) (laboratory report indicating that substance is crack is nontestimonial though some such reports may be testimonial; “*Crawford* suggests that business records ‘by their nature’ may not be testimonial.”); *Vill. of Granville v. Eastman*, No. 2006CA00050, 2006 Ohio App. LEXIS 6213, at \*9–11 (Ct. App. Nov. 27, 2006) (packet of documents containing certification breath-test machine working properly and officer certification to perform test documents, at least according to dicta in *Crawford* business records are nontestimonial); *State v. Greene*, No. CA2005-12-129, 2006 Ohio App. LEXIS 6053, at \*7 (Ct. App. Nov. 20, 2006) (Ohio Department of Health senior operator’s certificate and solution-batch certificate for breath-test machine are nontestimonial; “The U.S. Supreme Court stated, in dicta, that business records are not testimonial.”); *State v. Cook*, No. WD-04-029, 2005 Ohio App. LEXIS 1514, at \*9 (Ct. App. Mar. 13, 2005) (packet of documents containing certification breath-test machine working properly and officer certification to perform test; “[W]e conclude that the records are business records, which, at least according to dicta in *Crawford*, are not testimonial.”); *State v. Thackaberry*, 95 P.3d 1142, 1145 (Or. Ct. App. 2004) (toxicologist report signed by Department of State Police is likely to be considered admissible because “*Crawford* suggested in dictum [business and official records] would not be subject to its holding” and under plain-error analysis it is up to reasonable dispute whether admission of the report was error); see also *Commonwealth v. Melendez-Diaz*, 870 N.E.2d 676 (Mass. App. Ct. 2007), cert. granted, 76 U.S.L.W. 3496 (U.S. Mar. 17, 2008) (No. 07-591).

120. See *supra* Part I.

121. 897 A.2d at 823.



Medical Examiner. In a painstaking thirty-two-page opinion, the Court of Appeals of Maryland found that the report, as redacted, was nontestimonial and properly admitted under the Maryland business-<sup>122</sup> and public-<sup>123</sup> records exceptions. The report was redacted so as not to include any “contested opinions, speculations, and conclusions drawn from the objective findings.”<sup>124</sup> Because of this redaction of “opinion statements,” the court rejected the petitioner’s contention that “an autopsy report is *per se* testimonial”<sup>125</sup> and held that,

[i]f the autopsy report contains only findings about the physical condition of the decedent that may be fairly characterized as routine, descriptive and not analytical, and those findings are generally reliable and are afforded an indicum of reliability, the report may be admitted into evidence without the testimony of its preparer, and without violating the Confrontation Clause. If the autopsy report contains statements which can be categorized as contested opinions or conclusions, or are central to the determination of the defendant’s guilt, they are testimonial and trigger the protections of the Confrontation Clause, requiring both the unavailability of the witness and prior opportunity for cross-examination.<sup>126</sup>

Not only does this decision base a finding of whether a statement is testimonial on a court-made determination of reliability, an approach expressly rejected in *Crawford*,<sup>127</sup> it also leaves the Confrontation Clause to the “vagaries of the rules of evidence.”<sup>128</sup> Assuming, *arguendo*, that a medical examiner’s office is capable of producing testimonial statements,<sup>129</sup> under the court’s rationale, certain statements, if they

122. *Id.* at 837; *see also* MD. R. EVID. 5-803(b)(6) (“Records of Regularly Conducted Business Activity”).

123. 897 A.2d at 837–38; *see also* MD. CODE ANN., STATE GOV’T § 10-611(g)(1) (West 2007) (“Public record”). Public records are admissible as an exception to the hearsay rule under MD. R. EVID. 5-803(b)(8) (“Public Records and Reports”).

124. 897 A.2d at 834.

125. *Id.* at 844.

126. *Id.* at 845–46.

127. *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (one of the vices of the *Roberts* approach is that it “allows a jury to hear evidence . . . based on a mere judicial determination of reliability”).

128. The *Rollins* court expressly referenced this language in *Crawford*. 897 A.2d at 829.

129. This argument is not far fetched given a medical examiner’s responsibilities under Maryland law:

(a)(1) A medical examiner shall *investigate* the death of a human being if the death occurs:

(i) By violence;

(ii) By suicide;

(iii) By casualty;

(iv) Suddenly, if the deceased was in apparent good health or unattended by a physician; or

(v) In any suspicious or unusual manner.

meet the strictures of the business- or public-records exceptions, will be nontestimonial. Other statements collected or created by the medical examiner or similar governmental entities may be testimonial simply because they do not fit within such exceptions. For example, if a medical examiner while performing an autopsy made a so-called “objective” present-sense impression<sup>130</sup> utterance to a fellow examiner, such a statement would be inadmissible because it does not fit the *Crawford* dictum referring to business records. Yet the same statement, when put in a report constituting a business or public record under the Maryland rules of evidence, would be admissible simply because it fits within certain hearsay exceptions which are arbitrarily deemed nontestimonial. As a result, the Confrontation Clause is left not only to the “vagaries of the rules of evidence” but to certain rules of evidence and not others, without any apparent rationale. Additionally, there is no basis in *Crawford* or *Davis* for differentiating between “objective” and “opinion” statements.

To the *Rollins* court’s credit, there is no logical way to analyze autopsy reports under *Crawford*. If the Office of the Chief Medical Examiner is a part of the government subject to *Crawford* analysis, then under the “worse-er” rationale the report should be inadmissible in lieu of unavailability and a prior opportunity to cross the preparing examiner. But the “worse-er” rationale does not pass logical muster when faced with the admissibility of an admission of a party-opponent made by the criminal defendant to a police officer. Avoiding this difficulty, other courts argue that laboratories such as medical examiner’s offices are, in fact, not part of the “government” as contemplated in *Crawford*. The merits of this argument are discussed *infra*.<sup>131</sup>

Some state courts find that laboratory reports are, or arguably may be, business records, yet after further analysis they determine the report in question to be testimonial under *Crawford*.<sup>132</sup> The analysis of these

---

MD. CODE ANN., HEALTH-GEN. § 5-309 (West 2007) (emphasis added).

130. Present-sense impressions are an exception to the hearsay rule. FED. R. EVID. 803(1).

131. See discussion *infra* notes 216–21 and accompanying text.

132. See *State v. Moss*, 160 P.3d 1143, 1149–50 (Ariz. Ct. App. 2007) (blood test prepared by nontestifying criminalist from private laboratory on which expert based testimony is testimonial; “The Supreme Court suggested in dicta in *Crawford* that business records are non-testimonial. . . . [H]owever, the application of the Confrontation Clause is not controlled by state evidence law.”), *review denied, opinion depublished*, 173 P.3d 1021 (Ariz. 2007); *Hinojos-Mendoza v. People*, 169 P.3d 662, 666 (Colo. 2007) (laboratory report is testimonial; “*Crawford*’s dictum regarding the historic business records hearsay exception does not mean that any document which falls within the modern-day business records exception is automatically nontestimonial.”); *Belvin v. State*, 922 So. 2d 1046, 1051 (Fla. 4th Dist. Ct. App. 2006) (breath-test affidavit created by technician who administered breath test is testimonial; “[S]tatutory listing of breath test affidavits under the public records and reports exception to the hearsay rule does not control whether they are testimonial under *Crawford*.”); *id.* at 1054 (certifying question: “Does admission of those portions

courts goes beyond whether a laboratory report is a business or public record and looks to other factors that lead them to deem the report testimonial. Making such a decision, however, often does not sit well with these courts. After finding reports to be testimonial, lower state courts in Florida and Ohio requested that their respective highest courts review questions regarding whether, in fact, the reports are testimonial.<sup>133</sup> This

---

of the breath test affidavit pertaining to the breath test operator's procedures and observations in administering the breath test constitute testimonial evidence and violate the Sixth Amendment's Confrontation Clause in light of the United States Supreme Court's holding in *Crawford v. Washington*?" (citation omitted), *certifying question to* 928 So. 2d 336 (Fla. 2006); *Johnson v. State*, 929 So. 2d 4, 8–9 (Fla. 2d Dist. Ct. App. 2005) (laboratory report created by the Florida Department of Law Enforcement is testimonial; "The business records exception may have been the vehicle for admitting the report, but the vehicle does not determine the nature of the out-of-court statement. . . . The out-of-court statement does not lose its testimonial nature merely because it is contained in a business record.") (certifying question: "Does the admission of a Florida Department of Law Enforcement lab report establishing the illegal nature of substances possessed by the defendant violate the Confrontation Clause and *Crawford v. Washington*, when the person who performed the lab test did not testify?") (citation omitted), *certifying question to* 924 So. 2d. 810 (Fla. 2006); *State v. March*, 216 S.W.3d 663, 665 (Mo. 2007) (laboratory report is testimonial; noting that the business-records exception referred to in *Crawford* was the narrow exception in existence at the time of the Founding and finding that cases deeming business records to be per se nontestimonial "incorrectly focus on the reliability of such reports"); *People v. Orpin*, 796 N.Y.S.2d 512, 516 (Just. Ct. 2005) (inspection, maintenance, and calibration records of breath-test machine prepared by state division of criminal justice and certification of analysis of stimulator solution prepared by state-police forensic investigation center are testimonial; "[B]usiness records are subject to the same confrontation demands as other out-of-court statements."), *rev'd sub. nom.* *Green v. DeMarco*, 812 N.Y.S.2d 722 (Sup. Ct. 2005); *People v. Hernandez*, 794 N.Y.S.2d 788, 789 (Sup. Ct. 2005) (latent fingerprint card is testimonial; "[T]he People's contention that the Supreme Court would sanction the admission into evidence of the Latent Print Report because it is a business record ignores the inconvenient fact that under Rule 803(8) of the Federal Rules of Evidence the report would not be admitted in federal trials . . .").

133. See *Belvin v. State*, 922 So. 2d 1046, 1051 (Fla. 4th Dist. Ct. App. 2006) (breath-test affidavit created by technician who administered breath test is testimonial; "[S]tatutory listing of breath test affidavits under the public records and reports exception to the hearsay rule does not control whether they are testimonial under *Crawford*"); *id.* at 1054 (certifying question: "Does admission of those portions of the breath test affidavit pertaining to the breath test operator's procedures and observations in administering the breath test constitute testimonial evidence and violate the Sixth Amendment's Confrontation Clause in light of the United States Supreme Court's holding in *Crawford v. Washington*?" (citation omitted), *certifying question to* 928 So. 2d 336 (Fla. 2006); *Johnson v. State*, 929 So. 2d 4, 8–9 (Fla. 2d Dist. Ct. App. 2005) (laboratory report created by the Florida Department of Law Enforcement is testimonial; "The business records exception may have been the vehicle for admitting the report, but the vehicle does not determine the nature of the out-of-court statement. . . . The out-of-court statement does not lose its testimonial nature merely because it is contained in a business record.") (certifying question: "Does the admission of a Florida Department of Law Enforcement lab report establishing the illegal nature of substances possessed by the defendant violate the Confrontation Clause and *Crawford v. Washington*, when the person who performed the lab test did not testify?" (citation omitted), *certifying question to* 924 So. 2d. 810 (Fla. 2006); *State v. Crager*, 844 N.E.2d 390, 397–99 (Ohio Ct. App. 2005) (DNA test report is testimonial), *certifying question to* 846 N.E.2d 532 (Ohio 2006) (court determines conflict exists, ordering parties to brief issue: "Are records of scientific tests, conducted by a government agency at the request of the State for the specific purpose of being used as evidence in the criminal prosecution of a specific individual,

discomfort is presumably generated by what the courts correctly perceive to be a lack of a sufficient answer provided by *Crawford* and *Davis*, as well as the practical ramifications of the inadmissibility of the reports.

### B. *Reliability of the Laboratory Report*

In *Ohio v. Roberts*, the Court based its Confrontation Clause analysis of the admissibility of hearsay in a criminal trial on whether the statement contained “indicia of reliability” or “particularized guarantees of trustworthiness.”<sup>134</sup> But in rejecting *Roberts*,<sup>135</sup> the Supreme Court stated that the Framers did not intend to leave the Sixth Amendment’s protections “to amorphous notions of ‘reliability.’”<sup>136</sup> Instead the ultimate goal of the Clause “is to ensure reliability of evidence, but it is a *procedural* rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: *by testing in the crucible of cross-examination.*”<sup>137</sup> Nothing in *Davis* undermined this holding. In fact, *Davis* made it clear that even when an excited utterance<sup>138</sup> is made to law enforcement and the entire intercourse with the declarant recorded, the statement is testimonial if “the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”<sup>139</sup> The underlying premise of *Crawford* and *Davis* is that, when there is governmental involvement, a statement is *presumed* unreliable and therefore the declarant must be subjected to cross-examination. In spite of this, however, many courts still look to reliability in determining whether a laboratory report is testimonial.

#### 1. LABORATORY REPORTS ARE ROUTINE AND THEREFORE NONTESTIMONIAL; WHETHER A REPORT IS ROUTINE IS NOT A PROPER INQUIRY UNDER CRAWFORD

Some courts rely on the fact that laboratory reports are routine in

---

‘testimonial’ under *Crawford v. Washington*?”) (citation omitted), *overruled by* 879 N.E.2d 745 (Ohio 2007).

134. 448 U.S. 56, 66 (1980).

135. For “testimonial hearsay” in *Crawford* and outright in *Davis*.

136. *Crawford v. Washington*, 541 U.S. 36, 61 (2004). The court also emphatically states that “[d]ispensing with confrontation because testimony is *obviously* reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.” *Id.* at 62 (emphasis added).

137. *Id.* at 61 (emphasis added).

138. Excited utterances are presumed reliable under the rules of evidence, and they are not excluded by the hearsay rule. FED. R. EVID. 803(2).

139. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

deeming them reliable and therefore nontestimonial.<sup>140</sup> Assuming, arguendo, that reports created by governmental agencies are capable of being testimonial, the routine character of their preparation is wholly irrelevant under *Crawford*. As shown above, it is clear that whether a statement is substantively regarded as routine and thus reliable is irrelevant to any analysis under *Crawford*. The declarant must be cross-examined and thus a jury must deem the statement reliable following a specific procedural insurance of reliability: cross-examination.

In *State v. Lackey*, an autopsy report was admitted through the testimony of a coroner who did not prepare the report because the preparing physician was deceased.<sup>141</sup> The report was admitted at trial under a Kansas hearsay exception called “Contemporaneous statements and statements admissible on ground of necessity generally.”<sup>142</sup> On appeal, the defendant challenged the admissibility of the report under the Confrontation Clause. The court found that “[s]ince a copy of the autopsy

---

140. See *People v. Geier*, 161 P.3d 104, 140 (Cal. 2007) (DNA report created on state request by private laboratory is nontestimonial; “[The nontestifying technician’s report] w[as] made during a routine, non-adversarial process meant to ensure accurate analysis . . .”) (citation and internal quotation marks omitted); *People v. Moline*, No. D049262, 2007 Cal. App. Unpub. LEXIS 9933, at \*25–26 (Ct. App. Dec. 10, 2007) (laboratory report is nontestimonial; “[A] laboratory analyst recording test data during a routine, non-adversarial process meant to ensure accurate analysis was not bear[ing] witness against the defendant within the meaning of the *Crawford* rule.”) (second alteration in original) (citation and internal quotation marks omitted); *In re D.H.*, No. A116095, 2007 Cal. App. Unpub. LEXIS 8214, at \*11 (Ct. App. Oct. 11, 2007) (laboratory report is nontestimonial; “[S]uch analyses are generated as part of a standardized scientific protocol; are conducted pursuant to the analyst’s profession and during a routine, nonadversarial process meant to ensure accurate analysis . . .”); *Jarrell v. State*, 852 N.E.2d 1022, 1025 (Ind. Ct. App. 2006) (certificate created by State Department of toxicology stating breath-test machine has been inspected and certified is nontestimonial; “[T]he certificates serve an administrative function and are prepared in a routine manner.”); *State v. Lackey*, 120 P.3d 332, 351 (Kan. 2005) (autopsy report is nontestimonial; “[A]utopsy reports generally make routine and descriptive observations of the physical body in an environment where the medical examiner would have little incentive to fabricate the results.”), *overruled* by *State v. Davis*, 158 P.3d 317 (Kan. 2006); *State v. Anderson*, 942 So. 2d 625, 629 (La. Ct. App. 2006) (autopsy report is nontestimonial; “The information in the autopsy report was routine, descriptive, and nonanalytical; i.e., it was nontestimonial in nature . . .”); *Rollins v. State*, 897 A.2d 821, 845–46 (Md. 2006) (autopsy report as redacted is nontestimonial; “If the autopsy report contains only findings about the physical condition of the decedent that may be fairly characterized as routine, descriptive and not analytical, and those findings are generally reliable and are afforded an indicum of reliability, the report may be admitted into evidence without the testimony of its preparer, and without violating the Confrontation Clause.”); *Commonwealth v. Williams*, No. 04-451, 2005 WL 3007781, at \*3 (Va. Cir. Ct. Nov. 10, 2005) (certificate of analysis from Virginia Department of Forensic Science is nontestimonial; “The legislature of Virginia, in enacting [a state statute allowing admissibility of such certificates and providing the defendant a right to summon the technician] recognized that certificates of analysis present the same qualifications of routine and reliability that support documentary evidence entered under the business records exception.”).

141. 120 P.3d at 345–46.

142. *Id.* at 343; see also KAN. STAT. ANN. § 60-460(d) (West 2006) (“Contemporaneous statements and statements admissible on ground of necessity generally.”).

report was required to be filed with the clerk of the district court . . . it follows that the autopsy report would also qualify as a copy of an official record.”<sup>143</sup> In light of the practical ramifications of a per se rule requiring the preparing coroner to testify, the court found the report to be nontestimonial in part because autopsy reports “generally make *routine* and descriptive observations of the physical body.”<sup>144</sup> Under the court’s “approach, factual, routine, descriptive, and nonanalytical findings made in an autopsy report are nontestimonial and may be admitted without the testimony of the medical examiner.”<sup>145</sup> Such routine findings were contrasted with “contested opinions, speculations, and conclusions” that the court deemed testimonial.<sup>146</sup> Not only is this approach wrong in that it bases the testimonial–nontestimonial analysis on reliability, but it leaves the court broad discretion to make ad hoc determinations of “routine-ness” and thus is a “malleable standard [that] often fails to protect against paradigmatic confrontation violations.”<sup>147</sup>

Other courts, however, recognize that being routine or reliable is not a factor to consider under *Crawford*.<sup>148</sup> Assuming intragovernmental statements are subject to analysis under *Crawford*, these courts correctly state that reliability is not a factor to be considered. This being the case, all intragovernmental statements will be testimonial, something that courts relying on reliability as a factor quite reasonably want to avoid.

---

143. 120 P.3d at 348; *see also* KAN. STAT. ANN. § 60-460(o) (West 2006) (“Content of official record”).

144. 120 P.3d at 351 (emphasis added).

145. *Id.*

146. *Id.*

147. *Crawford v. Washington*, 541 U.S. 36, 60 (2004). It should be noted that the discretion permitted under *Roberts* is far from completely eliminated under *Crawford*. One needs to look no further than to *Davis* and the necessity a court has to determine whether the primary purpose of an interrogation is “to meet an ongoing emergency” or to “establish or prove past events potentially relevant to later criminal prosecution.” *Davis v. Washington*, 547 U.S. 813, 822 (2006). Simply because this determination is to be made from circumstances “objectively” viewed does not change the fact the differentiating between the two paradigmatic situations will often be far from clear.

148. *See Thomas v. United States*, 914 A.2d 1, 15 (D.C. 2006) (chemists written statement is testimonial; “Reliability no longer shields testimony from confrontation.”); *State v. Caulfield*, 722 N.W.2d 304, 309 (Minn. 2006) (laboratory report created by the Bureau of Criminal Apprehension found to be testimonial; “The state refers us to cases from other states that . . . hold that lab reports are not testimonial. . . . [T]hese cases seem to wrongly focus on the reliability of such reports.”); *State v. Smith*, No. 1-05-39, 2006 Ohio App. LEXIS 1555, at \*13 (Ct. App. Apr. 3, 2006) (finding a laboratory report to be testimonial; “[T]he Supreme Court in *Crawford* specifically rejected any notion that the reliability of the statement had any bearing on whether the statement could be considered ‘testimonial.’”).

## 2. SCIENTIFIC, MECHANICAL, AND THE LIKE MAKE LABORATORY REPORTS NONTESTIMONIAL

Some courts rely on the scientific or mechanical nature of laboratory reports in finding them to be nontestimonial.<sup>149</sup> This approach is no different from asserting that the report is reliable and therefore nontestimonial; it simply specifies the form of reliability. Yet the pressure to admit laboratory reports without the preparer's testimony often causes courts to make what seem to be blatantly contradictory statements to prevent technicians from being called every time a laboratory report is offered into evidence.

In *Bohsancurt v. Eisenberg*, the state appealed from a lower-court decision finding that "maintenance and calibration records for an Intoxilyzer 5000 breath-testing machine are testimonial."<sup>150</sup> At the outset of the opinion, the Arizona Court of Appeals, in reference to *Crawford*, stated that "[t]he Court adopted an absolute rule when 'testimonial' evidence of a witness who does not appear at trial is involved—regardless of reliability, the evidence is inadmissible unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine him or her."<sup>151</sup> Yet a mere two pages later, the court found the records to be nontestimonial and admissible as a business record partly because "the maintenance records contain factual memorializations generated by

---

149. See *Pruitt v. State*, 954 So. 2d 611, 617 (Ala. Crim. App. 2006) (certificate of analysis of substance found on defendant is nontestimonial; "[A] certificate of analysis is not based on speculation, opinion, or guesswork, but instead is founded in scientific testing to determine the physical and chemical composition of the substance and the amount or quantity of the substance."); *Bohsancurt v. Eisenberg*, 129 P.3d 471, 476 (Ariz. Ct. App. 2006) (maintenance and calibration records for a breath-test machine are nontestimonial; "[T]he maintenance records contain factual memorializations generated by a scientific machine."); *Commonwealth v. Verde*, 827 N.E.2d 701, 705 (Mass. 2005) (certificates of chemical analysis are nontestimonial; "[T]hey merely state the results of a well-recognized scientific test determining the composition and quantity of the substance."); *Green v. DeMarco*, 812 N.Y.S.2d 772, 781–82 (Sup. Ct. 2005) (certification of calibration of breath-test machine is nontestimonial; "When a technician certifies the accuracy of a breath testing instrument, he is acting no differently than an auto mechanic when he affixes an inspection sticker on a car."); *State v. Cao*, 626 S.E.2d 301, 305 (N.C. Ct. App. 2006) (laboratory report showing substance contains cocaine may be nontestimonial; "[L]aboratory reports' specification of the weight of the substances at issue would likely qualify as an objective fact obtained through a mechanical means."); *State v. Norman*, 125 P.3d 15, 18 (Or. Ct. App. 2005) (documents certifying breath-test machine had been tested for accuracy are nontestimonial; "[C]ertifications in this case do not resemble the classic kind of testimonial evidence at which the Confrontation Clause was aimed . . . . [T]he certifications are evidence about the accuracy of a test result arrived at by a machine."); *Commonwealth v. Brown*, No. 3082-05-1, 2006 Va. App. LEXIS 152, at \*10 (Ct. App. Apr. 20, 2006) (report of Sexual Assault Nurse Examiner is nontestimonial; "The report is the result of a physical examination of the victim . . . .").

150. 129 P.3d at 472.

151. *Id.* at 474.

a scientific machine.”<sup>152</sup> So what happened in two pages? It is likely that the court realized that if the prosecution was required to call the technician who performed the maintenance and calibration of the machine in every driving-while-intoxicated case, the burden on the criminal-justice system would be insufferable. Such a concern is certainly justified.<sup>153</sup> Yet if *Crawford* is extended to its logical conclusion, calling the technician would be required. It is clear, however, that the court by its own admission erred in using reliability as a rationale for finding the records to be nontestimonial. Regardless of whether the record consisted simply of a technician writing down the results of a mechanical test, the fact that the government hearsay declarant is a mere scrivener is of no moment under an honest application of *Crawford*.<sup>154</sup>

### 3. LABORATORY REPORTS: OBJECTIVE VS. SUBJECTIVE

A number of courts rely on a distinction between objective and subjective laboratory reports (and statements therein), deeming the former nontestimonial and the latter testimonial.<sup>155</sup> In *People v. Salinas*, the

152. *Id.* at 476.

153. There are other types of laboratory reports where the concern for the system is outweighed by other concerns such as risk of error, fraud, or mistake and it seems appropriate that the defendant be given the opportunity to cross-examine the person who performed the tests. *Crawford*, however, creates an all or nothing situation—if some laboratory reports are testimonial, all laboratory reports should be. Nothing in *Crawford* provides for a means to differentiate between reports created by the government that intuitively seem not to necessitate cross-examination and those that do.

154. In addition to the error in using a reliability analysis under *Crawford*, laboratory testing, though scientific, is not immune to mistake or fraud. See *Thomas v. United States*, 914 A.2d 1, 15 (D.C. 2006) (“[L]aboratories are not immune from problems of dishonesty, sloppiness, poor training, bias, unsound methodology, and scientific or other error.”); see also Andre A. Moenssens, *Forward: Novel Scientific Evidence in Criminal Cases: Some Words of Caution*, 84 J. CRIM. L. & CRIMINOLOGY 1 (1993); Flynn McRoberts & Steve Mills, *U.S. Seeks Review of Fingerprint Techniques; High-profile Errors Prompt Questions*, CHI. TRIB., Feb. 21, 2005, at 1; Leslie A. Pappas, *Crime Lab Follows Strict Rules, But Scientists Can Make Errors*, PHIL. INQ., July 18, 2003, at B4; Ruth Teichroeb, *State Patrol Fires Crime Lab Scientist; His Testimony in Montana Cited; Internal Audit Is Downplayed*, SEATTLE POST-INTELLIGENCER, Mar. 24, 2004, at B1.

155. See *Pruitt v. State*, 954 So. 2d 611, 617 (Ala. Crim. App. 2006) (finding a certificate of analysis nontestimonial because “certificates of analysis prepared by the Alabama Department of Forensic Sciences are business records grounded in inherently trustworthy and reliable scientific testing, rather than opinionated assertions”); *People v. Salinas*, 53 Cal. Rptr. 3d 302, 306 (Ct. App. 2007) (laboratory report showing substance to be methamphetamine is nontestimonial; “The report was not opinion evidence.”); *State v. Lackey*, 120 P.3d 332, 351 (Kan. 2005) (autopsy report is nontestimonial; “The court . . . differentiat[es] between objective factual findings (nontestimonial) and opinions and conclusions regarding cause of death (testimonial) . . .”), *overruled by State v. Davis*, 158 P.3d 317 (Kan. 2006); *Rollins v. State*, 897 A.2d 821, 841 (Md. 2006) (autopsy report is nontestimonial once “redacted to omit any information that could be construed as an ‘opinion’”); *Costley v. State*, 926 A.2d 769, 788 (Md. Ct. Spec. App. 2007) (“If the autopsy report contains statements which can be categorized as contested opinions or conclusions, or are central to the determination of the defendant’s guilt, they are testimonial



defendant was convicted of possession of methamphetamine.<sup>156</sup> At trial, a laboratory report prepared by a retired criminologist while he was employed at the Kern County Regional Crime Laboratory was admitted into evidence. The report established that the substance found on the defendant was methamphetamine. The retired criminologist did not testify. Instead, a supervisor of the retired criminologist laid a foundation for the report and it was admitted as a public record.<sup>157</sup> On appeal, the Court of Appeals of California found admission of the report not to violate the Confrontation Clause. In deeming the report nontestimonial, the court relied largely on the fact that the report was “not opinion evidence”<sup>158</sup> and that the report was “admitted only to show recorded test results.”<sup>159</sup> The court further noted that the trustworthiness requirement of the public-records exception to the hearsay rule is “established by a showing that the written report is based upon the observations of public employees who have a *duty* to observe the facts and report and record

---

. . . .”); *People v. Jambor*, 729 N.W.2d 569, 575 (Mich. Ct. App. 2007) (fingerprint cards with technicians writing is nontestimonial; “[T]he fingerprint cards . . . contained no subjective statements . . . .”); *People v. Freycinet*, 839 N.Y.S.2d 770, 770 (App. Div. 2007) (“The trial court properly determined that the non-opinion portion of the autopsy report was nontestimonial in nature . . . .”); *People v. Hrubecky*, No. 2006RI005491, 2006 N.Y. Misc. LEXIS 3859, at \*5 (Crim. Ct. Dec. 13, 2006) (test ampules, certified copies of stimulator-solution certification, and maintenance records of a breath-test instrument are nontestimonial; “[The reports are] neutral in character, relating only to the operation of the breath test instrument and the reference solution used to calibrate it—thus the results were neither discretionary nor based upon opinion.”); *People v. Lebrecht*, 823 N.Y.S.2d 824, 828 (App. Term 2006) (breath-test machine certifications are nontestimonial; “[They] involve merely the application of an objective procedure which does not involve the exercise of judgment and discretion, expressions of opinion, and making conclusions.”) (internal quotation marks omitted); *Green v. DeMarco*, 812 N.Y.S.2d 772, 784 (Sup. Ct. 2005) (certifications of breath-test machine and solution are nontestimonial; “These matters [involving certification] are neither discretionary nor based upon opinion.”); *People v. Brown*, 801 N.Y.S.2d 709, 712 (Sup. Ct. 2005) (DNA profile reports from independent laboratory and medical examiner’s office are nontestimonial; “[T]he records of the DNA testing . . . do not contain opinions of a testimonial nature, the records are simply memorializations of tests that were conducted.”) (internal quotation marks omitted); *People v. Mellott*, No. 1173-05, 2005 WL 3322843, at \*4 (N.Y. Just. Ct. Dec. 7, 2005) (“breath test foundation documents” are nontestimonial in part because the documents “purport to record the results of an objective test or process”); *State v. Sims*, No. 89261, 2007 Ohio App. LEXIS 5968, at \*5 (Ct. App. Dec. 20, 2007) (holding that “the ballistic test was nontestimonial because the conclusions stated in the report were fact, not opinion”); *In re J.R.L.G.*, No. 11-05-00002-CV, 2006 Tex. App. LEXIS 3344, at \*4 (App. Apr. 27, 2006) (laboratory report containing the result of a drug test is nontestimonial; “Where records are involved, courts have distinguished between objective or historical information and subjective observations germane to the accused.”); *Anderson v. Commonwealth*, 634 S.E.2d 372, 377 (Va. Ct. App. 2006) (certificate of analysis of rape kit offered under statute as prima facie evidence of chain of custody is nontestimonial; “*Crawford* . . . did not extend the Sixth Amendment to ‘documents establishing the existence or absence of some objective fact . . . .’”), *aff’d*, 650 S.E.2d 702 (Va. 2007).

156. 53 Cal. Rptr. 3d at 303.

157. *Id.* at 304.

158. *Id.* at 306.

159. *Id.* at 305.

them correctly.”<sup>160</sup>

That a statement is “objective” has no bearing on whether it is testimonial. Objectivity is merely a form of reliability. One can reasonably argue that a laboratory report offered by a government official at trial is no different analytically from a statement by a nongovernment witness to a government official. In fact, given the premise of *Crawford* and *Davis* that it is the governmental involvement that creates a risk of “flagrant inquisitorial practices,” the only analytical difference is that there is more cause for concern in the laboratory-report context.<sup>161</sup> For example, if a victim of domestic abuse were to call 911 after her assailant left the premises and said “I was punched in the face and have a black eye,” this statement would be testimonial under *Crawford* and *Davis* because it was made to the police and because the circumstances, viewed objectively, indicate that the primary purpose of the interrogation is to establish or prove past events “potentially relevant to later criminal prosecution.”<sup>162</sup> This is so even if the entire discourse is recorded. Such a statement is certainly not an opinion; it is an objective statement of fact. The statement in a laboratory report, “A test performed on the substance revealed it to be methamphetamine,” is no different.

The *Salinas* court’s argument that the report prepared by a government official is more trustworthy because of the government’s duty to “observe facts and report and record them correctly” is in complete contrast to the premise of *Crawford* that governmental involvement creates a greater risk of abuse. Further, it is not the statement of the witness that is to be analyzed under *Crawford* but whether, viewed objectively, the primary purpose the government is to “establish or prove past events potentially relevant to a later criminal prosecution.” Whether the declarant’s statement is objective or subjective is of no moment. In *Salinas*, the declarant (the retired criminologist) made a hearsay statement (the substance was drugs), which was offered by the supervisor without an opportunity to cross-examine the declarant.<sup>163</sup> *Crawford* postulates that a jury is incapable of evaluating a government official’s in-court testimony regarding an out-of-court statement. *Salinas* is just such a situa-

---

160. *Id.* (quoting *People v. Parker*, 10 Cal. Rptr. 2d 38, 41 (Ct. App. 1992)) (internal quotation marks omitted).

161. This of course returns us to the “worse-er” situation described *supra* Part IV.A.1.

162. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

163. The *Salinas* Court also argued that even if *Crawford* applies “routine documentary evidence” given that it is “highly unlikely” that the retired criminologist “who actually ran the test, would have testified any differently” the testimony of the supervisor would satisfy the Confrontation Clause. 53 Cal. Rptr. 3d at 306. This argument was often employed under *Roberts*, but it is clearly no longer valid under *Crawford*.

tion, and that the out-of-court statement is objective does not change the analysis.

4. CROSS-EXAMINING THE PREPARER OF THE LABORATORY REPORT  
WOULD BE OF LITTLE OR NO VALUE

Like *Roberts*, some courts rely on assertions that cross-examining the person who performed the tests would be of little value in response to the question whether a laboratory report is admissible under the Confrontation Clause in lieu of the preparer's in-court testimony.<sup>164</sup> In *Napier v. State*, the lower court admitted a "Director of Toxicology's certificate, which stated that an inspection and tests were performed on the [breath-test] machine on a specified date, and that 'the instrument is in good operating condition satisfying the accuracy requirements set out by the State Department of Toxicology Regulations.'"<sup>165</sup> The certificate further specified that the original Letter of Certification was on file with the Clerk of the Circuit Court, as mandated. Neither the Director of Toxicology nor the inspector of the machine testified. In finding the certificate to be nontestimonial, the Court of Appeals of Indiana stated, "we do not see how the admission of these certificates would serve to preclude any meaningful cross-examination of the breath test evidence presented against [the defendant]."<sup>166</sup> If *Crawford* applies, then this approach is improper on two levels. That cross-examination would not be meaningful is either an assertion of reliability of the report or an

---

164. See, e.g., *id.* ("It is highly unlikely that . . . the criminalist who actually ran the test, would have testified any differently. [The criminalist who ran the test] 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."); *Napier v. State*, 820 N.E.2d 144, 149 (Ind. Ct. App. 2005) (breath-test machine certification documents are nontestimonial; "[W]e do not see how the admission of these certificates would serve to preclude any meaningful cross-examination of the breath test evidence presented against [the defendant]."); *Notti v. State*, No. DV-05-89, 2005 Mont. Dist. LEXIS 1713, at \*6 (Dist. Ct. Dec. 9, 2005) (DNA report nontestimonial where the tester's co-worker laid the foundation; "The cross-examination of [the co-worker] was the same as the cross-examination of [the tester] would have been had [the tester] testified."); *State v. O'Maley*, 932 A.2d 1, 13 (N.H. 2007) (blood-sample-collection form including information about the technician drawing the blood and the draw itself is nontestimonial; "If the technician had been called to testify at trial . . . she likely 'would be unable to recall from actual memory information related to [its] specific contents and would rely instead upon the record of . . . her own action.'") (alterations in original); *State v. Crager*, 879 N.E.2d 745, 758 (Ohio 2007) (DNA report is nontestimonial; "[I]f Duvall, who actually did the DNA testing, had testified instead of [the testifying expert], her responses to defense counsel's questions likely would have been very similar, if not identical, to [the testifying expert's]. There are no indications that Crager was not able to conduct a meaningful cross-examination . . .").

165. 820 N.E.2d at 149. Note that this certificate is not only hearsay, but double-level hearsay (the tester made an out-of-court statement to the director who made an out-of-court statement that was offered in court).

166. *Id.*

assertion that, even if the report is unreliable, cross-examination would be of no assistance. The former, as stated earlier, is wrong. The latter is an indictment of the very process that the *Crawford* court deemed to be the only protection against the “flagrant inquisitorial practices” the Court so fears. Nowhere in *Crawford* does the Court even allude to the proposition that, “if cross-examination will not help the defendant, there is no need to afford the opportunity and the statement is nontestimonial.” On the contrary, whether cross-examination will aid the defendant is not a factor in determining whether a statement is testimonial. A criminal defendant has a right to subject all testimonial statements to the *process* of cross-examination. Cross-examination is therefore not a factor in determining whether a statement is testimonial but rather it is a necessary consequence when a statement is deemed testimonial.

### C. *The Uses of and Circumstances Surrounding Creation of Laboratory Reports*

*Crawford* focuses “solely upon government conduct in acquiring evidence against the accused.”<sup>167</sup> The fear is that the government will use “inquisitorial practices”<sup>168</sup> in furtherance of its prosecution of the accused. Therefore, at a minimum, when the government is involved in the creation of hearsay statements where the “primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution,”<sup>169</sup> the statement is testimonial. The declarant’s state of mind while making the statement is immaterial.

#### 1. NONACCUSATORY LABORATORY REPORTS ARE NONTESTIMONIAL; LABORATORY REPORTS NOT DIRECTED TOWARD A PARTICULAR DEFENDANT ARE NONTESTIMONIAL

A number of courts look to whether the laboratory report is “accusatory” in determining whether it is testimonial.<sup>170</sup> This approach is par-

167. Graham, *Special Report*, *supra* note 4, at 108.

168. *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

169. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

170. *See State v. Moss*, 160 P.3d 1143, 1149 (Ariz. Ct. App. 2007) (blood test prepared by nontestifying criminalist from private laboratory on which testifying expert based testimony is testimonial; “The testimony . . . reporting the results would be, in essence, an accusation by the absent criminalists that [the defendant] had ingested methamphetamine before the accident.”), *review denied, opinion depublished*, 173 P.3d 1021 (Ariz. 2007); *People v. Geier*, 161 P.3d 104, 140 (Cal. 2007) (DNA report is nontestimonial; “[T]o the extent [that the nontestifying analyst’s] notes, forms and report merely recount the procedures she used to analyze the DNA samples, they are not themselves accusatory . . . .”); *People v. Hinojos-Mendoza*, 140 P.3d 30, 37 (Colo. Ct. App. 2005) (laboratory report showing a substance to be a controlled substance is nontestimonial; “[W]hile the report names defendant, it contains no directly accusatorial statements against him.”), *aff’d in part, rev’d in part*, 169 P.3d 662 (Colo. 2007); *Johnson v. State*, 929 So. 2d 4, 8 (Fla. 2d Dist. Ct. App. 2005) (laboratory report created by the Florida Department of Law Enforcement is

ticularly prevalent when the challenged report involves certification records of breath-test machines. In *Commonwealth v. Walther*, the lower court suppressed evidence consisting of

[t]hree sets of copies of maintenance and test records pertaining to Intoxilyzer 5000 EN s/n 68-012628. Each set contained a notarized certification by . . . the breath-alcohol technician who prepared and had custody of them, that they were true and exact copies of the original records maintained by him and that he prepared and maintained them in the regular course of his duties as an employee of the Kentucky State Police Breath Alcohol Maintenance Program.<sup>171</sup>

The copies of the reports included lists of tests and other information performed on and pertaining to the machine with handwritten notes such as “verified” and “ok.” Reviewing a certified question,<sup>172</sup> the Supreme

---

testimonial; “The nature of the statement is one that is intended to lodge a criminal accusation against a defendant—in other words, it is testimonial.”); *People v. Kim*, 859 N.E.2d 92, 93 (Ill. App. Ct. 2006) (breath-test machine certification is nontestimonial; “Some courts have held that a Breathalyzer certification is simply not accusatory: it does not accuse any particular person of any particular crime.”); *Commonwealth v. Walther*, 189 S.W.3d 570, 575 (Ky. 2006) (breath-test machine certifications are nontestimonial; “[The preparer] did not accuse Respondent of any wrongdoing.”); *State v. Carter*, 114 P.3d 1001, 1007 (Mont. 2005) (“[T]he certification reports [for the breath-test machine] are nontestimonial in nature in that they are foundational, rather than substantive or accusatory.”); *State v. O’Maley*, 932 A.2d 1, 13 (N.H. 2007) (blood-sample-collection form is nontestimonial; “The blood sample collection form did not accuse the defendant of any wrongdoing.”); *People v. Lebrecht*, 823 N.Y.S.2d 824, 828 (App. Term 2006) (breath-test machine certifications are nontestimonial; “[T]hey did not constitute a direct accusation of an essential element of any offense.”) (citations omitted); *Green v. DeMarco*, 812 N.Y.S.2d 772, 783 (Sup. Ct. 2005) (breath-test machine certifications are nontestimonial; “[N]either document . . . accuses anyone of conduct that is criminal.”); *People v. Fisher*, No. 04-1556, 2005 N.Y. Misc. LEXIS 2409, at \*6 (City Ct. Oct. 25, 2005) (foundational documents for breath-test machine are nontestimonial; *Crawford* is concerned with “solemn formal accusations”); *State v. Crager*, 879 N.E.2d 745, 757 (Ohio 2007) (DNA report is nontestimonial; “Records of laboratory protocols followed and the resulting raw data acquired are not accusatory.”); *Commonwealth v. Brown*, No. 3082-05-1, 2006 Va. App. LEXIS 152, at \*8 (Ct. App. Apr. 20, 2006) (Sexual Assault nurse Examiner Report is nontestimonial; “[S]uch laboratory reports do not involve statements to the police or other government agents acting in their stead, which accuse another person of a crime.”); *Anderson v. Commonwealth*, 634 S.E.2d 372, 377 (Va. Ct. App. 2006) (certificate of analysis offered as prima facie evidence of chain of custody of materials tested is nontestimonial; “[T]he Confrontation Clause is aimed at protecting defendants from those people making accusations against them.”) (internal quotation marks omitted); *Luginbyhl v. Commonwealth*, 618 S.E.2d 347, 354 (Va. Ct. App. 2005) (breath-test certificate including attestation machine in good working order is nontestimonial; “[T]he statements do not accuse [the defendant] of any wrongdoing . . . .”); *Commonwealth v. Williams*, No. 04-451, 2005 WL 3007781, at \*3 (Va. Cir. Ct. Nov. 10, 2005) (certificates of analysis stating a substance to be cocaine is nontestimonial; “They do not accuse the defendant of any wrongdoing but rather simply serve to authenticate the routine test results.”).

171. *Walther*, 189 S.W.3d at 572.

172. The certified question read: “Can a certified copy of a breath-alcohol machine’s maintenance and test records be admitted into evidence to show compliance with [Kentucky regulations concerning the accuracy of breath-alcohol machines] without in-court testimony by the breath-alcohol technician who performed the maintenance and tests?” *Id.*

Court of Kentucky determined that the reports were nontestimonial. The court relied on the fact that the technician “did not accuse the Respondent of any wrongdoing.”<sup>173</sup>

The technician did not accuse the defendant of any wrongdoing, but that does not make the technician’s statement nontestimonial. Webster’s dictionary defines “accusation” as “a charge of wrongdoing, delinquency, of fault: the declaration containing such a charge.”<sup>174</sup> In *Crawford*, the declarant did not accuse the defendant of any wrongdoing; she merely gave an arguably contradictory recitation of the events of a stabbing. Nowhere in her statement did the declarant charge the defendant with wrongdoing.<sup>175</sup> In fact, it seemed as if the declarant was trying her hardest not to implicate the defendant in any wrongdoing. An accusation, however, can be made without an express “charge” of wrongdoing. In many situations, the declaration “he pushed me” is certainly an implicit charge of wrongdoing. The question whether a statement is accusatory is contextual and often only the putative accuser knows whether he intends to accuse the other of something. Another declarant may also say, “He pushed me.” But there is no accusation in a context in which the act of pushing does not constitute wrongdoing; there is merely a recitation of events.<sup>176</sup> Under *Crawford*, the question is not whether the hearsay statement is “accusatory” but whether the government was involved in making the statement. When a Kentucky State

---

173. *Id.* at 575.

174. WEBSTER’S’ THIRD NEW INTERNATIONAL DICTIONARY 14 (1976).

175. The declarant stated:

Q. Did Kenny do anything to fight back from this assault?

A. (pausing) I know he reached into his pocket . . . or somethin’ . . . I don’t know what.

Q. After he was stabbed?

A. He saw Michael coming up. He lifted his hand . . . his chest open, he might [have] went to go strike his hand out or something and then (inaudible).

Q. Okay, you, you gotta speak up.

A. Okay, he lifted his hand over his head maybe to strike Michael’s hand down or something and then he put his hands in his . . . put his right hand in his right pocket . . . took a step back . . . Michael proceeded to stab him . . . then his hands were like . . . how do you explain this . . . open arms . . . with his hands open and he fell down . . . and we ran (describing subject holding hands open, palms toward assailant).

Q. Okay, when he’s standing there with his open hands, you’re talking about Kenny, correct?

A. Yeah, after, after the fact, yes.

Q. Did you see anything in his hands at that point?

A. (pausing) um um (no).

*Crawford v. Washington*, 541 U.S. 36, 39–40 (2004) (internal quotation marks omitted).

176. For example, if a person standing on railroad tracks is about to be run over by a train, a statement, “he pushed me,” if done to prevent him from getting hit by the train, is not an accusation. But if a train hit a person after he was pushed onto the railroad tracks, the same statement would certainly be an accusation.

Police Breath Alcohol Maintenance Program technician makes a statement, the government is clearly involved. If the Court in *Crawford* is unwilling to leave the Sixth Amendment to the “vagaries or the rules of evidence,” then certainly the Court should be unwilling to leave it to the “vagaries” of judicial determinations of “accusatorial-ness.”

In *Johnson v. State*, the court reached a different result when analyzing a different type of laboratory report.<sup>177</sup> There the court reviewed the admission of a “Florida Department of Law Enforcement (FDLE) lab report establishing the illegal nature of substances [the defendant] possessed when the person who performed the test did not testify.”<sup>178</sup> The report was admitted as a business record through the testimony of the supervisor of the person who performed the test. In finding the admission to be a Confrontation Clause violation and the report to be testimonial, the court relied on the fact that “[t]he nature of the statement is one that is intended to lodge a criminal accusation against a defendant—in other words, it is testimonial.”<sup>179</sup> This use of the accusatory rationale seems no more correct in *Johnson* than it was in *Walther*.<sup>180</sup> Again, being accusatorial does not matter under *Crawford*, because such an inquiry wrongly focuses on the intent of the declarant. However, while focusing on the intent of the declarant is clearly incorrect when the declarant is a nongovernment witness, neither *Crawford* nor *Davis* resolves the issue how to analyze hearsay statements when the declarant is the government. One approach would be to treat the separate government actors involved separately. For example, treat the technician in *Johnson* like any other declarant, and the supervisor who was used to offer the report into evidence as a government actor. Under such an approach, the report would clearly be testimonial under *Davis* as “the circumstances objectively indicate that . . . the primary purpose of the interrogation [the receipt of the report] is to establish or prove past events potentially relevant to later criminal prosecution.”<sup>181</sup> Another approach would be to treat the government actors as part of one “declarant” for Confrontation Clause purposes, in which case one could argue

---

177. 929 So. 2d 4, 8–9 (Fla. 2d Dist. Ct. App. 2005) (certifying question: “Does the admission of a Florida Department of Law Enforcement lab report establishing the illegal nature of substances possessed by a defendant violate the Confrontation Clause and *Crawford v. Washington*, when the person who performed the lab test did not testify?”) (citation omitted), certifying question to 924 So. 2d. 810 (Fla. 2006).

178. *Id.* at 5.

179. *Id.* at 8.

180. The difference in the outcome of the two cases may be explained as a result of judge’s intuitive sense that certain laboratory reports require the testimony of the preparer while others do not. Unfortunately for these courts, *Crawford*, if it applies to government-created laboratory reports, does not afford them any discretion to make such a determination.

181. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

that because there was no statement made from a witness to a government official the report is outside *Crawford* and subject only to the rigors of the rules of evidence. If the government, however, is treated as a single declarant, arguably the accusatory nature of the statement is not an explicit concern. But under the definition of testimonial statements from *Davis*—"to establish or prove past events potentially relevant to later criminal prosecution"—the government, while "interrogating" itself, has created a testimonial statement. This is because the government is certainly attempting to "establish or prove past events potentially relevant to later criminal prosecutions." None of these approaches receives any support from *Crawford* or *Davis*, and they all are highly artificial. It is clear that whether the report is "accusatory" from the declarant's point of view is not a factor in a *Crawford* analysis.

In a similar vein, a number of courts determine that certain laboratory reports are nontestimonial because they are not directed toward a particular defendant.<sup>182</sup> This approach is used primarily, if not exclu-

---

182. See *Abyo v. State*, 166 P.3d 55, 60 (Alaska Ct. App. 2007) (breathalyzer-calibration reports are nontestimonial; "Verification of calibration reports . . . are not created in anticipation of litigation in a particular case."); *Bohsancurt v. Eisenberg*, 129 P.3d 471, 478 (Ariz. Ct. App. 2006) (maintenance and calibration records of a breath-test machine are nontestimonial; "[T]he recorded results of calibration testing in the abstract do not relate to any specific defendant or particular case."); *Pflieger v. State*, 952 So. 2d 1251, 1253 (Fla. 4th Dist. Ct. App. 2007) (annual inspection report for breath-testing instrument is nontestimonial; "The evidence is not 'against' any particular defendant."); *Rackoff v. State*, 621 S.E.2d 841, 845 (Ga. Ct. App. 2005) ("Considering . . . that the certificates prepared under [the state statute] are records which are routinely maintained and promulgated and . . . not made in anticipation of prosecution against any particular defendant, we hold that the inspection certificate . . . was not 'testimonial' hearsay under *Crawford*.") (citation omitted); *Jarrell v. State*, 852 N.E.2d 1022, 1026 (Ind. Ct. App. 2006) (breath-test-machine certification report is nontestimonial; "[C]ertification of breath-test machines is removed from the direct investigation or direct proof of whether any particular defendant has operated a vehicle while intoxicated; the certificates are not prepared in anticipation of litigation in any particular case or with respect to implicating any specific defendant."); *Commonwealth v. Walther*, 189 S.W.3d 570, 575 (Ky. 2006) (breath-test-machine certification is nontestimonial; "[The tester] did not make the notations in question for the purpose of proving Respondent's guilt."); *State v. Dorman*, 922 A.2d 766, 769 (N.J. Super. Ct. App. Div. 2007) (breathalyzer-machine certificate of operability is nontestimonial; "These decisions [finding laboratory reports to be testimonial] have a common element triggering a defendant's right of confrontation: the State's use of a document created for the specific purpose of establishing an essential element of the offense. By contrast, the certificates of operability . . . were not created with any specific case in mind."); *certification granted*, 932 A.2d 26 (N.J. 2007) (granting petition of certification as to "question of whether in light of *Crawford v. Washington*, the admission of the breathalyzer machine certificate of operability violated the Confrontation Clause of the United States Constitution") (citation omitted); *People v. Hrubecky*, No. 2006RI005491, 2006 N.Y. Misc. LEXIS 3859, at \*5 (Crim. Ct. Dec. 13, 2006) (test ampules, certified copies of stimulator-solution certification, and maintenance records of a breath-test instrument are nontestimonial; "[T]he [certifications] were [not] created at official request to gather incriminating evidence against a particular individual."); *People v. Lebrecht*, 823 N.Y.S.2d 824, 828 (App. Term 2006) (breath-test-machine certifications are nontestimonial; "[T]hey were not created at official request to gather incriminating evidence against a particular individual . . .") (internal quotation marks



sively, in regard to breath-test-machine certification reports. The rationale is largely that, because the laboratory report was not prepared with a specific individual in mind, the preparer is not a “witness” as the term is defined in *Crawford*.<sup>183</sup>

In *State v. Shisler*, the defendant was convicted of operating a motor vehicle while under the influence.<sup>184</sup> The defendant challenged his conviction, asserting that the lower court violated his Sixth Amendment rights by admitting “a certificate signed by the director of health indicating that he had approved the check solution” used to test the breath machine that inculpated him. The director of health did not testify. In affirming the lower court’s decision, the Court of Appeals of Ohio stated that “the director of health was not a “witness against the accused.” The check-solution certificate was not prepared for use specifically against [the defendant].”<sup>185</sup> Assuming, arguendo, that the director of health is part of the “government” contemplated by *Crawford*, this approach receives little support from *Crawford* and *Davis*. First, it ignores *Crawford*’s definition of testimony: “[a] solemn declaration or affirmation made for the purpose of establishing or proving *some* fact.”<sup>186</sup> Whether the director of health regarded the check solution as adequate is certainly “some fact.” Second, it is not clear in *Crawford* or *Davis* for the proposition that an “interrogation” must have a particular individual in mind. If after a mysterious murder, a police officer questioned the victim’s husband, who was not a suspect, it seems any response would be testimonial because “the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary

---

omitted); *People v. Fisher*, No. 04-1556, 2005 N.Y. Misc. LEXIS 2409, at \*5 (City Ct. Oct. 25, 2005) (certification documents for breath-test machine are nontestimonial; in the four “core testimonial statements” in *Crawford* “the witness’s testimony is clearly being given ‘against’ a specific accused regarding an identified offense”); *People v. Mellott*, No. 1173-05, 2005 WL 3322843, at \*4 (N.Y. Just. Ct. Dec. 7, 2005) (breath-test-machine certification documents are nontestimonial; “[D]ocuments made in the ordinary course of business by a public entity, without a specific individual in mind and which purport to record the results of an objective test or process, as is the case with breath test foundation documents, would normally be considered to be nontestimonial in nature.”); *Vill. of Granville v. Eastman*, No. 2006CA00050, 2006 Ohio App. LEXIS 6213, at \*\*9 (Ct. App. Nov. 27, 2006) (breath-test-machine certification is nontestimonial; “[T]he documents were not prepared with an eye to a specific prosecution . . . .”); *State v. Shisler*, No. C-050860, 2006 Ohio App. LEXIS 5251, at \*\*14 (Ct. App. Oct. 6, 2006) (check-solution certification for breath-test machine is nontestimonial; “The check solution certificate was not prepared for use specifically against [the defendant].”).

183. *Crawford* states that the Confrontation Clause applies to “‘witnesses’ against the accused—in other words, those who ‘bear testimony.’” *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (quoting WEBSTER, *supra* note 27).

184. 2006 Ohio App. LEXIS 5251, at \*\*2.

185. *Id.* at \*\*14.

186. *Crawford*, 541 U.S. 36, 51 (2004) (quoting WEBSTER, *supra* note 27) (alteration in original) (emphasis added).

purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”<sup>187</sup> That there is no specific individual in mind certainly reduces the risk of governmental foul play,<sup>188</sup> and under *Roberts* this would go to a reliability determination. Yet this fact is irrelevant if the logic of *Crawford* is applied to certifications of breath-test machines.

## 2. THE LABORATORY REPORT COULD BE USED TO EXONERATE THE DEFENDANT AND IS THEREFORE NONTESTIMONIAL

Some courts rely on an assertion that laboratory reports have the power to exonerate as well as to inculcate a defendant in finding laboratory reports to be nontestimonial.<sup>189</sup> In *State v. Forte*, the defendant was convicted of rape and murder and sentenced to death.<sup>190</sup> On appeal the defendant contested the admission of laboratory reports created by an agent with the State Bureau of Investigation (“SBI”). The reports included results of the agent’s analysis of blood and bodily fluid. Because the agent had left the SBI before trial, the reports were admitted though the testimony of the agent’s supervisor under the North Carolina

---

187. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

188. Unless, of course, the Supreme Court is willing to recognize widespread governmental conspiracies to convict massive amounts of innocent people. While the Court in *Crawford* and *Davis* certainly views the government with a jaundiced eye, it seems unlikely that the Court would take such an extreme view.

189. See *People v. Geier*, 161 P.3d 104, 140 (Cal. 2007) (DNA report is nontestimonial; “DNA analysis can lead to either incriminatory or exculpatory results.”); *People v. Kim*, 859 N.E.2d 92, 94 (Ill. App. Ct. 2006) (breath-test-machine certification is nontestimonial; “Indeed, it is conceivable that a reading below 0.08 could have been used by the defense to exonerate a suspect.”); *Commonwealth v. Walther*, 189 S.W.3d 570, 575 (Ky. 2006) (breath-test-machine certification is nontestimonial; “A properly operating breathalyzer machine could just as well prove innocence as guilt.”); *State v. Russell*, 966 So. 2d 154, 164 (La. Ct. App. 2007) (coroner’s report is nontestimonial; “The proof of the death or cause of death by a coroner’s report is not proof of guilt or innocence.”); *State v. O’Maley*, 932 A.2d 1, 12 (N.H. 2007) (blood-test report and blood-collection form are nontestimonial; “[The] report of laboratory protocols and the resulting raw data were neutral, having the power to exonerate as well as convict.”) (internal quotation marks omitted); *People v. Lebrecht*, 823 N.Y.S.2d 824, 828 (App. Term 2006) (breath-test certification is nontestimonial; “Proof that a BAC testing machine functions properly may exonerate as well as incriminate . . . .”); *Green v. DeMarco*, 812 N.Y.S.2d 772, 781 (Sup. Ct. 2005) (breath-test-machine certification of calibration is nontestimonial; “The testing . . . serves the legitimate law enforcement purpose of weeding out persons who may have consumed alcohol but whose blood alcohol level is not at the statutory level. Indeed, for those persons with blood alcohol levels [below the legal limit], the breath test may exonerate them from any liability . . . .”); *State v. Forte*, 629 S.E.2d 137, 143 (N.C. 2006) (DNA laboratory report is nontestimonial; such reports are “neutral, having the power to exonerate as well as convict.”); *State v. Crager*, 879 N.E.2d 745, 757 (Ohio 2007) (DNA report is nontestimonial; “[I]t is neutral, having the power to exonerate as well as convict.”) (internal quotation marks omitted). But see *Vill. of Granville v. Graziano*, 139 Ohio Misc. 2d 29, 35 (Licking County Mun. Ct. 2006) (breath-test-machine certifications are testimonial; “[T]he[] documents . . . closely pertain to the issue of guilt or innocence . . . .”).

190. 629 S.E.2d at 140.

business-records exception to the hearsay rule.<sup>191</sup> On appeal the defendant argued “that the introduction of the reports, containing both analysis results and chain of custody information, violated his constitutional right of confrontation.”<sup>192</sup> In affirming the conviction and rejecting the defendant’s argument, the court stated that the laboratory reports “do not bear witness against the defendant. . . . Instead, they are neutral, having the power to exonerate as well as convict.”<sup>193</sup> If one accepts this rationale, no statements would ever be testimonial. Every investigation and interrogation has the power, or at least potential, to “exonerate as well as convict.” The officers who interrogated the declarant in *Crawford* conceivably could have received statements corroborating the defendant’s version of events, but they did not. One cannot reasonably argue that the inculpatory statement is nontestimonial on the ground that a witness could have exculpated the defendant.

In *Village of Granville v. Graziano*, the court at a suppression hearing admitted, over the defendant’s Confrontation Clause objections, a packet of documents relating to the certification of a breath-test machine.<sup>194</sup> In later granting the defendant’s motion to suppress, the court found that “the pretest and posttest instrument check documents qualif[ied] as testimonial statements under *Crawford*.”<sup>195</sup> The court so found because the documents “more closely pertain[ed] to the issue of guilt or innocence than the other documents.”<sup>196</sup> This approach, which seems to repudiate the approach taken in *Forte*, is also incorrect. The question is not how closely evidence relates to “guilt or innocence,” because all relevant evidence is so related. Rather, the question under *Crawford* and *Davis* is whether the government was attempting to collect evidence “potentially relevant to a later criminal prosecution.”<sup>197</sup> Such evidence necessarily relates to “guilt or innocence” if it is offered by the prosecution. While these cases are wrong if *Crawford* applies, both cases show the extreme difficulty in applying *Crawford* and *Davis* to laboratory reports. The difficulty comes from the fact that neither *Crawford* nor *Davis* clearly apply and neither answers the question whether laboratory reports are testimonial. Faced with a Confrontation Clause challenge to the admission of laboratory reports offered without

---

191. *Id.* at 142; see also N.C. GEN. STAT. ANN. § 8-C1, Rule 803(6) (West 2007) (“Records of Regularly Conducted Activity”).

192. 629 S.E.2d at 142.

193. *Id.* at 143.

194. 139 Ohio Misc. 2d 29. The court discussed and decided that the Confrontation Clause applies to suppression hearings. *Id.* at 33. The validity of this decision is irrelevant to the analysis here.

195. *Id.* at 35.

196. *Id.*

197. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

the preparer's testimony, the courts have little option but to "wing it" and try their best to achieve a proper result. It is not the failure of state courts precipitating the divergent results regarding laboratory reports but the utter failure of *Crawford* and *Davis* to supply a workable framework.

### 3. PREPARED FOR LITIGATION OR EXPECTED TO BE USED PROSECUTORIALLY

In determining whether a report is testimonial, a number of courts rely on a distinction between laboratory reports prepared for litigation or for use in a prosecution and those that are not.<sup>198</sup> In *Martin v. State*, the

---

198. See *State v. Moss*, 160 P.3d 1143, 1149 (Ariz. Ct. App. 2007) (blood test prepared by nontestifying criminalist from private laboratory on which expert based testimony is testimonial; "The criminalists who performed the blood tests and interpreted the results surely expected their statements of the results to be used prosecutorially."), *review denied, opinion depublished*, 173 P.3d 1021 (Ariz. 2007); *Hinojos-Mendoza v. People*, 169 P.3d 662, 667 (Colo. 2007) (laboratory report is testimonial; "There can be no serious dispute that the sole purpose of the report was to analyze the substance found in [the defendant's] vehicle in anticipation of criminal prosecution."); *Pflieger v. State*, 952 So. 2d 1251, 1254 (Fla. 4th Dist. Ct. App. 2007) (breathalyzer-certification documents are nontestimonial; "Using these reports for a litigation purpose is a secondary purpose and therefore does not raise the concerns expressed in *Crawford* of unreliability."); *Martin v. State*, 936 So. 2d 1190, 1192 (Fla. 1st Dist. Ct. App. 2006) (Florida Department of Law Enforcement report indicating substance to be contraband is testimonial; "[T]he report obviously was prepared for litigation purposes."); *Shiver v. State*, 900 So. 2d 615, 618 (Fla. 1st Dist. Ct. App. 2005) (breath-test affidavit relied on to prove the date of performance of the most recent required maintenance is testimonial; "It contained statements one would reasonably expect to be used prosecutorially, and was made under circumstances which would lead an objective witness to reasonably believe the statements would be available for trial."); *People v. Horton*, No. 268264, 2007 Mich. App. LEXIS 2033, at \*10 (Ct. App. Aug. 28, 2007) ("[T]he non-testifying serologists' reports and findings [are testimonial because they] clearly qualified] as statements that [the non-testifying serologists] would reasonably expect would be used in a *prosecutorial* manner and at trial.") (third and fourth alterations in original) (internal quotation marks omitted); *State v. Weaver*, 733 N.W.2d 793, 799 (Minn. Ct. App. 2007) (laboratory test and results created at the request of the medical examiner as part of an autopsy occurring during a homicide investigation are testimonial; "The critical determinative factor in assessing whether a statement is testimonial is whether it was 'prepared for litigation.'"); *State v. Sickmann*, No. A05-2478, 2006 Minn. App. Unpub. LEXIS 1329, at \*8 (Ct. App. Dec. 12, 2006) ("[T]he medical-personnel certificate [is] considered testimonial because it contains statements that one would reasonably expect to be used prosecutorially and be available for trial."); *State v. March*, 216 S.W.3d 663, 666 (Mo. 2007) ("A laboratory report . . . that was prepared solely for prosecution to prove an element of the crime charged is 'testimonial' because it bears all the characteristics of an *ex parte* affidavit."); *City of Las Vegas v. Walsh*, 124 P.3d 203, 208 (Nev. 2005) (nurse's affidavits offered to prove certain facts relating to the withdrawal of blood for testing purposes are testimonial; "[T]hey are made for use at a later trial or legal proceeding."); *State v. Dedman*, 102 P.3d 628, 636 (N.M. 2004) (blood-alcohol report admitted without testimony of the nurse who drew the blood is nontestimonial; "[T]he report is not investigative or prosecutorial."); *People v. Rogers*, 780 N.Y.S.2d 393, 396 (App. Div. 2004) (DNA analysis report created at the request of the police is testimonial; "[T]he report here was requested by and prepared for law enforcement for the purpose of prosecution."); *State v. Warlick*, No. M2005-01477-CCA-R3-CD, 2007 Tenn. Crim. App. LEXIS 394, at \*19 (Crim. App. May 17, 2007) (medical records and laboratory reports created by private hospital are nontestimonial; "The tests were conducted by the hospital for the purpose of providing medical treatment to the Appellant, not for the purpose of preparing for future litigation.").

defendant was convicted of possession of cocaine and cannabis.<sup>199</sup> On appeal, the defendant argued “that the trial court erred in admitting, over objection, a report of the Florida Department of Law Enforcement (FDLE), which indicated that the substances seized from [the defendant] were contraband.”<sup>200</sup> The report was admitted as a business record in lieu of testimony by the preparer of the report. In finding the admission of the report to be reversible error under the Confrontation Clause, the court noted that one of the “various formulations” of testimonial statements are “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”<sup>201</sup> The court concluded that the report was testimonial because it “contained statements one would reasonably expect to be used prosecutorially and was made under circumstances which would lead an objective witness to reasonably believe the statement would be available for trial.”<sup>202</sup> The court was correct that an objective witness would be led to believe the statements made in the laboratory report would be available for use at trial. Although the approach may be reasonable, it has a great potential to precipitate significant failures of the justice system. For example, if a laboratory technician who performed a test is unavailable and there is no way to re-do the tests that the technician had performed, guilty and perhaps highly dangerous individuals will go free. Whether *Crawford* was meant to apply to laboratory reports at all is unclear. Regardless of the reasonableness of the approach, it is far from clear that the Court in *Crawford* or *Davis* intended this result. Additionally, despite being included in the two formulations of testimonial, focusing on what the witness believed is incorrect given the historical background provided in *Crawford*.<sup>203</sup>

#### 4. INVOLVEMENT OF GOVERNMENT OR LAW-ENFORCEMENT OFFICIALS WITH AN “EYE TOWARD TRIAL”

Many courts look to whether the laboratory report was prepared by law-enforcement or government officials in anticipation of prosecution in determining whether a laboratory report is testimonial.<sup>204</sup> The analy-

---

199. 936 So. 2d at 1191.

200. *Id.*

201. *Id.* at 1192 (quoting *Crawford v. Washington*, 541 U.S. 36, 51, 52 (2004)) (emphasis omitted).

202. *Id.* (quoting *Shiver*, 900 So. 2d at 618).

203. See Graham, *Special Report*, *supra* note 4.

204. See *Hinojos-Mendoza v. People*, 169 P.3d 662, 667 (Colo. 2007) (laboratory report is testimonial; “[It] was prepared at the direction of the police and a copy of the report was transmitted to the district attorney’s office.”); *Thomas v. United States*, 914 A.2d 1, 14 (D.C. 2006) (Drug Enforcement Agency chemist’s written statement is testimonial; “[B]ecause DEA chemist’s reports are created expressly for use in criminal prosecutions as a substitute for live

testimony against the accused, such reports are testimonial . . . ."); *Williams v. State*, 933 So. 2d 1283, 1284 (Fla. 2d Dist. Ct. App. 2006) (breath-test affidavit is testimonial; "[R]eport prepared pursuant to police investigation and offered to establish an element of a crime [is] testimonial hearsay and inadmissible in the absence of establishing the *Crawford* conditions."); *id.* at 1285 (certifying question to the Florida Supreme Court: "Does admission of a breath test affidavit violate the Confrontation Clause and *Crawford v. Washington*, when the technician who performed breath test does not testify?") (citation omitted); *Sobota v. State*, 933 So. 2d 1277, 1278 (Fla. 2d Dist. Ct. App. 2006) (results of blood test prepared by toxicologist at a county forensic lab is testimonial) (certifying question: "Does admission of a test result from a legal blood drawn violate the Confrontation Clause and *Crawford v. Washington*, when the toxicologist who performed the blood test does not testify?") (citation omitted), *certifying question to* 924 So. 2d 810 (Fla. 2006)); *Johnson v. State*, 929 So. 2d 4, 7, 8–9 (Fla. 2d Dist. Ct. App. 2005) (laboratory report created by the Florida Department of Law Enforcement is testimonial; "[W]e hold that an FDLE lab report prepared pursuant to police investigation and admitted to establish an element of a crime is testimonial hearsay . . . .") (certifying question: "Does the admission of a Florida Department of Law Enforcement lab report establishing the illegal nature of substances possessed by a defendant violate the Confrontation Clause and *Crawford v. Washington*, when the person who performed the lab test did not testify?") (citation omitted), *certifying question to* 924 So. 2d 810 (Fla. 2006); *Belvin v. State*, 922 So. 2d 1046, 1050, 1053 (Fla. 4th Dist. Ct. App. 2006) (affidavit of technician who administered breath tests is testimonial; "Breath test affidavits are usually generated by law enforcement for use at a later criminal trial or driver's license revocation proceeding.") (certifying question: "Does admission of those portions of the breath test affidavit pertaining to the breath test operator's procedures and observations in administering the breath test constitute testimonial evidence and violate the Sixth Amendment's Confrontation Clause in light of the United States Supreme Court's holding in *Crawford v. Washington*?") (citation omitted), *certifying question to* 928 So. 2d 336 (Fla. 2006); *Rackoff v. State*, 621 S.E.2d 841, 845 (Ga. Ct. App. 2005) (inspection certificate for breath-test machine is nontestimonial; "[The report was] not made in anticipation of prosecution . . . ."); *State v. Musser*, 721 N.W.2d 734, 754 (Iowa 2006) (laboratory-test report prepared years earlier for health reasons by a hospital showing the defendant to be HIV positive are nontestimonial; "The HIV tests were not requested by law enforcement; they were done two years before the crime at issue here was even committed."); *State v. Caulfield*, 722 N.W.2d 304, 309 (Minn. 2006) (Bureau of Criminal Apprehension laboratory report identifying substance as cocaine is testimonial; "[T]he critical determinative factor in assessing whether a statement is testimonial is whether it was prepared for litigation."); *State v. Dedman*, 102 P.3d 628, 636 (N.M. 2004) (blood-alcohol report prepared by the Scientific Laboratory Division of the Department of Health and admitted without testimony of the nurse who drew the blood is nontestimonial despite being "prepared for trial"); *People v. Rogers*, 780 N.Y.S.2d 393, 397 (App. Div. 2004) (laboratory report of DNA analysis prepared by a private laboratory at the request of the police is testimonial; "[T]he test was initiated by the prosecution and generated by the desire to discover evidence against defendant, the results were testimonial."); *People v. Brown*, 801 N.Y.S.2d 709, 712 (Sup. Ct. 2005) (DNA profile report from private lab subcontracted by the Office of the Chief Medical Examiner and the medical examiner's office itself are nontestimonial because neither laboratory is part of law enforcement and "the notes of the DNA testers were not prepared solely for litigation but were routine entries made to assist in the profiling of DNA"); *People v. Orpin*, 796 N.Y.S.2d 512, 516 (Just. Ct. 2005) (inspection, maintenance, and calibration records of breath-test machine prepared by state division of criminal justice and certification of analysis of stimulator solution prepared by state-police forensic-investigation center are testimonial; "It is difficult to conceive of any purpose in preparing these documents other than for use in DWI cases."); *rev'd sub. nom. Green v. DeMarco*, 812 N.Y.S.2d 772 (Sup. Ct. 2005); *State v. Forte*, 629 S.E.2d 137, 143 (N.C. 2006) (DNA report is nontestimonial; "Although we acknowledge that the reports were prepared with the understanding that eventual use in court was possible or even probable, they were not prepared exclusively for trial and [the preparing agent] had no interest in the outcome of any trial in which the records might be used."); *State v. Miller*, 144 P.3d 1052, 1056 (Or. Ct. App. 2006) (finding laboratory

sis of this approach is much the same as the section above. But even cases that rely on the fact that the government was involved in making the laboratory reports may overly narrow the definition of “testimonial” found in *Crawford* and *Davis*.

In *State v. Caulfield*, the defendant challenged his conviction of possession of a controlled substance with intent to distribute.<sup>205</sup> In finding that the lower court erred in admitting a Bureau of Criminal Investigation laboratory report through a state statute deemed unconstitutional,<sup>206</sup> the court stated, “the critical determinative factor . . . is whether [the laboratory report] was prepared for litigation.”<sup>207</sup> It seems, however, that the ambit of testimonial statements may run wider than merely statements “prepared for litigation.” *Crawford*’s formulation of “testimonial” that courts frequently cite and incorrectly use is “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement *would be available* for use at a later trial.”<sup>208</sup> *Davis* defines testimonial statements made “when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events *potentially* relevant to later criminal prosecution.”<sup>209</sup> Whether a laboratory report “would be available” or is “potentially relevant” is a far more expansive definition than “prepared for litigation.” Under the former two statements, even if a report was not prepared for litigation per se but was simply something that could possibly be admitted in a criminal trial, the report would be testimonial if the government was involved in its creation.

Another problem with this approach involves how to determine which governmental agencies, or nongovernmental entities acting at the government’s behest, are within the scope of *Crawford*. This question

---

reports prepared by the Oregon State Police Laboratory showing substance to be controlled are testimonial because they were made “for the purpose of establishing or proving a fact in issue in the case being prosecuted”) (quoting *State v. Norman*, 125 P.3d 15 (Or. Ct. App. 2005)); *State v. Warlick*, No. M2005-01477-CCA-R3-CD, 2007 Tenn. Crim. App. LEXIS 394, at \*19 (Crim. App. May 17, 2007) (medical records and laboratory reports created by private hospital are nontestimonial; “The records were not prepared at the request of the police, nor were the tests performed by a police laboratory.”).

205. 722 N.W.2d at 306.

206. *Id.* at 313. The court found the statute to be unconstitutional despite affording the defendant an opportunity to request the preparer of the report. The court stated that because the statute “does not require adequate notice to the defendant, we conclude that it violates the Confrontation Clause.” *Id.*

207. *Id.* at 309.

208. *Crawford v. Washington*, 541 U.S. 36, 52 (2004) (emphasis added) (internal quotation marks omitted).

209. *Davis v. Washington*, 547 U.S. 813, 822 (2006) (emphasis added).

has produced widely disparate answers.<sup>210</sup> In *Crawford*, the Court stated that “[t]he involvement of *government officers* in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.”<sup>211</sup> Whether this statement intends to apply the Confrontation Clause to all government officers or merely the police and similar law-enforcement entities is unclear.<sup>212</sup> In resolving (or, more accurately, in not resolving) whether a 911 operator is part of law enforcement, states,

[i]f 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers. For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police. As in *Crawford v. Washington*, therefore, our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are “testimonial.”<sup>213</sup>

Thus, *Davis* leaves open the possibility that statements to non-law-enforcement government officers as well as law-enforcement agents may at times be testimonial.<sup>214</sup> Of course, none of this answers the

---

210. See *People v. Lonsby*, 707 N.W.2d 610, 619–20 (Mich. Ct. App. 2005) (Michigan State Police Crime Laboratories serologist’s notes and laboratory report are testimonial; “[T]he State Police Crime lab is an arm of law enforcement . . . .”); *State v. Dedman*, 102 P.3d 628, 635 (N.M. 2004) (Scientific Laboratory Division (SLD) of the Department of Health preparing a blood-alcohol report is nontestimonial; “SLD employees are not police officers nor are they law enforcement personnel. Therefore, blood alcohol reports . . . are prepared in a non-adversarial setting.”); *People v. Rogers*, 780 N.Y.S.2d 393, 396 (App. Div. 2004) (lab report prepared by a private laboratory is testimonial; “[It] was requested by and prepared for law enforcement for the purpose of prosecution.”); *People v. Brown*, 801 N.Y.S.2d 709, 711 (Sup. Ct. 2005) (DNA laboratory reports prepared by a criminologist employed by the Office of the Chief Medical Examiner and a private subcontracted laboratory are nontestimonial; “The OCME is not a law enforcement agency and is by law, independent of and not subject to the control of the office of the prosecutor.”) (quoting *People v. Durio*, 794 N.Y.S.2d 863, 868 (Sup. Ct. 2005)); *Durio*, 794 N.Y.S.2d at 868 (autopsy report prepared by the Office of the Chief Medical Examiner is nontestimonial; “The OCME is not a law enforcement agency and is by law, independent of and not subject to the control of the office of the prosecutor.”) (internal quotation marks omitted); *State v. Cao*, 626 S.E.2d 301, 305 (N.C. Ct. App. 2006) (laboratory report determining substance to be controlled is nontestimonial despite report being made at the request of a police officer).

211. 541 U.S. at 53. This statement was made in the context of the Court downplaying the difference between English Justices of the Peace of the sixteenth century and police officers of today. According to the Court, the similarity between the two is their “investigative and prosecutorial function.” *Id.* It can certainly be argued that at least some governmental laboratories perform an “investigative” function, and are thus within the purview of *Crawford*.

212. But see *Graham, Special Report*, *supra* note 4, at 77 (“Thus only statements made following government official initiated *ex parte* judicial examination or police interrogation developed in anticipation of or in aid of potential criminal litigation are encompassed within the core meaning of the Confrontation Clause.”).

213. 547 U.S. at 823 n.2.

214. Cf. 4 GRAHAM, HANDBOOK, *supra* note 8, § 802:2, at 4 (Supp. 2008), stating:

Pursuant to *Davis*, any statement made to or elicited by a police officer, other law enforcement personnel, or a judicial officer under circumstances objectively



question whether a report created by a non-law-enforcement governmental agency (or one created by a law-enforcement official) is testimonial. State-court responses run from: if the report, even if created by a private laboratory, is requested by law enforcement, then it is subject to the *Crawford* analysis,<sup>215</sup> to holding that reports created by a state “crime laboratory” at the request of the police are not.<sup>216</sup>

*People v. Brown* exemplifies the confusion created by the question of which parts of the government or agents of it are capable of producing testimonial statements.<sup>217</sup> In *Brown*, a criminologist employed by the New York Office of the Chief Medical Examiner (“OCME”) testified based on two laboratory reports stating the results of DNA analysis.<sup>218</sup> One report was created by the OCME and the other by a private laboratory subcontracted by the OCME.<sup>219</sup> Both reports were admitted into evidence as business records and the preparers of the reports did not testify.<sup>220</sup> In rejecting the defense motion for a new trial, the court found there to be no Confrontation Clause violation in admitting the reports because “[t]he OCME is not a law enforcement agency and is *by law*, independent of and not subject to the control of the office of the prosecutor.”<sup>221</sup> Whether the government is able to legislate around whether a governmental entity is subject to the rigors of *Crawford* is highly questionable. Also, if the decision had come out differently as to whether the OCME is a branch of law enforcement (as a number of courts have), the analysis whether the laboratory report from the private laboratory is testimonial changes. If the OCME is considered part of law enforcement, then the private laboratory report could be analyzed like any other statement under *Davis*. Under such an analysis, the report would surely be testimonial.<sup>222</sup> Thus, if laboratory reports are to be subject to the rigors of *Crawford*, the Court will need to decide whether and when non-law-enforcement governmental agencies are subject to review. If they are not, what constitutes “law enforcement” for Con-

---

indicating at the time made that the primary purpose to which the statement will be used by the government is to establish or prove *past* events potentially relevant to later criminal prosecution is “testimonial”.

215. See, e.g., *Rogers*, 780 N.Y.S.2d at 396–97.

216. See, e.g., *State v. Cao*, 626 S.E.2d 301, 304–05 (N.C. Ct. App. 2006).

217. 801 N.Y.S.2d 709 (Sup. Ct. 2005).

218. *Id.* at 709–10.

219. *Id.* at 710.

220. *Id.*

221. *Id.* at 711 (quoting *People v. Durio*, 794 N.Y.S.2d 863, 868 (Sup. Ct. 2005)) (emphasis added).

222. This is so because the report would be a statement made to law enforcement “when the circumstances objectively indicate . . . that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Davis v. Washington*, 547 U.S. 813, 822 (2006).

frontation Clause purposes? If non-law-enforcement governmental agencies are subject to review, which ones? These deceptively innocuous questions will not lead to easy answers. The answers will have wide-ranging effects not only on laboratory reports created by the government but also on those created by private laboratories for use by the government.

## 5. EXPERT OPINION

A few courts have attempted to avoid the Confrontation Clause's application to laboratory reports by claiming that the report is not admitted for its truth when an expert testifies to his opinion regarding whether a substance was drugs, the results of DNA analysis, and the like based on a laboratory report.<sup>223</sup> In *State v. Delaney*, an agent with the North Carolina State Bureau of Investigation performed an analysis on substances seized from the defendant's home.<sup>224</sup> At trial an agent who was also employed by the Bureau of Investigation "testified as an expert wit-

---

223. See *State v. Cannady*, No. COA07-274, 2007 N.C. App. LEXIS 2537, at \*10 (Ct. App. Dec. 18, 2007) ("[E]xpert testimony based on analysis conducted by someone other than the testifying expert does not violate a defendant's right to confrontation under *Crawford*."); *State v. Pettis*, 651 S.E.2d 231, 234 (N.C. Ct. App. 2007) (expert testifying based on contents of DNA report prepared by a nontestifying state bureau of investigations agent is not a Confrontation Clause violation; "[I]t is well established [that there is no violation of a defendant's right of confrontation under the rationale of *Crawford* when] an expert . . . base[s] an opinion on tests performed by others in the field and [d]efendant was given an opportunity to cross-examine [the testifying expert] on the basis of his opinion[.]") (alterations in original) (internal quotation marks omitted); *State v. Palestino*, No. COA06-185, 2006 N.C. App. LEXIS 2000, at \*5-6 (Ct. App. Oct. 3, 2006) (holding that no Confrontation Clause violation occurred where colleague of agent who prepared chemical-analysis report and field notes testifies to his expert opinion based on the report); *State v. Shelly*, 627 S.E.2d 287, 299-300 (N.C. Ct. App. 2006) (gunshot-residue testing report, testified to as basis of expert opinion by agent who did not prepare the report, not deciding whether the report is testimonial but quoting *State v. Delaney*, 613 S.E.2d 699 (N.C. Ct. App. 2005), for the proposition that the basis of an expert opinion itself inadmissible into evidence can not be the ground for a Confrontation Clause violation); *Delaney*, 613 S.E.2d at 700 (analyst who did not prepare a laboratory report but relies on it as a basis for expert opinion at trial is not a Confrontation Clause violation; "The admission into evidence of expert opinion based upon information not itself admissible into evidence does not violate the Sixth Amendment guarantee of the right of an accused to confront his accusers where the expert is available for cross-examination.") (quoting *State v. Huffstetler*, 322 S.E.2d 110, 120 (N.C. 1984)) (internal quotation marks omitted); *State v. Lewis*, 235 S.W.3d 136, 151 (Tenn. 2007) (expert testimony based on DNA analysis of nontestifying analyst does not violate the Confrontation Clause; "Crawford . . . did not involve expert witness testimony and thus did not alter an expert witness's ability to rely on (without repeating to the jury) otherwise inadmissible evidence in formulating his opinion . . .") (quoting *United States v. Henry*, 472 F.3d 910, 914 (D.C. Cir. 2007)) (ellipses in original). But see *State v. Moss*, 160 P.3d 1143, 1149, 1147 (Ariz. Ct. App. 2007) (blood test prepared by nontestifying criminalist from private laboratory on which expert based testimony is testimonial; "[I]f the expert merely acts as a conduit for another non-testifying expert's opinion, the expert opinion is hearsay and inadmissible . . .") (internal quotation marks omitted), *review denied, opinion unpublished*, 173 P.3d 1021 (Ariz. 2007).

224. 613 S.E.2d at 700.

ness regarding the results of those analyses.”<sup>225</sup> On appeal, the court noted that “*Crawford* made explicit that its holding was not applicable to evidence admitted for reasons other than proving the truth of the matter asserted.”<sup>226</sup> The court then found there to have been no violation of the defendant’s rights under the Confrontation Clause because “[i]t is the expert opinion itself, not the underlying factual basis, that constitutes substantive evidence[,] and . . . [a]n expert may properly base his or her opinion on tests performed by another person, if the tests are of the type reasonably relied upon by experts in the field.”<sup>227</sup>

This approach is a bastardization of generally accepted evidence law and, should *Crawford* apply to laboratory reports, certainly will not pass muster. Under the Federal Rules of Evidence as well as many state rules, a so-called expert who merely summarizes the content of a single inadmissible source is not a true expert but a “summary” or “conduit” expert.<sup>228</sup> Although *Crawford* states that the Confrontation Clause “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted,”<sup>229</sup> a summary expert merely attempts to introduce inadmissible hearsay in the guise of expert opinion. Evidence law and *Crawford*, should it apply, cannot abide such pretext.<sup>230</sup>

---

225. *Id.*

226. *Id.*

227. *Id.* at 700–01 (citing *State v. Fair*, 557 S.E.2d 500, 522 (N.C. 2001)) (alterations in original) (internal quotation marks omitted).

228. See *United States v. Williams*, 431 F.2d 1168, 1172 (5th Cir. 1970) (“If the witness has gone to only one hearsay source and seeks merely to summarize the content of that source, then he is acting as a summary witness, not an expert. Since he is introducing the content of the extrajudicial statements or writings to prove truth, his testimony, like its source, is hearsay and is inadmissible unless the source qualifies under an exception to the hearsay rule. When, however, the witness has gone to many sources—although some or all be hearsay in nature—and rather than introducing mere summaries of each source he uses them all, along with his own professional experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as an attempt to introduce hearsay in disguise.”) (internal quotation marks omitted); see also 2 GRAHAM, HANDBOOK, *supra* note 8, § 703.1, at 362 n.12 (same).

229. *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004).

230. Other courts have recognized the invalidity of the approach propounded in *Delaney*. See *People v. Lonsby*, 707 N.W.2d 610, 620 n.12 (Mich. Ct. App. 2005) (noting that such an approach would not pass muster under *Roberts* and will not under *Crawford*; “The critical point . . . is the distinction between an expert who forms an opinion based in part on the work of others and an expert who merely summarizes the work of others. In short, one expert cannot act as a mere conduit for the opinion of another.”) (quoting *State v. Williams*, 644 N.W.2d 919, 926 (Wis. 2002)) (ellipsis in original) (internal quotation marks omitted); *State v. Barton*, 709 N.W.2d 93, 96 (Wis. Ct. App. 2005) (expert who performed independent review of report may testify to “his independent opinion.”); see also *Roberts v. United States*, 916 A.2d 922, 939 (D.C. 2007) (denying government’s reliance on the “expert witness paradigm” because the government conceded “some of the test results on which [the expert’s] opinion was based . . . were offered as substantive evidence”) (ellipsis in original) (internal quotation marks omitted); *People v. Goldstein*, 843 N.E.2d 727, 732–33 (N.Y. 2005) (noting in a context analogous to *Delaney* that

## 6. THE LABORATORY REPORT IS ONLY "FOUNDATIONAL"

Some courts rely on an assertion that the laboratory report in question is "foundational" and therefore admissible under the Confrontation Clause without the preparer's in-court testimony.<sup>231</sup> In *State v. Carter*, the Montana Supreme Court found the Confrontation Clause not to be implicated when "the State introduces a certification report for a breath analysis instrument without also providing the author of the report for cross-examination."<sup>232</sup> The court so found because "such certification reports are not substantive evidence of a particular offense, but rather are foundational evidence necessary for the admission of substantive evidence. In other words, the certification reports are nontestimonial in nature in that they are foundational, rather than substantive or accusatory."<sup>233</sup> This novel approach finds no support in either the law of evidence or in the text of *Crawford* or *Davis*. The rules of evidence apply

---

"[t]he distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful").

231. See *People v. Johnson*, 18 Cal. Rptr. 3d 230, 233 (Ct. App. 2004) (laboratory report from the Alameda County Crime Laboratory analyzing substance is nontestimonial; "[T]he need for confrontation is particularly important where the evidence is testimonial, because of the opportunity for observation of the witness's demeanor. Generally, the witness's demeanor is not a significant factor in evaluating foundational testimony relating to the admission of evidence such as laboratory reports . . .") (alteration in original) (citation and internal quotation marks omitted); *State v. Carter*, 114 P.3d 1001, 1007 (Mont. 2005) (breath-test-machine certification report is nontestimonial; "[S]uch certification reports are not substantive evidence of a particular offense, but rather are foundational evidence necessary for the admission of substantive evidence. In other words, the certification reports are nontestimonial in nature in that they are foundational, rather than substantive or accusatory.") (citation omitted); *Notti v. State*, No. DV-05-89, 2005 Mont. Dist. LEXIS 1713, at \*14 (Dist. Ct. Dec. 9, 2005) (DNA report nontestimonial; "[The report was] foundational evidence necessary for admission of substantive evidence. . . . [T]he DNA report . . . was non-testimonial evidence used to buttress actual witness testimony on both sides of the case."); *Green v. DeMarco*, 812 N.Y.S.2d 772, 783 (Sup. Ct. 2005) (breath-test-certification documents are nontestimonial; "The person who does the calibration-testing or solution-testing is purely a foundational witness . . ."); *People v. Fisher*, No. 04-1556, 2005 N.Y. Misc. LEXIS 2409, at \*13 (City Ct. Oct. 25, 2005) (breath-test-machine certification documents are nontestimonial; "All of [the] documents are foundational."); *State v. Cook*, No. WD-04-029, 2005 Ohio App. LEXIS 1514, at \*\*10 (Ct. App. Mar. 31, 2005) (affidavit of custodian of breath-test-machine certifications is testimonial but no Confrontation Clause violations; "[I]t is not evidence against appellant; it merely lays the foundation for the attached documents."); *Anderson v. Commonwealth*, 650 S.E.2d 702, 708 (Va. 2007) (statutory presumption of chain of custody of materials analyzed in certificate of analysis does not violate the Confrontation Clause; "[T]he evidentiary presumption regarding chain of custody is relevant to the admissibility of the evidence. It is the substance of the evidence, namely the content of the certificate, that is a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact' accusatory to [the defendant]."); *Anderson v. Commonwealth*, 634 S.E.2d 372, 377 (Va. Ct. App. 2006) (certificate of analysis showing the result of a DNA test admitted under statute providing for the certificate to be prima facie evidence of chain of custody is nontestimonial; "[T]he chain-of-custody verification provides only foundation evidence . . .").

232. 114 P.3d at 1002.

233. *Id.* at 1007.

equally to evidence admitted as “substantive” evidence as they do to so-called “foundational” evidence. It is not completely clear what *Carter* and cases like it mean by “substantive” evidence as opposed to “foundational” evidence. However, whether evidence is offered to lay a foundation or as direct proof of an element of a crime, it is substantive. Breath-test-machine certifications are certainly offered for their truth or else they would be of no value to the case. Evidence offered to provide a foundation for other evidence is vital because such evidence provides other evidence with its evidentiary value.<sup>234</sup> That the “foundational” versus “substantive” dichotomy receives no support under *Crawford* is made clear by the following example. Suppose a witness, Morgan, who was involved in a robbery, makes a statement against penal interests to a police officer after being shown a gun found in a dumpster a mile away from a store where a robbery took place. Morgan states, “Ok. You got me, I was the getaway driver, and I know that gun. It is Annie’s. She used it to rob the store. How do I know it is the gun she used? I saw her with it in the car before the robbery and have seen her with it a number of times.” If Morgan does not testify at Annie’s trial for robbery, the state cannot call the officer to testify to the statement in order to lay a foundation for the gun because the statement is testimonial. This is so despite the fact that the statement is offered as “foundational” evidence to tie Annie to the gun. Thus, should *Crawford* apply to laboratory reports, the fact that they are offered to lay a foundation for other evidence will not save them from being testimonial.<sup>235</sup>

#### 7. LABORATORY REPORTS ARE NOT A SUBSTITUTE FOR LIVE TESTIMONY; DO NOT BEAR TESTIMONY

Some courts assert that a laboratory report is not a substitute for live testimony and is therefore nontestimonial.<sup>236</sup> Similarly, other courts

---

234. For example, drugs offered into evidence against a defendant alleged to have possessed drugs are of absolutely no probative value unless a proper foundation is laid showing that the drugs offered were those possessed by the defendant, the substance was in fact contraband, and so forth.

235. Other courts realize that foundation evidence can give rise to a Confrontation Clause violation. See, for example, *Napier v. State*, 820 N.E.2d 144, 151 (Ind. Ct. App. 2005), noting that the State’s failure to provide testimony of an officer who performed a breath test on the defendant “runs afoul of the Confrontation Clause . . . [T]he State failed to establish an adequate evidentiary foundation for the admission of the test results into evidence.”

236. See *People v. Salinas*, 53 Cal. Rptr. 3d 302, 305 (Ct. App. 2007) (finding nontestimonial a laboratory report showing substance to be methamphetamine because the report was not “offered as a substitute for live testimony”); *Johnson*, 18 Cal. Rptr. 3d. at 233 (laboratory report from the Alameda County Crime Laboratory analyzing substance is nontestimonial; “[T]he laboratory report was not a substitute for live testimony at [the defendant’s] revocation hearing; it was routine documentary evidence.”); *Green*, 812 N.Y.S.2d at 784 (breath-test-machine certification is nontestimonial; “[T]he evidence at issue here records facts as easily and reliably proven by the

state that laboratory reports are nontestimonial because the purpose of a laboratory report is to comply with a statute or regulation.<sup>237</sup> Using the former approach, the court in *Commonwealth v. Williams* found a certificate of analysis created by the Virginia Department of Forensic Sciences reporting the results of chemical testing to be nontestimonial.<sup>238</sup> The report was admitted into evidence under a state statute and without testimony from the forensic scientist who prepared the report.<sup>239</sup> In support of finding the certificate nontestimonial, the court agreed with a California court that “[a] laboratory report does not bear testimony, or function as the equivalent of in-court testimony.”<sup>240</sup> Rather, the court asserted, certificates of analysis are “routine documentary evidence.”<sup>241</sup> Using the latter approach, the court, in *State v. Shisler*, found a check-solution certificate for a breath-test machine to be nontestimonial.<sup>242</sup> The gov-

---

documents themselves as by live testimony.”); *Commonwealth v. Williams*, No. 04-451, 2005 WL 3007781, at \*3 (Va. Cir. Ct. Nov. 10, 2005) (certificate of analysis from Virginia Department of Forensic Science reporting result of chemical testing is nontestimonial; “[I]t does not bear testimony, or function as the equivalent of in-court testimony.”) (internal quotation marks omitted).

237. See *Abyo v. State*, 166 P.3d 55, 60 (Alaska Ct. App. 2007) (breathalyzer-calibration reports are nontestimonial; “Verification of calibration reports are mandated by the administrative rules, are created whether or not the DataMaster machine whose calibration is being verified is used, and are not created in anticipation of litigation in a particular case.”) (footnotes omitted); *Pflieger v. State*, 952 So. 2d 1251, 1254 (Fla. 4th Dist. Ct. App. 2007) (holding that breathalyzer-inspection reports are nontestimonial because the “inspection report . . . is intended for the nontestimonial purpose of making sure the machine is working properly”); *Commonwealth v. Walther*, 189 S.W.3d 570, 575 (Ky. 2006) (breath-test-machine certification is nontestimonial; “[T]he records have a primary business purpose that would exist ‘to assure compliance with [the state statute], even in the absence of this litigation.’”); *Rollins v. State*, 897 A.2d 821, 839 (Md. 2006) (autopsy report is nontestimonial; “It is clear that there is a statutory duty to prepare such a report when a death has occurred in ‘any suspicious or unusual manner.’”); *People v. Hrubecsky*, No. 2006RI005491, 2006 N.Y. Misc. LEXIS 3859, at \*5–6 (Crim. Ct. Dec. 13, 2006) (breath-test-machine certification documents are nontestimonial under *Davis*; “[T]he ‘primary purpose’ of the certifications, which were in compliance with [the New York statute], was not to offer testimony against the defendant, but to certify as to the operation of equipment.”); *People v. Lebrecht*, 823 N.Y.S.2d 824, 827 (App. Term 2006) (breath-test-machine certification is nontestimonial; “The certificates were prepared . . . to fulfill an official mandate that the machines be maintained in working order.”); *Green*, 812 N.Y.S.2d at 782 (breath-test-machine certification is nontestimonial; “The records kept by the State Police are mandated [by state statute], as ‘memorials of the fact that the tests were made and what the results were.’”); *State v. Shisler*, Nos. C-050860, C-050861, 2006 Ohio App. LEXIS 5251, at \*\*14 (Ct. App. Oct. 6, 2006) (check-solution certification for breath-test machine is nontestimonial; “[T]he testing of the check solution here would have occurred even in the absence of charges against [the defendant] to ensure compliance with [the state statute].”).

238. 2005 WL 3007781, at \*3–4.

239. *Id.* at \*1; see also VA. CODE ANN. § 19.2-187 (West 2007) (“Admission into evidence of certain certificates of analysis”).

240. *Williams*, 2005 WL 3007781, at \*3 (quoting *Johnson*, 18 Cal. Rptr. 3d at 232) (internal quotation marks omitted).

241. *Id.* (quoting *Johnson*, 18 Cal. Rptr. 3d at 232) (internal quotation marks omitted).

242. 2006 Ohio App. LEXIS 5251, at \*\*13–14.

ernment agent who checked the solution did not testify. The court relied on the fact that the “testing of the check solution . . . would have occurred even in the absence of charges against [the defendant] to ensure compliance with [the state statute concerning checks on breath-testing instruments]. In other words, the [preparer of certificate] was not a ‘witness against the accused.’”<sup>243</sup>

The assertion in *Williams* and cases like it that a certificate of analysis does not “bear testimony” simply makes no sense. Testimony is defined in *Crawford* as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”<sup>244</sup> A certificate of analysis is created to establish the fact that a substance analyzed is of a certain character. It is hard to see how any court can honestly believe that such is not testimony. The assertion that a certificate of analysis does not “function as the equivalent of in-court testimony” is similarly baseless. If not for the admission of the certificate, how are the results of laboratory testing to be offered into evidence? Telepathy?<sup>245</sup> Of course certificates of analysis and all laboratory reports function as the equivalent of in-court testimony. If not for the report, the person who ran the test would have to come into court and testify to the results.

Whether a report is created to comply with the requirements of a legislative mandate is likewise irrelevant under *Crawford*. The check-solution certificate in *Shisler* was not created to meet an ongoing emergency. It was created to aid the government in prosecuting crimes. Many courts using this “legislative mandate” approach rely on the fact that the “primary purpose” of the report is to comply with a statute or regulation.<sup>246</sup> These courts conveniently ignore the fact that the “primary purpose” of the statute and the governmental agency’s compliance with it is to “establish or prove past events potentially relevant to later criminal prosecution.”<sup>247</sup> Though the check-solution certificate in *Shisler* is not direct proof of a defendant’s wrongdoing, it plays a vital role in proving that the breath-test machine was operating properly when the breath test was performed. The certificate is used to prove past events directly relevant to a criminal prosecution i.e., the defendant’s

---

243. *Id.* at \*\*14; see also OHIO ADMIN. CODE 3701-53-04(A) (2007) (“Instrument check”).

244. *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (quoting WEBSTER, *supra* note 27) (alteration in original). *Davis* essentially did away with any true solemnity requirement.

245. The author will refrain from extensive analysis of whether a telepathic communication would be testimonial. Yet if it were given in response to police questioning, it seems the communication would be testimonial.

246. See, e.g., *People v. Hrubecky*, No. 2006RI005491, 2006 N.Y. Misc. LEXIS 3859, at \*5–6 (Crim. Ct. Dec. 13, 2006) (“[T]he ‘primary purpose’ of the certifications . . . [was] to certify as to the operation of equipment.”).

247. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

blood-alcohol level was above the legal limit. That a governmental agency is required to check the solution is wholly irrelevant.

#### D. *The Texts of Crawford and Davis*

*Crawford* cited three “formulations” of the core class of testimonial statements that “all share a common nucleus and then define the [Confrontation] Clause’s coverage at various levels of abstraction around it.”<sup>248</sup> These formulations are:

1. “*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”;
2. “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions”;
3. “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”<sup>249</sup>

*Crawford* also provided a list of four situations that per se result in testimonial statements. The court stated that “[w]hatever else term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”<sup>250</sup>

The holding in *Davis* was in reference to “interrogations” and was intended to apply to “the narrow situations we address.”<sup>251</sup>

#### I. THE THREE CRAWFORD FORMULATIONS

Some courts refer to the three formulations and determine that the laboratory report in question is testimonial.<sup>252</sup> Other courts reach the

---

248. 541 U.S. at 52.

249. *Id.* at 51–52 (ellipsis in original) (citations omitted).

250. *Id.* at 68.

251. 547 U.S. at 830 n.5.

252. *See* Thomas v. United States, 914 A.2d 1, 12 (D.C. 2006) (DEA chemist report is testimonial; “Under every definition of ‘testimony’ and ‘testimonial’ in *Crawford*, as well as the ‘primary purpose’ test employed in *Davis*, the DEA chemist’s report in this case constituted a ‘core’ testimonial statement subject to the requirements of the Confrontation Clause.”); State v. Laturner, 163 P.3d 367, 376 (Kan. Ct. App. 2007) (citing the three *Crawford* formulations and finding laboratory report to be testimonial; “The forensic scientist who prepared [the defendant’s] lab report was a witness; the statements in her lab report were testimony; and she knew when preparing her report that it would be used by the State at [the defendant’s] trial to prove he committed the crime of possessing methamphetamine.”); State v. Caulfield, 722 N.W.2d 304, 309 (Minn. 2006) (Bureau of Criminal Apprehension (“BCA”) lab report identifying substance as cocaine is testimonial; “The BCA lab report bears characteristics of each of the three generic



exact opposite conclusion.<sup>253</sup> In *Thomas v. United States*, the District of Columbia Court of Appeals determined that the admission of a Drug Enforcement Agency (“DEA”) chemist’s report determining a substance to be cocaine without the testimony of the chemist who prepared the report violated the defendant’s rights under the Confrontation Clause.<sup>254</sup> The court determined that “[u]nder every definition of . . . ‘testimonial’ in *Crawford* . . . the DEA chemist’s report in this case constituted a ‘core’ testimonial statement subject to the requirements of the Confrontation Clause.”<sup>255</sup> In *Commonwealth v. Williams*, the defendant objected to the admission of a certificate of analysis from the Virginia Department of Forensic Science reporting the results of chemical testing.<sup>256</sup> The forensic scientist who prepared the report did not testify. In overruling the defendant’s objection the court stated, “A certificate of analysis is clearly different from the type of ‘core’ testimonial evidence described in *Crawford*.”<sup>257</sup> How can two courts faced with essentially the same set of facts take such diametrically opposite positions? The

---

descriptions offered by the Supreme Court in *Crawford*.”); *State v. Sickmann*, No. A05-2478, 2006 Minn. App. Unpub. LEXIS 1329, at \*6–8 (Ct. App. Dec. 12, 2006) (quoting *Crawford*’s “three general categories of testimonial statements” and finding laboratory report to be testimonial); *State v. March*, 216 S.W.3d 663, 666 (Mo. 2007) (listing *Crawford*’s “three useful formulations of this core class of testimonial statements” and holding that “[u]nder the definitions of testimony and testimonial in *Crawford*, as well as the primary purpose test in *Davis*, it is clear that the laboratory report in this case constituted a core testimonial statement subject to the requirements of the Confrontation Clause”) (internal quotation marks omitted); *State v. Pasqualone*, No. 2007-A-0005, 2007 Ohio App. LEXIS 5888, at \*15 (Ct. App. Dec. 14, 2007) (“[L]aboratory reports such as the one admitted in this matter meet all three of the examples of a testimonial statement given in *Crawford*.”); *State v. Reuschling*, No. 2007-A-0006, 2007 Ohio App. LEXIS 5895, at \*\*14 (Ct. App. Dec. 14, 2007) (“[L]aboratory reports such as the one admitted in this matter meet all three of the examples of a testimonial statement given in *Crawford*.”); *Deener v. State*, 214 S.W.3d 522, 526 (Tex. App. 2006) (certificate of analysis and chain of custody affidavits are testimonial; “We conclude the affidavits and certificate at issue fall squarely within all three [*Crawford* formulations] and are thus ‘testimonial’ within the meaning of the analysis set forth in *Crawford*.”).

253. See *Rollins v. State*, 897 A.2d 821, 838 (Md. 2006) (concluding that the autopsy report as redacted is nontestimonial because the report does not fall under the “core class of ‘testimonial’ statements”); *Commonwealth v. Verde*, 827 N.E.2d 701, 706 (Mass. 2005) (drug certificate stating results of analysis is nontestimonial; “The documentary evidence at issue here has very little kinship to the type of hearsay the confrontation clause intended to exclude, absent an opportunity for cross-examination.”); *State v. Norman*, 125 P.3d 15, 18 (Or. Ct. App. 2005) (breath-test-machine certifications are nontestimonial; “[T]he certifications in this case do not resemble the classic kind of testimonial evidence at which the Confrontation Clause was aimed . . . .”); *Commonwealth v. Williams*, No. 04-451, 2005 WL 3007781, at \*3 (Va. Cir. Ct. Nov. 10, 2005) (certificate of analysis from the Virginia Department of Forensic Science is nontestimonial; “A certificate of analysis is clearly different from the type of ‘core’ testimonial evidence described by *Crawford*.”).

254. 914 A.2d at 12.

255. *Id.*

256. 2005 WL 3007781, at \*1.

257. *Id.* at \*3.

answer lies in the “miasma of uncertainty” created by *Crawford*. There is no “right” answer to whether the laboratory reports are testimonial; at best there are more or less reasonable guesses.

Still other courts look to the three formulations, assert they are dictum or merely proposed, and refuse to rely on them.<sup>258</sup> At least when *Crawford* applies to witness statements to law enforcement, any focus on the declarant’s belief is improper.<sup>259</sup> So courts stating that the formulations (or at least two of the three) are dicta are seemingly correct. But because intra-governmental laboratory reports do not fit within the holding of *Crawford*, perhaps looking to the formulations is a reasonable approach. One thing is clear—the formulations have created more confusion than clarity. Courts that rely on them and those that do not reach contradictory results. Those courts treating them as dicta are forced to look elsewhere to justify their decision and the justifications are often no more “correct” than ones based on the formulations.

## 2. THE FOUR NECESSARILY TESTIMONIAL STATEMENTS

A great number of courts refer to the four per se testimonial statements set forth in *Crawford* and determine that laboratory reports are nontestimonial because laboratory reports are not akin to the four statements.<sup>260</sup> In *Moreno Denoso v. State*, the defendant was convicted of

---

258. See *People v. Kim*, 859 N.E.2d 92, 94 (Ill. App. Ct. 2006) (breath-test-machine certification is nontestimonial; “[W]hether a document may be used in litigation . . . [i]s but one of several considerations that *Crawford* identified as bearing on whether evidence is testimonial. None of the factors was deemed dispositive.”); *State v. Carter*, 114 P.3d 1001, 1007 (Mont. 2005) (breath-test-machine certification is nontestimonial; “*Crawford* also mentioned the . . . formulations . . . . However, *Crawford* did not adopt any of the . . . definitions . . . .”); *City of Las Vegas v. Walsh*, 124 P.3d 203, 208 (Nev. 2005) (nurse’s affidavit offered to prove certain facts relating to the withdrawal of blood for testing is testimonial; reviewing the three formulations and stating “we conclude the affidavits . . . are testimonial statements”); *People v. Fisher*, No. 04-1556, 2005 N.Y. Misc. LEXIS 2409, at \*\*16 (City Ct. Oct. 25, 2005) (“breath test documents,” including calibration certificate and certification of analysis of stimulator solution, are nontestimonial; “While the Court recognized several analytical models, it is important to remember that *the Court did not endorse any one of them.*”); *Luginbyhl v. Commonwealth*, 618 S.E.2d 347, 354 n.4 (Va. Ct. App. 2005) (breath-test certificate including attestation machine in good working order is nontestimonial; “Because the Supreme Court did not expressly adopt any of the[ ] formulations or use them in its analysis, we decline to rely on them here.”).

259. See *Graham*, *Special Report*, *supra* note 4.

260. See *People v. Hinojos-Mendoza*, 140 P.3d 30, 37 (Colo. App. 2005) (laboratory report showing substance to be cocaine is nontestimonial; “[The report] does [not] resemble the other types of statements identified by the *Crawford* majority as testimonial, such as ‘prior testimony at a preliminary hearing, before a grand jury, or at a former trial.’ It is not a statement obtained from a witness during a ‘police interrogation.’”), *aff’d in part, rev’d in part*, 169 P.3d 662 (Colo. 2007); *Pflieger v. State*, 952 So. 2d 1251, 1252 (Fla. 4th Dist. Ct. App. 2007) (breathalyzer certification is nontestimonial; “None of these [four necessarily testimonial statements] apply in this case.”); *Napier v. State*, 820 N.E.2d 144, 149 (Ind. Ct. App. 2005) (breath-test-machine certification is nontestimonial; “[I]nspection and operator certifications are simply not included in the class of evidence . . . identified by the *Crawford* court . . . .”); *Rembusch v. State*, 836 N.E.2d 979, 982

murder.<sup>261</sup> A certified copy of the victim's autopsy report that had been prepared by a state medical examiner was admitted at trial as a public record.<sup>262</sup> On appeal the defendant argued that admission of the autopsy report violated his rights under the Confrontation Clause because the pathologist who prepared the report did not testify.<sup>263</sup> Despite the fact that the report set forth both factual findings and the cause of death, the court found it to be nontestimonial.<sup>264</sup> Quoting the four necessarily testimonial statements listed in *Crawford*,<sup>265</sup> the court held that "the autopsy report in this case does not fall within the categories of testimonial evidence described in *Crawford*."<sup>266</sup>

It is true that laboratory reports do not resemble the four testimo-

---

(Ind. Ct. App. 2005) (breath-test-machine certification is nontestimonial; "[W]e do not believe that the admission of a certificate of inspection and compliance of a breath test instrument belong to that class of evidence involving [the four per se testimonial statements] that the *Crawford* court identified . . . ."); State v. Arita, 900 So. 2d 37, 45 (La. Ct. App. 2005) (latent fingerprint card is nontestimonial; listing the four testimonial statements in *Crawford*; "The evidence at issue here . . . was clearly non-testimonial hearsay evidence."); State v. Dedman, 102 P.3d 628, 636 (N.M. 2004) (blood-alcohol test report is nontestimonial; "[A] blood alcohol report is very different from the other examples of testimonial hearsay evidence . . . ."); State v. Forte, 629 S.E.2d 137, 143 (N.C. 2006) (DNA laboratory report is nontestimonial; "They do not fall into any of the categories that the Supreme Court defined as unquestionably testimonial."); Vill. of Granville v. Eastman, No. 2006CA00050, 2006 Ohio App. LEXIS 6213, at \*\*9 (Ct. App. Nov. 27, 2006) (breath-test-machine certification is nontestimonial; "[T]hey bear no similarities to the types of evidence the Supreme Court labeled as testimonial: [listing the four testimonial statements].") (quoting State v. Cook, No. WD-04-029, 2005 Ohio App. LEXIS 1514, at \*\*8) (Ct. App. Mar. 31, 2005) (internal quotation marks omitted); State v. Greene, No. CA2005-12-129, 2006 Ohio App. LEXIS 6053, at \*\*6 (Ct. App. Nov. 20, 2006) (same); Cook, 2005 Ohio App. LEXIS 1514, at \*\*8 (breath-machine-certification documents and officer certification are nontestimonial; "[T]hey bear no similarities to the types of evidence the Supreme Court labeled as testimonial: [listing the four testimonial statements.]); State v. Thackaberry, 95 P.3d 1142, 1145 (Or. Ct. App. 2004) (laboratory report showing presence of methamphetamine in defendant's urine is likely nontestimonial because it is not analogous to the four statements listed in *Crawford*); *In re J.R.L.G.*, No. 11-05-00002-CV, 2006 Tex. App. LEXIS 3344, at \*6-7 (App. Apr. 27, 2006) (holding laboratory report showing the result of a drug test is nontestimonial because it is not akin to the four testimonial statements listed in *Crawford*); Moreno Denoso v. State, 156 S.W.3d 166, 182 (Tex. App. 2005) (autopsy report is nontestimonial; "[T]he autopsy report in this case does not fall within the categories of testimonial evidence described in *Crawford*. It is not prior testimony at a preliminary hearing, before a grand jury, or at a former trial. It is not a statement given in response to police interrogations.") (citation omitted); Mitchell v. State, 191 S.W.3d 219, 222 (Tex. App. 2005) ("[B]ecause the autopsy report does not fall within the categories of testimonial evidence described in *Crawford*, we hold that it is nontestimonial."); *Luginbyhl*, 618 S.E.2d at 354 (certificate of blood-alcohol analysis is nontestimonial; "[The nontestifying officer's] statements in the affidavit do not resemble the types of statements identified by the Supreme Court as testimonial.").

261. 156 S.W.3d at 172.

262. *Id.* at 180.

263. *Id.* at 180-81.

264. *Id.* at 182.

265. *Id.* at 181.

266. *Id.* at 182.

nial statements listed in *Crawford*. This fact alone, however, is not enough to justify treating a laboratory report as nontestimonial. First, simply because the statements in *Crawford* are necessarily testimonial does not mean they are necessarily the *only* testimonial statements. The Court prefaced the list with “[w]hatever else the term covers, it applies at a minimum to . . .”<sup>267</sup> implying that “testimonial” may include statements other than those listed.<sup>268</sup> Whether laboratory reports are included in “whatever else” is unclear. Second, focus on the four testimonial statements ad seriatim has a tendency to lose sight of the forest by focusing on the trees. The Confrontation Clause under *Crawford* is concerned with “government conduct in acquiring evidence against the accused.”<sup>269</sup> Therefore, one can reasonably argue that the “trees” i.e., “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations” are only part of a broader forest, i.e., the overarching concern in *Crawford*.

### 3. THE EFFECT OF DAVIS ON LABORATORY REPORTS

Some courts have found laboratory reports to be testimonial in light of *Davis*,<sup>270</sup> and others have reached the opposite conclusion.<sup>271</sup> Still other courts reviewing laboratory reports following *Davis* make no mention of the case.<sup>272</sup> At least one court has stated that *Davis* is of no help

267. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

268. See *Johnson v. State*, 929 So. 2d 4, 7, 8–9 (Fla. 2d Dist. Ct. App. 2005) (“[*Crawford*] did provide a noncomprehensive list of testimony that would be considered testimonial: [listing the four testimonial statements].”) (certifying question: “Does the admission of a Florida Department of Law Enforcement lab report establishing the illegal nature of substances possessed by a defendant violate the Confrontation Clause and *Crawford v. Washington*, when the person who performed the lab test did not testify?”) (citation omitted), certifying question to 924 So. 2d. 810 (Fla. 2006).

269. *Graham, Special Report, supra* note 4, at 108.

270. See *Thomas v. United States*, 914 A.2d 1, 12 (D.C. 2006) (DEA chemists report is testimonial; “Under . . . the ‘primary purpose’ test employed in *Davis*, the DEA chemist’s report in this case constituted a ‘core’ testimonial statement subject to the requirements of the Confrontation Clause.”); *State v. Miller*, 144 P.3d 1052, 1058 (Or. Ct. App. 2006) (laboratory reports prepared by Oregon State Police Forensic Laboratory are testimonial in light of *Davis*; “We can ‘presume . . . that the reports were, in fact, produced in response to a police inquiry.’”).

271. See, e.g., *People v. Hrubycky*, No. 2006RI005491, 2006 N.Y. Misc. LEXIS 3859, at \*5–6 (Crim. Ct. Dec. 13, 2006) (breath-test-machine certification documents are nontestimonial; “[T]he ‘primary purpose’ of the certifications, which were in compliance with [the state statutes], was not to offer testimony against the defendant, but to certify as to the operation of equipment.”).

272. See *Pruitt v. State*, 954 So. 2d 611 (Ala. Crim. App. 2006) (certificate of analysis is nontestimonial; no mention of *Davis*); *Sobota v. State*, 933 So. 2d 1277 (Fla. 2d Dist. Ct. App. 2006) (laboratory report showing result of blood test is testimonial; no mention of *Davis*); *Martin v. State*, 936 So. 2d 1190 (Fla. 1st Dist. Ct. App. 2006) (laboratory report showing result of substance analysis is testimonial; no mention of *Davis*); *People v. Lebrecht*, 823 N.Y.S.2d 824 (App. Term 2006) (breath-test-machine certification is nontestimonial; no mention of *Davis*); *Deener v. State*, 214 S.W.3d 522 (Tex. App. 2006) (certificate of analysis is testimonial; no mention of *Davis*).

in analyzing laboratory reports.<sup>273</sup> *Davis* contained a narrow holding, so the assertion that the case is of no assistance in analyzing laboratory reports is certainly reasonable. But given that neither of the two cases setting forth the “new” (or traditional, according to the Court) meaning of the Confrontation Clause adequately deals with laboratory reports, looking to *Davis* by analogy is also a reasonable approach.

In *State v. Miller*, the Court of Appeals of Oregon agreed with the lower court that “two lab reports prepared by employees of the Oregon State Police Forensic Laboratory (OSP lab) that the state wished to introduce into evidence without calling the authors . . . as witnesses”<sup>274</sup> were “inadmissible without the live testimony of the forensic scientists, or criminalist or analyst who prepared the reports.”<sup>275</sup> The court determined that the reports were testimonial “in the light of the Court’s recent decision elaborating on *Crawford*” noting that “*Davis/Hammon* provided additional guidance.”<sup>276</sup> Referring to the “primary purpose” test, the court stated, “[t]he statements made in the lab reports at issue here are clearly intended to be used in a criminal prosecution to prove past events—the presence of controlled substance in the defendant’s urine at a specific time in the past and the presence of drug residue on the glass smoking device.”<sup>277</sup> The court described the reports as “solemn declarations or affirmations of fact, made to the police department that requested the results.”<sup>278</sup> Thus the court ignored the fact that the report was made by “the government” for “the government.” This distinction is important. Nothing in *Crawford* or *Davis* mandates that statements made within the government are to be subject to the same scrutiny as those coming from outside the government. Yet nothing says they are to be treated any differently.<sup>279</sup>

#### 4. CONTEMPORANEOUS RECORDATION OF OBSERVABLE EVENTS

Focusing on the circumstances under which a statement is made, some courts have distinguished between statements about past events and statements made while an event is perceived, judging only the for-

---

273. See *Jarrell v. State*, 852 N.E.2d 1022, 1025 (Ind. Ct. App. 2006) (breath-test-machine certification report is nontestimonial; “It appears to us that *Davis/Hammon* is of little or no assistance in deciding the case before us. Those cases were highly fact-specific and generated a rule related to a precise, but frequently recurring, scenario . . .”).

274. 144 P.3d at 1053. One of the authors of the reports had left the OSP laboratory and the other had not been subpoenaed for the day in question. *Id.*

275. *Id.* at 1054 (internal quotation marks omitted).

276. *Id.* at 1058.

277. *Id.*

278. *Id.* (emphasis added).

279. See discussion *supra* Part IV.A.1. An analysis of this quagmire results in the “worse-er” conundrum.

mer to be testimonial. As such, these courts find laboratory reports to be nontestimonial contemporaneous recordings of observable events.<sup>280</sup> In *People v. Geier*, the defendant was convicted of murder, rape, and conspiracy to murder.<sup>281</sup> At trial a DNA expert from a state-contracted private laboratory testified for the prosecution that DNA found on the victim matched the defendant's. The in-court expert, however, based her opinion on the DNA report of a nontestifying analyst from the same laboratory. At trial, the defendant argued that the test results were inadmissible unless the analyst who actually performed the tests testified. Overruling the objection, the trial court allowed the expert's testimony. On appeal the defendant argued that admission of the expert's testimony violated his rights under the Confrontation Clause because the DNA report was testimonial.<sup>282</sup> The California Supreme Court began its analysis with an overview of the various rationales offered by other courts in determining whether laboratory reports are testimonial. Though the court "found no single analysis of the applicability of *Crawford* and *Davis* to the kind of scientific evidence at issue in this case to be entirely persuasive," the court, based on its own interpretation of *Crawford* and *Davis*, was "nonetheless more persuaded by those cases concluding that such evidence is not testimonial."<sup>283</sup> The court held that:

For our purposes in this case, involving the admission of a DNA report, what we extract from those decisions is that a statement is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial. Conversely, a statement that does not meet all three criteria is not testimonial.<sup>284</sup>

Interpreting *Davis*, the court stated that while the possibility of use at a later trial is one consideration in determining whether a statement is tes-

---

280. See *People v. Geier*, 161 P.3d 104, 139 (Cal. 2007) (DNA report is nontestimonial because the nontestifying author's observations as recorded in the report "constitute a contemporaneous recollection of observable events rather than the documentation of past events"); *In re D.H.*, No. A116095, 2007 Cal. App. Unpub. LEXIS 8214, at \*10 (Ct. App. Oct. 11, 2007) (laboratory report is nontestimonial; "The [*Geier*] court identified the 'crucial point' as 'whether the statement represents the contemporaneous recollection of observable events,' and evidence is not testimonial just because it might be reasonably anticipated that it would be used at trial."); *State v. O'Maley*, 932 A.2d 1, 12 (N.H. 2007) (blood-sample-collection form and blood-test result are nontestimonial; "[A] crucial factor in determining whether a statement is testimonial or not is whether it represents 'the documentation of past events' or 'the contemporaneous recollection of observable events.'" (quoting *Geier*, 161 P.3d at 139); *State v. Crager*, 879 N.E.2d 745, 756 (Ohio 2007) (DNA report is nontestimonial; "[T]he [testimonial] inquiry actually should focus on 'whether the statement represents the contemporaneous recollection of observable events.'" (quoting *Geier*, 161 P.3d at 140).

281. 161 P.3d at 110.

282. *Id.* at 134.

283. *Id.* at 138.

284. *Id.* at 138-39.

testimonial, “the proper focus [in determining whether an out-of-court statement is testimonial] is *not* on the mere reasonable chance that an out-of-court statement might be used in a criminal trial.”<sup>285</sup> The court determined that the distinction made in *Davis* between testimonial and nontestimonial statements was based on the circumstances under which Michelle McCrotty’s and Amy Hammon’s respective statements were made.<sup>286</sup> McCrotty’s statement, the court noted, was “a contemporaneous description of an unfolding event,”<sup>287</sup> and therefore nontestimonial. Conversely, Hammon’s statement was in response to police questioning and its purpose was to “deliberately recount[ ], in response to police questioning, how potentially criminal past events began and progressed.”<sup>288</sup> Thus, the statement was testimonial. The court noted that the police, as part of an investigation, requested the nontestifying analyst’s statements contained in the DNA report and the analyst could reasonably have anticipated that the report might be used in a later criminal prosecution.<sup>289</sup> The court stated, however, that the analyst’s “observations . . . constitute a contemporaneous recordation of observable events rather than the documentation of past events.”<sup>290</sup> The analyst recoded her observations “regarding the receipt of the DNA samples, her preparation of the samples for analysis, and the results of that analysis as she was actually performing those tasks.”<sup>291</sup> As such, the statements made by the analyst and recorded in the DNA report were akin to the statements of Michelle McCrotty in *Davis* and thus nontestimonial.

It is not clear that the *Geier* court’s reasoning by analogy is at all appropriate given the contextual differences between the creation of laboratory reports and statements made in response to police interrogations. While it is true that *Davis* found the circumstances under which statements are made to be relevant in determining whether a statement is testimonial, the Court hardly sanctioned an approach that may well deem all present-sense impressions to be nontestimonial. While consid-

---

285. *Id.* at 139 (alteration in original) (emphasis added); *see also id.* (“United States v. Ellis, [ ] 460 F.3d [920,] 926 [(7th Cir. 2006)] [“A reasonable person reporting a domestic disturbance, which is what [Michelle McCrotty] in *Davis* was doing, will be aware that the result is the arrest and possible prosecution of the perpetrator. So it cannot be that a statement is testimonial in every case where a declarant reasonably expects that it might be used prosecutorially”].) (alterations in original) (citation omitted). This interpretation of *Davis*, however, improperly focuses on the reasonable expectations of the declarant. The proper inquiry (at least in the context of an interrogation) is whether law enforcement’s purpose is to meet an ongoing emergency or to gather evidence for a possible prosecution in the future.

286. *Id.*

287. *Id.*

288. *Id.* (alteration in original) (internal quotation marks omitted).

289. *Id.*

290. *Id.*

291. *Id.*

ering the circumstances in which a statement is made, courts relying on the contemporaneous recordation-of-observable-events rationale wholly disregard a key circumstance clearly relevant in *Davis*—emergency. In *Davis*, the Court held that a statement is 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*.”<sup>292</sup> Statements 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.”<sup>293</sup> Thus, it is clear that if there is an emergency and the police purpose in receiving a statement is to meet it, such circumstances are sufficient to create a nontestimonial statement. It is not clear whether and when statements falling outside such circumstances are testimonial. Clearly, if a statement is made under circumstances where there is no emergency and the primary purpose of an interrogation is to establish past events potentially relevant to a later criminal prosecution, the statement will be testimonial. Nothing in *Davis*, however, indicates that merely because an event is contemporaneously recorded it will be nontestimonial. The temporal focus of *Davis* is inextricably tied to the contemporaneousness of the statement and the ongoing emergency, not merely any event perceived. Further, if the nontestifying expert is treated as analytically distinct from the law-enforcement agent requesting a laboratory report, it seems incorrect to focus on whether the laboratory report itself “describes a past fact related to criminal activity.”<sup>294</sup> True, the laboratory report contains a record of events—for example, a lab test shows a substance is cocaine—recorded as they were contemporaneously observed. But *Davis* deems statements to be testimonial when the “*primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution*.”<sup>295</sup> If the request by the law-enforcement agent is analogized to an “interrogation” it seems that the pertinent inquiry is into the agent’s purpose in requesting that the laboratory report be created. The agent’s *purpose* in “interrogating” the analyst is to prove that the substance to be tested is, and *was* in the past, cocaine.

On the opposite end of the spectrum from *Geier*, the court in *State v. Kent* found both a laboratory report prepared by a New Jersey State Police chemist and a blood-test certificate prepared pursuant to a state

---

292. *Davis v. Washington*, 547 U.S. 813, 822 (2006) (emphasis added).

293. *Id.* at 822 (emphasis added).

294. *Geier*, 161 P.3d at 138.

295. *Davis*, 547 U.S. at 822 (emphasis added).



statute by a hospital employee to be testimonial.<sup>296</sup> Relying on *Davis*, the court found that the documents had been admitted into evidence during the defendant's trial for driving while intoxicated in violation of the Confrontation Clause. The court found that when the police chemist analyzed the defendant's blood there was "no ongoing emergency."<sup>297</sup> Further, it could not reasonably be argued "that the 'primary purpose' of the lab certificate was anything other than to prove past events, specifically defendant's blood alcohol concentration, relevant to his DWI prosecution."<sup>298</sup> As to the blood-test certificate the court held that "the 'primary purpose' of the blood certificate was surely to preserve evidence for a future anticipated DWI prosecution."<sup>299</sup> Noting that hospital nurses are not police officers, the court stated that "their close interaction with law enforcement officers, in extracting blood from DWI suspects and in certifying as to 'the manner and circumstances under which the sample was taken,' readily places them within the ambit of the 'testimonial' boundaries of *Crawford*."<sup>300</sup>

While *Kent* appears to be more consistent with *Davis* than *Geier*, it is far from clear that *Davis*, with its self-proclaimed narrow focus on police interrogations, should be applied by analogy to laboratory reports. In *Davis*, the Court prefaced the "primary purpose test" by stating, "[w]ithout 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."<sup>301</sup> Thus, laboratory reports may well fall into a yet-to-be-explicated category of nontestimonial statements. Unfortunately for courts and litigants alike, *Crawford* and *Davis* offer little guidance in divining the contours of such a category.

## 5. FOCUS ON THE DECLARANT

Based on the text of *Crawford*, a number of courts focus on the declarant's state of mind or reasonable belief in analyzing laboratory reports under *Crawford*.<sup>302</sup> In *People v. Lonsby*, a Michigan State Police

---

296. 918 A.2d 626, 628 (N.J. Super Ct. App. Div. 2007); *see also* *State v. Renshaw*, 915 A.2d 1081, 1088 (N.J. Super Ct. App. Div. 2007) (holding that a blood-test certificate is testimonial).

297. 918 A.2d at 637 (internal quotation marks omitted).

298. *Id.*

299. *Id.*

300. *Id.* at 638 (citation omitted).

301. *Davis v. Washington*, 547 U.S. 813, 822 (2006) (emphasis added).

302. *See Commonwealth v. Lampron*, 839 N.E.2d 870, 875 (Mass. App. Ct. 2005) (result of drug screen created by hospital is nontestimonial; "The proper inquiry is whether a reasonable person in the declarant's position would anticipate the statement's being used against the accused in investigating and prosecuting a crime.") (quoting *Commonwealth v. Gonsalves*, 833 N.E.2d

Crime Laboratories serologist tested a stain and “recorded her observations and test results in laboratory notes and a lab report.”<sup>303</sup> The serologist who performed the test did not testify at trial; instead, another serologist from the laboratory testified about the content of the written statements. The Court of Appeals of Michigan held that “the nontestifying serologist’s notes and lab report constitute testimonial hearsay and . . . the admission of these statements through [the other serologist’s] testimony violated defendant’s rights under the Confrontation Clause.”<sup>304</sup> The court based this conclusion on the fact that the writings “clearly qualify as statements that [the nontestifying serologist] would reasonably expect would be used in a *prosecutorial* manner.”<sup>305</sup> This approach is improper under *Crawford*, at least when the case is applied to situations it was explicitly designed to cover. But that two of the three formulations of testimonial focus on the declarant has created a great deal of confusion. Although it is far from clear on a cursory reading, but “consistent with the two historical inferences”<sup>306</sup> in *Crawford*, the Confrontation Clause focuses “solely upon government conduct in acquiring evidence against the accused.”<sup>307</sup> In other words, under *Crawford*—as clarified by *Davis*—the “reasonable” expectations of the declarant simply cannot be a relevant factor. As has been repeatedly stated, however, it is not clear whether this or any theory of *Crawford* or *Davis* applies when the “declarant” is the government and the “statement” a laboratory report.

---

549, 558 (2005)) (internal quotation marks omitted); *People v. Lonsby*, 707 N.W.2d 610, 612 (Mich. Ct. App. 2005) (serologist report from the Michigan State Police Crime Laboratories is nontestimonial; “[P]retrial statements are testimonial if the declarant would reasonably expect that the statement will be used in a prosecutorial manner and if the statement is made ‘under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]’”) (second alteration in original); *People v. Orpin*, 796 N.Y.S.2d 512, 515 (Just. Ct. 2005) (inspection, maintenance, and calibration records of breath-test machine prepared by state division of criminal justice and certification of analysis of stimulator solution prepared by state police forensic investigation center are testimonial; “What these [three *Crawford*] formulations all share is that the declarant understand that his or her statement will be used in a criminal investigation or prosecution.”), *rev’d sub. nom.* *Green v. DeMarco*, 812 N.Y.S.2d 722 (Sup. Ct. 2005); *State v. Shelly*, 627 S.E.2d 287, 299 (N.C. Ct. App. 2006) (gunshot residue testing report is nontestimonial; “Based on a comprehensive survey of other jurisdictions . . . testimonial statements share a common characteristic: The declarant’s knowledge, expectation, or intent that his or her statements will be used at a subsequent trial.”) (internal quotation marks omitted); *Vill. of Granville v. Graziano*, 139 Ohio Misc. 2d 29, 35 (Licking County Mun. Ct. 2006) (breath-test-machine certifications are testimonial; “[They] were made under circumstances which would lead the declarant to believe that the statements would be available for use at a later trial.”).

303. 707 N.W.2d at 613.

304. *Id.*

305. *Id.* at 619.

306. Graham, *The Davis Narrowing*, *supra* note 56, at 610.

307. Graham, *Special Report*, *supra* note 4, at 108.

### E. *Practical Considerations and Outlier Cases*

In describing the Framer's objections to the admission of Cobham's statement into evidence, the Court in *Crawford* stated that "the problem was that the judges refused to allow Raleigh to confront Cobham in court, where he could cross-examine him and try to expose his accusations as a lie."<sup>308</sup> Accordingly, "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."<sup>309</sup> Thus, the sine qua non for admissibility of testimonial statements is "testing in the crucible of cross-examination."<sup>310</sup>

#### 1. PRACTICAL CONSIDERATIONS

A number of courts stress the practical ramifications of finding laboratory reports testimonial in order to bolster their rationale for finding reports to be nontestimonial.<sup>311</sup> In *People v. Durio*, the court found to be nontestimonial an autopsy report created by a medical examiner employed by the Office of the Chief Medical Examiner.<sup>312</sup> The report was admitted into evidence without the testimony of the medical examiner who prepared the report. The court concluded its analysis with the statement:

[C]ourts cannot ignore the practical implications that would follow from treating autopsy reports as inadmissible testimonial hearsay in a homicide case. Years may pass between the performance of the autopsy and the apprehension of the perpetrator. This passage of

---

308. *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

309. *Id.* at 59.

310. *Id.* at 61.

311. *See Napier v. State*, 820 N.E.2d 144, 149 (Ind. Ct. App. 2005) (breath-test-machine certification is nontestimonial; "[T]he unreasonable alternative is to have a toxicologist in every court on a daily basis offering testimony about his inspection of a breathalyzer machine . . . ."); *State v. Lackey*, 120 P.3d 332, 351 (Kan. 2005) (autopsy report is nontestimonial; "If, as in this case, the medical examiner is deceased or otherwise unavailable, the State would be precluded from using the autopsy report in presenting its case, which could preclude the prosecution of a homicide case."); *overruled on other grounds by State v. Davis*, 158 P.3d 317 (Kan. 2006); *Rollins v. State*, 897 A.2d 821, 845 (Md. 2006) (autopsy report nontestimonial; "[W]e note the impractical implications to classifying autopsy reports as inadmissible testimonial hearsay because the person who prepared them is not present to testify."); *People v. Durio*, 794 N.Y.S.2d 863, 869 (Sup. Ct. 2005) (autopsy report is nontestimonial; "[C]ourts cannot ignore the practical implications that would follow from treating autopsy reports as inadmissible testimonial hearsay in a homicide case."); *State v. Crager*, 879 N.E.2d 745, 758 (Ohio 2007) (reversing lower court and finding DNA report to be nontestimonial; "As a final matter, the practical results of affirming the judgment of the court of appeals in this case would be problematical."). *But see State v. Kent*, 918 A.2d 626, 640 (N.J. Super Ct. App. 2007) ("Although we surely appreciate the practical quandaries created by post-*Crawford* jurisprudence, we are unpersuaded that the . . . laboratory reports and the blood sample certificate . . . were non-testimonial . . . .").

312. 794 N.Y.S.2d at 869.

time can easily lead to the unavailability of the examiner who prepared the autopsy report.<sup>313</sup>

The court's concerns are certainly justified. The practical ramifications of treating laboratory reports as testimonial are wide-ranging and significant. But *Crawford* is not practical. If hearsay is testimonial, it must be tested "in the crucible of cross-examinations." There are no exceptions. There must be cross-examination regardless of how impractical subjecting the testimonial statement to cross-examination may be. Courts noting the extreme difficulties created if laboratory reports are found to be testimonial, though observant, are incorrect in using such hardship to justify their decisions determining laboratory reports to be nontestimonial.

## 2. OUTLIER CASES

A few cases do not fall within the above-mentioned categories. In *State v. Berezansky*, a laboratory certificate created by a state police laboratory indicating the defendant's blood-alcohol level to have been above the legal limit was admitted into evidence as a business record.<sup>314</sup> The technician who prepared the report did not testify. In finding the defendant's rights under the Confrontation Clause were violated, the court stated, "[w]e need not fill in the definition left open by the Supreme Court to be guided by the Court's concerns for the right of confrontation as expressed in *Crawford*."<sup>315</sup> The court never decided whether the certificate was testimonial. Instead, the court relied on a New Jersey Supreme Court case from 2002 in light of *Crawford* and determined that the "defendant . . . was denied his constitutional right to confront the certificates preparer."<sup>316</sup> The merit of this approach is that the court seems to stay in line with the spirit of *Crawford* while avoiding reliance on individual portions of the *Crawford* text<sup>317</sup> that clearly do not provide adequate guidance in the analysis of laboratory reports under the Confrontation Clause.

Similarly, in *State v. Birchfield*, the Supreme Court of Oregon held that admission into evidence of a laboratory report without requiring the state to produce the criminalist who prepared the report or demonstrate that the criminalist was unavailable violated the Confrontation Clause of

---

313. *Id.*

314. 899 A.2d 306, 308 (N.J. Super. Ct. App. Div. 2006).

315. *Id.* at 310.

316. *Id.* at 312 (citing *State v. Simbara*, 811 A.2d 448 (N.J. 2002)); *see also* *State v. Renshaw*, 915 A.2d 1081, 1087–88 (N.J. Super. Ct. App. Div. 2007) (discussing *Berezansky* and explicitly finding a certificate of blood analysis to be testimonial in light of *Davis*).

317. Such as the business-records reference, *see supra* Part A, the three formulations, *see supra* Part D.1, the four testimonial statements, *see supra* Part D.2, etc.

the Oregon Constitution.<sup>318</sup> Thus, the court avoided the necessity of descending into the uncertainty surrounding *Crawford*.

At least one court, albeit subsequently reversed, was willing to admit that *Crawford* does not adequately answer whether laboratory reports are testimonial. In *State v. March*, the lower court admitted a crime laboratory report into evidence as a business record though the testimony of the custodian of the laboratory's records.<sup>319</sup> In response to a *Crawford* challenge on appeal, the court held that "in a case such as this, in which the Supreme Court has expressly refused to define what constitutes 'testimonial,' we must recognize . . . Missouri cases as controlling."<sup>320</sup> The court found that under existing Missouri precedent, admission of the laboratory report into evidence as a business record did not violate the Confrontation Clause. While this approach may seem like an easy way out of analyzing whether laboratory reports are testimonial, it is certainly honest. As has been asserted repeatedly throughout this article, *Crawford* does not provide a clear answer to whether laboratory reports are testimonial. Admittedly, it seems that under the Supreme Court's rationale laboratory reports should be testimonial. That it *seems*, however, that laboratory reports *should be* testimonial is hardly an adequate justification for an answer to a question of such far-reaching import.

## V. CONCLUSION AND SUGGESTIONS

Under *Crawford* and *Davis* it is not certain whether government-created laboratory reports are testimonial hearsay when offered against a criminal defendant. A few of the rationales used by courts in deciding whether laboratory reports are testimonial seem to find some support in *Crawford* and *Davis*. But *some support* is the extent to which any support can be found. This article has listed over twenty different rationales offered by state courts to support their determinations whether laboratory reports are testimonial. Many courts use a great number of these rationales to justify their decision. Courts seem to feel the need to excuse their decisions by setting forth as many rationales as possible. The need to write opinions that in essence say, "Look at all this. I must be right. Right?" is a manifestation of the lack of clarity in *Crawford* and *Davis*. One needs only to look to the courts of the State of Florida to see the confusion created by laboratory reports. Three cases from the

---

318. 157 P.3d 216, 220 (Or. 2007); *see also* OR. CONST. art I, § 11 ("In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face.")

319. *State v. March*, No. 27102, 2006 Mo. App. LEXIS 998, at \*4 (Ct. App. June 30, 2006), *rev'd*, 216 S.W.3d 663, 664 (Mo. 2007) (holding that the laboratory report constituted testimonial evidence).

320. *Id.* at \*13.

Second District Court of Appeal and one from the Fourth District Court of Appeal have all found laboratory reports to be testimonial and have then certified questions “of great public importance” to the Florida Supreme Court regarding whether their decisions are correct.<sup>321</sup> These courts, along with courts all over the country, are desperate for an answer. The sole cause of this despair is the “miasma of uncertainty” created by *Crawford*.

A further manifestation of the lack of clarity in *Crawford* is the disparate results courts reach on essentially the same facts. Nothing is a clearer symptom of unsound and unclear jurisprudence than widely disparate results in application. If some laboratory reports created by the government are testimonial, all laboratory reports should be. It should not matter whether the report in question is a certificate of analysis, breath-test-machine certification, or so forth. Yet courts are sharply divided based on the specific type of report as well as laboratory reports in general. For example, in Ohio one appellate court determined that breath-test-machine certifications are nontestimonial while another found a DNA analysis report to be testimonial.<sup>322</sup> In Oregon, the court of appeals found laboratory reports showing a substance to be contraband to be testimonial but breath-test-machine certifications to be nontestimonial.<sup>323</sup> There is no valid reason under *Crawford* for such distinctions, but again *Crawford* is not clear whether laboratory reports are testimonial in general. If they are, however, the distinctions between

---

321. See *Johnson v. State*, 929 So. 2d 4, 8–9 (Fla. 2d Dist. Ct. App. 2005) (certifying question: “Does the admission of a Florida Department of Law Enforcement lab report establishing the illegal nature of substances possessed by a defendant violate the Confrontation Clause and *Crawford v. Washington*, when the person who performed the lab test did not testify?”) (citation omitted), certifying question to 924 So. 2d 810 (Fla. 2006); *Sobato v. State*, 933 So. 2d 1277, 1279 (Fla. 2d Dist. Ct. App. 2006) (certifying question: “Does admission of a test result from a legal blood draw violate the Confrontation Clause and *Crawford v. Washington*, when the toxicologist who performed the blood test does not testify?”) (citation omitted); *Williams v. State*, 933 So. 2d 1283, 1285 (Fla. 2d Dist. Ct. App. 2006) (certifying question: “Does admission of a breath test affidavit violate the Confrontation Clause and *Crawford v. Washington*, when the technician who performed breath test does not testify?”) (citation omitted); *Belvin v. State*, 922 So. 2d 1046, 1054 (Fla. 4th Dist. Ct. App. 2006) (certifying question: “Does admission of those portions of the breath test affidavit pertaining to the breath test operator’s procedures and observations in administering the breath test constitute testimonial evidence and violate the Sixth Amendment’s Confrontation Clause in light of the United States Supreme Court’s holding in *Crawford v. Washington*?”) (citation omitted).

322. Compare *State v. Greene*, No. CA2005-12-129, 2006 Ohio App. LEXIS 6053, at \*8 (Ct. App. Nov. 20, 2006) (solution-batch certificate for breath-test machine is nontestimonial), with *State v. Crager*, 844 N.E.2d 390, 397 (Ohio Ct. App. 2005) (DNA report is testimonial), overruled by 879 N.E.2d 745 (Ohio 2007).

323. Compare *State v. Miller*, 144 P.3d 1052, 1058 (Or. Ct. App. 2006) (laboratory report showing a substance to be methamphetamine is testimonial), with *State v. Norman*, 125 P.3d 15, 19 (Or. Ct. App. 2005) (certificates of accuracy of breath-test machine are nontestimonial).

certain types of reports made by many courts are incorrect if *Crawford* and *Davis* are to be applied logically.

Finally, courts finding laboratory reports to be testimonial appear to be *more* correct. Yet at the same time these courts are generally far more uncomfortable with their decision. The fear in *Crawford* is of governmental overreaching and abuse. If an electronically recorded excited utterance to the police made by a nongovernment witness is testimonial then it certainly seems that laboratory reports created within the government for use in the prosecution of criminal activity should be as well. But under this “worse-er” logic admissions of a party opponent made to the police by a criminal defendant should also be testimonial, but they are not. Thus, while *Crawford* seems to imply that laboratory reports are testimonial, there is simply no clear answer. The discomfort felt by courts finding laboratory reports to be testimonial is due to the severe effect such a finding has on the criminal-justice system. If, for example, autopsy reports are testimonial, the preparing medical examiner must come to trial and testify. If not, the report is inadmissible and this may at times have a preclusive effect on homicide prosecutions. The same goes for all laboratory reports. Given the realities of turnover in governmental laboratories, the cost of bringing the person who ran the test to court, complications such as death of the person who ran the test, and other things, in comparison to what is often only a minimal value to the defendant in having an opportunity to cross-examine the preparer of the report, it is understandable why courts are uncomfortable. At the same time, in many situations it is reasonable to require the preparer of the report to be subject to cross-examination. The problem with *Crawford* is if laboratory reports are testimonial there is no room for judicial discretion in determining under which circumstances there is a need for cross-examination and when there is not. *Crawford* is all or nothing—either laboratory reports are testimonial or they are not.

So what can be done? One would think (or hope) that the Supreme Court will eventually recognize the pandemonium surrounding laboratory reports and decide whether they are testimonial. This will be no easy task. This author would recommend retreating from *Crawford* and *Davis* altogether and returning to *Roberts* with an express qualification that collateral inculpatory statements are not reliable, do not have particularized guarantees of trustworthiness, are not based in a firmly rooted hearsay exception, and therefore can never be used against a criminal defendant. This would afford courts the flexibility to deal with laboratory reports on a more case-specific basis while leaving the Confrontation Clause to prevent abusive use of such reports. While desirable, this is simply not likely to happen.

If the Supreme Court deems laboratory reports to be testimonial the toll on the criminal-justice system will be severe and in many circumstances unwarranted. If laboratory reports, however, are found to be nontestimonial they will be outside the protections of the Confrontation Clause.<sup>324</sup> Leaving reports to the whim of state-evidence law creates a great risk of under-protection of the rights of criminal defendants. Thus, if laboratory reports are testimonial the state will be greatly and at times unduly burdened, yet if they are nontestimonial criminal defendants may be convicted on the basis of unreliable hearsay. Either way justice suffers. Judging laboratory reports nontestimonial—the inconsistency with the underlying theory of *Crawford* notwithstanding—and resurrecting *Roberts* for nontestimonial statements is one possible (though likely logically inconsistent) solution. Another is to create a third category of hearsay statements that are nontestimonial yet subject to Confrontation Clause analysis, and have this category encompass laboratory reports. The problem, however, would be that the history of the Confrontation Clause as relied on in *Crawford* does not provide for such a third category and defining the contours of this category would be exceedingly difficult. Professor Michael. H. Graham's quotation of Oliver and Hardy is exceptionally appropriate: "Ollie, what a fine kettle of fish you got us into."<sup>325</sup>

Another possible approach in analyzing laboratory reports under *Crawford* is to look to the principal evil the Confrontation Clause was designed to address as reflected in *Crawford* and *Davis*. Professor Graham asserts that this evil "was and is *government officials eliciting and also receiving 'accusatory statements' from third parties.*"<sup>326</sup> Thus, "[t]he confrontation clause is not concerned with an out of court statement by a declarant not available to be cross-examined at trial asserting only that a crime was committed, i.e., corpus delicti; the confrontation is concerned solely with the 'identification' of the accused as having committed a crime."<sup>327</sup> This proposition is supported by the historical discussion provided in *Crawford*. In his examination before the privy counsel and in his letter, Lord Cohbam did not merely assert that someone had committed the crime of treason.<sup>328</sup> Instead, Cohbam implicated an identified individual, Sir Walter Raleigh, as his accomplice in trea-

---

324. See *Whorton v. Bockting*, 127 S. Ct. 1173, 1183 (2007) (noting "*Crawford's* elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements").

325. Graham, *The Davis Narrowing*, *supra* note 56, at 621.

326. 4 GRAHAM, HANDBOOK, *supra* note 8, § 802:2.2, at 123 (Supp. 2008).

327. *Id.* at 124.

328. *Crawford v. Washington*, 541 U.S. 36, 44 (2004).



son.<sup>329</sup> Further, in *Crawford* Justice Scalia seemed to be motivated, at least in part, by a desire once and for all to do away with the use of collateral inculpatory statements.<sup>330</sup> Such statements by definition implicate an identified individual in criminal activity. Thus, an alleged accomplice's statement, "John and I robbed Brian," offered in John's robbery prosecution through the testimony of a police officer who received the statement, would be testimonial. But Brian's statement, "I was robbed," offered through the same officer would be nontestimonial. Thus, one might reasonably argue:

[An] out of court statement is "testimonial" only when it is an *accusation of criminal conduct by an identified or identifiable accused* elicited or received by a government official under circumstances objectively indicating at the time made the primary purpose to which the statement will be used by the government is to establish or prove past events potentially relevant to a later criminal prosecution of the identified perpetrator.<sup>331</sup>

If this is the case, laboratory reports, it can be argued, are nontestimonial in that they "do not themselves accuse an identified or identifiable person of having committed a crime."<sup>332</sup> This, of course, is only one possible reading of *Crawford* and *Davis*. As has been consistently demonstrated though out this article, it is impossible to construct a wholly consistent theory of what statements are or are not testimonial given the Supreme Court's lack of guidance.

Perhaps the best approach available to courts wishing to find that the defendant has a right to cross-examine the preparer of laboratory reports, without getting bogged down in the interminable quest of determining whether laboratory reports are testimonial, is to decide, as a matter of evidence law, that the reports are inadmissible. Courts believing the reports are admissible without the preparer's testimony might use the same tack, but it seems less viable given that *Crawford* leans toward treating laboratory reports as testimonial. And ultimately, when faced with a Confrontation Clause challenge by the defendant, courts will be forced to decide whether the report is testimonial. In the end, however, there is no best approach because *Crawford* does not provide one. Speaking for the majority in *Crawford*, Justice Scalia stated that "the unpardonable vice of the *Roberts* test . . . is not its unpredictability."<sup>333</sup>

---

329. *Id.* ("Lord Cobham, Raleigh's alleged accomplice, had *implicated him* in an examination before the Privy Council and in a letter. At Raleigh's trial, these were read to the jury.") (emphasis added).

330. See *supra* Part II.

331. 4 GRAHAM, HANDBOOK, *supra* note 8, § 802:2.2, at 124 (Supp. 2008).

332. *Id.* at 127.

333. 541 U.S. at 63.

The same cannot be said for *Crawford*. The unpredictability created by *Crawford*'s application to laboratory reports is an unpardonable vice. The uncertainty and discord that *Crawford* created must not be allowed to persist.

Many state statutes provide for the admissibility of laboratory reports into evidence without the preparer's testimony, provided the defendant does not exercise his right to have the preparer called to testify.<sup>334</sup> Even assuming, without commenting on, the constitutional validity of such statutes, a problem arises when the person who prepared the report is unavailable. In such a situation, if laboratory reports are testimonial the report is inadmissible. One potential avenue of relief for state courts would be for state legislatures to amend these statutes to add a clause similar to Rule 804(b)(5), which was proposed but not adopted by the Federal Rules of Evidence.<sup>335</sup> The amended statute would allow the defendant to cross-examine the preparer of the report; if he were unavailable the report would be admitted as the only available evidence. Of course, if laboratory reports are testimonial this approach would be unconstitutional. But statutes are afforded a strong presumption of con-

---

334. The description provided here is of the general scheme of such statutes. The statutes, however, differ on the mechanics of the defendant's ability to call the preparer of the report. These differences may have Constitutional implications. An example of such a statute is TEX. CODE CRIM. PROC. ANN. art. 38.41 (2007):

Sec. 1. A certificate of analysis that complies with this article is admissible in evidence on behalf of the state or the defendant to establish the results of a laboratory analysis of physical evidence conducted by or for a law enforcement agency without the necessity of the analyst personally appearing in court.

Sec. 2. This article does not limit the right of a party to summon a witness or to introduce admissible evidence relevant to the results of the analysis.

Sec. 3. A certificate of analysis under this article must contain the following information certified under oath:

- (1) the names of the analyst and the laboratory employing the analyst;
- (2) a statement that the laboratory employing the analyst is accredited by a nationally recognized board or association that accredits crime laboratories;
- (3) a description of the analyst's educational background, training, and experience;
- (4) a statement that the analyst's duties of employment included the analysis of physical evidence for one or more law enforcement agencies;
- (5) a description of the tests or procedures conducted by the analyst;
- (6) a statement that the tests or procedures used were reliable and approved by the laboratory employing the analyst; and
- (7) the results of the analysis.

Sec. 4. Not later than the 20th day before the trial begins in a proceeding in which a certificate of analysis under this article is to be introduced, the certificate must be filed with the clerk of the court and a copy must be provided by fax, hand delivery, or certified mail, return receipt requested, to the opposing party. The certificate is not admissible under Section 1 if, not later than the 10th day before the trial begins, the opposing party files a written objection to the use of the certificate with the clerk of the court and provides a copy of the objection by fax, hand delivery, or certified mail, return receipt requested, to the offering party.

335. FED. R. EVID. 804(b)(5) (proposed 1974), *supra* note 114.

stitutionality.<sup>336</sup> Because *Crawford* does not answer whether laboratory reports are testimonial, the statute would not clearly be unconstitutional. Therefore, a court finding the statute to be constitutional based on the presumption of constitutionality would remain honest to the law and would avoid the fruitless task of attempting to determine whether laboratory reports are testimonial.

Justice Scalia and the six other Justices constituting the majority in *Crawford* did not foresee the very significant problem their reformulation of the Confrontation Clause would create with regard to laboratory reports. The Framers, to whom the Court looked to discover the true meaning of the Confrontation Clause, certainly did not contemplate the problem. This lack of foresight on the Court's part has serious day-to-day ramifications in courts all around the country. The absence of a sound theoretical base in *Crawford*, coupled with the unacceptable ramifications when the theory of the case is taken to its logical conclusion, has placed courts in the unenviable position of what amounts to having to decipher runes in order to determine whether laboratory reports are testimonial. The "miasma of uncertainty" that *Crawford* created is particularly thick in regard to laboratory reports and dispensing with it will be no easy task. Unfortunately for courts grappling with the admissibility of laboratory reports under *Crawford*, the only thing that is truly clear is that things are unclear.

---

336. See 16A AM. JUR. 2D *Constitutional Law* § 166 (2007) ("[I]t has been said that all statutes are of constitutional validity unless they are shown to be invalid . . .").