The Sixth Amendment to the U.S. Constitution states that an accused has a right to confront all witnesses against him.1 This clause, known as the Confrontation Clause, has been the subject of great debate since the Supreme Court’s landmark opinion in Crawford v. Washington.2 Under the new interpretation, a Confrontation Clause violation occurs if the prosecution is permitted to introduce statements at trial, made by third parties outside of the present trial, that the court deems to be both testimonial and hearsay, unless the declarants of those statements are both unavailable at time of trial and the defense had a previous opportunity to cross-exam the declarants.3

This new interpretation has caused great debate regarding how far this new definition reaches. Currently at the forefront of the debate is whether or not the substance of statements made to experts by third parties that the expert bases an opinion on may be recited to the jury by the expert on the stand (this type of information is often referred to as expert basis testimony). Courts have long held that allowing such statements to be introduced does not invoke Confrontation Clause concerns because the statements are not hearsay to begin with. However, some courts are breaking away from this tradition and classifying the information as both hearsay and testimonial. As the New York Court of Appeals stated, believing that such statements can be used by the jury for a non-hearsay purpose is a legal fiction.4

Considering current Supreme Court Confrontation Clause jurisprudence as well as the precedent regarding expert basis testimony, should expert basis testimony be considered either hearsay or testimonial by courts? If so, under what circumstances should expert basis testimony be classified as either or both? In light of Crawford and its progeny, what effect will the recent Confrontation Clause jurisprudence have on expert basis testimony as codified in Federal Rule of Evidence 703? In other words, are there instances in which Federal Rule of Evidence 703 is in conflict with the Confrontation Clause requirements laid down in Crawford?

In ten pages or less, please outline the arguments on each side of the debate, reaching an ultimate conclusion supported by case law, law review articles, treatises, or statutes (or some combination of the aforementioned). Remember, there is no correct answer to this question; what is important is that any conclusion reach is supported by resources attached to this question. Be sure to write your response following all applicable Bluebook rules regarding law review articles, including pinpoint citations and explanatory parentheticals when needed. Also note that the only binding authority in place is that of Supreme Court case law; all other authority is persuasive, but should still be used to support arguments and conclusions. AGAIN, BE SURE TO COME TO A CONCLUSION. Submissions exceeding ten pages will not be scored.

* Please note, a student need only write a response to this question or a response to the question presented by The Journal on Dispute Resolution in order to be considered for both journals.
1 U.S. CONST. amend. VI.
3 E.g., id.
List of Approved Sources

- People v. Goldstein, 843 N.E.2d 727 (N.Y. 2005)
- Howard v. Walker, 406 F.3d 114 (2d Cir. 2005)
- Barrett v. Acevedo, 169 F.3d 1155 (8th Cir. 1999)
- Bruton v. United States, 391 U.S. 123 (1968)
- United States v. Henry, 472 F.3d 910 (D.C. Cir. 2007)
- United States v. Cromer, 389 F.3d 662 (6th Cir 2004)
- United States v. Saget, 377 F.3d 223 (2d Cir. 2004)

Statutes
- Fed. R. Evid. 703 (with advisory committee notes)
- Fed. R. Evid. 801(c)

Law Review Articles
- Paul R. Rice, Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson, 40 Vand. L. Rev. 583 (1987)

Treatises
- DAVID KAYE, ET AL., THE NEW WIGMORE: A TREATISE ON EVIDENCE: EXPERT EVIDENCE § 3.10.1 (Supp. 2007)
541 U.S. 36, 158 L.Ed.2d 177
Michael D. CRAWFORD, Petitioner, v.
WASHINGTON.
No. 02–9410.
Decided March 8, 2004.
Background: Defendant was convicted, after a jury trial in the Washington Superior Court, Thurston County, Richard A. Strophy, J., of first-degree assault while armed with deadly weapon. Defendant appealed. The Washington Court of Appeals reversed. On review, the Washington Supreme Court, 147 Wash.2d 424, 54 P.3d 656, reversed and reinstated defendant's conviction. Certiorari was granted.
Holdings: The Supreme Court, Justice Scalia, held that:
(1) out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable by court, abrogating Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597, and
(2) admission of wife's out-of-court statements to police officers, regarding incident in which defendant, her husband, allegedly stabbed victim violated the Confrontation Clause.
Reversed, and remanded.
Chief Judge Rehnquist filed opinion concurring in judgment, in which Justice O'Connor joined.

1. Criminal Law ☞662.1
Principal evil at which the Confrontation Clause was directed was civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against accused. U.S.C.A. Const. Amend. 6.

2. Criminal Law ☞662.8
The Confrontation Clause, providing that accused has right to confront and cross-examine witnesses against him, applies not only to in-court testimony, but also to out-of-court statements introduced at trial, regardless of admissibility of statements under law of evidence. U.S.C.A. Const. Amend. 6.

3. Criminal Law ☞662.1
Defendant's right to confront and cross-examine witnesses against him, under the Confrontation Clause, applies to those who bear testimony against him, which is typically a solemn declaration or affirmation made for purpose of establishing or proving some fact. U.S.C.A. Const. Amend. 6.

4. Criminal Law ☞662.8, 662.9, 662.60
Out-of-court statements that qualify as testimonial, and thus that are not admissible, under the Confrontation Clause, unless witness is unavailable and defendant had prior opportunity to cross-examine witness, include at a minimum prior testimony at preliminary hearing, before a grand jury, or at a former trial, and statements elicited during police interrogations. U.S.C.A. Const. Amend. 6.

5. Criminal Law ☞662.60
Out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable by court; where testimonial statements are at issue, only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes, i.e., confrontation; abrogating Ohio v. Roberts, 448 U.S. 56, 100

6. Criminal Law 662.9, 662.60


7. Criminal Law 662.1, 662.7

Ultimate goal of the Confrontation Clause is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee, in that it commands, not that evidence be reliable, but that reliability be assessed in a particular manner, i.e., by testing in crucible of cross-examination. U.S.C.A. Const.Amend. 6.

8. Criminal Law 662.8

Admission of wife’s out-of-court statements to police officers, regarding incident in which defendant, her husband, allegedly stabbed victim, violated the Confrontation Clause, regardless of whether statements were deemed reliable by court, where statements were testimonial and defendant was not given prior opportunity to cross-examine wife. U.S.C.A. Const.Amend. 6.

Syllabus *

Petitioner was tried for assault and attempted murder. The State sought to introduce a recorded statement that petitioner’s wife Sylvia had made during police interrogation, as evidence that the stabbing was not in self-defense. Sylvia did not testify at trial because of Washington’s marital privilege. Petitioner argued that admitting the evidence would violate his Sixth Amendment right to be “confronted with the witnesses against him.” Under Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597, that right does not bar admission of an unavailable witness’s statement against a criminal defendant if the statement bears “adequate indicia of reliability,” a test met when the evidence either falls within a “firmly rooted hearsay exception” or bears “particularized guarantees of trustworthiness.” Id., at 66, 100 S.Ct. 2531. The trial court admitted the statement on the latter ground. The State Supreme Court upheld the conviction, deeming the statement reliable because it was nearly identical to, i.e., interlocked with, petitioner’s own statement to the police, in that both were ambiguous as to whether the victim had drawn a weapon before petitioner assaulted him.

Held: The State’s use of Sylvia’s statement violated the Confrontation Clause because, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation. Pp. 1359–1374.

(a) The Confrontation Clause’s text does not alone resolve this case, so this Court turns to the Clause’s historical background. That history supports two principles. First, the principal evil at which the Clause was directed was the civil-law mode of criminal procedure, particularly the use of ex parte examinations as evidence against the accused. The Clause’s primary object is testimonial hearsay, and interrogations by law enforcement officers fall squarely within that class. Second, 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. English authorities and early state cases indicate that this was the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of
common law at the time of the founding. And the “right . . . to be confronted with the witnesses against him,” Amdt. 6, is most naturally read as a reference to the common-law right of confrontation, admitting only those exceptions established at the time of the founding. See *Mattox v. United States*, 156 U.S. 237, 243, 15 S.Ct. 337, 39 L.Ed. 409. Pp. 1359–1367.

(b) This Court’s decisions have generally remained faithful to the Confrontation Clause’s original meaning. See, e.g., *Mattox*, supra. Pp. 1367–1369.

(c) However, the same cannot be said of the rationales of this Court’s more recent decisions. See *Roberts*, supra, at 66, 100 S.Ct. 2531. The *Roberts* test departs from historical principles because it admits statements consisting of ex parte testimony upon a mere reliability finding. Pp. 1369–1370.

(d) The Confrontation Clause commands that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. *Roberts* allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability, thus replacing the constitutionally prescribed method of assessing reliability with a wholly foreign one. Pp. 1370–1371.

(e) *Roberts’* framework is unpredictable. Whether a statement is deemed reliable depends on which factors a judge considers and how much weight he accords each of them. However, the unpardonable vice of the *Roberts* test is its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude. Pp. 1371–1372.

(f) The instant case is a self-contained demonstration of *Roberts’* unpredictable and inconsistent application. It also reveals *Roberts’* failure to interpret the Constitution in a way that secures its intended constraint on judicial discretion. The Constitution prescribes the procedure for determining the reliability of testimony in criminal trials, and this Court, no less than the state courts, lacks authority to replace it with one of its own devising. Pp. 1372–1374.

147 Wash.2d 424, 54 P.3d 656, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which STEVENS, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., filed an opinion concurring in the judgment, in which O’CONNOR, J., joined, post, p. 1374.

Jeffrey L. Fisher, appointed by this Court, Seattle, WA, for petitioner,

Michael R. Dreeben, Washington, DC, for United States as amicus curiae, by special leave of the Court.

Steven C. Sherman, Olympia, WA, for respondent.

Edward G. Holm, Prosecuting Attorney, Thurston County, Washington, John Michael Jones, Senior Deputy Prosecuting Attorney, Counsel of Record, Steven C. Sherman, Senior Deputy Prosecuting Attorney, Olympia, WA, for respondent.

Bruce E. H. Johnson, Jeffrey L. Fisher, Counsel of Record, Scott Carter-Eldred, Davis, Wright, Tremaine, LLP, Seattle, WA, for petitioner.

For U.S. Supreme Court briefs, see:

2003 WL 22228001 (Resp.Brief)

Justice SCALIA delivered the opinion of the Court.

Petitioner Michael Crawford stabbed a man who allegedly tried to rape his wife, Sylvia. At his trial, the State played for
the jury Sylvia’s tape-recorded statement
to the police describing the stabbing, even
though he had no opportunity for cross-
examination. The Washington Supreme
Court upheld petitioner’s conviction after
determining that Sylvia’s statement was
reliable. The question presented is whether
this procedure complied with the Sixth
Amendment’s guarantee that, “[i]n all
criminal prosecutions, the accused shall en-
joy the right . . . to be confronted with the
witnesses against him.”

I

On August 5, 1999, Kenneth Lee was
stabbed at his apartment. Police arrested
petitioner later that night. After giving
petitioner and his wife Miranda warnings,
detectives interrogated each of them twice.
Petitioner eventually confessed that he and
Sylvia had gone in search of Lee because
he was upset over an earlier incident in
which Lee had tried to rape her. The two
had found Lee at his apartment, and a
fight ensued in which Lee was stabbed in
the torso and petitioner’s hand was cut.

Petitioner gave the following account of
the fight:

“Q. Okay. Did you ever see anything in
[Lee’s] hands?

“A. I think so, but I’m not positive.

“Q. Okay, when you think so, what do
you mean by that?

“A. I could a swore I seen him goin’
for somethin’ before, right before every-
thing happened. He was like reachin’,
fiddlin’ around down here and stuff . . .
and I just . . . I don’t know, I think, this
is just a possibility, but I think, I think
that he pulled somethin’ out and I
grabbed for it and that’s how I got cut . . .
but I’m not positive. I, I, my mind
goes blank when things like this happen.
I mean, I just, I remember things
wrong, I remember things that just
doesn’t, don’t make sense to me later.”

App. 155 (punctuation added). Sylvia
generally corroborated petitioner’s
story about the events leading up to the
fight, but her account of the fight itself
was arguably different—particularly with
respect to whether Lee had drawn a weap-
on before petitioner assaulted him:

“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).” Id., at
137 (punctuation added).

The State charged petitioner with as-
sault and attempted murder. At trial, he
claimed self-defense. Sylvia did not testify
because of the state marital privilege,
which generally bars a spouse from testifying
without the other spouse’s consent. See Wash. Rev.Code § 5.60.060(1) (1994).
In Washington, this privilege does not extend to a spouse’s out-of-court statements admissible under a hearsay exception, see State v. Burden, 120 Wash.2d 371, 377, 841 P.2d 758, 761 (1992), so the State sought to introduce Sylvia’s tape-recorded statements to the police as evidence that the stabbing was not in self-defense. Noting that Sylvia had admitted she led petitioner to Lee’s apartment and thus had facilitated the assault, the State invoked the hearsay exception for statements against penal interest, Wash. Rule Evid. 804(b)(3) (2003).

Petitioner countered that, state law notwithstanding, admitting the evidence would violate his federal constitutional right to be “confronted with the witnesses against him.” Amdt. 6. According to our description of that right in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), it does not bar admission of an unavailable witness’s statement against a criminal defendant if the statement bears “adequate ‘indicia of reliability.’” Ibid., at 66, 100 S.Ct. 2531. To meet that test, evidence must either fall within a “firmly rooted hearsay exception” or bear “particularized guarantees of trustworthiness.” Ibid. The trial court here admitted the statement on the latter ground, offering several reasons why it was trustworthy: Sylvia was not shifting blame but rather corroborating her husband’s story that he acted in self-defense or “justified reprisal”; she had direct knowledge as an eyewitness; she was describing recent events; and she was being questioned by a “neutral” law enforcement officer. App. 76–77. The prosecution played the tape for the jury and relied on it in closing, arguing that it was “damning evidence” that “completely refutes [petitioner’s] claim of self-defense.” Tr. 468 (Oct. 21, 1999). The jury convicted petitioner of assault.

The Washington Court of Appeals reversed. It applied a nine-factor test to determine whether Sylvia’s statement bore particularized guarantees of trustworthiness, and noted several reasons why it did not: The statement contradicted one she had previously given; it was made in response to specific questions; and at one point she admitted she had shut her eyes during the stabbing. The court considered and rejected the State’s argument that Sylvia’s statement was reliable because it coincided with petitioner’s to such a degree that the two “interlocked.” The court determined that, although the two statements agreed about the events leading up to the stabbing, they differed on the issue crucial to petitioner’s self-defense claim: “[Petitioner’s] version asserts that Lee may have had something in his hand when he stabbed him; but Sylvia’s version has Lee grabbing for something only after he has been stabbed.” App. 32.

The Washington Supreme Court reinstated the conviction, unanimously concluding that, although Sylvia’s statement did not fall under a firmly rooted hearsay exception, it bore guarantees of trustworthiness: “[W]hen a codefendant’s confession is virtually identical [to, i.e., interlocks with] that of a defendant, it may be deemed reliable.” 147 Wash.2d 424, 437, 54 P.3d 656, 663 (2002) (quoting State v. Rice, 120 Wash.2d 549, 570, 844 P.2d 416, 427 (1993)). The court explained:

“Although the Court of Appeals concluded that the statements were contradictory, upon closer inspection they appear to overlap. . . .”

“[B]oth of the Crawfords’ statements indicate that Lee was possibly grabbing for a weapon, but they are equally unsure when this event may have taken place. They are also equally unsure how Michael received the cut on his hand, leading the court to question when, if ever, Lee possessed a weapon. In this respect they overlap. . . .
Neither Michael nor Sylvia clearly stated that Lee had a weapon in hand from which Michael was simply defending himself. And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable." 147 Wash.2d, at 438–439, 54 P.3d, at 664 (internal quotation marks omitted).

We granted certiorari to determine whether the State's use of Sylvia's statement violated the Confrontation Clause. 539 U.S. 914, 123 S.Ct. 2275, 156 L.Ed.2d 129 (2003).

II

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." We have held that this bedrock procedural guarantee applies to both federal and state prosecutions. Pointer v. Texas, 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). As noted above, Roberts says that an unavailable witness's out-of-court statement may be admitted so long as it has adequate indicia of reliability—i.e., falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." 448 U.S., at 66, 100 S.Ct. 2531. Petitioner argues that this test strays from the original meaning of the Confrontation Clause and urges us to reconsider it.

A

The Constitution's text does not alone resolve this case. One could plausibly read "witnesses against" a defendant to mean those who actually testify at trial, cf. Woodsides v. State, 3 Miss. 655, 664–665 (1837), those whose statements are offered at trial, see 3 J. Wigmore, Evidence § 1397, p. 104 (2d ed.1923) (hereinafter Wigmore), or something in-between, see infra, at 1364. We must therefore turn to the historical background of the Clause to understand its meaning.

The right to confront one's accusers is a concept that dates back to Roman times. See Coy v. Iowa, 487 U.S. 1012, 1015, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988); Hermann & Speer, Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause, 34 Va. J. Int'l L. 481 (1994). The founding generation's immediate source of the concept, however, was the common law. English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers. See 3 W. Blackstone, Commentaries on the Laws of England 373–374 (1768).

Nonetheless, England at times adopted elements of the civil-law practice. Justices of the peace or other officials examined suspects and witnesses before trial. These examinations were sometimes read in court in lieu of live testimony, a practice that "occasioned frequent demands by the prisoner to have his 'accusers,' i.e. the witnesses against him, brought before him face to face." 1 J. Stephen, History of the
Criminal Law of England 326 (1883). In some cases, these demands were refused. See 9 W. Holdsworth, History of English Law 216–217, 228 (3d ed.1944); e.g., Raleigh's Case, 2 How. St. Tr. 1, 15–16, 24 (1603); Throckmorton's Case, 1 How. St. Tr. 869, 875–876 (1554); cf. Lilburn's Case, 3 How. St. Tr. 1315, 1318–1322, 1329 (Star Chamber 1637).

Pretrial examinations became routine under two statutes passed during the reign of Queen Mary in the 16th century, 1 & 2 Phil. & M., c. 13 (1554), and 2 & 3 id., c. 10 (1555). These Marian bail and commital statutes required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court. It is doubtful that the original purpose of the examinations was to produce evidence admissible at trial. See J. Langbein, Prosecuting Crime in the Renaissance 21–34 (1974). Whatever the original purpose, however, they came to be used as evidence in some cases, see 2 M. Hale, Pleas of the Crown 284 (1736), resulting in an adoption of continental procedure. See 4 Holdsworth, supra, at 528–530.

The most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries. One such was the 1603 trial of Sir Walter Raleigh for treason. 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. Raleigh argued that Cobham had lied to save himself: “Cobham is absolutely in the King’s mercy; to excuse me cannot avail him; by accusing me he may hope for favour.” 1 D. Jardine, Criminal Trials 435 (1832). Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that “[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face . . . .” 2 How. St. Tr., at 15–16. The judges refused, id., at 24, and, despite Raleigh’s protestations that he was being tried “by the Spanish Inquisition,” id., at 15, the jury convicted, and Raleigh was sentenced to death.

One of Raleigh’s trial judges later lamented that “the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.” 1 Jardine, supra, at 520. Through a series of statutory and judicial reforms, English law developed a right of confrontation that limited these abuses. For example, treason statutes required witnesses to confront the accused “face to face” at his arraignment. E.g., 13 Car. 2, c. 1, § 5 (1661); see 1 Hale, supra, at 306. Courts, meanwhile, developed relatively strict rules of unavailability, admitting examinations only if the witness was demonstrably unable to testify in person. See Lord Morley’s Case, 6 How. St. Tr. 769, 770–771 (H.L.1666); 2 Hale, supra, at 284; 1 Stephen, supra, at 358. Several authorities also stated that a suspect’s confession could be admitted only against himself, and not against others he implicated. See 2 W. Hawkins, Pleas of the Crown, ch. 46, § 3, pp. 603–604 (T. Leach 6th ed. 1787); 1 Hale, supra, at 585, n. (k); 1 G. Gilbert, Evidence 216 (C. Lofft ed. 1791); cf. Tong’s Case, Kel. J. 17, 18, 84 Eng. Rep. 1061, 1062 (1662) (treason). But see King v. Westbeer, 1 Leach 12, 168 Eng. Rep. 108, 109 (1739).

One recurring question was whether the admissibility of an unavailable witness’s pretrial examination depended on whether the defendant had had an opportunity to cross-examine him. In 1696, the Court of King’s Bench answered this question in the affirmative, in the widely reported misdemeanor libel case of King v. Paine, 5 Mod. 163, 87 Eng. Rep. 584. The court ruled that, even though a witness was dead, his examination was not admissible
where "the defendant not being present when [it was] taken before the mayor . . . had lost the benefit of a cross-examination." *Id.*, at 165, 87 Eng. Rep., at 585.

The question was also debated at length during the infamous proceedings against Sir John Fenwick on a bill of attainder. Fenwick's counsel objected to admitting the examination of a witness who had been spirited away, on the ground that Fenwick had had no opportunity to cross-examine. See Fenwick's Case, 13 How. St. Tr. 537, 591–592 (H.C. 1696) (Powys) ("[T]hat which they would offer is something that Mr. Goodman hath sworn when he was examined . . .; sir J.F. not being present or privy, and no opportunity given to cross-examine the person; and I conceive that cannot be offered as evidence . . ."); *id.*, at 592 (Shower) ("[N]o deposition of a person can be read, though beyond sea, unless in cases where the party it is to be read against was privy to the examination, and might have cross-examined him . . . . (O)ur constitution is, that the person shall see his accuser."). The examination was nonetheless admitted on a closely divided vote after several of those present opined that the common-law rules of procedure did not apply to parliamentary attainder proceedings—one speaker even admitting that the evidence would normally be inadmissible. See *id.*, at 603–604 (Williamson); *id.*, at 604–605 (Chancellor of the Exchequer); *id.*, at 607; 3 Wigmore § 1364, at 22–23, n. 54. Fenwick was condemned, but the proceedings "must have burned into the general consciousness the vital importance of the rule securing the right of cross-examination." *Id.*, § 1364, at 22; cf. Carmell v. Texas, 529 U.S. 513, 526–530, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000).

Paine had settled the rule requiring a prior opportunity for cross-examination as a matter of common law, but some doubts remained over whether the Marian statutes prescribed an exception to it in felony cases. The statutes did not identify the circumstances under which examinations were admissible, see 1 & 2 Phil. & M., c. 13 (1554); 2 & 3 *id.*, c. 10 (1555), and some inferred that no prior opportunity for cross-examination was required. See Westbeer, supra, at 12, 168 Eng. Rep., at 109; compare Fenwick's Case, 13 How. St. Tr., at 596 (Sloane), with *id.*, at 602 (Musgrave). Many who expressed this view acknowledged that it meant the statutes were in derogation of the common law. See King v. Eriswell, 3 T.R. 707, 710, 100 Eng. Rep. 815, 817 (K.B.1790) (Grose, J.) (dicta); *id.*, at 722–723, 100 Eng. Rep., at 823–824 (Kenyon, C.J.) (same); compare 1 Gilbert, Evidence, at 215 (admissible only "by Force of the Statute"), with *id.*, at 65. Nevertheless, by 1791 (the year the Sixth Amendment was ratified), courts were applying the cross-examination rule even to examinations by justices of the peace in felony cases. See King v. Dingler, 2 Leach 561, 562–563, 168 Eng. Rep. 383, 383–384 (1791); King v. Woodcock, 1 Leach 500, 502–504, 168 Eng. Rep. 352, 353 (1789); cf. King v. Radbourne, 1 Leach 457, 459–461, 168 Eng. Rep. 330, 331–332 (1787); 3 Wigmore § 1364, at 23. Early 19th-century treatises confirm that requirement. See 1 T. Starkie, Evidence 95 (1826); 2 *id.*, at 484–492; T. Peake, Evidence 63–64 (3d ed. 1808). When Parliament amended the statutes in 1848 to make the requirement explicit, see 11 & 12 Vict., c. 42, § 17, the change merely "introduced in terms" what was already afforded the defendant "by the equitable construction of the law." Queen v. Beeston, 29 Eng. L. & Eq. R. 527, 529 (Ct.Crim.App. 1854) (Jervis, C. J.).

2. There is some question whether the require-
Controversial examination practices were also used in the Colonies. Early in the 18th century, for example, the Virginia Council protested against the Governor for having “privately issued several commissions to examine witnesses against particular men ex parte,” complaining that “the person accused is not admitted to be confronted with, or defend himself against his defamers.” A Memorial Concerning the Maladministrations of His Excellency Francis Nicholson, reprinted in 9 English Historical Documents 253, 257 (D. Douglas ed.1955). A decade before the Revolution, England gave jurisdiction over Stamp Act offenses to the admiralty courts, which followed civil-law rather than common-law procedures and thus routinely took testimony by deposition or private judicial examination. See 5 Geo. 3, c. 12, § 57 (1765); Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J. Pub.L. 381, 396–397 (1959). Colonial representatives protested that the Act subverted their rights “by extending the jurisdiction of the courts of admiralty beyond its ancient limits.” Resolutions of the Stamp Act Congress § 8th (Oct. 19, 1765), reprinted in Sources of Our Liberties 270, 271 (R. Perry & J. Cooper eds.1959). Colonial representatives protested that the Act subverted their rights “by extending the jurisdiction of the courts of admiralty beyond its ancient limits.”


John Adams, defending a merchant in a high-profile admiralty case, argued: “Examinations of witnesses upon Interrogatories, are unknown by the Civil Law. Interrogatories are unknown at common Law, and Englishmen and common Lawyers have an aversion to them if not an Abhorrence of them.” Draft of Argument in Sewall v. Hancock (Oct. 1768 – Mar. 1769), in 2 Legal Papers of John Adams 194, 207 (L. Wroth & H. Zobel eds.1965).

Many declarations of rights adopted around the time of the Revolution guaranteed a right of confrontation. See Virginia Declaration of Rights § 8 (1776); Pennsylvania Declaration of Rights § IX (1776); Delaware Declaration of Rights § 14 (1776); Maryland Declaration of Rights § XIX (1776); North Carolina Declaration of Rights § VII (1776); Vermont Declaration of Rights Ch. I, § X (1777); Massachusetts Declaration of Rights § XII (1780); New Hampshire Bill of Rights § XV (1783), all reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 235, 265, 278, 282, 287, 323, 342, 377 (1971). The proposed Federal Constitution, however, did not. At the Massachusetts ratifying convention, Abraham Holmes objected to this omission precisely on the ground that it would lead to civil-law practices: “The mode of trial is altogether indetermined; whether [the defendant] is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told. . . . [W]e shall find Congress possessed of powers enabling them to institute judicatures little less inauspicious than a certain tribunal in Spain, . . . the Inquisition.” 2 Debates on the Federal Constitution 110–111 (J. Elliot 2d ed. 1863). Similarly, a prominent Antifederalist writing under the pseudonym Federal Farmer criticized
the use of “written evidence” while objecting to the omission of a vicinage right: “Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question .... [W]ritten evidence .... [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth.” R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787), reprinted in 1 Schwartz, supra, at 469, 473. The First Congress responded by including the Confrontation Clause in the proposal that became the Sixth Amendment.

Early state decisions shed light upon the original understanding of the common-law right. State v. Webb, 2 N.C. 103 (Super. L. & Eq. 1794) (per curiam), decided a mere three years after the adoption of the Sixth Amendment, held that depositions could be read against an accused only if they were taken in his presence. Rejecting a broader reading of the English authorities, the court held: “[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.” Id., at 104.

Similarly, in State v. Campbell, 30 S.C.L. 124, 1844 WL 2558 (App.L.1844), South Carolina’s highest law court excluded a deposition taken by a coroner in the absence of the accused. It held: “[I]f we are to decide the question by the established rules of the common law, there could not be a dissenting voice. For, notwithstanding the death of the witness, and whatever the respectability of the court taking the depositions, the solemnity of the occasion and the weight of the testimony, such depositions are ex parte, and, therefore, utterly incompetent.” Id., at 125. The court said that one of the “indispensable conditions” implicitly guaranteed by the State Constitution was that “prosecutions be carried on by witnesses confronted by him, and subjected to his personal examination.” Ibid.

Many other decisions are to the same effect. Some early cases went so far as to hold that prior testimony was inadmissible in criminal cases even if the accused had a previous opportunity to cross-examine. See Finn v. Commonwealth, 26 Va. 701, 708 (1827); State v. Atkins, 1 Tenn. 229 (Super. L. & Eq. 1807) (per curiam). Most courts rejected that view, but only after reaffirming that admissibility depended on a prior opportunity for cross-examination. See United States v. Mcomb, 26 F.Cas. 1132, 1133 (No. 15,702) (CC Ill. 1851); State v. Houser, 26 Mo. 431, 435–436 (1858); Kendrick v. State, 29 Tenn. 479, 485–488 (1850); Bostick v. State, 22 Tenn. 344, 345–346 (1842); Commonwealth v. Richards, 35 Mass. 434, 437 (1837); State v. Hill, 20 S.C.L. 607, 608–610 (App. 1835); Johnston v. State, 10 Tenn. 58, 59 (Err. & App. 1821). Nineteenth-century treatises confirm the rule. See 1 J. Bishop, Criminal Procedure § 1093, p. 689 (2d ed. 1872); T. Cooley, Constitutional Limitations *318.

III

This history supports two inferences about the meaning of the Sixth Amendment.

A

[1] First, 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. It was these practices that the Crown deployed in notorious treason cases like Raleigh’s; that the Marian statutes invited; that English law’s assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decreed. The Sixth Amendment must be interpreted with this focus in mind.
Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon “the law of Evidence for the time being.” 3 Wigmore § 1397, at 101; accord, Dutton v. Evans, 400 U.S. 74, 94, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970) (Harlan, J., concurring in result). 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. Raleigh was, after all, perfectly free to confront those who read Cobham’s confession in court.

This focus also suggests that not all hearsay implicates the Sixth Amendment’s core concerns. 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.

The text of the Confrontation Clause reflects this focus. It applies to “witnesses” against the accused—in other words, those who “bear testimony.” 2 N. Webster, An American Dictionary of the English Language (1828). “Testimony,” in turn, is typically “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” Ibid. An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Various formulations of this core class of “testimonial” statements exist: “ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,” Brief for Petitioner 23; "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,” White v. Illinois, 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); “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,” Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3. These formulations all share a common nucleus and then define the Clause’s coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, ex parte testimony at a preliminary hearing.

Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not sworn testimony, but the absence of oath was not dispositive. Cobham’s examination was unsworn, see 1 Jardine, Criminal Trials, at 430, yet Raleigh’s trial has long been thought a paradigmatic confrontation violation, see, e.g., Campbell, 30 S.C.L., at 130. Under the Marian statutes, witnesses were typically put on oath,
but suspects were not. See 2 Hale, Pleas of the Crown, at 52. Yet Hawkins and others went out of their way to caution that such unworn confessions were not admissible against anyone but the confessor. See supra, at 1360.3

That interrogators are police officers rather than magistrates does not change the picture either. Justices of the peace conducting examinations under the Marian statutes were not magistrates as we understand that office today, but had an essentially investigative and prosecutorial function. See 1 Stephen, Criminal Law of England, at 221; Langbein, Prosecuting Crime in the Renaissance, at 34–45. England did not have a professional police force until the 19th century, see 1 Stephen, supra, at 194–200, so it is not surprising that other government officers performed the investigative functions now associated primarily with the police. The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.

3. These sources—especially Raleigh’s trial—refute THE CHIEF JUSTICE’s assertion, post, at 1375 (opinion concurring in judgment), that the right of confrontation was not particularly concerned with unworn testimonial statements. But even if, as he claims, a general bar on unworn hearsay made application of the Confrontation Clause to unworn testimonial statements a moot point, that would merely change our focus from direct evidence of original meaning of the Sixth Amendment to reasonable inference. We find it implausible that a provision which concededly condemned trial by sworn ex parte affidavit thought trial by unworn ex parte affidavit perfectly OK. (The claim that unworn testimony was self-regulating because jurors would disbelieve it, cf. post, at 1374, n. 1, is belied by the very existence of a general bar on unworn testimony.) Any attempt to determine the application of a constitutional provision to a phenomenon that did not exist at the time of its adoption (here, allegedly, admissible unworn testimony) involves some degree of estimation—what THE CHIEF JUSTICE calls use of a “proxy,” post, at 1375—but that is hardly a reason not to make the estimation as accurate as possible. Even if, as THE CHIEF JUSTICE mistakenly asserts, there were no direct evidence of how the Sixth Amendment originally applied to unworn testimony, there is no doubt what its application would have been.

4. We use the term “interrogation” in its colloquial, rather than any technical legal, sense. Cf. Rhode Island v. Innis, 446 U.S. 291, 300–301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Just as various definitions of “testimonial” exist, one can imagine various definitions of “interrogation,” and we need not select among them in this case. Sylvia’s recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition.

B

[5] The historical record also supports a second proposition: 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. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the “right . . . to be confronted with the witnesses against him,” Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. See Mattox v. United States, 156 U.S. 237, 243, 15 S.Ct. 337, 39 L.Ed. 409 (1895); cf. Houser, 26 Mo., at 433–435. As the English authorities above re-
5. THE CHIEF JUSTICE claims that English law’s treatment of testimonial statements was inconsistent at the time of the framing, post, at 1376, but the examples he cites relate to examinations under the Marian statutes. As we have explained, to the extent Marian examinations were admissible, it was only because the statutes derogated from the common law. See supra, at 1361. Moreover, by 1791 even the statutory-derogation view had been rejected with respect to justice-of-the-peace examinations—explicitly in King v. Woodcock, 1 Leach 500, 502–504, 168 Eng. Rep. 352, 353 (1789), and King v. Dingler, 2 Leach 561, 562–563, 168 Eng. Rep. 383, 383–384 (1791), and by implication in King v. Radbourne, 1 Leach 457, 459–461, 168 Eng. Rep. 330, 331–332 (1787).

None of THE CHIEF JUSTICE’s citations proves otherwise. King v. Westbeere, 1 Leach 12, 168 Eng. Rep. 108 (1739), was decided a half century earlier and cannot be taken as an accurate statement of the law in 1791 given the directly contrary holdings of Woodcock and Dingler. Hale’s treatise is older still, and far more ambiguous on this point, see 1 M. Hale, Pleas of the Crown 585–586 (1736); some who espoused the requirement of a prior opportunity for cross-examination thought it entirely consistent with Hale’s views. See Fenwick’s Case, 13 How. St. Tr. 537, 602 (H.C. 1696) (Musgrave). The only timely authority THE CHIEF JUSTICE cites is King v. Eriswell, 3 T.R. 707, 100 Eng. Rep. 815 (K.B. 1790), but even that decision provides no substantial support. Eriswell was not a criminal case at all, but a Crown suit against the inhabitants of a town to charge them with care of an insane pauper. Id., at 707–708, 100 Eng. Rep., at 815–816. It is relevant only because the judges discuss the Marian statutes in dicta. One of them, Buller, J., defended admission of the pauper’s statement of residence on the basis of authorities that purportedly held ex parte Marian examinations admissible. Id., at 713–714, 100 Eng. Rep., at 819. As evidence writers were quick to point out, however, his authorities said no such thing. See Peake, Evidence, at 64, n. (m) ("Mr. J. Buller is reported to have said that it was so settled in 1 Lev. 180, and Kel. 55; certainly nothing of the kind appears in those books"); 2 T. Starkie, Evidence 487–488, n. (c) (1826) ("Buller, J. . . . refers to Radbourne’s case . . . ; but in that case the deposition was taken in the hearing of the prisoner, and of course the question did not arise" (citation omitted)). Two other judges, Grose, J., and Kenyon, C. J., responded to Buller’s argument by distinguishing Marian examinations as a statutory exception to the common-law rule, but the context and tenor of their remarks suggest they merely assumed the accuracy of Buller’s premise without independent consideration, at least with respect to examinations by justices of the peace. See 3 T.R., at 710, 100 Eng. Rep., at 817 (Grose, J.); id., at 722–723, 100 Eng. Rep., at 823–824 (Kenyon, C.J.). In fact, the case reporter specifically notes in a footnote that their assumption was erroneous. See id., at 710, n. (c), 100 Eng. Rep., at 817, n. (c). Notably, Buller’s position on pauper examinations was resoundingly rejected only a decade later in King v. Ferry Frystone, 2 East 54, 55, 102 Eng. Rep. 289 (K.B.1801) ("The point . . . has been since considered to be so clear against the admissibility of the evidence . . . that it was abandoned by the counsel . . . without argument"), further suggesting that his views on evidence were not mainstream at the time of the framing.

In short, none of THE CHIEF JUSTICE’s sources shows that the law in 1791 was unsettled even as to examinations by justices of the peace under the Marian statutes. More importantly, however, even if the statutory rule in 1791 were in doubt, the numerous early state-court decisions make abundantly clear that the Sixth Amendment incorporated the common-law right of confrontation and not any exceptions the Marian statutes supposedly carved out from it. See supra, at 1363; see also supra, at 1361–1362, n. 2 (coroner statements). The common-law rule had been settled since Paine in 1696. See King v. Paine, 5 Mod. 163, 165, 87 Eng. Rep. 584, 585 (K.B.).
Early decision, for example, involved a deceased witness's prior trial testimony. *Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895). In allowing the statement to be admitted, we relied on the fact that the defendant had had, at the first trial, an adequate opportunity to confront the witness: “The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of . . . .” *Id.*, at 244, 15 S.Ct. 337.

Our later cases conform to *Mattox's* holding that prior trial or preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine. See *Mancusi v. Stubbs*, 408 U.S. 204, 213–216, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972); *California v. Green*, 399 U.S. 149, 165–168, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970); *Pointer v. Texas*, 380 U.S., at 406–408, 85 S.Ct. 1065; cf. *Kirby v. United States*, 174 U.S. 47, 55–61, 19 S.Ct. 574, 43 L.Ed. 890 (1899). Even where the defendant had such an opportu-

6. The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. See, e.g., *Mattox v. United States*, 156 U.S. 237, 243–244, 15 S.Ct. 337, 39 L.Ed. 409 (1895); *King v. Reason*, 16 How. St. Tr. 1, 24–38 (K.B.1722); 1 D. Jardine, *Criminal Trials* 435 (1832); Cooley, *Constitutional Limitations*, at *318; 1 G. Gilbert, *Evidence* 211 (C. Loft ed. 1791); see also F. Heller, *The Sixth Amendment* 105 (1951) (asserting that this was the only recognized criminal hearsay exception at common law). Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. See *Woodcock*, *supra*, at 501–504, 168 Eng. Rep., at 353–354; *Reason*, *supra*, at 24–38; *Peake*, *supra*, at 64; cf. *Radbourne*, *supra*, at 460–462, 168 Eng. Rep., at 332–333. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis.*

7. We cannot agree with THE CHIEF JUSTICE that the fact “[t]hat a statement might be testimonial does nothing to undermine the wisdom of one of these [hearsay] exceptions.” *Post*, at 1377. Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.

Even our recent cases, in their outcomes, hew closely to the traditional line. Ohio v. Roberts, 448 U.S., at 67–70, 100 S.Ct. 2531, admitted testimony from a preliminary hearing at which the defendant had examined the witness. Lilly v. Virginia, supra, excluded testimonial statements that the defendant had had no opportunity to test by cross-examination. And Bourjaily v. United States, 483 U.S. 171, 181–184, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), admitted statements made unwittingly to a Federal Bureau of Investigation informant after applying a more general test that did not make prior cross-examination an indispensable requirement.8

Lee v. Illinois, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), on which the State relies, is not to the contrary. There, we rejected the State’s attempt to admit an accomplice confession. The State had argued that the confession was admissible because it “interlocked” with the defendant’s. We dealt with the argument by rejecting its premise, holding that “[t]he logical inference of this statement is that when the discrepancies between the statements are insignificant, the codefendant’s confession may not be admitted.” Id., at 545, 106 S.Ct. 2056. Respondent argues that “[t]he logical inference of this statement is that when the discrepancies between the statements are insignificant, then the codefendant’s statement may be admitted.” Brief for Respondent 6. But this is merely a possible inference, not an inevitable one, and we do not draw it here. If Lee had meant authoritatively to announce an exception—previously unknown to this Court’s jurisprudence—for interlocking confessions, it would not have done so in such an oblique manner. Our only precedent on interlocking confessions had addressed the entirely different question whether a limiting instruction cured prejudice to codefendants from admitting a de-

8. One case arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial is White v. Illinois, 502 U.S. 346, 112 S.Ct. 116 L.Ed.2d 848 (1992), which involved, inter alia, statements of a child victim to an investigating police officer admitted as spontaneous declarations. Id., at 349–351, 112 S.Ct. 736. It is questionable whether testimonial statements would ever have been admissible on that ground in 1791; to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made “immediately upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.” Thompson v. Trevanion, Skin. 402, 90 Eng. Rep. 179 (K.B.1693). In any case, the only question presented in White was whether the Confrontation Clause imposed an unavailability requirement on the types of hearsay at issue. See 502 U.S., at 348–349, 112 S.Ct. 736. The holding did not address the question whether certain of the statements, because they were testimonial, had to be excluded even if the witness was unavailable. We “[took] as a given . . . that the testimony properly falls within the relevant hearsay exceptions.” Id., at 351, n. 4, 112 S.Ct. 736.

[6] Our cases have thus remained faithful to the Framers’ understanding: Testimonial 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.9

Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales. Roberts conditions the admissibility of all hearsay evidence on whether it falls under a “firmly rooted hearsay exception” or bears “particularized guarantees of trustworthiness.” 448 U.S., at 66, 100 S.Ct. 2531. This test departs from the historical principles identified above in two respects. First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of ex parte testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that do consist of ex parte testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.

Members of this Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding of the Clause. See, e.g., Lilly, 9.

THE CHIEF JUSTICE complains that our prior decisions have “never drawn a distinction” like the one we now draw, citing in particular Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895), Kirby v. United States, 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890 (1899), and United States v. Burr, 25 F.Cas. 187 (No. 14,694) (CC Va. 1807) (Marshall, C. J.). Post, at 1376–1377. But nothing in these cases contradicts our holding in any way. Mattox and Kirby allowed or excluded evidence depending on whether the defendant had had an opportunity for cross-examination. Mattox, supra, at 242–244, 15 S.Ct. 337; Kirby, supra, at 55–61, 19 S.Ct. 574. That the two cases did not extrapolate a more general class of evidence to which that criterion applied does not prevent us from doing so now. As to Burr, we disagree with THE CHIEF JUSTICE’s reading of the case. Although Chief Justice Marshall made one passing reference to the Confrontation Clause, the case was fundamentally about the hearsay rules governing statements in furtherance of a conspiracy. The “principle so truly important” on which “inroad[s]” had been introduced was the “rule of evidence which rejects mere hearsay testimony.” See 25 F.Cas., at 193. Nothing in the opinion concedes exceptions to the Confrontation Clause’s exclusion of testimonial statements as we use the term. THE CHIEF JUSTICE fails to identify a single case (aside from one minor, arguable exception, see supra, at 1368, n. 8), where we have admitted testimonial statements based on indicia of reliability other than a prior opportunity for cross-examination. If nothing else, the test we announce is an empirically accurate explanation of the results our cases have reached.

Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. See California v. Green, 399 U.S. 149, 162, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). It is therefore irrelevant that the reliability of some out-of-court statements “cannot be replicated, even if the declarant testifies to the same matters in court.” Post, at 1377 (quoting United States v. Inadi, 475 U.S. 387, 395, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986)). The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. (The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See Tennessee v. Street, 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985).)”
527 U.S., at 140–143, 119 S.Ct. 1887 (BREYER, J., concurring); White, 502 U.S., at 366, 112 S.Ct. 736 (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); A. Amar, The Constitution and Criminal Procedure 125–131 (1997); Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L.J. 1011 (1998). They offer two proposals: First, that we apply the Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law—thus eliminating the overbreadth referred to above. Second, that we impose an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine—thus eliminating the excessive narrowness referred to above.

In White, we considered the first proposal and rejected it. 502 U.S., at 352–353, 112 S.Ct. 736. Although our analysis in this case casts doubt on that holding, we need not definitively resolve whether it survives our decision today, because Sylvia Crawford's statement is testimonial under any definition. This case does, however, squarely implicate the second proposal.

A

[7] Where 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 “reliability.” Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal 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. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 Blackstone, Commentaries, at 373 (“This open examination of witnesses ... is much more conducive to the clearing up of truth”); M. Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing “beats and bolts out the Truth much better”).

The Roberts test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability. See Reynolds v. United States, 98 U.S. 145, 158–159, 25 L.Ed. 244 (1879).

The Raleigh trial itself involved the very sorts of reliability determinations that Roberts authorizes. In the face of Raleigh's repeated demands for confrontation, the prosecution responded with many of the arguments a court applying Roberts might invoke today: that Cobham's statements were self-inculpatory, 2 How. St. Tr., at 19, that they were not made in the heat of passion, id., at 14, and that they were not “extracted from [him] upon any hopes or promise of Pardon,” id., at 29. It is not plausible that the Framers' only objection to the trial was that Raleigh's judges did not properly weigh these fac-
tors before sentencing him to death. Rather, 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 accusation as a lie.

Dispensing 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.

B

The legacy of Roberts in other courts vindicates the Framers’ wisdom in rejecting a general reliability exception. The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.

Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable; the nine-factor balancing test applied by the Court of Appeals below is representative. See, e.g., People v. Farrell, 34 P.3d 401, 406–407 (Colo.2001) (eight-factor test). Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts. For example, the Colorado Supreme Court held a statement more reliable because its inculpation of the defendant was “detailed,” id., at 407, while the Fourth Circuit found a statement more reliable because the portion implicating another was “fleeting,” United States v. Photogrammetric Data Servs., Inc., 259 F.3d 229, 245 (C.A.4 2001). The Virginia Court of Appeals found a statement more reliable because the witness was in custody and not a suspect, see State v. Bintz, 2002 WI App. 204, ¶ 13, 257 Wis.2d 177, ¶ 13, 650 N.W.2d 913, ¶ 13. Finally, the Colorado Supreme Court in one case found a statement more reliable because it was given “immediately after” the events at issue, Farrell, supra, at 407, while that same court, in another case, found a statement more reliable because two years had elapsed, Stevens v. People, 29 P.3d 305, 316 (Colo.2001).


One recent study found that, after *Lilly*, appellate courts admitted accomplice statements to the authorities in 25 out of 70 cases—more than one-third of the time. Kirst, *Appellate Court Answers to the Confrontation Questions in Lilly v. Virginia*, 53 Syracuse L.Rev. 87, 105 (2003).


To add insult to injury, some of the courts that admit untested testimonial statements find reliability in the very factors that make the statements testimonial. As noted earlier, one court relied on the fact that the witness’s statement was made to police while in custody on pending charges—the theory being that this made the statement more clearly against penal interest and thus more reliable. *Nowlin*, supra, at 335–338, 579 S.E.2d, at 371–372. Other courts routinely rely on the fact that a prior statement is given under oath in judicial proceedings. *E.g., Gallego*, supra, at 168 (plea allocution); *Papajohn*, supra, at 1120 (grand jury testimony). That inculpatory statements are given in a testimonial setting is not an antidote to the confrontation problem, but rather the trigger that makes the Clause’s demands most urgent. It is not enough to point out that most of the usual safeguards of the adversary process attend the statement, when the single safeguard missing is the one the Confrontation Clause demands.

C

[8] *Roberts*’ failings were on full display in the proceedings below. Sylvia Crawford made her statement while in police custody, herself a potential suspect in the case. Indeed, she had been told that whether she would be released “depend[ed] on how the investigation continues.” App. 81. In response to often leading questions from police detectives, she implicated her husband in Lee’s stabbing and at least arguably undermined his self-defense claim. Despite all this, the trial court admitted her statement, listing several reasons why it was reliable. In its opinion reversing, the Court of Appeals listed several other reasons why the statement was not reliable. Finally, the State Supreme Court relied exclusively on the interlocking character of the statement and disregarded every other factor the lower courts had considered. The case is thus a self-contained demonstration of *Roberts*’ unpredictable and inconsistent application.

Each of the courts also made assumptions that cross-examination might well have undermined. The trial court, for example, stated that Sylvia Crawford’s statement was reliable because she was an eyewitness with direct knowledge of the events. But Sylvia at one point told the police that she had “shut [her] eyes and . . . didn’t really watch” part of the fight, and that she was “in shock.” App. 134.
The trial court also buttressed its reliability finding by claiming that Sylvia was “being questioned by law enforcement, and, thus, the [questioner] is . . . neutral to her and not someone who would be inclined to advance her interests and shade her version of the truth unfavorably toward the defendant.” \textit{Id.}, at 77. The Framers would be astounded to learn that \textit{ex parte} testimony could be admitted against a criminal defendant because it was elicited by “neutral” government officers. But even if the court’s assessment of the officer’s motives was accurate, it says nothing about Sylvia’s perception of her situation. Only cross-examination could reveal that.

The State Supreme Court gave dispositive weight to the interlocking nature of the two statements—that they were both ambiguous as to when and whether Lee had a weapon. The court’s claim that the two statements were \textit{equally} ambiguous is hard to accept. Petitioner’s statement is ambiguous only in the sense that he had lingering doubts about his recollection: “A. I could a swore I seen him goin’ for somethin’ before, right before everything happened . . . . B]ut I’m not positive.” \textit{Id.}, at 155. Sylvia’s statement, on the other hand, is truly inscrutable, since the key timing detail was simply assumed in the leading question she was asked: “Q. Did Kenny do anything to fight back from this assault?” \textit{Id.}, at 137 (punctuation added). Moreover, Sylvia specifically said Lee had nothing in his hands after he was stabbed, while petitioner was not asked about that.

The prosecutor obviously did not share the court’s view that Sylvia’s statement was ambiguous—he called it “damning evidence” that “completely refutes [petitioner’s] claim of self-defense.” \textit{Tr. 468} (Oct. 21, 1999). We have no way of knowing whether the jury agreed with the prosecutor or the court. Far from obviating the need for cross-examination, the “interlocking” ambiguity of the two statements made it all the more imperative that they be tested to tease out the truth.

We readily concede that we could resolve this case by simply reweighing the “reliability factors” under \textit{Roberts} and finding that Sylvia Crawford’s statement falls short. But we view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion. Moreover, to reverse the Washington Supreme Court’s decision after conducting our own reliability analysis would perpetuate, not avoid, what the Sixth Amendment condemns. The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.

We have no doubt that the courts below were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands. Cf. U.S. Const., Amdt. 6 (criminal jury trial); Amdt. 7 (civil jury trial); \textit{Ring v. Arizona}, 536 U.S. 584, 611–612, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (SCALIA, J., concurring). By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like Raleigh’s—great state trials where the
impartiality of even those at the highest levels of the judiciary might not be so clear. It is difficult to imagine Roberts' providing any meaningful protection in those circumstances.

* * *

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term 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. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. Roberts notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

The judgment of the Washington Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Chief Justice REHNQUIST, with whom Justice O'CONNOR joins, concurring in the judgment.

I dissent from the Court's decision to overrule Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). I believe that the Court's adoption of a new interpretation of the Confrontation Clause is not backed by sufficiently persuasive reasoning to overrule long-established precedent. Its decision casts a mantle of uncertainty over future criminal trials in both federal and state courts, and is by no means necessary to decide the present case.

The Court's distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine. Under the common law, although the courts were far from consistent, out-of-court statements made by someone other than the accused and not taken under oath, unlike ex parte depositions or affidavits, were generally not considered substantive evidence upon which a conviction could be based. See, e.g., King v. Brasier, 1

1. Modern scholars have concluded that at the time of the founding the law had yet to fully develop the exclusionary component of the hearsay rule and its attendant exceptions, and thus hearsay was still often heard by the jury. See Gallanis, The Rise of Modern Evidence Law, 84 Iowa L.Rev. 499, 534-535 (1999); Mosteller, Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions, 1993 U. Ill. L.Rev. 691, 738-746. In many cases, hearsay
Leach 199, 200, 168 Eng. Rep. 202 (K.B. 1779); see also J. Langbein, Origins of Adversary Criminal Trial 235–242 (2003); G. Gilbert, Evidence 152 (3d ed. 1769). 2 Testimonial statements such as accusatory statements to police officers likely would have been disapproved of in the 18th century, not necessarily because they resembled \textit{ex parte} affidavits or depositions as the Court reasons, but more likely than not because they were not made under oath. 3 See \textit{King v. Woodcock}, 1 Leach 500, 503, 168 Eng. Rep. 352, 353 (1789) (noting that a statement taken by a justice of the peace may not be admitted into evidence unless taken under oath).

7 Without an oath, one usually did not get to the second step of whether confrontation was required.

Thus, while I agree that the Framers were mainly concerned about sworn affidavits and depositions, it does not follow that they were similarly concerned about the Court’s broader category of testimonial statements. See 2 N. Webster, An American Dictionary of the English Language (1828) (defining “Testimony” as “[a] solemn declaration or affirmation as of some fact. Such affirmation in judicial proceedings, may be verbal or written, but must be under oath” (emphasis added)). As far as I can tell, unsworn testimonial statements were treated no differently at common law than were nontestimonial statements, and it seems to me any classification of statements as testimonial beyond that of sworn affidavits and depositions will be somewhat arbitrary, merely a proxy for what the Framers might have intended had such evidence been liberally admitted as substantive evidence like it is today. 4

alone was generally not considered sufficient to support a conviction; rather, it was used to corroborate sworn witness testimony. See 5 J. Wigmore, Evidence § 1364, pp. 17, 19–20, 19, n. 33 (J. Chadbourn rev. 1974) (hereinafter Wigmore) (noting in the 1600’s and early 1700’s testimonial and nontestimonial hearsay was permissible to corroborate direct testimony); see also J. Langbein, Origins of Adversary Criminal Trial 238–239 (2003). Even when unsworn hearsay was proffered as substantive evidence, however, because of the predominance of the oath in society, juries were largely skeptical of it. See Landsman, Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England, 75 Cornell L.Rev. 497, 506 (1990) (describing late 17th-century sentiments); Langbein, Criminal Trial before the Lawyers, 45 U. Chi. L.Rev. 263, 291–293 (1978). In the 18th century, unsworn hearsay was simply held to be of much lesser value than were sworn affidavits or depositions.

2. Gilbert’s noted in 1769:

‘Hearsay is no Evidence . . . though a Person Testify what he hath heard upon Oath, yet the Person who spake it was not upon Oath; and if a Man had been in Court and said the same Thing and had not sworn it, he had not been believed in a Court of Justice; for all Credit being derived from Attestation and Evidence, it can rise no higher than the Fountain from whence it flows, and if the first Speech was without Oath, an Oath that there was such a Speech makes it no more than a bare speaking, and so of no Value in a Court of Justice, where all Things were determined under the Solemnities of an Oath . . . .’

3. Confessions not taken under oath were admissible against a confessor because "the most obvious Principles of Justice, Policy, and Humanity" prohibited an accused from testifying to his statements. 1 G. Gilbert, Evidence 216 (C. Lofft ed. 1791). Still, these unsworn confessions were considered evidence only against the confessor as the Court points out, see \textit{ante}, at 1365, and in cases of treason, were insufficient to support even the conviction of the confessor, 2 W. Hawkins, Pleas of the Crown, ch. 46, § 4, p. 604, n. 3 (T. Leach 6th ed. 1787).

4. The fact that the prosecution introduced an unsworn examination in 1603 at Sir Walter Raleigh’s trial, as the Court notes, see \textit{ante}, at 1365, says little about the Court’s distinction between testimonial and nontestimonial statements. Our precedent indicates that unsworn testimonial statements, as do some nontesti-
I therefore see no reason why the distinction the Court draws is preferable to our precedent. Starting with Chief Justice Marshall's interpretation as a Circuit Justice in 1807, 16 years after the ratification of the Sixth Amendment, *United States v. Burr*, 25 F.Cas. 187, 193 (No. 14,694) (CC Va. 1807), continuing with our cases in the late 19th century, *Mattox v. United States*, 156 U.S. 237, 243–244, 15 S.Ct. 337, 39 L.Ed. 409 (1895); *Kirby v. United States*, 174 U.S. 47, 54–57, 19 S.Ct. 574, 43 L.Ed. 890 (1899), and through today, *White v. Illinois*, 502 U.S. 346, 352–353, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992), we have never drawn a distinction between testimonial and nontestimonial statements. And for that matter, neither has any other court of which I am aware. I see little value in trading our precedent for an imprecise approximation at this late date.

I am also not convinced that the Confrontation Clause categorically requires the exclusion of testimonial statements. Although many States had their own Confrontation Clauses, they were of recent vintage and were not interpreted with any regularity before 1791. State cases that recently followed the ratification of the Sixth Amendment were not uniform; the Court itself cites state cases from the early 19th century that took a more stringent view of the right to confrontation than does the Court, prohibiting former testimony even if the witness was subjected to cross-examination. See *ante*, at 1363 (citing *Finn v. Commonwealth*, 26 Va. 701, 708 (1827); *State v. Atkins*, 1 Tenn. 229 (Super. L. & Eq. 1807) (per curiam)). Nor was the English law at the time of the framing entirely consistent in its treatment of testimonial evidence. Generally *ex parte* affidavits and depositions were excluded as the Court notes, but even that proposition was not universal. See *King v. Eriswell*, 3 T.R. 707, 100 Eng. Rep. 815 (K.B.1790) (affirming by an equally divided court the admission of an *ex parte* examination because the declarant was unavailable to testify); *King v. Westbeer*, 1 Leach 12, 13, 168 Eng. Rep. 108, 109 (1739) (noting the admission of an *ex parte* affidavit); see also 1 M. Hale, Pleas of the Crown 585–586 (1738) (noting that statements of "accusers and witnesses" which were taken under oath could be admitted into evidence if the declarant was "dead or not able to travel"). Wigmore notes that sworn examinations of witnesses before justices of the peace in certain cases would not have been excluded until the end of the 1700's, 5 Wigmore § 1364, at 26–27, and sworn statements of witnesses before coroners became excluded only by statute in the 1800's, see *ibid.*; id., § 1374, at 59. With respect to unsworn testimonial statements, there is no indication that once the hearsay rule was developed courts ever excluded these statements if they otherwise fell within a firmly rooted exception. See, *e.g.*, *Eriswell, supra*, at 715–719 (Buller, J.), 720 (Ashhurst, J.), 100 Eng. Rep., at 819–822 (concluding that an *ex parte* examination was admissible as an exception to the hearsay rule because it was a declaration by a party of his state and condition). Dying declarations are one example. See, *e.g.*, *Woodcock, supra*, at 502–504, 168 Eng. Rep., at 353–354; *King v. Reason*, 16 How. St. Tr. 1, 22–23 (K.B.1722).

Monomaniacal statements, raise confrontation concerns once admitted into evidence, see, *e.g.*, *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999); *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), and I do not contend otherwise. My point is not that the Confrontation Clause does not reach these statements, but rather that it is far from clear that courts in the late 18th century would have treated unsworn statements, even testimonial ones, the same as sworn statements.
Between 1700 and 1800 the rules regarding the admissibility of out-of-court statements were still being developed. See n. 1, supra. There were always exceptions to the general rule of exclusion, and it is not clear to me that the Framers categorically wanted to eliminate further ones. It is one thing to trace the right of confrontation back to the Roman Empire; it is quite another to conclude that such a right absolutely excludes a large category of evidence. It is an odd conclusion indeed to think that the Framers created a cut-and-dried rule with respect to the admissibility of testimonial statements when the law during their own time was not fully settled.

To find exceptions to exclusion under the Clause is not to denigrate it as the Court suggests. Chief Justice Marshall stated of the Confrontation Clause: “I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important.” Burr, 25 F.Cas., at 193. Yet, he recognized that such a right was not absolute, acknowledging that exceptions to the exclusionary component of the hearsay rule, which he considered as an “inroad” on the right to confrontation, had been introduced. See ibid.

Exceptions to confrontation have always been derived from the experience that some out-of-court statements are just as reliable as cross-examined in-court testimony due to the circumstances under which they were made. We have recognized, for example, that co-conspirator statements simply “cannot be replicated, even if the declarant testifies to the same matters in court.” United States v. Inadi, 475 U.S. 387, 395, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986). Because the statements are made while the declarant and the accused are partners in an illegal enterprise, the statements are unlikely to be false and their admission “actually furthers the ‘Confrontation Clause’s very mission’ which is to ‘advance the accuracy of the truth-determining process in criminal trials.’” Id., at 396, 106 S.Ct. 1121 (quoting Tennessee v. Street, 471 U.S. 409, 415, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985) (some internal quotation marks omitted)). Similar reasons justify the introduction of spontaneous declarations, see White, 502 U.S., at 356, 112 S.Ct. 736, statements made in the course of procuring medical services, see ibid., dying declarations, see Kirby, supra, at 61, 19 S.Ct. 574, and countless other hearsay exceptions. That a statement might be testimonial does nothing to undermine the wisdom of one of these exceptions.

Indeed, cross-examination is a tool used to flesh out the truth, not an empty procedure. See Kentucky v. Stincer, 482 U.S. 730, 737, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987) (“The right to cross-examination, protected by the Confrontation Clause, thus is essentially a ‘functional’ right designed to promote reliability in the truth-finding functions of a criminal trial”); see also Maryland v. Craig, 497 U.S. 836, 845, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) (“The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact”); “[I]n a given instance [cross-examination may] be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation.” 5 Wigmore § 1420, at 251. In such a case, as we noted over 100 years ago, “The law in its wisdom declares that
the rights of the public shall not be wholly
sacrificed in order that an incidental bene-
fit may be preserved to the accused." Mattox,

By creating an immutable category of ex-
cluded evidence, the Court adds little to a
trial's truth-finding function and ignores
this longstanding guidance.

In choosing the path it does, the Court
of course overrules Ohio v. Roberts, 448
U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597
(1980), a case decided nearly a quarter of
a century ago. Stare decisis is not an in-
exorable command in the area of constitu-
tional law, see Payne v. Tennessee, 501
U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d
720 (1991), but by and large, it "is the
preferred course because it promotes the
evenhanded, predictable, and consistent
development of legal principles, fosters re-
liance on judicial decisions, and contrib-
utes to the actual and perceived integrity
of the judicial process," id., at 827, 111
S.Ct. 2597. And in making this appraisal,
doubt that the new rule is indeed the
"right" one should surely be weighed in
the balance. Though there are no vested
interests involved, unresolved questions
for the future of everyday criminal trials
throughout the country surely counsel the
same sort of caution. The Court grandly
declares that "[w]e leave for another day
any effort to spell out a comprehensive
definition of 'testimonial,'" ante, at 1374.

But to its credit, the Court's analysis of
"testimony" excludes at least some hearsay
exceptions, such as business records
and official records. See ante, at 1367.

To hold otherwise would require numerous
additional witnesses without any apparent
gain in the truth-seeking process. Like-
wise to the Court's credit is its implicit
recognition that the mistaken application
of its new rule by courts which guess
wrong as to the scope of the rule is subject
to harmless-error analysis. See ante, at
1359, n. 1.

But these are palliatives to what I be-
lieve is a mistaken change of course. It is
a change of course not in the least neces-
sary to reverse the judgment of the Su-
preme Court of Washington in this case.
The result the Court reaches follows inex-
orably from Roberts and its progeny with-
out any need for overruling that line of
cases. In Idaho v. Wright, 497 U.S. 805,
820–824, 110 S.Ct. 3139, 111 L.Ed.2d 638
(1990), we held that an out-of-court state-
ment was not admissible simply because
the truthfulness of that statement was cor-
robated by other evidence at trial. As
the Court notes, ante, at 1373, the Su-
preme Court of Washington gave decisive
weight to the "interlocking nature of the
two statements." No re-weighing of the
"reliability factors," which is hypothesized
by the Court, ibid., is required to reverse
the judgment here. A citation to Idaho v.
Wright, supra, would suffice. For the rea-
sons stated, I believe that this would be a
far preferable course for the Court to take
here.
Yel Flg
Davis v. Washington

Supreme Court of the United States
Adrian Martell DAVIS, Petitioner,
v.
WASHINGTON.
Hershel Hammon, Petitioner,
v.
Indiana.
Nos. 05-5224, 05-5705.

Argued March 20, 2006.

Background: Defendant was convicted in the Washington Superior Court, King County, Jay V. White, J., of felony violation of a domestic no-contact order. Defendant appealed. The Court of Appeals of Washington, 116 Wash.App. 81, 64 P.3d 661, affirmed. On appeal, the Supreme Court of Washington, 154 Wash.2d 291, 111 P.3d 844, affirmed, holding that portion of victim's 911 conversation in which she identified defendant was not testimonial for purposes of the Confrontation Clause. In a separate case, defendant was convicted, following a bench trial, in the Indiana Circuit Court, Miami County, Rosemary Higgins Burke, J., of domestic battery, based in part on victim's written statements in affidavit given to police officer. Defendant appealed. The Court of Appeals of Indiana, 809 N.E.2d 945, affirmed in part and reversed in part. On petition to transfer, the Supreme Court of Indiana, 829 N.E.2d 444, affirmed.

Holdings: After granting certiorari, the United States Supreme Court, Justice Scalia, held that:

(1) victim's statements in response to 911 operator's interrogation were not testimonial, and therefore, were not subject to Confrontation Clause, and

(2) domestic battery victim's written statements in affidavit given to police officer were testimonial, and therefore, were subject to Confrontation Clause.

Affirmed in part, reversed in part and remanded.

Justice Thomas filed separate opinion concurring in the judgment in part and dissenting in part.
Statements taken by police officers in the course of an interrogation are "nontestimonial," and not subject to the Confrontation Clause, when they are made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. U.S.C.A. Const.Amend. 6.

Statements taken by police officers in the course of interrogation are "testimonial," and subject to the Confrontation Clause, 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. U.S.C.A. Const.Amend. 6.

Out-Of-Court Statements and Hearsay in General. Most Cited Cases

Statements made by domestic abuse victim in response to 911 operator's questions while defendant was allegedly inside victim's home in violation of no-contact order, in which victim identified her assailant, were not "testimonial" and, therefore, were not subject to Confrontation Clause; victim was speaking about events as they were actually happening, rather than describing past events, and primary purpose of 911 operator's interrogation was to enable police assistance to meet ongoing emergency caused by physical threat to victim. U.S.C.A. Const.Amend. 6.

[5] Criminal Law 110 k662.8

A conversation which begins as an interrogation to determine the need for emergency assistance, and is not subject to the Confrontation Clause, may evolve into testimonial statements subject to the Confrontation Clause once that purpose has been achieved; trial courts should recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial and, through in limine procedure, should redact or exclude the portions of any statement that have become testimonial. U.S.C.A. Const.Amend. 6.

[6] Criminal Law 110 k662.8

Alleged domestic battery victim's written statements in affidavit given to police officer who responded to domestic disturbance call were "testimonial" and, therefore, subject to Confrontation Clause; there was no emergency in progress when statements were given, as alleged battery had happened before police arrived, so that primary purpose of officer's interrogation was to investigate a possible past crime. U.S.C.A. Const.Amend. 6.

[7] Criminal Law 110 k662.80
In No. 05-5224, a 911 operator ascertained from Michelle McCottry that she had been assaulted by her former boyfriend, petitioner Davis, who had just fled the scene. McCottry did not testify at Davis's trial for felony violation of a domestic no-contact order, but the court admitted the 911 recording despite Davis's objection, which he based on the Sixth Amendment's Confrontation Clause. He was convicted. The Washington Court of Appeals affirmed, as did the State Supreme Court, which concluded that, inter alia, the portion of the 911 conversation in which McCottry identified Davis as her assailant was not testimonial.

In No. 05-5705, when police responded to a reported domestic disturbance at the home of Amy and Hershel Hammon, Amy told them that nothing was wrong, but gave them permission to enter. Once inside, one officer kept petitioner Hershel in the kitchen while the other interviewed Amy elsewhere and had her complete and sign a battery affidavit. Amy did not appear at Hershel's bench trial for, inter alia, domestic battery, but her affidavit and testimony from the officer who questioned her were admitted over Hershel's objection that he had no opportunity to cross-examine her. Hershel was convicted, and the Indiana Court of Appeals affirmed in relevant part. The State Supreme Court also affirmed, concluding that, although Amy's affidavit was testimonial and wrongly admitted, it was harmless beyond a reasonable doubt.

Held:

1. The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177. These cases require the Court to determine which police "interrogations" produce statements that fall within this prohibition. Without attempting to produce an exhaustive classification of all conceivable statements as either testimonial or nontestimonial, it suffices to decide the present cases to hold that statements are nontestimonial when made in the course of police
interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Pp. 2273 - 2274.

2. McCottry's statements identifying Davis as her assailant were not testimonial. Pp. 2274 - 2278.

(a) This case requires the Court to decide whether the Confrontation Clause applies only to testimonial hearsay, and, if so, whether the 911 recording qualifies. Crawford suggested the answer to the first question, noting that "the Confrontation Clause ... applies to 'witnesses' against the accused-in other words, those who 'bear testimony.'" Only "testimonial statements" cause a declarant to be a witness. The Court is unaware of any early American case invoking the Confrontation Clause or the common-law right to confrontation that did not involve testimony as thus defined. Well into the 20th century, this Court's jurisprudence was carefully applied only in the testimonial context, and its later cases never in practice dispensed with the Confrontation Clause requirements of unavailability and prior cross-examination in cases involving testimonial hearsay. Pp. 2274 - 2276.

(b) The question in Davis, therefore, is whether, objectively considered, the interrogation during the 911 call produced testimonial statements. In contrast to Crawford, where the interrogation took place at a police station and was directed solely at establishing a past crime, a 911 call is ordinarily designed primarily to describe current circumstances requiring police assistance. The difference is apparent here. McCottry was speaking of events as they were actually happening, while Crawford's interrogation took place hours after the events occurred. Moreover, McCottry was facing an ongoing emergency. Further, the statements elicited were necessary to enable the police to resolve the present emergency rather than simply to learn what had happened in the past. Finally, the difference in the level of formality is striking. Crawford calmly answered questions at a station house, with an officer-interrogator taping and taking notes, while McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even safe. Thus, the circumstances of her interrogation objectively indicate that its primary purpose was to enable police assistance to meet an ongoing emergency. She was not acting as a witness or testifying. Pp. 2276 - 2278.

3. Amy Hammon's statements were testimonial. They were not much different from those in Crawford. It is clear from the circumstances that Amy's interrogation was part of an investigation into possibly criminal past conduct. There was no emergency in progress, she told the police when they arrived that things were fine, and the officer questioning her was seeking to
determine not what was happening but what had happened. Objectively viewed, the primary, if not sole, purpose of the investigation was to investigate a possible crime. While the formal features of Crawford's interrogation strengthened her statements' testimonial aspect, such features were not essential to the point. In both cases, the declarants were separated from the defendants, the statements recounted how potentially criminal past events began and progressed, and the interrogation took place some time after the events were over. For the same reasons the comparison to Crawford is compelling, the comparison to Davis is unpersuasive. The statements in Davis were taken when McCottry was alone, unprotected by police, and apparently in immediate danger from Davis. She was seeking aid, not telling a story about the past. Pp. 2278 - 2279.

4. The Indiana courts may determine on remand whether a claim of forfeiture by wrongdoing-under which one who obtains a witness's absence by wrongdoing forfeits the constitutional right to confrontation-is properly raised in Hammon, and, if so, whether it is meritorious. Absent such a finding, the Sixth Amendment operates to exclude Amy Hammon's affidavit. Pp. 2279 - 2280.

No. 05-5224, 154 Wash.2d 291, 111 P.3d 844, affirmed; No. 05-5705, 829 N.E.2d 444, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, SOUTER, GINSBURG, BREYER, and ALITO, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part.

Michael R. Dreeben, for United States as amicus curiae, by special leave of the Court, supporting the respondent.
Irving L. Gornstein, for the United States as amicus curiae, by special leave of the Court, supporting the respondent.
Nancy Collins, Washington Appellate Project, Seattle, WA, Jeffrey L. Fisher, Counsel of Record, Lissa Wolfendale, Shook Davis Wright Tremaine LLP, Seattle, WA, Counsel for Petitioner.
Norm Maleng, King County Prosecuting Attorney, James M. Whisman, Counsel of Record, Senior Deputy Prosecuting Attorney, Deborah A. Dwyer, Senior Deputy Prosecuting Attorney, Lee D. Yates, Senior Deputy Prosecuting Attorney, Seattle, Washington, Counsel for Respondent.
Richard D. Friedman, Counsel of Record, Ann Arbor, Michigan, Kimberly A. Jackson, Jensen & Associates, Indianapolis, Indiana, Brief of Petitioner Hershel Hammon.
Justice SCALIA delivered the opinion of the Court. These cases require us to determine when statements made to law enforcement personnel during a 911 call or at a crime scene are "testimonial" and thus subject to the requirements of the Sixth Amendment's Confrontation Clause.

I

A

The relevant statements in Davis v. Washington, No. 05-5224, were made to a 911 emergency operator on February 1, 2001. When the operator answered the initial call, the connection terminated before anyone spoke. She reversed the call, *2271 and Michelle McCottry answered. In the ensuing conversation, the operator ascertained that McCottry was involved in a domestic disturbance with her former boyfriend Adrian Davis, the petitioner in this case:

"911 Operator: Hello.
"Complainant: Hello.
"911 Operator: What's going on?
"Complainant: He's here jumpin' on me again.
"911 Operator: Okay. Listen to me carefully. Are you in a house or an apartment?
"Complainant: I'm in a house.
"911 Operator: Are there any weapons?
"Complainant: No. He's usin' his fists.
"911 Operator: Okay. Has he been drinking?
"Complainant: No.
"911 Operator: Okay, sweetie. I've got help started. Stay on the line with me, okay?
"Complainant: I'm on the line.
"911 Operator: Listen to me carefully. Do you know his last name?
"Complainant: It's Davis.
"911 Operator: Davis? Okay, what's his first name?
"Complainant: Adrian
"911 Operator: What is it?
"Complainant: Adrian.
"911 Operator: Adrian?
"Complainant: Yeah.
"911 Operator: Okay. What's his middle initial?
"Complainant: Martell. He's runnin' now." App. in No. 05-5224, pp. 8-9.

As the conversation continued, the operator learned that Davis had "just ran out the door" after hitting McCottry, and that he was leaving in a car with someone else. Id., at 9-10. McCottry started talking, but the operator
cut her off, saying, "Stop talking and answer my questions." Id., at 10. She then gathered more information about Davis (including his birthday), and learned that Davis had told McCottry that his purpose in coming to the house was "to get his stuff," since McCottry was moving. Id., at 11-12. McCottry described the context of the assault, id., at 12, after which the operator told her that the police were on their way. "They're gonna check the area for him first," the operator said, "and then they're gonna come talk to you." Id., at 12-13.

The police arrived within four minutes of the 911 call and observed McCottry's shaken state, the "fresh injuries on her forearm and her face," and her "frantic efforts to gather her belongings and her children so that they could leave the residence." 154 Wash.2d 291, 296, 111 P.3d 844, 847 (2005) (en banc).

The State charged Davis with felony violation of a domestic no-contact order. "The State's only witnesses were the two police officers who responded to the 911 call. Both officers testified that McCottry exhibited injuries that appeared to be recent, but neither officer could testify as to the cause of the injuries." Ibid. McCottry presumably could have testified as to whether Davis was her assailant, but she did not appear. Over Davis's objection, based on the Confrontation Clause of the Sixth Amendment, the trial court admitted the recording of her exchange with the 911 operator, and the jury convicted him. The Washington Court of Appeals affirmed, 116 Wash.App. 81, 64 P.3d 661 (2003). The Supreme Court of Washington, with one dissenting justice, also affirmed, concluding that the portion of the 911 conversation in which McCottry identified Davis was not testimonial, and that if other portions of the conversation were testimonial, admitting them was harmless beyond a reasonable doubt. 154 Wash.2d, at 305, 111 P.3d, at 851. We granted certiorari. 546 U.S. ----, 126 S.Ct. 552, 163 L.Ed.2d 459 (2005).

B

In Hammon v. Indiana, No. 05-5705, police responded late on the night of February 26, 2003, to a "reported domestic disturbance" at the home of Hershel and Amy Hammon. 829 N.E.2d 444, 446 (Ind.2005). They found Amy alone on the front porch, appearing " 'somewhat frightened,' " but she told them that " 'nothing was the matter,' " id., at 446, 447. She gave them permission to enter the house, where an officer saw "a gas heating unit in the corner of the living room" that had "flames coming out of the ... partial glass front. There were pieces of glass on the ground in front of it and there was flame emitting from the front of the heating unit." 829 N.E.2d, at 447. Hershel, meanwhile, was in the kitchen. He told the police "that he and his wife had 'been in an argument' but 'everything was fine now' and the argument 'never became physical.' " 829 N.E.2d, at 447. By this point Amy had come
back inside. One of the officers remained with Hershel; the other went to
the living room to talk with Amy, and "again asked [her] what had occurred." 
Ibid.; App. in No. 05-5705, at 17, 32. Hershel made several attempts to
participate in Amy's conversation with the police, see id., at 32, but was
rebuffed. The officer later testified that Hershel "became angry when I
insisted that [he] stay separated from Mrs. Hammon so that we can investigate
what had happened." Id., at 34. After hearing Amy's account, the officer "
had her fill out and sign a battery affidavit." Id., at 18. Amy handwrote
the following: "Broke our Furnace & shoved me down on the floor into the
broken glass. Hit me in the chest and threw me down. Broke our lamps &
phone. Tore up my van where I couldn't leave the house. Attacked my
daughter." Id., at 2.

The State charged Hershel with domestic battery and with violating his
probation. Amy was subpoenaed, but she did not appear at his subsequent
bench trial. The State called the officer who had questioned Amy, and asked
him to recount what Amy told him and to authenticate the affidavit.
Hershel's counsel repeatedly objected to the admission of this evidence. See
id., at 11, 12, 13, 17, 19, 20, 21. At one point, after hearing the
prosecutor defend the affidavit because it was made "under oath," defense
counsel said, "That doesn't give us the opportunity to cross examine [the]
person who allegedly drafted it. Makes me mad." Id., at 19. Nonetheless,
the trial court admitted the affidavit as a "present sense impression," id.,
at 20, and Amy's statements as "excited utterances" that "are expressly
permitted in these kinds of cases even if the declarant is not available to
testify." Id., at 40. The officer thus testified that Amy
"informed me that she and Hershel had been in an argument. That he became
irrate [sic] over the fact of their daughter going to a boyfriend's house.
The argument became ... physical after being verbal and she informed me that
Mr. Hammon, during the verbal part of the argument was breaking things in the
living room and I believe she stated he broke the phone, broke the lamp, broke
the front of the heater. When it became physical he threw her down into the
glass of the heater.

......
"She informed me Mr. Hammon had pushed her onto the ground, had shoved her
head into the broken glass of the *2273 heater and that he had punched her in
the chest twice I believe." Id., at 17-18.

The trial judge found Hershel guilty on both charges, id., at 40, and the
Indiana Court of Appeals affirmed in relevant part, 809 N.E.2d 945 (2004).
The Indiana Supreme Court also affirmed, concluding that Amy's statement was
admissible for state-law purposes as an excited utterance, 829 N.E.2d, at 449;
that "a 'testimonial' statement is one given or taken in significant part for
purposes of preserving it for potential future use in legal proceedings,"
where "the motivations of the questioner and declarant are the central
concerns," id., at 456, 457; and that Amy's oral statement was not "
testimonial" under these standards, id., at 458. It also concluded that, although the affidavit was testimonial and thus wrongly admitted, it was harmless beyond a reasonable doubt, largely because the trial was to the bench. Id., at 458-459. We granted certiorari. 546 U.S. ----, 126 S.Ct. 552, 163 L.Ed.2d 459 (2005).

II

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." In Crawford v. Washington, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), we held that this provision bars "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." A critical portion of this holding, and the portion central to resolution of the two cases now before us, is the phrase "testimonial statements." Only statements of this sort cause the declarant to be a "witness" within the meaning of the Confrontation Clause. See id., at 51, 124 S.Ct. 1354. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.

Our opinion in Crawford set forth "[v]arious formulations" of the core class of "testimonial" statements, ibid., but found it unnecessary to endorse any of them, because "some statements qualify under any definition," id., at 52, 124 S.Ct. 1354. Among those, we said, were "[s]tatements taken by police officers in the course of interrogations," ibid.; see also id., at 53, 124 S.Ct. 1354. The questioning that generated the deponent's statement in Crawford-which was made and recorded while she was in police custody, after having been given Miranda warnings as a possible suspect herself-"qualifies under any conceivable definition" of an "'interrogation,'" 541 U.S., at 53, n. 4, 124 S.Ct. 1354. We therefore did not define that term, except to say that "[w]e use [it] ... in its colloquial, rather than any technical legal, sense," and that "one can imagine various definitions ... , and we need not select among them in this case." Ibid. The character of the statements in the present cases is not as clear, and these cases require us to determine more precisely which police interrogations produce testimony.

[1][2] Without attempting to produce an exhaustive classification of all conceivable statements-or even all conceivable statements in response to police interrogation-as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial
when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.\textsuperscript{FN1}

\textsuperscript{FN1} Our holding refers to interrogations because, as explained below, the statements in the cases presently before us are the products of interrogations—which in some circumstances tend to generate testimonial responses. This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation. (Part of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly not the result of sustained questioning. Raleigh's Case, 2 How. St. Tr. 1, 27 (1603).) And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.

III

A

[3] In Crawford, it sufficed for resolution of the case before us to determine that "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." Id., at 53, 124 S.Ct. 1354. Moreover, as we have just described, the facts of that case spared us the need to define what we meant by "interrogations." The Davis case today does not permit us this luxury of indecision. The inquiries of a police operator in the course of a 911 call \textsuperscript{FN2} are an interrogation in one sense, but not in a sense that "qualifies under any conceivable definition." We must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay; and, if so, whether the recording of a 911 call qualifies.

\textsuperscript{FN2} If 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, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), therefore, our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are "testimonial."
The answer to the first question was suggested in Crawford, even if not explicitly held:
"The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to 'witnesses' against the accused-in other words, those who 'bear testimony.' 1 N. Webster, An American Dictionary of the English Language (1828). 'Testimony,' in turn, is typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.' Ibid. An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." 541 U.S., at 51, 124 S.Ct. 1354.

A 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.

We are not aware of any early American case invoking the Confrontation Clause or the common-law right to confrontation that did not clearly involve testimony as thus defined. FN3 Well into the 20th century, our *2275 own Confrontation Clause jurisprudence was carefully applied only in the testimonial context. See, e.g., Reynolds v. United States, 98 U.S. 145, 158, 25 L.Ed. 244 (1879) (testimony at prior trial was subject to the Confrontation Clause, but petitioner had forfeited that right by procuring witness's absence); Mattox v. United States, 156 U.S. 237, 240-244, 15 S.Ct. 337, 39 L.Ed. 409 (1895) (prior trial testimony of deceased witnesses admitted because subject to cross-examination); Kirby v. United States, 174 U.S. 47, 55-56, 19 S.Ct. 574, 43 L.Ed. 890 (1899) (guilty pleas and jury conviction of others could not be admitted to show that property defendant received from them was stolen); Motes v. United States, 178 U.S. 458, 467, 470-471, 20 S.Ct. 993, 44 L.Ed. 1150 (1900) (written deposition subject to cross-examination was not admissible because witness was available); Dowdell v. United States, 221 U.S. 325, 330-331, 31 S.Ct. 590, 55 L.Ed. 753 (1911) (facts regarding conduct of prior trial certified to by the judge, the clerk of court, and the official reporter did not relate to defendants' guilt or innocence and hence were not statements of "witnesses" under the Confrontation Clause).

FN3. See, e.g., State v. Webb, 2 N.C. 103, 103-104, 1794 WL 98 (Super. L. & Eq. 1794) (per curiam) (excluding deposition taken in absence of the accused); State v. Atkins, 1 Tenn. 229, 1807 WL 107 (Super. L. & Eq. 1807) (per curiam) (excluding prior testimony of deceased witness); Johnston v. State, 10 Tenn. 58, 59, 1821 WL 401 (Err. & App. 1821) (admitting written deposition of deceased deponent, because defendant had the opportunity to cross-examine); Finn v. Commonwealth, 26 Va. 701, 707-708, 1827 WL 1081 (1827) (excluding prior testimony of a witness still alive, though outside the jurisdiction); State v. Hill, 20 S.C.L. 607, 1835 WL 1416 (App.1835) (excluding deposition of deceased victim taken in absence of the accused); Commonwealth v. Richards, 35
Mass. 434, 436-439, 1836 WL 2491 (1837) (excluding preliminary examination testimony of deceased witness because the witness’s precise words were not available); Bostick v. State, 22 Tenn. 344, 1842 WL 1948 (1842) (admitting deposition of deceased where defendant declined opportunity to cross-examine); People v. Newman, 5 Hill 295, 1843 WL 4534 (N.Y.Sup.Ct.1843) (per curiam) (excluding prior trial testimony of witness who was still alive); State v. Campbell, 30 S.C.L. 124, 125, 1844 WL 2558 (App.L.1844) (excluding deposition taken in absence of the accused); State v. Valentine, 29 N.C. 225, 1847 WL 1081 (1847) (per curiam) (admitting preliminary examination testimony of decedent where defendant had opportunity to cross-examine); Kendrick v. State, 29 Tenn. 479, 491, 1850 WL 2014 (1850) (admitting testimony of deceased witness at defendant’s prior trial); State v. Houser, 26 Mo. 431, 439-441, 1858 WL 5832 (1858) (excluding deposition of deponent who was still alive).

Even our later cases, conforming to the reasoning of Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980),^FN4 never in practice dispensed with the Confrontation Clause requirements of unavailability and prior cross-examination in cases that involved testimonial hearsay, see Crawford, 541 U.S., at 57-59, 124 S.Ct. 1354 (citing cases), with one arguable exception, see id., at 58, n. 8, 124 S.Ct. 1354 (discussing White v. Illinois, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992)). Where our cases did dispense with those requirements—even under the Roberts approach—the statements at issue were clearly nontestimonial. See, e.g., Bourjaily v. United States, 483 U.S. 171, 181-184, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987) (statements made unwittingly to a Government informant); Dutton v. Evans, 400 U.S. 74, 87-89, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970) (plurality opinion) (statements from one prisoner to another).

We overruled Roberts in Crawford by restoring the unavailability and cross-examination requirements.

Most of the American cases applying the Confrontation Clause or its state constitutional or common-law counterparts involved testimonial statements of the most formal sort—sworn testimony in prior judicial proceedings or formal depositions under oath—which invites the argument that the scope of the Clause is limited to that very formal category. But the English cases that were the progenitors of the Confrontation Clause did not limit the exclusionary rule to prior court testimony and formal depositions, see Crawford, supra, at 52, and n. 3, 124 S.Ct. 1354. In any event, we do not think it conceivable that the protections of the Confrontation Clause can
readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition. Indeed, if there is one point for which no case-English or early American, state or federal-can be cited, that is it.

[4] The question before us in Davis, then, is whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements. When we said in Crawford, supra, at 53, 124 S.Ct. 1354, that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial. It is, in the terms of the 1828 American dictionary quoted in Crawford, "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " 541 U.S., at 51, 124 S.Ct. 1354. (The solemnity of even an oral declaration of relevant past fact to an investigating officer is well enough established by the severe consequences that can attend a deliberate falsehood. See, e.g., United States v. Stewart, 433 F.3d 273, 288 (C.A.2 2006) (false statements made to federal investigators violate 18 U.S.C. § 1001); State v. Reed, 2005 WI 53, ¶ 30, 280 Wis.2d 68, 695 N.W.2d 315, 323 (state criminal offense to "knowingly giv[e] false information to [an] officer with [the] intent to mislead the officer in the performance of his or her duty ").) A 911 call, on the other hand, and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to "establish[ ] or prove[ ]" some past fact, but to describe current circumstances requiring police assistance.

The difference between the interrogation in Davis and the one in Crawford is apparent on the face of things. In Davis, McCottry was speaking about events as they were actually happening, rather than "describ [ing] past events," Lilly v. Virginia, 527 U.S. 116, 137, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (plurality opinion). Sylvia Crawford's interrogation, on the other hand, took place hours after the events she described had occurred. Moreover, any reasonable listener would recognize that McCottry (unlike Sylvia Crawford) was facing an ongoing emergency. Although one might call 911 to provide a narrative report of a crime absent any imminent danger, McCottry's call was plainly a call for help against bona fide physical threat. Third, the nature of what was asked and answered in Davis, again viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn (as in Crawford ) what had happened in the past. That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. See, e.g., Hiibel v. Sixth
We conclude from all this that the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a witness; she was not testifying. What she said was not "a weaker substitute for live testimony" at trial, United States v. Inadi, 475 U.S. 387, 394, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986), like Lord Cobham's statements in Raleigh's Case, 2 How. St. Tr. 1 (1603), or Jane Dingler's ex parte statements against her husband in King v. Dingler, 2 Leach 561, 168 Eng. Rep. 383 (1791), or Sylvia Crawford's statement in Crawford. In each of those cases, the ex parte actors and the evidentiary products of the ex parte communication aligned perfectly with their courtroom analogues. McCottry's emergency statement does not. No "witness" goes into court to proclaim an emergency and seek help.

Davis seeks to cast McCottry in the unlikely role of a witness by pointing to English cases. None of them involves statements made during an ongoing emergency. In King v. Brasier, 1 Leach 199, 168 Eng. Rep. 202 (1779), for example, a young rape victim, "immediately on her coming home, told all the circumstances of the injury" to her mother. Id., at 200, 168 Eng. Rep., at 202. The case would be helpful to Davis if the relevant statement had been the girl's screams for aid as she was being chased by her assailant. But by the time the victim got home, her story was an account of past events.

[5] This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, as the Indiana Supreme Court put it, "evolve into testimonial statements," 829 N.E.2d, at 457, once that purpose has been achieved. In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises). The operator then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the "structured police questioning" that occurred in Crawford, 541 U.S., at 53, n. 4, 124 S.Ct. 1354. This presents no great problem. Just as, for Fifth Amendment purposes, "police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect," New York v. Quarles, 467 U.S. 649, 658-659, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984),
trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through in limine procedure, they should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence. Davis's jury did not hear the complete 911 call, although it may well have heard some testimonial portions. We were asked to classify only McCottry's early statements identifying Davis as her assailant, and we agree with the Washington Supreme Court that they were not testimonial. That court also concluded that, even if later parts of the call were testimonial, their admission was harmless beyond a reasonable doubt. Davis does not challenge that holding, and we therefore assume it to be correct.

B

[6] Determining the testimonial or nontestimonial character of the statements that were the product of the interrogation in Hammon is a much easier task, since they were not much different from the statements we found to be testimonial in Crawford. It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct-as, indeed, the testifying officer expressly acknowledged, App. in No. 05-5705, at 25, 32, 34. There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything, id., at 25. When the officers first arrived, Amy told them that things were fine, id., at 14, and there was no immediate threat to her person. When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in Davis) "what is happening," but rather "what happened." Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime-which is, of course, precisely what the officer should have done.

It is true that the Crawford interrogation was more formal. It followed a Miranda warning, was tape-recorded, and took place at the station house, see 541 U.S., at 53, n. 4, 124 S.Ct. 1354. While these features certainly strengthened the statements' testimonial aspect-made it more objectively apparent, that is, that the purpose of the exercise was to nail down the truth about past criminal events-none was essential to the point. It was formal enough that Amy's interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his "investigation." App. in No. 05-5705, at 34. What we called the "striking resemblance" of the Crawford statement to civil-law ex parte examinations, 541 U.S., at 52, 124 S.Ct. 1354, is shared by Amy's statement here. Both declarants were actively separated from the defendant-officers forcibly prevented Hershel from participating in the interrogation. Both statements deliberately recounted, in response to police
questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely what a witness does on direct examination; they are inherently testimonial. FN5

FN5. The dissent criticizes our test for being "neither workable nor a targeted attempt to reach the abuses forbidden by the [Confrontation] Clause," post, at 2285 (opinion of THOMAS, J.). As to the former: 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," supra, at 2273, but rather a resolution of the cases before us and those like them. For those cases, the test is objective and quite "workable." The dissent, in attempting to formulate an exhaustive classification of its own, has not provided anything that deserves the description "workable"—unless one thinks that the distinction between "formal" and "informal" statements, see post, at 2282-2283, qualifies. And the dissent even qualifies that vague distinction by acknowledging that the Confrontation Clause also reaches the use of technically informal statements when used to evade the formalized process," post, at 2283, and cautioning that the Clause would stop the State from "us [ing] out-of-court statements as a means of circumventing the literal right of confrontation," post, at 2283. It is hard to see this as much more "predictable," ibid., than the rule we adopt for the narrow situations we address. (Indeed, under the dissent's approach it is eminently arguable that the dissent should agree, rather than disagree, with our disposition in Hammon v. Indiana, No. 05-5705.)

As for the charge that our holding is not a "targeted attempt to reach the abuses forbidden by the [Confrontation] Clause," which the dissent describes as the depositions taken by Marian magistrates, characterized by a high degree of formality, see post, at 2281-2282: We do not dispute that formality is indeed essential to testimonial utterance. But we no longer have examining Marian magistrates; and we do have, as our 18th-century forebears did not, examining police officers, see L. Friedman, Crime and Punishment in American History 67-68 (1993)—who perform investigative and testimonial functions once performed by examining Marian magistrates, see J. Langbein, The Origins of Adversary Criminal Trial 41 (2003). It imports sufficient formality, in our view, that lies to such officers are criminal offenses. Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction. Cf. Kyllo v. United States, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001).

*2279 Both Indiana and the United States as amicus curiae argue that this case should be resolved much like Davis. For the reasons we find the comparison
to Crawford compelling, we find the comparison to Davis unpersuasive. The statements in Davis were taken when McCottry was alone, not only unprotected by police (as Amy Hammon was protected), but apparently in immediate danger from Davis. She was seeking aid, not telling a story about the past. McCottry's present-tense statements showed immediacy; Amy's narrative of past events was delivered at some remove in time from the danger she described. And after Amy answered the officer's questions, he had her execute an affidavit, in order, he testified, "[t]o establish events that have occurred previously." App. in No. 05-5705, at 18.

Although we necessarily reject the Indiana Supreme Court's implication that virtually any "initial inquiries" at the crime scene will not be testimonial, see 829 N.E.2d, at 453, 457, we do not hold the opposite—that no questions at the scene will yield nontestimonial answers. We have already observed of domestic disputes that "[o]fficers called to investigate ... need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." Hiibel, 542 U.S., at 186, 124 S.Ct. 2451. Such exigencies may often mean that "initial inquiries" produce nontestimonial statements. But in cases like this one, where Amy's statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were "initial inquiries" is immaterial. Cf. Crawford, supra, at 52, n. 3, 124 S.Ct. 1354. FN6

FN6. Police investigations themselves are, of course, in no way impugned by our characterization of their fruits as testimonial. Investigations of past crimes prevent future harms and lead to necessary arrests. While prosecutors may hope that inculpatory "nontestimonial" evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it be so. The Confrontation Clause in no way governs police conduct, because it is the trial use of, not the investigatory collection of, ex parte testimonial statements which offends that provision. But neither can police conduct govern the Confrontation Clause; testimonial statements are what they are.

IV

[7] Respondents in both cases, joined by a number of their amici, contend that the nature of the offenses charged in these two cases—domestic violence—requires greater flexibility in the use of testimonial evidence. This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall. We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free. Cf. Kyllo v. United States, 533 U.S. 27, 121
S.Ct. 2038, 150 L.Ed.2d 94 (2001) (suppressing evidence from an illegal search). But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in Crawford: that "the rule of forfeiture by wrongdoing ... extinguishes confrontation claims on essentially equitable grounds." 541 U.S., at 62, 124 S.Ct. 1354 (citing Reynolds, 98 U.S., at 158-159). That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.

We take no position on the standards necessary to demonstrate such forfeiture, but federal courts using Federal Rule of Evidence 804(b)(6), which codifies the forfeiture doctrine, have generally held the Government to the preponderance-of-the-evidence standard, see, e.g., United States v. Scott, 284 F.3d 758, 762 (C.A.7 2002). State courts tend to follow the same practice, see, e.g., Commonwealth v. Edwards, 444 Mass. 526, 542, 830 N.E.2d 158, 172 (2005). Moreover, if a hearing on forfeiture is required, Edwards, for instance, observed that "hearsay evidence, including the unavailable witness's out-of-court statements, may be considered." Id., at 545, 830 N.E.2d, at 174. The Roberts approach to the Confrontation Clause undoubtedly made recourse to this doctrine less necessary, because prosecutors could show the "reliability" of ex parte statements more easily than they could show the defendant's procurement of the witness's absence. Crawford, in overruling Roberts, did not destroy the ability of courts to protect the integrity of their proceedings.

We have determined that, absent a finding of forfeiture by wrongdoing, the Sixth Amendment operates to exclude Amy Hammon's affidavit. The Indiana courts may (if they are asked) determine on remand whether such a claim of forfeiture is properly raised and, if so, whether it is meritorious.

* * *

We affirm the judgment of the Supreme Court of Washington in No. 05-5224. We reverse the judgment of the Supreme Court of Indiana in No. 05-5705, and remand the case to that Court for proceedings not inconsistent with this opinion.

It is so ordered.

Justice THOMAS, concurring in the judgment in part and dissenting in part. In Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), we abandoned the general reliability inquiry we had long employed to judge the admissibility of hearsay evidence under the Confrontation Clause, describing that inquiry as "inherently, and therefore permanently,
unpredictable." Id., at 68, n. 10, 124 S.Ct. 1354 (emphasis in original).
Today, a mere two years after the Court decided Crawford, it adopts an equally unpredictable test, under which district courts are charged with divining the "primary purpose" of police interrogations. Ante, at 2273. Besides being difficult for courts to apply, this test characterizes as "testimonial," and therefore inadmissible, evidence *2281 that bears little resemblance to what we have recognized as the evidence targeted by the Confrontation Clause. Because neither of the cases before the Court today would implicate the Confrontation Clause under an appropriately targeted standard, I concur only in the judgment in Davis v. Washington, No. 05-5224, and dissent from the Court's resolution of Hammon v. Indiana, No. 05-5705.

I

A

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...." U.S. Const., Amdt. 6. We have recognized that the operative phrase in the Clause, "witnesses against him," could be interpreted narrowly, to reach only those witnesses who actually testify at trial, or more broadly, to reach many or all of those whose out-of-court statements are offered at trial. Crawford, supra, at 42-43, 124 S.Ct. 1354; White v. Illinois, 502 U.S. 346, 359-363, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (THOMAS, J., concurring in part and concurring in judgment). Because the narrowest interpretation of the Clause would conflict with both the history giving rise to the adoption of the Clause and this Court's precedent, we have rejected such a reading. See Crawford, supra, at 50-51, 124 S.Ct. 1354; White, supra, at 360, 112 S.Ct. 736 (opinion of THOMAS, J.).

Rejection of the narrowest view of the Clause does not, however, require the broadest application of the Clause to exclude otherwise admissible hearsay evidence. The history surrounding the right to confrontation supports the conclusion that it was developed to target particular practices that occurred under the English bail and committal statutes passed during the reign of Queen Mary, namely, the "civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." Crawford, supra, at 43, 50, 124 S.Ct. 1354; White, supra, at 361-362, 112 S.Ct. 736 (opinion of THOMAS, J.); Mattox v. United States, 156 U.S. 237, 242, 15 S.Ct. 337, 39 L.Ed. 409 (1895). "The predominant purpose of the [Marian committal] statute was to institute systematic questioning of the accused and the witnesses." J. Langbein, Prosecuting Crime in the Renaissance 23 (1974) (emphasis added). The statute required an oral examination of the suspect and the accusers, transcription within two days of the examinations, and physical transmission to the judges hearing the case. Id., at 10, 23, 15
S.Ct. 337. These examinations came to be used as evidence in some cases, in lieu of a personal appearance by the witness. Crawford, supra, at 43-44, 124 S.Ct. 1354; 9 W. Holdsworth, A History of English Law 223-229 (1926). Many statements that would be inadmissible as a matter of hearsay law bear little resemblance to these evidentiary practices, which the Framers proposed the Confrontation Clause to prevent. See, e.g., Crawford, supra, at 51, 124 S.Ct. 1354 (contrasting "[a]n off-hand, overheard remark" with the abuses targeted by the Confrontation Clause). Accordingly, it is unlikely that the Framers intended the word "witness" to be read so broadly as to include such statements. Cf. Dutton v. Evans, 400 U.S. 74, 94, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970) (Harlan, J., concurring in result) (rejecting the "assumption that the core purpose of the Confrontation Clause of the Sixth Amendment is to prevent overly broad exceptions to the hearsay rule").

In Crawford, we recognized that this history could be squared with the language of the Clause, giving rise to a workable, and more accurate, interpretation of the Clause. " [W]itnesses," we said, are those who "bear testimony." 541 U.S., at 51, 124 S.Ct. 1354 (quoting 1 N. Webster, An American Dictionary of the English Language (1828)). And "[t]estimony" is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Ibid. (quoting Webster, supra ). Admittedly, we did not set forth a detailed framework for addressing whether a statement is "testimonial" and thus subject to the Confrontation Clause. But the plain terms of the "testimony" definition we endorsed necessarily require some degree of solemnity before a statement can be deemed "testimonial."

This requirement of solemnity supports my view that the statements regulated by the Confrontation Clause must include "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." White, supra, at 365, 112 S.Ct. 736 (opinion of THOMAS, J.). Affidavits, depositions, and prior testimony are, by their very nature, taken through a formalized process. Likewise, confessions, when extracted by police in a formal manner, carry sufficient indicia of solemnity to constitute formalized statements and, accordingly, bear a "striking resemblance," Crawford, supra, at 52, 124 S.Ct. 1354, to the examinations of the accused and accusers under the Marian statutes. FN1 See generally Langbein, supra, at 21-34.

FN1. Like the Court, I presume the acts of the 911 operator to be the acts of the police. Ante, at 2274, n. 2. Accordingly, I refer to both the operator in Davis and the officer in Hammon, and their counterparts in similar cases, collectively as "the police."

Although the Court concedes that the early American cases invoking the right to confrontation or the Confrontation Clause itself all "clearly involve[d] testimony" as defined in Crawford, ante, at 2274, it fails to acknowledge that
all of the cases it cites fall within the narrower category of formalized testimonial materials I have proposed. See ante, at 2274, n. 3. See also Crawford, for example, the interrogation was custodial, taken after warnings given pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). 541 U.S., at 38, 124 S.Ct. 1354. Miranda warnings, by their terms, inform a prospective defendant that "anything he says can be used against him in a court of law." Dickerson v. United States, 530 U.S. 428, 435, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (quoting Miranda, supra, at 479, 86 S.Ct. 1602). This imports a solemnity to the process that is not present in a mere conversation between a witness or suspect and a police officer.

FN2. Our more recent cases, too, nearly all hold excludable under the Confrontation Clause materials that are plainly highly formal. See White v. Illinois, 502 U.S. 346, 365, n. 2, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (THOMAS, J., concurring in part and concurring in judgment). The only exceptions involve confessions of codefendants to police, and those confessions appear to have either been formal due to their occurrence in custody or to have been formalized into signed documents. See Douglas v. Alabama, 380 U.S. 415, 416, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965) (signed confession); Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966) (signed confession taken after accomplice's arrest, see Brief for Petitioner in Brookhart v. Janis, O.T.1965, No. 657, pp. 10-11); Bruton v. United States, 391 U.S. 123, 124, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (custodial interrogation); Roberts v. Russell, 392 U.S. 293, 88 S.Ct. 1921, 20 L.Ed.2d 1100 (1968) (per curiam) (custodial interrogation following a warning that the co-defendant's statement could be used against her at trial, see Brief in Opposition, O.T.1967, No. 920, pp. 5-6).

FN3. The possibility that an oral declaration of past fact to a police officer, if false, could result in legal consequences to the speaker, see ante, at 2275 - 2276, may render honesty in casual conversations with police officers important. It does not, however, render those conversations solemn or formal in the ordinary meanings of those terms.

The Court all but concedes that no case can be cited for its conclusion that the Confrontation Clause also applies to informal police questioning under certain circumstances. Ante, at 2274 - 2276. Instead, the sole basis for the Court's conclusion is its apprehension that the Confrontation Clause will "readily be evaded" if it is only applicable to formalized testimonial materials. Ante, at 2276. But the Court's proposed solution to the risk of evasion is needlessly overinclusive. Because the Confrontation Clause sought to regulate prosecutorial abuse occurring through use of ex parte statements.
as evidence against the accused, it also reaches the use of technically informal statements when used to evade the formalized process. Cf. ibid. That is, even if the interrogation itself is not formal, the production of evidence by the prosecution at trial would resemble the abuses targeted by the Confrontation Clause if the prosecution attempted to use out-of-court statements as a means of circumventing the literal right of confrontation, see Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988). In such a case, the Confrontation Clause could fairly be applied to exclude the hearsay statements offered by the prosecution, preventing evasion without simultaneously excluding evidence offered by the prosecution in good faith.

The Court's standard is not only disconnected from history and unnecessary to prevent abuse; it also yields no predictable results to police officers and prosecutors attempting to comply with the law. Cf. Crawford, supra, at 68, n. 10, 124 S.Ct. 1354 (criticizing unpredictability of the pre-Crawford test); White, 502 U.S., at 364-365, 112 S.Ct. 736 (THOMAS, J., concurring in part and concurring in judgment) (limiting the Confrontation Clause to the discrete category of materials historically abused would "greatly simplify" application of the Clause). In many, if not most, cases where police respond to a report of a crime, whether pursuant to a 911 call from the victim or otherwise, the purposes of an interrogation, viewed from the perspective of the police, are both to respond to the emergency situation and to gather evidence. See New York v. Quarles, 467 U.S. 649, 656, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984) ("Undoubtedly most police officers [deciding whether to give Miranda warnings in a possible emergency situation] would act out of a host of different, instinctive, and largely unverifiable motives-their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect"). Assigning one of these two "largely unverifiable motives," ibid., primacy requires constructing a hierarchy of purpose that will rarely be present-and is not reliably discernible. It will inevitably be, quite simply, an exercise in fiction.

The Court's repeated invocation of the word "objectiv[e]" to describe its test, see ante, at 2273, 2276 - 2277, 2278, however, suggests that the Court may not mean to reference purpose at all, but instead to inquire into the function served by the interrogation. Certainly such a test would avoid the pitfalls that have led us repeatedly to reject tests dependent on the subjective intentions of police officers. FN4 It *2284 would do so, however, at the cost of being even more disconnected from the prosecutorial abuses targeted by the Confrontation Clause. Additionally, it would shift the ability to control whether a violation occurred from the police and prosecutor to the judge, whose determination as to the "primary purpose" of a particular interrogation would be unpredictable and not necessarily tethered to the actual purpose for which the police performed the interrogation.

Neither the 911 call at issue in Davis nor the police questioning at issue in Hammon is testimonial under the appropriate framework. Neither the call nor the questioning is itself a formalized dialogue.\(^{\text{FN5}}\) Nor do any circumstances surrounding the taking of the statements render those statements sufficiently formal to resemble the Marian examinations; the statements were neither Mirandized nor custodial, nor accompanied by any similar indicia of formality. Finally, there is no suggestion that the prosecution attempted to offer the women's hearsay evidence at trial in order to evade confrontation. See 829 N.E.2d 444, 447 (Ind.2005) (prosecution subpoenaed Amy Hammon to testify, but she was not present); 154 Wash.2d 291, 296, 111 P.3d 844, 847 (2005) (en banc) (State was unable to locate Michelle McCottry at the time of trial). Accordingly, the statements at issue in both cases are nontestimonial and admissible under the Confrontation Clause.

\(^{\text{FN5}}\) Although the police questioning in Hammon was ultimately reduced to an affidavit, all agree that the affidavit is inadmissible per se under our definition of the term "testimonial." Brief for Respondent in No. 05-5705, p. 46; Brief for United States as Amicus Curiae in No. 05-5705, p. 14.

The Court's determination that the evidence against Hammon must be excluded extends the Confrontation Clause far beyond the abuses it was intended to prevent. When combined with the Court's holding that the evidence against Davis is perfectly admissible, however, the Court's Hammon holding also reveals the difficulty of applying the Court's requirement that courts investigate the "primary purpose[s]" of the investigation. The Court draws a line between the two cases based on its explanation that Hammon involves "no emergency in progress," but instead, mere questioning as "part of an investigation into possibly criminal past conduct," ante, at 2269 - 2270, and its explanation that Davis involves questioning for the "primary purpose" of "enabl[ing] police assistance to meet an ongoing emergency," ante, at 2277. But the fact that the officer in Hammon was investigating Mr. Hammon's past conduct does not foreclose the possibility that the primary purpose of his inquiry was to assess whether Mr. Hammon constituted a continuing danger to
his wife, requiring further police presence or action. It is hardly remarkable that Hammon did not act abusively towards his wife in the presence of the officers, ante, at 2278, and his good judgment to refrain from criminal behavior in the presence of police sheds little, if any, light on whether his violence would have resumed had the police left without further questioning, transforming what the Court dismisses as "past conduct" back into an "ongoing *2285 emergency." Ante, at 2277, 2278.\FN6 Nor does the mere fact that McCottry needed emergency aid shed light on whether the "primary purpose" of gathering, for example, the name of her assailant was to protect the police, to protect the victim, or to gather information for prosecution. In both of the cases before the Court, like many similar cases, pronouncement of the "primary" motive behind the interrogation calls for nothing more than a guess by courts.

FN6. Some of the factors on which the Court relies to determine that the police questioning in Hammon was testimonial apply equally in Davis. For example, while Hammon was "actively separated from the [victim]" and thereby "prevented ... from participating in the interrogation," Davis was apart from McCottry while she was questioned by the 911 operator and thus unable to participate in the questioning. Ante, at 2271, 2278. Similarly, "the events described [by McCottry] were over" by the time she recounted them to the 911 operator. Ibid. See 154 Wash.2d 291, 295-296, 111 P.3d 844, 846-847 (2005) (en banc).

II

Because the standard adopted by the Court today is neither workable nor a targeted attempt to reach the abuses forbidden by the Clause, I concur only in the judgment in Davis v. Washington, No. 05-5224, and respectfully dissent from the Court's resolution of Hammon v. Indiana, No. 05-5705.


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Here, although the personal injury claim could have been litigated with the matrimonial action—as the facts arose from the same transaction or series of events—it was not, as all of Chen's fault allegations, save one, were withdrawn by stipulation for the salutary purpose of expediting the matrimonial action. She is therefore not precluded from litigating that claim in a separate action.

Parties are free, of course, to join their interspousal tort claims with the matrimonial action (see CPLR 601[a]) and the trial court retains discretion to sever the claims in the interest of convenience, if necessary (see CPLR 603). If a separate interspousal tort action is contemplated, however, or has been commenced, the better practice would be to include a reservation of rights in the judgment of divorce. Finally, if fault allegations are actually litigated in a matrimonial action, res judicata or some form of issue preclusion would bar a subsequent action in tort based on the same allegations.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the case remitted to Supreme Court for further proceedings in accordance with this opinion.

Chief Judge KAYE and Judges G.B. SMITH, ROSENBLATT, GRAFFEO, READ and R.S. SMITH concur.

Order reversed, etc.
based in part on hearsay statements from third-party interviewees, whom psychiatrist had contacted as part of forensic investigation into effect that defendant’s schizophrenia had on his behavior; psychiatrist herself established that third-party interviews constituted accepted practice in profession by testifying that, although not part of “traditional” practice, such interviews had gained acceptance from named experts, and any imprecision in psychiatrist’s description could have been explored on cross-examination.

3. Criminal Law ⇑662.8

Confrontation Clause generally prohibits use of testimonial hearsay against defendant in criminal case, even if hearsay is reliable, unless defendant has chance to cross-examine out-of-court declarant. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇑662.8

In second-degree murder prosecution in which defendant asserted insanity defense, People’s psychiatrist’s opinion testimony recounting statements made to her by third-party interviewees, contacted as part of psychiatrist’s forensic investigation, was inadmissible under Confrontation Clause absent opportunity to cross-examine interviewees; statements, including former roommate’s observation that defendant was “never violent,” buttressed prosecution theory that defendant used his mental illness as excuse, and thus were offered for their truth and constituted hearsay, and statements also were testimonial, since it could be inferred that interviewees were aware that psychiatrist had been retained as People’s expert. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇑1168(2)

Confrontation Clause violation in second-degree murder prosecution in which defendant asserted insanity defense, consisting of admission, without opportunity for defense cross-examination, of People’s psychiatrist’s opinion testimony which included hearsay statements from third-party interviewees, was not harmless error; while People’s case that defendant was sane and used his mild schizophrenia as excuse for violent acts was strong, it was not so strong that rational jury could not reject it, and improperly admitted statements, including eyewitness’s testimony that defendant following unrelated assault had stated “I’m sick, I’m schizophrenic,” just as he had following instant offense, could have affected verdict. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇑1163(1)

When there is violation of defendant’s constitutional rights, constitutional test for harmless error applies; People must show that any error was harmless beyond reasonable doubt.

Legal Aid Society, Criminal Appeals Bureau, New York City (Natalie Rea and Laura R. Johnson of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York City (Morrie I. Kleinbart and Patrick J. Hynes of counsel), for respondent.

OPINION OF THE COURT

R.S. SMITH, J.

We reverse defendant’s conviction and order a new trial, because his constitutional right to be confronted with the witnesses against him was violated when a psychiatrist who testified for the prosecution recounted statements made to her by people who were not available for cross-examination.
Facts and Procedural History

On January 3, 1999, defendant killed Kendra Webdale, a woman he did not know, by throwing her into the path of an approaching subway train. He was charged with murder in the second degree; his principal defense was insanity. His first trial ended in a hung jury.

At his second trial, the two main witnesses were forensic psychiatrists, Spencer Eth, called by the defense, and Angela Hegarty, called by the prosecution. These doctors agreed that defendant was mentally ill; he had been diagnosed as schizophrenic some 10 years before the act for which he was on trial, and had been treated in a number of mental hospitals in the interim. The doctors disagreed, however, on the role that defendant’s mental illness played in the killing.

In Eth’s opinion, defendant pushed Kendra Webdale to her death “when he was suffering an acute exacerbation . . . of severe psychotic symptoms,” perhaps resulting from a failure to take prescribed antipsychotic medications. Eth testified that the symptoms were so extreme that defendant “couldn’t plan, he couldn’t intend, he couldn’t know as we understand what know means what he was doing or that it was wrong.” Hegarty, by contrast, found that defendant had a “relatively mild” disorder “in the schizophrenic spectrum” and that his psychotic symptoms “were substantially in remission” at the time of the killing. Hegarty also testified that defendant’s personality had “antisocial” features that were more relevant to his act than his schizophrenia. She testified, in substance, that defendant was a predator, driven to acts of violence against women by feelings of rejection and sexual frustration, who was using his schizophrenia as an excuse for his actions. Both doctors supported their opinions by describing their own examinations of defendant and by reviewing voluminous clinical records.

The main issue on this appeal arises because Hegarty’s testimony also described another category of information—facts she had obtained in interviews of third parties. According to Hegarty, her field of expertise, “forensic psychiatry,” could be distinguished from more traditional “clinical psychiatry,” which “would largely . . . confine itself to what the defendant would say. And maybe the clinical record.” The purpose of forensic psychiatry, Hegarty testified, is “to get to the truth,” and she made clear that she believes interviews of people with firsthand knowledge are an important way of accomplishing that goal.

Over objection, Hegarty was permitted to tell the jury what she was told by six of her interviewees. The statements thus relayed from four of these people—whom we will call John P., Kimberly D., Serita G. and Isaac V.—are important to our decision.

John P. was a security guard at Waldbaum’s in late 1996, about two years before the fatal attack on Kendra Webdale, when defendant assaulted a woman who was shopping there. John P. restrained defendant immediately after the assault, and he described to Hegarty, who repeated to the jury, defendant’s reaction when he was seized. According to Hegarty’s account of John P.’s statement, defendant said “I’m sick, I’m sick, I’m schizophrenic,” kept repeating those assertions, and said that he had just got out of the hospital. Defendant made a similar statement—“I’m psychotic, take me to the hospital,” or words to that effect—immediately after throwing Kendra Webdale to her death. John P.’s statement thus supported Hegarty’s and the prosecution’s theory that defendant had repeatedly used
his schizophrenia to minimize his misconduct and avoid punishment.

Kimberly D. was the girlfriend of a man who shared an apartment with defendant in November 1998—about two months before Kendra Webdale’s death—when Stephanie H., the girlfriend of another resident, visited the apartment. Hegarty testified that Kimberly D. had told Hegarty that Stephanie H., who worked in a strip club, “would tease” defendant. Hegarty also testified, apparently still recounting what Kimberly D. said to her, that Stephanie H. “bears a rather remarkable similarity to Kendra Webdale.” Thus, Hegarty suggested to the jury that defendant identified the woman he killed with another woman who had frustrated him sexually.

Serita G. had been defendant’s landlady twice, first in 1996 and then in 1998–1999 up to the date of Kendra Webdale’s death. According to Hegarty, Serita G. told her “that on one occasion . . . her maid went downstairs and the defendant was lying on his bed exposed and he didn’t cover himself.” This was part of the basis for Hegarty’s testimony that defendant had “been sexually inappropriate with women.”

Isaac V. was one of defendant’s roommates in the month preceding Kendra Webdale’s death. Hegarty testified to Isaac V.’s description of defendant’s personality: She said that Isaac V. said that defendant was “a little weird . . . didn’t act his age . . . wanted to go to college and . . . wanted to be somebody . . . was never disrespectful and never violent and very calm.” This description corroborated Hegarty’s overall picture of defendant as someone suffering from a relatively mild mental illness, not a hopelessly out-of-control schizophrenic.

The jury convicted defendant of second degree murder, thus rejecting his insanity defense. The Appellate Division affirmed. We now reverse.

Discussion

Defendant argues that Hegarty’s testimony recounting statements of interviewees was inadmissible hearsay under New York law, because the People failed to show that the statements were information of a kind commonly relied on by members of Hegarty’s profession. Defendant also argues that the admission of the interviewees’ statements violated his constitutional right to confront the witnesses against him. We reject defendant’s New York law argument, but we agree that his right to confrontation was violated.

I

[1] People v. Stone, 35 N.Y.2d 69, 358 N.Y.S.2d 737, 315 N.E.2d 787 [1974] and People v. Sugden, 35 N.Y.2d 453, 363 N.Y.S.2d 923, 323 N.E.2d 169 [1974] govern the question of when a psychiatrist’s opinion may be received in evidence, even though some of the information on which it is based is inadmissible hearsay. As we explained in Sugden, a psychiatrist “may rely on material, albeit of out-of-court origin, if it is of a kind accepted in the profession as reliable in forming a professional opinion,” or if it “comes from a witness subject to full cross-examination on the trial.” People v. Stone, 35 N.Y.2d at 460, 461, 358 N.Y.S.2d 737, 315 N.E.2d 787. The latter ground for admissibility does not apply here; defendant had no opportunity to cross-examine the interviewees whose statements are in issue. Defendant argues that the former ground is inapplicable also, because the prosecution failed to meet its burden of showing that the interviewees’ statements were “material . . . of a kind accepted in the profession as reliable.”

[2] We disagree. The proponent’s burden of showing acceptance in the profession may be met through the testimony
of a qualified expert, whether or not that expert is the same one who seeks to rely on the out-of-court material. Here, the People's burden was met by Hegarty's testimony. Hegarty acknowledged that “traditionally” psychiatrists did not rely on interviews with third parties, but said that “several researchers, forensic psychiatrists, past presidents of the Academy of Psychiatry and Law, Park Dietz and Philip Resnick, for example” had emphasized the need for a broader approach. While she acknowledged that “not everybody holds this view” and that “many good forensic psychiatrists might . . . disagree,” she testified that interviewing of third parties is “becoming more and more the practice.” She added that the seeking out of facts from sources other than defendant’s own statements and the clinical record is “very, very much supported in the literature.”

Any imprecision in Hegarty’s description of accepted professional practice could have been explored on cross-examination; defendant’s counsel was free to ask Hegarty, for example, exactly what “literature” she was referring to, and to try to show it did not support her procedure. But Hegarty’s statements on this issue were neither made the subject of cross-examination nor contradicted by any other evidence. Indeed, Eth acknowledged that Hegarty’s preferred approach was accepted by some reputable professionals, though he said they were a “minority.” The prosecution did not have to prove that the materials in question were universally accepted; widespread acceptance by professionals of good reputation is enough. The case would be different if the procedures at issue found support only among a faction of outliers not generally respected by their colleagues. But in this case, the trial court had a sufficient basis for finding that the third-party interviews were material of a kind accepted in the profession as reliable, and that therefore Hegarty’s opinion was admissible under Stone and Sugden.

To avoid any misinterpretation of our holding, we point out the existence of a New York law issue that the parties have not addressed and we do not reach.

We have held in section I only that Hegarty’s opinion, although based in part on statements made out of court, was admissible because those statements met the test of acceptance in the profession. Both parties seem to assume that, if that test was met, Hegarty was free, subject to defendant’s constitutional right of confrontation, not only to express her opinion but to repeat to the jury all the hearsay information on which it was based. That is a questionable assumption.

Stone and Sugden were concerned with the admissibility of a psychiatrist’s opinion, not the facts underlying it. There is no indication in either case that the prosecution sought to elicit from the psychiatrist the content of the hearsay statements he relied on. And it can be argued that there should be at least some limit on the right of the proponent of an expert’s opinion to put before the factfinder all the information, not otherwise admissible, on which the opinion is based. Otherwise, a party might effectively nullify the hearsay rule by making that party’s expert a “conduit for hearsay” (Hutchinson v. Groskin, 927 F.2d 722, 725 [2d Cir.1991]).

The distinction between the admissibility of an expert’s opinion and the admissibility of the information underlying it, when offered by the proponent, has received surprisingly little attention in this state (which perhaps accounts for the parties’ failure to discuss it here). We have found no New York case addressing the question of when a party offering a psychiatrist’s opinion pursuant to Stone and Sugden may
present, through the expert, otherwise inadmissible information on which the expert relied. The issue of when a proponent may present inadmissible facts underlying an admissible opinion has, however, been discussed by courts in other jurisdictions, and in many law review articles (see authorities cited in Kaye et al., The New Wigmore: Expert Evidence § 3.7 [2004]). And in 2000, rule 703 of the Federal Rules of Evidence (“Bases of Opinion Testimony by Experts”) was amended to deal with this issue. The last sentence of the rule now provides: “Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.” We are not called upon to decide here, and do not decide, whether the New York rule is the same as, or less or more restrictive than, this federal rule.

III

The Sixth Amendment to the United States Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” Similarly, article I, § 6 of the New York Constitution provides: “In any trial in any court whatever the party accused shall ... be confronted with the witnesses against him or her.” The meaning of the federal Confrontation Clause was recently considered by the United States Supreme Court in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 [2004], and we conclude that Crawford requires reversal of defendant’s conviction.

[3] Crawford, which overruled Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2581, 65 L.Ed.2d 597 [1980], establishes that the Confrontation Clause generally prohibits the use of “testimonial” hearsay against a defendant in a criminal case, even if the hearsay is reliable, unless the defendant has a chance to cross-examine the out-of-court declarant. The People contend that Crawford does not apply here, first, because the statements by Hegarty’s interviewees were not hearsay, and secondly, because they were not testimonial. We reject both arguments.

[4] The claim that the interviewees’ statements to Hegarty were not hearsay is based on the theory that they were not offered to prove the truth of what the interviewees said. Hearsay is “a statement made out of court ... offered for the truth of the fact asserted in the statement” (People v. Romero, 78 N.Y.2d 355, 361, 575 N.Y.S.2d 802, 581 N.E.2d 1048 [1991], quoting Richardson, Evidence § 200, at 176 [Prince 10th ed.]). The Supreme Court said in Crawford that the Confrontation Clause “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted” (541 U.S. at 59 n. 9, 124 S.Ct. 1354). Here, according to the People, the interviewees’ statements were not evidence in themselves, but were admitted only to help the jury in evaluating Hegarty’s opinion, and thus were not offered to establish their truth.

We find the distinction the People make unconvincing. We do not see how the jury could use the statements of the interviewees to evaluate Hegarty’s opinion without accepting as a premise either that the statements were true or that they were false. Since the prosecution’s goal was to buttress Hegarty’s opinion, the prosecution obviously wanted and expected the jury to take the statements as true. Hegarty herself said her purpose in obtaining the statements was “to get to the truth.” The distinction between a statement offered for its truth and a statement offered
to shed light on an expert’s opinion is not meaningful in this context. (See Kaye et al., The New Wigmore: Expert Evidence § 3.7, at 19 [Supp. 2005] ["(T)he factually implausible, formalist claim that experts’ basis testimony is being introduced only to help in the evaluation of the expert’s conclusions but not for its truth ought not permit an end-run around a Constitutional prohibition.”].) We conclude that the statements of the interviewees at issue here were offered for their truth, and are hearsay.

We also conclude that the statements are testimonial, in the sense that Crawford used that term. Crawford explained that the Confrontation Clause “applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’ ” (541 U.S. at 51, 124 S.Ct. 1354.) The Court added: “‘Testimony,’ in turn, is typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’ … An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” (Id. at 51–52, 124 S.Ct. 1354 [citations omitted].)

The Court in Crawford did not adopt a definition of testimonial hearsay, but it offered some alternative definitions: “Various formulations of this core class of ‘testimonial’ statements exist: ‘ex parte’ in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,’ … ‘extrajudicial statements … contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,’ … ‘statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial’ … . These formulations all share a common nucleus and then define the Clause’s coverage at various levels of abstraction around it.” (Id. at 51–52, 124 S.Ct. 1354 [citations omitted].)

We think the statements made to Hegarty by her interviewees were testimonial. Hegarty was an expert retained to testify for the People. The record does not specifically show that the interviewees knew this, but it would be strange if Hegarty did not tell them; we infer that they knew they were responding to questions from an agent of the State engaged in trial preparation. None of them was making “a casual remark to an acquaintance”; all of them should reasonably have expected their statements “to be used prosecutorially” or to “be available for use at a later trial.”

While it is true that the Supreme Court referred, in describing testimonial hearsay, to “formal” statements made to “government officers,” we do not think that these words exclude the statements at issue here. Responses to questions asked in interviews that were part of the prosecution’s trial preparation are “formal” in much the same sense as “depositions” and other materials that the Supreme Court identified as testimonial. Crawford itself shows that the statements need not be under oath and need not be formal in their language; the statement held excludable by the Crawford court was unsworn and used colloquial phrasing (see 541 U.S. at 38–39, 124 S.Ct. 1354). Nor do we think the difference between an expert retained by the State and a “government officer” is of constitutional significance here. The Confrontation Clause would offer too little protection if it could be avoided by assigning the job of interviewing witnesses to an
independent contractor rather than an employee.

In short, defendant’s rights under the Confrontation Clause were violated when Hegarty was allowed to tell the jury what witnesses defendant had no chance to cross-examine had said to her.

IV

[5] The People argue that, if the admission of the interviewees’ statements was error, the error was harmless. We cannot agree.

[6] Since the error was a violation of defendant’s constitutional rights, the constitutional test for harmless error applies: The People must show that any error was harmless beyond a reasonable doubt (Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 [1967]; People v. Crimmins, 36 N.Y.2d 230, 240–241, 367 N.Y.S.2d 213, 326 N.E.2d 787 [1975]).

In deciding whether the People have met this burden, we consider both the overall strength of the case against defendant and the importance to that case of the improperly admitted evidence.

The People’s case that defendant was sane when he killed Kendra Webdale was a strong one, but we cannot say it was so strong that no rational jury could have rejected it. The question before the jury was, in essence, what was going on in defendant’s admittedly diseased mind at the time he committed a bizarre, horrifying act; this is not an easy question to answer with complete certainty. In other contexts—for example, when the question is whether a defendant committed a particular act or not—overwhelming evidence will sometimes permit a court to say that only one verdict was reasonably possible. This case is not of that kind.

The People’s case drew some significant support from the improperly admitted statements of John P., Kimberly D., Serita G. and Isaac V. It is true that these statements were by no means vital to the People’s case on sanity, but they were not trivial either. It is reasonably possible that any of the four—and, a fortiori, all four together—could have affected the jury’s verdict. Specifically:

1. John P.’s statement to the effect that defendant, upon being seized after the Waldbaum’s incident, said repeatedly “I’m sick, I’m sick, I’m schizophrenic” supported an important theme of the prosecution’s case—that defendant thought his schizophrenia was an excuse for his bad behavior. The resemblance of the remarks described in John P.’s statement to those made by defendant after killing Kendra Webdale—“I’m psychotic, take me to the hospital”—strongly suggests a pattern. The prosecution’s claim that these protestations showed defendant was hiding behind his mental illness was a major theme in closing argument. Indeed, the prosecutor’s last words to the jury were: “He’s counting on you to buy, I am sick, take me to a hospital.”

It is true that the prosecutor did not rest this argument entirely on John P.’s statement; the prosecutor relied primarily, of course, on the statement defendant made after the Kendra Webdale killing, and also on other more or less similar remarks he made after other incidents. There is a real possibility, however, that without John P.’s statement the argument would not have been as strong. There is no clearer proof in the record that defendant had, before his attack on Kendra Webdale, made a habit of announcing his mental illness the moment he got into trouble.

2. Kimberly D.’s statement that there was a “remarkable” resemblance between Stephanie H., a young woman who “tease[d]” defendant, and Kendra Web-
dale could well have had an impact on the jury. It offers a possible explanation for defendant's otherwise inexplicable decision to attack a total stranger on a subway platform, and suggests that, however distorted his reasoning, he acted out of rage, knew he was killing someone, and thus was not legally insane. It is true, as the People point out, that Stephanie H.'s teasing of defendant was proved by other evidence, and that photographs of both Stephanie H. and Kendra Webdale were in evidence, so that perhaps Hegarty could have made her point without relying on Kimberly D.; but Hegarty did not do so, and we cannot be sure she would have done so successfully. From the photographs alone, the jury might or might not have found the resemblance between the two women to be striking.

3. Serita G.'s statement that defendant, lying exposed on his bed, failed to cover himself when a woman came into his presence was used by Hegarty as one example of inappropriate behavior that reflected defendant's sexual frustration. It was not Hegarty's only example, but it was a vivid and memorable one; we cannot say, beyond a reasonable doubt, that it had no effect on the jury.

4. Isaac V.'s sketch of defendant's personality ("a little weird") was useful to the prosecution because it supported Hegarty's overall portrayal of defendant as someone with a "relatively mild" mental disorder, not a raving psychotic. Again, it is true that Hegarty could have made the same point without relying on Isaac V.'s statement, but it is also true that the statement might have had significant impact. It is reasonably possible that jurors found the observations of someone who saw defendant frequently at the very time of the Kendra Webdale killing to be telling evidence of defendant's mental state.

In sum, the People have failed to show beyond a reasonable doubt that the mistaken admission of these four out-of-court statements was harmless error.

V

Defendant makes two other arguments on this appeal: He contends that the trial court erred in precluding the testimony of a defense expert proffered to support a defense of extreme emotional disturbance, and in refusing to order a PET scan of defendant. To avoid unnecessary issues at a retrial, we mention that we find both arguments lacking in merit. On the facts of this case, the trial court's rulings on both issues were within its discretion.

We have concluded that another trial of this case is necessary. We are well aware of the unwelcome consequences of this result. Defendant has already been tried twice, and the second jury found, on sufficient evidence, that he was legally sane at the time of his act. We are troubled by the tangible cost of a third trial, and by the intangible cost of the long delay in resolving this case. We are yet more troubled by the knowledge that another trial will bring added pain to innocent people, particularly to the family of Kendra Webdale.

But the constitutional rules that guarantee defendants a fair trial must be enforced, and few such rules are more important than the one that guarantees defendants the right to confront the witnesses against them. Because that right was violated in this case, defendant is entitled to be tried again.

Accordingly, the order of the Appellate Division should be reversed and the case remitted to Supreme Court for a new trial.
READ, J. (dissenting).

_Crawford v. Washington_, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 [2004] is a fresh precedent, the contours and limits of which are still indistinct. At this early stage, it is difficult to predict whether the Supreme Court will apply _Crawford_—universally or in some cases or with limitations or at all—to hearsay used as a basis for expert testimony, much less the exact implications of any such holding. Still, the majority’s analysis of this case in relation to _Crawford_ is reasonable, and I do not disagree with it. Further, I wholeheartedly agree with section II of the majority opinion, which points out a New York law issue that is, in my view, significant, but which we need not reach here. I respectfully dissent, however, because, even assuming that _Crawford_ precludes admission of the four remarks made by interviewees to the People’s expert, I cannot agree that defendant suffered any harm as a result.

As an initial matter, we should keep in mind that this trial presented no issue regarding guilt per se. Defendant indisputably killed Kendra Webdale by thrusting her into the path of an oncoming subway train. The only issue at trial was whether defendant had established, by a preponderance of the evidence, his affirmative defense that he should not be held criminally responsible for his conduct because he suffered from a mental disease or defect at the time of the killing (see Penal Law § 40.15). Specifically, defendant wanted the jurors to accept that he killed Ms. Webdale while in the throes of what his primary expert, Dr. Spencer Eth, during direct examination called a “sudden psychotic act.”

According to Dr. Eth, defendant murdered Ms. Webdale “when he was suffering an acute exacerbation of sudden intensification of severe psychotic symptoms and his brain was not functioning[,] which meant that] his motor control—he could walk, he could thrust out his arms, he could see, but he couldn’t think, he couldn’t plan, he couldn’t intend, he couldn’t know as we understand what know means what he was doing or that it was wrong.” During cross-examination, Dr. Eth denied describing the incident as a “sudden psychotic moment,” and declined to characterize it as a “sudden psychotic attack,” although he essentially had testified to this effect. As an alternative description of his diagnosis, he offered that, at the moment of the killing, “a ferocious torrence [sic] of symptoms overwhelmed [defendant’s] mind,” thereby precluding him from planning or “execut[ing] an action with reason and intent.”

Another of defendant’s experts, Dr. Wilfred Van Gorp, provided similar testimony, telling the jurors that he agreed with Dr. Eth’s conclusion that defendant suffered a “transient episode of extreme psychotic symptomology that destroyed his capacity to appreciate the nature and consequences of his conduct and to appreciate that his conduct was wrong.” Both experts opined that the “transient episode” essentially began directly before and ended almost immediately after the killing—a “symptomatic exacerbation while on the station platform.”

But defendant’s expert testimony, which hinged on defendant’s supposed inability to intend or plan, ran directly counter to the prior testimony of witnesses to the crime, who described how defendant had engaged in seemingly meticulous planning. According to eyewitness testimony, before approaching the blond Ms. Webdale and immediately after being rebuffed by another blond woman, defendant walked to the front of the subway platform, the best vantage point from which to see a train entering the curved station. Bending over, defendant peered up the tracks, con-
cededly looking for the headlights of an oncoming train. He then walked back towards Ms. Webdale, who was standing near the platform’s edge, and asked her the time. Following Ms. Webdale’s response, defendant positioned himself directly behind her, standing with his back to the wall of the station. Notably, he chose to stand behind Ms. Webdale rather than the other blond woman, who was taller and heavier. As the train proceeded through the station, defendant rushed forward and shoved Ms. Webdale at the precise moment when she would pitch headlong into the train’s path without any chance to save herself or be rescued. Despite having moved with great force (he pushed off from the back wall), defendant had sufficient presence of mind to break his momentum and avoid sharing Ms. Webdale’s fate by twisting his body away from the platform’s edge. As the trial prosecutor told the jurors during summation, “actions speak louder than words.”

This description of events by the People’s fact witnesses, which defendant did not challenge, contradicted the defense experts’ assertions that a theorized “acute exacerbation” prevented defendant from planning or intending. Another facet of the attack also undermined defendant’s supposed inability to comprehend that his conduct was wrong. Immediately after killing Ms. Webdale, he announced “I’m sick,” and asked to be taken to a hospital, which displayed his understanding that he indeed had done something wrong and needed an excuse to negate his blameworthiness.

In addition to the facts of the murder, the People also refuted defendant’s affirmative defense with the testimony of their rebuttal experts. These experts attacked the legitimacy of the defense theory that defendant had acted while experiencing a fleeting psychotic disorder or “transient episode,” and they did so independently of the four challenged observations. Specifically, Dr. Angela Hegarty explained to the jurors that, according to the Diagnostic and Statistical Manual of Mental Disorders (DSM), the standard classification of mental disorders used by mental health professionals in the United States, psychotic symptoms simply do not rapidly appear and disappear as defendant’s supposedly did while he stood on the subway platform. Rather, the DSM makes clear that the shortest duration for a brief psychotic disorder is one day. Dr. William Bryon Barr, the People’s other expert, offered similar testimony.

Although defendant adduced expert testimony that consumed thousands of pages of trial transcript (as did the People), that, standing alone, does not compel a conclusion that he proffered such a strong case that the error here could not have been harmless. As we have noted, “before constitutional error . . . may be found to be harmless, it is not necessary that the untainted evidence on which the verdict in the case must be supported demonstrate undisputable guilt. Rather, the reasonable doubt standard, extremely high though it is, still leaves room for judgmental determination of harmlessness” (People v. Schaeffer, 56 N.Y.2d 448, 455, 452 N.Y.S.2d 561, 438 N.E.2d 94 [1982]).

In other words, a court engaging in harmless error review should center its analysis not on the quantity of the evidence adduced, but rather on its quality (see id. “[because consideration of whether an error is harmless requires an evaluation not only of the tainted matter, but of the strength of the case absent the taint, the court must focus on the reliability and persuasiveness of the untainted matter and its source . . . . In short, neither side of the evidentiary equation may be ignored; in
the end, the picture must be seen as a whole).

Significantly, the trial court instructed the jurors to engage in a similar inquiry, explaining that defendant had to prove that he “was not criminally responsible” by “a preponderance of the credible evidence[, which] is evidence which you find worthy of belief.” The court amplified its instruction by stating that defendant would meet his burden if “you, the jury, are satisfied that the evidence of lack of criminal responsibility, from whatever source, out-weighs and is more convincing than the evidence that he was criminally responsible when he committed the crime.” Finally, the jurors were informed that “[a]s with any other factual issue, it is the quality of the evidence which controls, not the number of witnesses on one side or the other.”

Ultimately, defendant’s criminal responsibility does not seem to have presented a close case in the minds of the jurors. They deliberated for no more than two hours, during which they apparently lunched as well. The jurors sent no notes. Clearly, no problematic issues arose during these brief deliberations. I find it impossible to believe that in those two hours, the jurors were only able to dismiss defendant’s “transient episode” theory by focusing on the four isolated comments cited by the majority. Far more likely, the jurors readily rejected what they must have viewed as a rather outlandish defense theory, unsupported as it was in fact or professional literature.

Evaluating the “importance” of the four comments to the case, however, the majority concludes that the People “drew some significant support” from them (majority op. at 129, 130, 810 N.Y.S.2d at 106, 107, 843 N.E.2d at 733, 734). But even assuming that the jurors, like the majority, zeroed in on these four comments, they were generally duplicated or corroborated by other evidence in the record, thereby diminishing their hypothesized potential significance to the jurors’ deliberations. For example, the majority asserts that the record contains “no clearer proof” of defendant’s “habit of announcing his mental illness the moment he got in trouble” (majority op. at 130, 810 N.Y.S.2d at 107, 843 N.E.2d at 734) than John P.’s statement that, after attacking a woman at a Waldbaum’s supermarket, defendant repeated “I’m sick, I’m sick, I’m schizophrenic.” As the majority acknowledges, however, there is evidence in the record that defendant made similar statements following other instances of aggressive behavior. And John P.’s statement is not disputed. Defendant’s primary expert, Dr. Eth, acknowledged on cross-examination that defendant announced to John P. that he was sick and a psychiatric patient, and begged him not to call the police. As for Kimberly D.’s apparent observation that Kendra

* From the transcript, it is not entirely clear to me whether Dr. Hegarty was testifying that Kimberly D. told her that Stephanie H. and Kendra Webdale resembled each other, or was offering her own view on this subject. After Dr. Hegarty testified that Kimberly D. told her that Stephanie H. teased defendant, defense counsel objected based on the “right to confrontation,” and the trial court overruled the objection. Then the prosecutor asked Dr. Hegarty two questions about Stephanie H. (her last name and occupation). After Dr. Hegarty answered these two questions, the prosecutor asked her “And did you learn anything about [Stephanie H.’s] general appearance?” to which Dr. Hegarty responded “Yes. She bears a rather remarkable similarity and appearance to Kendra Webdale.” In context, the prosecutor might having been asking Dr. Hegarty if she had learned this information about Stephanie H.’s general appearance from Kimberly D., but this is far from certain, especially since Dr. Hegarty surely had access to the photographs of both women. Defense counsel did not object to the question or answer about Stephanie H.’s “general appearance,” which were followed
Webdale bore a “rather remarkable” resemblance to another woman, Stephanie H., who had teased defendant, the jury heard from another witness that both women were blond, and that Stephanie H. had teased defendant. Moreover, as the majority points out, Stephanie H.’s and Kendra Webdale’s photographs were admitted into evidence. As a result, the jurors were free to make their own judgment about any resemblance between the two women, assuming they found this important, and either to credit or discount Dr. Hegarty’s testimony accordingly. It is also worth noting that Dr. Hegarty testified that while interviewing defendant, she mentioned Stephanie H. inadvertently, and defendant became visibly sexually aroused. This speaks far more powerfully to “inappropriate behavior that reflected defendant’s sexual frustration” (majority op. at 131, 810 N.Y.S.2d at 108, 843 N.E.2d at 735) than does the third challenged observation by Serita G. that defendant, naked on a bed, did not cover up when her maid entered his room. Finally, Issac V.’s statement that, close in time to the killing, defendant appeared “a little weird,” is, if anything, innocuous. True, the People’s experts opined that defendant had a “relatively mild” mental disorder. But defendant’s “transient episode” theory also called for him to act relatively normally immediately preceding the attack.

In short, I see no possibility that the four hearsay comments caused the jurors to reject defendant’s affirmative defense. Rather, his defense was subverted by the incredible nature of his psychiatric theory coupled with his uncontested actions, which contradicted any “transient” loss of control or comprehension. Because any Crawford error that occurred here was harmless beyond a reasonable doubt (see Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 [1967]; People v. Crimmins, 36 N.Y.2d 230, 240–241, 367 N.Y.S.2d 213, 326 N.E.2d 787 [1975]), defendant’s conviction should be affirmed.

Chief Judge KAYE and Judges G.B. SMITH, CIPARICK, ROSENBLATT and GRAFFEO concur with Judge R.S. SMITH.

Judge READ dissents and votes to affirm in a separate opinion.

Order reversed, etc.
hereby made part of this opinion and is fully effective, except to the extent that it is inconsistent with the present remand in conformity with Crosby.

Any appeal taken from the district court’s decision on remand can be initiated only by filing a new notice of appeal. See Fed. R.App. P. 3, 4(b).

A party will not waive or forfeit any appropriate argument on remand or on any appeal post-remand by not filing a petition for rehearing of this opinion.

We therefore deny the petition for rehearing but remand.

Holdings: The Court of Appeals, Janet C. Hall, District Judge, sitting by designation, held that:

(1) trial court’s limitation on defendant’s cross-examination of expert witness violated defendant’s Sixth Amendment rights under the Confrontation Clause, and

(2) trial court’s exclusion of defense expert witness violated defendant’s Sixth Amendment right to compulsory process.

Reversed and remanded.

John HOWARD, Petitioner–Appellant,
v.
Hans G. WALKER, Respondent–Appellee.

Docket No. 01–2471.

United States Court of Appeals, Second Circuit.

Argued: March 5, 2003.
Re-argued: March 2, 2005.
Decided: April 26, 2005.


1. Habeas Corpus ⇐842


2. Habeas Corpus ⇐453

A claim that a state conviction was obtained in violation of state law is not cognizable in the federal court.

3. Habeas Corpus ⇐450.1

For purposes of determining whether limited standard of review applies on petition for habeas corpus from state court adjudication, a state court adjudicates a petitioner’s federal claims “on the merits” when it disposes of the claim on the merits, and reduces its disposition to judgment; a claim need not be addressed in detail by a state court to have been adjudicated on the merits. 28 U.S.C.A. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

4. Habeas Corpus ⇐450.1, 452

For purposes of habeas corpus review, “clearly established federal law” refers to the holdings, as opposed to the dicta, of the Supreme Court’s decisions as of the
time of the relevant state-court decision. 28 U.S.C.A. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

5. Habeas Corpus ⇔452

A federal court may not grant habeas corpus relief simply because, in its independent judgment, the relevant state-court decision applied clearly established federal law erroneously or incorrectly; rather, a decision is “contrary to clearly established federal law” if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decided a case differently than the Supreme Court has on a set of materially indistinguishable facts. 28 U.S.C.A. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

6. Habeas Corpus ⇔450.1

For purposes of habeas corpus review, a state court decision is an “unreasonable application of clearly established federal law” if the state court identifies the correct governing legal principle from the Supreme Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case. 28 U.S.C.A. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

7. Habeas Corpus ⇔770

For purposes of habeas corpus review, when the state court concludes that any error was or would be harmless, that finding is subject to the same standard of deference as is any other legal conclusion; that is, the Court of Appeals must find that the state court’s harmless error determination, whether the People proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained, was objectively unreasonable. 28 U.S.C.A. § 2254.

8. Criminal Law ⇔531(1)

The confession of an accomplice is presumptively unreliable.

9. Criminal Law ⇔662.7

Habeas Corpus ⇔481

In murder and burglary prosecution, trial court’s limitation on defendant’s cross-examination of expert witness, by ruling that if the defense challenged the basis of the expert’s opinion, which was based in part on statement of co-conspirator, the state would be permitted to admit statement of co-conspirator in its entirety, was an unreasonable denial of defendant’s rights under the Confrontation Clause, warranting habeas corpus relief; the court required defendant to choose between his Sixth Amendment right to cross-examine the witness and his Sixth Amendment right to exclude the unreliable hearsay confession of a co-conspirator. U.S.C.A. Const.Amend. 6.; 28 U.S.C.A. § 2254.

10. Criminal Law ⇔662.7

While the right to cross-examination is not absolute, it is effectively denied when a defendant is prohibited from exposing to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. U.S.C.A. Const.Amend. 6.

11. Habeas Corpus ⇔481

Witnesses ⇔2(1)

Trial court’s exclusion of defense expert witness who would have testified that victim could have suffered cardiac arrhythmia and death even if defendant had not burglarized her home, by ruling that if defendant called the witness to challenge testimony of expert witness for the state, the state would be permitted to introduce the substance of co-conspirator’s statement

12. Witnesses

To establish a Sixth Amendment compulsory process violation, a defendant must demonstrate that he was deprived of the opportunity to present a witness who would have provided testimony that was both material and favorable to his defense; materiality requires that the omission be evaluated in the context of the entire record. U.S.C.A. Const.Amend. 6.

13. Witnesses

When considering whether a trial court’s exclusion of expert witness testimony violated a criminal defendant’s Sixth Amendment right to Compulsory Process, a two-step analysis is appropriate; first, a reviewing court considers the trial court’s reasons for excluding the evidence, and, second, the reviewing court considers the strength of the prosecution’s case as a whole. U.S.C.A. Const.Amend. 6.

14. Habeas Corpus

In the context of habeas corpus review of defendant’s state murder and burglary conviction, trial court’s confrontation clause error in limiting cross-examination of state expert witness by ruling that if the defense challenged the basis of the expert’s opinion, which was based in part on statement of co-conspirator, the state would be permitted to admit statement of co-conspirator in its entirety, was not harmless; defendant’s inability to challenge the expert’s opinion that burglary caused victim’s arrhythmia and death, significantly impaired his ability to cross-examine the witness effectively. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254.

15. Criminal Law

Whether an unconstitutional limitation on a defendant’s cross-examination of a witness is harmless depends upon a host of factors, which include the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case. U.S.C.A. Const. Amend. 6.

16. Habeas Corpus

In the context of habeas corpus review of defendant’s state murder and burglary conviction, trial court’s confrontation clause error in excluding testimony of defense witness, who would have testified that victim could have suffered cardiac arrhythmia and death even if defendant had not burglarized her home, was not harmless. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254.

Randa D. Maher (Jeffrey G. Pittell, on the brief), Great Neck, N.Y., for Petitioner–Appellant.

Loretta S. Courtney, Assistant District Attorney, Rochester, N.Y., for Respondent–Appellee.

Before: JACOBS and POOLER, Circuit Judges, and HALL, District Judge.*

* The Honorable Janet C. Hall, of the United States District Court for the District of Connecticut, sitting by designation.
HOWARD v. WALKER
Cite as 406 F.3d 114 (2nd Cir. 2005)

JANET C. HALL, District Judge.

Petitioner, John Howard, appeals from a judgment of the United States District Court for the Western District of New York (Feldman, M.J.) denying his application for a writ of habeas corpus under 28 U.S.C. § 2254. Howard was convicted of various charges, including Murder in the Second Degree and Burglary in the First Degree, on August 26, 1994 in the County Court of the State of New York, Monroe County. Howard claims that the trial court erred by allowing the State’s expert witness to base her testimony on statements otherwise inadmissible pursuant to Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); limiting Howard’s ability to cross-examine the state’s expert; and denying Howard the right to present a defense. Because we find that the trial court’s limitations on cross-examination of the State’s expert witness and its denial of Howard’s ability to call an expert witness were contrary to clearly established federal law and were not harmless, this Court reverses the district court’s ruling and vacates Howard’s convictions for Murder in the Second Degree and Burglary in the First Degree. In light of these findings, we decline to reach the remaining issue raised by Howard, the admission of the State’s expert’s testimony based on Bruton-infected statements.

I. FACTS

Howard is currently incarcerated in New York State pursuant to a judgment of conviction on Burglary in the First Degree, Petit Larceny, Criminal Mischief in the Fourth Degree, and Murder in the Second Degree, entered on August 26, 1994. The 1994 trial followed the reversal of his first conviction of these same charges. Howard has been incarcerated in connection with these offenses since 1991.

The charges at issue in this petition arose out of the burglary of the home of Joanna Metz in the early morning hours of April 13, 1990. Later that day, Ms. Metz was found dead in a chair located in an upstairs bedroom in her home. The prosecution claimed at trial that, as a result of the stress caused by the burglary, Ms. Metz, an 89-year old woman with a history of heart problems, suffered a heart attack and died.

Howard, along with his two co-conspirators, Eric Williams and Daniel Williams, was arrested in connection with the incident. Upon their arrests, each provided a statement to the police admitting his involvement in the burglary. Each statement verified that all three men participated in the burglary of Ms. Metz’ home, but relayed different details regarding what occurred. In his statement, Howard admitted taking part in the Metz burglary, but he claimed he did not go upstairs and denied he had any contact with Ms. Metz. He further claimed that he left the house after hearing Ms. Metz yelling and that Eric and Daniel Williams left the house later, some time after Howard had already started walking away.

Eric Williams’ statement, which was not allowed in evidence, provided a more detailed, and significantly different, account of the events. In his statement, Eric Williams claimed that he and Howard went upstairs and encountered Ms. Metz. Eric Williams said that Ms. Metz slapped Howard three times, after which encounter Howard grabbed Ms. Metz and put her in a chair. Eric Williams claimed Ms. Metz, crying, asked for her medicine but that Howard yelled at her and would not let her get it. Shortly thereafter, Eric Williams claimed Ms. Metz’ body started jumping and then was still. By this time, according to Eric Williams’ statement, Howard had gone back downstairs. Eric
Williams followed Howard downstairs and told Howard and Daniel Williams about Ms. Metz’ seizure.

Daniel Williams’ written statement, which was likewise not admitted into evidence, indicated that Howard and Eric Williams had gone upstairs while he had remained downstairs. He also stated that Eric Williams stayed upstairs for a few minutes after Howard came back downstairs. In his statement, Daniel Williams recounted hearing Ms. Metz say something while the three men were in her house and claimed that both Howard and Eric Williams told him that Ms. Metz had slapped Howard while the two were upstairs.

Prior to Howard’s first trial, Daniel Williams pled guilty and agreed to testify against Howard and Eric Williams. At the 1994 trial, however, Daniel Williams testified that he could not remember what had occurred during the evening in question, that his prior statements about that evening had been based on Eric Williams’ statement, and that he would lie if he thought it would help him. Daniel Williams, at times, stated that he could not remember whether Howard went into Ms. Metz’ residence, whether Howard went upstairs, or even if there was a second level in the house.

The State introduced no evidence tending to show Howard’s presence on the second floor of Ms. Metz’ house. His own statement did not indicate that, and neither did the state’s physical evidence. The State recovered sneaker prints from the residence, but the prosecution’s forensic chemist could not reach a conclusion regarding which shoes had left the prints. Howard’s sneaker prints were only found in the kitchen.

The State also offered the testimony of Dr. Jacqueline Martin, a county medical examiner, in support of its case. Dr. Martin testified that Ms. Metz had died of a heart attack, which was induced by the stress of the burglary. Prior to her testimony, defense counsel conducted a voir dire examination of Dr. Martin in which she revealed that she based her opinion in relevant part on information obtained from the statements of the defendant and his two co-conspirators. The defendant objected to Dr. Martin’s testimony on the ground that it was based in part on unreliable, inadmissible statements otherwise precluded pursuant to Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). The trial court denied Howard’s motion to exclude Dr. Martin’s testimony.

In connection with its ruling to allow the admission of Dr. Martin’s testimony, the court also established parameters for the defendant’s cross-examination of Dr. Martin. It ruled that, if Howard attacked the basis for Dr. Martin’s expert opinion through cross-examination, the State would be permitted to present to the jury all of the evidence Dr. Martin considered, including the statement by Eric Williams.

Defense counsel then inquired of the court whether two specific potential questions would “open the door” to the court’s admission of Eric Williams’ statement. Howard’s attorney indicated his desire to ask: (1) Can you say to a reasonable degree of medical certainty that, if Ms. Metz had taken a Nitrostat pill, she would not have had a heart attack?; and (2) Can you say to a reasonable degree of medical certainty that if Ms. Metz’ house had not been burglarized or broken into on April 13th, that she wouldn’t have had the heart attack that evening?

The defense designed the first question to address the State’s claim in its opening statement that Ms. Metz had medication in her purse, but that the purse was removed
from her possession during the burglary. The trial court noted that, if the defense were to mention the medication, the State would be entitled to establish that Ms. Metz may have experienced additional stress because the medication, according to Eric Williams’ statement, had been deliberately withheld.

With regard to the second question, the defense expressed its interest in establishing that there was a possibility Ms. Metz would have died that day, even in the absence of a burglary. The trial court again held that, if the defense were to so inquire, the State would be entitled to present the otherwise-inadmissible evidence relied upon by Dr. Martin, including Eric Williams’ statement. The court explained that the defense’s proposed question would “change dramatically the view of what occurred that morning in the eyes of the jury” and that since Dr. Martin had considered information that demonstrated that this was “much, much more” than just an ordinary burglary, the state would be entitled to introduce such information as evidence. Trial Tr. at 543. The court also ruled that the defense would not be permitted to ask general questions intended to establish that sometimes individuals have heart attacks even in the absence of a precipitating event. Again, the court found that this line of questioning would entitle the state to present the full version of what occurred on the night in question, as relied upon by its expert, Dr. Martin.

The defense also indicated its intent to call its own expert, Dr. Richard E. Abbott, who would testify that he could not conclude to any degree of certainty that Ms. Metz’ heart attack was induced by stress or any particular event. Indeed, he would testify that no medical examiner could say with certainty whether the burglary of Ms. Metz’ home caused her to suffer a cardiac arrhythmia. The trial court ruled that, if the defense called Dr. Abbott, the State would be able to cross-examine Dr. Abbott using Eric Williams’ statement and the particular information contained within it.

On direct examination, Dr. Martin testified that the burglary of the home was “an important factor on Mrs. Metz’ death.” Trial Tr. at 574. More specifically, Dr. Martin testified that she believed that “the break-in and ransacking on both floors” would have “caused fear in Joanna Metz in her condition,” and that that fear played a role in her death. Trial Tr. at 575. Dr. Martin also testified that, based on the information in the police records, she concluded the stress Ms. Metz experienced was “severe.” Trial Tr. at 577.

The defense’s cross-examination of Dr. Martin, limited as it was by the trial court’s rulings, was extremely brief. Howard’s attorney merely established that there were not any external signs that Ms. Metz suffered from a heart condition or that Ms. Metz suffered physical trauma prior to her death, and then he ended his cross-examination.

The jury found Howard guilty of Burglary in the First Degree, Petit Larceny, Criminal Mischief in the Fourth Degree, and Murder in the Second Degree. On his conviction for Murder in the Second Degree, Howard was sentenced to an indeterminate term of 22 years to life to run concurrently with his sentences on the other three convictions, including a sentence of 10 to 20 years on his conviction for Burglary in the First Degree. Howard appealed his conviction to the Supreme Court of New York.1

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1 While Dr. Abbott was given the Bruton-infected statements to review, he did not rely on those statements in rendering his opinion. His review of the statements did not alter or affect his opinion.
Court of New York, Appellate Division, raising, *inter alia*, the challenges outlined below. That court denied his claims. *People v. Howard*, 241 A.D.2d 920, 661 N.Y.S.2d 386 (4th Dept. 1997). The Appellate Division concluded that Dr. Martin “testified that her opinion regarding the cause of death would be the same even without the information obtained from the statement of one of the accomplices.” *Id.* at 388. Furthermore, the court found that, should any error have occurred, such error was “harmless in light of the other evidence that established that the victim was alive at the time of the burglary.” *Id.*

The Appellate Division did not consider the harmlessness of any other error purported by Howard to have occurred. With respect to any other issues presented for review before that court, the Appellate Division simply stated that the court had “considered the other contentions raised by defendant . . . and conclude that they are without merit.” *Id.* Howard sought leave to appeal to the New York Court of Appeals, which court denied him such leave on September 24, 1997. *People v. Howard*, 90 N.Y.2d 940, 664 N.Y.S.2d 759, 687 N.E.2d 656 (1997). Having exhausted his state claims, Howard timely filed a petition for habeas relief in the United States District Court for the Western District of New York.

The case was referred upon consent of the parties to Magistrate Judge Feldman. See 28 U.S.C. § 636(c)(1). The district court denied Howard's petition for habeas corpus relief. *Howard v. Walker*, No. 98–CV–6427Fe (W.D.N.Y. June 26, 2001). The district court granted a certificate of appealability limited to Howard’s allegations that Dr. Martin’s reliance on *Bruton*–infected statements to form an opinion regarding the time and cause of Ms. Metz’ death violated his rights under the Sixth Amendment. *Id.* slip op. at 26. Howard appealed to this court. Following oral argument, the panel remanded the case to the district court for supplementation of the record pursuant to *United States v. Jacobson*, 15 F.3d 19, 21–22 (2d Cir.1994). The panel required that the district court make findings of fact and conclusions of law on the issue of whether Howard had been deprived “of the opportunity to present a meaningful defense, in violation of his right to due process under the Fourteenth Amendment and his right of compulsory process under the Sixth Amendment, by ruling that the substance of Eric Williams’ statement—otherwise inadmissible under *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)—could be disclosed if petitioner’s counsel cross-examined the prosecution’s expert witness on the basis of her opinion or called his own expert witness.” *Howard v. Walker*, 57 Fed. Appx. 502, 503 (2d Cir.2003).

On remand, the court below issued an amended decision and order without holding a hearing. The district court found that Howard's meaningful defense argument depended on the extent to which the government’s expert, Dr. Martin, had relied on the co-defendant's statement. The court found that Dr. Martin based her opinion on “ample other evidence not tainted by *Bruton*.” *Howard v. Walker*, No. 98–cv–6427Fe, 2004 WL 1638197, at *5 (W.D.N.Y. July 21, 2004). Magistrate Judge Feldman cited to the Fourth Department's determination that Dr. Martin’s testimony “would be the same even without information obtained from the statement of one of the accomplices.” *Id.* at *6 (quoting *People v. Howard*, 241 A.D.2d 920, 661 N.Y.S.2d 386, 388 (4th Dep't 1997), *leave to appeal denied*, 90 N.Y.2d 940, 664 N.Y.S.2d 759, 687 N.E.2d 656 (1997)). The district court also rejected Howard's contention that the trial court's limitations on his ability to cross-examine
Dr. Martin or to call his own expert witness violated his constitutional rights under the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment.

The appeal having been reinstated to this court’s docket pursuant to our March 18, 2003 mandate and having heard argument on March 2, 2005, in an order dated March 7, 2005, this court reversed the district court’s denial of a writ of habeas corpus and vacated Howard’s state conviction for Murder in the Second Degree by Order on March 7, 2005, and indicated that this opinion would follow. The evidentiary rulings challenged by Howard implicate both his conviction for Murder in the Second Degree and Burglary in the First Degree. Howard is guilty of Burglary in the First Degree if “he or another participant in the crime ... [c]auses physical injury to any person who is not a participant in the crime.” 2 N.Y. Penal Law § 140.30. The evidentiary rulings discussed below do not, however, implicate Howard’s conviction for Petit Larceny, Criminal Mischief in the Fourth Degree, or the lesser included offense of Burglary in the Second Degree as none of those charges requires a jury to find the element of physical injury to a person.

II. DISCUSSION

[1] This court’s review of a denial of a petition for habeas corpus is de novo. See, e.g., Zappulla v. New York, 391 F.3d 462, 466 (2d Cir.2004). The district court’s factual findings are reviewed for clear error. See, e.g., Cox v. Donnelly, 387 F.3d 193, 196 (2d Cir.2004).

2. In New York, a person is guilty of Burglary in the First Degree only if, in the course of the burglary, he is armed with a deadly weapon, causes physical injury to any person who is not a participant in the crime, uses or threatens use of a dangerous instrument, or dis-

A. Federal Habeas Review of State Convictions

[2] A federal court “shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). A claim that a state conviction was obtained in violation of state law is not cognizable in the federal court. See Estelle v. McGuire, 502 U.S. 62, 68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Dunnigan v. Keane, 137 F.3d 117, 125 (2d Cir.1998).


(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) re-
sulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). To determine whether this standard of review applies, this court must first determine whether the state court adjudicated an issue on the merits. "A state court adjudicates a petitioner's federal claims on the merits when it (1) disposes of the claim on the merits, and (2) reduces its disposition to judgment." Norde v. Keane, 294 F.3d 401, 410 (2d Cir.2002)(internal quotation marks omitted). A claim need not be addressed in detail by a state court to have been "adjudicated on the merits." See, e.g., Ryan v. Miller, 303 F.3d 231, 245–46 (2d Cir.2002) (finding that a "blanket statement" that "[t]he defendant's remaining contentions are either unpreserved for appellate review or without merit" constituted adjudication on the merits). In the instant case, all of the issues before this court were adjudicated on the merits by the state court. People v. Howard, 241 A.D.2d 920, 661 N.Y.S.2d 386, 388 (4th Dep't 1997) ("We have considered the other contentions raised by defendant, including those raised in his pro se supplemental brief, and conclude that they are without merit."). leave to appeal denied, 90 N.Y.2d 940, 664 N.Y.S.2d 759, 687 N.E.2d 656 (1997).

[4, 5] Clearly established federal law "refers to the holdings, as opposed to the dicta, of the Supreme Court's decisions as of the time of the relevant state-court decision." Kennaugh v. Miller, 289 F.3d 36, 42 (2d Cir.2002) (internal quotation marks and alterations omitted). "A federal court may not grant habeas simply because, in its independent judgment, the 'relevant state-court decision applied clearly established federal law erroneously or incorrectly.'" Fuller v. Gorczyk, 273 F.3d 212, 219 (2d Cir.2001) (quoting Williams, 529 U.S. at 411, 120 S.Ct. 1495). Rather, a decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decided a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Williams, 529 U.S. at 413, 120 S.Ct. 1495.

[6] A state court decision is an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. As this court has instructed the district courts, "[i]n determining whether an application was objectively unreasonable, a habeas court does not require that 'reasonable jurists would all agree' that the state court erred; on the other hand, 'the most important point is that an unreasonable application of federal law is different from an incorrect application.'" Jones v. Stinson, 229 F.3d 112, 119 (2d Cir.2000) (quoting Williams, 529 U.S. at 411, 120 S.Ct. 1495). Although "'some increment of incorrectness beyond error is required . . . the increment need not be great.'" Id. (quoting Francis S. v. Stone, 221 F.3d 100, 111 (2d Cir.2000) (internal alteration omitted)).

If this court finds that the state court engaged in an unreasonable application of established law, resulting in constitutional error, it must next consider whether such error was harmless. See Brecht v. Abrahamson, 507 U.S. 619, 629–30, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Again, this court is required to consider the state court's resolution of this question. In the instant case, the state court determined that admission of Dr. Martin's testimony was not in error and, furthermore, if it had been in error, the error would have been
harmless. The state court engaged in no explicit resolution, however, of the question of whether the restrictions on Howard's ability to put forward an expert witness or to cross-examine Dr. Martin were harmless.

[7] When the state court concludes that any error was or would be harmless, that finding is subject to the same standard of deference as is any other legal conclusion. Zappulla, 391 F.3d at 467 (citing Mitchell v. Esparza, 540 U.S. 12, 124 S.Ct. 7, 157 L.Ed.2d 263 (2003) (per curiam)). That is, this court must find that the state court's harmless error determination, whether “the People proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained,” was “objectively unreasonable.” Id. (quoting Mitchell, 540 U.S. at 17–18, 124 S.Ct. 7).

Following AEDPA, this court has yet to define the standard of review appropriate to determine whether a non-structural constitutional error challenged on collateral review is harmless where the state court does not address the question of harmless error. See Benn v. Greiner, 402 F.3d 100, 105 (2d Cir.2005); Gutierrez v. McGinnis, 389 F.3d 300, 306–07 n. 7 (2d Cir.2004); Ryan, 303 F.3d at 253–54. Prior to the passage of AEDPA, on collateral review, determination that an error was not harmless required a court to find that the error “had substantial and injurious effect or influence in determining the jury’s verdict.” Brecht, 507 U.S. at 623, 113 S.Ct. 1710 (quoting Kottekos v. United States, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). Alternatively, this court might apply AEDPA’s standard of review for state court legal conclusions—whether the state court’s resolution of legal questions “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law”—despite the fact that the state court did not reach a determination on the question of harmlessness. 28 U.S.C. § 2254(d)(1); see Benn, 402 F.3d at 105. Where the question has arisen, this court has declined to resolve it, finding instead that the harmless error determination would be identical under either analysis. Benn, 402 F.3d at 105 (citing analogous cases).

B. A Criminal Defendant’s Rights Pursuant to Bruton

Howard’s claims arise under the Sixth Amendment’s Confrontation Clause, recently interpreted by the Supreme Court in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). This court has previously determined that the holding of Crawford is irrelevant to our review of the state courts' analysis of a habeas petitioner's claim on the merits because the petitioner's conviction became final prior to the date of that ruling. See Mungo v. Duncan, 393 F.3d 327, 334 (2d Cir.2004). Therefore, this court takes the contours of Howard's Sixth Amendment rights as of the date that his conviction became final, considering whether the State court’s “adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d).

Howard claims that his rights under the Sixth Amendment were violated by the trial court’s ruling which allowed the State’s expert witness to testify to an opinion based in relevant part on the otherwise inadmissible hearsay statement of Eric Williams. The Supreme Court has long held that the “utterance of a co-conspirator made after the termination of the conspiracy was inadmissible against other co-conspirators.” Delli Paoli v. United States, 352 U.S. 232, 239, 77 S.Ct. 294, 1
L.Ed.2d 278 (1957), overruled on other grounds by Bruton, 391 U.S. at 126, 88 S.Ct. 1620. Where two or more defendants are tried together, such a statement could be admissible against the declarant under the long-standing admissions exception to the hearsay rule. In Delli Paoli, the Court held that under such circumstances, the State could offer such a statement as evidence against the declarant and any prejudice to the other defendant could be overcome by a limiting instruction to the jury. Id. at 243, 77 S.Ct. 294. However, finding that a limiting instruction is insufficient to mitigate the prejudice to the co-defendant against whom such a statement is otherwise inadmissible, the Supreme Court has held that such statements are not admissible in a joint trial. Bruton, 391 U.S. at 126, 88 S.Ct. 1620.

The Supreme Court's firm stance on the inadmissibility of such statements is founded on the fact that the credibility of such statements "is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others." Id. at 136, 88 S.Ct. 1620. The Sixth Amendment serves to ensure and protect the jury trial's fact-finding function. The Supreme Court has long concerned itself with the likelihood "that the admission of [co-defendants' statements] will distort the truthfinding process." Lee v. Illinois, 476 U.S. 530, 542, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986).

[8] The confession of an accomplice is "presumptively unreliable." Id. In the context of an accomplice's confession, the Supreme Court has concluded that the "truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination." Id. at 541, 106 S.Ct. 2056. "Due to his strong motivation to implicate the defendant and to exonerate himself," a co-conspirator's statement is "intrinsically much less reliable" than hearsay generally. Bruton, 391 U.S. at 141–42, 88 S.Ct. 1620 (White, J., dissenting).

Constituting hearsay, Eric Williams' statement was admissible only if it bore independent indicia of reliability. Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980); see also Lee, 476 U.S. at 539, 106 S.Ct. 2056. Prior to the Appellate Division's ruling, the Supreme Court had found "that certain hearsay exceptions rely upon such solid foundations that admission of virtually any evidence within them comports with the substance of the constitutional protection." Roberts, 448 U.S. at 66, 100 S.Ct. 2531 (internal quotation marks omitted). Therefore, if a hearsay declarant was unavailable to testify at trial where he would be subjected to the rigors of cross-examination, but the declarant's out-of-court statement bore "adequate 'indicia of reliability,'" a defendant's rights pursuant to the Sixth Amendment were not violated by the admission of the statement. Id. at 66, 100 S.Ct. 2531. Where there are "particularized guarantees of trustworthiness," id., otherwise inadmissible hearsay was rendered admissible pursuant to Roberts.

As a preliminary matter, there are no such "particularized guarantees of trustworthiness" with respect to Eric Williams' confession.\footnote{The fact that the statements may have overlapped in some regard does not support a conclusion that any one of the statements was characterized by "particularized guarantees of trustworthiness." See Idaho v. Wright, 497 U.S. 805, 822, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990) ("To be admissible under the Confrontation Clause, hearsay evidence used to
such and no facts in the record support such a conclusion. Furthermore, the Supreme Court has consistently held that statements that inculpate both the declarant and another person ought to be considered with even greater suspicion than that applied to hearsay statements generally. See Lilly v. Virginia, 527 U.S. 116, 131–34, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (describing a long line of Supreme Court cases analyzing the inherent unreliability of such statements).

The facts of this case constitute a casebook example of the circumstances that would cause a court to question, as a matter of law, the reliability of a Bruton-infected statement. Significant admissible evidence, not the least of which was each defendant's signed and sworn confession, existed to support the conviction of one or all of Eric Williams, Daniel Williams, or John Howard for the burglary of Ms. Metz' home. The ability to convict one or more defendants on the charge of felony murder, however, was compromised by each man's incentive to lay blame for the death of Ms. Metz on the other two men. In New York State, an individual may be guilty of murder in the second degree where “[a]cting either alone or with one or more other persons, he commits or attempts to commit [an enumerated felony], and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants.” N.Y. Penal Law § 125.25(3) (2004) (emphasis added). The law also provides, however, an affirmative defense to felony murder. A defendant is not guilty of felony murder where he can prove that he:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and (c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance.

Id. The likelihood that the accused will prove the affirmative defense is immeasurably enhanced should he credibly attribute the “homicidal act” to one of his co-defendants.

The statements made and signed by Eric Williams, Daniel Williams, and John Howard following their arrest illustrate the incentives to distort the truth faced by co-conspirators following termination of a criminal conspiracy when that conspiracy is under investigation by law enforcement authorities. While each acknowledged his involvement in the burglary of Ms. Metz' home, Howard and Daniel Williams denied any interaction with Ms. Metz, physical, verbal, or otherwise. In addition, each of the three men suggested that the other two men may have climbed the stairs to the second floor of the house, where Ms. Metz was found dead, or had the opportunity to go upstairs while the declarant was either downstairs in the kitchen or just outside the house. Eric Williams admitted to going upstairs, but claimed that Howard physically assaulted Ms. Metz. His statement, constituting inadmissible hearsay, was not admissible against Howard. Indeed, admission of the statement would have proven “uniquely threatening” to the “truthfinding function of the Confrontation Clause.” Lee, 476 U.S. at 541, 106

ness, not by reference to other evidence at trial.”).
Because the defense did not contest that the medical cause of Ms. Metz’ death was cardiac arrhythmia, the material question was what had caused the cardiac arrhythmia. While the State averred that stress resulting from the burglary caused Ms. Metz to suffer cardiac arrhythmia, the defense asserted that no person could conclude with any degree of certainty what had brought on the arrhythmia.

The trial court allowed an expert witness for the State, Dr. Jacqueline Martin, to testify to her opinion regarding the cause of Ms. Metz’ death. In reaching an expert opinion on this question, Dr. Martin considered the police files and reports of the incident, which reports included the three statements of Howard, Eric Williams, and Daniel Williams.

The district court relied upon the state appellate court’s finding that Dr. Martin’s voir dire testimony established that her opinion “would be the same even without information obtained from the statement of one of the accomplices.” *Howard*, 241 A.D.2d at 921, 661 N.Y.S.2d 386. The district court accepted this finding as correct in light of AEDPA’s requirement that state court findings of fact are presumptively correct absent contrary “clear and convincing evidence.” 28 U.S.C. § 2254(e)(1). *See Howard*, 2004 WL 1638197, at *6. However, this finding confuses the contours of Dr. Martin’s opinion and its bases. The record clearly demonstrates that Dr. Martin’s expert opinion on the cause of Ms. Metz’ cardiac arrhythmia, as heard by the jury, rested on Eric Williams’ otherwise inadmissible statement.

As described above, Dr. Martin’s opinion regarding Ms. Metz’ death consisted of two parts. The first, that Ms. Metz’ death was caused by a cardiac arrhythmia, was not seriously contested by the defendant. Howard did, however, contest the second part of Dr. Martin’s opinion, that the cardiac arrhythmia was caused by stress resulting from the burglary. In the course of voir dire, Howard’s counsel questioned Dr. Martin regarding the impact of the three men’s statements on her opinion.

[Howard’s Counsel:] Is your opinion as to cause of death in this case contingent to some degree upon the representations in Eric Williams’ statement being true?

[Dr. Martin]: Yes.

Q. Okay. If those representations were not true, would that possibly change your opinion as to cause of death?

A. As to cause of death, I don’t think so.

Trial Tr. at 515. When pushed to specify to what she understood “cause of death” to refer, however, Dr. Martin defined cause of death to mean “cardiac arrhythmia, due to arteriosclerosis.” Trial Tr. at 516. The fact that the immediate cause of Ms. Metz’ death was cardiac arrhythmia was not contested. Asked, on the other hand, whether she could, without relying on the *Bruton*-infected statements, “give an opinion to a reasonable degree of medical certainty as to whether, in fact, the house robbery brought about the cardiac arrhythmia,” Dr. Martin testified that she could not do so. Trial Tr. at 523.

There exists “clear and convincing evidence,” indeed it is indisputable, that Dr. Martin’s testimony that the burglary caused Ms. Metz’ death relied on the *Bruton*-infected statement. On the basis of that statement, Dr. Martin testified before the jury that the burglary “was an important factor on Mrs. Metz’ death.” Trial Tr. at 574. The appellate division’s ruling “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”
28 U.S.C. § 2254(d)(2). Dr. Martin relied on inadmissible inherently unreliable hearsay in formulating an opinion to which she testified before the jury.

Experts are generally permitted to rely on otherwise inadmissible evidence in formulating an expert opinion: "expert witnesses can testify to opinions based on hearsay or other inadmissible evidence if experts in the field reasonably rely on such evidence in forming their opinions." United States v. Locascio, 6 F.3d 924, 938 (2d Cir.1993). Such reliance does not, as a rule, violate a defendant's Confrontation Clause rights. This court has previously concluded that "[i]t is rare indeed that an expert can give an opinion without relying to some extent upon information furnished him by others." Reardon v. Manson, 806 F.2d 39, 42 (2d Cir.1986), cert. denied, 481 U.S. 1020, 107 S.Ct. 1903, 101 L.Ed.2d 932 (1987). An expert may be permitted to rely on such information without interfering with a defendant's Sixth Amendment rights. Id. A defendant's rights under the Confrontation Clause are protected "where the expert is available for questioning concerning the nature and reasonableness of his reliance." Id.

A number of structural mechanisms ensure that an expert's reliance on hearsay furthers, rather than hinders, "the truth-finding process." See Lee, 476 U.S. at 541, 106 S.Ct. 2056. First, trial courts exercise the authority to ensure that an expert's testimony rests upon reliable bases and foundation. See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); see also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147–49, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). Second, as an expert, the witness herself is assumed 'to have the skill to properly evaluate the hearsay, giving it probative force appropriate to the circumstances.' ” Locascio, 6 F.3d at 938 (quot-
frontation Clause rights, Dr. Martin’s assurance that her methodology conformed with that of forensic pathologists generally was not sufficient to procure the admissibility of her opinion, where that opinion was based on a *Bruton*–infected statement.

While the *Bruton*–infected statements are presumptively unreliable, we decline to decide whether the admission of the State’s expert testimony based on *Bruton*–infected statements is equivalent to the unconstitutional admission of a *Bruton*–infected statement. This court declines to determine whether admission of expert testimony based on a *Bruton*–infected statement violates a defendant’s confrontation rights in every case. In this case, Howard was denied his right to cross-examine that witness or to rebut that witness’ testimony by presenting his own expert witness. Because these denials, in and of themselves, constituted harmful constitutional errors, this court does not decide whether the admission of Dr. Martin’s testimony, based on presumptively unreliable statements, had it not been accompanied by the court’s limitations on Howard’s rights to cross-examination and compulsory process, would have violated Howard’s Confrontation Clause rights.

C. The Trial Court’s Limitations on Howard’s Cross–Examination of Dr. Martin

A defendant in a state criminal prosecution has a right, guaranteed by the Sixth and Fourteenth Amendments to the Constitution, “to be confronted with the witnesses against him.” U.S. Const. amend. VI; see *Pointer v. Texas*, 380 U.S. 400, 401, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) (holding that the Sixth Amendment Confrontation Clause is made applicable to the states by the Fourteenth Amendment).

“The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” *Maryland v. Craig*, 497 U.S. 836, 845, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), quoted in *Lilly v. Virginia*, 527 U.S. at 123–24, 119 S.Ct. 1887. Trials are by their nature adversarial processes, and it is this adversarial nature that ensures the fulfillment of their truthfinding function. The Supreme Court has stated that:

Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the “greatest legal engine ever invented for the discovery of truth” . . . .


[9] This court considers Howard’s right of cross-examination as it existed at the time his conviction became final. As previously described, supra at 124–25, the admission of an out-of-court statement may violate the Confrontation Clause. *Roberts*, 448 U.S. at 66, 100 S.Ct. 2531. Court-imposed limitations on cross-examination can also violate a defendant’s Confrontation Clause rights. “[T]he right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him.” *Pointer*, 380 U.S. at 404, 85 S.Ct. 1065. “The right of cross-examination, though not absolute, is one of the most firmly established principles under Supreme Court law.” *Cotto v. Herbert*, 331 F.3d 217, 248 (2d Cir.2003) (considering a petition for writ of habeas corpus under § 2254). As a result, “a denial of cross-examination without waiver . . . would be constitutional error of the
first magnitude . . .” Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968) (internal quotation marks omitted). Not inconsistent with a defendant’s right to confrontation, “trial judges retain wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). Limitations on cross-examination may be lawful and legitimate if they are harmonious with the goal of ensuring the legitimacy of the truthfinding process. After all, “[t]he right of cross-examination . . . is implicit in the constitutional right of confrontation, and helps assure the accuracy of the truth-determining process.” Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (quoting Dutton v. Evans, 400 U.S. 74, 89, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970)).

[10] Accordingly, while the right to cross-examination is not absolute, it is effectively denied when a defendant is prohibited from “expos[ing] to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.” Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). If a defendant is prevented from doing so, he “states a violation of the Confrontation Clause.” Van Arsdall, 475 U.S. at 680, 106 S.Ct. 1431. In this case, Howard was not able to engage in cross-examination of Dr. Martin that would shed light on her reliability by questioning her methodology, the factual bases upon which she rested her conclusion, or the soundness of the opinion itself.

Here, the trial court’s ruling that, if the defense challenged the basis of Dr. Martin’s opinion, the State would be permitted to admit Eric Williams’ statement in its entirety, offered Howard a constitutionally-impermissible choice. The court required Howard to choose between his Sixth Amendment right to cross-examine Dr. Martin, and his Sixth Amendment right to exclude the unreliable hearsay confession of a co-conspirator. The Supreme Court has recognized that a court may not subject a defendant to such a sacrifice. Simmons v. United States, 390 U.S. 377, 394, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) (“[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another.”).

This court recognizes that the Simmons principle has not widely been applied in the Sixth Amendment context. United States v. Harris, 707 F.2d 653, 663 (2d Cir.1983) (citing United States v. Kahan, 415 U.S. 239, 242–43, 94 S.Ct. 1179, 39 L.Ed.2d 297 (1974)), cert. denied, 464 U.S. 997, 104 S.Ct. 495, 78 L.Ed.2d 688 (1983). This court has previously determined that a criminal defendant’s testimony at a hearing held to determine whether he qualifies for appointment of counsel cannot be used as part of the government’s case against him. Harris, 707 F.2d at 662–63. The Supreme Court, however, in Kahan, declined to apply the Simmons principle where a criminal defendant’s statements on a financial disclosure form, completed for the purposes of exercising his Sixth Amendment right to counsel, were admitted against him at trial not for the purposes of establishing the truth of the statements, but for the purposes of establishing defendant’s knowledge that such statements were false. Kahan, 415 U.S. at 242–43, 94 S.Ct. 1179. The Supreme Court determined that the criminal defendant faced no “intolerable choice” of the sort that “Simmons sought to relieve.” Id. at 243, 94 S.Ct. 1179. In making the
false financial disclosure, the defendant did not exercise “what was ‘believed’ by the claimant to be a ‘valid’ constitutional claim.”

The instant case is more analogous to Simmons than it is to Kahan. Kahan had no right to state-provided counsel as he was not in reality indigent. Howard did have an absolute right under Bruton and to exercise the rights to confrontation and compulsory process. Furthermore, the inability to cross-examine Dr. Martin or to present Dr. Abbott’s testimony were “essential to [Howard’s felony murder] conviction” and “had a prejudicial impact on the jury’s deliberations on [that] charge.” United States v. Hardwell, 80 F.3d 1471 (10th Cir.1996) (citing, inter alia, Harris, 707 F.2d at 662–63 to support a holding that a defendant cannot be “forced to choose between the Sixth Amendment right to counsel and the Fifth Amendment right against self-incrimination.”). Accordingly, the Simmons principle is particularly apt in this case. Therefore, this court examines the choice posed to Howard as it would an outright limitation on his right to cross-examination or, as discussed infra at 131, his right to present a defense.

By conditioning Howard’s right to cross-examine Dr. Martin on the surrender of another constitutional right, the court effectively foreclosed Howard’s opportunity to engage in cross-examination that would challenge “the nature and reasonableness of [Dr. Martin’s] reliance” on Eric Williams’ statement, or any other basis upon which she reached her conclusion. Reardon, 806 F.2d at 42. As discussed supra at 127–28, the trial court’s limitation on Howard’s cross-examination of Dr. Martin was particularly harmful to the truthfinding process given her reliance upon unreliable hearsay in forming her expert opinion. Even setting aside, however, the constitutional implications of allowing Dr. Martin to testify to an opinion based upon Bruton-infected statements, the court’s limitation on Howard’s cross-examination of Dr. Martin was an unreasonable denial of Howard’s rights under the Confrontation Clause.

In this case, the trial court barred Howard from engaging in even the most basic cross-examination of Dr. Martin, thereby gutting the function of cross-examination, “the principal means by which the believability of a witness and the truth of his testimony are tested.” Davis, 415 U.S. at 316, 94 S.Ct. 1105. The trial judge’s ruling barred areas of cross-examination that went to the reliability of Dr. Martin’s conclusion itself as well as to the basis of her opinion. Howard was not permitted to question her conclusions or the information on which they were based in any way without risking the admission into evidence of Eric Williams’ statement. The court found that, if Howard attempted to establish that it was possible that Ms. Metz would have suffered a heart attack even in the absence of a burglary, the State would be permitted to present Eric Williams’ statement to the jury.

The district court, in denying Howard’s petition, noted that “the ruling by the trial judge here did not restrict or preclude defense counsel from engaging in cross-examination or challenging the veracity of Dr. Martin. Rather, the trial court’s ruling simply defined an inevitable consequence should defense counsel pursue a particular line of impeachment question-

4. While there are exceptions that may allow a statement otherwise inadmissible under Bruton to be admitted into evidence, none of those exceptions apply in this case. There is no question that in this case, Howard had an absolute right to exclude such statement under Bruton.
Howard v. Walker, No. 98–CV–6427Fe, slip op. at 12 (W.D.N.Y. June 26, 2001). The district court found that the trial judge “fashioned a remedy that balanced the defendant's Bruton rights with his right to effective cross-examination.” Id., slip op. at 13. The trial court's ruling can hardly be considered a balancing, however, where the only entitlements compromised belonged to the defendant.

The trial court did not simply define an inevitable consequence of cross-examination. The trial court's rulings on what constitutes “opening the door” failed to consider the serious constitutional violation in conditioning the opportunity for cross-examination on Howard's waiver of his Bruton rights. Howard was entitled to exclusion of Eric Williams' out-of-court statement and in making exclusion of such statement contingent upon Howard's sacrifice of another equally fundamental constitutional right, the trial court denied Howard rights guaranteed by “one of the most firmly established principles under Supreme Court law.” Cotto, 331 F.3d at 248. In light of longstanding Supreme Court precedent, the trial court's ruling “involved an unreasonable application of] clearly established Federal law” and, therefore, cannot withstand collateral review. See 28 U.S.C. § 2254(d)(1).

D. Howard's Inability to Call an Expert Witness

The trial court's ruling that, were Howard to call Dr. Abbott to testify, the prosecution could introduce the substance of Eric Williams' statement through cross-examination effectively prohibited Howard from presenting Dr. Abbott's testimony to the jury. Howard argues this ruling denied him the right to a fair opportunity to defend himself against the State's accusations.

[11] The right at issue arises from the right to compulsory process under the Sixth Amendment. “In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . .” U.S. Const. amend. VI. “The right to call witnesses in order to present a meaningful defense at a criminal trial is a fundamental constitutional right secured by both the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment.” Washington v. Schriver, 255 F.3d 45, 56 (2d Cir.2001) (citing Supreme Court cases). “Few rights are more fundamental than that of an accused to present witnesses in his own defense.” Taylor v. Illinois, 484 U.S. 400, 408, 108 S.Ct. 646, 98 L.Ed.2d 798 (1987). This right protects, among other things, the truth-finding process. “The ends of criminal justice would be defeated if judgment were to be founded on a partial or speculative presentation of the facts.” Id. at 409, 108 S.Ct. 646 (quoting United States v. Nixon, 418 U.S. 683, 709, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974)). To those ends, “[t]he rights to confront and cross-examine witnesses and to call witnesses in one’s own behalf has long been recognized as essential to due process.” Chambers, 401 U.S. at 294, 91 S.Ct. 633.

However, “[t]he accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible,” and his right may yield to rules and procedure of the adversary process that “provide each party with a fair opportunity to assemble and submit evi-

5. On remand, the district court adopted its reasoning expressed in its original Decision on the question of whether Howard’s right to cross-examine Dr. Martin was unconstitutionally limited. See Howard, 2004 WL 1638197, at *7.
dence to contradict or explain the opponent’s case.” *Taylor*, 484 U.S. at 410–11, 108 S.Ct. 646. A trial court may consider the “the broader public interest in a full and truthful disclosure of critical facts.” *See* id. at 412, 108 S.Ct. 646. Restrictions on a defendant’s right under the Sixth Amendment to introduce testimony on his behalf, however, “may not be arbitrary or disproportionate to the purposes they are designed to serve.” *Rock v. Arkansas*, 483 U.S. 44, 55–56, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987).

To establish a Sixth Amendment violation, a defendant must demonstrate that he was deprived of the opportunity to present a witness who would have provided testimony that was “both material and favorable to his defense.” *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982). Materiality requires that “the omission . . . be evaluated in the context of the entire record.” *Id.* at 868, 102 S.Ct. 3440. When considering whether a trial court’s exclusion of expert witness testimony violated a criminal defendant’s right to Compulsory Process, a two-step analysis is appropriate. First, we consider the trial court’s reasons for excluding the evidence. Second, we consider the strength of the prosecution’s case as a whole. *See Washington*, 255 F.3d at 59; *Agard v. Portuondo*, 117 F.3d 696, 705–07 (2d Cir.1997) (*citing United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)), rev’d on other grounds, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000).

In this case, the trial court ruled that, were Howard to call an expert witness, the court would allow that expert to be cross-examined using the *Bruton*-infected statement.

[Howard’s Counsel]: My understanding, Judge, if I were to call a medical expert on behalf of defendant, that the People would be permitted to cross-examine him relating to the basis of his opinion and using the co-defendants’ [*Bruton*-infected] statements and the particular information contained in those statements; is that right?

**The Court:** Yes, for the reasons I have already stated.

Trial Tr. at 532. The testimony of Dr. Abbott was clearly favorable to the defense. Through that testimony, Howard sought to establish that Ms. Metz’ death may have occurred even if there had been no burglary, thus supporting a reasonable doubt regarding his guilt. While Howard had no obligation to come forward with evidence, the Constitution entitled him to the opportunity to challenge the State’s evidence against him. Without Dr. Abbott’s testimony, which controverted the State’s case in favor of Murder in the Second Degree as well as Burglary in the First Degree, Howard had no opportunity to contest Dr. Martin’s testimony that she could, to a degree of reasonable certainty, draw a conclusion regarding Howard’s role in causing Ms. Metz’ cardiac arrhythmia. Furthermore, Dr. Abbott’s testimony supported Howard’s only available defense to the felony murder charge. Therefore, the omitted evidence, particularly as it would have been provided by a medical expert, “create[d] a reasonable doubt that did not otherwise exist” and, as such, “constitutional error has been committed.” *Agurs*, 427 U.S. at 112, 96 S.Ct. 2392. Furthermore, while the State’s case in support of Howard’s role in the burglary was substantial, its case supporting both felony murder and the physical injury element of Burglary in the First Degree was speculative and circumstantial. Under such circumstances, the crucial role Dr. Abbott’s testimony would have played in Howard’s defense should not be minimized.
The instant case is easily distinguishable from Washington, in which this court found that exclusion of a defendant’s expert was not constitutional error because the defendant was not deprived of the opportunity to make the argument that was supported by the expert’s testimony. Washington, 255 F.3d at 60. In that case, the defendant sought to establish, through expert testimony, that a young victim’s testimony was unreliable. The Washington court was able to list “the myriad ways” in which the defendant had put evidence regarding the witness’ unreliability before the jury, including witnesses’ accounts of inconsistent statements by the young witness to a social worker and an assistant district attorney, the defendant’s cross-examination of the young victim, and the simple fact that the victim’s age was itself evidence that the jury could consider. Id. at 60–61. This court can point to no such analogous opportunities to present the relevant argument in this case. Given the trial court’s ruling, Howard could not cross-examine Dr. Martin’s analysis of the cause of Ms. Metz’ cardiac arrhythmia. Nor could anyone other than a medical expert seriously rebut Dr. Martin’s testimony regarding causation. The omitted testimony of Dr. Abbott was both material and favorable to Howard’s case.

In spite of the materiality and favorableness of Dr. Abbott’s testimony, it is possible that the trial court excluded such testimony “to accommodate other legitimate interests in the criminal trial process.” Rock, 483 U.S. at 56, 107 S.Ct. 2704. So long as restrictions designed to accommodate such interests were not arbitrary or disproportionate, they were within the trial court’s discretion. Id. at 55–56, 107 S.Ct. 2704. In this case, however, there were no legitimate competing interests. The trial court was clearly concerned about fairness to the prosecution, as the court perceived it. There is no “legitimate interest[ ] in the criminal trial process,” however, in admitting evidence that is unreliable as a matter of law. Id. at 56, 107 S.Ct. 2704. The presentation to the jury of incompetent and inadmissible evidence does not further the determination of truth and cannot constitute such an interest. Therefore, the trial court’s prohibition-in-fact of Dr. Abbott’s testimony was an unreasonable denial of Howard’s clearly established constitutional rights.

E. Harmless Error

Having determined that the trial court’s exclusion of Dr. Abbott’s testimony and the limitations on cross-examination of Dr. Martin were “contrary to, or involved an unreasonable application of, clearly established Federal law,” 28 U.S.C. § 2254(d)(1), the court turns to the question of whether such errors were harmless. The state court reached no harmlessness determination with respect to either of these errors. Because neither error can be considered harmless under any of the standards potentially applicable, see supra at 123, the court does not need to reach a conclusion regarding the correct standard in this case.

Howard’s ability to cross-examine Dr. Martin was unconstitutionally compromised. Whether an unconstitutional limitation on a defendant’s cross-examination of a witness is harmless “depends upon a host of factors” which include the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case.
Van Arsdall, 475 U.S. at 684, 106 S.Ct. 1431. The trial court's limitations on Howard's cross-examination of the State's expert did not address a "collateral matter," but went to the heart of Dr. Martin's testimony. Cf. Tinsley v. Kuhlmann, 973 F.2d 163, 166 (2d Cir.1992). Unless the jury found that the burglary caused Ms. Metz' arrhythmia and thus her death, Howard could not be convicted of felony murder or first degree burglary. Therefore, his inability to challenge Dr. Martin's opinion to that effect significantly impaired his ability to cross-examine Dr. Martin effectively.

In addition, the trial court placed unconstitutional limitations on Howard's ability to call his own expert witness. Whether such error was harmless depends on Howard's ability to make the argument supported by his expert witness, despite the exclusion of that witness. See Agard, 117 F.3d at 706–07. In this case, Dr. Abbott's testimony cannot be described as "cumulative." See Agurs, 427 U.S. at 114, 96 S.Ct. 2392. Given the trial court's rulings with regard to the Bruton-infected statements, no witness testified and no physical evidence could be marshaled in support of Howard's contention that no person could conclude with any degree of certainty that the burglary caused Ms. Metz' death.

[16] To support its position that the trial court's error with respect to cross-examination of Dr. Martin and Howard's ability to call Dr. Abbott was harmless, the State contends that there was overwhelming evidence of Howard's guilt and that it is unlikely that Howard's expert would have testified that the State's theory of the case, that Ms. Metz suffered stress which led to her death, was impossible. The State's analysis overstates its case and ignores the evidentiary burden in a criminal case. Howard need not prove that it was impossible for the robbery to have resulted in Ms. Metz' death. The jury need only have found reasonable doubt to that effect. Howard's expert witness, Dr. Abbott, would have testified that "it is not possible to say with certainty that this criminal encounter was the cause of arrhythmia and that it would not have occurred without the encounter." Dr. Abbott's Ltr., December 19, 1990. Had she been subject to cross-examination, or limited in her reliance on Bruton-infected statements, Dr. Martin would have testified similarly. Both medical experts, outside of the jury's presence, expressed serious doubt on their ability to reach a conclusion on the timing and causation of Ms. Metz' death without reference to an inherently unreliable Bruton-infected statement and even with the Bruton-infected statement, Dr. Abbott concluded that he could not reach any such conclusion to any degree of medical certainty.6

The jury never heard either expert express such serious doubts. At trial, Howard did not contest his participation in the burglary of Ms. Metz' home. It could be argued that the jury had sufficient evidence on the basis of which to determine that Ms. Metz died as a result of the burglary of her house. In this case, however, where a medical expert testified to that causal element, it clearly cannot be said that the infringements on Howard's right to cross-examine that expert or to provide his own expert to the contrary constituted harmless errors. The evidence supporting Howard's conviction for murder was entirely circumstantial. Cross-examination casting doubt on a medical doctor's ability to tie the burglary to the

6. These statements demonstrate that Dr. Abbott, unlike Dr. Martin, did not base his opinion on Bruton-infected statements in relevant part.
death was, therefore, crucial to Howard's ability to put forward a defense.

Absent the ability to cross-examine Dr. Martin effectively or to provide an expert to rebut Dr. Martin's testimony, as was his right under the United States Constitution, Howard's ability to create reasonable doubt was severely restricted. The trial court's restrictions on Howard's cross-examination and presentation of evidence undermined his ability to challenge the factual basis for the charges of felony murder and burglary or to lay a foundation for his affirmative defense to those charges. Although the trial court remarked that the fact that a heart attack can occur without a precipitating event is something of which all jurors must be aware, that assumption does not eviscerate the value of expert testimony supporting the inability of any doctor to reach a conclusion regarding the existence or nature of a precipitating event, let alone an unchallenged opinion that such a causal connection existed in this case. In addition to barring any evidence which would tend to establish that Ms. Metz' heart attack may not have been caused by the burglary, the court's limitations on cross-examination prevented Howard from mounting any challenge whatsoever to Dr. Martin's conclusion to the contrary. Because these issues lay at the heart of the charges of Murder in the Second Degree and Burglary in the First Degree against Howard and his efforts to establish the affirmative defense to Murder in the Second Degree, the errors cannot reasonably be considered harmless.

III. CONCLUSION

Having found that the state court based its decision on an unreasonable determina-

7. While the State need not have proven that the Howard caused physical injury to a person to prove the lesser included charge of Burglary in the Second Degree, such physical injury was a necessary element of the State's charge of Burglary in the First Degree. See N.Y. Penal Law § 140.30; compare N.Y. Penal Law § 140.25.
nexion as the members of the Gates Four community did. Instead, the relief requested is a complete nullification, or at the very least, a potential long-term holdup, of the annexation. This remedy is broad and would go beyond the stated purpose of the Act. Nullifying an annexation is not simply an action to preserve the rights of servicemembers during their military service. Rather, it would allow the tolling provision to be improperly applied to non-servicemembers, people who would then receive the benefits and burdens of having the annexation nullified even if they failed to take timely action in seeking judicial review. Furthermore, as petitioners have acknowledged, the relief they request is not temporary because it could halt the annexation almost indefinitely.

While we recognize and appreciate the sacrifices of the members of our armed forces, we believe that Congress did not intend to defeat municipalities’ ability to operate, including their ability to complete annexations with finality. Petitioners did not seek to exempt their own property and did not seek judicial review within the 60–day time period. The Act’s tolling provision has never been applied to large-scale governmental action, such as annexations. Finally, since the Act does not reveal a clear intent to intrude upon North Carolina’s state sovereignty in the area of annexations, we hold that the trial court acted properly in granting respondent’s motion to dismiss. The order is

Affirmed.

Judges HUNTER and LEVINSON concur.

1. Criminal Law ⇠662.7

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. U.S.C.A. Const. Amend. 6.

2. Criminal Law ⇠662.7

Admission of expert witness’s opinion testimony that substances recovered from defendant’s residence and outbuilding were marijuana and opium, which was based on analyses conducted by non-testifying chemist, did not violate defendant’s right of confrontation in drug prosecution; defendant had an opportunity cross-examine expert, and testimony was not hearsay, as it was not offered as substantive evidence. U.S.C.A. Const. Amend. 6.

3. Criminal Law ⇠486(4)

Testimony as to information relied upon by an expert when offered to show the basis for the expert’s opinion is not hearsay, since it is not offered as substantive evidence.

Appeal by Defendant from judgment entered 14 August 2003 by Judge Susan C. Taylor in Superior Court, Cabarrus County. Heard in the Court of Appeals 17 May 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Amar Majmundar, for the State.
WYNN, Judge.

[1, 2] “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.” State v. Huffstetler, 312 N.C. 92, 108, 322 S.E.2d 110, 120–21 (1984). In this case, Defendant contends that expert testimony based on analyses conducted by someone other than the testifying expert violated his right to confrontation under the rationale of Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Because Defendant had an opportunity to cross-examine the expert, and because the analyses on which the expert testimony was based were not hearsay, we affirm the trial court’s admission of the expert testimony.

The facts pertinent to the resolution of the issues on appeal show that under a search warrant issued in November 2002, the Cabarrus County Sheriff’s Department searched Defendant’s residence and found marijuana and a lock box containing drugs under Defendant’s bed. Further, in an outbuilding, the police discovered additional drugs that appeared ready for distribution. Defendant’s appeal does not challenge the constitutionality of the search of his residence or the propriety of seizing the evidence of drugs on the property.

In the course of the police investigation into Defendant’s case, the various drugs found at Defendant’s residence were sent to the North Carolina State Bureau of Investigation for analyses. At trial, Special Agent Aaron Joncich testified as an expert witness regarding the results of those analyses, which had been conducted by another analyst at the State Bureau of Investigation. A jury convicted Defendant of trafficking in opium, possession of Lortab, possession of Klonopin, and intentionally maintaining a dwelling for the purpose of keeping or selling controlled substances. Defendant appealed.

On appeal, Defendant contends that the trial court committed prejudicial error by allowing the prosecution to introduce hearsay evidence of the chemical analyses performed by a non-testifying chemist because the admission of that evidence violated his confrontation rights under the rationale of Crawford, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177. We disagree.

In Crawford, the United States Supreme Court held that a recorded out-of-court statement made by the defendant’s wife to the police regarding the defendant’s alleged stabbing of another, which was introduced as hearsay at trial, was testimonial in nature and thus inadmissible due to Confrontation Clause requirements. Id. Regarding nontestimonial evidence, the Supreme Court stated: “Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law . . . as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.” Id. at 68, 124 S.Ct. at 1374, 158 L.Ed.2d at 203. Crawford made explicit that its holding was not applicable to evidence admitted for reasons other than proving the truth of the matter asserted. Id. at 60, 124 S.Ct. at 1369, 158 L.Ed.2d at 198 (stating that the Confrontation “Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted”) (citing Tennessee v. Street, 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985)).

[3] Under North Carolina case law, “testimony as to information relied upon by an expert when offered to show the basis for the expert’s opinion is not hearsay, since it is not offered as substantive evidence.” Huffstetler, 312 N.C. at 107, 322 S.E.2d at 120 (citing State v. Wood, 306 N.C. 510, 294 S.E.2d 310 (1982)). Indeed, our Supreme Court has stated that “[i]t is the expert opinion itself, not its underlying factual basis, that constitutes substantive evidence[,]” and that “[a]n expert may properly base his or her opinion on tests performed by another person, if the

Regarding expert testimony and the Confrontation Clause, our Supreme Court has held that “[t]he 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.” *Huffstetter*, 312 N.C. at 108, 322 S.E.2d at 120–21 (citing *United States v. Williams*, 447 F.2d 1285 (5th Cir.1971) (en banc), cert. denied, 405 U.S. 954, 92 S.Ct. 1168, 31 L.Ed.2d 231 (1972); *United States v. Lawson*, 653 F.2d 299 (7th Cir.1981), cert. denied, 454 U.S. 1150, 102 S.Ct. 1017, 71 L.Ed.2d 305 (1982)).

In the case *sub judice*, after a recitation of his credentials, Special Agent Joncich was tendered and accepted, without objection by Defendant, as an expert in analyzing controlled substances. Special Agent Joncich, after a thorough review of the methodology undertaken by his colleague, relied on the colleague’s analyses in forming his opinion that the substances recovered from Defendant’s residence and outbuilding were marijuana and opium, and his opinion was based on data reasonably relied upon by others in the field. Defendant was given an opportunity to cross-examine Special Agent Joncich as to his opinion and the bases thereof.

Since it is well established that an expert may base an opinion on tests performed by others in the field and Defendant was given an opportunity to cross-examine Special Agent Joncich on the basis of his opinion, we conclude that there has been no violation of Defendant’s right of confrontation under the rationale of *Crawford*.

We also note that Defendant has failed to argue his remaining assignments of error. They are therefore deemed abandoned. N.C. R.App. P. 28(b).

No error.

Judges BRYANT and JACKSON concur.
granted jurisdiction to the federal courts to enforce the rights created. Only then can a court conclude that Congress intended to make the claims removable. See Aaron v. National Union Fire Insurance Company, 876 F.2d 1157, 1164–65 (5th Cir. 1989), cert. denied, 493 U.S. 1074, 110 S.Ct. 1121, 107 L.Ed.2d 1028 (1990).

In the case before us, the court does not indicate why it believes Mr. Husmann’s case is completely preempted, and it seems clear to me that the defendant’s removal of the case cannot survive the application of the principles outlined in Aaron: The defendant has not directed our attention to any statute, nor has my research revealed any, specifically conferring federal jurisdiction over claims under the Warsaw Convention. In these circumstances, I would be hard put to find a congressional intention to make this case removable. I would therefore reverse the judgment of the district court and remand the case for remand to the state court from which, I believe, it was improperly removed.

1. Habeas Corpus $\approx$842

Court of Appeals would review de novo the district court’s legal conclusion that amended standard for granting habeas relief under Antiterrorism and Effective Death Penalty Act (AEDPA) did not apply to petitioner’s case. 28 U.S.C.A. § 2254(d)(1).

2. Habeas Corpus $\approx$205

Amended standard for granting habeas relief under Antiterrorism and Effective Death Penalty Act (AEDPA) did not apply to petitioner’s case, which was pending when AEDPA became effective. 28 U.S.C.A. § 2254(d)(1).

3. Habeas Corpus $\approx$319.1, 361

Before a state prisoner is entitled to federal habeas corpus relief, he must first exhaust his state remedies and present the habeas claim to the state court; if a petitioner has not presented his habeas corpus claim to the state court, the claim is generally defaulted.

4. Habeas Corpus $\approx$314

Court of Appeals will not review a procedurally defaulted habeas claim because the state has been deprived of an opportunity to address the claim in the first instance.

5. Habeas Corpus $\approx$382

To present a habeas claim to the state court, a prisoner must “fairly present” not
only the facts but also the substance of his federal habeas corpus claim.

6. Habeas Corpus ⇨383
   To satisfy the requirement that federal habeas claims must first be "fairly presented" to state court, a petitioner is required to refer to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue; presenting a claim that is merely similar to the federal habeas claim is not sufficient to satisfy the fairly presented requirement.
   See publication Words and Phrases for other judicial constructions and definitions.

7. Habeas Corpus ⇨402
   Although the procedural bar issue should ordinarily be resolved first, judicial economy sometimes dictates reaching the merits of federal habeas claims if the merits are easily resolvable against a petitioner while the procedural bar issues are complicated.

8. Criminal Law ⇨419(1.10)

9. Criminal Law ⇨662.8
   The Confrontation Clause and the hearsay rule are not coextensive; an out-of-court statement can pass constitutional scrutiny if the declarant is unavailable and the statement is shown to have inherent reliability. U.S.C.A. Const.Amend. 6.

10. Criminal Law ⇨662.8
    Reliability required for out-of-court statement to be admissible under Confrontation Clause can be presumed if the evidence either (1) falls within a firmly rooted hearsay exception, or (2) has particularized guarantees of trustworthiness; the evidence must be shown to be so trustworthy that adversarial testing would add little to its reliability. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⇨419(1.10)
    If the declarant’s truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, the hearsay rule does not bar admission of the statement at trial.

12. Criminal Law ⇨662.8
    In the context of evidence relied upon by experts in forming their opinions, trustworthiness required of out-of-court statements under Confrontation Clause is shown by testifying expert’s reliance on the material in forming his opinion. U.S.C.A. Const.Amend. 6; Fed.Rules Evid.Rule 703, 28 U.S.C.A.

13. Habeas Corpus ⇨453
    When the outcome of federal habeas litigation involves a matter of state law, a federal court is bound by a legal interpretation made by the state’s highest court.

14. Habeas Corpus ⇨490(1)
    Admissibility of evidence at a state trial is a matter of state law and ordinarily will not form the basis for federal habeas corpus relief; only when the evidentiary ruling impinges on a specific constitutional protection or is so prejudicial that it amounts to a denial of due process may a federal court grant a habeas corpus remedy. U.S.C.A. Const. Amend. 14.

15. Habeas Corpus ⇨767
    Presumption of correctness accorded to state court factual findings in habeas corpus action does not extend to mixed question of law and fact. 28 U.S.C.(1994 Ed.) § 2254(d).

16. Habeas Corpus ⇨775(1)
    Whether a hearsay statement violates the Confrontation Clause is mixed question of law and fact, in habeas proceeding, in that it involves application of legal principles to historical facts of a case. U.S.C.A. Const. Amend. 6.

17. Habeas Corpus ⇨775(1)
    On habeas review, Court of Appeals would give deference to the state court’s factual findings regarding the timing, manner, and circumstances of challenged hearsay statement, but would review de novo the ultimate determination that petitioner’s Confrontation Clause rights were violated by statement’s admission. U.S.C.A. Const. Amend. 6.

18. Criminal Law ⇨662.1
    Whether or not testimony was characterized as hearsay under Iowa law, admission
of expert's testimony that his colleagues had not given him persuasive reason to disregard his own opinion that death at issue resulted from murder did not violate Confrontation Clause, inasmuch as evidentiary value of colleagues' statements arose from their effect on expert, and evidence was intended to reveal expert's state of mind after engaging in discussion of his findings and conclusions with colleagues. U.S.C.A. Const. Amend. 6.

19. Criminal Law \(\Rightarrow 419(2.20)\)

Out-of-court statement which is offered to reveal the recipient's state of mind is not hearsay. Fed. Rules Evid. Rule 801(e), 28 U.S.C.A.

20. Criminal Law \(\Rightarrow 662.8\)


21. Habeas Corpus \(\Rightarrow 481\)

Even if expert's testimony that his colleagues had not given him persuasive reason to disregard his own opinion that death resulted from murder was hearsay and violated Confrontation Clause, its admission was harmless beyond a reasonable doubt; prosecution had assembled solid case based on compelling circumstantial evidence, upon which jury could reasonably find guilt without expert testimony, and none of other expert witnesses discredited expert's findings based on combination of factors that expert considered. U.S.C.A. Const. Amend. 6.

22. Criminal Law \(\Rightarrow 1168(2)\)


23. Habeas Corpus \(\Rightarrow 842\)

In habeas case, Court of Appeals reviews the district court's harmless error analysis de novo.

24. Habeas Corpus \(\Rightarrow 461\)

In a habeas corpus case, Court of Appeals applies the more deferential \textit{Brecht} harmless error review standard, by determining whether error had substantial or injurious effect or influence on jury's verdict, to constitutional errors that have been subject to harmless error analysis by state courts, but uses the strict standard under \textit{Chapman}, looking to whether error was harmless beyond a reasonable doubt, in cases in which the state court has not applied the \textit{Chapman} analysis in the first instance.

25. Criminal Law \(\Rightarrow 1168(2)\)

In the context of Confrontation Clause violation, to determine whether error is harmless beyond a reasonable doubt, court must examine other evidence adduced at trial and determine whether it appears beyond a reasonable doubt that error complained of did not contribute to verdict obtained; in doing so, court must consider host of factors including (1) importance of witness' testimony to prosecution's case, (2) whether testimony was cumulative, (3) presence or absence of corroboring or contradicting testimony of witness on material points, (4) the extent of cross-examination otherwise permitted, and (5) overall strength of prosecution's case. U.S.C.A. Const. Amend. 6.

26. Habeas Corpus \(\Rightarrow 842\)

In habeas case, Court of Appeals reviews the district court's legal conclusions de novo.

27. Constitutional Law \(\Rightarrow 90.1(1)\)

Witnesses \(\Rightarrow 16\)

State did not violate defendant's free speech rights under First Amendment when it obtained his journal by subpoena duces tecum, given that defendant had previously left journal in restaurant and therefore risk that speech would be curtailed through public disclosure was created by his own conduct. U.S.C.A. Const. Amend. 1.

28. Witnesses \(\Rightarrow 297(1)\)

Fifth Amendment's protection against self-incrimination applies only when the accused is compelled to make a testimonial communication that is incriminating. U.S.C.A. Const. Amend. 5.

29. Criminal Law \(\Rightarrow 393(1)\)

Fifth Amendment's protection against self-incrimination may be implicated when an act of complying with a government demand for documents will amount to a testimonial act. U.S.C.A. Const. Amend. 5.
30. Witnesses

When material has been transferred from a client to an attorney for the purpose of seeking legal advice and subpoena compelling production is directed to the attorney, the proper inquiry under Fifth Amendment privilege against self-incrimination is whether the subpoena, if directed to the client himself, would require compelled testimonial self-incrimination. U.S.C.A. Const.Amend. 5.

31. Criminal Law

At least with respect to business records, if the party asserting the Fifth Amendment privilege against self-incrimination has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged. U.S.C.A. Const.Amend. 5.

32. Criminal Law

Although defendant's compelled act of producing personal papers can, in some circumstances, result in compelled testimony in violation of Fifth Amendment privilege against self-incrimination, when existence, possession, and authenticity of documents are foregone conclusions, and defendant would add little or nothing to government's case by his act of producing documents, Fifth Amendment is not violated by compelling production, inasmuch as nothing defendant has said or done is deemed to be sufficiently testimonial for purposes of the privilege. U.S.C.A. Const.Amend. 5.

33. Criminal Law

Fifth Amendment protection against self-incrimination did not extend to defendant's journal, inasmuch as defendant negligently abandoned whatever protections which might have inured to contents of journal, as personal document, when he left journal at restaurant and contents became known to law enforcement officers without any government compulsion. U.S.C.A. Const. Amend. 5.

34. Criminal Law

State did not violate defendant's Fifth Amendment right not to incriminate himself when it compelled production of defendant's journal, given that defendant had earlier admitted that he owned and authored journal after it was discovered in restaurant and turned over to police and state already had copy of journal in its possession. U.S.C.A. Const.Amend. 5.

Nicholas Critelli, Des Moines, IA, argued (Lylea D. Critelli, on the brief), for Appellee/Cross–Appellant.

Thomas D. McGrane, Assistant Attorney General, Des Moines, IA, argued (Thomas J. Miller, on the brief), for Appellant/Cross–Appellee.

Before BOWMAN, Chief Judge, McMILLIAN, RICHARD S. ARNOLD, JOHN R. GIBSON, FAGG, WOLLMAN, BEAM, LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, MURPHY, and KELLY, Circuit Judges.

BEAM, Circuit Judge.

Gerardo Acevedo, on behalf of the State of Iowa (the State), appeals the district court's grant of habeas corpus relief under 28 U.S.C. § 2254 to Bryan Kirby Barrett. We reverse.

I. BACKGROUND

Barrett has been twice tried for, and twice convicted of, the murders of two young women. The Iowa Supreme Court set aside his first conviction and granted him a new trial on the ground that certain evidence had been improperly admitted. See State v. Barrett, 401 N.W.2d 184, 189 (Iowa 1987) (Barrett I). Barrett was again tried and convicted. His second conviction was affirmed by the Iowa Supreme Court. See State v. Barrett, 445 N.W.2d 749 (Iowa 1989) (Barrett II). Barrett then sought a writ of habeas corpus under 28 U.S.C. § 2254. The district court granted the writ, finding that Barrett's First and Fifth Amendment rights had been violated by the trial court's admission of a journal and that Barrett's Sixth Amendment right to confront witnesses had been violated by the trial court's admission of hearsay testimony on the Confrontation Clause issue.
The State appealed to this court and Barrett cross-appealed, contending that the Iowa Supreme Court had improperly relied on the prior reversed conviction in making findings in his second appeal. A panel of this court reversed the district court on the First and Fifth Amendment issues but agreed with the district court that Barrett’s Sixth Amendment Confrontation Clause right had been infringed. See Barrett v. Acevedo, 143 F.3d 449 (8th Cir.1998) (rehearing en banc granted, opinion vacated July 28, 1998). The State then sought a rehearing and the matter was reheard en banc. We now reverse the district court.2

The evidence adduced at Barrett’s second trial showed that the bodies of two young women, Cynthia Kay Walker and Carol Ann Willits, were found several miles apart in rural Iowa on the morning of February 23, 1979. Both had been shot with a .38 caliber weapon. Cynthia Walker had been shot three times and was found dead on a gravel road. Carol Ann Willits had been shot once through the temple and was found in the front seat of her car on a nearby blacktop road. She was blindfolded and was wearing men’s work gloves. The gun was found in her lap.

Bryan Kirby Barrett had been acquainted with both women. Cynthia Walker was Barrett’s girlfriend at the time of her death, and Carol Ann Willits may also have been dating him, although her friends testified that the two were only friends. A note in Carol Ann Willits’s handwriting, torn from a spiral steno notebook, was found in the car near her body. The note was addressed to Barrett and stated in part, “I’m sorry I’ve caused you so much trouble,” and “I hope you find your peace/I found mine.” A torn-up rough draft of the note, also from a spiral steno notebook, was found in the trash at Carol Willits’s apartment. Several crossed-out notations appear in the margins of the reconstructed rough draft. These include several misspellings of Carol’s name, i.e., “Kayrol,” “Caryl.” Curiously, a post script added to the rough draft was also added to the final draft as a post script, not incorporated into the body of the letter. The remnant of yet another draft of the letter was also found in the car—a torn corner, still attached to the spiral notebook. The rest of that draft was never found.

Also found in the car was a three-page postmarked letter from Barrett to Willits. The letter informed her that he did not reciprocate her romantic feelings for him. The pages of the letter, however, had no cancellation impressions on them, as if they were put in the envelope after it had been mailed. A valentine card in an envelope addressed to Barrett from Cynthia Walker was also found in the car, as were strands of Walker’s hair.

The defense theory was that Willits was romantically involved with Barrett and had caught him in a compromising situation with Walker. In a jealous rage, Willits was to have killed Walker and then committed suicide. The State’s theory, on the other hand, was that Barrett had killed Walker to obtain life insurance proceeds from a policy he had purchased on Walker’s life. The State further contended that Barrett had left false clues to give the impression of murder/suicide by Willits.

The evidence showed that Barrett had taken out a life insurance policy on Cynthia Walker shortly before her death. He was the beneficiary on the $50,000 policy, which had a double indemnity clause in the case of a nonnatural death. The State also produced evidence that Barrett had once forged his ex-wife’s signature on an application for life insurance and had then plotted to kill her with money as his motive. This scheme was shown through a 143-page journal that was received into evidence at the second trial.3

The journal, which had been written in 1977,

2. Because we agree with the panel’s holdings on the applicability of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and Barrett’s First and Fifth Amendment claims, those portions of the panel’s vacated opinion are essentially restated herein in Parts II(A) and (C).

3. An additional, undated journal that outlined a scheme to kill a paperboy, had been admitted into evidence at Barrett’s first trial. On appeal, the Iowa Supreme Court found that the journal’s admission was error because it had been admitted for the improper purpose of showing Barrett’s alleged propensity to commit the crimes. The court reversed and remanded for a new trial. See Barrett I, 401 N.W.2d at 189.
had been inadvertently left by Barrett at a fast food restaurant and had been turned over to police. It described Barrett’s feelings about a pending divorce and child custody dispute and discussed various schemes to harm or kill his wife and others.

The State also produced evidence that, although Willits had purchased the gun, she had done so at Barrett’s behest and with his money. Significantly, the State showed that Willits had applied for a permit for the weapon before she had any motive to kill Cynthia Walker, that is, before she ostensibly found Barrett with Walker. There was also evidence that the blindfold found on Willits was made from material matching a pillowcase found in Barrett’s parents’ home. In addition, there was evidence that two cars had been seen on the blacktop road on the night of the murders—one matching the description of Willits’s car and one with rectangular tailights, similar to those on Barrett’s parents’ car.

The evidence also portrayed Carol Ann Willits as an unlikely murderer. On the night of the murder, she had prepared a spaghetti dinner for some former coworkers. The women testified that she was in a good mood, showed them family Christmas pictures and spoke excitedly of a trip to Ireland she was planning with friends. Her friends testified that she was a helpful, cheerful woman who regarded Barrett as a friend. Evidence showed that Willits had received a phone call from Barrett that night.

Expert testimony was presented on the issue of whether Willits’s death was a suicide or a homicide. Dr. Vincent DiMaio, a physician and forensic pathologist, testified that, in his opinion, Willits had been murdered. He based his opinion on six factors: (1) the presence of a blindfold, which he found highly unusual in a suicide; (2) the knot on the blindfold was tied on the left by a right-handed person; (3) Willits was wearing large cotton work gloves, which would have made it difficult for her to tie the knot and which would have become bunched in the trigger of the gun; (4) Willits’s hand was found in her lap with the gun on top of her hand when the recoil of the gun should have sent the hand and the gun to the right; (5) the path of the bullet was straight, when in most suicides the path of the bullet is at an angle; and (6) there was an intact paper bag on the seat which should have been flattened by the gun.

He emphasized that each of these factors, standing alone, could be discredited, but that his opinion was based on the presence of all six factors.

On cross-examination, Dr. DiMaio conceded that he had formed his opinion on the first day he was contacted by authorities. This exchange followed:

Q. And you reached that judgment on the 29th day of November and you haven’t changed it, have you?
A. Nothing has been presented to me since then to change the opinion.
Q. Then you’re not about to. You’re 99 percent right and you’re not about to change your opinion, are you, Doc?
A. I change my opinions when you present material to me to show that I am wrong and then I’ll change my opinion.

Trial Transcript at 617.

To counter the implication that Dr. DiMaio was “so inflexible or dogmatic that [he] would never change [his] opinion if presented with contrary evidence,” Dr. DiMaio was asked, on redirect examination, whether it was common practice for forensic pathologists to discuss cases with colleagues when coming to a professional conclusion. Id. at 619. He answered in the affirmative, noting that such discussions helped avoid a “God complex.” Id. Dr. DiMaio was then asked if any of his colleagues “[had] given [him] persuasive reason to disregard [DiMaio’s] opinion.” Id. at 622. Over Barrett’s hearsay objection, Dr. DiMaio was allowed to answer and stated, “No, sir.” 5 Id. at 622.

4. The State further showed that it was doubtful that Willits could have found Walker and Barrett together on the night it was supposed to have occurred. Her car was being repaired on that day and she would have had to walk twenty blocks in sub-zero temperatures.

5. That answer is the subject of Barrett’s Sixth Amendment Confrontation Clause claim.
Three other expert witnesses testified that the death was a suicide. Each of these experts discredited the factors that Dr. DiMaio relied on in forming his opinion. Although each factor was discredited singly, there was no refutation of the factors in combination.

II. DISCUSSION

A. Applicability of the Antiterrorism and Effective Death Penalty Act

First, the parties dispute the applicability of a provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) to Barrett’s habeas petition. The State contends that the Act’s amended standard for granting habeas relief applies here, see 28 U.S.C. § 2254(d)(1), while Barrett takes an opposing view. In the district court’s order certifying probable cause for appeal, the district court held that the Act did not apply to this pending case. We review the district court’s legal conclusion de novo. See Hendrix v. Norris, 81 F.3d 805, 807 (8th Cir.1996).

The Act was signed into law on April 24, 1996, and, among other things, it: (1) amended certain sections of chapter 153 of Title 28 of the United States Code, which govern all federal habeas corpus proceedings; and (2) created a new chapter 154 which applies only to habeas proceedings in capital cases. As to capital cases, the Act expressly provides that “[c]hapter 154 . . . shall apply to cases pending on or after the date of enactment of this Act.” Pub.L. No. 104–132, § 107(c), 110 Stat. 1226 (1996). In contrast, the Act is silent as to whether the amendments to chapter 153 apply to pending cases. The Court read this “as indicating implicitly that the amendments to chapter 153 were assumed and meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act.” Id. at 2063. The Court reasoned that “[n]othing . . . but a different intent explains the different treatment.” Id. at 2064. The difference between the two chapters “illustrates the familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted.” Id. at 2065.

Based on the Supreme Court’s decision in Lindh, and the fact that Barrett’s habeas petition was filed on February 5, 1991, we conclude that 28 U.S.C. § 2254(d), as amended by the Act, does not apply to Barrett’s pending habeas corpus petition. Accordingly, we cannot apply the amended standard to Barrett’s habeas petition and need not address Barrett’s argument that the Act is unconstitutional.

B. Confrontation Clause

1. Procedural Bar

As a threshold matter, the State argues that Barrett’s Confrontation Clause claim is procedurally barred. Before a state prisoner is entitled to federal habeas corpus relief, he must first exhaust his state remedies and present the habeas claim to the state court. See Abdullah v. Groose, 75 F.3d 408, 411 (8th Cir.1996) (en banc). If a petitioner has not presented his habeas corpus claim to the state court, the claim is generally defaulted. See id. We will not review a procedurally defaulted habeas claim because the state has been deprived of an opportunity to address the claim in the first instance. See id. In order to present a habeas claim to the state court, a prisoner must “fairly present” not only the facts, but also the amendments to chapter 153 apply to pending cases.

We may summarily dispose of this issue because the Supreme Court has resolved it. In Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), the Court addressed the issue of “whether that new section of the statute dealing with petitions for habeas corpus governs applications in non-capital cases that were already pending when the Act was passed.” Id., 117 S.Ct. at 2061. The Court concluded that amended 28 U.S.C. § 2254(d) does not apply to pending cases, emphasizing Congress’ express statement in the Act that new chapter 154 shall apply to pending cases, in contrast with congressional silence as to the applicability of amended chapter 153 to pending cases. The Court read this “as indicating implicitly that the amendments to chapter 153 were assumed and meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act.” Id. at 2063. The Court reasoned that “[n]othing . . . but a different intent explains the different treatment.” Id. at 2064. The difference between the two chapters “illustrates the familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted.” Id. at 2065.
2. Merits

Barrett’s Sixth Amendment claim centers on Dr. DiMaio’s answer, “No, sir,” to the question whether any colleagues had given DiMaio persuasive reason to disregard his own opinion. The Iowa Supreme Court, without mentioning the Sixth Amendment, found that the statement amounted to improper hearsay under Iowa law. See *Barrett II*, 445 N.W.2d at 754. Although the court stated that it was “inclined to disapprove” Dr. DiMaio’s testimony, it expressly deferred considering whether the statement “amounted to abuse requiring reversal.” *Id.* at 751. The court, however, later found that even if the statement were hearsay, its admission would nonetheless amount to harmless error. See *id.*

[8–12] The court conceded that the declaration would not be hearsay if offered in federal court or in most, if not all, other state courts. See *id.* (rejecting the positions of other state and federal courts and relying on its pre-Rule 703 doctrine of “obscured” hearsay). The State of Iowa is, of course, free to construct such evidentiary rules as it deems proper and it has apparently formulated an unusual hearsay rule with respect to Rule 703 evidence. The Iowa Supreme Court’s constitutional scrutiny if the declarant is unavailable and the statement is shown to have inherent reliability. See *Idaho v. Wright*, 497 U.S. 805, 814–15, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). Such reliability can be presumed if the evidence either: (1) falls within a firmly rooted hearsay exception or (2) has “particularized guarantees of trustworthiness.” *Id.* at 815, 110 S.Ct. 3139. It must be shown to be “so trustworthy that adversarial testing would add little to its reliability.” *Id.* at 821, 110 S.Ct. 3139. In other words, “if the declarant’s truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial.” *Id.* at 820, 110 S.Ct. 3139.

In the context of Rule 703 evidence, such trustworthiness is shown by the testifying expert’s reliance on the material in forming his opinion. See, e.g., *United States v. Abbas*, 74 F.3d 506, 512–13 (4th Cir.1996) (noting “Rule 703 exists so that scientific standards may be admitted as trustworthy and reliable exceptions to the hearsay rule” and recognizing that “the right of confrontation is not violated by an expert’s reliance on out-of-court sources where the utility of trial confrontation would be remote and of little value to either the jury or the defendant”); *United States v. A & S Council Oil Co.*, 947 F.2d 1128, 1134 (4th Cir.1991) (stating that Rule 705, which allows cross-examination on the bases for the
finding that Dr. DiMaio's statement should be characterized as obscured hearsay under Iowa law does not impact our Confrontation Clause analysis. If the Iowa Supreme Court characterizes certain evidence as hearsay under Iowa law, it does not necessarily follow that admission of such evidence violates the Confrontation Clause of the Constitution. If that were so, constitutional requirements would vary from state to state, depending on each state's evidentiary rules. Our analysis is not dependent on whether a state court defines an out-of-court statement as hearsay, but on whether the statement violates the Sixth Amendment.

[13, 14] When the outcome of federal habeas litigation involves a matter of state law, a federal court is bound by a legal interpretation made by the state's highest court. See Clark v. Groose, 16 F.3d 960, 962 (8th Cir. 1994). Of course, admissibility of evidence at a state trial is a matter of state law and ordinarily will not form the basis for federal habeas corpus relief. See id. Only when the evidentiary ruling impinging on a specific constitutional protection or is so prejudicial that it amounts to a denial of due process may a federal court grant a habeas corpus remedy. See id. Our inquiry is thus confined to whether the admission of Dr. DiMaio's statement violated Barrett's Sixth Amendment right to confrontation.


expert's opinions, furnishes the means through which concerns about admission of inadmissible evidence under 703 are vindicated); Reardon v. Manson, 806 F.2d 39, 41 (2d Cir. 1986) (noting “[e]xpert reliance on the output of others does not necessarily violate the confrontation clause where the expert is available for questioning concerning the nature and reasonableness of his

Peterson, 6 F.3d 1373, 1379 (9th Cir. 1993). Accordingly, we give deference to the state court's factual findings regarding the timing, manner, and circumstances of the hearsay statement, but review de novo the ultimate determination that Barrett's Confrontation Clause rights were violated. See Swan, 6 F.3d at 1379.

[18–20] We find that the statement in question, whether or not characterized as hearsay under Iowa law, is not the type of utterance that violates the Confrontation Clause. Hearsay is ordinarily an out-of-court statement offered to prove the truth of the matter asserted. Fed.R.Evid. 801(c). Therefore, by definition an out-of-court statement is not hearsay if it is not offered to prove the facts asserted. See Roberts v. Newville, 554 N.W.2d 298, 300 (Iowa Ct.App. 1996). A common type of statement that falls outside the hearsay definition, because it is not offered for its truth, is a statement that is offered to show its effect on the recipient. See id. Thus, an out-of-court statement which is offered to reveal the recipient’s state of mind is not hearsay. See id. A statement that is not hearsay raises no Confrontation Clause concerns. See Tennessee v. Street, 471 U.S. 409, 414–17, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985) (stating an accomplice's out-of-court statement was non-hearsay because it was offered to show, not what happened at the murder scene, but what happened when the accomplice confessed); United States v. Inadi, 475 U.S. 387, 394, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986) (referring to co-conspirator’s out-of-court statements as an “exemption to the hearsay rule”).

In this case, the evidentiary value of any colleagues' statements that were made to Dr. DiMaio did not arise from the truth of the statements, but rather from their effect on Dr. DiMaio. Dr. DiMaio did not, as Barrett claims, recite opinions of his colleagues without providing Barrett the opportunity to cross-examine, suffices).
front and cross-examine the individuals. An examination of the testimony in context shows that it was intended to reveal Dr. DiMaio’s state of mind. After stating that it is common practice in forensic medicine to discuss findings and conclusions with associates, Dr. DiMaio was asked if any of his colleagues “had given [him] persuasive reason to disregard [DiMaio’s] opinion.” Trial Transcript at 621. He was asked, in other words, about his state of mind after these discussions. Barrett’s counsel had opened the door to this line of inquiry by attempting to portray Dr. DiMaio’s mind-set as inflexible and dogmatic. The line of questioning was aimed at negating that inference.

Accordingly, we find Dr. DiMaio’s answer did not constitute evidence that triggers a Sixth Amendment confrontation issue.

[21–23] Most importantly, we find that, even if the statement were hearsay and it were to violate the Confrontation Clause, any error would be harmless. A violation of the Confrontation Clause is subject to harmless error analysis. See Harrington v. Iowa, 109 F.3d 1275, 1279 (8th Cir.1997). We review the district court’s harmless error analysis de novo. Pruitt v. Norris, 153 F.3d 579, 590 (8th Cir.1998).

[24] In a habeas corpus case, we apply the more deferential harmless error review standard of Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (substantial or injurious effect or influence on the jury’s verdict) to constitutional errors that have been subject to harmless error analysis by state courts. See Joubert v. Hopkins, 75 F.3d 1232, 1245 (8th Cir.1996). However, we use the strict standard set out in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (harmless beyond a reasonable doubt) in cases where the state court has not applied the Chapman analysis in the first instance. See Joubert, 75 F.3d at 1245. The Iowa Supreme Court conducted harmless error review on the state law hearsay issue, but did not specifically rely on the Chapman standard for review of constitutional errors. It did, however, apply a similarly rigorous test. See Barrett II, 445 N.W.2d at 754. It presumed the hearsay statement was prejudicial error unless the evidence affirmatively established the contrary. See id. Thus, we are of the view that the harmless error review that the Iowa Supreme Court conducted was essentially the same as that required by Chapman. Accordingly, we would be free to proceed under Brecht. However, we need not decide which standard to apply here, because under even the stringent standard, we find the admission of the statement was harmless “beyond a reasonable doubt.”

[25] In the context of a Confrontation Clause violation, to determine whether error is harmless beyond a reasonable doubt, we must examine the other evidence adduced at trial and determine whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. See Lufkins v. Leapley, 965 F.2d 1477, 1481 (8th Cir.1992). We must consider a host of factors including: (1) the importance of the witness’s testimony to the prosecution’s case; (2) whether the testimony was cumulative; (3) the presence or absence of corroborating or contradicting testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution’s case. See Orndorff v. Lockhart, 998 F.2d 1426, 1431 (8th Cir.1993).

This was not a close case. Our review of the record shows that this case was much more than a “battle of the experts,” with Dr. DiMaio’s testimony being pivotal. The prosecution assembled a solid case based on compelling circumstantial evidence. Barrett had purchased a $50,000 life insurance policy on Cynthia Walker. The policy contained a double indemnity clause in case of nonnatural death. The State offered proof that Carol Willits purchased the murder (and ostensible suicide) weapon at Barrett’s request. The policy contained a double indemnity clause in case of nonnatural death. The State further presented evidence that a car with rectangular taillights, similar to Barrett’s parents’ Buick, had been seen on the road where Willits died. There was also evidence that the blindfold used on Carol Willits was made of fabric that matched a pillowcase found in Barrett’s parents’ home.

The most damaging evidence, the admission of which the court affirms today, was contained in Barrett’s earlier journal. The 143-page handwritten journal details numerous plans and schemes to kill or maim his ex-wife, including plans to burn her face with
The journal is replete with drawings, diagrams, and sketches of his sinister designs. In the journal, Barrett repeatedly refers to his need to get rid of his ex-wife. The State also showed that, contemporaneously with the inception of the journal, Barrett had forged his ex-wife's signature on an application for life insurance. This evidence tended to negate Barrett's innocent explanation for his later purchase of insurance on the life of his then-girlfriend, Cynthia Walker. It is hard to imagine that the scientific testimony of experts would overwhelm a jury in the face of such compelling evidence. In short, based on this evidence, a reasonable juror could find, without relying on the expert testimony, that Barrett committed these murders.

In fact, however, the expert testimony favors the prosecution. The prosecution presented Dr. DiMaio, who testified that, in his opinion, Carol Willits was murdered. He based his decision on a combination of six factors. None of the other expert witnesses could discredit the combined factors. We find that Dr. DiMaio's testimony is more persuasive. It simply makes more sense than the testimony of the other experts. We have no difficulty finding that the jury believed Dr. DiMaio over the others, without regard to any asserted bolstering of his testimony by unnamed supporters. Having reviewed the record of this case, we find any error to be harmless beyond a reasonable doubt.

C. The Journal

1. First Amendment

As explained above, Barrett wrote a 143-page journal that had its last entry dated July 1977, which was approximately two years before the deaths of Willits and Walker. In July 1977, Barrett inadvertently left this journal in a restaurant in Iowa City. See Barrett I, 401 N.W.2d at 189–90. Restaurant employees found the journal and alerted the police because of the nature of the journal's entries. The police made a copy of the journal, although the original journal was returned to the restaurant and subsequently to Barrett. See id. at 190. The police provided a copy of the journal to agents of the Division of Criminal Investigation during the investigation of the two deaths. Prior to Barrett's first trial, the State subpoenaed the original journal from Barrett's counsel, and it was produced and admitted into evidence over Barrett's objection at trial. See id. On appeal, the Supreme Court of Iowa affirmed the admission of the journal and held that it was “relevant and material to some legitimate issue other than a general propensity to commit wrongful acts.” Id. at 187. The court held that the journal entries, when considered with other evidence in the case, were “relevant as tending to dispel an innocent purpose for defendant’s action in obtaining insurance on Walker’s life.” Id. at 188.

At Barrett's second trial, this journal was again admitted into evidence over his objection. On appeal, Barrett argued that evidence surrounding his purchase of life insurance on his wife, including his journal, was erroneously admitted because he did not purchase the insurance for a sinister purpose. Barrett contended that he obtained the insurance because his wife lost her job and therefore lost the life insurance provided by her employer. See Barrett II, 445 N.W.2d at 752. The Supreme Court of Iowa held that Barrett's explanation went to the weight of the insurance evidence and not its admissibility.

The federal district court held that admitting Barrett’s journal into evidence violated his rights under both the First Amendment and the Fifth Amendment. We review the district court’s legal conclusions de novo. See Hendrix, 81 F.3d at 807.

The district court held that under Fisher v. United States, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976), Barrett had stated a legally-cognizable First Amendment claim. Fisher involved the IRS’s summons to the taxpayers’ attorneys to obtain tax-related work papers. See id. at 393–94, 96 S.Ct. 1569. The Court upheld the seizure of the documents under the Fifth Amendment, as will be discussed below, but left open the possibility that more personal documents might find trip to California with him and was afraid her parents would sue him if something happened to her.

8. It is not surprising that Barrett’s “innocent” explanation did not sway the jury. His explanation for the purchase of insurance on his girlfriend’s life was that he planned to take her on a
protection elsewhere, either in the Constitution, such as under the First or Fourth Amendments, or through an evidentiary privilege. See id. at 401, 96 S.Ct. 1569.9

The State argues that to the extent that Fisher held that the First Amendment protects personal papers, only those documents raising freedom of association, and not freedom of speech, concerns are protected. The State emphasizes that the case cited by the Supreme Court in connection with the First Amendment, NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), involved the NAACP’s membership list and its members’ freedom of association, and did not raise freedom of speech issues.

Public disclosure of membership identities may, in some circumstances, pose a very real threat to freedom of association. Accordingly, “[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.” Id. at 462, 78 S.Ct. 1163. This case, however, is based upon Barrett’s privacy and speech interests in his journal, and he does not contend that publicly disclosing his journal will chill his right to freely associate.

We need not, and do not, decide whether Fisher’s suggestion that the First Amendment may protect certain private papers applies not only to papers implicating freedom of association interests, but also to those implicating freedom of speech interests. Even assuming that the First Amendment does protect private papers raising certain types of speech interests, we do not believe that Barrett’s journal is the type of speech that would, or should, be constitutionally protected. The risk that Barrett’s speech would be curtailed through public disclosure was created by Barrett himself when he left his journal in a public place. In fact, one type of harm that could arise from public disclosure—that Barrett would stop making entries in his journal because he no longer felt free to express himself—may have already occurred since he ceased writing in this journal soon after the police discovered it. But it was Barrett’s own action, and not government action, that caused such speech to cease. See United States v. Apker, 705 F.2d 293, 305 (8th Cir.1983).10

Moreover, we believe that more recent Supreme Court cases reflect less willingness to recognize First Amendment interests in criminal cases. In Wisconsin v. Mitchell, 508 U.S. 476, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993), the Court, in a unanimous opinion, upheld a state statute that enhanced the defendant’s sentence for aggravated battery and theft because he intentionally selected his victim because of his victim’s race. While enhancing a sentence merely because the government does not agree with a defendant’s beliefs would violate the Constitution, the statute permissibly “single[d] out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm.” Id. at 487–88, 113 S.Ct. 2194. The Court also held that:

The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a defendant’s previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like. Id. at 488, 113 S.Ct. 2194 (citing Haupt v. United States, 330 U.S. 631, 67 S.Ct. 874, 91 L.Ed. 1145 (1947));11 see also Dawson v. Delaware, 503 U.S. 159, 165, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992) (“[T]he Constitution does not erect a per se barrier to the admis-

9. In a footnote, the Court further explained that “[s]pecial problems of privacy which might be presented by subpoena of a personal diary, United states v. Bennett, 409 F.2d 888, 897 (2d Cir. 1969) (Friendly, J.), are not involved here.” Fisher, 425 U.S. at 401 n. 7, 96 S.Ct. 1569. The Bennett case involved a Fourth Amendment challenge to seizing a letter but did not address the implications of the First Amendment. See Bennett, 409 F.2d at 896–97.

10. In United States v. Apker, we rejected a First Amendment challenge to a warrant seeking, among other things, disclosure of the membership list of a Hell’s Angels group. We noted that the group members publicly identified themselves as Hell’s Angels by their dress; therefore, any additional harm from disclosing their membership list was unlikely. See Apker, 705 F.2d at 305. Similarly, here, it is Barrett who publicly disclosed his speech, not the government.

11. Barrett argues that Wisconsin v. Mitchell’s
tion of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.

We conclude that the State did not violate Barrett's First Amendment right when it obtained his journal by subpoena duces tecum, and we reverse the district court on this issue.

2. Fifth Amendment

The district court also held that Barrett's Fifth Amendment right not to incriminate himself was violated through a subpoena duces tecum requiring him to produce his journal.

The Fifth Amendment's protection applies only when the accused is compelled to make a testimonial communication that is incriminating. See Fisher, 425 U.S. at 408, 96 S.Ct. 1569. The Fifth Amendment's protection may also be implicated because an act of complying with a government demand for documents will amount to a testimonial act, i.e., the accused's testifying to the existence, possession, or authenticity of the thing produced. See Baltimore City Dep't of Social Servs. v. Bouknight, 493 U.S. 549, 555, 110 S.Ct. 900, 107 L.Ed.2d 992 (1990). We are thus faced with the issues of whether the Fifth Amendment protects either the contents of Barrett's journal or the communicative aspects of Barrett's actions in producing the journal.

Barrett's argument is premised on the Supreme Court's broad pronouncement that there was no difference between compelling a witness to testify against himself and using a person's private papers against him. See Boyd v. United States, 116 U.S. 616, 633, 6 S.Ct. 524, 29 L.Ed. 746 (1886). Boyd's continued vitality has been questioned in later cases. See, e.g., Bouknight, 493 U.S. at 555, 110 S.Ct. 900 (holding the Fifth Amendment did not shield a mother from producing her infant son); United States v. Doe, 465 U.S. 605, 612 n. 9, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984) (holding that the Fifth Amendment does not protect the contents of an individual's business records in his own possession); Andrews v. Maryland, 427 U.S. 463, 477, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976) (stating any self-incrimination analysis must focus on the voluntariness of the statement at issue); and Fisher, 425 U.S. at 409, 96 S.Ct. 1569 (noting that the claim presented in Boyd would now be rejected and stating that the "prohibition against forcing the production of private papers has long been a rule searching for a rationale").

It is now clear, at least with respect to business records, that "if the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged." Doe, 465 U.S. at 612 n. 10, 104 S.Ct. 1237. However, whether Doe's rationale extends to purely personal papers in a defendant's possession is still open to some debate. Compare ruling is limited to post-trial sentencing and does not apply to trials. As the quoted language shows, however, the Court observed that such evidence could be used for trial purposes also. Moreover, we have relied upon Wisconsin v. Mitchell for this proposition in subsequent cases. See, e.g., Richenberg v. Perry, 97 F.3d 256, 263 (8th Cir.1996) (First Amendment not violated by using service member's declaration of homosexuality as evidence of engaging in conduct inconsistent with military activity), cert. denied, --- U.S. ---, 118 S.Ct. 45, 139 L.Ed.2d 12 (1997); United States v. Dunnaway, 88 F.3d 617, 618–19 (8th Cir.1996) (First Amendment not violated by admitting evidence of defendant's racist views, behavior, and speech to prove discriminatory purpose and intent, an element of the crime); United States v. Dunwiddie, 76 F.3d 913, 926 n. 10 (8th Cir.1996) (First Amendment would be violated by punishing defendant for expressing her view on abortion, but it was not violated by using her statements as evidence of intimidation with threats of force).

To the extent the Fifth Amendment shielded the journal from compulsory production, that protection was not lost by Barrett transferring the journal to his counsel. "When material has been transferred from a client to an attorney for the purpose of seeking legal advice and the subpoena is directed to the attorney, the proper inquiry is whether the subpoena, if directed to the client himself, would require compelled testimonial self-incrimination." In re Grand Jury Proceedings, 41 F.3d 377, 379 (8th Cir.1994).

In Fisher, the Supreme Court expressly declined to reach the issue. See Fisher, 425 U.S. at 414, 96 S.Ct. 1569 ("[w]hether the Fifth Amend-
United States v. Grable, 98 F.3d 251, 253 (6th Cir.1996); In re Grand Jury Subpoena Duces Tecum, 1 F.3d 87, 93 (2d Cir.1993); United States v. Wujkowski, 929 F.2d 981, 983 (4th Cir.1991); In re Sealed Case, 877 F.2d 83, 84 (D.C.Cir.1989); In re Grand Jury Proceedings, 759 F.2d 1418, 1419 (9th Cir.1985) (all holding that the Fifth Amendment does not protect the contents of voluntarily prepared documents, whether business or personal) with In re Grand Jury Proceedings, 55 F.3d 1012, 1013-14 (5th Cir. 1995) (per curiam); In re Grand Jury Proceedings, 632 F.2d 1033, 1043 (3d Cir.1980) (holding that the contents of personal papers remain privileged in certain circumstances).

[32] This court has indicated that if contents of personal papers are protected at all, it is only in rare situations, where compelled disclosure would break the heart of our sense of privacy. See United States v. Mason, 869 F.2d 414, 416 (8th Cir.1989). Subsequently, we have found that the “voluntary creation of the subpoenaed documents means that the contents of the documents do not fall under the protection of the Fifth Amendment.” In re Grand Jury Proceedings, 41 F.3d 377, 379 (8th Cir.1994). The act of producing such personal papers, however, and thus requiring a defendant to admit the existence, authenticity, or possession of the documents, can, in some circumstances, result in compelled testimony in violation of the Fifth Amendment. See id. at 380; In re Grand Jury Witnesses, 92 F.3d 710, 712 (8th Cir.1996). Where the existence, possession, and authenticity of the documents are foregone conclusions, and the defendant would add little or nothing to the government’s case by his act of producing the documents, the Fifth Amendment is not violated because nothing he has said or done is deemed to be sufficiently testimonial for purposes of the privilege. See United States v. Rue, 819 F.2d 1488, 1492 (8th Cir.1987).

[33] Whatever the extent of Fifth Amendment protection for intensely personal and intimate documents in a defendant’s possession, Barrett’s journal is not entitled to such protection. Under the facts presented in this case, we find that no Fifth Amendment claim can prevail where, as here, there exists “no legitimate expectation of privacy and no semblance of governmental compulsion against the person of the accused.” Couch v. United States, 409 U.S. 322, 326, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973). Barrett negligently abandoned whatever protections might inure to the contents of the journal as a personal document when he left it for perusal by any prying eyes at the fast food restaurant. The contents of the journal became known to law enforcement officers without any compulsion by the government. Accordingly, we hold that the Fifth Amendment does not protect the contents of Barrett’s voluntarily created and negligently disclosed journal.

[34] We further find no violation of the Fifth Amendment in Barrett’s compelled production of the journal. The existence, possession, and authenticity of the journal were already known to law enforcement officers and were foregone conclusions in this case. Barrett left the journal in the restaurant almost two years before the deaths of Willits and Walker. It was turned over to the police and copied. At that time Barrett admitted that he had written the journal. The police officer to whom he had made the admission identified and authenticated the journal at trial. Given that the State already had a copy of the journal in its possession and that Barrett had admitted ownership and authorship, there is no support in the record for the conclusion that Barrett incriminated himself through the act of producing the journal. In sum, Barrett’s act of producing the journal “add[ed] little or nothing to the sum total of the Government’s information by conceding that he in fact [had] the papers.” Fisher, 425 U.S. at 411, 96 S.Ct. 1569.

We reverse the district court’s finding that Barrett’s Fifth Amendment privilege against self-incrimination was violated by his compelled production of the journal.

14. A different question might be presented if a personal diary had been kept in a person’s secure possession since it had been written and the State attempted to obtain it via a subpoena duces tecum.
D. Due Process

After discussing harmless error in Barrett's appeal of his second conviction, the Iowa Supreme Court stated, "[t]his was a second trial. Two juries have unanimously agreed on defendant's guilt." *Barrett II*, 445 N.W.2d at 754. After noting the fact was "of some significance in evaluating the possibility of prejudice," the court went on to state, "[d]efendant was superbly represented at trial and on appeal. He received a fair, if not absolutely perfect, trial. He is not entitled to a third one." *Id.*

Barrett contends that this statement by the Iowa Supreme Court violated his right to due process. The district court was inclined to agree, but did not reach the issue because it found the issue was procedurally barred.

Although we are inclined, once again, to doubt that the claim was fairly presented to state court, we again decline to rule on the procedural bar issue, since we find that Barrett cannot prevail on the merits. See *Lambrix*, 117 S.Ct. at 1522. To say that this statement by the Iowa Supreme Court deprived Barrett of constitutional rights borders on the absurd. It is clear that the Iowa Supreme Court relied only on evidence from the second trial. There is no other mention of Barrett's first trial. The comment can be characterized as nothing more than an off-hand remark, used to bolster the court's conclusion that Barrett received a fair, if not perfect, second trial. Our review of the record in this case convinces us that the Iowa Supreme Court was correct in that conclusion.

III. CONCLUSION

The judgment of the district court granting Barrett's petition for a writ of habeas corpus is reversed and this action is remanded with directions to dismiss Barrett's petition for a writ of habeas corpus.

JOHN R. GIBSON, Circuit Judge, with whom McMILLIAN, Circuit Judge, joins dissenting.

I dissent from the court's holding in Part IIIB that the admission of DiMaio's testimony did not violate the Confrontation Clause.


DiMaio's testimony constituted hearsay in violation of Barrett's Sixth Amendment right to confrontation. When the court today reaches the claim of the confrontation clause violation, it engages in what can most charitably be described as a circular analysis. The court first assumes that the Iowa Supreme Court determined DiMaio's answer to be a recitation of hearsay. It then recognizes that in Iowa, hearsay is ordinarily an out-of-court statement offered to prove the truth of the matter asserted. It then concludes that the statement was offered to reveal DiMaio's state of mind which would not be hearsay, and thus raises no confrontation clause concerns. The court's reading of DiMaio's testimony is contrary to that of the Iowa Supreme Court and the arguments asserted by the Attorney General of Iowa. In order to develop its reasoning, the court dissected DiMaio's statement into three possible meanings, which is two more meanings than have been asserted before either by the Iowa court or the Attorney General. When it must engage in such a creative enterprise it deals a fatal blow to its holding.
The Supreme Court of Iowa in *State v. Barrett* refers to Barrett’s hearsay objection and discusses Iowa cases in which one expert testified that his opinion was confirmed by another expert. 445 N.W.2d 749, 751 (Iowa 1989). The court identified this type of testimony as “indirect or obscured hearsay.” *Id.* The court considered whether Rule 703, which allows an expert to rely on “facts or data” in forming his opinion, allowed an expert to state that other experts also subscribed to the expert’s stated conclusions. *Id.* The court emphasized that Rule 703 did not overrule *State v. Judkins*, 242 N.W.2d 266 (Iowa 1976), and did not empower one expert witness to state other experts also subscribed to the witness’s stated conclusion. *Id.* It rejected the argument that DiMaio’s testimony could be allowed under Rule 703 because there was no foundation testimony showing that the opinion of DiMaio’s colleagues was the type of “fact or data” reasonably relied on by similar experts. *Id.* The court made clear that it “agree[d] with [Barrett’s] challenge to the testimony,” and that it was “inclined to disapprove” DiMaio’s testimony. *Id.*

When the Iowa court reached the question of prejudicial error, the court again referred to the hearsay evidence rule and considered the defense argument that DiMaio’s testimony amounted to testimony that his conclusion was endorsed by his unnamed colleagues, allowing the State, by the challenged testimony, to counter Barrett’s array of expert witnesses before the jury without producing their experts for cross-examination. 445 N.W.2d at 754. Further, Justice Lavorato, joined by two other justices in dissent, made abundantly clear that the Iowa Supreme Court’s discussion of the issue correctly defined what Iowa courts frequently refer to as the “fighting issue,” namely, the shoring up of testimony by soliciting hearsay testimony of the opinions of other experts. Justice Lavorato concluded: “[t]he evil in such a procedure, of course, lay in the defendant’s inability to challenge these opinions through cross-examination.” *Id.* at 758.

Thus, it is evident that the Iowa Supreme Court was considering an issue entirely different from the hair split by the court today. The justices of the Iowa Supreme Court, both in the majority and the dissent, found only one meaning springing from the testimony in question. Nevertheless, to reach its conclusion, the court dissected the testimony into two additional slices, neither of which has occurred to anyone dealing with this case in the state courts, or even to counsel appearing before this court. The court simply blinks semantic reality in reaching out for the conclusion it rationalizes today. I think we must consider the testimony as it was considered by the Iowa Supreme Court. DiMaio’s answer “no” to the question of whether any of his colleagues had given him persuasive reason to disregard his opinion that Willits’s death was a homicide, as opposed to a suicide, carried the evident meaning that other experts, who were not produced for cross-examination, agreed with and bolstered DiMaio’s opinion and constituted inadmissible hearsay.

DiMaio’s testimony was not harmless. See *O’Neal v. McAninch*, 513 U.S. 432, 435, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995). DiMaio’s hearsay statement was relevant to perhaps the most crucial issue at trial: whether Willits was murdered, as the State contends, or committed suicide, as Barrett asserts. The statement was made on redirect examination and was obviously intended to bolster DiMaio’s opinion that Willits had been murdered. In effect, DiMaio was telling the jury, “All of my colleagues agree with me that she was murdered.” Through these unidentified witnesses—whether two or a dozen—the State presented to the jury evidence damaging to Barrett on a crucial issue and bypassed the constitutional safeguards designed to test the reliability of evidence and bring the truth to light.

Without the opportunity to confront and cross-examine DiMaio’s colleagues, Barrett was unable to examine and challenge their theories, assumptions, tests, qualifications, the “particularized guarantees of trust-worthiness,” or explain the foundation for the testimony. Instead, the court boldly assumes the statement was reliable because DiMaio relied on it, in a seeming “I know it when I see it” approach.
credibility, or any other factor relevant to the weight of this evidence. Barrett was deprived of the "opportunity, not only of testing the recollection and sift[ing] the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242–43, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895).

Of course, we cannot know how much weight the jury assigned to this evidence. But given the importance of this issue to the verdict, the importance of expert testimony to this issue, Barrett’s complete lack of opportunity to confront and cross-examine these unidentified accusers, and the State’s failure to demonstrate that this evidence had any particularized guarantee of trustworthiness, I conclude that this error was not harmless. I note that both the district court and three dissenting judges of the Supreme Court of Iowa took the view that “such unchallenged opinions on a critical issue served to tip the scales in favor of the State in a case that was obviously close.” 445 N.W.2d at 758.

I would hold that the admission of DiMaio’s hearsay testimony violated Barrett’s Sixth Amendment right of confrontation, and I would grant the writ of habeas corpus.

**Geneva SCHULER, Appellant,**

v.

**PHILLIPS PETROLEUM COMPANY,**
doing business as Phillips 66 Company, Appellee.

No. 98–2089.

United States Court of Appeals, Eighth Circuit.


Decided March 9, 1999.

Employee sued employer under Age Discrimination in Employment Act (ADEA), Americans with Disabilities Act (ADA), and Missouri Human Rights Act (MHRA). The United States District Court for the Eastern District of Missouri, Carol E. Jackson, J., dismissed ADA claim, entered summary judgment for employer on ADEA claim, and declined to exercise pendent jurisdiction over MHRA disability discrimination claim. Appeal was taken. The Court of Appeals, Beam, Circuit Judge, held that: (1) absence of any reference to employee’s MHRA age discrimination claim in district court opinion indicated the court’s belief that its resolution of ADEA claim also disposed of state claim; (2) summary judgment was properly granted on federal and state law age discrimination claims; but (3) given its existing diversity jurisdiction, district court erred in declining jurisdiction over employee’s state law disability discrimination claim.

Affirmed in part, and reversed and remanded in part.

1. Federal Civil Procedure 2558

Because employee’s ADEA claim and Missouri Human Rights Act (MHRA) age discrimination claim were analyzed under same standard, absence of any reference to employee’s MHRA age discrimination claim in district court opinion granting summary judgment on ADEA claim indicated the court’s belief that its resolution of ADEA claim also disposed of state claim. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; V.A.M.S. § 213.010 et seq.

2. Federal Courts 18

After dismissing employee’s ADA claim and granting summary judgment to employer on ADEA claim, district court erred in declining jurisdiction over employee’s Missouri Human Rights Act (MHRA) disability discrimination claim, since court was not limited to only pendent jurisdiction over state disability claim stemming from its federal question jurisdiction over ADEA claim, but, rather, since parties were diverse, court possessed an independent basis of jurisdiction over employee’s state claims. Age Discrimination in Employment Act of 1967, § 2 et
United States District Court, E.D. Tennessee.

UNITED STATES of America,
v.
Charles C. STONE, Dora B. Stone, and L. Byron Woody.
No. 1:02-CR-189.


Background: Tax fraud and tax evasion defendants, owners and executives of corporation, objected to government's proffer of expert testimony by Internal Revenue Service (IRS) officer.

Holdings: The District Court, Collier, J., held that:
(1) IRS officer could testify as summary witness and expert witness;
(2) fact that IRS officer had testified as fact witness at beginning of trial did not preclude her testimony as summary witness and expert witness at conclusion of government's case-in-chief; and
(3) Confrontation Clause did not prevent IRS officer's relying on her conversations with non-testifying employees of corporation in forming her expert opinions.
Motion denied.

West Headnotes

[1] Criminal Law k478(1)
110k478(1) Most Cited Cases
Internal Revenue Service (IRS) officer could testify as summary witness and expert witness in tax fraud and tax evasion prosecution, in area of corporate and individual tax computations; officer had B.S. in accounting, 18 years of experience as IRS agent, and certified public accountant license, and had audited numerous individuals and corporations. 18 U.S.C.A. <section> 371; 26 U.S.C.A. <section> 7201; Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[2] Criminal Law k451(2)
110k451(2) Most Cited Cases

[2] Criminal Law k470(2)
110k470(2) Most Cited Cases
Summary witness may be used to summarize evidence in income tax prosecution; while summary witness may not give legal opinion that determines guilt or that instructs jury on controlling legal principles, witness may give her opinion that tax liability would arise under certain circumstances and may opine whether particular payments would be taxable.

[3] Criminal Law k477.1
Fact that Internal Revenue Service (IRS) officer had testified as fact witness at beginning of tax fraud and tax evasion trial, based on her audit of defendants, did not preclude her testimony as summary witness and expert witness at conclusion of government's case-in-chief, concerning corporate and individual tax computation. 18 U.S.C.A. <section> 371; 26 U.S.C.A. <section> 7201; Fed.Rules Evid.Rule 702, 28 U.S.C.A.

Internal Revenue Service (IRS) officer who testified as summary witness and expert witness in tax fraud and tax evasion prosecution against corporation's owners and executives could, consistent with Confrontation Clause, rely on her conversations with non-testifying employees of corporation in forming her expert opinions, to extent permitted by rule governing bases of expert-opinion testimony; if employees' statements were elicited on cross-examination of officer, statements' purpose would not be to establish truth of matters asserted by employees but rather to evaluate officer's opinions. U.S.C.A. Const.Amend. 6; 18 U.S.C.A. <section> 371; 26 U.S.C.A. <section> 7201; Fed.Rules Evid.Rules 702, 703, 28 U.S.C.A.

Confrontation Clause prevents admission of out-of-court testimonial statements against defendant unless prosecution shows out-of-court declarant is unavailable to testify at trial and defendant had prior opportunity to cross-examine declarant on out-of-court statement. U.S.C.A. Const.Amend. 6.


Rule governing bases of opinion testimony by experts allows expert to base her opinion on otherwise inadmissible evidence such as hearsay; however, such otherwise inadmissible evidence does not thereby become admissible. Fed.Rules Evid.Rule 703, 28 U.S.C.A.

In cases where expert witness seeks to give testimony based upon otherwise
inadmissible evidence, trial court has obligation to determine both that facts or data relied upon by expert are of type relied upon by experts in particular field and that such reliance is reasonable, must scrutinize specific facts relied upon to insure that reliance is reasonable, and must insure that expert is not merely serving as conduit for hearsay. Fed.Rules Evid.Rules 104(a), 702, 703, 28 U.S.C.A.

*336 Stephanie Evans, U.S. Dept of Justice, Washington, DC, for Plaintiff.

Roger W. Dickson, Miller & Martin, Chattanooga, TN, for Defendant.

MEMORANDUM & ORDER

COLLIER, District Judge.

During the trial of this case the Court faced an evidentiary decision regarding whether a witness, Internal Revenue Service Officer Teresa Cantrel, could testify as an expert and, if so, regarding the extent of that testimony. Involved in the issue was whether Ms. Cantrel, if allowed to testify as an expert, could rely upon statements made to her by non-parties in formulating her opinion. When the Court reached its decision it announced it might clarify or elaborate on its decision. The purpose of this memorandum is to add that clarification.

I. BACKGROUND

Ms. Cantrel is a Revenue Officer with eighteen years of experience with the Internal Revenue Service ("IRS"). The prosecution sought to call Ms. Cantrel to testify as an expert witness. Anticipating the issue the prosecution filed a Trial Memorandum (Court File No. 73) and in this memorandum stated that Ms. Cantrel would be asked to testify as an expert in corporate and individual tax computation. When the issue was raised on the first day of trial, the defense indicated it had objections to Ms. Cantrel's testimony.

Defendants Charles Stone, Dora Stone, and Byron Woody were on trial for tax fraud. Defendants were owners and/or officers of Benton Manufacturing Company. All three defendants were charged in Count One with conspiracy to defraud the United States in violation of Title 18, United States Code, <section> 371, and Charles Stone and Dora Stone were charged with three counts of attempted tax evasion in violation of Title 26, United States Code, <section> 7201.

According to the Trial Memorandum and her testimony at trial, Ms. Cantrel has a B.S. in accounting from the University of Tennessee at Chattanooga, eighteen years of experience as an IRS agent, and a Certified Public Accountant license from Texas. She has audited numerous individuals and corporations to compute their correct tax liability.
In their response to the Government's Trial Memorandum (Court File No. 80), Defendants argued Ms. "Cantrel cannot testify about certain inadmissible hearsay evidence--specifically her conversations with non-testifying witnesses--to form the bases of her expert opinion." Defendants stated that the cases relied upon by the Government for support of its position do not support its position. They largely based their argument upon the recent United States Supreme Court decision of Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). They concluded by arguing that Agent Cantrel cannot testify about her conversations with non-testifying witnesses. However, Crawford actually addressed itself to a specific type out-of-court statement, what the Court called "testimonial" statements. According to the Court in Crawford, testimonial statements defy easy description but the Court approved of three such descriptions, the first description consisting of statements that 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.'" Crawford, 541 U.S. at ----, 124 S.Ct. at 1364. Not all out-of-court statements, however, implicate the Sixth Amendment's concerns. Id.

At the end of the trial proceedings on March 24, 2004, counsel argued this issue. The Court engaged in a spirited dialogue with all counsel to better understand the arguments and issues. With Crawford being such a recent case, having been decided after the Government's trial memorandum was drafted, it played an important role in the arguments. The argument clarified and narrowed the objections and the facts underlying Ms. Cantrel's anticipated testimony. After considering the applicable law, the arguments of counsel, and the facts as represented by counsel, the Court found Ms. Cantrel's*337 expertise to be established, allowed Ms. Cantrel to testify as an expert witness in the proffered field, and allowed Ms. Cantrel to render opinions based upon out-of-court statements from witnesses that did not testify at trial.

II. ANALYSIS

A. IRS Employee May Testify as Summary Witness and Expert Witness

Whether to accept a witness as an expert or not is committed to the sound discretion of the trial judge. United States v. Tarwater, 308 F.3d 494, 512 (6th Cir.2002); see Trepel v. Roadway Express, Inc., 194 F.3d 708, 716-17 (6th Cir.1999).

[1][2] The Government offered several cases in support of its position that Ms. Cantrel be allowed to provide summary testimony and to testify as an
expert witness in the area of corporate and individual tax computations. First, the case law is uniform in establishing that a summary witness may be used to summarize evidence in an income tax prosecution. In the most recent case in this circuit to discuss this issue, United States v. Sabino, the United States Court of Appeals for the Sixth Circuit explained a summary witness, such as the IRS employee in that case, was allowed to summarize and analyze the facts indicating a defendant's willful tax evasion so long as the summary witness does not directly embrace the ultimate question whether the defendants intended to evade income taxes. 274 F.3d 1053, 1067 (6th Cir.2001), amended on other grounds by 307 F.3d 446 (6th Cir.2002). While a summary witness may not give a legal opinion that determines guilt or that instructs the jury on controlling legal principles, a summary witness may give her opinion that tax liability would arise under certain circumstances and may opine whether particular payments would be taxable. 274 F.3d at 1067.

In addition to providing summary testimony, the Sixth Circuit has repeatedly allowed IRS employees to testify as expert witnesses. In United States v. DeClue, an IRS agent presented her computation of the defendant's due taxes and gave her opinion regarding whether tax was due and owing for the years in question. 899 F.2d 1465, 1473 (6th Cir.1990). The Sixth Circuit held the IRS employee's testimony addressed a proper subject, an essential element of attempted tax evasion, and was offered to assist the jury in determining a fact in issue. Id. It held there was no abuse of discretion in allowing the IRS agent to testify as an expert. Id. In United States v. Collins, the Sixth Circuit permitted an expert witness to assume hypothetical facts and to explain the tax implications involved in the alleged Klein conspiracy. 78 F.3d 1021, 1037 (6th Cir.1996). Citing to a 1986 Eleventh Circuit decision, the court stated "[e]xpert testimony on the income tax implications of certain actions are [sic] clearly permissible." Id. (citing United States v. Barnette, 800 F.2d 1558, 1568 (11th Cir.1986)).

In United States v. Monus, an IRS revenue agent testified as an expert witness, opining in response to hypothetical questions that particular payments would be taxable and that certain events would trigger tax liability. 128 F.3d 376, 385-86 (6th Cir.1997). Citing DeClue, the Sixth Circuit stated, "[s]uch testimony is permissible as an expert opinion to help the jury determine a fact in issue." Id. at 386. As recently as 2002, the Sixth Circuit approved a district court allowing an IRS agent to testify as an expert witness regarding a defendant's under-reporting of income. United States v. Tarwater, 308 F.3d 494, 502, 512-14 (6th Cir.2002). In that case, the IRS agent applied the principles and methods of her technical expertise to give her expert opinion the defendant under reported his income, basing her opinion on an examination and analysis of the defendant's records and her ability to trace the flow of income and disbursements as a revenue agent with training and twenty-five years of experience. Id. at 513-14. Other circuits also permit IRS agents to testify as expert witnesses. See, e.g., United
States v. West, 58 F.3d 133, 139-141 (5th Cir.1995) (IRS agent admitted as expert witness to explain basis of findings and calculation of taxes owed); United States v. Notch, 939 F.2d 895, 900 (10th Cir.1991) (government expert permitted to testify regarding understated personal income using net worth method of proof); United States v. Windfelder, 790 F.2d 576, 581 (7th Cir.1986) ("Expert testimony by an IRS agent which expresses an opinion as to the proper tax consequences of a transaction is admissible evidence."); United States v. Stokes, 998 F.2d 279, 280-81 (5th Cir.1993) (IRS agent permitted to testify as expert in calculation and compilation of income and taxes); United States v. Pedroni, No. 99-5182, 2002 WL 993573 (3d Cir. Apr.18, 2002) (IRS agent permitted to testify as expert witness regarding tax returns and financial transactions, the taxing structure as it pertained to motor fuel excise tax, and taxes and the methods of evasion or tax fraud).

[3] The fact that Ms. Cantrel testified at the beginning of the trial as a fact witness did not impede her ability to testify at the end of the prosecution's case-in-chief as a summary witness and/or as an expert witness. In United States v. Tocco, an FBI agent testified as both a fact witness and an expert witness, and the Sixth Circuit permitted him to testify in multiple capacities, particularly because the district court and the prosecutor took steps to ensure the jury was informed of the dual roles. 200 F.3d 401, 418 (6th Cir.2000). To emphasize the FBI agent's dual roles, the agent testified early in the trial as a fact witness and again at the conclusion of the trial as an expert witness. Id. at 419. Further, the district court instructed the jury just before the agent gave his opinion and again in the jury charge that it should consider the FBI agent's dual role in considering his expert testimony. Id. In light of these measures, the Sixth Circuit concluded discretion was not abused in permitting a government employee to testify as a fact witness and as an expert witness. Id.

The prosecution proposed calling Ms. Cantrel at the end of its case-in-chief as both a summary witness and as an expert witness, resulting in Ms. Cantrel testifying in three capacities during the course of the trial: as a fact witness, as a summary witness, and as an expert witness. Ms. Cantrel testified as a fact witness regarding her observations when she performed a civil audit of Benton Manufacturing Company and dealt with Defendants Charles Stone and Dora Stone. She received permission to observe other testimony at trial and intended to provide summary testimony. She also intended to provide opinion testimony as an expert witness. Although the Court's review of the cases indicated this would be proper, it is nevertheless worthwhile to touch upon the issue of the "three-headed" witness.

In United States v. Moore, an IRS agent testified in a multi-faceted capacity due to his involvement in investigating the case, his specialized knowledge and background in tax matters, and his role in summarizing the testimony offered at trial. 997 F.2d 55, 57 (5th Cir.1993). At trial the IRS agent
testified as a general tax expert, as a direct witness of events leading to
the prosecution, and as a summary witness. Id. The IRS agent permissibly
testified about his personal investigation and the summary of the evidence,
and he could have given his opinion of the evidence based on underlying facts
within his area of expertise. Id. at 59. After reviewing the case, the Fifth
Circuit stated the multi-faceted nature of the IRS agent's testimony was
admissible. Id. In United States v. West, the Fifth Circuit approved another
IRS agent providing testimony as a "summary expert" based on her specialized
training and experience to help the jury understand the large amount of
documentary evidence and the tax implications. 58 F.3d 133, 140 (5th
Cir.1995). The agent used the testimony of other witnesses to explain the
basis of her findings and calculation of the taxes owed, and the court
reminded the jury her role was to explain the tax liability charged against
the defendants. Id. at 141.

In light of these cases, the Court concluded the prosecution could offer Ms.
Cantrel as both a summary witness and as an expert witness.

B. Ms. Cantrel Was Permitted to Rely on Out-Of-Court Statements By Benton
Manufacturing Employees As Bases For Her Opinions

[4] The Government stated in its Trial Memorandum that Ms. Cantrel would base
her opinions on her conversations with non-testifying employees of Benton
Manufacturing Company. During argument on this issue, counsel clarified the
conversations *339 referenced were actually statements the employees provided
to IRS criminal investigator Iris Bohannan during a 1998 interview that Ms.
Cantrel attended. This occurred after Ms. Cantrel referred her civil audit of
the Stones and Benton Manufacturing Company for criminal investigation and
while Ms. Cantrel served in an assisting or cooperating capacity to the
criminal investigators. Documents indicated counsel for Benton Manufacturing
also attended the interviews, but there is no clear indication what role, if
any, the attorneys were permitted to have in regard to the interviews.
Specifically, there is no showing whether the Benton Manufacturing attorneys
had opportunity to cross examine the employees regarding the statements they
gave to the IRS criminal investigator.

[5][6] The Confrontation Clause of the Sixth Amendment prevents the admission
of out-of-court testimonial statements against a criminal defendant, unless
the prosecution shows the out-of-court declarant is unavailable to testify at
trial and the defendant had a prior opportunity to cross-examine the declarant
on the out-of-court statement. Crawford v. Washington, 541 U.S. 36, ---- -
----, 124 S.Ct. 1354, 1365-66, 158 L.Ed.2d 177 (2004) ("[T]he common law in
1791 conditioned admissibility of an absent witness's examination on
unavailability and a prior opportunity to cross-examine. The Sixth Amendment
therefore incorporates those limitations."). Despite the changes to hearsay
analysis wrought by the Court's decision in Crawford, the Court in Crawford
explicitly stated "[t]he [Confrontation] Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Crawford, 541 U.S. at ---- n. 9, 124 S.Ct. at 1369 n. 9 (citing Tennessee v. Street, 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985)).

Even if the particular Benton Manufacturing employees are not "unavailable" and even if the statements they gave to IRS criminal investigator Bohannan during the interviews Ms. Cantrel attended are "testimonial" as contemplated by the Court in Crawford, the statements may nevertheless be used by Ms. Cantrel in forming her expert opinions because they would not be used to establish the truth of the matters the employees asserted. Rather, if defense counsel were to elicit the statements from Ms. Cantrel on cross-examination, the purpose of the out-of-court statements would not be for hearsay purposes but rather would be for evaluating the merit of the opinions Ms. Cantrel offered on direct examination. Because Crawford explicitly maintained the Confrontation Clause's inapplicability to statements used at trial for purposes other than establishing the truth of the matter asserted, Ms. Cantrel could rely on the employees' statements in forming her opinions.

C. Federal Rule of Evidence 703

Because the Confrontation Clause did not prevent the use of the employees' statements by Ms. Cantrel in forming her opinions as an expert witness, the Court had to determine whether such use is permissible under the Federal Rules of Evidence.

The starting point for analysis is Federal Rule of Evidence 703. Rule 703 allows an expert to base her opinion upon three grounds: 1) facts within her personal knowledge, 2) facts presented to her at trial; and 3) facts presented to her outside of court, but not perceived by her personally, if those facts are the type of facts reasonably relied upon by experts in her field in drawing such conclusions. The Rule also imposes upon the trial judge the obligation to determine that the probative value of the otherwise inadmissible facts or data substantially outweighs their prejudicial effect, before the trial judge should allow such underlying facts to be disclosed to the jury.

[7] The defendants' objection relates to the third ground, i.e., facts presented to Ms. Cantrel outside of court. The rule now allows an expert to base her opinion on otherwise inadmissible evidence. However, such otherwise inadmissible evidence does not thereby become admissible. Rule 703 explicitly provides that otherwise inadmissible facts or data upon which an opinion is based do not themselves become automatically admissible simply because the expert relied upon them.
For such evidence the Rule imposes upon the trial judge a number of obligations to both ensure the expert is offering proper testimony and to safeguard the quality of information received by the fact finder. In essence, the Rule requires the Court to perform a gatekeeping function. When an expert witness's proposed testimony is based wholly or in part on facts or data that the witness obtained outside the court room through a method other than personal perception, the trial court must make a preliminary determination whether the facts on which the witness relied are of a type that experts in the witness's field of expertise reasonably rely on in reaching such opinions.

1. The otherwise inadmissible facts or data must be type reasonably relied upon in field

The next obligation imposed upon the trial court is the obligation to determine that the inadmissible facts or data are of the type reasonably relied upon by experts in the particular field. In United States v. Bonds, 12 F.3d 540 (6th Cir.1993), the Sixth Circuit applied that standard and determined that it had been met when it stated the experts in that case gave testimony that "was based on data and facts reasonably relied upon by experts in molecular biology and population genetics." Id. at 566. "It is not sufficient for the court simply to ascertain that other experts do in fact rely on that type of data. Rather, the court must make an independent assessment, based on a factual showing, that the material in question is sufficiently reliable for experts in that field to rely on it." 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, <section> 703.04[2] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed.2004).

2. Court must make Rule 104(a) determination

Moreover, in cases where the expert seeks to give testimony based upon otherwise inadmissible evidence, an obligation is imposed upon the trial court to determine, pursuant to Rule 104(a), both that the facts or data relied upon by the expert are of a type relied upon by experts in the particular field and
that such reliance is reasonable. Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 682 (3d Cir.1991). In Sphere Drake Insurance PLC v. Trisko, 226 F.3d 951, 955 (8th Cir.2000), the expert investigator testified he routinely relied on statements of informants as an investigating police officer. On that basis the Eighth Circuit stated he was permitted to rely on informant statements in forming his expert opinion. Id. Other courts are in agreement that the trial court may consider the expert's own testimony concerning the types of data that are reasonably relied upon by experts in his field. Indian Coffee Corp. v. Procter & Gamble Co., 752 F.2d 891, 895-97 (3d Cir.1985). In addition to relying on the experts own testimony, the trial court may rely upon other sources of information it deems reliable, such as the testimony of other experts. The court may consult learned treatises. And in appropriate cases the court may take judicial notice regarding the types of data that are reasonably relied upon by experts in the field.

3. Court must scrutinize specific facts relied upon by expert

Another obligation placed upon the trial court is the duty to carefully scrutinize the specific facts relied upon by the expert to ensure that the expert's reliance is reasonable *341 in the particular case. "The trial court's determination should be on a case-by-case basis." Weinstein's Federal Evidence <section> 703.04[2]. As a matter of logic the greater reliance by the expert on inadmissible facts that the court finds to be untrustworthy, the less likely it is that the reliance is reasonable. "The appellate courts have been reluctant to impose on trial courts any specific considerations they should include in their reasonableness analyses." Id. In United States v. Locascio, 6 F.3d 924, 937-38 (2d Cir.1993), the prosecution presented expert testimony about the operation, structure, membership, and terminology of organized crime families, some of which was based on hearsay. The court of appeals upheld the admission of the testimony, noting that law enforcement agents routinely rely upon such hearsay in the course of their duties. Id.

4. Expert must not be conduit for hearsay

The last obligation placed on the trial court is that it must ensure that the expert witness is truly testifying as an expert and not merely serving as a conduit through which hearsay is brought before the jury. United States v. Lundy, 809 F.2d 392, 395 (7th Cir.1987). Assistance to the trier of fact is the basic purpose of expert testimony. To assist the trier of fact the court must ensure that the witness is giving expert opinion and not merely the opinion of an expert. In other words, the expert must bring his own expertise to bear. If the expert merely relates inadmissible hearsay to the fact finder, he is not aiding the fact finder. Essentially, the value the expert brings to the trial process is his ability to apply his expertise to the facts and draw inferences from them.
Accordingly, the Court applied the above principles and allowed Ms. Cantrel to testify pursuant to Rule 703.

III. IMPACT UPON DEFENDANT WOODY

Defendant Woody also objected to Ms. Cantrel's testimony but on other grounds. He argued that because he was not charged in Counts Two, Three, and Four, her testimony was irrelevant to the charges against him and would be prejudicial. The Court did not believe this was a valid ground to disallow Ms. Cantrel's testimony. The jury was instructed at the beginning of the trial to consider each defendant separately and again was instructed to do so at the end of the trial. The Court does not see why such jury instructions were not sufficient to alleviate any concerns of prejudice to Defendant Woody.

IV. CONCLUSION

The Court DENIED Defendants' objection to the prosecution's use of IRS Revenue Officer Teresa Cantrel as an expert witness. The Court allowed Ms. Cantrel to form her opinions in reliance on statements she heard from Benton Manufacturing employees to the extent permitted by Federal Rule of Evidence 703 because such reliance is not prohibited by the Confrontation Clause of the Sixth Amendment.

SO ORDERED.

222 F.R.D. 334

END OF DOCUMENT
People v. Thomas  

Court of Appeal, Fourth District, Division 2, California.  
The PEOPLE, Plaintiff and Respondent,  
v.  
Melvin Hiram THOMAS II, Defendant and Appellant.  
No. E035829.  

June 10, 2005.  
Certified for Partial Publication.\(^{FN}\)

\(^{FN}\) This opinion is to be certified for partial publication publishing only FACTS AND PROCEDURAL BACKGROUND, DISCUSSION, C. Admission of Hearsay Evidence of Gang Membership, and Disposition.  

Background:  Defendant was convicted in the Superior Court, Riverside County, No. SWF004055,Mark Ashton Cope, J., of receiving stolen property and active participation in a street gang. Defendant appealed.

Holding:  The Court of Appeal, Hollenhorst, J., held that the Confrontation Clause did not apply to prevent admission of hearsay evidence in the form of a gang expert's conversations with other gang members in which they identified defendant as a gang member.

Affirmed.

West Headnotes

[1] Criminal Law 110 k662.8

110 Criminal Law  
110XX Trial  
110XX(C) Reception of Evidence  
110k662 Right of Accused to Confront Witnesses  
110k662.8 k. Out-Of-Court Statements and Hearsay in General.  

Most Cited Cases  
Confrontation Clause did not apply to prevent admission of hearsay evidence in the form of a gang expert's conversations with other gang members in which
they identified defendant as a gang member; since the statements were not offered to establish the truth of the matter asserted, but merely as one of the bases for the expert's opinion, the Confrontation Clause did not apply. U.S.C.A. Const.Amend. 6.


[2] Criminal Law 110 k1035(10)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E)1 In General
110k1035 Proceedings at Trial in General
110k1035(10) k. Reception of Evidence. Most Cited

Defendant's failure to object in the trial court to the admission of hearsay evidence, which was used to prove he was a gang member, and which allegedly resulted in violation of his rights under confrontation clause, was excusable and therefore the Court of Appeal would address the issue on the merits, where the controlling case was decided by the United States Supreme Court after defendant's trial.

[3] Criminal Law 110 k662.1

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.1 k. In General. Most Cited Cases

The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. U.S.C.A. Const.Amend. 6.

[4] Criminal Law 110 k469

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k469 k. In General. Most Cited Cases

Criminal Law 110 k486(4)
Experts may testify as to their opinions on relevant matters and, if questioned, may relate the information and sources on which they relied in forming those opinions, including hearsay sources.

Marilee Marshall, Los Angeles, under appointment by the Court of Appeal, for Defendant and Appellant.
Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant **583 Attorney General, Pamela A. Ratner Sobeck, Supervising Deputy Attorney General, and Bradley A. Weinreb, Deputy Attorney General, for Plaintiff and Respondent.

OPINION
HOLLENHORST, J.

*1204 INTRODUCTION ^FN**

FN** See footnote *, ante.

FACTS AND PROCEDURAL BACKGROUND

In the evening of May 15, 2003, Brian Morrell parked his pickup truck on the street in front of Judith Barrera's house. Barrera was in the backyard *1205 when she heard a man yell, "F--- you, guys. E.Y.C." ^FN2 Barrera ran to the front of her house where she saw codefendant Joseph Atilano Johnson get out of the front passenger seat of a car, jump into Morrell's pickup, and drive off. Defendant, who had been in the backseat of the car, climbed into the front passenger seat where Johnson had been sitting. Barrera recognized both defendant and Johnson because they had driven by her house in the same car a few hours earlier.

FN2. A gang expert testified that "E.Y.C." was an acronym for the Elsinore Young Classics gang, and Morrell was a known member of the Elsinore Vatos Locos (E.V.L.) gang, a rival of E.Y.C.

Barrera got into her own car to try to find Johnson and the truck. Ten or 15 minutes after the truck had been taken, she spotted it near a convenience store about a mile and a half from her house. Barrera and her aunt, who was with her in the car, saw Johnson pushing the truck toward the gas pumps at the
convenience store. Both women testified they saw defendant get out of the passenger seat of the truck and enter the convenience store.

Barrera yelled out, "That's our truck." Johnson called defendant out of the convenience store, and the two men walked away. Barrera called 911. Johnson and defendant started running into a field at the back of the convenience store. After a search of the field, a deputy sheriff found defendant and Johnson at 7:45 or 8:00 p.m., lying on their stomachs and concealed by weeds.

Deputy Sheriff Donovan Brooks arrested defendant and Johnson. At the jail, defendant asked Brooks why they had been arrested, and Brooks said it was for stealing a truck. Johnson stated that he had seen the truck rolling down the street with the keys in it, so he jumped in and took off in it. Brooks told them that because someone had yelled out, "F--- you, E.Y.C.," they were also facing a gang enhancement. Johnson said that defendant had not even been there when he, Johnson, had yelled out that remark.

Riverside Sheriff's Officer Robert Kwan testified as a gang expert. Kwan described the structure of the different cliques within E.Y.C. as follows: "They have the P.W.L.'s, which is the Pee-Wee Locos, the kids in the elementary school levels. They have the Tiny Winos, which is between 12 and 18 years old, which their acronym is T.W.S., and then they have the Nite Owls, which are the guys that are 18 and older." Kwan testified that E.Y.C. **584 was primarily a Hispanic gang, although some of the members were White. The primary activities of E.Y.C. ranged "from graffiti to robbery, to burglary, to attempt murder, up to murder" as well as stealing cars.

In Kwan's opinion, both defendant and Johnson were members of E.Y.C., and the crime was committed for the benefit of the E.Y.C. Kwan based his opinion that defendant was a member of the gang on Kwan's "training and experience, reports written where he [was] a suspect, times [Kwan had] contacted him being in the presence of other gang members, when he was caught with Mr. Johnson; also with-that day being caught with another gang member." Kwan testified that he had known defendant "to admit to commit other crimes with other gang members." Specifically, Kwan referred to a 1992 robbery in which defendant and other gang members had stolen "some bikes and hats off some kids." In February 2002, when searching a house for an E.Y.C. member who was an attempted murder suspect, Kwan found defendant hiding in a concealed basement. Moreover, Kwan had seen an incident report that indicated that defendant had been present at a knife fight or stabbing in 1995 involving another E.Y.C. member, although defendant had not been charged with any crime in connection with that incident.

Defendant had numerous gang-related tattoos: "He's got 'Elsinore' on his neck, on his eyebrow; 'Y.C.' on his eyebrow; 'P.W.L.' on his head underneath
his hair; 'Y.C.' on the back of his head. "P.W.L. on his arms; 'E.Y.C.' across his whole midsection and chest. Numerous other tattoos depicting 'South Side' or 'I.E.;' 'SUR,' S-U-R, 'Y.C.' on his hands." Defendant had the number "13" FN3 tattooed on his arm; "Thug" tattooed on his back; "Elsinore" tattooed on his back, and another tattoo stating "Brand." FN4 Another tattoo on his arm stated "909" depicting ... area code; that he's from the Inland Empire." He had "Brown Pride" on his arm. Defendant's head had been shaved when he was arrested so the tattoos on the back and side of his head were fully visible. In Kwan's opinion, that meant defendant was still active in the gang; otherwise, he would have grown his hair out to conceal the tattoos.

FN3. Kwan explained the significance of the "13" tattoo: "In the Hispanic gang culture, ... the 13th letter of the alphabet is M, which is the EME. [T]he EME runs the southern faction of the prison system, in the state prison system. The northern ... is run by a group called a 'Nuestro Familia.' And if you are from the north, you will tattoo a 14. If you are from the southern, you will tattoo 13, showing your affiliation to what they call 'South Side Surenos,'..."

FN4. Kwan testified that "Brand" was "in association with EME gang members." However, he later testified that he had been mistaken; the tattoo stated, "Brandy," and it was common for people to have their girlfriends' names as tattoos. Moreover, the "Brand" tattoo was connected with the Aryan Brotherhood, and someone who had a "Brown Pride" probably would not be in the Aryan Brotherhood.

Kwan testified that he had talked with other E.Y.C. members about defendant, and they had told him that defendant was a member of E.Y.C. and that defendant's moniker was "Little Casper" or "Villain." Kwan had also talked with members of rival gangs about defendant's membership in E.Y.C.

In Kwan's opinion, based on his training and experience, the current crimes were committed for the benefit of E.Y.C. because**585 the crimes caused fear and intimidation on rival gang members. A week before the pickup was *1207 taken, the graffito "Grizzly" had appeared on the fence next door to Barrera's house; "Grizzly" was Johnson's gang moniker.

On cross-examination, Kwan conceded that defendant did not appear in the photographs of E.Y.C. gang members that were introduced into evidence. Moreover, Kwan was not aware of any recent crimes defendant had committed, although he knew that defendant had committed crimes eleven and nine years ago and had had a seven-year prison term. FN5 Kwan testified that defendant was about 30 years old, and E.Y.C. was "predominantly geared towards younger age groups." Kwan testified on cross-examination that much of his expertise concerning Elsinore gangs had been provided by other Elsinore officers and
deputies as well as by speaking with E.Y.C. gang members.

FN5. Kwan later testified that defendant had actually been sentenced to a four-year term and had served two years.

Kwan described conversations with gang members concerning defendant: "[J]ust a lot of consensual conversation, you know. We just started talking and names get thrown out on who's who and monikers and-." Kwan testified that he had not documented those conversations. The only record he had in his file concerning defendant was about the February 2002 contact when defendant was found hiding in a concealed basement. Kwan did not have any field identification cards for defendant. There was no record that defendant had bragged about committing any crimes. Defendant had not been charged with any gang enhancement in connection with the prior robbery.

The jury found defendant guilty of receiving stolen property in count 2 (<section> 496, subd. (a)) and of active participation in a criminal street gang (<section> 186.22, subd. (a)); however, the jury found him not guilty of vehicle theft in count 1. FN6 In bifurcated proceedings, the jury found true the allegations that defendant had suffered a prior prison term (<section> 667.5, subd. (b)(5)); two prior serious convictions (<section> 667, subd. (a)) and three strike priors (<section> 667, subds.(c), (e), 1170.12, subd. (c)(2)(A)).

FN6. Codefendant Johnson was found guilty on count 1 and the jury returned a true finding on the allegation that the crime had been committed for the benefit of a criminal street gang.

The trial court exercised its discretion to strike two of defendant's strike priors with respect to count 2 and sentenced defendant on count 2 to the aggravated term of six years as a second strike. However, the trial court refused to strike any of the priors with respect to count 3 and sentenced defendant to a concurrent term of 25 years to life plus an additional and consecutive five-year term for each of the two serious felony priors for a total sentence of 35 years to life.

*1208 DISCUSSION

A.-B. FN***

FN*** See footnote *, ante.
C. Admission of Hearsay Evidence of Gang Membership

[1] Citing Crawford v. Washington (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (Crawford), defendant contends that his right to confront witnesses was violated by the admission of hearsay evidence in the form of the gang expert's conversations with other gang members in which they identified defendant as a gang member. Deputy Kwan testified that he learned through casual, undocumented conversations with other gang members that defendant was a member of E.Y.C., and his gang moniker was "Little Casper" or "Villain."

1. Waiver

[2] The People contend that defendant waived the issue by failing to raise an objection in the trial court on the basis now urged on appeal. However, because Crawford was decided after the trial in this case, we conclude that the failure to object was excusable. (People v. Johnson (2004) 121 Cal.App.4th 1409, 1411, fn. 2, 18 Cal.Rptr.3d 230.) We will therefore address the issue on the merits.

2. Analysis

[3] In all criminal prosecutions, the accused has a right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, "to be confronted with the witnesses against him...." (U.S. Const., Amend. 6; Pointer v. Texas (1965) 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923.) The central concern of the Sixth Amendment's Confrontation Clause is "to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." (Maryland v. Craig (1990) 497 U.S. 836, 845, 110 S.Ct. 3157, 111 L.Ed.2d 666.)

In Crawford, the Supreme Court held that out-of-court statements that are testimonial in nature are inadmissible unless the declarant is unavailable and the accused has had a prior opportunity to cross-examine the declarant. In Crawford, therefore, the court held that a wife's out-of-court statement to an officer during a custodial interrogation about a knife fight, in which both the husband and wife were suspects, could not be used against the husband in his trial for attempted murder. (Crawford, supra, 541 U.S. 36 at pp. 68-69, 124 S.Ct. 1354, 158 L.Ed.2d 177.)

The Crawford court stated, however, that "[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 Ohio v. Roberts [ (1980) 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597], and as would an approach
that exempted such statements from Confrontation Clause scrutiny altogether...

We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' " (Crawford, supra, 541 U.S. at p. 68, 124 S.Ct. 1354, 1374, fn. omitted.) The court nonetheless provided illustrations of statements that could be considered testimonial: (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,' " and (2) "statements ... 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 p. 52, 124 S.Ct. at p. 1364.)

Few published California cases have yet addressed the scope of Crawford's limitation on the use of hearsay evidence,^FN8 and none of those cases has analyzed the use of hearsay as the basis for an expert witness's**587 opinion. Defendant argues, however, that the statements on which Kwan relied were testimonial, and therefore inadmissible, because when the officer inquired about gang membership, he "was obviously gathering information which he intended to use and in fact did use in at least one criminal prosecution that being the instant case."


[4] The rule is long established in California that experts may testify as to their opinions on relevant matters and, if questioned, may relate the information and sources on which they relied in forming those opinions. Such sources may include hearsay. (See People v. Gardeley (1996) 14 Cal.4th 605, 618-619, 59 Cal.Rptr.2d 356, 927 P.2d 713; Evid.Code, <section> 801, subd. (b) [an expert's opinion may be based on matter "whether or not admissible, that is *1210 of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, ..."].) In People v. Vy (2004) 122 Cal.App.4th 1209, 1223, footnote 10, 19 Cal.Rptr.3d 402, the court stated, "Of course, because the culture and habits of gangs are matters which are 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact' (Evid.Code, <section> 801, subd. (a)), opinion testimony from a gang expert, subject to the limitations applicable to expert testimony generally, is proper. [Citation.]
Such an expert—like other experts—may give opinion testimony that is based upon hearsay, including conversations with gang members as well as with the defendant. [Citations.] Such opinions may also be based upon the expert's personal investigation of past crimes by gang members and information about gangs learned from the expert's colleagues or from other law enforcement agencies. [Citations.]

Crawford does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion. Crawford itself states that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (Crawford, supra, 541 U.S. at p. 59, fn. 9, 124 S.Ct. at p. 1369, fn. 9, citing Tennessee v. Street (1985) 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425.)

Here, the conversations with other gang members were mentioned only as a basis for Kwan's opinion that defendant was a gang member. There was no Sixth Amendment violation based on Kwan's reliance on hearsay matters.


Thus, because the statements were not offered to establish the truth of the matter asserted, but merely as one of the bases for an expert witness's opinion, the Confrontation Clause, as interpreted in Crawford, does not apply. There was no error in the use of the hearsay statements.

**588 D.**

FN**<dagger>> See footnote *, ante.

**DISPOSITION**

The judgment is affirmed.
We concur: RAMIREZ, P.J., and WARD J.
People v. Thomas
130 Cal.App.4th 1202, 30 Cal.Rptr.3d 582, 05 Cal. Daily Op. Serv. 5911, 2005
Daily Journal D.A.R. 8092

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ages may not be opened or consumed in motor vehicles traveling on the highways, except in the "living quarters of a housecar or camper." The same definitions might not necessarily apply in the context of the Fourth Amendment, but they do indicate that descriptive distinctions are humanly possible. They also reflect the California Legislature's judgment that "house cars" entertain different kinds of activities than the ordinary passenger vehicle.

In my opinion, searches of places that regularly accommodate a wide range of private human activity are fundamentally different from searches of automobiles which primarily serve a public transportation function. Although it may not be a castle, a motor home is usually the functional equivalent of a hotel room, a vacation and retirement home, or a hunting and fishing cabin. These places may be as spartan as a humble cottage when compared to the most majestic mansion, 456 U.S., at 822, 102 S.Ct., at 2171; ante, at 2070, but the highest and most legitimate expectations of privacy associated with these temporary abodes should command the respect of this Court. *Stoner v. California*, 376 U.S. 483, 490, 84 S.Ct. 889, 893, 11 L.Ed.2d 856 (1964); *Payton v. New York*, 445 U.S., at 585, 100 S.Ct., at 1379; *United States v. Karo*, 468 U.S. 705, 714–715, 104 S.Ct. 3296, 3302–3303, 82 L.Ed.2d 530 (1984).

In my opinion, a warrantless search of living quarters in a motor home is "presumptively unreasonable absent exigent circumstances." *Ibid.*

I respectfully dissent.


25. Cf. *Cardwell v. Lewis*, 417 U.S., at 590, 94 S.Ct., at 2469 (opinion of BLACKMUN, J.);

"One has a lesser expectation of privacy in a motor vehicle because its function is transportation, and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view."

471 U.S. 409, 85 L.Ed.2d 425

TENNESSEE, Petitioner

v.

Harvey J. STREET.

No. 83–2143.

Argued March 18, 1985.

Decided May 13, 1985.

Defendant was convicted before the Unicoi Criminal Court, Arden L. Hill, J., of first-degree murder, and he appealed. The Tennessee Court of Criminal Appeals reversed and remanded, 674 S.W.2d 741. Certiorari was granted. The Supreme Court, Chief Justice Burger, held that defendant's rights under the confrontation clause were not violated by introduction of the confession of an accomplice for the nonhearsay purpose of rebutting defendant's testimony that his own confession was coercively derived from the accomplice's statement.

Reversed.

Justice Brennan, with whom Justice Marshall joined, filed concurring opinion.

1. Criminal Law ≈662.8

Defendant's rights under the confrontation clause were not violated by introduction of an accomplice's confession for the nonhearsay purpose of rebutting defendant's testimony that his own confession was coercively derived from the accomplice's statement, and the clause's role in protecting right of cross-examination was satisfied when the sheriff, whom defendant

26. "At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. Our cases have not deviated from this basic Fourth Amendment principle. Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances." *United States v. Karo*, 468 U.S., at 714–715, 104 S.Ct., at 3303.
testified had directed him to repeat accomplice’s testimony, took the stand and instruction as to limited purpose of admitting the accomplice’s confession was the appropriate way to limit use of that evidence. U.S.C.A. Const.Amend. 6.

2. Criminal Law $\Rightarrow 1144.15$

Assumption that jurors are able to follow the court’s instructions fully applies when rights guaranteed by the confrontation clause are at issue. U.S.C.A. Const. Amend. 6.

3. Criminal Law $\Rightarrow 661$

When defendant testified that his confession was coercively derived from an accomplice’s written confession, claiming that the sheriff read from the accomplice’s confession and directed defendant to say the same thing, the State was not required to call the accomplice to testify or forego effective rebuttal and State had choice of calling the accomplice or the sheriff, who read accomplice’s testimony to the jury. U.S.C.A. Const.Amend. 6.

Syllabus *

At respondent’s Tennessee state-court trial for murder, the State relied on a confession that respondent made to the Sheriff. Respondent testified that his confession was coercively derived from an accomplice’s written confession, claiming that the Sheriff read from the accomplice’s confession and directed respondent to say the same thing. In rebuttal, the State called the Sheriff, who denied that respondent was read the accomplice’s confession and who read that confession to the jury after the trial judge had instructed the jury that the confession was not admitted for the purpose of proving its truthfulness but for the purpose of rebuttal only. The prosecutor then elicited from the Sheriff testimony emphasizing the differences between respondent’s confession and the accomplice’s confession. Respondent was found guilty and sentenced to life imprisonment. The Tennessee Court of Criminal Appeals reversed, holding that the introduction of the accomplice’s confession denied respondent his Sixth Amendment right to confront witnesses, even though the confession was introduced for the nonhearsay purpose of rebutting respondent’s testimony.

Held: Respondent’s rights under the Confrontation Clause of the Sixth Amendment were not violated by the introduction of the accomplice’s confession for rebuttal purposes. Pp. 2081–2083.

(a) The nonhearsay aspect of the accomplice’s confession—not to prove what happened at the murder scene but to prove what happened when respondent confessed—raises no Confrontation Clause concerns. The Clause’s fundamental role in protecting the right of cross-examination was satisfied by the Sheriff’s presence on the witness stand. Pp. 2081–2082.

(b) If the prosecutor had been denied the opportunity to present the accomplice’s confession in rebuttal so as to enable the jury to make the relevant comparison with respondent’s confession, the jury would have been impeded in evaluating the truth of respondent’s testimony and in weighing the reliability of his confession. Such a result would have been at odds with the Confrontation Clause’s mission of advancing the accuracy of the truth-determining process in criminal trials. There were no alternatives that would have both assured the integrity of the trial’s truth-seeking function and eliminated the risk of the jury’s improper use of evidence. Pp. 2082–2083.

(c) The trial judge’s instructions to the jury as to the limited purpose of admitting the accomplice’s confession were the appropriate way to limit the use of that evidence in a manner consistent with the Confrontation Clause. P. 2083.

674 S.W.2d 741 (Tenn.Cr.App.1984), reversed.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.
Robert A. Grunow, Nashville, Tenn., for petitioner.

Joshua Ira Schwartz, Washington, D.C., for the United States as amicus curiae supporting the petitioner, by special leave of Court.

Lance J. Rogers, Charlottesville, Va., for respondent.

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to decide whether respondent's rights under the Confrontation Clause were violated by the introduction of the confession of an accomplice for the nonhearsay purpose of rebutting respondent's testimony that his own confession was coercively derived from the accomplice's statement.

I

Ben Tester was last seen alive on August 26, 1981, as he walked toward his home in Hampton, Tennessee. The next day Tester's body was found hanging by a nylon rope from an apple tree in his yard. Tester's house had been ransacked, and it appeared that Tester had struggled with his assailants.

Respondent, a neighbor of Tester, was arrested and charged with the murder. At respondent's trial, which was severed from the trials of others charged with the crime, the State relied on a detailed confession that respondent made during an interview with Sheriff Papantonio and agents of the Tennessee Bureau of Investigation on September 17, 1981. According to respondent's confession, he and Clifford Peele decided to burglarize Ben Tester's house when Tester was away at church. While respondent, Peele and two others were in the house, however, Tester returned home and surprised the intruders. Peele threw Tester to the floor and declared that they were going to "string him up." Working toward that end, respondent tore a sheet to make a gag for Tester's mouth. Respondent then watched as the others carried Tester out of the house, placed him in the back of a pickup truck, put a rope around his neck, tied the rope to a tree, and pushed him off the tailgate.1

Respondent testified at trial that he did not burglarize Tester's house, nor participate in the murder. He also maintained that his September 17 confession was coerced. The confession, respondent testified, was derived from a written statement that Peele had previously given the Sheriff. Respondent claimed that Sheriff Papantonio read from Peele's statement and directed him to say the same thing.

In rebuttal, the State called Sheriff Papantonio to testify about the September 17 interview. The Sheriff denied that respondent was read Peele's statement or pressured to repeat the terms of Peele's confession. To corroborate this testimony, and to rebut respondent's claim that his own confession was a coerced imitation, the Sheriff read Peele's confession to the jury.2 Before Peele's statement was received, however, the trial judge twice informed the jury that it was admitted "not for the purpose of proving the truthfulness of his statement, but for the purpose of rebuttal only." App. 292, 293.

Although Peele's statement was generally consistent with Street's confession, there were some differences. For instance, Peele portrayed respondent as an active participant in Tester's hanging, and respondent's statement contained factual details that were not found in Peele's confession.3 Following the reading of Peele's confession, the prosecutor elicited from the Sher

1. The Judicial Commissioner of Carter County testified that respondent made another statement on June 27, 1982, while at the county jail. According to this witness, respondent admitted having placed the rope around Tester's neck.

2. Peele's written statement was also introduced into evidence as an exhibit.
iff testimony emphasizing the differences between the confessions.

The prosecutor referred to Peele’s confession in his closing argument to dispute respondent’s claim that he had been forced to repeat Peele’s statement. The prosecutor noted details of the crime that appeared solely in respondent’s confession and argued that respondent knew these facts because he participated in the murder. In instructing the jury, the trial judge stated:

“The Court has allowed an alleged confession or statement by Clifford Peele to be read by a witness.

“[I]nstruct you that such can be considered by you for rebuttable [sic] purposes only, and you are not to consider the truthfulness of the statement in any way whatsoever.” Id., at 350.

Respondent was found guilty and sentenced to life in prison. The Court of Criminal Appeals of Tennessee, ruling that the introduction of Peele’s confession denied respondent his Sixth Amendment right to confront witnesses, reversed. Dutton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Confrontation Clause issues arose in Roberts and Dutton because hearsay evidence was admitted as substantive evidence against the defendants. 448 U.S., at 77, 100 S.Ct., at 2544; 400 U.S., at 79, 91 S.Ct., at 214. And in Bruton, the Court considered whether a codefendant’s confession, which was inadmissible hearsay as to Bruton, could be admitted into evidence accompanied by a limiting instruction. 391 U.S., at 135–136, 88 S.Ct., at 1627–1628.

In this case, by contrast, the prosecutor did not introduce Peele’s out-of-court confession to prove the truth of Peele’s assertions. Thus, as the Court of Criminal Appeals acknowledged, Peele’s confession was not hearsay under traditional rules of evidence. 674 S.W.2d, at 744; accord, Fed. Rule Evid. 801(c). In fact, the prosecutor’s nonhearsay use of Peele’s confession was critical to rebut respondent’s testimony that his own confession was derived from Peele’s. Before the details of Peele’s confession were admitted, the jury could evaluate the reliability of respondent’s confession only by weighing and comparing the testimony of respondent and Sheriff Papantonio. Once Peele’s statement was introduced, however, the jury could compare the two confessions to determine whether it was plausible that respondent’s account of the crime was a coerced imitation.5


II

A

This case is significantly different from the Court’s previous Confrontation Clause cases such as Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), and Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Confrontation Clause issues arose in Roberts and Dutton because hearsay evidence was admitted as substantive evidence against the defendants. 448 U.S., at 77, 100 S.Ct., at 2544; 400 U.S., at 79, 91 S.Ct., at 214. And in Bruton, the Court considered whether a codefendant’s confession, which was inadmissible hearsay as to Bruton, could be admitted into evidence accompanied by a limiting instruction. 391 U.S., at 135–136, 88 S.Ct., at 1627–1628.

1] The nonhearsay aspect of Peele’s confession—not to prove what happened at the murder scene but to prove what happened when respondent confessed—raises respondent may have invented factual details out of whole cloth. Nevertheless, the discrepancies do cast doubt on respondent’s version of his interrogation.
no Confrontation Clause concerns. The
Clause's fundamental role in protecting the
right of cross-examination, see Douglas v.
Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074,
1076, 13 L.Ed.2d 934 (1965), was satisfied by
Sheriff Papantoniou's presence on the stand.
If respondent's counsel doubted that Peele's
collection was accurately re-
counted, he was free to cross-examine the
Sheriff. By cross-examination respond-
ent's counsel could also challenge Sheriff
Papantoniou's testimony that he did not
read from Peele's statement and direct re-
ponent to say the same thing. In short,
the State's rebuttal witness against respond-
ent was not Peele, but Sheriff Papanto-

see generally Anderson v. United
2253, 2260, 41 L.Ed.2d 20 (1974).

B

(2) The only similarity to Bruton is
that Peele's statement, like the codefend-
ant's confession in Bruton, could have
been misused by the jury. If the jury had
been asked to infer that Peele's confession
proved that respondent participated in the
murder, then the evidence would have been
hearsay; and because Peele was not avail-
able for cross-examination, Confrontation
Clause concerns would have been implicat-
ed. The jury, however, was pointedly in-
structed by the trial court 'not to consider
the truthfulness of [Peele's] statement in
any way whatsoever.' App. 350. Thus
as in Bruton, the question is reduced to
whether, in light of the competing values
at stake, we may rely on the 'crucial
assumption' that the jurors followed
'the instructions given them by the trial
judge.' Marshall v. Lonberger, 459 U.S.
422, 438, n. 6, 103 S.Ct. 843, 853, n. 6, 74
L.Ed.2d 646 (1983) (quoting Parker v. Ran-
dolph, 442 U.S. 62, 73, 99 S.Ct. 2132, 2139,
60 L.Ed.2d 713 (1979) (REHNQUIST, J.).

6. The assumption that jurors are able to fol-
low the court's instructions fully applies when rights
guaranteed by the Confrontation Clause are at
issue. See, e.g., Frazier v. Cupp, 394 U.S. 731,

The State's most important piece of sub-
stantive evidence was respondent's confes-
sion. When respondent testified that his
confession was a coerced imitation, there-
fore, the focus turned to the State's ability
to rebut respondent's testimony. Had the
prosecutor been denied the opportunity to
present Peele's confession in rebuttal so as
to enable the jury to make the relevant
comparison, the jury would have been im-
peded in its task of evaluating the truth of
respondent's testimony and handicapped in
weighing the reliability of his confession.
Such a result would have been at odds with
the Confrontation Clause's very mission—
to advance 'the accuracy of the truth-de-
termining process in criminal trials.' Dutton
v. Evans, supra, 400 U.S., at 89, 91
S.Ct., at 220.

Moreover, unlike the situation in Bruton,
supra, 391 U.S., at 134, 88 S.Ct., at 1626,
there were no alternatives that would have
both assured the integrity of the trial's
truth-seeking function and eliminated the
risk of the jury's improper use of evidence.7
We do not agree with the Court of Criminal
Appeals' suggestion that Peele's confession
could have been edited to reduce the risk of
jury misuse 'without detracting from the
alleged purpose for which the confession
was introduced.' 674 S.W.2d, at 745; see
generally Bruton, supra, 391 U.S., at 134,
n. 10, 88 S.Ct., at 1626, n. 10. If all of
Peele's references to respondent had been
deleted, Dutton would have been more diffi-
cult for the jury to evaluate respondent's
testimony that his confession was a coerced
imitation of Peele's. Indeed, such an ap-
proach would have undercut the theory of
defense by creating artificial differences
between respondent's and Peele's confes-
sions.

Respondent correctly notes that Sheriff
Papantoniou could have pointed out the
differences between the two statements
without reading Peele's confession. But

7. Severance obviously was not an available al-
ternative; respondent's trial had been severed
from those of his codefendants.
such a rebuttal presentation was not the only option constitutionally open. After respondent testified that his confession was based on Peele's, the Sheriff read Peele's confession to the jury and answered questions that emphasized the differences. In closing argument, the prosecutor recited the details that appeared only in respondent's confession, and argued that respondent knew these facts because he participated in the murder. The whole of the State's rebuttal, therefore, was designed to focus the jury's attention on the differences, not the similarities between the two confessions.

[3] Finally, we reject the Court of Criminal Appeals' implicit holding that the State was required to call Peele to testify or to forgo effective rebuttal of respondent's testimony. 674 S.W.2d, at 745. Because Peele's confession was introduced to refute respondent's claim of coercive interrogation, Peele's testimony would not have made the State's point. And respondent's cross-examination of Peele would have been ineffective to undermine the prosecutor's limited purpose in introducing Peele's confession. It was appropriate that, instead of forcing the State to call a witness who could offer no relevant testimony on the immediate issue of coercion, the trial judge left to respondent the choice whether to call Peele.

IV

The State introduced Peele's confession for the legitimate, nonhearsay purpose of rebutting respondent's testimony that his own confession was a coerced "copy" of Peele's statement. The jury's attention was directed to this distinctive and limited purpose by the prosecutor's questions and closing argument. In this context, we hold

8. If Peele did not invoke his privilege against self-incrimination, he might have helped the prosecution prove that respondent participated in the murder; but he would have been of no assistance in rebutting respondent's claim that he had been forced to repeat Peele's confession.

9. The parties were aware that Peele was located in the county jail.

that the trial judge's instructions were the appropriate way to limit the jury's use of that evidence in a manner consistent with the Confrontation Clause. Accordingly, the judgment of the Court of Criminal Appeals is

Reversed.

Justice POWELL took no part in the consideration or decision in this case.

Justice BRENAN, with whom Justice MARSHALL joins, concurring.

I join the opinion of the Court today admitting Peele's out-of-court confession for nonhearsay rebuttal purposes. I do so on the understanding that the trial court's limiting instruction is not itself sufficient to justify admission of the confession. See Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). The out-of-court confession is admissible for nonhearsay purposes in this case only because that confession was essential to the State's rebuttal of respondent Street's defense and because no alternative short of admitting the statement would have adequately served the State's interest. See ante, at 2082. With respect to the State's need to admit the confession for rebuttal purposes, it is important to note that respondent created the need to admit the statement by pressing the defense that his confession was a coerced imitation of Peele's out-of-court confession. Also, the record contains no suggestion that the State was engaged in any improper effort to place prejudicial hearsay evidence before the jury. See Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). Under the circumstances of the present case, admission of the out-of-court confession for nonhearsay rebuttal pur-
poses raises no Confrontation Clause problems.

471 U.S. 419, 85 L.Ed.2d 434

Frank LIPAROTA, Petitioner,
v.

UNITED STATES.
No. 84–5108.
Decided May 13, 1985.

Defendant was convicted before the United States District Court for the Northern District of Illinois, Prentice H. Marshall, J., of unlawfully acquiring and possessing food stamps, and he appealed. The Court of Appeals for the Seventh Circuit, 735 F.2d 1044 affirmed. Certiorari was granted. The Supreme Court, Justice Brennan, held that the offense has a mens rea requirement and the Government must prove that a defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations.

Reversed.

Justice White filed a dissenting opinion, in which Chief Justice Burger joined.

1. Criminal Law ⇝ 13(2)

Definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.

2. Statutes ⇝ 241(1)

Rule of lenity, i.e., that ambiguity concerning ambit of criminal statutes should be resolved in favor of lenity, is not to be applied where to do so would conflict with the implied or express intent of Congress,

but the rule provides a time-honored interpretative guideline when the congressional purpose is unclear.

3. Agriculture ⇝ 2.6(5)

In a prosecution for using, acquiring, etc., food stamps in any manner not authorized by statute or regulation, the government must prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulation; failure of Congress explicitly and unambiguously to indicate whether mens rea was required did not mean that Congress had dispensed with a mens rea requirement. Food Stamp Act of 1964, § 15(b), 7 U.S.C.A. § 2024(b)(1).

4. Agriculture ⇝ 2.6(5)

To establish the required mens rea in a prosecution for unlawfully acquiring or possessing food stamps, the government need not show that the defendant had knowledge of specific regulations governing food stamp acquisition or possession and the government is not required to introduce any extraordinary evidence that would conclusively demonstrate defendant’s state of mind, but rather, as in any other criminal prosecution requiring mens rea, the government may prove by reference to facts and circumstances surrounding the case that defendant knew that his conduct was unauthorized or illegal. Food Stamp Act of 1964, § 15(b), 7 U.S.C.A. § 2024(b)(1).

Syllabus *

The federal statute governing food stamp fraud provides in 7 U.S.C. § 2024(b)(1) that "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations" shall be guilty of a criminal offense. Petitioner was indicted for violation of § 2024(b)(1). At a jury trial in Federal District Court, the Government reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.
reach. In *Marsh*, the company ran an entire town and the State was deemed to have devolved upon the company the task of carrying out municipal functions. But here the "streets" of Logan Valley Plaza are not like public streets; they are not used as thoroughfares for general travel from point to point, for general parking, for meetings, or for Easter parades.

If it were shown that Congress has thought it necessary to permit picketing on private property, either to further the national labor policy under the Commerce Clause or to implement and enforce the First Amendment, we would have quite a different case. But that is not the basis on which the Court proceeds, and I therefore dissent.

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**391 U.S. 123**

George William BRUTON, Petitioner,  
v.  
UNITED STATES.  
No. 705.  
Argued March 11, 1968.  
Decided May 20, 1968.

Defendant and codefendant were convicted in the United States District Court for the Eastern District of Missouri of armed postal robbery. The Court of Appeals for the Eighth Circuit affirmed defendant's conviction, 375 F. 2d 355, and defendant brought certiorari. The Supreme Court, Mr. Justice Brennan, held that admission of codefendant's confession that implicated defendant at joint trial constituted prejudicial error even though trial court gave clear, concise and understandable instruction that confession could only be used against co-defendant and must be disregarded with respect to defendant.

Reversed.

Mr. Justice White and Mr. Justice Harlan dissented.

1. **Criminal Law ⇐=528, 1169(5, 12)**

   Admission of codefendant's confession that implicated defendant at joint trial constituted prejudicial error even though trial court gave clear, concise and understandable instruction that confession could only be used against codefendant and must be disregarded with respect to defendant; overruling Delli Paoli v. United States, 352 U.S. 232, 27 S.Ct. 294. U.S.C.A.Const. Amend. 6.

2. **Criminal Law ⇐=662(1)**


3. **Criminal Law ⇐=662(1)**

   Major reason underlying constitutional confrontation rule is to give defendant charged with crime an opportunity to cross-examine witnesses against him. U.S.C.A.Const. Amend. 6.

4. **Criminal Law ⇐=662(4)**

   Where codefendant's confession was admitted at joint trial and codefendant did not take the stand, defendant was denied his constitutional right of confrontation. U.S.C.A.Const. Amend. 6.

5. **Criminal Law ⇐=528**

   Postal inspector's testimony concerning codefendant's confession that incriminated defendant was hearsay and inadmissible against defendant in armed robbery prosecution. 18 U.S.C.A. § 2114.

6. **Criminal Law ⇐=1169(5)**


7. **Constitutional Law ⇐=266**

   To deprive an accused of right to cross-examine witnesses against him is

8. Federal Civil Procedure \(\Rightarrow 23\)
   The Rules of Criminal Procedure are designed to promote economy and efficiency and to avoid a multiplicity of trials, where these objections can be achieved without substantial prejudice to the right of defendants to a fair trial. Fed.Rules Crim.Proc. rules 8(b), 14, 18 U.S.C.A.

9. Criminal Law \(\Rightarrow 338(1), 385\)
   Important element of fair trial is that jury consider only relevant and competent evidence bearing on issue of guilt or innocence.

10. Criminal Law \(\Rightarrow 1169(5)\)
    Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently.

11. Criminal Law \(\Rightarrow 633(1)\)
    A defendant is entitled to a fair trial but not a perfect one.

12. Criminal Law \(\Rightarrow 1169(5)\)
    There are some contexts in which risk that jury will not, or cannot, follow instructions is so great and consequences of failure so vital to defendant in criminal cause that practical and human limitations of jury system cannot be ignored.

13. Criminal Law \(\Rightarrow 673(4)\)
    Limiting instructions on use of co-defendant’s confession implicating defendant are not adequate substitute at joint trial for defendant’s constitutional

1. The trial began June 20, 1966, one week after the decision in Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. The Court of Appeals held, 375 F.2d, at 357, that Miranda and its companion cases were therefore applicable and controlling on the question of the admissibility in evidence of the postal

   Daniel P. Reardon, Jr., St. Louis, Mo., for petitioner.
   Solicitor General Erwin N. Griswold, for respondent.

   Mr. Justice BRENNAN delivered the opinion of the Court.

   This case presents the question, last considered in Delli Paoli v. United States, 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed.2d 278, whether the conviction of a defendant at a joint trial should be set aside

   although the jury was instructed that a codefendant’s confession inculpating the defendant had to be disregarded in determining his guilt or innocence.

   [1] A joint trial of petitioner and one Evans in the District Court for the Eastern District of Missouri resulted in the conviction of both by a jury on a federal charge of armed postal robbery, 18 U.S.C. § 2114. A postal inspector testified that Evans orally confessed to him that Evans and petitioner committed the armed robbery. The postal inspector obtained the oral confession, and another in which Evans admitted he had an accomplice whom he would not name, in the course of two interrogations of Evans at the city jail in St. Louis, Missouri, where Evans was held in custody on state criminal charges. Both petitioner and Evans appealed their convictions to the Court of Appeals for the Eighth Circuit. That court set aside Evans’ conviction on the ground that his oral confessions to the postal inspector should not have been received in evidence against him. 375 F.2d 355, 361. How-
ever, the court, relying upon *Delli Paoli*, affirmed petitioner’s conviction because the trial judge instructed the jury that although Evans’ confession was competent evidence against Evans it was inadmissible hearsay against petitioner and therefore had to be disregarded in determining petitioner’s guilt or innocence. 375 F.2d, at 361–363. We granted certiorari to reconsider *Delli Paoli*. 389 U.S. 818, 88 S.Ct. 126, 19 L.Ed.2d 70. The Solicitor General has since submitted a memorandum stating that “in the light of the record in this particular case and in the interests of justice, the judgment below should be reversed and the cause remanded for a new trial.” The Solicitor General states that this disposition is urged in part because “[h]ere it has been determined that the confession was wrongly admitted against [Evans] and his conviction has been reversed, leading to a new trial at which he was acquitted.

To argue, in this situation, that [petitioner’s] conviction should nevertheless stand may be to place too great a strain upon the [*Delli Paoli*] rule—at least, where, as here the other evidence against [petitioner] is not strong.” We have concluded, however, that *Delli Paoli* should be overruled. We hold that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner’s guilt, admission of Evans’ confession in this joint trial violated petitioner’s right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. We therefore overrule *Delli Paoli* and reverse.

[2, 3] The basic premise of *Delli Paoli* was that it is “reasonably possible for the jury to follow” sufficiently clear instructions to disregard the confessor’s extrajudicial statement that his co-defendant participated with him in committing the crime. 332 U.S., at 239, 77 S.Ct., at 299. If it were true that the jury disregarded the reference to the co-defendant, no question would arise under the Confrontation Clause, because by hypothesis the case is treated as if the confessor made no statement incriminating the nonconfessor. But since *Delli Paoli* was decided this Court has effectively

The instructions to the jury included the following:

“A confession made outside of court by one defendant may not be considered as evidence against the other defendant, who was not present and in no way a party to the confession. Therefore, if you find that a confession was in fact voluntarily and intentionally made by the defendant Evans, you should consider it as evidence in the case against Evans, but you must not consider it, and should disregard it, in considering the evidence in the case against the defendant Bruton.

* * * * *

“It is your duty to give separate, personal consideration to the cause of each individual defendant. When you do so, you should analyze what the evidence shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant. Each defendant is entitled to have his case determined from his own acts and statements and the other evidence in the case which may be applicable to him.”
repudiated its basic premise. Before discussing this, we pause to observe that in Pointer v. State of Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923, we confirmed “that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him” secured by the Sixth Amendment, id., at 404, 85 S.Ct., at 1068; “a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him.” Id., at 406–407, 85 S.Ct., at 1069.

[4] We applied Pointer in Douglas v. State of Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934, in circumstances analogous to those in the present case. There were two persons, Loyd and Douglas, accused of assault with intent to murder, were tried separately. Loyd was tried first and found guilty. At Douglas’ trial the State called Loyd as a witness against him. An appeal was pending from Loyd’s conviction and Loyd invoked the privilege against self-incrimination and refused to answer any questions. The prosecution was permitted to treat Loyd as a hostile witness. Under the guise of refreshing Loyd’s recollection the prosecutor questioned Loyd by asking him to confirm or deny statements read by the prosecutor from a document purported to be Loyd’s confession. These statements inculpated Douglas in the crime. We held that Douglas’ inability to cross-examine Loyd denied Douglas “the right of cross-examination secured by the Confrontation Clause.” 380 U.S., at 419, 85 S.Ct. at 1077. We noted that “effective confrontation of Loyd was possible only if Loyd affirmed the statement as his. However, Loyd did not do so, but relied on his privilege to refuse to answer.” Id., at 420, 85 S.Ct., at 1077. The risk of prejudice in petitioner’s case was even more serious than in Douglas. In Douglas we said, “Although the Solicitor’s reading of Loyd’s alleged statement, and Loyd’s refusals to answer, were not technically testimony, the Solicitor’s reading may well have been the equivalent in the jury’s mind of testimony that Loyd in fact made the statement; and Loyd’s reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true.” Id., at 419, 85 S.Ct., at 1077. Here Evans’ oral confessions were in fact testified to, and were therefore actually in evidence. That testimony was legitimate evidence against Evans and to that extent was properly before the jury during its deliberations. Even greater, then, was the likelihood that the jury would believe Evans made the statements and that they were true—not just the self-incriminating portions but those implicating petitioner as well. Plainly, the introduction of

Evans’ confession added substantial, perhaps even critical, weight to the Government’s case in a form not subject to cross-examination, since Evans did not take the stand. Petitioner thus was denied his constitutional right of confrontation.

[5, 6] Delli Paoli assumed that this encroachment on the right to confrontation could be avoided by the instruction to the jury to disregard the inadmissible hearsay evidence. But, as we have said,
that assumption has since been effectively repudiated. True, the repudiation was not in the context of the admission of a confession incriminating a codefendant but in the context of a New York rule which submitted to the jury the question of the voluntariness of the confession itself. *Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908.* Nonetheless the message of *Jackson for Delli Paoli* was clear. We there held that a defendant is constitutionally entitled at least to have the trial judge first determine whether a confession was made voluntarily

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before submitting it to the jury for an assessment of its credibility. More specifically, we expressly rejected the proposition that a jury, when determining the confessedor’s guilt, could be relied on to ignore his confession of guilt should it find the confession involuntary. *Id., at 388–389, 84 S.Ct., at 1786–1788.* Significantly, we supported that conclusion in part by reliance upon the dissenting opinion of Mr. Justice Frankfurter for the four Justices who dissented in *Delli Paoli.* *Id., at 388, n. 15, 84 S.Ct., at 1787.*

That dissent challenged the basic premise of *Delli Paoli* that a properly instructed jury would ignore the confessedor’s inculpation of the nonconfessedor in determining the latter’s guilt. “The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell.” *Id., at 247, 77 S.Ct., at 302.* The dissent went on to say, as quoted in the cited note in *Jackson,* “The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.” *Id., at 248, 77 S.Ct., at 303.* To the same effect, and also cited in the *Jackson* note, is the statement of Mr. Justice Jackson in his concurring opinion in *Krulewitch v. United States, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790:* “The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction. * * *” 4

4. Several cases since *Delli Paoli* have refused to consider an instruction as inevitably sufficient to avoid the setting aside of convictions. See, e.g., United States ex rel. *Floyd v. Wilkins,* 2 Cir., 367 F.2d 990; United States v. *Bozza,* 2 Cir., 365 F.2d 206; *Greenwell v. United States,* 119 U.S.App.D.C. 43, 338 F.2d 962; *Jones v. United States,* 119 U.S.App.D.C. 284, 342 F.2d 863; *Barton v. United States,* 5 Cir., 263 F.2d 894; United States ex rel. *Hill v. Deegan,* D.C., 268 F.Supp. 590. In *Bozza* the Court of Appeals for the Second Circuit stated: “It is impossible realistically to suppose that when the twelve good men and women had Jones’ confession in the privacy of the jury room, not one yielded to the nigh irresistible temptation to fill in the blanks with the keys Kuhle had provided and ask himself the intelligent question to what extent Jones’ statement supported Kuhle’s testimony, or that if anyone did yield, his colleagues effectively persuaded him to dismiss the answers from his mind.” *365 F.2d,* p. 215.

State decisions which have rejected *Delli Paoli* include *People v. Aranda,* 63 Cal.2d 518, 47 Cal.Rptr. 353, 407 P.2d 1624 88 SUPREME COURT REPORTER 391 U.S. 128
The significance of Jackson for Delli Paoli was suggested by Chief Justice Traynor in People v. Aranda, 63 Cal.2d 518, 528–529, 47 Cal.Rptr. 353, 358–359, 407 P.2d 265, 271–272:

“Although Jackson was directly concerned with obviating any risk that a jury might rely on an unconstitutionally obtained confession in determining the defendant's guilt, its logic extends to obviating the risks that the jury may rely on any inadmissible statements. If it is a denial of due process to rely on a jury's presumed ability to disregard an involuntary confession, it may also be a denial of due process to rely on a jury's presumed ability to disregard a codefendant's confession implicating another defendant when it is determining that defendant's guilt or innocence.

[7] “Indeed, the latter task may be an even more difficult one for the jury to perform than the former. Under the New York procedure, which Jackson held violated due process, the jury was only required to

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disregard a confession it found to be involuntary. If it made such a finding, then the confession was presumably out of the case. In joint trials, however, when the admissible confession of one defendant inculpates another defendant, the confession is never deleted from the case and the jury is expected to perform the

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overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any codefendants of the declarant. A jury cannot ‘segregate evidence into separate intellectual boxes.’ * * * It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A.”

[8, 9] In addition to Jackson, our action in 1966 in amending Rule 14 of the Federal Rules of Criminal Procedure also evidences our repudiation of Delli Paoli's basic premise. Rule 14 authorizes a severance where it appears that a defendant might be prejudiced by a joint trial. The Rule was amended in 1966 to provide expressly that “[i]n ruling on a motion by a defendant for severance the

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court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.” The Advisory Committee on Rules said in explanation of the amendment:

“A defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confes-

6. Joinder of defendants is governed by Rules 8(b) and 14 of the Federal Rules of Criminal Procedure. “The rules are designed to promote economy and efficiency and to avoid a multiplicity of trials, where these objectives can be achieved without substantial prejudice to the right of the defendants to a fair trial.” Daley v. United States, 1 Cir., 231 F.2d 123, 125. An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence. See, e. g., Blumenthal v. United States, 332 U.S. 539, 559–560, 68 S.Ct. 245, 257–258, 92 L.Ed. 154.
sion made by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand. Limiting instructions to the jury may not in fact erase the prejudice. * * *

"The purpose of the amendment is to provide a procedure whereby the issue of possible prejudice can be resolved on the motion for severance.

* * * 

Those who have defended reliance on the limiting instruction in this area have cited several reasons in support. Judge Learned Hand, a particularly severe critic of the proposition that juries could be counted on to disregard inadmissible hearsay, wrote the opinion for the

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Second Circuit which affirmed Delli Paoli’s conviction. 229 F.2d 319. In Judge Hand’s view the limiting instruction, although not really capable of preventing the jury from considering the prejudicial evidence, does as a matter of form provide a way around the exclusionary rules of evidence that is defensible because it “probably furthers, rather than impedes, the search for truth * * *.” Nash v. United States, 2 Cir., 54 F.2d 1006, 1007. Insofar as this implies the prosecution ought not to be denied the benefit of the confession to prove the confessor’s guilt, however, it overlooks alternative ways of achieving that benefit without at the same time infringing the nonconfessor’s right of confrontation. Where viable alternatives do ex-


8. Judge Hand addressed the subject several times. The limiting instruction, he said, is a “recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody’s else,” Nash v. United States, 2 Cir., 54 F.2d 1006, 1007; “Nobody can indeed fail to doubt whether the caution is effective, or whether usually the practical result is not to let in hearsay,” United States v. Gottfried, 2 Cir., 105 F.2d 360, 367; “it is indeed very hard to believe that a jury will, or for that matter can, in practice observe the admonition,” Delli Paoli v. United States, 2 Cir., 229 F.2d 319, 321. Judge Hand referred to the instruction as a “placebo,” medically defined as “a medicinal lie.” Judge Jerome Frank suggested that its legal equivalent “is a kind of ‘judicial lie’: It undermines a moral relationship between the courts, the jurors, and the public; like any other judicial deception, it damages the decent judicial administration of justice.” United States v. Grunewald, 2 Cir., 233 F.2d 556, 574. See also S Wigmore, supra, n. 3, § 2272, at 418.


9. In this case, however, Evans’ conviction was reversed on the ground that his confessions were inadmissible in evidence even against him, and on his retrial he was acquitted. In People v. Aranda, supra, 63 Cal.2d, at 526, 47 Cal.Rptr., at 358, 407 F.2d, at 270, it was said: “When, however, the confession implicating both defendants is not admissible at all, there is no longer room for compromise. The risk of prejudicing the nonconfessing defendant can no longer be justified by the need for introducing the confession against the one who made it. Accordingly, we have held that the erroneous admission into evidence of a confession implicating both defendants is not necessarily cured by an instruction that it is to be considered only against the declarant.” See also Jones v. United States and Greenwell v. United States, both supra, n. 4.

10. Some courts have required deletion of references to codefendants where practicable. See, e. g., Oliver v. United States, 118 U.S.App.D.C. 302, 335 F.2d 724; People v. Vitagliano, 15 N.Y.2d 300, 258 N.Y.S.2d 839, 206 N.E.2d 864; People v.
ist, it is deceptive to rely on the pursuit of truth to defend a clearly harmful practice.

Another reason cited in defense of *Delli Paoli* is the justification for joint trials in general, the argument being that the benefits of joint proceedings should not have to be sacrificed by requiring separate trials in order to use the confession against the declarant. Joint trials do conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial. But the answer to this argument was cogently stated by Judge Lehman of the New York Court of Appeals, dissenting in *People v. Fisher*, 249 N.Y. 419, 432, 164 N.E. 336, 341:

> "We still adhere to the rule that an accused is entitled to confrontation of the witnesses against him and the right to cross-examine them **135**. We destroy the age-old rule which in the past has been regarded as a fundamental principle of our jurisprudence by a legalistic formula, required of the judge, that the jury may not consider any admissions against any party who did not join in them. We secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high."

[10–12] Finally, the reason advanced by the majority in *Delli Paoli* was to tie the result to maintenance of the jury system. "Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense." 352 U.S., at 242, 77 S.Ct., at 300. We agree that there are many circumstances in which this reliance is justified. Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. "A defendant is entitled to a fair trial but not a perfect one." *Lutwak v. United States*, 344 U.S. 604, 619, 73 S.Ct. 481, 490, 97 L.Ed. 593; see *Hopt v. People of Utah*, 120 U.S. 430, 438, 7 S.Ct. 614, 617, 30 L.Ed. 708; cf. *Fed.Rule Crim.Proc. 52(a)*. It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information. Nevertheless, as was recognized in *Jackson v. Denno*, supra, there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Compare *Hopt v. People of Utah*, supra; *Throckmorton v. Holt*, 180 U.S. 552, 567, 21 S.Ct. 474, 480, 45 L.Ed. 663; *Mora v. United States*, 5 Cir., 190 F.2d 749; *Holt v. United States*, 10 Cir., 94 F.2d 90. Such

La Belle, 18 N.Y.2d 405, 276 N.Y.S.2d 105, 222 N.E.2d 727. For criticisms suggesting that deletions (redactions) from the confession are ineffective, see, e.g., *Note, 72 Harv.L.Rev. 920, 990 (1959); Comment, 24 UChi.L.Rev. 719, 733 (1967); Note, 74 Yale L.J. 563, 564 (1965).*

In this case Evans' confessions were offered in evidence through the oral testimony of the postal inspector. It has been said: "Where the confession is offered in evidence by means of oral testimony, redaction is patently impractical. To expect a witness to relate X's confession without including any of its references to Y is to ignore human frailty. Again, it is unlikely that an intentional or accidental slip by the witness could be remedied by instructions to disregard." *Note, 3 Col.L. of Law & Soc.Prob. 80, 88 (1967).*

Some courts have promulgated rules governing the use of the confessions. See n. 4, supra. See also rules suggested by Judge Frank, dissenting in *Delli Paoli v. United States*, 2 Cir., 229 F.2d 319, 324.
a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant,

who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed.

[13] We, of course, acknowledge the impossibility of determining whether in fact the jury did or did not ignore Evans' statement incriminating petitioner in determining petitioner's guilt. But that was also true in the analogous situation in Jackson v. Denno, and was not regarded as militating against striking down the New York procedure there involved. It was enough that that procedure posed "substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disre-

garded and to have the coercion issue fairly and reliably determined. These hazards we cannot ignore." 378 U.S., at 389, 84 S.Ct., at 1787, 12 L.Ed.2d 908. Here the introduction of Evans' confession posed a substantial threat to petitioner's right to confront the witnesses against him, and this is a hazard we cannot ignore. Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence incriminating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all. See Anderson v. United States, 318 U.S. 350, 356-357, 63 S.Ct. 599, 602, 87 L.Ed. 829; cf. Burgett v. State of Texas, 389 U.S. 109, 115, 88 S.Ct. 258, 262, 19 L.Ed.2d 319.

Reversed.

Mr. Justice BLACK concurs in the result for the reasons stated in the dissent in Delli Paoli v. United States, 352 U.S. 232, 246, 77 S.Ct. 294, 302, 1 L.Ed. 2d 278.

Mr. Justice MARSHALL took no part in the consideration or decision of this case.

Mr. Justice STEWART, concurring.

I join the opinion and judgment of the Court. Although I did not agree with


12. It is suggested that because the evidence is so unreliable the need for cross-examination is obviated. This would certainly seem contrary to the acceptance of the rule of evidence which would require exclusion of the confession as to Bruton as "inadmissible hearsay, a presumptively unreliable out-of-court statement of a nonparty who was not a witness subject to cross-examination." Post, at 1629. "The theory of the Hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of Cross-examination." 5 Wigmore, Evidence § 1362, at 3. The reason for excluding this evidence as an evidentiary matter also requires its exclusion as a constitutional matter. Surely the suggestion is not that Pointer v. State of Texas, for example, be repudiated and that all hearsay evidence be admissible so long as the jury is properly instructed to weigh it in light of "all the dangers of inaccuracy which characterize hearsay generally." Post, at 1630.
the decision in Jackson v. Denno, 378 U.S. 368 (see id., at 427), 84 S.Ct. 1774, at 1807, 12 L.Ed.2d 908, I accept its holding and share the Court's conclusion that it compels the overruling of Delli Paoli v. United States, 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed.2d 278.

Quite apart from Jackson v. Denno, however, I think it clear that the underlying rationale of the Sixth Amendment's Confrontation Clause precludes reliance upon cautionary instructions when the highly damaging out-of-court statement of a codefendant, who is not subject to cross-examination, is deliberately placed before the jury at a joint trial. A basic premise of the Confrontation Clause, it seems to me, is that certain kinds of hearsay (see, e.g., Pointer v. State of Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923; Douglas v. State of Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934) are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, whatever instructions the trial judge might give. See the Court's opinion, ante, at 1628, n. 12. It is for this very reason that an out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused, rather than admissible for the little it may be worth. Even if I did not consider Jackson v. Denno controlling, therefore, I would still agree that Delli Paoli must be overruled.

Mr. Justice WHITE, dissenting.

Whether or not Evans' confession was inadmissible against him, nothing in that confession which was relevant and material to Bruton's case was admissible against Bruton. As to him it was inadmissible hearsay, a presumptively unreliable out-of-court statement of a non-party who was not a witness subject to cross-examination. Admitting Evans' confession against Bruton would require a new trial unless the error was harmless.

The trial judge in this case had no different view. He admitted Evans' confession only against Evans, not against Bruton, and carefully instructed the jury to disregard it in determining Bruton's guilt or innocence.*

Contrary to its ruling just a decade ago in Delli Paoli v. United States, 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed.2d 278 (1957), the Court now holds this instruction insufficient and reverses Bruton's conviction. It would apparently also reverse every other case where a court admits a codefendant's confession implicating a defendant, regardless of cautionary instructions and regardless of the circumstances. I dissent from this excessively rigid rule. There is nothing in this record to suggest that the jury did not follow the trial judge's instructions. There has been no new learning since Delli Paoli indicating that juries are less reliable than they were considered in that case to be. There is nothing in the prior decisions of this Court which supports this new constitutional rule.

The Court concedes that there are many instances in which reliance on limiting instructions is justified—"[N]ot every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently." Ante, at 1627. The Court asserts, however, that the hazards to the defendant of permitting the jury to hear a codefendant's confession implicating him are so severe that we must assume the jury's inability to heed a limiting instruction. This was the holding of the Court with

*As the Court observes, "[I]f the jury disregarded the reference to the codefendant, no question would arise under the Confrontation Clause." Ante, at 1622. Because in my view juries can reasonably be relied upon to disregard the codefendant's references to the defendant, there is no need to explore the special considerations involved in the Confrontation Clause.
respect to a confession of the defendant himself in Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). There are good reasons, however, for distinguishing the codefendant’s confession from that of the defendant himself and for trusting in the jury’s ability to disregard the former when instructed to do so.

First, the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him. Though itself an out-of-court statement, it is admitted as reliable evidence because it is an admission of guilt by the defendant and constitutes direct evidence of the facts to which it relates. Even the testimony of an eyewitness may be less reliable than the defendant’s own confession. An observer may not correctly perceive, understand, or remember the acts of another, but the admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so. This was the conclusion of the Court in Jackson, and I continue to believe that case to be sound law.

Second, it must be remembered that a coerced confession is not excluded because it is thought to be unreliable. Regardless of how true it may be, it is excluded because specific provisions of the Constitution demand it, whatever the consequences for the criminal trial. In Jackson itself it was stated that “[i]t is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession.”

378 U.S., at 376, 84 S.Ct., at 1780. See id., at 385–386, 84 S.Ct., at 1785–1786. In giving prospective effect only to its rules in Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Court specifically reaffirmed the principle that coerced confessions are inadmissible regardless of their truth or falsity, Johnson v. State of New Jersey, 384 U.S. 719, 729, n. 9, 86 S.Ct. 1772, 1778, 16 L.Ed.2d 882 (1966). The Court acknowledged that the rules of Miranda apply to situations “in which the danger [of unreliable statements] is not necessarily as great as when the accused is subjected to overt and obvious coercion.” Id., at 730, 86 S.Ct., at 1779. And, in Tehan v. United States ex rel. Shott, 382 U.S. 406, 416, 86 S.Ct. 459, 465, 15 L.Ed.2d 453 (1966), holding the rule of Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), not retroactive, the Court quite explicitly stated that “the Fifth Amendment’s privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values * * *.” The exclusion of probative evidence in order to serve other ends is sound jurisprudence but, as the Court concluded in Jackson v. Denno, 378 U.S., at 382, 84 S.Ct., at 1783, juries would have great difficulty in understanding that policy, in putting the confession aside, and in finding the confession involuntary if the consequence was that it could not be used in considering a defendant’s guilt or innocence.

The situation in this case is very different. Here we deal with a codefendant’s confession which is admitted only against the codefendant and with a firm instruction to the jury to disregard it in determining the defendant’s guilt or innocence. That confession cannot compare with the defendant’s own confession in evidentiary value. As to the defendant, the confession of the codefendant is wholly inadmissible. It is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally. Furthermore, the codefendant is no more
than an eyewitness, the accuracy of whose testimony about the defendant's conduct is open to more doubt than would be the defendant's own account of his actions. More than this, however, the statements of a codefendant have traditionally been viewed with special suspicion. Crawford v. United States, 212 U.S. 183, 204, 29 S.Ct. 260, 268, 53 L.Ed. 465 (1909); Holmgren v. United States, 217 U.S. 509, 523–524, 30 S.Ct. 588, 591–592, 54 L.Ed. 561 (1910). See also Caminetti v. United States, 242 U.S. 470, 495, 37 S.Ct. 192, 198, 61 L.Ed. 442 (1917); Mathes, Jury Instruction and Forms for Federal Criminal Cases, 27 F.R.D. 59, 68–69 (1961). Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence. Where- as the defendant's own confession possesses greater reliability and evidentiary value than ordinary hearsay, the codefendant's confession implicating the defendant is intrinsically much less reliable.

The defendant's own confession may not be used against him if coerced, not because it is untrue but to protect other constitutional values. The jury may have great difficulty understanding such a rule and following an instruction to disregard the confession. In contrast, the codefendant's admissions cannot enter into the determination of the defendant's guilt or innocence because they are unreliable. This the jury can be told and can understand. Just as the Court believes that juries can reasonably be expected to disregard ordinary hearsay or other inadmissible evidence when instructed to do so, I believe juries will disregard the portions of a codefendant's confession implicating the defendant when so instructed. Indeed, if we must pick and choose between hearsay as to which limiting instructions will be deemed effective and hearsay the admission of which cannot be cured by instructions, codefendants' admissions belong in the former category rather than the latter, for they are not only hearsay but hearsay which is doubly suspect. If the Court is right in believing that a jury can be counted on to ignore a wide range of hearsay statements which it is told to ignore, it seems very odd to me to question its ability to put aside the co- defendant's hearsay statements about what the defendant did.

It is a common experience of all men to be informed of "facts" relevant to an issue requiring their judgment, and yet to disregard those "facts" because of sufficient grounds for discrediting their veracity or the reliability of their source. Responsible judgment would be impossible but for the ability of men to focus their attention wholly on reliable and credible evidence, and jurymen are no less capable of exercising this capacity than other men. Because I have no doubt that serious-minded and responsible men are able to shut their minds to unreliable information when exercising their judgment, I reject the assumption of the majority that giving instructions to a jury to disregard a codefendant's confession is an empty gesture.

The rule which the Court announces today will severely limit the circumstances in which defendants may be tried together for a crime which they are both charged with committing. Unquestionably, joint trials are more economical and minimize the burden on witnesses, prosecutors, and courts. They also avoid delays in bringing those accused of crime to trial. This much the Court concedes. It is also worth saying that separate trials are apt to have varying consequences for legally indistinguishable defendants. The unfairness of this is confirmed by the common prosecutorial experience of seeing codefendants who are tried separately strenuously jockeying for position with regard to who should be the first to be tried.

In view of the practical difficulties of separate trials and their potential un-
fairness, I am disappointed that the Court has not spelled out how the federal courts might conduct their business consistent with today's opinion. I would suppose that it will be necessary to exclude all extrajudicial confessions unless all portions of them which implicate defendants other than the declarant are effectively deleted. Effective deletion will probably require not only omission of all direct and indirect inculpations of codefendants but also of any statement that could be employed against those defendants once their identity is otherwise established. Of course, the deletion must not be such that it will distort the statements to the substantial prejudice of either the declarant or the Government. If deletion is not feasible, then the Government will have to choose either not to

use the confession at all or to try the defendants separately. To save time, money, and effort, the Government might best seek a ruling at the earliest possible stage of the trial proceedings as to whether the confession is admissible once offending portions are deleted. The failure of the Government to adopt and

follow proper procedures for insuring that the inadmissible portions of confessions are excluded will be relevant to the question of whether it was harmless error for them to have gotten before the jury. Oral statements, such as that involved in the present case, will present special problems, for there is a risk that the witness in testifying will inadvertently exceed permissible limits. Except for recommending that caution be used with regard to such oral statements, it is difficult to anticipate the issues which will arise in concrete factual situations.

I would hope, but am not sure, that by using these procedures the federal courts would escape reversal under today's ruling. Even so, I persist in believing that the reversal of Delli Paoli unnecessarily burdens the already difficult task of conducting criminal trials, and therefore I dissent in this case.

Mr. Justice HARLAN joins this opinion without abandoning his original disagreement with Jackson v. Denno, 378 U.S. 368, 427, 84 S.Ct. 1774, 1807, 12 L. Ed.2d 908, expressed in his dissenting opinion in that case.
tion of its own words’’ as memorialized in a verbatim transcript. See maj. op. 908. We routinely review transcripts of judicial hearings and, in this case, the trial judge’s finding was based on his interpretation of the entire transcript of the Rule 11 colloquy, including not only his own words but, significantly, also those of defense counsel who, as the majority notes, “twice asked the court to accept the plea agreement contemporaneously with the plea itself.” Id. 8.


Holdings: The Court of Appeals held that:

1. Criminal Law ⊕1180 Where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand.

2. Criminal Law ⊕1180 Defendants convicted of conspiracy to distribute heroin and heroin distribution waived claim on second appeal after remand that admission of expert testimony based in part on testimonial hearsay violated the Crawford v. Washington bar against admission of testimonial hearsay; defendants failed to raise claim at trial or on direct appeal, and although Crawford decision was issued after their direct appeal, it did not affect the admissibility of expert testimony, so that no exceptional circumstances existed to excuse defendants’ failure to raise the claim earlier. Fed.Rules Evid.Rule 703, 28 U.S.C.A.


4. Criminal Law ⊕1181.5(6) When a defendant raises an ineffective assistance of trial counsel claim for the first time on direct appeal, the general
practice is to remand the claim for an evidentiary hearing. U.S.C.A. Const. Amend. 6.

5. Criminal Law ⇐1119(1)

An ineffective assistance of trial counsel claim can be resolved on direct appeal if the trial record conclusively shows that counsel did or did not perform effectively. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐1180, 1440(2)

Court of Appeals would decline to address claim of ineffective assistance of appellate counsel on second appeal after remand; such claim would not be addressed on initial appeal, and uniform procedure of addressing such claims on collateral review should apply to all defendants. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇐1177

Under the harmless error standard in reviewing a sentence, the government must establish beyond a reasonable doubt that the error complained of did not contribute to the sentence obtained. Fed. Rules Cr.Proc.Rule 52(a), 18 U.S.C.A.

8. Criminal Law ⇐1177

A sentence at the top of the Sentencing Guidelines range is not, in itself, enough to establish that error in sentencing court's use of mandatory Guidelines, rather than advisory Guidelines, was harmless beyond a reasonable doubt. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

9. Criminal Law ⇐1177, 1181.5(8)

Sentencing and Punishment ⇐661

Imposition of life imprisonment sentences under mandatory Sentencing Guidelines was not harmless error for defendants convicted of conspiracy to distribute heroin, and thus, remand for resentencing under the advisory Guidelines was required, where there was no showing that the District Court would have imposed the same sentences under the advisory Guide-
able methodology (Claim Two) and (3) it admitted the guilty plea of a non-testifying co-conspirator (Claim Three). Henry and Harrison also argue that they received ineffective assistance of counsel when their appellate counsel failed to raise Claims Two and Three on direct appeal. Finally, Henry and Harrison challenge their sentences on the ground that the district court applied the United States Sentencing Guidelines (Guidelines) in a mandatory fashion in violation of United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). For the reasons set forth below, we conclude that Henry and Harrison waived their evidentiary claims by failing to raise them at trial or on direct appeal. Furthermore, Henry’s and Harrison’s ineffective assistance of counsel claim must be raised on collateral review, see 28 U.S.C. § 2255, if at all. Consistent with our holding in United States v. Ayers, 428 F.3d 312 (D.C.Cir.2005), however, we will vacate the sentences and remand for resentencing because we cannot say that the district court’s Booker error was harmless beyond a reasonable doubt.

I.

We set forth in detail the facts surrounding the heroin conspiracy in United States v. Stover, 329 F.3d 859 (D.C.Cir. 2003), cert. denied, 541 U.S. 1018, 124 S.Ct. 2088, 158 L.Ed.2d 635 (2004). Accordingly, we mention only those matters required for an understanding of the decision. On May 4, 1999, the Government charged Henry, Harrison and other individuals with conspiracy to possess with intent to distribute one kilogram or more of heroin. Nuri Lama, the conspiracy’s ringleader, pleaded guilty and thereafter testified as a witness against his co-conspirators at their October 20, 1999 trial. Although the jury convicted Henry of possession with intent to distribute, it failed to reach a verdict on the drug conspiracy count against Henry and Harrison.

On September 11, 2000, Henry and Harrison were retried on the drug conspiracy count. Because Lama had died between the two trials, the prosecution introduced evidence at the second trial that Lama had pleaded guilty to the conspiracy charge. The prosecution also introduced the expert testimony of Metropolitan Police Department Detective Tyrone Thomas who testified about the meanings of various code words used by the co-conspirators during telephone conversations intercepted by the FBI.

After a five-week trial, the jury convicted both Henry and Harrison of conspiracy to possess with intent to distribute one kilogram or more of heroin. In determining Henry’s and Harrison’s sentences under the then-mandatory Guidelines, the district court utilized a formula derived from Detective Thomas’s expert testimony to calculate the amount of heroin for which Henry and Harrison were responsible. Based on its calculations, the court found each responsible for 39.4 kilograms of heroin, resulting in a base offense level of 38. The court then added four levels for the leadership roles of both Henry and Harrison in the conspiracy and two levels for possession of a firearm for a total offense level of 44. Combined with Henry’s and Harrison’s Criminal History Category of I, the Guidelines mandated a sentence of life.

1. It remains unclear, even after oral argument, whether Henry and Harrison ask us to review Claims Two and Three on the merits or to decide whether failure to raise them on direct appeal constituted ineffective assistance of counsel. See Appellants’ Br. at 35–36, 40. As a result, we will address both.

2. The jury also failed to reach a verdict on the money laundering conspiracy count against Harrison. Stover, 329 F.3d at 864. The district court eventually dismissed that count. Id.
imprisonment for both and the court sentenced them accordingly.

The co-conspirators, including Henry and Harrison, appealed their convictions and sentences. In Stover, we affirmed Henry's and Harrison's convictions but concluded that the district court had erroneously calculated the amount of heroin for which each should be held responsible. Accordingly, we vacated their sentences and remanded to the district court to recalculate the drug quantity. Stover, 329 F.3d at 876.

At their resentencing hearings, both Henry and Harrison argued that the Sixth Amendment prohibits judicial calculation of drug amounts at sentencing. The district court rejected their argument and, based on its revised calculation of the drug amounts, held both Henry and Harrison responsible for 27.3 kilograms of heroin. Again treating the Guidelines as mandatory, the court set both base offense levels at 36. It then added four levels for their managerial roles in the offense and two levels for possession of a firearm for a total offense level of 42. Combined with their Criminal History Category of I, Henry's and Harrison's Guidelines range was 360 months to life imprisonment and the district court again sentenced them to life imprisonment. Henry and Harrison filed timely notices of appeal.

II.

We address separately Henry's and Harrison's evidentiary challenges, their ineffective assistance of counsel claim and their Booker challenge.

A. Evidentiary Challenges

Although they failed to raise their evidentiary challenges at trial or on direct appeal, Henry and Harrison argue that we should nevertheless review them for plain error on this appeal after the resentencing remand. See Fed.R.Crim.P. 52(b). We disagree.

[1] It is well-settled that “where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand.” Nw. Ind. Tel. Co. v. FCC, 872 F.2d 465, 470 (D.C.Cir.1989) (citing Laffey v. Nw. Airlines, Inc., 740 F.2d 1071, 1089–90 (D.C.Cir.1984)); see also United States v. Ben Zvi, 242 F.3d 89, 95–96 (2d Cir.2001) (applying waiver to second appeal following resentencing remand); cf. United States v. Adesida, 129 F.3d 846, 849–50 (6th Cir.1997) (applying waiver at resentencing remand stage). The “widely-accepted” bar promotes procedural efficiency and prevents the “‘bizarre result’” that “‘a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost.’” Nw. Ind. Tel., 872 F.2d at 470 (quoting Laffey, 740 F.2d at 1089–90). Although the “waiver principle is [not] an absolute preclusion to appellate review,” Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 739 (D.C.Cir.1995), we have stated that “discretion to waive a waiver is normally exercised only in ‘exceptional circumstances, where injustice might otherwise result,’” id. at 740 (quoting Eli Lilly & Co. v. Home Ins. Co., 794 F.2d 710, 717 (D.C.Cir.1986)).


Henry and Harrison have not demonstrated “exceptional circumstances” that excuse their failure to raise the evidentiary challenges either at trial or on direct appeal. Regarding Claim One—the allegedly erroneous admission of Thomas’s expert testimony based in part on hearsay—Henry and Harrison argue that the Crawford decision, which the Supreme Court issued after their direct appeal, created a new legal rule that rendered the testimony inadmissible. While we have suggested that an intervening change in the law can constitute an “exceptional circumstance” that justifies waiving waiver, see Crocker, 49 F.3d at 740, the Crawford decision did not effect such a change with respect to the admissibility of Thomas’s expert testimony. In Crawford, the Supreme Court altered the framework set forth earlier in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), and held that the Confrontation Clause of the Sixth Amendment bars “testimonial” hearsay statements unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine him. Crawford, 541 U.S. at 68–69, 124 S.Ct. 1354. Crawford, however, 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 under Federal Rule of Evidence 703. In other words, while the Supreme Court in Crawford altered Confrontation Clause precedent, it said nothing about the Clause’s relation to Federal Rule of Evidence 703. Because Crawford does not represent an intervening change in the law regarding the admissibility of Thomas’s expert testimony, no exceptional circumstance exists and Henry’s and Harrison’s Claim One is thus waived.

With respect to Claims Two and Three, Henry and Harrison appear to argue that we should address the merits in this appeal because their original appellate counsel acted ineffectively in failing to raise them on direct appeal. See Appellants’ Br. at 35–36, 40. In particular, Henry and Harrison argue that the trial court erroneously permitted Detective Thomas to testify about the meanings of terms used by the co-conspirators in intercepted telephone conversations and erroneously admitted evidence that Lama pleaded guilty although Lama himself was unavailable to testify. In order to reach the merits of Claims Two and Three because counsel allegedly acted ineffectively, however, we would first need to determine whether counsel acted ineffectively. And because an ineffective assistance of appellate counsel claim must ordinarily be made on collateral review, see Part II.B infra, we decline to consider Henry’s and Harrison’s original appellate counsel’s performance an exceptional circumstance that justifies waiving waiver. Accordingly, we do not reach the merits of Claims Two and Three.

B. Ineffective Assistance of Counsel Claim

Henry and Harrison argue that their original appellate counsel acted ineffectively in failing to raise Claims Two and Three on direct appeal. When a defendant raises an ineffective assistance of trial counsel claim for the first time on direct appeal, our “‘general practice is to remand experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.”’ (Emphasis added.)
the claim for an evidentiary hearing.’” United States v. Moore, 394 F.3d 925, 931 (D.C.Cir.2005) (quoting United States v. Rashad, 331 F.3d 908, 909 (D.C.Cir.2003)). Other circuits require the defendant to pursue an ineffective assistance of trial counsel claim in collateral proceedings under 28 U.S.C. § 2255. See, e.g., United States v. Quintero–Barraza, 78 F.3d 1344, 1347 (9th Cir.1995); United States v. Matzkin, 14 F.3d 1014, 1017 (4th Cir.1994). Nevertheless, an ineffective assistance of trial counsel claim can be resolved on direct appeal if the trial record conclusively shows that counsel did or did not perform effectively. See, e.g., Moore, 394 F.3d at 931; Quintero–Barraza, 78 F.3d at 1347; Matzkin, 14 F.3d at 1017.

[6] The question here is whether we should similarly treat a claim of ineffective assistance of appellate counsel raised in an appeal following a resentencing remand. On the one hand, such a claim is virtually unreviewable on direct appeal as appellate counsel will hardly assert his own ineffectiveness. Cf. United States v. Weaver, 281 F.3d 228, 234 (D.C.Cir.2002) (explaining that defendant can, with new counsel, raise ineffective assistance of trial counsel claim for first time on direct appeal because “trial counsel cannot be expected to argue his own ineffectiveness in a motion for a new trial”). Therefore, if the trial record sufficed, we could decide a claim of ineffective assistance of appellate counsel on appeal following a resentencing remand. Cf. Nw. Ind. Tel., 872 F.2d at 470 (explaining that waiver applies “where an argument could have been raised on an initial appeal” (emphasis added)); see also Ben Zvi, 242 F.3d at 96 (deciding ineffective assistance of appellate counsel claim on appeal after resentencing remand because “the underlying challenge” was “sufficiently presented” and “judicial efficiency would be served”). Unlike a claim of ineffective trial counsel that can be made on direct appeal, however, a claim of ineffective appellate counsel can be made only if a “second” appeal occurs—for example, as a result of a resentencing remand. In effect, a fortuity of the judicial process—whether we decide to remand for resentencing—would thus determine whether the defendant has an alternative to collateral review in pursuing an ineffective assistance of appellate counsel claim. Cf. Griffith v. Kentucky, 479 U.S. 314, 327–28, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) (applying new Supreme Court rule retroactively in criminal case because it is “solely the fortuities of the judicial process” that determine case Court chooses to hear first on plenary review). We believe a uniform procedure should apply to all defendants with an ineffective assistance of appellate counsel claim and therefore we will not consider such a claim on appeal following remand for resentencing. Instead, a defendant with such a claim must pursue it on collateral review pursuant to 28 U.S.C. § 2255.

C. Booker Claim

Finally, it is undisputed that the district court sentenced Henry and Harrison by applying the Guidelines in a mandatory fashion to increase his sentence beyond that which could have been imposed based solely on the facts found by the jury which is constitutional error under United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). See United States v. Simpson, 430 F.3d 1177, 1182–83 (D.C.Cir.2005). Nevertheless, the Government argues that the error was harmless beyond a reasonable doubt and thus a resentencing remand is unnecessary. We disagree.

[7] At their respective resentencing hearings, both Henry and Harrison raised a Sixth Amendment objection to their sentences. Accordingly, we review the sentences for harmless error under Federal Rule of Criminal Procedure 52(a) (“Any error, defect, irregularity, or variance that
does not affect substantial rights must be disregarded."'). That is, the Government must establish "beyond a reasonable doubt that the error complained of did not contribute to the sentence obtained." United States v. Coumaris, 399 F.3d 343, 351 (D.C.Cir.2005) (quotation omitted).

The Government maintains that the district court's sentencing error was harmless beyond a reasonable doubt because it imposed the maximum sentence in the Guidelines range notwithstanding its discretion to impose a lower sentence. That is, the district court decided to sentence Henry and Harrison to life imprisonment under a then-mandatory Guidelines range of 360 months to life imprisonment. Relying on Tenth Circuit precedent, Appellee's Br. at 47–48, the Government contends that if a judge imposed the maximum sentence within the then-mandatory Guidelines range, there is no reason to believe he would change the sentence on remand. See United States v. Riccardi, 405 F.3d 852, 876 (10th Cir.2005) (sentence imposed at top of Guidelines range pre-Booker constitutes harmless error because "[h]aving exercised his limited discretion under the pre-Booker system to give [the defendant] the highest permissible sentence, there is no reason to think the judge would exercise his now-greater discretion to reduce the sentence"); United States v. Waldrop, 431 F.3d 736, 743 (10th Cir.2005) (citing Riccardi for same proposition).

We do not believe that the pre-Booker imposition of a sentence at the top of a Guidelines range by itself constitutes harmless error. In United States v. Coles, we held that a Booker error constitutes plain error if "there would have been a materially different result, more favorable to the defendant, had the sentence been imposed in accordance with the post-Booker sentencing regime." 403 F.3d 764, 767 (D.C.Cir.2005). In so holding, we recognized that "[t]here undoubtedly will be some cases in which a reviewing court will be confident that a defendant has suffered no prejudice," id. at 769, and therefore remand would be unnecessary. For example, if a district judge imposed a sentence at the statutory maximum "‘and [said] that if he could he would have imposed an even longer sentence, there would be no basis for thinking that if he had known that the sentencing guidelines [were] merely advisory he would have given the defendant a lighter sentence.’" Id. (quoting United States v. Paladino, 401 F.3d 471, 483 (7th Cir.2005)).

[8] We also suggested in Coles, however, that the imposition of a sentence at the top of a Guidelines range without "the judge's characterization of the sentence," United States v. Tchibassa, 452 F.3d 918, 930 (D.C.Cir.2006), is "hardly conclusive," Coles, 403 F.3d at 769. We noted:

"A conscientious judge—one who took the guidelines seriously whatever his private views—would pick a sentence relative to the guideline range. If he thought the defendant a more serious offender than an offender at the bottom of the range, he would give him a higher sentence even if he thought the entire range too high."

Id. at 770 (quoting Paladino, 401 F.3d at 482). In other words, a trial judge treating the Guidelines as mandatory might have imposed the maximum sentence in a particular range not necessarily because he believed the defendant deserved that sentence but because he considered the defendant to be the most serious type of offender in the range. And if this analysis applies in the plain error context, where the burden of proving prejudice is on the defendant, it applies a fortiori in the context of constitutional harmless error, where the burden is on the Government to establish no prejudice beyond a reasonable doubt. Thus, we agree with our sister
circuits that have held that a sentence at the top of a Guidelines range is not, in itself, enough to establish that a Booker error was harmless beyond a reasonable doubt. See United States v. Woods, 440 F.3d 255, 259 (5th Cir.2006); United States v. Cain, 433 F.3d 1345, 1348 (11th Cir. 2005).

[9] Here, unlike in Coles, the defendants raised Sixth Amendment objections in the district court. Because we cannot conclude that the district court would have sentenced Henry and Harrison to life imprisonment irrespective of the mandatory nature of the Guidelines, the Government has not established that the error was harmless. We therefore vacate the sentences and remand for resentencing. See United States v. Baugham, 449 F.3d 167, 182–83 (D.C.Cir.2006); United States v. Brown, 449 F.3d 154, 159–60 (D.C.Cir. 2006); Ayers, 428 F.3d at 315–16.

For the foregoing reasons, we affirm Henry’s and Harrison’s convictions but we vacate the sentences and remand the case to the district court for resentencing under Booker and 18 U.S.C. § 3553(a).

So ordered.

KAREN LECRAFT HENDERSON, Circuit Judge, concurring.

I fully agree that we should affirm Henry’s and Harrison’s convictions. I am less certain, however, that we should remand for a second resentencing.

A Booker error is prejudicial if “there would have been a materially different result, more favorable to the defendant, had the sentence been imposed in accordance with the post-Booker sentencing regime.” * United States v. Coles, 403 F.3d 764, 767 (D.C.Cir.2005). As Coles acknowledges, “[t]here undoubtedly will be some cases in which a reviewing court will be confident that a defendant has suffered no prejudice.” Id. at 769. In such a case, “there would be no basis for thinking that if [the judge] had known that the sentencing guidelines [were] merely advisory he would have given the defendant a lighter sentence,” id. (quoting United States v. Paladino, 401 F.3d 471, 483 (7th Cir. 2005)), and thus no reason exists to remand for resentencing.

While I agree that a sentence imposed at the top of a Guidelines range does not without more constitute harmless error, the record in this case reveals more. Although the trial judge did not explicitly state that he would have imposed the same sentences were the Guidelines not mandatory, he has twice sentenced Henry and Harrison to the maximum sentence of life imprisonment. He originally imposed the mandatory sentence of life imprisonment. Upon remand for resentencing, the judge again sentenced Henry and Harrison to life imprisonment after calculating a lower Guidelines range of 360 months to life imprisonment. Therefore, the judge not only rejected a lower sentence within a particular Guidelines range, he rejected a lower sentence in a lower range. Indeed, a “conscientious judge” who considered mandatory life imprisonment to be excessive would necessarily impose a lighter sentence if a lower mandatory range applied. See Coles, 403 F.3d at 770. Because here the district judge chose not to impose a shorter sentence on the first remand—even with a lower Guidelines range—I believe there is no reason to

* Although we applied the plain error standard in Coles, 403 F.3d at 767, the prejudice inquiry is the same under both the plain and harmless error standards. See United States v. Olano, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (plain error inquiry “norma-
think that he would reduce the sentence on a second remand with no mandatory Guidelines range.

Furthermore, at least with respect to Harrison, the district judge explained why the life sentence was appropriate. In *United States v. Tchibassa*, under plain error review, we found no prejudice where the district judge imposed the maximum sentence within the Guidelines range and stated that the sentence was “appropriate to serve as a warning to those who will kidnap Americans abroad and entirely appropriate for the type of actions that occurred here in depriving [the former hostage] not only of his freedom for two months, but basically of his life.” 452 F.3d 918, 930 (D.C.Cir.2006) (quotation omitted) (emphasis original). As we explained in *Tchibassa*:

The judge’s strong and unambiguous approval of the sentence imposed, based 
. . . on its deterrent effect and its proportionality to the crime committed, 
makes us confident that were the judge given the opportunity to resentence Tchibassa . . . he would not impose a sentence materially more favorable than the one he made plain he considered “appropriate.”

*Id.* Similarly, the court stated at Harrison’s resentencing hearing:

The Court finds that a sentence of life is *appropriate in this case* in light of the defendant’s boasting of his lifestyle and his lifestyle, and the need for deterrence provides sufficient reason for the maximum penalty. Dealing in this amount of drugs should result in a sentence of life imprisonment, in this Court’s view, and that will provide . . . some deterrence in the community if others were to understand that even though they’ve never been arrested before, if they deal in this amount of drugs they’re going away for the rest of their lives.

Because the judge offered a “strong and unambiguous approval of the sentence imposed” upon Harrison, I think there is little, if any, reason to believe that he would impose a sentence more favorable to Harrison were he given the opportunity to resentence him. *See Tchibassa*, 452 F.3d at 930.

KAVANAUGH, Circuit Judge, concurring.

I join the Court’s opinion and add this concurrence to note a few broader points about the path of post-*Booker* jurisprudence in the federal courts.

To review: In *Booker*, a five-Justice majority of the Supreme Court held that the United States Sentencing Guidelines were unconstitutional under the Fifth and Sixth Amendments to the extent that facts used to increase a criminal sentence (beyond what the defendant otherwise could have received) were not proved to a jury beyond a reasonable doubt. *United States v. Booker*, 543 U.S. 220, 226–27, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) (Stevens, J., joined by Scalia, Souter, Thomas, and Ginsburg, JJ.). The logical upshot of this part of *Booker* (what is known as the *Booker* constitutional opinion) is that the Constitution is satisfied by a sentence in which sentencing facts are proved to a jury beyond a reasonable doubt. *United States v. Booker*, 543 U.S. 220, 226–27, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) (Stevens, J., joined by Scalia, Souter, Thomas, and Ginsburg, JJ.).

In some tension with the *Booker* constitutional opinion, however, a different five-Justice majority of the *Booker* Court also held (in what is known as the *Booker* remedial opinion) that the constitutional problem with the Guidelines is more readily solved by requiring sentencing facts to be proved to a jury beyond a reasonable doubt, but instead by making the Guidelines one factor in the district court’s sentencing decision, along with other factors specified in 18 U.S.C. § 3553(a). *Id.* at 245–46, 260–61, 125 S.Ct. 738 (Breyer, J.,
joined by Rehnquist, C.J., and O'Connor, Kennedy, and Ginsburg, JJ.); cf. id. at 302, 125 S.Ct. 738 (Stevens, J., dissenting in part, joined by Scalia and Souter, JJ.) ("[B]y repealing the right to a determinate sentence that Congress established in the SRA, the Court has effectively eliminated the very constitutional right Apprendi sought to vindicate."). The Booker remedial opinion emphasized, however, that the sentencing court still “must consult” the Guidelines and “take them into account when sentencing.” Id. at 264, 125 S.Ct. 738. The Booker remedial opinion also directed appellate courts to review district court sentences for “reasonableness”—a term not defined, but which the Court stated would help “to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.” Id. at 264, 125 S.Ct. 738.

In light of the Booker remedial opinion and § 3553(a)’s requirement that district courts “shall consider” the Guidelines, as well as § 3553(a)’s express goal of avoiding unwarranted sentencing disparities, this Court and other federal courts after Booker have held that the Guidelines remain central to sentencing. In part because the “reasonableness” of a sentence is not self-defining and because the Booker remedial opinion said that appellate review would help maintain uniformity, appellate courts have relied on the Guidelines as the predominant substantive standard against which to measure a sentence’s reasonableness. Indeed, many courts of appeals, including this one, have accorded a “presumption of reasonableness” to within-Guidelines sentences. See United States v. Dorcely, 454 F.3d 366, 376 (D.C.Cir. 2006); see generally United States v. Buchanan, 449 F.3d 731, 735–41 (6th Cir. 2006) (Sutton, J., concurring). And appeals courts have found many below-Guidelines sentences to be “unreasonable.” The post-Booker appellate jurisprudence in turn has exerted further hydraulic pressure on district courts to rely heavily on the Guidelines in sentencing criminal defendants. It thus may be something of a misnomer to call the Guidelines “advisory” with respect to current sentencing practices given that appeals courts often assess the propriety of a district court sentence in part by reference to the Guidelines.

As we review what has happened since Booker, there is no denying that the post-Booker system in substance closely resembles the pre-Booker Guidelines system in constitutionally relevant respects. See Michael W. McConnell, The Booker Mess, 83 DENV. U.L. REV. 665, 678 (2006) (“All the things that troubled Sixth Amendment purists about the pre-Booker Guidelines system are unchanged.”); see also Douglas A. Berman & Stephanos Bibas, Making Sentencing Sensible, 4 OHIO STATE J. CRIM. L. 37, 53 (2006); Douglas A. Berman, Tweaking Booker: Advisory Guidelines in the Federal System, 43 HOUS. L. REV. 341, 347–55 (2006). Four of the five Justices who joined the Booker remedial opinion, including its author Justice Breyer, did not find any constitutional problem with the Guidelines to begin with. So it is understandable that the current system as applied is not a major departure from the pre-Booker Guidelines system. Cf. Booker, 543 U.S. at 312–13, 125 S.Ct. 738 (Scalia, J., dissenting in part) (stating that Booker remedial opinion may convey message that “little has changed” from mandatory Guidelines system and posing question: “Will appellate review for ‘unreasonableness’ preserve de facto mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges?”).

To be sure, district and appeals courts now take some additional and important procedural steps (as exemplified again by today’s per curiam opinion). But the bot-
tom line, at least as a descriptive matter, is that the Guidelines determine the final sentence in most cases. And notwithstanding the Booker constitutional opinion, many key facts used to calculate the sentence are still being determined by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt. The oddity of all this is perhaps best highlighted by the fact that courts are still using acquitted conduct to increase sentences beyond what the defendant otherwise could have received—notwithstanding that five Justices in the Booker constitutional opinion stated that the Constitution requires that facts used to increase a sentence beyond what the defendant otherwise could have received be proved to a jury beyond a reasonable doubt.

In short, we appear to be back almost where we were pre-Booker. And if that is so—and if the lower courts’ effort to harmonize the competing goals of the Booker opinions has become the jurisprudential equivalent of a dog chasing its tail—it makes sense to examine how current sentencing practices square not just with Booker but with underlying constitutional principles.

The disagreement in Booker (and in earlier cases such as Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)) represents the collision of two starkly different conceptions of how the Fifth and Sixth Amendments apply to criminal sentencing.

The first conception of the Fifth and Sixth Amendments, which might be called the “deference-to-legislatures” model, generally defers to legislatures in defining crimes and enacting sentencing schemes. Under this interpretation, the Fifth and Sixth Amendments generally require that a jury find the elements of the crime (as defined by the legislature) beyond a reasonable doubt. As to sentencing, this approach gives legislatures wide discretion in crafting a mandatory or structured sentencing system; or adopting an unstructured system in which each sentencing judge possesses broad authority to assess a sentence based on the individual background, facts, and circumstances of the offense and offender; or choosing some approach in between. See generally Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949); McMilan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) (Rehnquist, J.) (opinion of the Court); Booker, 543 U.S. at 326–34, 125 S.Ct. 738 (Breyer, J., dissenting in part); Blakely, 542 U.S. at 314–26, 124 S.Ct. 2531 (O’Connor, J., dissenting); id. at 326–28, 124 S.Ct. 2531 (Kennedy, J., dissenting). Proponents of this approach argue that it has prevailed throughout most of our history, as courts have generally respected and adhered to legislative choices with respect to sentencing schemes. See Booker, 543 U.S. at 327–28, 125 S.Ct. 738 (Breyer, J., dissenting in part).

The second conception of the Fifth and Sixth Amendments, which might be termed the “real-elements-of-the-offense” model, rests on the constitutionally central role of the jury in the criminal process. This approach begins with the idea that no logical distinction exists between the elements of a crime and so-called sentencing facts that are used to increase a sentence. Because the Constitution requires that the Government prove the elements of a crime to a jury beyond a reasonable doubt, the Constitution also requires that the Government prove substantively similar sentencing facts (such as carrying a weapon during commission of a drug crime) to a jury beyond a reasonable doubt. To do otherwise, this view contends, would be to elevate form over substance and allow leg-
islatures to evade the constitutional re-
quirement that the prosecutor prove the ele-
ments of the crime to a jury beyond a rea-
sonable doubt simply by re-labeling ele-
ments of the crime as sentencing factors.
Under this jurisprudential approach,
therefore, courts do not defer to a legisla-
tive choice to label a fact as a sentencing 
factor rather than an element of the crime.
See Booker, 543 U.S. at 226–44, 125 S.Ct. 738 (Stevens, J., joined by Scalia, Souter, 
Thomas, and Ginsburg, JJ.); Harris v. 
United States, 536 U.S. 545, 572–83, 122 
S.Ct. 2406, 153 L.Ed.2d 524 (2002) (Thom-
as, J., dissenting); Appendix, 530 U.S. at 
498–99, 120 S.Ct. 2348 (Scalia, J., concur-
ring).
There is an important qualification to 
this second approach, however, which may 
explain some of the conceptual and prac-
tical difficulty in this area. Despite re-
quiring the jury to find beyond a reason-
able doubt the facts used to increase a 
sentence, the adherents to the real-ele-
ments-of-the-offense approach allow purely 
discretionary sentencing schemes whereby 
judges “exercise broad discretion in impos-
ing a sentence within a statutory range.” 
Booker, 543 U.S. at 233, 125 S.Ct. 738; see 
also Appendix, 530 U.S. at 481, 120 S.Ct. 2348. This concession creates an apparent 
amomaly: After all, discretionary sentenc-
ing systems appear to pose an even grea-
ter concern that key facts used to increase 
a sentence are found by judges—on the 
record or often silently—by a preponder-
ance of the evidence rather than by juries 
beyond a reasonable doubt. See Appendix, 530 U.S. at 548–49, 120 S.Ct. 2348 
(O’Connor, J., dissenting) (“[O]ur approval 
of discretionary-sentencing schemes, in 
which a defendant is not entitled to have a 
jury make factual findings relevant to sen-
tencing despite the effect those findings 
have on the severity of the defendant’s sentence, demonstrates that the defendant 
should have no right to demand that a jury 
make the equivalent factual determinations 
under a determinate-sentencing scheme.”); 
Kevin R. Reitz, The New Sentencing Co-
nundrum, 105 Colum. L. Rev. 1082, 1119 
(2005). Because the Court has long up-
held discretionary sentencing schemes,
Chief Justice Rehnquist stated for the 
Court in 1986 (before the Apprendi–Blake-
ly–Booker cases): “We have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance.” McMil-
lan, 477 U.S. at 92, 106 S.Ct. 2411.

Notwithstanding weighty arguments of 
the kind made by Chief Justice Rehnquist, 
the adherents to the real-elements-of-the-
offense conception have maintained their 
approach—and continued to accept discre-
tionary sentencing schemes as a constitu-
tionally acceptable alternative. See Book-
ner, 543 U.S. at 233, 125 S.Ct. 738. As a 
result, the real-elements-of-the-offense ap-
proach to the Constitution seems to mean 
the following: Legislatures may enact: (i) 
a discretionary sentencing scheme where 
the sentencing judge has complete discre-
tion to impose a sentence within the legal 
range that applies to the crime found by 
the jury, and the judge may determine the 
sentence based on the judge’s own subsidi-
ary factual determinations, other consid-
erations, or no stated rationale at all; or 
(ii) a mandatory sentencing scheme where 
the sentencing judge has no discretion to 
make factual determinations to increase a 
sentence. But legislatures, under this 
real-elements-of-the-offense approach, may 
not enact an intermediate sentencing 
scheme where the sentencing judge has structured discretion—in other words, 
where the sentencing judge must make factual determinations (such as “Did the 
defendant carry a gun during the drug 
transaction?”) in order to increase a sen-
tence.
How do post-Booker sentencing practices square with the various constitutional approaches described above?

If the deference-to-legislatures conception is correct, then current federal sentencing practices, which largely mirror pre-Booker practices, are obviously constitutionally permissible. Indeed, if this conception is correct, then the Booker constitutional opinion is incorrect and the Sentencing Guidelines should apply as promulgated and made mandatory by Congress.

If the real-elements-of-the-offense approach is correct, however, then current federal sentencing practices may be in tension with the Constitution. That is because the current system—in practice—works a lot like the pre-Booker system: District judges are obliged to apply the Guidelines, and certain facts used to increase a sentence (beyond what the defendant would have received based on the offense of conviction) are found by the judge, not by the jury beyond a reasonable doubt.
U.S. v. Zavala  

This case was not selected for publication in the Federal Reporter. NOT PRECEDENTIAL Please use FIND to look at the applicable circuit court rule before citing this opinion. Third Circuit Local Appellate Rule 28.3(a) and Internal Operating Procedure 5.3. (FIND CTA3 Rule 28.0 and CTA3 IOP APP I 5.3.)

United States Court of Appeals, Third Circuit.  
UNITED STATES of America,  
v.  
Francisco ZAVALA, Appellant.  
No. 03-4654.  
Submitted under Third Circuit LAR 34.1(a) on Jan. 14, 2005.  
Decided July 22, 2005.

Background: Defendant was convicted following a jury trial in the United States District Court for the Eastern District of Pennsylvania, Jan E. DuBois, J., of conspiracy to distribute and to possess with intent to distribute methamphetamine, attempting to possess with intent to distribute methamphetamine, and using communication facility in facilitating the conspiracy, and he appealed.

Holdings: The Court of Appeals, Roth, Circuit Judge, held that:

(1) prosecutor's improper argument during opening statement was harmless error;

(2) law enforcement agent's expert testimony did not violate defendant's confrontation right;

(3) evidence was sufficient to support conviction for use of communication facility to facilitate conspiracy.

Affirmed in part, vacated in part, and remanded.

West Headnotes
[1] Criminal Law 110 k714

110 Criminal Law
In prosecution for drug offenses, prosecutor's attempt to read cross-examination portion of government witness's suppression hearing testimony to jury was consistent with parties' stipulation allowing reading of witness's entire testimony to jury, and thus, did not constitute prosecutorial misconduct.

[2] Criminal Law 110 k1171.3

In prosecution for drug offenses, prosecutor's improper argument during opening statement that co-defendant lied to postal police about contents of package he had mailed to defendant was harmless error; even if jury believed prosecutor's argument that co-defendant lied, that argument directly implicated only co-defendant, not defendant, and overwhelming bulk of testimony against defendant was that of law enforcement officers about their surveillance of defendant, their seizure of drugs from his car, and his post-arrest admissions of guilt.

[3] Criminal Law 110 k1171.1(6)

In prosecution for drug offenses, any error in prosecutor's reprimanding of defense counsel in front of jury for incorrectly reading a statement into the record was harmless; because jury heard both defense counsel's original reading of question included in statement and her rephrased question after prosecutor's objection, jury was aware that defense counsel was hiding nothing of substance from jury, but had only read original question somewhat informally.
In prosecution for drug offenses, law enforcement agent's testimony as to amount of methamphetamine in a clinical dosage unit, number of clinical dosage units possessed by defendant, number of street dosage units that equaled, and street value of the drugs, which was based on agent's experience, on position of Drug Enforcement Agency (DEA) based on its investigations, and on agent's interviews of subjects arrested following methamphetamine investigations, was admissible under rule of evidence permitting expert testimony based on inadmissible evidence of a type reasonably relied on in the field in forming opinions.  Fed.Rules Evid.Rule 703, 28 U.S.C.A.

In prosecution for drug offenses, admission of law enforcement agent's testimony as to amount of methamphetamine in a clinical dosage unit, number of clinical dosage units possessed by defendant, number of street dosage units that equaled, and street value of the drugs, which was based on agent's experience, on position of Drug Enforcement Agency (DEA) based on its investigations, and on agent's interviews of subjects arrested following methamphetamine investigations, did not violate defendant's Sixth Amendment right to confrontation, since witness's statements were generic descriptions of drug transactions, and did not involve defendant's case or his involvement in it.  U.S.C.A. Const.Amend. 6.
Evidence was sufficient to support conviction for committing or aiding and abetting illegal use of a communication facility, the mail, to facilitate a conspiracy to distribute methamphetamine; after being arrested while in possession of package containing methamphetamine, defendant admitted to police that he had asked co-defendant to accept a mailed package for him, and that the package contained methamphetamine and that he knew he was in trouble, and he stated that he had mailed the package to himself from another state. 18 U.S.C.A. <section> 2; Comprehensive Drug Abuse Prevention and Control Act of 1970, <section> 403(b), 21 U.S.C.A. <section> 843(b).


Rocco C. Cipparone, Jr., Haddon Heights, NJ, for Appellant.

Before ROTH and CHERTOFF<sup>FN*</sup> Circuit Judges, and IRENAS, <sup>FN**</sup> District Judge.

<sup>FN*</sup> This case was originally submitted to the three judge panel of Roth, Chertoff and Irenas. Judge Chertoff subsequently resigned from the Court.

<sup>FN**</sup> Honorable Joseph E. Irenas, United States District Court Judge for the District of New Jersey, sitting by designation.

*71 OPINION

ROTH, Circuit Judge.

Francisco Zavala has appealed his convictions on three counts of a superseding indictment. The indictment charged Zavala in Count 1 with conspiracy to distribute and to possess with intent to distribute in excess of 500 grams of methamphetamine in violation of 21 U.S.C. <section><section> 841(a)(1), 841(b)(1)(A)(vii) and <section> 846; in Count 2 with attempting to possess with intent to distribute in excess of 500 grams of methamphetamine, and aiding and abetting such, in violation of 21 U.S.C. <section><section> 841(a)(1), 841(b)(1)(A)(vii), 846 and 18 U.S.C. <section> 2; and in Count 3 with knowingly and intentionally using a communication facility, that is, the mail, in facilitating the conspiracy to distribute and possess with intent to distribute methamphetamine described in Count 1, and the attempted possession with intent to distribute methamphetamine described in Count 2, and aiding and abetting such, in violation of 21 U.S.C. <section> 843(b) and 18 U.S.C. <section> 2.
The jury convicted Zavala on all counts. Sentence was imposed on December 5, 2003, and Zavala appealed, contesting both the convictions and the sentence imposed.\footnote{Zavala first contested his sentence on appeal in supplemental briefing submitted to this Court following United States v. Booker, \textit{---} U.S. \textit{---}, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).}

\footnote{Zavala first contested his sentence on appeal in supplemental briefing submitted to this Court following United States v. Booker, \textit{---} U.S. \textit{---}, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).}

For the reasons stated below, we will affirm Zavala's conviction, vacate his sentence, and remand for a resentencing consistent with United States v. Booker, \textit{---} U.S. \textit{---}, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

I. Factual Background and Procedural History

As the facts are well known to the parties, we give only a brief description of the facts and procedural posture of the case.

Government witnesses testified to the following facts. On June 25, 2002, co-defendant Jose Zavala (also known as Anthony Zavala) mailed a package from a United States post office in Los Angeles, California. Jose Zavala is the brother of the defendant, Francisco Zavala. The sender on the package was listed as "David Martin" and the package was addressed to "Monica Flores" at an address in Philadelphia, Pennsylvania. The mailing was videotaped by surveillance cameras at the post office. On June 26, 2002, a postal inspector retrieved the package and obtained a search warrant for the package. When the package was opened, it was found to contain 1,302 grams of methamphetamine. On June 27, 2002, postal inspectors, along with agents from other law enforcement agencies, made a controlled delivery of the reassembled packaged.

Surveillance officers observed that co-defendant Michael Gonzalez arrived at the delivery address at approximately 9:22 a.m. and Francisco Zavala arrived in a separate vehicle at approximately 9:57 a.m. The postal inspector made delivery at approximately 10 a.m. Michael Gonzalez signed for the package on the steps of the delivery address and indicated that he could take delivery for Monica Flores. Francisco Zavala was in the general area. Michael Gonzalez put the package on the steps. Francisco Zavala took the package, placed it in his vehicle and, at approximately 10:05 a.m., drove away. At the same time, Michael Gonzalez left in his vehicle in a different direction.

**2 Both Gonzalez and Zavala were followed by surveillance units, who stopped them *72 and took them into custody. Zavala was read his Miranda rights but nevertheless made a statement to the police. Agent Kennedy testified that Zavala said that he had asked Migueito [Michael Gonzalez] to accept a package.
for him and that he offered to pay Migueito a couple of hundred dollars to accept a package. Zavala stated that there was "meth inside of the package" and that "he knew he was in trouble but he was unwilling to get anyone else in trouble." Agent Nowelski testified that Zavala said that "[Michael Gonzalez] was just receiving $200 for the delivery address he provided to Mr. Zavala" and that "he [Francisco Zavala had] mailed [the package] to himself and that he flew back to Philadelphia to retrieve it." A postal inspector questioned co-defendant Jose Zavala. Jose Zavala denied mailing the package to his brother and claimed that "he is not aware of what his brother does." He made the latter statement after being warned of his Miranda rights and after having been informed that the package in question contained methamphetamine.

II. Jurisdiction and Standard of Review

The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction to consider the appeals of the defendant's convictions and the sentences imposed. See 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Francisco Zavala's first claim is for prosecutorial misconduct. If no contemporaneous objection was made to the District Court for prosecutorial misconduct, we review for plain error that must show "egregious error or a manifest miscarriage of justice." United States v. Brennan, 326 F.3d 176, 182 (3d Cir.2003) (quoting United States v. Brown, 254 F.3d 454, 458 (3d Cir.2001)). On the other hand, if a contemporaneous objection is made: "a finding of prosecutorial misconduct requires reversal unless the error is harmless." Id.

Similarly, Francisco Zavala's claim that the testimony of a witness was improperly admitted is reviewed under a plain error, absent a contemporaneous objection. See United States v. Tyler, 281 F.3d 84, 100-01 (3d Cir.2002).

Lastly, Francisco Zavala argues that there was insufficient evidence to support his conviction under count 3, for knowingly or intentionally using a mail facility to facilitate a drug offense, in violation of 21 U.S.C. § 843(b) and 18 U.S.C. § 2. "[W]hen deciding whether a jury verdict rests on legally sufficient evidence .... [i]t is not for us to weigh the evidence or to determine the credibility of the witnesses. Rather, we must view the evidence in the light most favorable to the government ... and will sustain the verdict if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Dent, 149 F.3d 180, 187 (3d Cir.1998) (citations and quotation marks omitted).

III. Discussion

[1] In support of his appeal, Zavala contends that the prosecutor committed
several acts of misconduct during the trial. The first such instance
concerns the suppression hearing testimony of Monte Jones, a government
witness. The parties agreed that Jones's testimony from that hearing would
be transcribed for use at trial rather than flying Jones back from California
to Pennsylvania for later trial proceedings. At the trial, the prosecutor
read Jones's direct examination to the jury. At the end of the direct
examination, the prosecutor attempted to read Jones's cross-examination to the
jury. The following colloquy took place:

*73 **3 Zittlau [Asst. U.S. Attorney]: I'll read the questions posed by
counsel for Jose Zavala and the answers of Monte Jones under oath.
Bosch [Counsel to Jose Zavala]: Your Honor-
Zittlau: Or if you want to do it, that's fine too.
Bosch: I assumed that it was only the direct examination that is going to
be read to the jury. I-
Eubanks [Counsel to Francisco Zavala]: Yeah.
Bosch: We had no discussion about cross-examination. I-and I would object
to cross-examination being-
Zittlau: Oh, that's fine. I just was trying to be fair, because-
The Court: All right.
Zittlau:-we-
The Court: No.
Zittlau:-agreed to read both.
The Court: We don't need any speeches.
Bosch: No. I was not. I was just going to say-
The Court: You object to the cross-examination?
Bosch: Yes, Sir.
The Court: And you agree to it, Mr.-
Zittlau: I agree to it.
The Court:-Zittlau. And you have no position, Ms. Webb Eubanks?
Eubanks: Oh, I agree with everyone else.
The Court: Well-
Eubanks: No. I don't have a position., Your Honor.
The Court: That's very good, Ms. Webb Eubanks. Thank you. And then your
objection is sustained by agreement.
Bosch: Thank you, sir.
Zittlau: All right. Now, your Honor, if there was any question-I'm just
checking Okay. There was questions by Ms. Eubanks that were also asked. Do
you wish me to read those questions and the answers given by Monte Jones under
oath?
Eubanks: No.
The Court: There's no need to do that. Ms. Eubanks has said no. You've
used the deposition transcript for the purposes you intended, is that correct?
Zittlau: Correct, Your Honor.

The core of Francisco Zavala's counsel's argument on appeal is that, although
the direct testimony was properly read to the jury per the stipulation, the
attempt to read testimony from the cross-examination was improper because it "was contrary to the stipulation" and that the effect of the colloquy was to leave jurors with the impression that there was other "testimony exist[ing] that they were not permitted to hear." Even assuming that there is anything here that might be construed as prejudicial, the prosecutor's attempt to introduce the cross-examination testimony was not improper because it was, in fact, fully authorized by the February 13, 2003 stipulation.

On February 13, 2003, the following colloquy took place:
The Court: And you flew [Mr. Monte Jones]-
Zittlau: From California, yes, your Honor. And defense counsel has graciously stipulated that his testimony today, direct and cross, may be read at the trial if your Honor denies the motion to suppress and this case proceeds to trial, to avoid flying him back for the trial.
And so his testimony will be transcribed and then we'll, by stipulation, read that *74 testimony at the time of trial so he doesn't have to come twice to Philadelphia.
The Court: Is that agreed?
**4 Seabold [Counsel for Jose Zavala]: Yes, it is, your Honor. Do you understand?
Defendant J. Zavala: Yes, I do.
The Court: And Ms. Webb Eubanks?
Eubanks: Yes, your honor.
The Court: And Francisco Zavala, do you agree to that?
The Court: Do either of the defendants^FN2 have any questions about that agreement?

    FN2. Codefendant Michael Gonzalez is a fugitive: he was released on bail pending trial.

Defendant J. Zavala: No, your Honor.
Defendant F. Zavala: No.
The Court: Well, then what we're going to do is we'll hear the testimony of this witness and if the suppression motion is denied and the case goes to trial, the testimony of this witness will be used at trial in the same way as if the witness were present. So the defendants will fully cross-examine the witness.

The stipulation, as proposed by Zittlau, expressly provided for the introduction of both direct and cross-examination testimony at trial. It was that proposal which was accepted by defendants and defendants' counsel. For that reason, Zittlau's proposal to read the cross-examination did not violate the stipulation.
Zavala also argues that Zittlau forced defense counsel to respond to his attempt to introduce the cross-examination testimony, leaving jurors with the "image of defense counsel as seeking to suppress testimony and reneging on an alleged stipulation." The transcript tells a different story. Moreover, it highly doubtful that the jury would have construed this colloquy as an effort to suppress evidence from their view. We find, therefore, no prosecutorial misconduct.

[2] Zavala points to two other alleged instances of prosecutorial misconduct. First, the prosecutor stated in his opening: "And then [Jose Zavala] was asked [by the postal police], well, what was in this package that you mailed.. . And he says he couldn't completely remember, but it was toys and stuff like that. This is not toys. This is approximately three pounds of drugs. Now why did he [Jose Zavala] not tell the truth?" Francisco Zavala's trial counsel objected that this was argument. The objection was sustained. A colloquy ensued and the District Judge interrupted Zittlau in quick succession as he attempted twice more to make argument rather than describe what the evidence would show. No curative instruction was sought by trial counsel. We do not disagree that argument by the prosecutor in his opening statement was improper. But not every error by a prosecutor, even when repeated, is reversible error. This is particularly true on these facts, where to the extent that the jury believed the prosecutor, i.e., that Jose Zavala lied to the postal police regarding the contents of the mailing, that lie directly implicated only Jose Zavala, not Francisco Zavala. Moreover, the overwhelming bulk of the testimony against Francisco Zavala was that of law officers who testified to their observations arising from surveillance of Francisco Zavala, their seizure of drugs from Francisco Zavala's car, and post-arrest admissions of guilt made by Francisco Zavala. On these facts, it is "highly probable that the error did not contribute to the judgment." United States v. Zehrbach, 47 F.3d 1252, 1265 (3d Cir.1995) (en banc) (quoting Government of Virgin Islands v. Toto, 529 F.2d 278, 284 (3d Cir.1976)).

**[3] Finally, Zavala argues that the prosecutor engaged in prosecutorial misconduct for "boldly reprimand[ing] defense counsel in the presence of the jury by stating, 'If you're going to read the statement, read it correctly. '

Zavala contends that this improper comment-made not in the form of an objection, but directly to defense counsel-again conveyed to the jury that the defense was attempting to mis-characterize evidence by failing to read the statement in question "correctly." The transcript tells a more balanced story:

Zittlau: Well, you didn't read it. A couple hundred [dollars]. If you're going to read the statement, read it correctly. Objection.  

The Court: Just object. Wait a minute. We ought to have the rules that I've established for years, and you all know better. Mr. Zittlau, no speeches. Ms. Webb Eubanks, no wandering through a statement. You have a
Because the jury heard both Eubanks’ original question and the rephrased questions she asked after Zittlau’s objection, the jurors were aware that Eubanks was hiding nothing of substance from them but had only asked her original question somewhat informally. Thus, Francisco Zavala was not prejudiced.

Zavala's next contention is that Agent Terry's expert witness testimony violated Zavala's Sixth Amendment right to confrontation. Agent Terry testified as to the number of milligrams of methamphetamine in a clinical dosage unit-5 mg, the number clinical dosage units possessed by Zavala-260,000, the number of street dosage units that amounted to-4,000, and the street value of the drugs-$8,000 to $14,000 per pound. Terry concluded that the amount of drugs involved here, about 3 pounds or 1302 grams, was consistent with intent to distribute. His testimony was based on his experience, on the position of the DEA bases on its investigations, and on Terry's "interviews of subjects who [had been] arrested following methamphetamine investigations." Neither the interviewees nor the DEA officials who determined the DEA position testified at trial.

Zavala now argues that the admission of this testimony violated his Sixth Amendment confrontation rights as established in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). He argues that the absence of the out of court declarants, absent an opportunity to cross examine, contravenes Crawford. We disagree. This type of expert witness testimony, based on inadmissible evidence accrued over years of drug investigations and discussed by investigators in forming their opinions is exactly the type of testimony, based on inadmissible evidence which is permitted by Federal Rule of Evidence 703.

FN3. We note that no contemporaneous objections were made by Zavala on this basis, and we also note that Crawford was decided after Zavala's trial proceedings had ended.

FN4. Cf. Ross Andrew Oliver, Note, Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and the Federal Rule of Evidence 703 after Crawford v. Washington, 55 Hast. L.J. 1539, 1558 (2004): "In a case where an expert forms an opinion from many sources, including his own experience, rather than simply relating testimonial hearsay to the jury, there is less risk of a Confrontation Clause violation." and "On the other end of the spectrum exist cases
where an expert has relied on a number of sources and types of data and has added significant expertise to interpret and analyze them. In these circumstances, a confrontation violation likely will not exist because the expert's opinion is truly original and a product of his special knowledge or experience, and the defendant can test its reliability by cross-examination of the expert." Id. at 1560. (emphasis added).

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

Moreover, Crawford involved the recorded statement of defendant's wife, implicating him in the charged offense. The statements here are generic descriptions of drug transactions. They do not involve this case or Zavala's participation in it. This distinction removes this case from the ruling established in Crawford. For the same reasons, the admission of the expert testimony does not conflict with Ohio v. Roberts, 448 U.S. 56, 65-66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

[6] Third, Zavala contends that there was insufficient evidence to support his conviction under Count 3, committing or aiding and abetting the illegal use of a communication facility. He argues both that there was insufficient evidence that he knew of the underlying crime, meth distribution and that the evidence did not establish that he intended to illegally use a communication facility. However, our review of Zavala's statements to the authorities demonstrates ample evidence from which a jury could convict him of this offense.

Finally, Zavala has asked for resentencing in light of United States v. Booker, --- U.S. ----, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). We have determined that Booker sentencing issues are best determined by the District Court in the first instance. We will therefore vacate the sentence and remand for resentencing in accordance with Booker. See United States v. Davis, 397 F.3d 173, 183 (3d Cir.2005).

IV. Conclusion
For the reasons stated above, we will affirm Francisco Zavala's judgment of conviction, vacate his sentence, and remand for a resentencing consistent with Booker.

U.S. v. Zavala  
141 Fed.Appx. 69, 2005 WL 1705824 (C.A.3 (Pa.))

END OF DOCUMENT
UNITED STATES of America,  
Plaintiff–Appellee,  

v.  

Sean Lamont CROMER, Defendant–Appellant.  

No. 02–2394.  

United States Court of Appeals,  
Sixth Circuit.  


Background: Defendant was convicted in the United States District Court for the Western District of Michigan, Quist, J., of narcotics trafficking, and he appealed.  

Holdings: The Court of Appeals, Marbury, District Judge sitting by designation, held that:  

(1) statements of confidential informant (CI) are testimonial, and thus inadmissible under Confrontation Clause unless CI is unavailable and defendant had prior opportunity to cross-examine him;  

(2) Confrontation Clause was applicable to officer's direct-examination testimony relating information from CI concerning name identification of defendant;  

(3) Confrontation Clause also applied to officer's testimony relating CI's physical description of participant in drug activity;  

(4) Confrontation Clause violations constituted plain error; and  

(5) defendant was not entitled to receive Faretta inquiry and warnings concerning self-representation, given his limited participation in defense.  

Reversed and remanded.  

1. Criminal Law 662.9  
   Under Confrontation Clause, testimonial, out-of-court statements offered against accused to establish truth of matter asserted may only be admitted where declarant is unavailable and where defendant has had prior opportunity to cross-examine declarant. U.S.C.A. Const. Amend. 6.  

2. Criminal Law 662.9, 662.60  
   Out-of-court statements that are testimonial, and thus inadmissible under Confrontation Clause unless witness is unavailable and defendant had prior opportunity to cross-examine witness, include, at minimum, prior testimony at preliminary hearing, before grand jury, or at former trial, as well as statements elicited during police interrogations. U.S.C.A. Const.Amend. 6.  

3. Criminal Law 1030(2)  
   Plain error review applies to federal defendant's forfeited assignments of error even if they have constitutional dimension. Fed.Rules Cr.Proc.Rule 52(b), 18 U.S.C.A.  

4. Criminal Law 1030(1)  
   Pursuant to plain error review, federal appellate court may only correct error not raised at trial if there is: (1) error, (2) that is plain, and (3) that affects substantial rights, in which case appellate court may exercise its discretion to notice error, but only if (4) error seriously affects fairness, integrity or public reputation of judicial proceedings. Fed.Rules Cr.Proc.Rule 52(b), 18 U.S.C.A.  

5. Criminal Law 662.9  
   Statement made to authorities who will use it in investigating and prosecuting crime, made with full understanding that it will be so used, is testimonial, and thus inadmissible under Confrontation Clause unless witness is unavailable and defendant had prior opportunity to cross-examine witness, regardless of whether state-
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ment was made under oath.  U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇨662.9

Statements of a confidential informant (CI) are testimonial, and thus inadmissible under Confrontation Clause unless CI is unavailable and defendant had prior opportunity to cross-examine him.  U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇨662.8

Confrontation Clause did not apply to police officer’s direct-examination statements in federal narcotics trafficking prosecution that she and her partner “had information about [specific address]” and “began an investigation about this residence being associated with selling drugs,” and that officers obtained search warrant based on that investigation; any out-of-court statements by confidential informant alluded to by officer served purpose of explaining how certain events came to pass or why officers took actions they did, rather than being offered to establish truth of matter asserted.  U.S.C.A. Const.Amend. 6; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401, 21 U.S.C.A. §841.

8. Criminal Law ⇨662.8

Confrontation Clause applied to police officer’s direct-examination answer in federal narcotics trafficking prosecution relating physical description, provided by confidential informant (CI), of participant in drug activity, regardless of fact that defendant had opened door on cross-examination by asking officer whether “[informant gave] you a description of [defendant]”; description related by officer, which matched defendant, was provided for purpose of establishing truth of matter asserted, i.e. that defendant had participated in illegal activity, and thus was inadmissible absent prior opportunity to cross-examine CI.  U.S.C.A. Const.Amend. 6.

10. Criminal Law ⇨1035(10)

Violations of Confrontation Clause in federal narcotics trafficking prosecution, consisting of police officer’s relating on direct examination information from confidential informant (CI) concerning identification of defendant, without defendant’s prior opportunity to cross-examine CI, constituted plain error; testimony concerned central issue of trial, i.e. whether defendant was involved in illegal drug activities, and case was close one given tenuousness of evidence on that central issue.  U.S.C.A. Const.Amend. 6; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401, 21 U.S.C.A. §841.

11. Criminal Law ⇨1139, 1158(1)

In reviewing alleged deprivation of defendant’s right to counsel, Court of Appeals reviews for clear error federal dis-
district court’s factual findings, and reviews de novo district court’s legal conclusions.

12. Criminal Law ☞641.4(1, 5)

Criminal defendant has constitutionally protected right to present his own defense in addition to constitutionally protected right to be represented by counsel; by electing to exercise former, defendant waives the latter. U.S.C.A. Const.Amend. 6.

13. Criminal Law ☞641.4(2)

Waiver of right to be represented by counsel, via election to represent oneself, must be knowing and voluntary. U.S.C.A. Const.Amend. 6.

14. Criminal Law ☞641.7(1)

Federal defendant who sought to supplement his attorney’s representation by putting some questions to a witness, and did not seek to replace his attorney, was not entitled to receive Faretta inquiry and warnings concerning self-representation, given absence of clear and unequivocal assertion of right to proceed pro se; defendant continued to receive substantial assistance from counsel even while he was engaged in questioning. U.S.C.A. Const. Amend. 6.

15. Criminal Law ☞641.10(3)


16. Criminal Law ☞641.7(1)

Faretta inquiry and warnings concerning self-representation are only required when defendant has clearly and unequivocally asserted his right to proceed pro se. U.S.C.A. Const.Amend. 6.

* The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio. sitting by designation.

Timothy M. Holloway, Taylor, Michigan, for Appellant.

Andrew Byerly Birge, Assistant United States Attorney, Grand Rapids, Michigan, for Appellee.

Before: MOORE and COLE, Circuit Judges; MARBLEY, District Judge.*

MARBLEY, District Judge.

Defendant–Appellant, Sean Lamont Cromer, appeals his conviction by a jury for possession of cocaine with intent to distribute. On appeal, Cromer asserts the following grounds for reversal: (1) there was insufficient evidence to support his conviction; (2) the district court plainly erred by allowing a witness to testify about hearsay statements made by a confidential informant (“CI”) indicating that Cromer was involved in drug activity; (3) the district court erred by not requiring the production of the CI after admitting the hearsay statements made by the CI; and (4) the district court erred by allowing Cromer to cross-examine a witness without giving him Faretta warnings. Jurisdiction is proper under 28 U.S.C. § 1291. For the following reasons, Cromer’s conviction is REVERSED and this case is REMANDED for additional proceedings in accordance with this opinion.

I. BACKGROUND

A. Procedural History

On June 6, 2001, a grand jury for the Western District of Michigan returned a two-count indictment against Cromer based upon the results of a search conducted pursuant to a warrant on March 8,
2001, at a residence located at 3284 Buchanan Avenue in Wyoming, Michigan (the “Buchanan residence”). Count I charged Cromer with being a felon in possession of a firearm “[o]n or about March 8, 2001,” in violation of 18 U.S.C. §§ 922(g)(1), 921(a), and 924(a)(1). Count II charged Cromer with “knowingly, intentionally and unlawfully possess[ing] with intent to distribute ... cocaine,” in violation of 21 U.S.C. § 841(a) and (b)(1)(C). On July 10, 2001, a grand jury returned a superseding indictment, adding a third count based upon a firearm found at the time of Cromer’s arrest, on May 24, 2001. Count III thus charged Cromer with being a felon in possession of a firearm “[o]n or about May 24, 2001.”

At the beginning of Cromer’s first trial, the district court granted Cromer’s oral motion to sever the drug charge from the firearms charges and proceeded to try Cromer solely upon the drug charge. Cromer’s first trial on the possession with intent to distribute charge was held on January 15, 2002, through January 18, 2002, and resulted in a hung jury. The court declared a mistrial on January 23, 2002. Cromer’s second trial on the drug charge was held on May 21, 2002, through May 24, 2002. Cromer moved for a judgment of acquittal at the close of the government’s case and then again moved for a judgment of acquittal at the close of all the evidence. Both motions were denied. The jury found Cromer guilty of the drug charge. Subsequently, Cromer and the government entered into a plea agreement regarding the two firearms charges, whereby Cromer agreed to plead guilty to the felon in possession charge contained in Count III and the government agreed to dismiss the felon in possession charge contained in Count I.

The district court sentenced Cromer to 294 months of imprisonment on Count II, the drug charge, and 96 months of imprisonment on Count III, the firearms charge. On November 21, 2002, Cromer filed a timely notice of appeal of his judgment of conviction on the possession with intent to distribute cocaine charge. In his plea agreement, Cromer waived the right to appeal his conviction and sentence on the felon in possession charge contained in Count III, and he does not raise any issues on appeal regarding his conviction or sentence on that charge.

B. Factual Background

1. Evidence of Cromer’s Guilt

On March 8, 2001, a search warrant was executed at the Buchanan residence, during the course of which the following incriminating evidence was discovered:

(1) a “pocket tech digital scale,” rolling paper, and razor blades in a kitchen cupboard;

(2) a shoe box containing a pan and knife covered in cocaine residue, a small bag of suspected marijuana, a small bag of cocaine, and small baggies in a cupboard or pantry;

(3) two electric mixers—one that had cocaine residue on it and one that did not have any cocaine residue on it—in a kitchen cupboard;

(4) $8,500 in cash inside an oven mitt that was resting between the refrigerator and its handle;

(5) a loaded gun in the basement;

1. The following factual background is taken from testimony provided during Cromer’s sec-
(6) a large glass tube containing cocaine residue in a hidden corner of a kitchen cabinet;
(7) a coffee grinder caked with cocaine residue; and
(8) some apparent drug tabulations, mixed in with thirty to forty documents that appeared to be Cromer's.

At trial, the government introduced evidence that Cromer's fingerprints were found on the mixer with the cocaine residue, the gun, and a Pyrex dish with no cocaine residue; that Cromer had spent at least some time at the residence for the stated purpose of house sitting; that the interior of the Buchanan residence was consistent with the sort of “stash house” often used by distributors of crack cocaine; and that Cromer, when he was arrested, had on his person almost $4,000 in cash for which he provided inconsistent explanations.

2. Hearsay Statements

On direct examination of Maureen O'Brien, the officer in charge of the investigation of the Buchanan residence, the prosecutor asked, “Were you in charge of the investigation that led to charges against Sean Cromer?” The prosecutor also asked, “What was your role in that?” O'Brien stated in response, “My partner and I, Officer Galloway, back in January of 2001, had information about 3284 Buchanan. And we began an investigation about this residence being associated with selling drugs.” The prosecutor then asked, “By investigating the place, did you come up with enough information that a state court judge gave you an order to go and have the place searched?” O'Brien responded by saying, “Yes.”

The prosecutor also engaged in the following colloquy with O'Brien:

Q...Was there a period or a time set where you would meet with other officers that were going to assist you in getting ready to conduct the search of Buchanan Street?
A Yes...

Q Now, during the course of that meeting, from the information available to you, did some names come up or some descriptions of people come up that you told the officers you thought might be there?
A Yes.

Q And can you tell us what was the name or names that you had of people that were associated with that place from your investigation that you told the officers to be on the lookout for?
A Well, the focus of our investigation were [sic] for two subjects: one being a person nicknamed Nut, which is Mr. Sean Cromer. The second individual who was the subject of this investigation was Quincy Hatcher.

Q Now you knew the name Nut. Did you know the defendant’s nickname before the date of the search?
A Yes.

Q And what was the nickname that you knew him by?
A Peanut.

Q Did you actually know his name as Sean Cromer before the search?
A Not until we got inside.

The prosecutor then proceeded to question O'Brien regarding the search. Neither the prosecutor nor O'Brien mentioned during this line of questioning that O'Brien had received a tip from an informant.

On cross examination, the following exchange took place between Cromer's defense counsel and O'Brien:
Q And in this particular affidavit, you talked about an informant who had gone into the home at Buchanan and saw cocaine being purchased there. Is that correct?
A That’s correct.

Q And that within the past 36 hours of the time that you prepared your affidavit, that your informant had been in that house?
A Yes.

Q So when I asked you [the] question about purchasing drugs, you’re swearing to Judge Timmers that actually he had been in there within—I say he—he or she had been in within 36 hours and could purchase drugs and saw drugs there?
A That’s correct.

Q Was there surveillance of the home within 36 hours?
A Yes, there was.

Q During this 36 hours, did you see Sean Cromer either go into or come out of that home?
A I did not see him physically, no.

Then, still on cross examination, the following exchange took place between Cromer and O’Brien:

Q Did the informant give you the description of the person?
A Of both people, yes.

Q He said both people?
A Yes.

Q Did he give you a description of Mr. Cromer?
A Yes.

2. At this point, Cromer was conducting the cross examination with his counsel’s assis-

Q He did?
A Um-hum.

Q Did the informant give you the name of the person doing the selling?
A Yes.

Q So the informant—

THE COURT: Just a minute. Let’s have a side bar over here.

THE COURT: Mr. Cromer, you’re killing yourself.

DEFENDANT CROMER: No, I ain’t.

MR. COURTADE [government’s counsel]: I was about to object to hearsay, but you’re going to open the door to allowing me to respond to what did the informant say about you, and that could hurt you definitely.

DEFENDANT CROMER: But what I’m leading to is the affidavit. You made an affidavit; and, in the affidavit, you gave a description. It never said nothing about the two people. You said one person.

THE COURT: ... What I’m concerned about is I don’t know what the next question is going to be. But if the next question is did—she said that, yes, the informant identified—described you, that never would have come otherwise.

DEFENDANT CROMER: She didn’t say he described me.

THE COURT: She just did.

DEFENDANT CROMER: Okay. I can go back to other testimony where she said that the informant didn’t describe nobody.
THE COURT: Okay. Okay. So that would discredit her. I just want to—

DEFENDANT CROMER: She before that, she didn’t know nothing about me.

THE COURT: Okay.

(End of bench conference. In open court:)

BY DEFENDANT CROMER:

Q And was your statement truthful and factual when you said that the person who gave the description of the person selling the drugs was a 25-year-old?

A Yes. That was—yes.

Q Did it prove to be true?

A I'm sorry?

Q Did it prove to be true that it was a 25-year-old doing the selling?

A Well—

MR. COURTADE: Your Honor, I'm going to object because that's a conclusion I believe that the jury is being called upon to make. It would be improper for her to give her own opinion.

THE COURT: I think the question can be rephrased. But sustained as to the form of that question.

After the district court sustained this objection, Cromer moved to a different line of questioning.

Subsequently, on redirect, the following exchange occurred between the government's counsel and O'Brien:

A The description was for a black male, darker skinned, five-seven, 200 pounds, and 25 years.

Q Now, who provided that? It was alluded to that you provided that description. Where did that description come from?

A That description came from the informant.

Q That was not your description to the Judge. That was the informant's description?

A That's correct.

Q Now, how does that description compare with Quincy Hatcher?

A He's more—Mr. Cromer is stockier, smaller and stockier. Mr. Hatcher is like five-eleven, 150 pounds. He's more of a bean pole than stocky.

Q So the description that you provided, which of the two individuals that you know—Quincy Hatcher and Sean Cromer—who does it more—the informant's description more closely match?

A It more accurately depicts Mr. Cromer.

In his rebuttal closing statement, the government's counsel commented on the description of Cromer provided by the informant. The government's counsel stated,

This individual was a confidential informant. But what they have said was pretty darn accurate. Okay. They're off by ten years on age. I'm not a very good judge of age. Mr. Kaczor [defense counsel] kept saying it was Ms. O'Brien's description. She did not describe him. It was the informant's description. Black male, 25, five-seven, 200 pounds.

3. Cromer's Participation at Trial

During defense counsel's cross-examination of O'Brien, defense counsel indicated to the court that Cromer wanted to participate in the cross-examination of O'Brien, and possibly the examination of other witnesses and closing argument. While
Cromer's participation was being discussed, the government's counsel stated, "Unless his questions are scripted and defense counsel has looked at them, it could open doors to other evidence that he might not want to have come in." Initially the district judge was not going to allow Cromer to cross-examine O'Brien because defense counsel had already started cross examining her, though the judge indicated that he would allow Cromer to examine other witness and participate in closing argument. Defense counsel, however, again raised Cromer's concerns. At a sidebar during defense counsel's cross-examination of O'Brien, the following exchange took place:

MR. KACZOR [defense counsel]:

... Mr. Cromer is upset, basically saying that he has a number of questions that he believes I am covering at this point but that he would cover them in a much more effective manner. So he doesn't want me to ask those questions. He wants me to stop asking questions so that he can then ask the questions himself.

THE COURT: ... Mr. Cromer, what would you—I'm going to give about a five-minute demonstration here—give you a chance for a five-minute demonstration to see what you're going to do. This is a new legal issue to me. You have the right to try your case without a lawyer. I don't know that you can try your case 50 percent without a lawyer. But let's see what you do here.

After the court had excused the jury, the district judge allowed Cromer to practice cross examining O'Brien. During this practice, the district judge told Cromer that he was being argumentative and also indicated that one of his questions was inappropriate. Cromer stated during this practice, "I can always consult my counsel as far as anything that may be something that shouldn't be appropriately asked."

Then, the following dialogue ensued:

THE COURT: Let me just tell you my observations about it. I think that, quite frankly, you're respectful when you ask questions, and I think you're doing your best to ask the questions. You have to be careful about being argumentative. From my perspective, looking at it as a judge—and I'm not the judge of the facts in this case—your client—or, your counsel is more effective than you are in asking the questions. But it's your case. As you say, you are the person facing a heavy jail sentence if you get convicted. All I can do and all your lawyer can do is give you advice; although, I could prevent you from asking questions. But it does not seem to be a disruptive procedure to me.

I'm willing to hear both the government and Mr. Kaczor on this.

... 

MR. COURTADE: I guess our basic position is we'll try anything once.

THE COURT: Well, it's different. But, you know, it's his life. And if he's more comfortable doing this, and if he behaves appropriately,—and I am questioning a little bit ... a person has the right to represent himself. What has never been decided, as far as I know, is can he represent himself 50 percent or 65 percent or 35 percent. I don't know. ...

MR. KACZOR: In this circuit, I have been appointed as what the Court calls stand-by counsel on some of these tax protester cases. Essentially, what I have done is sat by and advised the defendant, given him my best advice. And at times, the defendant questioned witnesses; and at times, I questioned witnesses. I think that's somewhat
what Mr. Cromer wants.... It's somewhat frustrating to me to represent him and get all these questions he wants. I think there is more to just what's on the written page. I think it's important to allow him to continue if that's what he wants.

THE COURT: All right.

MR. COURTADE: Your Honor, what I would—again, what I do not want is the tag-team approach when both of them get up.

THE COURT: Mr. Cromer is going to have to finish it.

... THE COURT: I'll give him any opportunity to consult with Mr. Kaczor when he wants, too. For example, if there is an objection, sometimes a simple rephrasing of the question can take care of it. And so you'll be literally stand-by counsel, Mr. Kaczor, because I want you to stand right next to him while he does this.

MR. KACZOR: I have no objection to whatever the Court would like to do to accommodate Mr. Cromer.

THE COURT: All right.

Mr. Cromer, do you want to do it that way?

DEFENDANT CROMER: He can sit down, or he can stand next to me. I don't have a problem with it. Basically, the questions is [sic] “Yes” or “No” questions.

... THE COURT: I'll have the jury come back, and I'll explain to them that Mr. Cromer wants to take a more active role in his own defense. And he is not firing his counsel or anything, but he wants to ask the questions and that Kaczor will be standing by Mr. Cromer to help him phrase the questions correctly and to consult with Mr. Cromer whenever he wants.

The district judge stated several times both in and out of the presence of the jury that Cromer was not firing his counsel. After Cromer conducted a large portion of the cross-examination of O'Brien, the district judge, outside the presence of the jury, told Cromer and his counsel to speed up the cross-examination and indicated on the record “that there are long discussions before each—almost every question now.” The court instructed defense counsel to “go over” the rest of the questions with Cromer, and defense counsel did so. Additionally, on redirect examination of O'Brien, the district judge allowed defense counsel to make objections on behalf of Cromer, and it appears that defense counsel conducted the recross-examination of O'Brien.

II. ANALYSIS

Cromer argues that his conviction cannot stand for the following reasons: (1) there was insufficient evidence to support his conviction; (2) the district court plainly erred by allowing a witness to testify about hearsay statements made by a confidential informant (“CI”) implicating Cromer in drug activity; (3) the district court erred by not requiring the production of the CI after admitting the hearsay statements made by the CI; and (4) the district court erred by allowing Cromer to cross-examine a witness without giving Faretta warnings.

In light of Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), decided after the briefing in this case was complete, the Court holds that statements of a confidential informant are testimonial in nature and therefore may not be offered by the government to establish the guilt of an accused absent an opportunity for the accused to cross-exam-
The government in this case did offer certain statements made by a CI for the purpose of establishing the truth of the matter asserted. The admission of these statements amounted to plain error, so Cromer's conviction must be reversed.

On retrial, because the district court may face issues regarding Cromer's participation in his defense that are similar to the issues encountered in the previous trial, the Court also decides Defendant–Appellant's Faretta claim in order to provide guidance to the district court on remand. Due to our resolution of the Confrontation Clause issue, however, we need not reach either of the other matters raised by Cromer on appeal.

A. Confrontation Clause

The Confrontation Clause of the Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. Prior to Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the admissibility of out-of-court statements under the Confrontation Clause was governed by Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). According to Roberts, an unavailable witness's out-of-court statement could be admitted against the accused if the statement had adequate indicia of reliability. Roberts, 448 U.S. at 66, 100 S.Ct. 2531. A statement was considered to have sufficient indicia of reliability if it either fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." Id.

Crawford involved a tape-recorded statement given by the defendant's wife to the police describing the stabbing with which the defendant was charged. Pursuant to the state marital privilege, the defendant's wife did not testify at trial, so the defendant had no opportunity to cross-examine her. The statement nevertheless was admitted at trial, over the defendant's objections, because the trial court determined that the statement had "particularized guarantees of trustworthiness." Roberts, 448 U.S. at 66, 100 S.Ct. 2531.

[1, 2] The Supreme Court, in Crawford, introduced a fundamental re-conception of the Confrontation Clause. The Court reaffirmed the importance of the confrontation right and introduced a distinction between testimonial and nontestimonial statements for Confrontation Clause purposes: "Where 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 'reliability.'" Crawford, 124 S.Ct. at 1370. The Court based this distinction on the word "witnesses" in the Clause, which refers to those who "bear testimony." Id. at 1364 (quoting 1 N. Webster, An American Dictionary of the English Language (1828)). Ultimately, the Court's holding was that testimonial, out-of-court statements offered against the accused to establish the truth of the matter asserted may only be admitted where the declarant is unavailable and where the defendant has had a prior opportunity to cross-examine the declarant. Id. at 1369, 1374. While the Court declined to "spell out a comprehensive definition of 'testimo-

3. The Court found the admission of statements deemed reliable by a judge to be fundamentally at odds with the right of confrontation: "Dispensing 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." Crawford at 1370–71.
'testimonial,'” it stated that the term “applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” Id. at 1374. The Court found that the defendant’s wife’s tape-recorded statement was “testimonial under any definition,” id. at 1370, and accordingly reversed the defendant’s conviction, id. at 1374.

There are three categories of statements in the case sub judice that the Confrontation Clause arguably should have excluded. First is the testimony provided by O’Brien in the government’s case-in-chief in which O’Brien describes the commencement of the investigation based on information she and her partner had regarding the Buchanan residence. Second is testimony O’Brien provided on direct examination relating to information she had before the search on a man nicknamed “Nut.” Third is O’Brien’s testimony, given on redirect examination, in which she furnishes and discusses the physical description given to her by the CI. The description was for an alleged drug distributor operating out of the Buchanan residence. O’Brien stated on redirect, and the government argued in closing, that the description more closely matched Cromer than Hatcher.

[3, 4] At trial, Cromer did not object to any of these statements. When an appellant fails to object to an error in the district court, this Court reviews for plain error. Fed.R.Crim.P. 52(b) (“A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”); United States v. Koeberlein, 161 F.3d 946, 949 (6th Cir. 1998). Plain error review applies even if the forfeited assignment of error is a constitutional error. United States v. Jones, 108 F.3d 668, 676 (6th Cir. 1997). Pursuant to plain error review, an appellate court may only correct an error not raised at trial if there is “(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'” Johnson v. United States, 520 U.S. 461, 466–67, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (quoting United States v. Olano, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)). “If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if(4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'” Johnson at 467, 117 S.Ct. 1544 (quoting Olano, 507 U.S. at 732, 113 S.Ct. 1770) (internal quotation marks omitted).

[5] The threshold determination that we must make is whether the statements of a confidential informant to police are “testimonial” in nature. While the Crawford Court did not provide a comprehensive definition of “testimonial,” it did provide some guidance in the matter. For example, the Court noted that “testimony” may be defined as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” Crawford at 1364 (quoting 1 N. Webster, An American Dictionary of the English Language (1828)). The Court emphasized that, “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” Id. at 1364. The Court mentioned various formulations that had been proposed to define the class of “testimonial” statements 4 but found no need to

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4. The Court included the following “formulations of this core class of ‘testimonial’ statements”:

"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," Brief for
choose among those formulations since “[s]tatements taken by police officers in the course of interrogations,” such as the defendant’s wife’s tape-recorded statement, are “testimonial under even a narrow standard.” *Id.* at 1364 (“Police interrogations bear a striking resemblance to examinations by justices of the peace in England.”).

The Court examined the historical underpinnings of the Confrontation Clause, concluding 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.” *Id.* at 1363. The Court detailed one of the “most notorious instances of civil-law examination”—the 1603 trial of Sir Walter Raleigh for treason. *Id.* at 1360. There, Lord Cobham, Raleigh’s alleged accomplice, had implicated Raleigh in an examination before the Privy Council and in a letter. *Id.* Raleigh argued that Cobham had lied to save himself and demanded the right to confront his accuser face-to-face. *Id.* Raleigh’s judges refused to call Cobham to appear, and Raleigh was found guilty and sentenced to death. *Id.* Out of such abuses was the English right of confrontation, used as a model for our Confrontation Clause, born. *Id.*

Additional guidance may be found by looking to the sources upon which the *Crawford* Court relied in framing its redefinition of the Confrontation Clause. For example, the Court cites to works by two leading constitutional scholars—Professor Akhil Reed Amar of Yale Law School and Professor Richard Friedman of University of Michigan Law School—both of whom have been closely associated with the testimonial approach to the Confrontation Clause. Professor Amar contends that the Clause encompasses “those ‘witnesses’ who testify either by taking the stand in person or via government-prepared affidavits, depositions, videotapes, and the like.” Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 Geo. L.J. 1045, 1045 (1998). Professor Friedman, in contrast, urges a broader definition of “testimonial” that would include any statement “made in circumstances in which a reasonable person would realize that it likely would be used in investigation or prosecution of a crime.” Richard D. Friedman & Bridget McCormack, *Dial–In Testimony*, 150 U. Pa. L.Rev. 1171, 1240–41 (2002). Based on his proposed definition, Friedman offers five rules of thumb:

A statement made knowingly to the authorities that describes criminal activity is almost always testimonial. A statement made by a person claiming to be the victim of a crime and describing the crime is usually testimonial, whether made to the authorities or not. If, in the case of a crime committed over a short period of time, a statement is made before the crime is committed, it almost certainly is not testimonial. A statement made by one participant in a criminal enterprise to another, intended to further the enterprise, is not testimonial. And neither is a statement made in the course of going about one’s ordinary

Petitioner 23; “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,” *White v. Illinois*, 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); “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,” Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3. *Crawford* at 1364.
business, made before the criminal act has occurred or with no recognition that it relates to criminal activity.


Since *Crawford*, other Circuits have begun to work toward developing a more comprehensive definition of “testimonial.” *See United States v. Saget*, 377 F.3d 223, 228 (2d Cir.2004) (“Crawford at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant’s awareness or expectation that his or her statements may later be used at a trial.”); *see also Horton v. Allen*, 370 F.3d 75, 84 (1st Cir. 2004) (finding statements made in private conversation between private individuals not to be testimonial because “[t]hey were not ex-parte in-court testimony or its equivalent; were not contained in formalized documents such as affidavits, depositions, or prior testimony transcripts; and were not made as part of a confession resulting from custodial examination” and they were not made “under circumstances in which an objective person would ‘reasonably believe that the statement would be available for use at a later trial’” (quoting *Crawford*, 124 S.Ct. at 1364). In *United States v. Silva*, 380 F.3d 1018 (7th Cir.2004), the Seventh Circuit denounced the practice of law enforcement officials, under the guise of demonstrating the reason for a particular investigation, testifying at trial as to statements made by confidential informants. The court strongly suggested that statements by a CI are testimonial in nature:

Under the prosecution’s theory, every time a person says to the police “X committed the crime,” the statement (including all corroborating details) would be admissible to show why the police investigated X. That would eviscerate the constitutional right to confront and cross-examine one’s accusers. *See Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

*Silva*, 380 F.3d at 1020.

We find the definition of “testimonial” proposed by Professor Friedman to be both well-reasoned and wholly consistent with the purpose behind the Confrontation Clause. As emphasized by *Crawford*, the Confrontation Clause refers to those who bear testimony against an accused. Statements “made to the authorities who will use them in investigating and prosecuting a crime, . . . made with the full understanding that they will be so used,” are precisely the sort of accusatory statements the Confrontation Clause was designed to address. Friedman, *Confrontation*, 86 Geo. L.J. at 1025. Certainly Lord Cobham, who accused Sir Walter Raleigh of treason, fell into this category.

Professor Friedman’s definition is somewhat broader than Professor Amar’s definition, which would implicate the Confrontation Clause only in the instance of formalized statements—such as affidavits, depositions, and government-prepared recordings—made directly to the authorities. As explained by Professor Friedman, however, the broader definition “is necessary to ensure that the adjudicative system does not effectively invite witnesses to testify in informal ways that avoid confrontation.” Friedman, *Confrontation*, 86 Geo. L.J. at 1043. The *Crawford* Court found the absence of an oath not to be determinative in considering whether a statement is testimonial. *Crawford*, 124 S.Ct. at 1364–65. We are unable to discern how the additional formalities identified by Professor Amar are necessary components of a testimonial statement.
Indeed, the danger to a defendant might well be greater if the statement introduced at trial, without a right of confrontation, is a statement volunteered to police rather than a statement elicited through formalized police interrogation. One can imagine the temptation that someone who bears a grudge might have to volunteer to police, truthfully or not, information of the commission of a crime, especially when that person is assured he will not be subject to confrontation. Professor Friedman’s concern becomes especially meaningful in such a context. If the judicial system only requires cross-examination when someone has formally served as a witness against a defendant, then witnesses and those who deal with them will have every incentive to ensure that testimony is given informally. The proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant’s position would anticipate his statement being used against the accused in investigating and prosecuting the crime.

[6] Considered within such a framework, statements of a confidential informant are testimonial. Indeed, such statements fall squarely within Professor Friedman’s paradigm: “A statement made knowingly to the authorities that describes criminal activity is almost always testimonial.” Friedman, Confrontation, 86 Geo. L.J. at 1042. Tips provided by confidential informants are knowingly and purposely made to authorities, accuse someone of a crime, and often are used against the accused at trial. The very fact that the informant is confidential—i.e., that not even his identity is disclosed to the defendant—heightens the dangers involved in allowing a declarant to bear testimony without confrontation. The allowance of anonymous accusations of crime without any opportunity for cross-examination would make a mockery of the Confrontation Clause. Cf. Silva, 380 F.3d at 1020 (“This court has warned against the potential for abuse when police testify to the out-of-court statements of a confidential informant.”).

[7] Given that statements by a confidential informant are testimonial and thus are subject to the dictates of the Confrontation Clause, the next question is whether any of the testimony provided by O’Brien implicates the Clause. For purposes of this analysis, the objectionable statements made by O’Brien may be divided into three categories. The first set of objectionable testimony was provided in the following exchange in O’Brien’s direct examination:

Q . . . .
Were you in charge of the investigation that led to charges against Sean Cromer?
A Yes.
Q What was your role in that?
A My partner and I, Officer Galloway, back in January of 2001, had information about 3284 Buchanan. And we began an investigation about this residence being associated with selling drugs.
Q By investigating the place, did you come up with enough information that a state court judge gave you an order to go and have the place searched?
A Yes.

5. Professor Friedman gives the example of a private rape counselor who is able to assure a victim that she may give a videotaped statement, without going under oath, that will be provided to prosecutors and used against the perpetrator with little risk that she will have to testify in court and face cross-examination. Friedman, Confrontation, 86 Geo. L.J. at 1040–41.
Cromer’s Confrontation Clause rights were not violated by this testimony. This exchange at least arguably did not even put before the jury any statements made by the CI. See United States v. Dunbar, 104 Fed.Appx. 638, 2004 WL 1614932, at *1 (9th Cir. July 19, 2004) (finding no Confrontation Clause violation where no testimonial evidence provided by CI was ever introduced into evidence); United States v. Stone, 222 F.R.D. 334, 339 (E.D.Tenn.2004) (same). Even if testimonial statements of an out-of-court declarant were revealed by this testimony, Cromer’s confrontation right was not implicated because the testimony was provided merely by way of background. See United States v. Martin, 897 F.2d 1368, 1371–72 (6th Cir.1990) (finding Confrontation Clause not implicated where assertions not offered for their content, but merely to explain why government commenced investigation). The Confrontation Clause “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” Crawford, 124 S.Ct. at 1369 n. 9 (citing Tennessee v. Street, 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985)). Any out-of-court statements alluded to by O’Brien at this juncture served the purpose of explaining how certain events came to pass or why the officers took the actions they did.6 Because the statements were not offered to establish the truth of the matter asserted, the Confrontation Clause does not apply.

6. For the same reason, O’Brien’s statements here also did not contain inadmissible hearsay.

[8] The second category of testimony that potentially violated the Confrontation Clause includes O’Brien’s statements, also provided on direct examination, regarding information about a person nicknamed “Nut.” When asked what names she had, prior to executing the search, of persons involved with illegal activities at the Buchanan residence, O’Brien replied, “Well, the focus of our investigation were [sic] for two subjects: one being a person nicknamed Nut, which is Mr. Sean Cromer. The second individual who was the subject of this investigation was Quincy Hatcher.” This testimony was not offered merely to explain why a government investigation was undertaken or to demonstrate the effect of the out-of-court statements on the officers. Cf. Martin, 897 F.2d at 1371 (“In some circumstances, out of court statements offered for the limited purpose of explaining why a government investigation was undertaken have been determined not to be hearsay.”). Rather, the purpose of this testimony could only have been to help establish that the person nicknamed “Nut” or “Peanut,” which the prosecution demonstrated elsewhere in the trial was Sean Cromer’s nickname,7 had been involved with the illegal drug activity occurring at the Buchanan residence. See United States v. Fountain, 2 F.3d 656, 669 (6th Cir.1993) (concluding that, where the reason for focusing officers’ search on a particular room was not at issue in the case, out-of-court statement purportedly offered to establish that reason was, in actuality, offered to prove the truth of the matter asserted); Stewart v. Cowan, 528 F.2d 79, 86 n. 4 (6th Cir.1976) (finding Confrontation Clause and hearsay violations where out-of-court statements implicated defendant as the perpetrator of the crime and thus went “to the very heart of the prosecutor’s case”).

Crawford held that when testimonial, out-of-court statements of an unavailable

7. For example, Cromer’s girlfriend, Felicia Crawford, testified that she knew Cromer only as “Peanut.”
declarant are offered to prove the truth of the matter asserted, the admission of those statements violates the Confrontation Clause unless the defendant has had an opportunity to cross-examine the declarant. O'Brien's testimony about "Nut" is distinguishable from her earlier background testimony for several reasons. Not only did the testimony about "Nut" more clearly place before the jury information provided by a CI, but this second category of testimony also implicated Cromer in a way that went "to the very heart of the prosecutor's case." Stewart, 528 F.2d at 86 n. 4. In the earlier testimony, O'Brien had merely stated that she "had information" about the Buchanan residence that led her to begin an investigation. O'Brien thus alluded, in the vaguest possible terms, to the statements made to her by a CI; she also manifestly linked those out-of-court statements with action taken by her and her partner. Furthermore, that brief explanation for why the government began its investigation of the Buchanan residence at least arguably provided some assistance to the jury in understanding the background of the case.

O'Brien's testimony about "Nut," by contrast, explicitly, albeit not directly, informed the jury that someone had implicated Nut in illegal activities. The prosecutor attempted to link this statement by a CI with an action taken by O'Brien; however, any such linkage is a sham. The central issue at Cromer's trial was not whether illegal activity occurred at the Buchanan residence, but whether Cromer knowingly participated in that illegal activity. The evidence on this point was so tenuous that the jury in Cromer's first trial was unable to convict him. Because there was no dispute as to the subjects of the government's investigation or the reason those subjects were believed to be involved, evidence that the government focused its investigation on Nut is helpful to the jury only insofar as it relates to the difficult question of whether Cromer was involved in the illegal activity. See Silva, 380 F.3d at 1020 ("If a jury would not otherwise understand why an investigation targeted a particular defendant, the testimony could dispel an accusation that the officers were officious intermeddlers staking out [the defendant] for nefarious purposes. No such argument was made in this case, however, and no other explanation was given why the testimony would be relevant."); Fountain, 2 F.3d at 669 (finding the only possible conclusion to be that statement was offered for truth where purported reason for offering statement was to establish immaterial issue); Stewart, 528 F.2d at 88 (finding the admission of highly inculpatory out-of-court statement to violate Confrontation Clause). In other words, we are forced to conclude that the purpose of this testimony was to establish the truth of the matter asserted: to prove that Cromer was, indeed, involved in the illegal activity, as stated by the CI. Because there was a testimonial, out-of-court statement, offered to establish the truth of the matter asserted, and Cromer was pro-among paperwork containing Cromer's name; (3) Cromer's fingerprint was found on a mixer that had cocaine residue; (4) Cromer's fingerprint was found on a loaded gun in the basement of the Buchanan residence; and (5) Cromer had almost $4,000 in cash on his person when he was arrested, over two months after the raid on the Buchanan residence.

8. The government's counsel, rather than asking O'Brien what information she had about suspects, asked her what suspects she told the officers conducting the search to be on the lookout for.

9. The evidence of Cromer's guilt boils down to the following: (1) Cromer had spent some amount of time in the Buchanan residence; (2) alleged drug tabulations were found
vided no opportunity to cross-examine the CI, Cromer’s Sixth Amendment confrontation right was violated by the introduction of this second set of testimony.

[9] The third category of objectionable testimony is O’Brien’s testimony on redirect examination regarding the physical description provided by the CI. As we have already established, the out-of-court statements of the CI were testimonial in nature, and Cromer had no opportunity to cross-examine the CI. Moreover, the physical description was provided to the jury for the purpose of establishing the truth of the matter asserted—that Cromer, who met the description, had participated in the illegal activity at the Buchanan residence. The only question regarding this third set of testimony is whether the fact that Cromer opened the door to this testimony somehow acts to preclude the testimony from violating the Confrontation Clause. The government argues that any error in the admission of this testimony is error that Cromer invited or provoked as part of a failed defense strategy and, thus is not reversible error. As Crawford demonstrates, however, the Confrontation Clause, when properly applied, is not dependent upon “the law of Evidence for the time being.” Crawford, 124 S.Ct. at 1364, 1370 (quoting 3 J. Wigmore, Evidence § 1397, p. 101 (2d ed. 1923)) (“Where 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 . . . .”); see also Friedman, Confrontation, 86 Geo. L.J. at 1020 (“[W]e might well pause at a doctrine that in effect conforms a constitutional right, a part of the Bill of Rights, to the contours designed-in a process not bearing the remotest resemblance to the amendment procedure established by Article V of the Constitution—by a committee of drafters of evidentiary rules for the federal courts.”).

As a matter of modern evidence law, the district court may well have been correct in admitting O’Brien’s redirect testimony about the description provided by the informant since Cromer, on cross-examination, had opened the door to the subject by asking about that description. See United States v. Ramos, 861 F.2d 461, 468 (6th Cir.1988) (finding no violation of confrontation right when defendant, on cross-examination, had opened door for government’s line of inquiry); United States v. Wynn, 845 F.2d 1439, 1443 (7th Cir.1988) (“It is clear from the record that [the defendant] opened the door to this line of questioning when he tried to impeach [the government agent] on the issue of his motive for investigating [the defendant]. By questioning [the agent’s] motives, [defendant’s] counsel was attempting to further his own theory that [defendant] was framed . . . . On redirect examination the government merely clarified the basis for [the agent’s] suspicion of [the defendant].”); United States v. Walker, 421 F.2d 1298, 1299–1300 (3d Cir. 1970) (stating that a defendant can, “by cross-examination of a witness[,] . . . open the door for the admission on redirect examination of matters tending to support the case, which would not have been ad-

10. Any potential doubts about whether these statements were offered for the truth of the matter asserted is resolved by the prosecutor’s closing argument, wherein the government’s counsel argued that Cromer was guilty because he matched the description offered by the CI.

11. We need not devote much attention to the question of whether the Confrontation Clause was violated by any of the evidence admitted during O’Brien’s cross-examination since “a party may not complain on appeal of errors that he himself invited or provoked.” Harvis v. Roadway Express, Inc., 923 F.2d 59, 60 (6th Cir.1991).
missible on the case in chief''). Cromer and his counsel, on cross-examination, introduced the existence of an informant and a description provided by that informant in an attempt to discredit the government's case by emphasizing the limited information tying Cromer to the Buchanan residence prior to the execution of the warrant. Even after Cromer was warned that this line of questioning would open the door to allow the government to question O'Brien about the exact content of the informant's statements, Cromer continued in his attempt to establish that the informant's statement did not describe him. On redirect examination, the government merely clarified the precise nature of the description provided by the CI.

The pertinent question, however, is not whether the CI's statements were properly admitted pursuant to “the law of Evidence for the time being.” Crawford, 124 S.Ct. at 1364. Rather, the relevant inquiry is whether Cromer's right to confront the witnesses against him was violated by O'Brien's redirect testimony. If there is one theme that emerges from Crawford, it is that the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admission of hearsay statements. Thus, the mere fact that Cromer may have opened the door to the testimonial, out-of-court statement that violated his confrontation right is not sufficient to erase that violation. In this, too, we agree with Professor Friedman, who has postulated that a defendant only forfeits his confrontation right if his own wrongful conduct is responsible for his inability to confront the witness. Friedman, Confrontation, 86 Geo. L.J. at 1031. If, for example, the witness is only unavailable to testify because the defendant has killed or intimidated her, then the defendant has forfeited his right to confront that witness. A foolish strategic decision does not rise to the level of such misconduct and so will not cause the defendant to forfeit his rights under the Confrontation Clause. O'Brien's redirect testimony relating the CI's physical description therefore violated Cromer's right of confrontation.

[10] The only question remaining in our Confrontation Clause analysis is whether the two violations of the Clause that we have identified amounted to plain error. We already have found that there was error. In light of Crawford, the error is "plain." Based on Crawford's affirmation of the importance of the constitutional right of confrontation, we readily can determine that Cromer's substantial rights were affected by these violations. In the context of a case as close as this one on the central issue of whether the defendant was involved in any illegal drug activities, the admission of these statements directly tying Cromer to the crime likely impacted the outcome of the trial. Because this plain error compromised the fairness and integrity of Cromer's trial, we REVERSE the judgment of the district court and REMAND this case for a new trial in accordance with this opinion.

B. Faretta Warnings

[11] Cromer argues on appeal that the district court violated his rights under the Sixth Amendment by failing to give him Faretta warnings and to make an explicit finding that he knowingly and voluntarily waived his right to counsel before allowing him to conduct part of the cross-examination of O'Brien. When reviewing an alleged deprivation of a defendant's right to counsel, this court reviews for clear error the district court's factual findings and reviews de novo the district court's legal conclusions. United States v. Cope, 312 F.3d 757, 772 (6th Cir. 2002), cert. denied,

[12, 13] The Supreme Court has held that a criminal defendant has a constitutionally protected right to present his own defense in addition to a constitutionally protected right to be represented by counsel. *Faretta v. California*, 422 U.S. 806, 833–34, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). By electing to exercise his constitutional right to present his own defense, a defendant necessarily waives his constitutional right to be represented by counsel. *United States v. Mosley*, 810 F.2d 93, 97 (6th Cir.1987) ("The right to defend *pro se* and the right to counsel have been aptly described as "two faces of the same coin," in that waiver of one right constitutes a correlative assertion of the other." (quoting *United States v. Conder*, 423 F.2d 904, 908 (6th Cir.1970))). This waiver of counsel must be knowing and voluntary. *Faretta*, 422 U.S. at 835, 95 S.Ct. 2525. This Court has adopted a rather lengthy series of questions from 1 *Bench Book for United States District Judges* 1.02–2 to –5 (3d ed.1986) that a district court should ask in order to ensure that a defendant's waiver of counsel is knowing and intelligent. *United States v. McDowell*, 814 F.2d 245, 247, 250 (6th Cir.1987). Substantial compliance with this series of questions is sufficient. *United States v. Miller*, 910 F.2d 1321, 1324 (6th Cir.1990); *United States v. Grosshans*, 821 F.2d 1247, 1250–51 (6th Cir.1987).

[14] Defendant–Appellant contends that a proper waiver of his right to counsel was required even though he sought a hybrid form of representation rather than total self-representation because he sought to take on some of the core functions of counsel. Cromer argues that the district court erred both by failing to ensure that he had knowingly and intelligently made the necessary waiver and by failing to make a specific finding of knowing and intelligent waiver. While the trial court did state that it thought Cromer’s counsel could do a better job and did indicate that Cromer would have to comply with the Federal Rules of Evidence, Defendant–Appellant contends that the trial court committed reversible error by failing to address Cromer in a manner substantially similar to the colloquy mandated by *McDowell*.

The United States asserts that there was no reason for the district court to secure a waiver of the right to counsel because Cromer never unequivocally asked to proceed *pro se*. Indeed, Defendant–Appellant did not actually proceed without the assistance of counsel when he questioned the witness because his attorney stood next to him at the podium during the questioning, conferred with him before virtually every question, and continued to make objections on this behalf and make interjections on the record when necessary. The government contends that to the extent a waiver of counsel was required, Cromer effectively waived that right. Finally, the government maintains that even if there was any error, that error was harmless.

There is conflicting authority on the issue of when *Faretta* warnings are required. A number of courts have held that there is a presumption against a waiver of counsel, and that *Faretta* warnings are only required when a defendant has clearly and unequivocally asserted his right to proceed *pro se*. *Buhl v. Cooksey*, 233 F.3d 783, 790 (3d Cir.2000) ("Courts must indulge every reasonable presumption against a waiver of counsel. In order to overcome this presumption, and conduct his/her own defense, a defendant must clearly and unequivocally ask to proceed *pro se*.") (citations omitted); *Islam v. Miller*, 166 F.3d 1200, 1998 WL 907692, at *3
(2d Cir. Dec. 23, 1998) (finding no Faretta inquiry necessary because defendant did not “clearly and unequivocally” waive his right to counsel and proceed pro se but, rather, participated in his defense along with his counsel); United States v. Taylor, 113 F.3d 1136, 1143 (10th Cir. 1997) (holding that because defendant made an articulable and unmistakable demand to proceed pro se, the trial court was obligated to ensure that the waiver of counsel was knowingly and intelligently made); United States v. Leggett, 81 F.3d 220, 224 (D.C. Cir. 1996) (“The law presumes that a defendant has not exercised his right to represent himself nor waived the right to counsel in the absence of an articulate and unmistakable demand by the defendant to proceed pro se.”); Stano v. Dugger, 921 F.2d 1125, 1144 (11th Cir. 1991) (“The Faretta case law does not provide for proceeding pro se without assertion of the right to self-representation. There simply is no precedent in this circuit for proceeding pro se by constructive notice without an obvious assertion of the right to self-representation.”); see United States v. Frazier–El, 204 F.3d 553, 558 (4th Cir. 2000) (stating that a request for self-representation must be clear and unequivocal); United States v. Arlt, 41 F.3d 516, 519 (9th Cir. 1994) (stating that the requirement of an unequivocal assertion of the right to proceed without counsel “protects against two unacceptable occurrences: an inadvertent waiver of the right to counsel by a defendant’s ‘occasional musings on the benefits of self-representation’ and manipulation by the defendant of the mutually exclusive rights to counsel and self-representation” (quoting Adams v. Carroll, 875 F.2d 1441, 1444 (9th Cir. 1989)); Robinson v. United States, 897 F.2d 903, 907–08 (7th Cir. 1990) (finding simultaneous representation rather than partial waiver of counsel where defendant interrupted his attorney’s summation at mid-point and concluded the summation pro se); Cross v. United States, 893 F.2d 1287, 1290 (11th Cir. 1989) (“In recognition of the thin line that a district court must traverse in evaluating demands to proceed pro se, and the knowledge that shrewd litigants can exploit this difficult constitutional area by making ambiguous self-representation claims to inject error into the record, this Court has required an individual to clearly and unequivocally assert the desire to represent himself.”) (footnote omitted); Bontempo v. Fenton, 692 F.2d 954, 961 n. 6 (3d Cir. 1982) (declining to find partial waiver of counsel where defendant presented to jury summation that was “supplemental to, and not in lieu of, retained counsel’s closing to the jury”); O’Reilly v. New York Times Co., 692 F.2d 863, 868 (2d Cir. 1982) (stating that, to claim the right to self-representation, a party must “clearly and unequivocally discharge any lawyer”).

[15] These courts have found that in the case of hybrid representation, when a defendant desires to represent himself in part, the Faretta inquiry is only necessary once the defendant has made an “articulate and unmistakable demand” to proceed pro se. Leggett, 81 F.3d at 224. In Leggett, for example, the court found that the defendant never represented himself nor sought to do so but, rather, “merely sought and received the court’s permission to sup-

12. It is well settled that there is no constitutional right to hybrid representation. See Mosely, 810 F.2d at 97–98; see also McKaskle v. Wiggins, 465 U.S. 168, 183, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (noting that “Faretta does not require a trial judge to permit ‘hybrid’ representation” and “[a] defendant does not have a constitutional right to choreograph special appearances by counsel”). A district court may, however, exercise its discretion to permit a defendant to participate in his own defense without requiring the defendant thereafter to proceed without the assistance of counsel. See Mosely, 810 F.2d at 97–98.
plement his counsel's examination and argument.” *Id.* at 222. The defendant had informed the trial court that he was “not interested in representing [himself]" and was “not interested in taking the lead,” but, rather, “want[ed] clarification as to whether” he could “interject certain questions.” *Id.* at 225. The district court allowed Leggett to cross-examine three government witnesses, to pose questions to two defense witnesses, and to make a closing argument to the jury following the summation of his counsel. The D.C. Circuit noted that, by its own terms, “Faretta applies only where a defendant chooses to proceed *pro se* and thereby foregoes the benefits associated with the right to counsel.” *Id.* at 224. Finding that the defendant had not made an unmistakable choice to proceed *pro se*, the court noted that “because the record shows that the hybrid procedure allowed by the district court responded to Leggett's concerns and to his stated preference that he be allowed to supplement his counsel's questions and argument, he has a heavy burden to show that the district court abused its discretion.” *Id.* at 224.

In other cases, however, courts have held that in the instance of hybrid representation, *Faretta* warnings must be given any time the defendant assumes any of the "core functions" of counsel. *United States v. Davis*, 269 F.3d 514, 519–20 (5th Cir. 2001); *United States v. Turnbull*, 888 F.2d 636, 638 (9th Cir. 1989). In *Davis*, for example, the court allowed a hybrid arrangement whereby either the defendant or his counsel was required to be responsible for each witness:

Of the nineteen witnesses examined by the defense at trial, Davis questioned fourteen. Fry [defense counsel] made objections to the Government’s questioning of one witness; responded to offers of government exhibits; assisted Davis in making a proffer of a witness's potential testimony; and moved for acquittal after the Government rested, but not at the close of all the evidence. Both Davis and Fry gave closing arguments.

*Davis*, 269 F.3d at 517. The court found that, “'hybrid' or not, the representation sought by Davis entailed a waiver of his Sixth Amendment right to counsel that required the safeguards specified in *Faretta*.” *Id.* at 520. The court implied that defense counsel had acted in the role of standby counsel and held that because the existence of such standby counsel does not satisfy the Sixth Amendment right to counsel, Davis had waived his right to counsel and the district court had erred by not ensuring that the waiver was knowing and intelligent. *Id.*

We agree that *Faretta* procedures are only required when a defendant has clearly and unequivocally asserted his right to proceed *pro se*, and we find this case to be factually comparable to the *Leggett* line of cases rather than to the *Davis* line of cases. A defendant may assert either his right to counsel or his right to present his own defense. Because

13. In *Wilson v. Hurt*, 29 Fed.Appx. 324, 2002 WL 197997, at *4–5 (6th Cir. Feb.6, 2002), this Court, in an unreported decision, expressed its agreement with *Davis* and *Turnbull* rather than with *Leggett*. We note that *Wilson* does not represent binding precedent. Furthermore, *Wilson* is factually distinguishable from the case sub judice. There, the defendant had elected to proceed *pro se* in the middle of his trial. After the request, Wilson examined all of the remaining witnesses, testified in narrative form without the assistance of counsel, and delivered his own closing argument. Wilson's attorney remained at counsel table, but he appears to have acted only in an advisory capacity. While Wilson seems to have acted on his own during the entire second part of the trial, Cromer never actually acted without the assistance of counsel.
the assertion of the right to self-representation necessarily involves a waiver of the constitutional right to counsel, and given the importance of the right to counsel, we think the wisest course is to require a clear and unequivocal assertion of a defendant’s right to self-representation before his right to counsel may be deemed waived. Requiring an articulate and unmistakable demand of the right to proceed pro se decreases the danger of a savvy defendant manipulating these two mutually exclusive rights to put the district court in a Catch-22. A defendant who seeks merely to supplement his counsel’s representation, as Cromer did here, has failed to avail himself of his right to self-representation and thus failed to waive his right to the assistance of counsel. This case is readily distinguishable from cases in which a defendant assumes the whole of his representation part-way through trial or acts as co-counsel with full responsibility for certain witnesses. Here, Cromer did not waive his right to counsel because he continued to receive substantial assistance from counsel, even while he was actually questioning the witness. Because there was no waiver, clearly and unequivocally asserted, there was no need to warn Cromer about the consequences of that waiver.

III. CONCLUSION

For the foregoing reasons, this matter is REVERSED and REMANDED for further proceedings in accordance with this opinion.

BEACON JOURNAL PUBLISHING COMPANY, INC., et al., Plaintiffs–Appellants,

v.

J. Kenneth BLACKWELL, et al., Defendants–Appellees.

No. 04–4313.

United States Court of Appeals,
Sixth Circuit.


Background: Newspaper publisher and editor brought action under § 1983 against the Ohio Secretary of State and county board of elections, alleging that manner in which defendants intended to enforce election law prohibiting loitering at polling place would have effect of abridging their First Amendment rights. Plaintiffs moved for emergency injunctive relief from district court’s order denying their motion for a temporary restraining order and a preliminary injunction.

Holding: The Court of Appeals, Clay, Circuit Judge, held that plaintiffs established strong likelihood of success on merits of their claim, as would warrant temporary restraining order and a preliminary injunction.

Order vacated.

Cook, Circuit Judge, filed dissenting opinion.

1. Injunction ☞138.51, 150

Ohio Secretary of State and county board of elections failed to show that their application of election law prohibiting loitering at polling place to members of the press, whose objective was to report news of the day, was necessary to further state’s interest in preventing interference with voting, and was narrowly drawn to achieve that end, and thus, newspaper publisher and editor had strong likelihood of success on merits of their challenge that such an
answering service in Sweden that forwarded to him messages meant for a fictitious bank. There was ample evidence that Martins and Guastella were guilty of the substantive offenses for which they were charged. Moreover, the jury was instructed that it could consider the plea allocutions only as evidence that the conspiracy existed, and we may presume that the jury followed this instruction, see United States v. Downing, 297 F.3d 52, 59 (2d Cir.2002). With respect to the existence of the conspiracy, the plea allocutions were cumulative, as the documentary evidence established that Martins and Guastella set up the fictitious banks together and worked in tandem throughout the duration of the scheme. The admission of the plea allocutions was therefore harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, the judgment of conviction is AFFIRMED with respect to the introduction of the co-conspirators' plea allocutions against Martins and Guastella. A summary order will follow with respect to defendants' other challenges to their convictions and sentences.

UNITED STATES of America,
Appellee,
v.
James SAGET, also known as Hesh,
Defendant-Appellant.

No. 03–1200.

United States Court of Appeals,
Second Circuit.

Background: Following a jury trial, defendant was convicted in the United States District Court for the Southern District of New York, Kaplan, J., of conspiracy to traffic in firearms and firearms trafficking, and defendant appealed.

Holdings: The Court of Appeals, Sotomayor, Circuit Judge, held that:

(1) co-conspirator's statements against defendant to a confidential informant, whose true status was unknown to co-conspirator, did not constitute testimony;

(2) co-conspirator's statements contained sufficient guarantees of trustworthiness, such that admission of such statements did not violate the Confrontation Clause; and

(3) statements were sufficiently self-inculpatory to be admissible under the hearsay exception for statements against a declarant's penal interests.

Affirmed.

1. Criminal Law ☞422(1)

Co-conspirator's statements against defendant to a confidential informant, whose true status was unknown to co-conspirator, did not constitute “testimony,” and thus introduction of the statements did not implicate per se bar on the introduction of out-of-court testimonial statements without a prior opportunity for cross-examination.

See publication Words and Phrases for other judicial constructions and definitions.

2. Criminal Law ☞662.11

Co-conspirator's statements against defendant to a confidential informant, whose true status was unknown to co-conspirator, contained sufficient guarantees of trustworthiness, such that admis-
sion of such statements in defendant's prosecution for firearms trafficking did not violate the Confrontation Clause, where the co-conspirator made the statements while believing he was speaking with a friend in a private setting, and the co-conspirator described the method both he and defendant used in buying and transporting guns, thereby implicating himself in the gun-running scheme without attempting to shift criminal culpability from himself to defendant. U.S.C.A. Const. Amend. 6; 18 U.S.C.A. §§ 371, 922(a)(1)(A), (a)(6).

3. Criminal Law ☞ 417(15)
A statement may be admitted under hearsay exception for statements against penal interest only if the district court determines that a reasonable person in the declarant's shoes would perceive the statement as detrimental to his or her own penal interest. Fed.Rules Evid. Rule 804(b)(3), 28 U.S.C.A.

4. Criminal Law ☞ 422(5)
Co-conspirator's statements to a confidential informant were sufficiently self-inculpatory to be admissible in defendant's prosecution for firearms trafficking under the hearsay exception for statements against a declarant's penal interests, given the bulk of the statements described acts that defendant and co-conspirator had committed jointly, and though some statements described acts that defendant alone had committed, such statements were self-inculpatory in that the statements reflected co-conspirator's attempt to give the informant examples of how he and defendant operated and why their gun-running scheme worked. 18 U.S.C.A. §§ 371, 922(a)(1)(A), (a)(6); Fed.Rules Evid. Rule 804(b)(3), 28 U.S.C.A.

Marilyn S. Reader, Larchmont, NY, for defendant-appellant.

Anthony S. Barkow, Assistant United States Attorney for the Southern District of New York (David N. Kelley, United States Attorney for the Southern District of New York, on the brief; Marc L. Mukasey, Assistant United States Attorney, of counsel), New York, NY, for appellee.

Before: SACK, SOTOMAYOR, and RAGGI, Circuit Judges.

SOTOMAYOR, Circuit Judge.

Defendant-appellant James Saget appeals from a judgment of conviction entered on April 1, 2003 in the United States District Court for the Southern District of New York (Kaplan, J.), following a jury trial. Saget was convicted of one count of conspiracy, in violation of 18 U.S.C. § 371, to traffic in firearms in violation of 18 U.S.C. § 922(a)(1)(A) and to make false statements in connection with firearms trafficking in violation of 18 U.S.C. § 922(a)(6), as well as one count of firearms trafficking in violation of 18 U.S.C. § 922(a)(1)(A). On appeal, Saget argues that, inter alia, the district court violated his Confrontation Clause rights by allowing the government to introduce into evidence the statements of a separately indicted co-conspirator, Shawn Beckham, who was unavailable to testify at the trial. Saget also argues that the court abused its discretion in determining that Beckham's statements were admissible under the exception to the hearsay rule for statements against the declarant's penal interest, see Fed.R.Evid. 804(b)(3). We address these arguments in this opinion and deal with Saget's other challenges to his conviction in a summary order to be later filed.

We hold that the introduction of Beckham's co-conspirator statements against Saget did not violate the Confrontation
Clause because the statements were not testimonial, and therefore did not implicate the per se bar on the introduction of out-of-court testimonial statements, absent a prior opportunity for cross-examination, enunciated by Crawford v. Washington, — U.S. —, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and because Beckham's statements were made under circumstances conferring the indicia of reliability required by Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). We also hold that the district court did not abuse its discretion in admitting the statements as against the declarant's penal interests pursuant to Fed.R.Evid. 804(b)(3).

BACKGROUND

In June 2002, Saget was indicted for conspiring to traffic in firearms and to make false statements in connection with firearms trafficking, and firearms trafficking. According to the evidence introduced at trial, Saget and his co-conspirator, Shawn Beckham, concocted a scheme in early 2000 to purchase firearms illegally in Pennsylvania and transport them to New York for sale on the black market. Because Saget and Beckham both had criminal records that prohibited them from purchasing firearms, they used straw purchasers—people without criminal records who were paid to make individual gun purchases—to buy guns in Pennsylvania. The straw purchasers were usually, but not always, female exotic dancers. Saget and Beckham would then sell the guns in New York.

In May and June 2001, Beckham engaged in two conversations with a confidential informant ("CI"), a friend whom Beckham thought was interested in joining the gun-running scheme. During the conversations, Beckham extolled the benefits of the scheme, relaying his and Saget's gun-running practices, profits, and past exploits in a manner that implicated both himself and Saget. Unbeknownst to Beckham, both conversations were recorded by the CI. At Saget's trial, Beckham was unavailable to testify. The government therefore sought to introduce the portions of the taped conversations in which Beckham implicated both himself and Saget, arguing that the statements were against Beckham's penal interest and were admissible under Fed.R.Evid. 804(b)(3). The district court ruled that the statements in which Beckham referred to gun-running activities that he and Saget conducted jointly were admissible as statements against Beckham's penal interest because they implicated Beckham in a conspiracy with Saget. The court also found that the admission of the statements as substantive evidence of Saget's participation in the conspiracy did not violate the Confrontation Clause because the statements bore particularized guarantees of trustworthiness required under Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). Saget was subsequently convicted.

Saget now appeals the district court's ruling that Beckham's statements were admissible. He argues that the court committed reversible error in failing to exclude the statements on the ground that they contained insufficient indicia of reliability to satisfy the Confrontation Clause as explicated by Roberts and United States v. Matthews, 20 F.3d 538 (2d Cir.1994), and that the court improperly admitted many statements that were not actually against Beckham's penal interest, in violation of

1. Beckham was arrested in connection with a gun delivery he arranged with the CI and was indicted, separately from Saget, on charges of firearms trafficking and conspiracy to traffic in firearms. He pled guilty before Judge Daniels in the Southern District of New York in September 2001.

Subsequent to the filing of this appeal but prior to oral argument, the Supreme Court decided Crawford, which substantially alters the Court’s existing Confrontation Clause jurisprudence. Crawford holds that no prior testimonial statement made by a declarant who does not testify at the trial may be admitted against a defendant unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine him or her. Crawford, — U.S. at —–, 124 S.Ct. at 1369. We ordered supplemental briefing on the issue of whether Crawford renders the admission of Beckham’s statements about Saget unconstitutional. Saget now argues that Beckham’s statements were testimonial within the meaning of Crawford and that, because Saget had no opportunity for cross-examination when the statements were made, their admission violated the Confrontation Clause.

DISCUSSION

I. Crawford and Its Effect on Existing Confrontation Clause Jurisprudence

As an initial matter, we must determine how the Confrontation Clause analysis should proceed in light of Crawford. Crawford redefines the scope and effect of the Confrontation Clause, substituting a per se bar on the admission of out-of-court testimonial statements that were not subject to prior cross-examination for the balancing test that previously delineated the limits of the right to confrontation. This redefinition is premised on the text of the Clause, which states that “[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.” U.S. Const. amend. VI. The right of confrontation extends only to witnesses, therefore, and Crawford redefines the Court’s Sixth Amendment jurisprudence by holding that the term “witnesses” does not encompass all hearsay declarants. Crawford, — U.S. at —–, 124 S.Ct. at 1364.

Until Crawford was decided in March 2004, the scope of a defendant’s Confrontation Clause rights was delineated by Roberts, which “conditions the admissibility of all hearsay evidence on whether it falls under a firmly rooted hearsay exception or bears particularized guarantees of trustworthiness.” Id. at 1369 (internal quotation marks omitted). Any out-of-court statement was constitutionally admissible so long as it fell within an exception to the hearsay rule or, if that exception was not firmly rooted, the court found that the statement was likely to be reliable. See White v. Illinois, 502 U.S. 346, 366, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (Thomas, J., concurring in part and concurring in the judgment) (noting that the Roberts line of cases tended to “constitutionalize the hearsay rule and its exceptions”); Lilly v. Virginia, 527 U.S. 116, 140, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (Breyer, J., concurring) (“The Court’s effort to tie the Clause so directly to the hearsay rule is of fairly recent vintage . . . .”).

Crawford abrogates Roberts with respect to prior testimonial statements by holding that such statements may never be introduced against the defendant unless he or she had an opportunity to cross-examine the declarant, regardless of whether that statement falls within a firmly rooted hearsay exception or has particularized guarantees of trustworthiness. See Crawford, — U.S. at —–, —–, 124 S.Ct. at 1370, 1374. It is clear that a court faced with an out-of-court testimonial statement need not perform the Roberts reliability analysis, as Crawford replaces that analysis with a bright-line rule drawn from the
historical origins of the Confrontation Clause. See id. at 1359–63.

Crawford, however, leaves somewhat less clear the status of the Roberts line of cases insofar as these decisions deal with statements that are not testimonial in nature, however. In discussing the fallibility of the Roberts reliability analysis with respect to testimonial statements, the Court leveled several criticisms at the Roberts approach that would apply with equal force to its application to nontestimonial statements. See id. at 1370 (stating that Roberts obscures the fact that the Confrontation Clause prescribes a procedural guarantee that reliability should be determined through cross-examination rather than through other methods); id. at 1371 (noting that “[r]eliability is an amorphous, if not entirely subjective, concept” that is subject to judicial manipulation); id. at 1373–74 (stating that Roberts’s “open-ended balancing test” may often fail to provide “any meaningful protection”). In light of these perceived flaws in the Roberts analysis, at least two Justices—including Justice Scalia, who authored the Crawford opinion—would completely overrule Roberts and hold that the Confrontation Clause places no limits on the admission of nontestimonial hearsay. See White, 502 U.S. at 364–66, 112 S.Ct. 736 (Thomas, J., concurring in part and concurring in the judgment, joined by Scalia, J.). Because such statements do not implicate the concerns historically addressed by the right of confrontation, these Justices believe that the Roberts analysis unduly confuses what should be a bright-line rule prohibiting only the admission of testimonial hearsay and allowing all other types of statements. See id. at 358–59, 364–66, 112 S.Ct. 736; see also Crawford, — U.S. at ——, 124 S.Ct. at 1373 (suggesting that Roberts “do[es] violence to” the design of the “categorical constitutional guarantee[]” of the Confrontation Clause).

Despite the criticisms that Crawford and the White concurrence aim at existing Confrontation Clause jurisprudence, Crawford leaves the Roberts approach untouched with respect to nontestimonial statements. The Crawford Court expressly declined to overrule White, in which the majority of the Court considered and rejected a conception of the Confrontation Clause that would restrict the admission of testimonial statements but place no constitutional limits on the admission of out-of-court nontestimonial statements. See Crawford, — U.S. at ——, 124 S.Ct. at 1370 (“Although our analysis in this case casts doubt on that holding, we need not definitively resolve whether [White] survives our decision today . . . .”); see also White, 502 U.S. at 352–53, 112 S.Ct. 736.

Accordingly, while the continued viability of Roberts with respect to nontestimonial statements is somewhat in doubt, we will assume for purposes of this opinion that its reliability analysis continues to apply to control nontestimonial hearsay, and that our precedents applying the Roberts analysis to such statements retain their force. This assumption gives effect to the Court’s refusal to overrule White while erring on the side of providing more protection to defendants in the absence of a definitive ruling from the Supreme Court. Thus, the analysis of whether the admission of Beckham’s statements violated the Confrontation Clause begins with the question of whether the statements are testimonial, triggering Crawford’s per se rule against their admission. If the statements are not testimonial, their admission did not violate the Confrontation Clause so long as the statements fall within a firmly rooted hearsay exception or demonstrate particularized guarantees of trustworthiness. See Roberts, 448 U.S. at 66, 100 S.Ct. 2531.
II. Testimonial Statements Under Crawford

Crawford conditions its bar on the admission of prior out-of-court statements that were not subject to cross-examination on whether the statements are “testimonial.” This limitation stems from Crawford’s definition of a witness, as that term is used in the Confrontation Clause, as someone who “bear[s] testimony.” Crawford, —— U.S. at ——, 124 S.Ct. at 1364 (internal quotation marks omitted). Testimony, in turn, is “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” Id. (quoting 1 N. Webster, An American Dictionary of the English Language (1828)).

Although the Court declined to “spell out a comprehensive definition of ‘testimonial,’” id. at 1374, it provided examples of those statements at the core of the definition, including prior testimony at a preliminary hearing, previous trial, or grand jury proceeding, as well as responses made during police interrogations. See id. at 1364, 1374. With respect to the last example, the Court observed that “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” Id. at 1364. Thus, the types of statements cited by the Court as testimonial share certain characteristics; all involve a declarant’s knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings. See id. at 1365 n. 4 (stating that declarant’s “recorded statement, knowingly given in response to structured police questioning,” was made in an interrogation setting and was therefore testimonial).

[1] By denominating these types of statements as constituting the “core” of the universe of testimonial statements, the Court left open the possibility that the definition of testimony encompasses a broader range of statements. See id. at 1371; see also id. at 1370 (citig Richard D. Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L.J. 1011, 1039–43 (1998) (advocating that any statement made by a declarant who “anticipates that the statement will be used in the prosecution or investigation of a crime” be considered testimony)). But see White, 502 U.S. at 364–65, 112 S.Ct. 736 (Thomas, J., concurring in part and concurring in the judgment, joined by Scalia, J.) (stating that only statements contained in “formalized testimonial materials” should be considered testimony, and opining that any broader definition would entail difficult factual determinations). Because the Court declined to delineate a more concrete definition of the outer limits of the concept of testimonial statements, however, it is unclear which of the characteristics listed above are determinative of whether a given statement constitutes testimony. The statements at issue in this case present an example of a situation not falling squarely within any of the Crawford examples. Beckham’s statements were elicited by an agent of law enforcement officials, but without his knowledge, and not in the context of the structured environment of formal interrogation. The question, therefore, is whether Beckham served as a “witness” who bears testimony within the meaning of the Clause, despite the fact that he was unaware that his statements were being elicited by law enforcement and would potentially be used in a trial.

Crawford at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant’s awareness or expectation that his or her statements may later be used at a trial. The opinion lists several formula-
tions of the types of statements that are included in the core class of testimonial statements, such as "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." Crawford, — U.S. at ——, 124 S.Ct. at 1364 (internal quotation marks omitted). All of these definitions provide that the statement must be such that the declarant reasonably expects that the statement might be used in future judicial proceedings. See id. Although the Court did not adopt any one of these formulations, its statement that "[t]hese formulations all share a common nucleus and then define the Clause’s coverage at various levels of abstraction around it" suggests that the Court would use the reasonable expectation of the declarant as the anchor of a more concrete definition of testimony. See also id. at 1365 n. 4 (noting that declarant’s testimonial statement was knowingly given to investigators). If this is the case, then Beckham’s statements would not constitute testimony, as it is undisputed that he had no knowledge of the CI’s connection to investigators and believed that he was having a casual conversation with a friend and potential co-conspirator.

We need not attempt to articulate a complete definition of testimonial statements in order to hold that Beckham’s statements did not constitute testimony, however, because Crawford indicates that the specific type of statements at issue here are nontestimonial in nature. The decision cites Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), which involved a co-defendant’s unwitting statements to an FBI informant, as an example of a case in which nontestimonial statements were correctly admitted against the defendant without a prior opportunity for cross-examination. See Crawford, —— U.S. at ——, 124 S.Ct. at 1368. In Bourjaily, the declarant’s conversation with a confidential informant, in which he implicated the defendant, was recorded without the declarant’s knowledge. See Bourjaily, 483 U.S. at 173–74, 107 S.Ct. 2775. The Court held that even though the defendant had no opportunity to cross-examine the declarant at the time that he made the statements and the declarant was unavailable to testify at trial, the admission of the declarant’s statements against the defendant did not violate the Confrontation Clause. See id. at 182, 107 S.Ct. 2775. Crawford approved of this holding, citing it as an example of an earlier case that was “consistent with” the principle that the Clause permits the admission of nontestimonial statements in the absence of a prior opportunity for cross-examination. Crawford, —— U.S. at ——, 124 S.Ct. at 1367. Thus, we conclude that a declarant’s statements to a confidential informant, whose true status is unknown to the declarant, do not constitute testimony within the meaning of Crawford. We therefore conclude that Beckham’s statements to the CI were not

2. Although one of the formulations, taken from Justice Thomas’s concurrence in White, 502 U.S. at 365, 112 S.Ct. 736, does not explicitly require that the statement have been made with the reasonable expectation that it would be used at a later trial, Justice Thomas’s definition of testimonial statements appears to be narrower than that contemplated by Crawford, as it includes only “formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” Id. By definition, a declarant who gives a statement in one of the formalized contexts cited by Justice Thomas must reasonably expect that his or her statement could be used in future proceedings. This definition is, as Crawford notes, consistent with the other two formulations, which are explicitly conditioned on the reasonable expectation of the declarant. See Crawford, —— U.S. at ——, 124 S.Ct. at 1364.
testimonial, and Crawford does not bar their admission against Saget.

III. Indicia of Reliability Under Roberts

[2] Because Beckham's statements were not testimonial, the Confrontation Clause does not bar their admission so long as the statements fall within a firmly rooted hearsay exception or contain particularized guarantees of trustworthiness. See Roberts, 448 U.S. at 66, 100 S.Ct. 2531. Because we have not yet decided whether the hearsay exception for statements against penal interest is a firmly rooted hearsay exception, see United States v. Matthews, 20 F.3d 538, 545 (2d Cir.1994), the district court admitted the statements on the basis of their indicia of reliability. We review the district court's Confrontation Clause analysis de novo, see United States v. Tropeano, 252 F.3d 653, 657 (2d Cir.2001). Applying this standard, we give appropriate deference to any factual findings by the district court that may inform the question of reliability. We hold that the statements bear adequate guarantees of trustworthiness.

Under our precedents, Beckham's statements to the CI were made in circumstances that confer adequate indicia of reliability on the statements. In United States v. Sasso, 59 F.3d 341 (2d Cir. 1995), we explained that “[a] statement incriminating both the declarant and the defendant may possess adequate reliability if … the statement was made to a person whom the declarant believes is an ally,” and the circumstances indicate that those portions of the statement that incriminate the defendant are no less reliable than the self-inculpatory parts of the statement. Id. at 349. Thus, in Matthews we concluded that the declarant’s statements to his girlfriend were sufficiently reliable to be introduced against the defendant, given the unofficial setting in which the remarks were made and the declarant’s friendly relationship with the listener. See Matthews, 20 F.3d at 546. Beckham’s statements were made under circumstances almost identical to those at issue in Matthews, as Beckham believed that he was speaking with a friend—their conversations involved discussions of personal issues such as child support as well as details of the gun-running scheme—in a private setting. See also Sasso, 59 F.3d at 349–50 (finding that declarant’s statements to his girlfriend were reliable because they were not made in response to questioning or in a coercive atmosphere). Moreover, because Beckham was describing his and Saget’s method of buying and transporting the guns, the majority of his statements were descriptions of acts that he and Saget had jointly committed. Thus, Beckham does not appear to have been attempting to shift criminal culpability from himself to Saget. See id. at 350; United States v. Rahme, 813 F.2d 31, 36–37 (2d Cir.1987) (finding reliability where declarant’s statements implicating the defendant were also self-inculpatory). The statements therefore contained sufficient guarantees of trustworthiness to be introduced against Saget.

Saget contends, however, that Sasso and Matthews are inapposite here, because Beckham had a motive to exaggerate his statements in order to convince the CI to join him in selling guns. This argument is unavailing. Although the CI asked Beckham fairly detailed questions about the logistics of the gun-running scheme, he never expressed doubt about the veracity of Beckham’s statements or misgivings about joining the illegal activity. Moreover, those statements that incriminate Saget, such as the assertions that Beckham and Saget made a profit on the guns, drove them to New York, and used exotic dancers to buy guns, are factual in nature.
Those elements of the statements that Beckham might have exaggerated, such as the amount of money the partners made or the number of guns they purchased at once, are immaterial to Beckham's central assertion, that he and Saget participated in the gun-running scheme. Establishing Saget's participation in the conspiracy was the principal purpose for which the statements were introduced. We therefore conclude that Beckham's statements bore sufficiently particularized guarantees of trustworthiness, such that their admission did not violate the Confrontation Clause.

IV. Admissibility Under Rule 804(b)(3)

Saget next argues that several of Beckham's individual statements were not admissible as statements against his penal interest because they were not sufficiently self-inculpatory to implicate Rule 804(b)(3). We review the district court's determination with respect to the admissibility of the statements under the Federal Rules of Evidence for abuse of discretion. See Tropeano, 252 F.3d at 657.

[3, 4] A statement may be admitted under Rule 804(b)(3)'s hearsay exception for statements against penal interest only if the district court determines that a reasonable person in the declarant's shoes would perceive the statement as detrimental to his or her own penal interest. See Williamson v. United States, 512 U.S. 594, 599–603, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994) (holding that a court may admit only those portions of a declarant's statement that are truly self-inculpatory). Here, the district court correctly determined, after an adequately particularized analysis, that the bulk of Beckham's statements were self-inculpatory because they described acts that Saget and Beckham committed jointly. Those statements in which Beckham described acts that Saget alone had committed—such as Beckham's statement that the authorities arrested one of Saget's straw purchasers while Saget himself escaped investigation—were self-inculpatory in context, the court concluded, because the statements reflected Beckham's attempt to give the CI examples of how he and Saget operated and why their scheme worked. Having reviewed the record, we find no abuse of discretion in the district court's analysis of these statements.

CONCLUSION

For the foregoing reasons, the judgment of conviction is AFFIRMED with respect to the introduction of Beckham's statements as substantive evidence against Saget. A summary order will follow with government's interpretations of the statements are facially reasonable. Saget was of course free to argue to the jury that the statements were so ambiguous that they lacked significant probative value.

3. Saget argues that certain of these statements were not self-inculpatory because the meaning ascribed to them by the government was incorrect or speculative. For instance, the government contends that Beckham's statement that "we drove them down" indicated that Beckham and Saget were driving the guns to New York, but Saget asserts that the government's reading is impermissible because, in light of contemporaneous statements about driving "up" to New York from Philadelphia, Beckham's use of the word "down" eliminates the possibility that he and Saget had transported the guns northward. The district court did not abuse its discretion in admitting these statements, however, as the

4. To the extent that Saget's argument is that Beckham's statements were not truly against his interest because Beckham made the statements in an attempt to persuade the CI to enter into the conspiracy, it is misplaced. Even if the statements were in Beckham's pecuniary interest, they were clearly self-inculpatory and therefore against his penal interest, as required by Rule 804(b)(3).
respect to defendant’s other challenges to his conviction.

UNITED STATES of America, Appellee,

v.

Wade THOMAS, Defendant—Appellant.

No. 02–1029.

United States Court of Appeals, Second Circuit.


Background: Following jury trial before the United States District Court for the Eastern District of New York, Reena Raggi, J., defendant was convicted of inducement of travel in interstate commerce for a fraudulent purpose. Defendant appealed.

 Holdings: The Court of Appeals, Gibson, Circuit Judge, held that:
(1) travel by agent of victim of fraud satisfied interstate travel requirement of statute;
(2) evidence was sufficient to show that financial advisor was victim’s agent;
(3) instructional error did not occur in describing advisor as victim’s representative;
(4) evidence was sufficient to show that defendant induced travel;
(5) limiting cross-examination of victim was not abuse of discretion;
(6) victim’s alleged foolishness in investing in scheme was not defense;
(7) prosecutor’s comment in closing that defendant lied during his testimony did not prejudice defendant.

Affirmed.

1. Fraud ⇔68
   Travel by agent of victim will satisfy element of interstate travel by victim for purposes of conviction of travel fraud. 18 U.S.C.A. § 2314.

2. Fraud ⇔68
   In prosecution for travel fraud, evidence was sufficient to show that financial advisor was agent of church, such that his travel to another state to discuss investment of church funds with defendant could satisfy element of interstate travel by victim, notwithstanding that advisor believed he did not have authority to bind church to investment; advisor’s travel was essential to scheme, as without convincing advisor, defendant could not have secured church funds. 18 U.S.C.A. § 2314.

3. Principal and Agent ⇔3(2)
   An independent contractor may also be an agent.

4. Criminal Law ⇔1030(1)
   To meet standard for plain error, defendant must show (1) error, (2) that is plain, and (3) that affected defendant’s substantial rights, and court must be convinced that (4) the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. Fed.Rules Cr. Proc.Rule 52(b), 18 U.S.C.A.

5. Fraud ⇔69(7)
   Instruction in prosecution for travel fraud that travel by financial advisor as “representative” of victim of fraud would be sufficient to satisfy interstate travel requirement of statute did not rise to level of plain error, even though word “representative” did not follow exact language of
Federal Rule of Evidence 703

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

ADVISORY COMMITTEE NOTES

1972 Proposed Rules

Facts or data upon which expert opinions are based may, under the rule, be derived from three possible sources. The first is the firsthand observation of the witness with opinions based thereon traditionally allowed. A treating physician affords an example. Rheingold, The Basis of Medical Testimony, 15 Vand.L.Rev. 473, 489 (1962). Whether he must first relate his observations is treated in Rule 705. The second source, presentation at the trial, also reflects existing practice. The technique may be the familiar hypothetical question or having the expert attend the trial and hear the testimony establishing the facts. Problems of determining what testimony the expert relied upon, when the latter technique is employed and the testimony is in conflict, may be resolved by resort to Rule 705. The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception. In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes. Rheingold, supra, at 531; McCormick § 15. A similar provision is California Evidence Code § 801(b).


If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data "be of a type reasonably relied upon by experts in the particular field." The language would not warrant admitting in evidence the opinion of an "accidentologist" as to the point of impact in an automobile collision based on statements of bystanders since this requirement is not satisfied. See Comment, Cal.Law Rev. Comm'n, Recommendation Proposing an Evidence Code 148-150 (1965).
1987 Amendments

The amendment is technical. No substantive change is intended.

2000 Amendments

Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted. Courts have reached different results on how to treat inadmissible information when it is reasonably relied upon by an expert in forming an opinion or drawing an inference. Compare United States v. Rollins, 862 F.2d 1282 (7th Cir. 1988) (admitting, as part of the basis of an FBI agent's expert opinion on the meaning of code language, the hearsay statements of an informant), with United States v. 0.59 Acres of Land, 109 F.3d 1493 (9th Cir. 1997) (error to admit hearsay offered as the basis of an expert opinion, without a limiting instruction). Commentators have also taken differing views. See e.g., Ronald Carlson, Policing the Bases of Modern Expert Testimony, 39 Vand.L.Rev. 577 (1986) (advocating limits on the jury's consideration of otherwise inadmissible evidence used as the basis for an expert opinion); Paul Rice, Inadmissible Evidence as a Basis for Expert Testimony: A Response to Professor Carlson, 40 Vand.L.Rev. 583 (1987) (advocating unrestricted use of information reasonably relied upon by an expert).

When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert's opinion, a trial court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes on the other. The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect. If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes. See Rule 105. In determining the appropriate course, the trial court should consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances.

The amendment governs only the disclosure to the jury of information that is reasonably relied on by an expert, when that information is not admissible for substantive purposes. It is not intended to affect the admissibility of an expert's testimony. Nor does the amendment prevent an expert from relying on information that is inadmissible for substantive purposes.

Nothing in this Rule restricts the presentation of underlying expert facts or data when offered by an adverse party. See Rule 705. Of course, an adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with information that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test provided by this amendment. Moreover, in some circumstances the proponent might wish to disclose information that is relied upon by the expert in order to "remove the sting" from the opponent's anticipated attack, and thereby prevent the jury from drawing an unfair negative inference. The trial court should take this consideration into account in applying the balancing test provided by this amendment.

This amendment covers facts or data that cannot be admitted for any purpose other than to assist the jury to evaluate the expert's opinion. The balancing test provided in this
amendment is not applicable to facts or data that are admissible for any other purpose but have not yet been offered for such a purpose at the time the expert testifies.

The amendment provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert. In a multi-party case, where one party proffers an expert whose testimony is also beneficial to other parties, each such party should be deemed a "proponent" within the meaning of the amendment.
Federal Rule of Evidence 801(c)

The following definitions apply under this article:

(a) **Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) **Declarant.** A "declarant" is a person who makes a statement.

(c) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
I. INTRODUCTION

"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." [FN1] The Confrontation Clause of the Sixth Amendment is composed of just these eighteen words, yet this small phrase has been an enigma for the United States Supreme Court for many years. [FN2] Over the past half century the Court has merged an absolute constitutional right with the rule against hearsay. [FN3] In doing so the Court has subjected the categorical right of confrontation to a "malleable standard" of evidence law that "often fails to protect against paradigmatic confrontation violations." [FN4] Since its formalization in Ohio v. Roberts, [FN5] this approach has rendered inconsistent and contradictory results and has increasingly drawn the attention of critics who have advocated a return to the original ideas behind the Clause. [FN6] By its recent decision in Crawford v. Washington, the Court attempted to remedy some of the problems resulting from Roberts. [FN7] In Crawford the Court returned to an examination of the historical influences behind the Confrontation Clause and formulated a doctrine that should appease the historical advocates while remaining applicable to modern criminal procedure concerns. [FN8]

*324 This note examines the inestimable significance of Crawford v. Washington [FN9] to evidentiary procedures in the criminal justice system. The note first briefly summarizes the facts behind the Crawford case and the twisted procedural history that it traversed on its way to a grant of certiorari. [FN10] Next, the note tracks the history of the Confrontation Clause from its English and American Colonial origins through the case law
leading up to the establishment of the Roberts doctrine. [FN11] This historical trek sets the stage for an examination of the Court's analysis in the Crawford decision. [FN12] The note concludes with a discussion of the promises of the Crawford approach, the resulting problems it may create in its application, and a discussion of the new approach's interrelation with the law of hearsay. [FN13]

II. FACTS

A. The Incident

On August 5, 1999, Michael Crawford, accompanied by his wife Sylvia Crawford, went to the apartment of Kenneth Lee. [FN14] An argument ensued, and Michael stabbed Kenneth. [FN15] Later that evening, the police picked the couple up and, when they arrived at the police department, the police separated the couple for questioning. [FN16] During interrogation each gave separate tape-recorded statements. [FN17] The couple's first story was that the two had gone to visit Lee, and while Michael went to the store, Kenneth tried to sexually assault Sylvia. Michael then returned and the fight occurred. [FN18] Both Michael and Sylvia gave roughly the same story; the police, however, decided to take a second statement from each of them due to some discrepancies. [FN19] The second set of stories differed greatly from the first. [FN20]

*325 The couple's second accounts of the incident revealed that the alleged sexual assault had actually occurred weeks earlier. [FN21] Both stated that while visiting with friends earlier that day, Lee's name arose in conversation and Michael became angry. [FN22] The two then went in search of Lee. When they arrived at his house, the fight started and Michael stabbed Lee. [FN23] The stories diverged on the point of whether or not Lee actually brandished a weapon while Michael was stabbing him--Michael claimed that Lee might have been holding a weapon during the fight. [FN24] Sylvia, however, indicated that Lee might not have grabbed for a weapon until after Michael had assaulted him. [FN25] Michael was charged with one count of attempted first degree murder *326 with a deadly weapon and one count of first degree assault with a deadly weapon. [FN26]

B. Procedural Posture

1. The Trial Court

At trial Michael pleaded self-defense and invoked the marital privilege under Washington evidence law to prevent Sylvia from testifying. [FN27] In response the prosecution sought to admit both of Sylvia's statements into evidence under the hearsay exception of statements against penal interest; [FN28] the defense objected on the grounds that this would implicate Michael's rights under the Confrontation Clause of the Sixth Amendment. [FN29] Under
the United States Supreme Court decision Ohio v. Roberts, [FN30] an out-of-court statement of an unavailable witness could be admitted when the statement bore "adequate 'indicia of reliability.'" [FN31] The reliability test could be satisfied if the statement (1) fell within "a firmly rooted hearsay exception" or (2) bore "particularized guarantees of trustworthiness." [FN32] The trial court determined that Sylvia's statement did not fall into a "firmly rooted hearsay exception" after considering the Supreme Court's ruling in Lilly v. Virginia, [FN33] but it did find the statement trustworthy enough to bypass cross-examination under the Sixth Amendment. [FN34] The court allowed both of Sylvia's statements to be admitted, declaring them reliable because Sylvia was *327 not attempting to inculpate her husband and exculpate herself; rather, she was trying to support him by corroborating his story. [FN35] The prosecution admitted the evidence, and the jury returned a verdict finding Michael guilty of first degree assault with a deadly weapon. [FN36]

2. The Court of Appeals of Washington

On appeal Michael again challenged the trial court's admission of Sylvia's statements as a violation of his right to confrontation. [FN37] The Court of Appeals of Washington analyzed the reliability of the statements using a nine factor test designed to show "particularized guaranties of trustworthiness." [FN38] The court found that Sylvia's statements failed the test and were not admissible under the Confrontation Clause. [FN39] Accordingly, the court of appeals reversed Michael's conviction. [FN40]

3. The Supreme Court of Washington

The Supreme Court of Washington reversed the appellate division's decision. [FN41] While acknowledging the nine factor test used by the Appellate *328 Division, the court relied on its decision in State v. Rice [FN42] to declare that "interlocking" confessions could satisfy the reliability requirement as an alternative to the nine factor test. [FN43] The court rejected the court of appeals conclusion that the couple's statements contradicted each other, finding instead that the statements actually overlapped. [FN44] It based this conclusion on the idea that both Michael and Sylvia's statements were equally ambiguous as to whether Lee actually had a weapon because both indicated that it was possible that he grabbed for a weapon either before or after the assault. [FN45] The court deemed the couple's statements to be "virtually identical" thus satisfying the interlocking confessions rule and the residual reliability test of the Confrontation Clause. [FN46]

III. BACKGROUND

The United States Supreme Court has struggled for decades to distinguish the Sixth Amendment's Confrontation Clause as a categorical right separate from the rule against hearsay. [FN47] One reason for this struggle may be *329
that American history gives no clear origin of the right in this country. [FN48] Traditionally, it has been traced to the abuses of the English courts in the century preceding the American Revolution, and at least some of its roots may be found in the transgressions of the Crown in the American colonies. [FN49] This section briefly addresses the historical reasons for the inclusion of the Confrontation Clause in the Sixth Amendment. [FN50] Then, it moves on to discuss the early American case law concerning the Confrontation Clause. [FN51] Next, the section reviews the cases preceding Ohio v. Roberts. [FN52] Finally, this section analyses the Roberts decision. [FN53]

A. The History Surrounding the Drafting of the Clause: The Framers' Intentions

1. The Influence of the English Courts
   The traditional view is that the Framers drafted the Confrontation Clause because of the "remembered harms or injuries suffered or feared by the colonists" that were linked to the abuses in the English courts of the sixteenth and seventeenth centuries. [FN54] It was the political trials of this time and the proceedings of the Star Chamber [FN55] that would lead to reforms after the Glorious Revolution. [FN56]

   In the sixteenth century the English courts adopted trial techniques from the civil law countries that gave criminal proceedings an inquisitorial approach. [FN57] The political cases were assigned to the Privy Counsel, [FN58] which examined the accused in preparation for trial, sometimes resorting to torture in order to exact a confession. [FN59] Witnesses did not testify in open court; instead, their statements were presented in the form of depositions, letters, and accomplice confessions that had been taken during examination by the Counsel. [FN60] It was this lack of an opportunity to cross-examine the witnesses that led to the repeated requests by the prisoners to have the witnesses brought before them face-to-face. [FN61]

   This procedure was adopted in Sir Walter Raleigh's infamous trial for treason in 1603. [FN62] The principal evidence against Raleigh was the confession of his alleged co-conspirator, Lord Cobham. [FN63] During trial, the court repeatedly rejected Raleigh's request to have Cobham brought before him. [FN64] Raleigh was convicted and sentenced to be hanged, drawn, and quartered. [FN65] Raleigh's conviction was later lamented as a debasement of the English justice system. [FN66]

*331 2. The Influences in the Colonies
   There is another perhaps more compelling argument that the most significant impact upon the framers came from the various influences within the colonies during the pre-Revolutionary era. [FN67] Aside from the troubles in England, the colonies faced their own problems with the poor administration of justice, beginning with the abuses of authority by the early colonial
governors. [FN68] As the founders of new colonies learned from the mistakes made by their seniors, provisions were made in the new governments, and the right to confrontation and cross-examination gradually became part of colonial criminal procedure by the beginning of the eighteenth century. [FN69]

Around the time of the French and Indian War, the Crown's administration in the colonies began to exhibit increased weakness and unfairness that adversely affected the right to trial by jury. [FN70] The first of these injustices occurred with the attempt to enforce the Sugar Act in 1763 and the Stamp Act in 1765. [FN71] When the colonial courts resisted the enforcement of the new laws, which they regarded as unconstitutional, Parliament granted jurisdiction over those cases to the admiralty courts. [FN72] In the admiralty courts the defendants were not afforded a trial by jury, and the procedures in those courts made frequent use of testimony by deposition and ex parte examinations of witnesses. [FN73] In addition to the Sugar Act and Stamp Act prosecutions, Parliament called for persons charged with certain treasonous acts to be sent to England for trial, which severely limited their trial rights. [FN74] The outrage over these cases was probably fueled by contemporary publications *332 such as William Blackstone's Commentaries on the Laws of England that advocated the superiority of trial by jury and the rights it encompassed over other modes of criminal procedure. [FN75]

As a result of these influences, when the original draft of the constitution contained little mention of criminal procedure, the states vehemently refused to ratify it. [FN76] Several of the states had already included a right to trial by jury and a right to confrontation in their constitutions and declarations of rights, and it was contended in the Federal Convention of 1787 that the state declarations would be sufficient to protect these rights. [FN77] After the states voiced strong objections, however, a full bill of rights was amended to the Constitution, which included the Sixth Amendment's Confrontation Clause. [FN78] With the inclusion of the Sixth Amendment and the Confrontation Clause the framers furthered their purpose of employing a checks and balances system to limit the powers of the sovereign. [FN79]

*333 B. The Interpretations of the Confrontation Clause

1. The First Discussion of the Confrontation Clause: Mattox v. United States

The United States Supreme Court gave the Confrontation Clause little treatment until the late 1800s when the court decided Mattox v. United States. [FN80] In Mattox, the defendant had been convicted of murder but was awarded a retrial; however, some of the witnesses who testified at the first trial had died during the interim. [FN81] During the second trial, the prosecution admitted the reporter's notes of the two deceased witnesses' testimony from the first trial. [FN82]
Because both of the deceased witnesses had appeared at the first trial and had been fully examined and cross-examined, the Supreme Court rejected the defendant's claim that his right to confrontation had been violated. [FN83] The Court stressed that the "primary object" of the Confrontation Clause was to prevent the use of the inquisitorial techniques of the civil law (ex parte affidavits) by offering a method for deciphering the truth--cross-examination. [FN84] The Court then stated that a constitutional provision should not be construed so narrowly as to harm the interest of the public in order to protect a defendant, when the defendant had been previously afforded the protections guaranteed by the Constitution. [FN85] The Court indicated that the Bill of Rights was subject to the common law at 1791 and all of its exceptions. [FN86] The Confrontation Clause was subject even to those exceptions that strayed from its purposes because they were grounded in experience that had shown them to be of the same reliability and trustworthiness as testimony that was taken under oath. [FN87] These statements might have opened the *334 door for the "firmly rooted hearsay exception" and "indicia of reliability" tests that would be employed in the future. [FN88]

2. The Development of a Doctrine: The Precursors to Ohio v. Roberts [FN89] The Court did not address a great number of confrontation cases after Mattox until 1965 when it decided Pointer v. Texas. [FN90] The court in Pointer held that the Sixth Amendment's Confrontation Clause applies to criminal trials in the state courts by way of the Fourteenth Amendment. [FN91] Until Pointer there was no urgency to formulate a doctrine for applying the Confrontation Clause to out-of-court statements because the states simply applied their own rules of evidence to such situations. [FN92] After Pointer, some statements that had previously been admissible in the states were now barred by a constitutional provision. [FN93] Thus, it became much more pressing for the Court to devise a doctrine for the Clause's application. [FN94] John Henry Wigmore's treatise on evidence influenced the Court's decisions following Pointer. [FN95] Wigmore's theory endorsed the Confrontation Clause as an evidentiary doctrine--a constitutionalization of the rules against hearsay that essentially consisted of an absolute right to cross-examination. [FN96] Thus, according to Wigmore, when the hearsay rule required that a statement be taken in court, the Confrontation Clause required that it be taken subject to cross-examination and the current rules of evidence. [FN97]

*335 a. The sufficiency of the opportunity to cross-examine: Barber v. Page Shortly after Pointer the Court was called upon to answer one of the many questions concerning the application of the Confrontation Clause in Barber v. Page. [FN98] The issue in Barber was whether the defendant had been given sufficient opportunity to cross-examine when the witness's prior testimony was given at a preliminary hearing. [FN99] Barber and his
co-defendants were charged with committing armed robbery in Oklahoma, and at the preliminary hearing, Woods, one of the co-defendants, waived his privilege against self-incrimination and gave testimony that incriminated Barber. [FN100] Barber's attorney did not cross-examine Woods. [FN101] When Barber's trial arrived seven months later, Woods was incarcerated in a federal prison in Texas. [FN102] The state claimed that Woods was unavailable as a witness because he was out of the jurisdiction and sought to admit the transcript of his preliminary hearing testimony. [FN103]

Initially, the Court scolded the prosecution for even claiming that the witness was unavailable because of the ease with which the state could obtain his presence due to the growing cooperation between the federal and state prison systems. [FN104] The Court held that a witness is unavailable only when the prosecution can show that it made a good faith effort to procure his presence at trial. [FN105]

Next the Court rejected the State's argument that the defendant had waived his right to confront Woods because he did not take advantage of his opportunity to do so at the preliminary hearing. [FN106] The Court proclaimed that even if Barber had cross-examined Woods at the preliminary hearing, it would not have been sufficient because confrontation was "basically a trial right" reserved to give the jury the opportunity to scrutinize the witness. [FN107] The Court further explained stating that "[a] preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is [a] more limited one" [FN108] In dicta, however, the Court skirted its critical statements saying that there may be a necessity and a good argument for admission of preliminary hearing testimony in some cases in which the witness was actually unavailable. [FN109]

b. The beginnings of a test: California v. Green

Just two years after Barber, the Court decided California v. Green, [FN110] a case that disregarded Barber and set the stage for the new tests that would arise in the following years. [FN111] In Green a sixteen-year-old boy testified that Green was his drug supplier at Green's preliminary hearing for drug charges. [FN112] At trial, however, the boy claimed uncertainty as to this point because he had been under the influence of LSD. [FN113] During the boy's direct examination, the prosecution read excerpts from his preliminary hearing testimony and submitted the previous testimony as substantive evidence. [FN114] After the boy's statement was read, he claimed that his memory was "refreshed" and proceeded to tell a muddled account of the incident. [FN115] The District Court of Appeals later held, and the California Supreme Court affirmed, that the admission of the boy's prior testimony implicated Green's Sixth Amendment right to confrontation even if it was subject to cross-examination because the prior inconsistent statements were admitted as substantive evidence. [FN116]
The United States Supreme Court rejected the California court's decision, holding that the Confrontation Clause was not violated as long as the witness was subjected to cross-examination at trial. [FN117] The Court attempted to bolster this argument by weighing the "alleged dangers" of admitting out-of-court statements against the Confrontation Clause's protections. [FN118] The Court stated that the Confrontation Clause provides the following:

(1) insures that the witness will give his statements under oath thus impressing him with the seriousness of the matter and guarding against the *337 lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for discovery of the truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility. [FN119] The Court concluded that, in light of this balancing test, Green's opportunity to confront the witness was sufficient because Green had the opportunity for "full and effective cross-examination," the conditions of trial were present, and the jury was provided an opportunity to scrutinize the witness's testimony regarding his prior statements. [FN120] The Court claimed that the question was not whether the jury could be in a better position to experience the prior testimony, but whether the jury could still obtain a "satisfactory basis for evaluating the truth of the prior statement." [FN121]

Then, in part III of the opinion, the Court seemingly discounted what it had held two years earlier in Barber concerning the sufficiency of preliminary hearing testimony. [FN122] Instead of acknowledging the Barber holding that preliminary hearing testimony is not of the same degree as trial testimony, the Court concluded that the prior testimony in this case was taken "under circumstances closely approximating those that surround the typical trial" and was thus sufficient. [FN123] The Court relied upon dicta from Barber that stated that preliminary hearing testimony might be satisfactory in some circumstances to infer that the boy's prior statement would have been admissible even if the boy had been unavailable for trial because there was "substantial compliance with the purposes behind the confrontation requirement." [FN124]

c. Expanding on the test: Dutton v. Evans

In Dutton v. Evans, [FN125] the Court added another condition to the test that the court would adopt in Roberts. [FN126] In that case Evans and his co-*338 conspirators Truett and Williams were charged with murder. [FN127] Truett turned state's witness, and Williams was arraigned and imprisoned in the federal penitentiary before Evans's trial. [FN128] At Evans's trial, Shaw, one of Williams's fellow inmates, testified that Williams had made a comment to him that implicated Evans as the mastermind of the scheme. [FN129] The
state claimed that Shaw's statement was admissible under a Georgia hearsay exception that allowed the admission of statements made by a co-conspirator during the commission of the conspiracy or during the time the co-conspirators are continuing to conceal the crime. [FN130] Evans claimed that his Sixth Amendment right to confrontation had been violated by the admission of Shaw's hearsay statement. [FN131]

The plurality opinion began by distinguishing this case from the Court's recent decisions regarding co-conspirators, claiming that those cases far out-weighed the case at bar in regards to the significance of the admitted evidence. [FN132] Then the Court decided that the state's longstanding hearsay exception regarding co-conspirators was applied in a manner consistent with the Confrontation Clause. [FN133] The Court supported this conclusion by stating that the rule against hearsay does not restrict a witness from telling what he heard; rather, the rule prevented the use of extra-judicial statements to prove fact. [FN134] The Court concluded that the circumstances surrounding the making of Williams's statement bore "indicia of reliability," which were considered to be determinative of whether a statement could be admitted into evidence without an opportunity for confrontation. [FN135]

*339 3. The Birth of a Doomed Doctrine: Ohio v. Roberts

In Ohio v. Roberts, [FN136] the Court unveiled its long-awaited approach to the Confrontation Clause. [FN137] In Roberts, the defendant was charged with forgery of a check and possession of stolen credit cards that belonged to Bernard and Amy Isaacs. [FN138] At the preliminary hearing, the defense called the Isaacs's daughter, Anita, to testify and attempted to draw out an admission that she had given the defendant permission to use the checks and credit cards, but she denied these assertions. [FN139] Defense counsel did not cross-examine Anita or declare her a hostile witness. [FN140] When time for trial arrived, Anita could not be located at her last permanent address, and the prosecution declared her unavailable and admitted her preliminary hearing statements. [FN141]

The defendant contended that his rights under the Sixth Amendment's Confrontation Clause had been violated and advanced the two following arguments: (1) that the defendant did not enjoy a sufficient opportunity to cross-examine the witness, and (2) that the state did not make a good faith effort to obtain the witness's presence. [FN142] The majority focused mainly on the first argument. [FN143] The Court began by stating that the Confrontation Clause should not be read so narrowly that all prior statements would be inadmissible. [FN144] The Court advanced the argument first set out in Mattox that the competing interests of protecting the defendant's rights and protecting the public must be balanced to determine whether confrontation could *340 be dispensed with in a particular case. [FN145] It then mapped out the two ways in which the Clause was designed to restrict admissibility of hearsay. [FN146] First, a threshold requirement had to be met in which the
prosecution proved the unavailability of the witness whose statement it wished to use. [FN147] For the second step, the prior statement must bear adequate "indicia of reliability," a requirement that could be satisfied if the statement (1) fell within a "firmly rooted hearsay exception" or (2) bore "particularized guarantees of trust-worthiness." [FN148] The Court declined to identify any particular "guarantees of trustworthiness"; rather, it referred to dicta in Green to assert that "substantial compliance with the purposes behind the confrontation requirement" was all that the Sixth Amendment demanded. [FN149]

In part III of the opinion the Court compared the facts of Roberts to those in Green to determine whether the "indicia of reliability" requirement had been met. [FN150] The Court drew on Green to conclude that the Confrontation Clause was satisfied when the defendant had the opportunity to cross-examine the witness at a preliminary hearing even without the actual occurrence of cross-examination. [FN151] The Court then concluded that the Confrontation Clause was satisfied in this case because on direct examination the defense counsel engaged in "cross-examination as a matter of form" by using very leading questions in order to challenge the truth of the witness's statements.*341 [FN152] This approach was destined to create instability in the lower courts, to be ridiculed by commentators and members of the Court, and ultimately to be dissolved by Crawford v. Washington. [FN153]

IV. REASONING

In Crawford v. Washington, [FN154] the United States Supreme Court held that the Confrontation Clause of the Sixth Amendment mandates that the common law requirements of unavailability and a prior opportunity for cross-examination be met for the admission of prior testimonial statements. [FN155] The majority opinion, written by Justice Scalia, began with a discussion of the history behind the right of confrontation. [FN156] Then the Court moved on to present two conclusions it had reached about the Framers' intentions behind writing the Confrontation Clause. [FN157] Finally, the Court concluded that the Ohio v. Roberts [FN158] "guarantees of trustworthiness" and "firmly rooted hearsay exception" tests produced results that ran counter to the original purposes of the Confrontation Clause [FN159] and, thus, overruled Roberts. [FN160]

Chief Justice Rehnquist wrote a concurring opinion in which Justice O'Connor joined. [FN161] The Chief Justice concurred in the outcome but dissented from the majority's decision to overrule Roberts. [FN162] The concurring opinion stressed that Roberts and its progeny were not in conflict with the Clause's history and that the majority's categorical exclusion of testimonial statements was an arbitrary move that did not fully serve the framers' purposes. [FN163]
A. The Majority Opinion

1. The History of the Right of Confrontation
   The Court began by tracing the history behind the right to confrontation in England and America in order to determine the purposes behind the Confrontation Clause. First, it discussed the right of confrontation's roots in the English common law as a reaction to the problematic civil law practices that were adopted in the English courts in the sixteenth and seventeenth centuries. The majority accredited these trials with prompting reforms in the English system and the resulting requirements of witness unavailability and prior opportunity for cross-examination. Moving on, the Court discussed the controversial practices in the colonies during the pre-Revolutionary period. The discussion then shifted to the early adoption of the right of confrontation by individual states, which lead to its inclusion in the United States Constitution.

2. Two Propositions about the Confrontation Clause
   The Court used the history and the text of the Sixth Amendment to glean two propositions about its meaning. First, the Confrontation Clause's principal aim was the defeat of the civil-law procedures that had been abused by the English and early American courts. Second, the Framers would have only admitted prior testimonial statements if the witness was proven unavailable and the defendant had been afforded a prior opportunity for cross-examination.

a. The principal purpose of the Confrontation Clause
   The Court first propositioned that the principal purpose of the Confrontation Clause was to combat the use of civil law practices in American courts, particularly ex parte examinations. Then, the Court rejected the view hypothesized by Wigmore that while the Confrontation Clause governs the admission of in-court testimony, the Clause's application to out-of-court statements depends upon "the law of Evidence for the time being." The Court stressed the separation of the Confrontation Clause from the general rule against hearsay, asserting that the Clause applies to those statements that are akin to the ex parte examinations of the sixteenth century. The Court drew upon the text of the Confrontation Clause to determine that a "witness" is a person who "bear[s] testimony"; thus, the Clause is concerned with a specific kind of out-of-court statement, a testimonial statement. Then the Court went on to list the various definitions of testimonial statements that had been presented to it, such as affidavits and pretrial statements made with the expectation of prosecution and trial. It concluded that statements produced from interrogation by police officers qualify as testimonial under any formulation because present day interrogations by police are very similar to examinations conducted by justices of the peace during the sixteenth century.
b. The common law requirements: unavailability and opportunity to cross-examine

The Court's second proposition was that the right of confrontation *344 should be interpreted subject to the requirements at common law in 1791. [FN178] Therefore, the Court concluded that the Framers would not admit testimonial statements unless it was proven that the witness was unavailable to testify at trial and the defendant had been provided a prior opportunity to cross-examine the witness. [FN179] The majority stressed that prior opportunity for cross-examination is more than just sufficient to satisfy the Clause--it is a dispositive factor for a statement to be admissible. [FN180] The Court acknowledged that some exceptions to the Clause were present and established at common law. [FN181] The Court claimed, however, that there was little evidence to show that they were used in criminal trials and the majority of such exceptions did not apply to testimonial statements. [FN182] Thus, the Court determined that the Framers would not have used these exceptions in the context of prior testimony. [FN183]

The Court went on, in section IV of the opinion, to discuss the ways in which the case law supported these two propositions. [FN184] The Court explained that both the early case law and more recent decisions were consistent with the majority's propositions, showing several instances in which the Court required either a witness's unavailability or an adequate opportunity for cross-examination. [FN185] The Court placed special emphasis on the decision in Lee v. Illinois, [FN186] on which the state court relied for different reasoning, to show that Lee was not contradictory to these principals. [FN187]

*345 3. The Problems with Ohio v. Roberts

In section V of the opinion the Court criticized the Ohio v. Roberts [FN188] decision in light of the historical objectives of the Clause and the unstable results created in the state and circuit courts of appeals. [FN189] The Court discussed how Roberts was unsatisfactory in that it was too broad because it applied the "same mode of analysis whether or not the hearsay consist[ed] of ex parte testimony" and too narrow because it "admit[ted] statements that do consist of ex parte testimony upon a mere finding of reliability." [FN190] The Court acknowledged the criticisms of the Roberts approach, citing recent opinions by members of the Court and works of commentators. [FN191] Then, the Court discussed the two proposals presented by those criticizing the Roberts decision: (1) that the excessive broadness of Roberts could be eliminated if the Confrontation Clause was applied only to testimonial statements, and (2) that Roberts's extreme narrowness could be eliminated if the Clause was read categorically to exclude all testimonial statements where the defendant did not have an opportunity to cross-examine the witness. [FN192] Because the first proposition was rejected in White v.
Illinois, [FN193] and in light of the case at bar, the Court chose an analysis based upon the second proposition. [FN194]

*346 a. The failings of Roberts and its progeny

The Court began its analysis of the flaws of Roberts by discussing the conflict between the framers' intentions and the admission of testimonial statements using judge-made tests of "reliability." [FN195] While it recognized that the "ultimate goal" of the Confrontation Clause is to ensure reliable evidence, the Court suggested that the right of confrontation is a procedural rather than a substantive right. [FN196] It bolstered this idea by asserting that proof of the reliability of evidence is not demanded before admission, but rather it is ensured by the guaranteed procedure of cross-examination. [FN197] The Court argued that by employing a judge-made reliability analysis, Roberts had effectively nullified the very constitutional protection provided by the Clause--the opportunity to confront the witness and thus show the reliability or unreliability of his statement. [FN198] The majority proclaimed that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." [FN199]

The Court continued its criticism of Roberts by demonstrating the unpredictability that it had produced in the state and circuit courts. [FN200] It argued that reliability was an almost wholly subjective concept that yielded to whatever test or set of factors a particular judge deemed necessary. [FN201] Despite its unpredictability, the most damning aspect of the Roberts test was its tendency to allow admission of evidence absent an opportunity to cross-examine and thus, being completely contrary to the purpose of the Clause. [FN202] Finally, the Court expressed its dismay at the fact that some courts admitted testimonial statements absent an opportunity to cross-examine simply because of the very elements that made them testimonial, such as being taken under oath or while in police custody. [FN203] The Court declared that it is not enough that a statement is made in a testimonial setting with "most of the usual safeguards of the adversary process" when the one factor required by the Clause, the opportunity to cross-examine, is missing. [FN204]

b. Application to the case at bar

The Court continued its criticism of Roberts by showing the differing results it had produced in the procedural history of the case at bar. [FN205] The Court pointed out that each of the lower courts that heard Crawford's case employed different methods for determining whether or not the prior testimonial statement was reliable. [FN206] Further, the lower courts made inferences about the reliability of the evidence that could have been remedied by a mere opportunity to cross-examine and draw out the real truth of the matter. [FN207] Finally, the Court refused to dispose of this case easily by
applying its own reliability analysis. [FN208] Instead, it chose to take the opportunity to overrule Roberts, holding that testimonial statements are inadmissible under the Confrontation Clause of the Sixth Amendment unless the witness has been shown to be unavailable and the defendant has been afforded a prior opportunity to cross-examine the witness. [FN209] The Court declined to provide a "comprehensive definition" of a testimonial statement, but it did provide some examples that it would include in that category, "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and ... police interrogations." [FN210] Thus, in light of its holding, the Court found that the admission of Sylvia's testimonial statement in the case at bar was a violation of the defendant's Sixth Amendment right to confrontation, and it reversed and remanded the decision of the Washington Supreme Court. [FN211]

B. Chief Justice Rehnquist's Concurring Opinion

Chief Justice Rehnquist delivered a concurring opinion that criticized the majority's interpretation of the history of the right of confrontation and its application of that history to Roberts. [FN212] The Chief Justice argued that the English judiciary of the sixteenth and seventeenth centuries was not concerned with whether a statement taken from an unavailable witness was testimonial or non-testimonial. [FN213] Rather, the judges at common law were more concerned with whether a statement was taken under oath because unsworn statements were not considered to be substantive evidence and thus, the oath requirement was considered before the confrontation requirement. [FN214] He further argued that the majority's broad categorization of testimonial statements was inconsistent with history and the Court's precedent, stating that the "classification of statements as testimonial beyond that of sworn affidavits and depositions will be somewhat arbitrary, merely a proxy for what the Framers might have intended." [FN215]

The Chief Justice also did not think that the categorical exclusion of testimonial statements was supported by the history behind the Clause because the law in both America and England concerning testimonial evidence was not uniform at the time of the framing. [FN216] He argued that exceptions to the general rule of exclusion existed at the time of the development of the rules regarding out-of-court statements. [FN217] Furthermore, the Chief Justice stated that the Framers could not have intended to create a rigid rule of exclusion when the law during their time was still developing. [FN218] The Chief Justice argued in support of Ohio v. Roberts [FN219] that the exceptions to the general rule of exclusion of out-of-court statements had developed because those types of statements were believed to be just as reliable as statements made under cross-examination. [FN220] He recognized that cross-examination was a very useful truth finding tool, but asserted that sometimes its use is rendered needless by the reliability of the evidence sought to be admitted. [FN221]

Finally, the Chief Justice concluded by warning against the danger of
overturning a quarter-century of precedent and leaving the criminal law community with a new rule and no definitive way to apply it. [FN222]

V. SIGNIFICANCE

Crawford v. Washington has been called "one of those rare Supreme Court decisions that will come up on a daily basis in courts all over the country." [FN223] Crawford replaces twenty-five years of case law with a new and hopefully more stable approach to interpreting the Sixth Amendment's Confrontation Clause. The Court's refusal to give "testimonial" a comprehensive definition, however, may lead to inconsistent application of Crawford in the lower courts. The abrogation of Ohio v. Roberts [FN224] will also have an effect on the law of hearsay. This section will attempt to show the further significance of the Crawford decision through a discussion of all of these issues.

A. Replacing a Balancing Test with a Categorical Right

Commentators have called for the termination of the Ohio v. Roberts [FN225] "indicia of reliability" approach for several years. The Roberts balancing test has been criticized for its inadequate protection of the absolute constitutional right of confrontation due to its malleability in the hands of judges. [FN226] Hopefully, the Court's holding in Crawford will appease these dissenters by placing a categorical bar on all statements that are "testimonial" in nature, where the witness was not proven unavailable or the defendant was not afforded a prior opportunity for cross-examination. [FN227] By overruling Roberts, the Court shifts its approach towards the Confrontation Clause from an emphasis on the categorization of exceptions to a focus on the context in which a statement is made. This shift should serve to do away with the numerous *350 and varied reliability tests used in the lower courts and to exclude those statements that clearly violate the Confrontation Clause that would have been admissible under a Roberts reliability analysis. [FN228] Crawford should thus promote the purposes of the Confrontation Clause by testing the reliability of a declarant's statement in open court under cross-examination as was intended by the Framers--not at the front door in the absence of a jury. The strong majority, in which seven justices supported the abrogation of Roberts, foreshadows the Court's steadfast adherence to the new doctrine, and once the lower courts adjust to applying the Crawford approach, it should result in more consistent and homogenous outcomes than under the previous doctrine. [FN229]

B. The Court's Refusal to Define "Testimonial"

While the Crawford approach seems promising, it is soiled by the Court's refusal to comprehensively define "testimonial." [FN230] Given that the Crawford approach is principally concerned with whether a statement is testimonial, this void in the Court's decision makes it very difficult for
criminal trial attorneys to ascertain how to apply it. [FN231] The Court did provide a list of statements that it would deem testimonial, "prior testimony at a preliminary hearing, before a grand jury, or at a former trial ... police interrogations" and "plea allocution[s]." [FN232] The extension of this list beyond statements made under oath, however, may open the door for various different definitions of "testimonial" in the lower courts.

Beyond this specific list, the Court did give some general guidelines to determine whether a statement is testimonial. Generally, the Court indicated that testimonial statements are those with the "closest kinship to the abuses at which the Confrontation Clause was directed." [FN233] The Court also drew upon different definitions that it had been presented with by commentators and members of the Court to draw a rough sketch of "testimonial" statements as formalized statements made by a declarant in view of prosecution and trial. [FN234] Additionally, the Court's concern over statements made to government officials indicates that some of these statements, other than police interrogations, might be regarded as testimonial in the future. [FN235] With these vague descriptions in hand, the criminal justice system has an interesting road to travel before the Supreme Court provides more details on its definition of "testimonial."

C. The Effects of the Court's Decision on Hearsay Law

Critics of Roberts presented the Court with two options: (1) to limit the application of the Confrontation Clause to only testimonial statements and leave the rest to governance by hearsay law, or (2) to impose an absolute bar on the admission of testimonial statements absent an opportunity for crossexamination. [FN236] The Court chose to follow the second suggestion, indicating that the Court might not yet be ready to release other kinds of hearsay from the Confrontation Clause's grasp. [FN237] This failure to relinquish control over hearsay law calls into question what effect the Crawford decision will have upon the exceptions to the rule against hearsay and by what means they will be analyzed for admittance under the Confrontation Clause. One proposition is that non-testimonial hearsay will continue to undergo an Ohio v. Roberts [FN238] reliability analysis. [FN239] Along those same lines it may be feasible to apply requirements for admission under the Federal Rules of Evidence, especially the residual hearsay exception, which is similar to the doctrine under Roberts. [FN240] This approach seems to be consistent with the Court's objectives in Crawford: "Where non-testimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law." [FN241] The Court did assure that some hearsay exceptions will not be deemed testimonial, such as business records and statements made in furtherance of a conspiracy. [FN242] Some hearsay exceptions, however, walk the fine line between testimonial and non-testimonial statements depending upon their particular fact pattern, and their admissibility will hinge on that factor. The Court indicated this by its hesitance to address the dying
declarations and the excited utterance exceptions, both of which could very easily fall into either the testimonial or non-testimonial category. [FN243]

From these examples it seems that Crawford could have long resounding effects on criminal trial procedure. Crawford promises stability in an area of the law that has been a long time lost in a haze of uncertainty. Time and experience will tell, however, whether Crawford will live up to this promise or create more uncertainty by leaving criminal prosecutors with no viable precedent.

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[FN1]. UNITED STATES CONST. amend. VI.

[FN2]. Penny J. White, Rescuing the Confrontation Clause, 54 S.C. L. REV. 537, 539 (2003). At least some of the confusion over the Confrontation Clause has been blamed on its very murky origins. See Murl A. Larkin, The Right of Confrontation: What Next?, 1 TEX. TECH L. REV. 67, 67-68 (1969). Unlike many other constitutional provisions, the Confrontation Clause is somewhat unclear from its text and there is very little documentation to explain the framers' reasoning behind its inclusion in the Sixth Amendment. Id.

[FN3]. White, supra note 2, at 539.


[FN6]. Crawford III, 541 U.S. at 59.

[FN7]. See id. Justice Scalia delivered the majority opinion for the Court. Id at 1356. Chief Justice Rehnquist wrote a concurring opinion in which Justice O'Connor joined. Id. at 1374 (Rehnquist, C.J., concurring).

[FN8]. See infra Part IV.A.

[FN9]. 541 U.S. at 36.

[FN10]. See infra Part II.
[FN11]. See infra Part III.

[FN12]. See infra Part IV.

[FN13]. See infra Part V.


[FN15]. Id. Lee sustained severe injuries to his stomach. Id. During the altercation, Sylvia's sweater got blood on it, and Michael's hand was deeply cut, requiring twelve stitches to close the wound. Id. Michael could not recall how he received the cut, but he indicated that it might have been from a weapon that Lee was carrying. Joint Appendix at 155, Crawford III (No. 02-9410). In Sylvia's second statement to the police she indicated that Michael might have cut himself while stabbing Lee. Id. at 137.

[FN16]. Brief for Petitioner at 2, Crawford III (No. 02-9410).

[FN17]. Id.


[FN19]. Joint Appendix at 127, Crawford III (No. 02-9410).

[FN20]. See Crawford I, 2001 WL 850119, at *1. The first and second statements were taken a few hours apart, and Sylvia's were always taken before Michael's--Sylvia's at 7:03 p.m. and 10:43 p.m., and Michael's at 8:00 p.m. and approximately 12:45 a.m. Joint Appendix at 79, 98, 124, 142 Crawford III (No. 02-9410).


[FN22]. Id. According to Sylvia's second statement, the couple had been drinking, and Michael was "past tipsy." Joint Appendix at 132, Crawford III (No. 02-9410). She also reported that when Lee's name came up, Michael declared that he needed an "ass whoopin." Id. at 131.

[FN23]. Joint Appendix at 132-33, Crawford III (No. 02-9410).

[FN24]. See id. at 137.

[FN25]. See id. at 155. Michael's second statement read as follows:
Q: okay. Did you ever see anything in his hands
A: I think so, but I'm not positive
Q: okay, when you think so, what do you mean by that
A: I could a swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff ... I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut ... but I'm not positive. I, I my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later.
Joint Appendix at 155, Crawford III (No. 02-9410).

Sylvia's second statement read as follows:
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 of 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)
Joint Appendix at 137, Crawford III (No. 02-9410).

[FN26]. Joint Appendix at 1, Crawford III (No. 02-9410).


A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without consent of the other, examined as to any communication made by one to the other during marriage.
Id.

[FN28]. See Joint Appendix at 61, Crawford III (No. 02-9410). The trial court found that the statements were against Sylvia's penal interest because she
acted as an accomplice by leading Michael to the scene of the crime and aiding him in his escape. Id.


[FN31]. Id. at 66.

[FN32]. Id.

[FN33]. 527 U.S. 116, 127 (1999) (holding that the category of statements against penal interest is too broad to be considered a "firmly rooted hearsay exception").

[FN34]. Crawford III, 124 S. Ct. at 1358.

[FN35]. Joint Appendix at 60-61, Crawford III (No. 02-9410). The trial judge did seem to show some hesitance towards allowing the admission of the statement, stating:

So when I take the statement of Sylvia Crawford in the context of the statement of the Defendant Crawford, I do not find that it is unreliable and untrustworthy. It's not dissimilar to the defendant's own statement. When I take it in a vacuum, not measured against any other evidence known at the time or understood at the time, I think it's a closer call.

Id. at 61. Also, the trial judge recommended that the prosecution not admit Sylvia's statements to avoid possible error on appeal. Id. at 62. He suggested that in the alternative the state could rely on the statements made by Michael Crawford and the testimony of the alleged victim, Kenneth Lee. Id.


[FN38]. Id. at *4. The failure of any one of the nine factors was not dispositive. Id. The factors were (1) whether the declarant had an apparent motive to lie, (2) whether the declarant's general character suggests trustworthiness, (3) whether more than one person heard the statement, (4) whether the declarant made the statement spontaneously, (5) whether the timing of the statements and the relationship between the declarant and the witness suggests trustworthiness, (6) whether the statement contained express assertions of past fact, (7) whether cross-examination could help to show the declarant's lack of knowledge, (8) the possibility that the declarant's
recollection was faulty because the event was remote, and (9) whether the circumstances surrounding the statement suggest that the declarant misrepresented the defendant's involvement. Id. at *4-5.

[FN39]. Id. at *6. Sylvia's second statement failed seven out of the nine factors, and the court found that one factor was irrelevant in this situation. Id. at *4-5.

[FN40]. Id. at *7.


[FN42]. 844 P.2d 416 (Wash. 1993). In Rice, the Washington Supreme Court adopted dicta from Lee v. Illinois, 476 U.S. 530 (1986), to conclude that when the statements of codefendants are "virtually identical" they can be deemed reliable as "interlocking" confessions in place of other reliability tests. Id at 427. In Lee, the United States Supreme Court rejected Illinois's contention that the reliability of a co-defendant's statement was insured because it interlocked with that of the defendant and stated that "when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted." 476 U.S. at 545. The Court would discount this inference by the Washington Supreme Court claiming that if it had intended to announce a new exception to the Confrontation Clause it would have done so in a more clear and authoritative manner. Crawford III, 541 U.S. 36, 57-58 (2004).

[FN43]. Crawford II, 54 P.3d at 661.

[FN44]. Id. at 664.

[FN45]. Id. The court sided with the dissent from the court of appeals. Id. That dissent stated:

"Whether or not Lee was armed is certainly critical to Michael's claim of self-defense. But any dissimilarity in the Crawfords' statements regarding Lee being armed is minor. The majority confuses these two considerations and wrongly concludes that because the statements are slightly dissimilar on a critical issue, there is a critical difference between the two statements. I disagree."


[FN46]. Crawford II, 54 P.3d at 664. The United States Supreme Court later criticized this statement and pointed out that the "ambiguity of the two statements made it all the more imperative that they be tested to tease out the truth." Crawford III, 541 U.S. at 67. The Court also pointed out that the prosecutor did not seem to share in the Washington Supreme Court's opinion
that the statements were ambiguous because during his closing argument he called Sylvia's statement "damning evidence' that 'completely refutes [petitioner's] claim of self-defense." Id.


[FN48]. See Larkin, supra note 2, at 67.


[FN50]. See infra at Part III.A.

[FN51]. See infra at Part III.B.1.

[FN52]. 448 U.S. 56 (1980); see infra at Part III.B.2.

[FN53]. See infra at Part III.B.3.

[FN54]. Larkin, supra note 2, at 67,70.

[FN55]. The Star Chamber was a division of the English courts where criminal cases of misdemeanor were tried without a jury. 1 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 325, 337-38 (1883).

[FN56]. See Margaret A. Berger, The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model, 76 MINN. L. REV. 557, 577 (1992). The Glorious Revolution was an English civil war that ended with the replacement of James II with William and Mary. 2 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 77 (1998). It was the precursor to the English Bill of Rights, which was passed in 1689 and advanced individual freedoms while restricting the power of the monarch. Id. Parts of the English Bill of Rights served as a model for the fledgling state governments and America's own Bill of Rights. See id.

[FN57]. Berger, supra note 56, at 569.

[FN58]. The Privy Council is the private council of the British Crown, which derived from the King's Council of the Middle Ages. 8 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 173 (1998). The Council once wielded great administrative power, but after the civil wars in England it lost most of its power and now its function in mainly ceremonial. See id.

[FN59]. STEPHEN, supra note 55, at 325.
Id. at 326. The judges during that period did not adhere to any code of evidence as we know it today. See id. at 336. The only distinction they made between the different kinds of evidence was between eyewitness evidence and all other kinds of evidence. Id. Also the defendant had no right to counsel, no means of procuring evidence, and no right to admit evidence in a proceeding, leaving the prisoner almost completely subject to the court. Id. at 337. Additionally, the jury had almost absolute freedom to base their decision on whatever they deemed to be evidence, including their own personal knowledge. See id. at 336-37.

Id. at 326.

See id. at 333-36. The indictment charged Raleigh with conspiring with Lord Cobham to oust James I and advance Arabella Stuart to the throne. Trial of Sir Walter Raleigh, 2 How. St. Tr. 1 (1603) [hereinafter Raleigh].

Contrary to the modern view of accomplice confessions, the prosecution in Raleigh's case declared that accusations that are also self-inculpatory for the accuser are the most forcible sort of evidence. Raleigh, supra note 62, at 7. See Lee v. Illinois, 476 U.S. 530, 541 (1986) (confessions by an accomplice inculpating the principal are "presumptively suspect").

Raleigh, supra note 62, at 15-18. The court cited various reasons for rejecting Raleigh's requests. For instance, if Raleigh were allowed to confront Cobham, Cobham might be influenced to change his story by his loyalty to Raleigh and by Raleigh's persuasiveness. Id. at 17-18. Ironically, the court claimed that if the accused was allowed to confront his accusers few prosecutions for treason would ever lead to guilty verdicts. Id.

Raleigh did not go quickly to his death. He lived another fourteen years in the Tower, and in 1616 King James I decided to utilize him by sending him on an expedition to Guinea in search of gold. Id. at 32. The voyage was unsuccessful, and Raleigh lost his fortune and his son to the excursion. Id. at 34. When he returned to England he was again imprisoned and brought before the King's Bench for the enforcement of the judgment of execution against him. Id. at 33. The king considered bringing a new charge against Raleigh for breach of the peace, but decided against it because of the experience with Raleigh's wit and abilities in the first trial. Id. Raleigh was condemned to death. Id. at 34-35.

See White, supra note 2, at 543.

See Larkin, supra note 2, at 70-72.
The earliest examples come from Virginia where, in 1702, the Virginia Council complained that Governor Nicholson encouraged "sycophants" and "tattlers" and conducted ex parte examinations and tampered with the results from these examinations all while not allowing the accused the right to confront his accusers. Id. at 391. Massachusetts did not have a stable system of justice, and the colonists were not allowed knowledge of the offenses they could be charged with and the procedures the court would use against them until 1641. Id. at 392.

The French and Indian War took place from 1754-63. Id. England was in severe debt after the French and Indian War and in response enacted taxes on the colonies; Charles Townsend, acting as the first Lord of Trade called for the strict enforcement of these new laws and of the existing trade laws that had grown lax in previous years. Id.

Transporting the accused to England denied him the right to a jury drawn from the locality where the alleged crime took place, limited his right to challenge the jurors, deprived him of an ability to call witnesses for his defense, and almost insured that the testimony from the prosecution's witnesses would be given by deposition. Id. at 72.

Blackstone's Commentaries enjoyed an avid readership in the colonies and had a profound impact on the development of the early Americans' attitude towards the legal system. Larkin, supra note 2, at 72. In a significant passage Blackstone praised the examination of witnesses in open court as opposed to the old civil law practices. Id. Blackstone wrote:

"This open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of the truth, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law: where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain..."
his meaning, if misunderstood, which he can never do after a written deposition is once taken. Besides the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial.

3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373 (2d. ed. 1768).

[FN76]. One example of the discussions raised in the state conventions comes from Abraham Holmes's comments in the Massachusetts convention:

The mode of trial is altogether indetermined; whether the criminal is to be allowed the benefit of counsel; whether he is to be allowed to meet with his accuser face to face; whether he is allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told.


[FN77]. Larkin, supra note 2, at 76. States with provisions similar to the Sixth Amendment's Confrontation Clause included Delaware, Maryland, New Hampshire, North Carolina, Pennsylvania, Vermont, and Virginia. COMPLETE BILL OF RIGHTS, supra note 76, at 402-13.

[FN78]. Larkin, supra note 2, at 76.


[FN82]. Id.

[FN83]. Id. at 240-42. The court cited several state cases to prove that the admission of such evidence was the general practice across the country. Id. at 241.

[FN84]. Id. at 242. The court praised cross-examination stating:

The accused has an opportunity, not only of testing the
recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id. at 242-43.

[FN85]. See id. at 243.

[FN86]. Id.

[FN87]. See Mattox, 156 U.S. at 243-44. The Court drew upon the example of dying declarations, in which the defendant is rarely afforded the opportunity to come face-to-face with a dying declarant. Id. The Court stated that dying declarations are admissible because "the sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath." Id. at 244.

[FN88]. White, supra note 2, at 558-59.


[FN91]. Id. at 403. Pointer was a test case indicative of the Confrontation Clause violations occurring in the states. Id. at 401-02. In Pointer a robbery victim testified at a preliminary hearing that Pointer was one of his assailants. Id. at 401. Before trial, however, the witness moved out of state, and the prosecution declared him unavailable for trial. Id. The prosecution was allowed to admit the transcript from the preliminary hearing even though the defendant had not been represented by counsel and had not attempted to cross-examine the witness at the preliminary hearing. Id.

[FN92]. Friedman, supra note 47, at 1014.

[FN93]. Id.

[FN94]. Id.

[FN95]. Berger, supra note 56, at 592.

[FN96]. See 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW <section> 1397, at 128-31 (3d. ed. 1940).

Wigmore inferred that the terms confrontation and cross-examination could be used almost interchangeably. See id. at 128-29.
[FN97]. Id. at 130. Wigmore thought that the Framers intended the Clause to be subject to exceptions, but that they did not wish to enumerate them. Id. at 131.


[FN99]. Id. at 720.

[FN100]. Id.

[FN101]. Id. Counsel for one of the other co-defendants did cross-examine Woods. Id.

[FN102]. Id. The prison was in Texarkana, Texas approximately 225 miles from the Oklahoma court. Id.

[FN103]. Id. at 720.

[FN104]. Barber, 390 U.S. at 723-24. The Court claimed that the old idea that once a witness left a state he was rendered impossible to produce had grown obsolete because of the rising cooperation between the states and within the prison systems. Id.

[FN105]. Id. at 724-25.

[FN106]. Id. at 725. The Court asserted that Barber's failure to cross-examine Woods at the preliminary hearing could hardly qualify as a waiver because he could not have known that Woods would be incarcerated or that the State would neglect to produce him at trial. Id.

[FN107]. Id.

[FN108]. Id.

[FN109]. Id. at 725-26.


[FN111]. Id.

[FN112]. Id. at 151.

[FN113]. Id. at 151-52. The boy claimed to have taken "acid" twenty minutes prior to Green's phone call about the marijuana. Id. at 152.
[FN114]. Id. at 152.

[FN115]. Id. at 152. On cross-examination he testified that his memory had been "refreshed" as to the preliminary hearing, not as to the actual incident. Id.

[FN116]. Green, 399 U.S. at 153.

[FN117]. Id. at 158.

[FN118]. Id.

[FN119]. Id.

[FN120]. Id. at 158-60. The majority based this conclusion partially upon the Mattox decision, claiming that it was not against the Confrontation Clause to admit out-of-court statements of a witness who was available to testify at trial. Id. at 157-58. The court did not, however, distinguish that the witness in Mattox was available and cross-examined at the first trial rather than at a preliminary hearing. Mattox v. United States, 156 U.S. 237, 240 (1895).

[FN121]. Id. at 161.

[FN122]. Green, 399 U.S. at 165.

[FN123]. Id.

[FN124]. Id. at 166. In his dissent, Brennan criticized the majority's treatment of Barber stating that "it ignores reality to assume that the purposes of the Confrontation Clause are met during the preliminary hearing." Id. at 199 (Brennan, J., dissenting).


[FN126]. Id. Dutton was actually argued before Green, but it was scheduled for reargument and was decided in the term following the Green decision. Id. at 76-77.

[FN127]. Id. at 76.

[FN128]. Id. at 77.

[FN129]. Id. at 77-78. Shaw testified that when Williams arrived back to his cell after his arraignment he stated, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." Id. at 77. Truett, however, was the principal witness for the prosecution, and both he and Shaw
were fully cross-examined by defense counsel. Id. at 77-78.

[FN130]. Id. at 78.

[FN131]. Dutton, 400 U.S. at 77-78.

[FN132]. Id. at 87.

[FN133]. Id. at 87-88.

[FN134]. Id. at 88. The Court recognized that the possibility of a constitutional violation arose because Shaw's statement encouraged the jury to conclude that Williams had implicitly identified Evans as the one who murdered the victims. Id. The Court, however, proceeded to list the ways in which Evans's confrontation right was not denied by showing the reliability of Williams's statement. Id. at 88-89.

[FN135]. Id. at 89. The circumstances bearing "indicia of reliability" were that Williams made the statement against his penal interest and that it was a spontaneous utterance. Id. The Court went on to remark that "the possibility that cross-examination of Williams could conceivably have shown the jury that the statement, though made, might have been unreliable was wholly unreal." Id. In his concurring opinion, Justice Blackmun stated that the admission of Shaw's statement was "harmless error if it was error at all." Id. at 90 (Blackmun, J., concurring). Justice Marshall, however, dissented, stating that Shaw's statement put Evans's case in very real danger and that this was the very kind of situation in which cross-examination was needed to sift out the truth. See id. at 103-04 (Marshall, J., dissenting). Marshall was also wary of the Court's use of "indicia of reliability" to admit the statement, claiming that this approach would undermine the Confrontation Clause's purpose if any statement could be admitted on a showing of reliability. Id. at 109-10 (Marshall, J., dissenting).


[FN137]. Id.

[FN138]. Id. at 58.

[FN139]. Id. Anita did testify that she had allowed the defendant to live in her apartment while she had been away for several days. Id.

[FN140]. Id.

[FN141]. Id. at 59. Five subpoenas had been issued to Anita at her parent's home over a period of five months. Id. The defense objected to the state's
assertion that Anita was unavailable, and a voir dire hearing was held in which her mother, Amy, testified that her family had been unable to locate Anita after the preliminary hearing. Id. at 59-60.

[FN142]. Roberts, 448 U.S. at 62, 74.

[FN143]. See id. at 62-73. In part IV of the opinion the court quickly dismissed the defendant's argument that the prosecution had not made a good faith showing of the witness's unavailability. See id. at 74-77. The Court contrasted Barber in which the prosecution knew the exact location of the witness and made no effort to procure him with this case in which the prosecution and the witness's family had no idea as to her whereabouts. Id.

[FN144]. Id. at 63.

[FN145]. Id. at 64.

[FN146]. Id. at 65.

[FN147]. Id. at 65. Six years later in United States v. Inadi, the Court held that the unavailability requirement was not necessary for the admission of co-conspirator statements. See 475 U.S. 387, 396 (1986). Due to the nature of these statements, cross-examination of co-conspirators would lend little to the finding out of the truth. Id. The Court decided that the burden of proving unavailability in such cases would outweigh the benefit that could be reaped from producing the declarant at trial. See id. at 398-400. A year later in Bourjaily v. United States, the Court held that the "indicia of reliability" requirement did not apply in the case of co-conspirator's statements. 483 U.S. 171, 182 (1987).

[FN148]. Roberts, 448 U.S. at 65-66. The Court bolstered the "firmly rooted hearsay exception" prong of the test by referring to the dying declarations example set forth in Mattox to show that some hearsay exceptions are based on such firm foundations of reliability and trustworthiness that they will always comport with the Confrontation Clause. Id. at 66 (citing Mattox v. United States, 156 U.S. 237, 244 (1895)).

[FN149]. Roberts, 448 U.S. at 69. In Idaho v. Wright, the Court gave a rough guideline of how to determine whether a statement bore "particularized guarantees of trustworthiness" 497 U.S. 805 (1990). The Court held that a court must look to the "totality of the circumstances that surround the making of the statement" to determine whether the "particularized guarantees of trustworthiness" had been met. Id. at 820. The Court rejected the argument that a statement was reliable if there was other evidence corroborating it. Id. at 822. The Court stated that this would risk the "admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of
other evidence at trial," a result that they found to be contrary to the purposes of the Confrontation Clause. Id. at 823.


[FN151]. Id. at 69-70.

[FN152]. Id. at 70-71.

[FN153]. 541 U.S. 36 (2004). For examples of the instability caused in the state and circuit courts see infra Part IV.A.3.a. at n.207. For discussion of the criticism that Roberts received see infra Part IV.A.3. at n.197.


[FN155]. Id. at 1374.

[FN156]. Id. at 1356, 1359-63.

[FN157]. Id. at 1363-67.


[FN159]. Crawford III, 124 S. Ct. at 1369-72.

[FN160]. See id. at 1374.

[FN161]. Id. at 1374-78 (Rehnquist, C.J., concurring).

[FN162]. Id. at 1374 (Rehnquist, C.J., concurring).

[FN163]. Id. at 1374-78 (Rehnquist, C.J., concurring).

[FN164]. Id. at 1359-63.

[FN165]. Crawford III, 124 S. Ct. at 1359-60. The majority discussed the Raleigh case and the criminal procedure statutes from that period. Id. at 1360.

[FN166]. Id. at 1360-61.

[FN167]. Id. at 1362.

[FN168]. Id. at 1362-63.

[FN169]. Id. at 1363.
[FN170]. Id.

[FN171]. Crawford III, 541 U.S. at 52.

[FN172]. Id. at 50.

[FN173]. Id. at 51 (quoting 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW <section>1397, at 101 (2d ed. 1923)).

[FN174]. Id. (quoting 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). In his concurring opinion, Chief Justice Rehnquist limited his definition of witness to include only sworn "testimonial" statements. See id. at 70 (Rehnquist, C.J., concurring). The Chief Justice stressed that the true concern of the judiciary at common law was whether the statement sought to be admitted was made under oath, not whether it was testimonial or non-testimonial. See id. Further, the Chief Justice claimed that the majority's broad categorization that includes unsworn statements was not what the Framers intended. Id. But, Justice Scalia retorted to this claim by asserting that it is "implausible that a provision which concededly condemned trial by sworn ex parte affidavit thought trial by unsworn ex parte affidavit perfectly OK." Id. at 52 n.3.

[FN176]. Id. at 1364. See Brief for Petitioner at 23, Crawford III, (No. 02-9410) (stating that "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"); Brief of Amici Curiae, National Association of Criminal Defense Lawyers et al., at 3, Crawford III (No. 02-9410) (stating that "out-of-court 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"); White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment) (stating that "extra-judicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions").

[FN177]. Crawford III, 541 U.S. at 52.

[FN178]. Id. at 54.
[FN179]. Id.

[FN180]. Id. at 55-56.

[FN181]. Id. at 56.

[FN182]. Id.

[FN183]. Crawford III, 541 U.S. at 55. At footnote six of the opinion, the Court did recognize the longstanding use of the dying declarations exception in criminal hearsay law—even dying declarations that were testimonial in nature—but declined to address whether the exception was incorporated into the Sixth Amendment; rather, it let the exception stand on historical grounds as being "sui generis." Id. at 1367 n.6.

[FN184]. Id. at 1367-69. The Court did admit that White v. Illinois, 502 U.S. 346 (1992), was contradictory to the requirement for prior opportunity to cross-examine, but declined to address that case because the only question argued in White was necessity of the unavailability requirement in respect to the spontaneous declarations hearsay exception. Id. at 1368 n.8. In White the Court affirmed the admission of the statements of a child victim of sexual abuse to a police officer and medical personnel under the hearsay exceptions of spontaneous utterances and statements made in the course of securing medical treatment. 502 U.S. at 350-51. The Court relied on its opinion in United States v. Inadi, 475 U.S. 387 (1986), to conclude that the unavailability prong of the Roberts analysis applied only to statements made in a prior judicial proceeding. Id. at 354. Relying further on Inadi, the Court held that the unavailability requirement did not apply to the hearsay exceptions in White, which addressed statements with a certain inherent reliability that could not be reproduced at trial. See id. at 354-56.

[FN185]. Crawford III. 541 U.S. at 56-57.

[FN186]. 476 U.S. 530 (1986). For discussion of the Washington Supreme Court's use of Lee, see supra Part.II.B.3. at note 42.


[FN189]. Crawford III, 541 U.S. at 60-68.

[FN190]. Id. at 60. The Court's reasoning on the overbreadth and excessive narrowness of the Roberts approach follows Justice Breyer's concurring opinion in Lilly v. Virginia, 527 U.S. 116, 141-43 (1999). See id.
[FN191]. Id. at 61. The Court cited Justice Breyer's concurring opinion in Lilly, which criticized the Roberts analysis for being both too broad and too narrow. Id. Justice Breyer also urged the Court to reevaluate the connection between the Sixth Amendment and the rule against hearsay. Id. The Court also referred to Justice Thomas's concurring opinion in White v. Illinois, 502 U.S. 346, 365 (1999), which argued for a narrow reading of the clause that would apply to both infra judicial and extra judicial statements made in a formal testimonial setting. Id. The Court also cited the works of commentators such as, AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES, 125-31 (1997), which argue that a distinction should be made between the confrontation clause and the rule against hearsay and that the term witness should be read to refer to the maker of any statement prepared for the purposes of trial. Id. The Court also cited Richard D. Friedman, Confrontation: The Search for Basic Principles, 86 GEO. L.J. 1011, 1031 (1998) , which argues that the right to confrontation should apply to testimonial statements. Id.

[FN192]. Id.

[FN193]. 502 U.S. 346 (1992). In that case the United States, as amicus curiae, argued that the Confrontation Clause was only concerned with the admission of evidence that was similar to the dreaded ex parte affidavits of the sixteenth and seventeenth centuries. Id. at 352. The United States further argued that declarants who made out-of-court statements in a context different from this were not "witness[es] against" the accused and thus, other such statements would be governed by the rules of hearsay. Id. The Court rejected this argument claiming that "[s]uch a narrow reading of the Confrontation Clause, which would virtually eliminate its role in restricting the admission of hearsay testimony, is foreclosed by our prior cases," and it stated that the United States's argument "comes too late in the day to warrant reexamination of this approach." Id. at 352-53.


[FN195]. Id.

[FN196]. Id.

[FN197]. Id.

[FN198]. Id. at 62. The Court asserted that the reason the method used at Raleigh's trial was unjust was not because the judges had made a faulty evaluation of the reliability of Lord Cobham's confession, but because Raleigh had not been allowed the opportunity to confront Cobham and show the degree of reliability in his testimony. Id.
[FN199]. Id. at 62-63.

[FN200]. Crawford III, 541 U.S. at 63.

[FN201]. Id. The Court listed several examples of the differing results in the lower courts, especially those in which different courts read the same significance into opposite fact patterns. Id. Compare People v. Farrell, 34 P.3d 401, 407 (Colo. 2001) (holding statement more reliable because the inculpation of the defendant was "detailed") with United States v. Photogrammetric Data Servs., Inc., 259 F.3d 229, 245 (4th Cir. 2001) (holding that a statement was more reliable because the implication of the defendant was "fleeting"). Compare Nowlin v. Commonwealth, 579 S.E.2d 367, 371-72 (Va. Ct. App. 2003) (finding a statement is more reliable because the witness made it while in police custody) with State v. Bintz, 650 N.W.2d 913, 918 (Wis. Ct. App. 2003) (finding the statement more reliable because it was made while the witness was not in custody).

[FN202]. Crawford III, 541 U.S. at 63. The Court discussed the plurality's statement in Lilly that the accomplice statements implicating the accused would probably not pass the Roberts test, and the resulting admission of such statements by several lower courts. Id.

[FN203]. Id. at 64-65.

[FN204]. Id.

[FN205]. Id. at 66.

[FN206]. Id.

[FN207]. Id. at 66-67. The Court discussed the weight that the Washington Supreme Court placed upon the interlocking nature of the defendant and his wife's statements. Id. at 1373. The Washington Court thought that the statements were interlocking because they were both ambiguous on the point of whether the victim had a weapon, but the Court found that this ambiguity was the very thing that called for cross-examination. Id.


[FN209]. Id. at 68.

[FN210]. Id. The Court also implied that guilty plea allocutions were testimonial in Part V.B. of the opinion. Id. at 65.

[FN211]. Id. at 66-67.
[FN212]. Id. at 68-75 (Rehnquist, C.J., concurring).

[FN213]. Id. at 68 (Rehnquist, C.J., concurring).


[FN215]. Id. at 70-73 (Rehnquist, C.J., concurring).

[FN216]. See id. 73 (Rehnquist, C.J., concurring). Justice Scalia replied to this assertion by discrediting the English sources that the Chief Justice cited, and he stressed that even if the English rule was uncertain, the early state cases in America support the conclusion that the common law right of confrontation was included in the Sixth Amendment's Confrontation Clause. Id. at 54 n.5.

[FN217]. Id. at 73 (Rehnquist, C.J., concurring).

[FN218]. Id.


[FN221]. Id. at 75 (Rehnquist, C.J., concurring).

[FN222]. Id. (Rehnquist, C.J., concurring).

[FN223]. Erwin Chemerinsky, Court Bars Out-of-Court 'Testimonial' Statements, 40 TRIAL 82 (July 2004).


[FN225]. Id.

[FN226]. See Friedman, supra note 47, at 1031 (advocating a categorical rule that affords the defendant the right to confront witnesses who make testimonial statements against the defendant).


[FN228]. See id. at 62.

the statements of a dead witness were not admissible because the defendants did not have an opportunity for cross-examination); see also People v. Fry, 92 P.3d 970, 978-79 (Colo. 2004) (holding that because preliminary hearings in Colorado do not provide the defendant an adequate opportunity for cross-examination and the admission of preliminary hearing testimony is banned by the Sixth Amendment).

[FN230]. For the Court's refusal to formulate a definition see Crawford III, 541 U.S. at 68.

[FN231]. See id. at 75 (Rehnquist, C.J., concurring).

[FN232]. Id. at 64, 68. This compilation raises questions itself because some of the statements it encompasses and that have been used by criminal prosecutors in the past will most likely fail under a Crawford analysis. Testimony from a prior trial seems quite safe, assuming that the defendant had a prior opportunity for cross-examination. Grand jury testimony, however, although it is made for the purposes of finding out the truth, may fail under Crawford because grand jury proceedings do not provide for cross-examination of witnesses. See FED. R. CRIM. P. 6(d). Statements made during police interrogations again will probably fail under Crawford because they would rarely if ever provide for confrontation of the witness. Guilty plea allocations were once admissible under the Federal Rules of Evidence 804 (b)(3) statements against penal interest exception if they bore "particularized guarantees of trustworthiness." See, e.g., United States v. Moskowitz, 215 F.3d 265, 269 (2d Cir. 2000). Now these statements may be inadmissible unless the declarant is called as witness during trial. See, e.g., United States v. McClain, 377 F.3d 219, 222 (2d Cir. 2004) (holding that admission of plea allocations absent an opportunity for cross-examination violated the Confrontation Clause under a Crawford analysis). Preliminary hearing testimony raises the issue presented in Barber v. Page, 390 U.S. 719 (1968), of whether cross-examination at a preliminary hearing is sufficient considering the difference in dynamics between a preliminary hearing and trial. See id. at 725-26. For a discussion of Barber see supra Part. III.B.2.a. The Colorado Supreme Court recently determined that preliminary hearing testimony was insufficient for these reasons. See Fry, 42 P.3d at 977-79.

[FN233]. Crawford III, 541 U.S. at 68. This would seem to include such things as sworn affidavits and depositions to the list of potential testimonial statements.

[FN234]. See id. at 51. The classification of "testimonial" statements as being made with the expectation of prosecution raises interesting questions, such as how far this idea will be carried in regards to statements made to police officers. Will a statement made by a passer-by to a police officer that "X just committed the murder of Y" be regarded as a statement made in view of
prosecution, and thus testimonial?

[FN235]. See id. at 66.

[FN236]. Id. at 61.

[FN237]. See id. The Court based this decision on the rejection of the first proposition in White v. Illinois, 502 U.S. 346 (1992). The Court did recognize, however, that Crawford would cast doubt on the White holding, but declined to address that point. Id.


[FN240]. See FED. R. EVID. 807.

[FN241]. Crawford III, 541 U.S. at 68.

[FN242]. See id. at 56.

[FN243]. For the Court's discussion of dying declarations see id. at 56 n.6. For the Court's discussion of testimonial spontaneous utterances see id. at 58 n.8.

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I. Introduction

Crawford v. Washington n1 has adopted a testimonial approach to the Confrontation Clause of the Sixth Amendment. Under this approach, a statement that is deemed to be testimonial in nature may not be introduced at trial against an accused unless he has had an opportunity to cross-examine the person who made the statement and that person is unavailable to testify at trial. If a statement is not deemed to be testimonial, then the Confrontation Clause...
poses little if any obstacle to its admission. A great deal therefore now rides on the meaning of the word "testimonial." [*242]

Those of us who previously advocated the testimonial approach thus find ourselves in a position somewhat like that of an opposition politician who suddenly wins election and has to deal with the realities of government. It is relatively easy to carp from the outside about what is wrong with the old regime, to present an alternative approach in general terms, and to offer a few illustrations of how that approach may work in real situations. Actually resolving the daily flood of issues as they arise may be considerably more difficult. Before Crawford, the prevailing doctrine was the unsatisfactory rule of Ohio v. Roberts, under which the key question for confrontation purposes was whether the statement should be deemed sufficiently reliable to warrant admissibility. In that context, it was possible to advocate a wholesale doctrinal transformation and adoption of a testimonial approach without going into too much detail as to what "testimonial" means. But now that Crawford has adopted the testimonial approach, actual cases must be decided under it, and many of them. Pretty quickly, we are going to have to get to a much fuller understanding of the meaning of "testimonial." [*243]

Of course, the analogy cannot be pushed too far. Crawford, unlike many elections, did not put anybody in power who was not already. Academics, commenting from the sidelines, have neither the opportunity nor the responsibility to decide cases. But I believe the transformation achieved by Crawford was correct, and I want it to succeed. I am therefore happy to take this opportunity to reflect at some length on the question of what statements should be deemed testimonial for Confrontation Clause purposes. I cannot offer in this article a resolution for every possible situation posing an issue of whether a statement should be deemed testimonial. Rather, I hope to present a broad conceptual approach to the meaning of "testimonial" and an overview of how several critical issues in construing the term should be resolved. [*244]

Many of my arguments stem from one central insight, which can be summarized this way: Many courts and commentators have attempted to define testimonial by starting at a core of statements that includes trial testimony and then working outwards. But this is a bad approach because the whole point of the confrontation right is to bring testimony to trial, or some other formal proceeding.

Parts II and III of this article develop this thought. In Part II, I contend that the purpose of the Confrontation Clause is to assure that prosecution testimony be given under prescribed conditions, most notably that it be in the presence of the accused and subject to cross-examination. Part III examines the tendency of some courts, in determining whether a statement is testimonial for purposes of the Clause, to ask whether the statement bears a set of characteristics resembling trial testimony. Rather, I argue, the courts should ask whether the statement fulfills the function of prosecution testimony. That function, in rough terms, is the transmittal of information for use in prosecution.

Parts IV through VI address the question of the perspective that should be used in determining whether a statement is testimonial. Part IV argues that the critical question is not the purpose for which the statement was given or taken. Rather, the basic question is one of reasonable anticipation at the time the statement was made - whether at that time it appeared reasonably probable that the statement would be used in prosecuting or investigating crime. As discussed in Part V, it is a matter of secondary, though still substantial, importance whether the test is objective or subjective - that is, whether it depends on the actual expectation of the given actor or on the expectation of a reasonable person in the position of that actor. Part VI argues that whether a statement is testimonial must be determined from the perspective of the person who made it - the witness.

Parts VII, VIII, and IX examine several considerations that may support the conclusion that a statement is testimonial, but the absence of any one or more of which does not mean that a statement is not testimonial. Thus, a statement can be testimonial even if it is (a) not made to a government agent; (b) made at the initiative of the witness, rather than in response to interrogation; or (c) made in an informal setting. Part X argues that a statement may be testimonial even if it is made in great excitement shortly after the event in question. Lastly, I discuss the difficult problem of child declarants in Part XI. Some very young children should perhaps be considered too
undeveloped to be capable of being witnesses. In the case of children who are capable of being witnesses, how to determine whether the given statement is testimonial may often depend on whether a subjective or objective approach is used.

At the outset, it may be useful to comment on the intellectual orientation of this article. My aim is to develop a conception of the Confrontation Clause that is theoretically sound, that can be implemented practically, and that leads to sensible results that are defensible and, at least for the most part, intuitively appealing. I try to get to that point from both ends, theoretical and practical. To some extent I support particular doctrinal approaches by arguing that as a matter of principle they are superior, and to some extent I do so by showing how they lead to satisfactory results. Both aspects, I believe, are essential. An argument from principle alone might be radically indeterminate and could prove to be most unsatisfactory when set in the crucible of actual cases. n6 An argument based only on results would lack any connecting thesis and so would hardly have any predictive or persuasive power.

II. The Conditions of Testimony

If a system of adjudication is to depend in large part on the testimony of witnesses - which any rational system ultimately does - then almost by definition it must determine the conditions under which testimony may be given. That is, an adjudicative system would hardly warrant that designation if it provided:

Anybody who wishes to testify against a criminal defendant may do so however she wishes. She may, for example, do so in open court, but if she does not wish to testify in that way she may make a statement to the police, or submit a written statement or a videotape directly to the court, or she may make a statement to a friend with the understanding that the friend will relay it to court.

One can imagine, because it has happened, different rules for giving testimony. For example, many systems, but ["245] not all, have insisted that testimony be given under oath. n7 A system might provide, as the later Athenians did, that testimony be written and placed into a sealed container, thus allowing the parties to know before trial what the body of evidence would be. n8 Or it might provide, as many Continental courts have done, that testimony must be recorded out of the presence of the parties, to prevent intimidation. n9 The English took another course, one that the Hebrews, n10 the earlier Athenians, n11 and the Romans n12 had followed: They insisted that witnesses give their testimony "face to face" with the adverse party. This practice was not universally followed, especially in politically charged cases, but by the middle of the seventeenth century it was firmly established even in that context. By then it was also clear that the defendant could question the witness. And even before then, and for long after, English commentators proudly proclaimed this method of giving testimony as one of the chief superiorities of the English system of criminal justice over its Continental counterparts. n13 The practice took on even greater significance in America, where the importance of defense counsel and cross-examination became established sooner. Shortly after declaring independence, the American states made the practice a right protected by their constitutions, and in 1791, in the Sixth Amendment, so did the United States. n14 ["246]

Several points from this brief historical review bear emphasis. First, the inquiry under the Confrontation Clause is not best conceived in the terms that some writers (including myself) have used, as a determination of what hearsay - some, but less than all - should be excluded as a matter of constitutional law. The right articulated by the Confrontation Clause predated the development of the hearsay rule, and it has existed in adjudicative systems that do not have a rule resembling our rule against hearsay. The confrontation right is really a fundamental rule of procedure, providing that if a person acts as a witness against an accused then the accused has a right to confront her. To act as a witness means to testify, or to make a testimonial statement; although the English words "witness" and "testimony" do not resemble each other, their counterparts in many other languages come from the same root and show the near identity between the two. n15 Thus, to make the question of whether a statement is testimonial, the key criterion in applying the Confrontation Clause is not merely a matter of choosing a convenient term that will help distinguish between categories of hearsay. If a statement is testimonial, then the maker has acted as a witness, and so the statement is within the purview of the
Confrontation Clause. If the statement is not testimonial, there may nevertheless be good reasons to exclude it - the lack of an opportunity to cross-examine the declarant may be a significant factor weighing in favor of exclusion - but the statement is simply not within the scope of the Confrontation Clause.

Second, the Confrontation Clause is a guarantee rather than merely a prohibition. Crawford said 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." n16 That is correct in the sense that the civil-law method was the one most salient to the Framers: It had been used in some English and American courts and the Framers and their forebears found it highly objectionable. But certainly the Confrontation Clause did not mean to provide that any method of giving testimony would be acceptable, so long as it did not resemble the civil-law method. It did not mean, for example, to endorse the later Athenian method of putting testimony in written form in a pot that was kept sealed until trial; nor did it mean to allow a witness to use a trusted confidante as a conduit for passing her testimony on to court. Had the Confrontation Clause been meant only to prohibit a given form of procedure, it could have been written to do so; there are many such clauses in the Constitution, n17 including in the Bill of Rights. n18 But the Confrontation Clause is an affirmative guarantee; it ensures that "the accused shall enjoy the right . . . to be confronted with the witnesses against him." n19 If a given procedure for presenting the testimony of a witness does not provide that right, it violates the Clause, no matter how dissimilar that procedure may be to the civil-law method. Thus, courts that, like State v. Davis, n20 treat a statement as per se non-testimonial if it "cannot accurately be described as an ex parte examination or its functional equivalent" n21 apply too narrow a conception of what statements are testimonial.

Third, the view presented here means that the conundrum that plagues originalist views of the Constitution in other contexts - trying to determine what rule the Framers prescribed for a situation that they could not anticipate - really is not a problem with respect to the Confrontation Clause. No matter how unfamiliar a given type of hearsay may have been to the Framers, the originalist question posed by the Clause is a simple one: Would admitting this statement against the accused amount to allowing a witness to testify against him without being subjected to confrontation? I do not mean to advocate originalism as a dominant principle of constitutional interpretation, but only to say that in this particular context it works quite well. The passage of more than two centuries has not substantially altered our insistence that prosecution witnesses give testimony by one prescribed method - under oath, face-to-face with the accused, and subject to cross-examination. n22

III. A Functional Rather Than Descriptive Approach

Part II has shown that there are many ways in which prosecution testimony could be given, but that the Confrontation Clause insists on one - face-to-face with the accused and subject to cross-examination. It therefore makes no sense to determine whether a statement is testimonial by asking whether the statement shares key characteristics with trial testimony. The very point of the Clause is to ensure that testimony will be given at trial, or at some other proceeding that maintains the essential attributes of trial testimony. To say that a statement is beyond the reach of the Confrontation Clause because the circumstances in which it was given do not resemble a trial therefore turns logic on its head. It means that the more that a statement fails to satisfy the conditions for testimony prescribed by the Confrontation Clause, the less likely the Clause will address the problem.

Thus, a characteristic-based approach to the question of what is testimonial - that is, one that depends on whether the statement has similar characteristics to trial testimony - lacks logic and historical foundation. A critical practical factor also weighs decisively against it. If certain characteristics are deemed crucial for treating a statement as testimonial, then repeat players involved in the creation or receipt of prosecution evidence will have a strong incentive, and often ready means, to escape that treatment, simply by avoiding those characteristics. We have seen this already. Some courts have indicated that even if a statement made knowingly to the police accuses a person of a crime, it is not testimonial unless it is the product of a formal interrogation conducted after the police have determined that a crime has been committed. n23 Some courts have held that, so long as the police can be deemed to have been assessing and securing the scene, even a statement making an express criminal accusation is not testimonial. n24 As a result, we have seen police advised to try to secure accusatory statements before beginning what would necessarily be deemed a
formal interrogation. n25

These difficulties are all solved if, instead of relying on a pre-determined checklist of characteristics, the determination of whether a statement is testimonial depends on whether it performs the function of testimony. That approach allows the Confrontation Clause to perform its historically-supported function, assuring that however testimony has been given it will be proscribed unless it satisfies the demands of the Clause. And it deprives repeat players of the ability or incentive to manipulate because they cannot change the status of a statement under the Clause by shaping the circumstances in which the statement is given unless they defeat their own purposes by depriving the statement of testimonial value.

This approach does, of course, require the articulation of what the testimonial function is, and then implementation of that standard. I will concentrate here on the first step. A useful articulation, I believe, is that a statement is testimonial if it transmits information for use in litigation. In the context of importance to the Confrontation Clause, this usually means that the statement transmits information for use in a criminal prosecution. n26 (I am using "for" as a shorthand; as explained [*250] below, I do not believe the statement needs to have been made for the purpose of aiding a criminal prosecution to be deemed testimonial.) n27

Note that "use in a . . . prosecution" is a somewhat looser wording than, say, "use as evidence at trial" (which resembles a wording I have used on at least one occasion n28). Two reasons justify this choice. First, I think it is better as a matter of principle. A great deal of criminal procedure occurs before trial - the vast majority of cases never go to trial - and evidence provided to the authorities can be useful to them and help them secure a conviction long before trial. The trial is when the confrontation right can most often be invoked - in fact, this is a great deal of what makes a trial, given that the confrontation most often occurs in the presence of the fact-finder - but the information may have performed its inculpatory function well beforehand. Indeed, it seems the confrontation right should be independent of a right to trial. Even if there were no proceeding recognizable as a trial - even if all testimony were recorded and delivered piecemeal behind [*251] closed doors to a fact-finder - the accused should have a right to confront the witnesses.

Second, this approach has the practical advantage of helping us avoid a bothersome Catch-22. Suppose the governing doctrine makes admissibility at trial the critical factor determining whether a statement is testimonial. Suppose also that the jurisdiction assiduously protects the confrontation right. This means that it will exclude testimonial statements (unless the accused has had an opportunity to cross-examine and the declarant is unavailable). But then a statement that otherwise would be testimonial will not be under the hypothetically governing law - for the very reason that it is inadmissible at trial and so cannot be testimonial under that law. But then if it is not testimonial it presumably could be admitted . . . and so on. One could construct a complicated contingent question to try to avoid this infinite regress. It is far simpler, though, to avoid the whole problem simply by speaking in terms of use of the information in prosecution generally rather than specifically at trial.

IV. Anticipated Use

I have contended that, in rough terms, testimony is the transmittal of information for use in prosecution. Necessarily, then, the determination of whether a statement is testimonial examines the situation as of the time the statement is made. A standard that labeled a statement as testimonial because it was actually used in prosecution would make no sense; it would mean that any out-of-court statement offered by the prosecution at trial to prove the truth of what it asserts - that is, any hearsay - is testimonial.

To determine whether a statement is testimonial, therefore, we must figuratively stand at the time of the statement and look forward in time towards the prosecutorial process. Now, let us assume for the sake of argument a point that I will try to demonstrate in Part VI, that in doing so we should take the perspective of the declarant, the purported witness. And for the moment I will assume also that in taking that perspective it is the actual state of mind of the witness - rather than the state of mind of an hypothesized reasonable person - that matters. The question I will address here is what state of mind is necessary for the statement to be deemed testimonial. [*252]
It may be tempting to conclude, as some courts have done, that the statement is testimonial only if it was made for the purpose of transmitting information to be used in prosecution. But of course people often make statements for multiple purposes, and so this test would immediately raise the question of how important that purpose must be for the statement to be deemed testimonial: The dominant purpose? A purpose? Something in between, such as a decisive, but-for purpose, absent which the statement would not have been made? I think none of these should be the test. Instead, the question is whether the declarant understood that there was a significant probability that the statement would be used in prosecution. In other words, the test is one of anticipation; one might speak of it as an intent test, but only in the soft sense that a person is deemed to have intended the natural consequences of her actions.

I believe this anticipation test is preferable to a purpose test for several reasons. First, as a matter of principle, it better describes the testimonial function. Suppose, to put aside for the moment several other issues, a witness gives a statement to the police describing the commission of a crime in circumstances like those of Crawford. If the statement is made in the station house in response to formal and structured questioning by the police, it is undeniably testimonial. The reason, I believe, is that the witness must have understood (as did the police) that the statement was transmitting information for use in prosecution. This conclusion would remain the same even if we found out that the witness only gave the statement under pressure, because she thought doing so would help her own status with the authorities; or that, feeling personal sympathy with the defendant, she hoped even while making the statement that it would never be used; or that she made the statement primarily for the purpose of personal catharsis, or expiation, or to secure her immediate personal safety. In each case, this other purpose would have been sufficient to explain her conduct even if use of the statement in prosecution were not a possibility. In short, understanding of the probable evidentiary use, rather than desire for that use, is what makes the statement testimonial.

Second, as a practical matter, the inquiry into anticipation is much easier than an inquiry into motivation. Anticipation depends on, and can be proven by, external circumstances; motivation demands a more searching psychological inquiry.

Third, a test framed in terms of anticipation can be applied on an objective basis. In Section V, immediately following, I will assess the relative merits of a subjective test, which looks to the actual state of mind of the actor, and an objective test, which looks to the state of mind of an hypothesized reasonable person in that actor's position. Both types of test have their merits, but I think it is clear that most courts prefer an objective test. If the test is one of anticipation, it can be applied objectively (What would a reasonable person in that position have anticipated?) as well as subjectively (What did this declarant anticipate?). But if the test is one of motive, it would be hard to apply it coherently except subjectively, on the basis of the witness's actual motivations. To answer the question of what would have motivated a reasonable person who acted as the declarant did in the declarant's position would require positing not only the base of knowledge of that hypothetical person but also a set of values; that makes for an inquiry that is at best very complex.

V. Subjective or Objective?

Again, I will assume for now that the perspective of the witness is the crucial one. In Part IV, I have argued that anticipation of use in prosecution is the crucial question. But in answering this question, should we take a subjective or objective view? That is, should we ask whether this particular declarant anticipated use in prosecution, or should we ask whether a reasonable person in the position of the declarant would anticipate such use?

In most cases, I do not think the choice makes very much difference. Assuming the test is a subjective one, a court would still perforce often determine what the declarant's anticipation was by relying largely on surrounding circumstances. In other words, the court would infer that the declarant did (or did not) anticipate use in prosecution from its perception that a reasonable person in the declarant's position would (or would not) anticipate such use. The subjective approach has the advantage of theoretical simplicity; the objective approach, but not the subjective approach, requires a court to determine both a set of characteristics that it will assume a reasonable person has in this
context and a set of criteria defining what it means to be in the declarant's position. The subjective approach is also more intellectually straightforward: It is easier to explain why a statement should be deemed testimonial given that the person who actually made the statement anticipated prosecutorial use than to explain why the statement should be deemed testimonial given that a mythical person who might be quite different from the actual declarant would have anticipated such use.

On the other hand, because it does not entail an inquiry into the actual declarant's state of mind, the objective approach is more likely to yield some categorical rules, and to the extent reasonable rules could be crafted, that would be a welcome development. Not all situations lend themselves to categorical rules, or at least not to simple categorical rules - 911 calls reporting an assault while the assailant is still nearby provide a good example. n30 But some situations do. For example, I believe that a statement describing an assault made after the assailant has left to a police officer responding at the scene should, if an objective test is used, be deemed testimonial as a categorical matter.

Even though it is theoretically more complex, therefore, the objective approach is probably simpler in actual implementation, and this factor appears to have made it more attractive to courts. An objective approach is, as I have argued in Part IV, more easily compatible with a definition of testimonial that depends on the anticipation of a reasonable declarant than with a definition that depends on such a declarant's motivation. Apart from this, the chief consequence of the choice between an objective and subjective approach may well be in the context of child witnesses. As I shall show in Part XI, an objective approach would tend to characterize more statements by children as testimonial than would a subjective approach. [*255]

VI. The Perspective of the Witness

I have argued in Part IV that anticipation of use in prosecution is the key question in determining whether a statement is testimonial. But whose anticipation? The declarant's? Governmental authorities'? n31 Both - so that a statement is not deemed testimonial unless both the declarant and governmental authorities anticipate use in prosecution? Either - so that a statement is deemed testimonial if either the declarant or governmental authorities anticipate use in prosecution? I will contend here that it is the perspective of the declarant - the witness - that matters. (For simplicity of expression, I will speak here as if it is the actual anticipation of the declarant that is material - that is, that a subjective test is used - though the test could be objective or subjective, as discussed in Part V.) In this Part, I will contend that the fact that governmental authorities are gathering evidence for use in prosecution does not make a statement testimonial if the declarant does not understand that this is happening. In Part VII, I will argue that if the declarant does anticipate that the statement will be used in prosecution, that is sufficient, even if the statement was not made to a governmental agent. In short, government involvement in the production of the statement is neither sufficient nor necessary to make the statement testimonial.

This is a contentious area. I will approach it first by showing that making the intentions or anticipation of government agents the dispositive consideration, or a sufficient factor to characterize the statement as testimonial, would lead to some unappealing results - and unappealing in particular to one arguing from a pro-prosecution perspective. A statement by a co-conspirator of the defendant, made for the purpose of furthering the conspiracy but to an undercover police agent, was clearly admissible under pre-Crawford law. I suspect that the Supreme Court would be loath to adopt any theory that would entail a change in this result. n32 But if the intention of a government agent to gather evidence for use in prosecution is [*256] the critical consideration, then such a statement is clearly testimonial, for that is precisely what the agent is trying to do. So what makes the statement non-testimonial? Clearly it is that the declarant did not anticipate a prosecutorial use of the statement.

Similarly, consider the cases in which police intercept calls to a drug or gambling house, either by answering the telephone and playing the role of an order-taker or by monitoring an answering machine; the callers, unaware that they are speaking to the police, place their orders or make communications otherwise indicating their awareness of the business performed at the house. The American cases were in consensus before Crawford that these utterances are admissible, n33 and that is the proper result. But any attempt to contend that the police are not gathering evidence for
use in prosecution would be utterly unconvincing. Assuming such an utterance is deemed to be a statement offered to prove the truth of what it asserts, the reason the statement is not testimonial is that the declarant did not anticipate prosecutorial use. n34

These examples suggest that an intention on the part of a government agent to gather evidence for prosecutorial purposes does not in itself make a statement testimonial. And as a theoretical matter I believe this conclusion is right.

Police and other government agents gather evidence for prosecutorial purposes from many different sources. Think of three categories. Category 1 includes sources of information other than communications by humans - blood, maggots, bloodhounds, DNA tests, skid marks, and so forth. The police may, for prosecutorial purposes, observe a phenomenon of evidentiary significance, and even generate one, but plainly this type of evidence poses no Confrontation Clause problem. By contrast, Category 2 includes statements made to government investigators by declarants who know the investigators are gathering evidence for prosecutorial purposes. This type of evidence seems clearly to be testimonial within the [*257] meaning of the Confrontation Clause. Category 3 includes statements made by humans who do not realize that their audience is a government investigator gathering evidence for use in prosecution; the classic example is that of a conspirator making a statement to an undercover police officer. I contend that for Confrontation Clause purposes evidence in Category 3 is more like evidence in Category 1, from non-human sources, than like evidence in Category 2, the self-conscious testimonial statement. The critical factor distinguishing Category 2 from Category 1, and also from Category 3, is that only in Category 2 is the source cognizant of the likely prosecutorial use of the statement.

A skeptic may contend that the critical factor distinguishing Category 1 from Category 2 is that one cannot usefully attempt to cross-examine a maggot or a bloodhound, to say nothing of a vial of blood or a skid mark. If that were so, Category 3 would materially resemble Category 2 more than Category 1. And it may seem at first that this view is correct, because of course if a statement is testimonial for Confrontation Clause purposes it cannot be admitted against the accused unless he has had an opportunity to cross-examine the declarant. Nevertheless, I believe this view is wrong. For at least two reasons, the ability of the declarant to be cross-examined is not the hallmark of what makes a statement testimonial for Confrontation Clause purposes.

First, there is more to confrontation than cross-examination; though cross-examination has taken on greater importance over time, historically the core of the right, as its name suggests, has been the right of the accused to demand that prosecution witnesses testify in his presence. n35 And even now that is an essential aspect of the right. n36 Yet no [*258] confrontation problem is posed by, say, the fact that the accused was not present when the chemicals used in a DNA test were generating their evidence - even though the test was performed by government agents for the purpose of producing evidence for prosecution and it would be possible to demand the accused's presence.

Second, that cross-examination was never possible does not relieve a Confrontation Clause problem if a human statement is testimonial. Corpses cannot be cross-examined any more than bloodhounds or maggots can. Suppose that the prosecution takes the deposition of a witness - clearly a testimonial statement - and just before cross-examination is about to start the witness dies of a heart attack, through nobody's fault. If the prosecution offers the deposition transcript at trial, and the accused objects on confrontation grounds, the prosecution could not validly contend, "Cross-examination is not possible now and it never was possible. It is therefore silly to exclude this evidence on the basis that the accused has not had an opportunity for cross-examine the declarant. Nevertheless, I believe this view is wrong. For at least two reasons, the ability of the declarant to be cross-examined is not the hallmark of what makes a statement testimonial for Confrontation Clause purposes.

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And why not? It appears that the essence of testifying is provision of information understanding there is a significant probability it will be used in prosecution. The bloodhound lacks the understanding to make his bark testimonial - and so does the conspirator or the unwitting drug customer. Without such understanding on the part of the source of information - whether that source is a human declarant or not - all we can say is that a phenomenon occurred, one that was observed or perhaps even generated by government agents. But that does not make the evidence testimonial. If, by contrast, the source of the information is a human who does understand its likely use, we can say that she was playing a conscious, knowing role in the criminal justice system, providing information with the anticipation that it would be used in prosecution - and that certainly sounds a lot like testifying. Furthermore, without such understanding on the part of the declarant, the situation lacks the moral component allowing the judicial system to say in effect, "You have provided information with the knowledge that it may help convict a person. If that is to happen, our system imposes upon you the obligation of taking an oath, saying what you have to say in the presence of the accused, and answering questions put to you on his behalf." n37

In sum, the fact that evidence is created through the participation of a government agent does not make the evidence testimonial. The conduct of the purported witness must be testimonial in nature. A conspirator going about his routine conspiratorial business is not performing a testimonial act, nor is a drug or gambling customer placing an order. To be testimonial, it must appear from the perspective of the witness that the statement is transmitting information that will, to a significant probability, be used in prosecution.

VII. Statements Not Made to Governmental Agents

Part VI has shown that government involvement is not sufficient to make a statement testimonial. But is it necessary? I believe the answer is negative. That a statement is made to a government agent is often a factor supporting a conclusion that the statement is testimonial. But there is no requirement that the statement be made to such an agent. If the declarant anticipates that the statement, or the information asserted in it, will be conveyed to the authorities and used in prosecution, then it is testimonial, whether it is made directly to the authorities or not.

Once again I will argue both from consequences and from theory. A rule providing that a statement is not testimonial unless it is made directly to government agents would have some consequences that I believe are intolerable. A witness who did not want to undergo the rigors of cross-examination could presumably send a statement to the court, in writing or other recorded form: "Here's what I have to say. Please read it at trial; I don't want to come in person." If that statement were considered testimonial - on a theory that the court is a government agent, and all that is necessary is that such an agent receive the statement directly, not that the agent play a role in procuring the statement - the reluctant witness would still have an easy alternative. She could simply make a statement to a friend and ask the friend, as her agent, to pass the statement on to the authorities or directly to court; even if the friend had to testify subject to cross-examination, that would probably not be a hardship, because she would only be testifying that the reluctant witness made the statement.

In many cases the witness would not even have to take the initiative. I think it is not only plausible but virtually inevitable that, if a government agent standard is established by the courts, private victims' rights organizations will provide a comfortable way for many complainants to create evidence for use in prosecution without having to confront the accused: "Make a videotape, and then go on vacation. We'll bring the tape to court and present the testimony necessary to get the tape shown to the jury. Don't worry, you never have to look the accused in the eye, you never have to answer questions by his attorney, and you don't even have to take an oath." How can the making of that videotape not be considered testimonial?

Similarly, if a dying murder victim says to a private person nearby, "Jack shot me!" I do not believe the statement is made for the edification or amusement of the listener; clearly it is made to help bring the assailant to justice, and that makes it testimonial. n38

These examples suggest that government involvement in the creation of a statement is not necessary to make the
statement testimonial. History lends further support to the point. The confrontation right predates the existence of
government prosecutors or police. As I mentioned in Part II, the Hebrews, the early Athenians, and the Romans all
protected the right of the accused to confront the witnesses against him. In England, state prosecutors did not become
the norm for ordinary crime until the nineteenth century, n39 but the right to confront was established long before;
indeed, in the sixteenth century Thomas Smith described the criminal trial as an "altercation" between accuser and
accused. n40 If today a jurisdiction were to eliminate state prosecutors, returning to a system in which crime was
privately prosecuted, I do not believe we would say that this change virtually nullified the confrontation right, allowing
a private prosecutor or his agent to gather statements from observers and report them all in court.

Moreover, it makes no sense conceptually to say that a statement must be made to a government agent for it to be
deemed testimonial. Granted, there is language in Crawford emphasizing prosecutorial abuse. n41 But it must be
remembered that it is not prosecutorial authorities who violate the Confrontation Clause. Certainly the authorities do not
violate the Clause when they take a statement behind closed doors from a witness. We expect the police to take
confidential statements; often they would be derelict in their investigatory duty if they did not do so. The violation of
the Clause occurs when a testimonial statement is admitted at trial against an accused without his being afforded an
opportunity to confront the witness. The prosecutor may be said to be complicit in the violation, because presumably it
was the prosecutor who sought admissibility. But it is the court that commits the violation by deciding to admit the
statement notwithstanding the lack of confrontation. n42 Once again, if we imagine a world without
prosecutors, this time a world in which the court gathers evidence against the accused, that should not mean the
destruction of the confrontation right; Alice should not be allowed to testify, "Barbara chose not to come here today, but
she asked me to relay to you her rendition of what she saw at the crime scene."

I am only arguing that there is no per se rule that a statement cannot be testimonial unless it is made to a
government agent; the bottom line question is what the witness anticipated. In some cases, as suggested by the examples
I have given above, the anticipation of prosecutorial use is clear even though the statement is made to a private person.
In other cases, there will be no good basis for inferring such an anticipation. And clearly, when the statement is made to
a prosecutorial agent, that will often be a strong basis for drawing an inference that the declarant anticipated that the
statement would be used in prosecution. Sometimes, indeed, the agent will announce this intention. But even if she does
not, in some contexts the likely use is obvious from the nature of the statement and the open presence of a government
officer. "Our neighbor parked his car strangely yesterday" said to one's spouse, when nothing else unusual appears to
have happened, will probably be characterized as a "casual remark to an acquaintance." n43 But now suppose that what
prompted the statement was this question by a police officer: "We're investigating a murder in the neighborhood. Did
you notice anything strange yesterday?" Then the statement seems plainly testimonial.

A rule refusing to deem a statement to be testimonial unless it was made to a government agent might be mitigated
by stretching the meaning of "government agent." Suppose a calm, collected statement to a privately employed 911
operator describing a crime that occurred several hours before. Perhaps the 911 operator may be considered a
government agent because the company that employs her is under contract with government agencies. Or consider an
emergency room doctor, who regularly receives and passes on to the authorities victims' descriptions of crimes. Perhaps
she, too, can be considered a government agent, even if she is not a public employee, because she is under a legal
obligation to report the statement. But such manipulations are not a satisfactory resolution of the problem because they
require generous use of the term "government agent" and because they cannot reach all situations in any event. It would
be far better to acknowledge frankly that in some circumstances a statement may be testimonial even though it is not
made directly to a government agent.

VIII. Interrogation n44

Since Crawford, some courts have said that a statement is not testimonial unless it is made in response
governmental interrogation. n45 And indeed, some have gone further, refusing to characterize a statement as testimonial
unless it meets a restrictive definition of interrogation as "structured police questioning." n46 This idea has begun to
distort police practices, as police try to act in such a way that prosecutors can later argue that statements made to the
police were not in response to interrogation. n47

I believe that the whole supposed interrogation requirement is entirely mistaken. Interrogation - like the participation of a government agent in the making of a statement - is a factor that in some contexts supports an inference that the statement is testimonial, but the statement may be testimonial even though it is not in response to interrogation. [*264]

Those who contend that interrogation is necessary for a statement to be deemed testimonial have language they can point to in Crawford, though it is quickly apparent that the language does not really support them. Sylvia Crawford's statements were made in response to police interrogation, and the Court held that, whatever else the category of testimonial statements might include, statements made in response to police interrogation certainly fall within it. Here are the passages in question, with emphasis added in each case:

Even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class. n48

Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. n49

Whatever else the term 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. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed. n50

There is no indication, then, that statements not made during formal testimonial events - a preliminary hearing, grand jury or a former trial - must be in response to police interrogation to be considered testimonial. The Court was very clear that it was merely listing a core class of testimonial statements, a class that plainly includes the statements at issue in the Crawford case itself, and was deciding no more than that these statements are testimonial. Left for another day was the question of what additional statements, if any, shall be considered testimonial. It is true that the Court left open the possibility that it will not consider any statements beyond this core class to be testimonial. Indeed, the fact that the Court took the care, in footnote 4, to offer some elaboration on the meaning of "interrogation" n51 confirms that the Court preserved the possibility that the term would in some [*265] circumstances be decisive. But that is as far as the Court went in this direction. It offered no intimation that a statement not made in response to structured police questioning" it would not be testimonial; it merely said that a statement meeting that standard "qualifies under any conceivable definition." n52

So Crawford does not tell us that a statement must be in response to interrogation to be characterized as testimonial. And common sense tells us that there is no such requirement. Suppose that at trial a prosecutor or the court issues a general invitation: "Anyone who knows anything about this incident, please feel free to come to the front of the courtroom and tell us what you know." After Observer does so, the prosecutor says, "Thank you. You may go." Alertly, defense counsel objects because of a lack of confrontation. "But," says the prosecutor, "this was no witness. I did not subject her to any interrogation." The prosecutor is right that there was no interrogation, but of course we would expect the legal argument to be rejected sneeringly. What Observer was doing was testifying. It does not matter that her statement was not given in response to questions; nor would it matter whether it was she or the prosecutor or the court who took the initiative in arranging for her to give the testimony.

Now suppose the invitation comes not at trial but at the police station: "Ms. Observer, if you care to make a statement, please feel free to do so. I will videotape it, and when this perpetrator stands trial I will give the prosecutor the tape so that she can play it in front of the jury." I think it is equally obvious that a statement made in response to this
invitation is testimonial. And now suppose an observer walks into the police station and says, "You don't know about a crime that has been committed, but I am now going to tell you, and I expect that you will then want to prosecute. Please record what I am about to say, because I expect you will want to use it at trial - I do not like the idea of being under oath and having to answer questions by some aggressive defense lawyer." I cannot see a plausible basis on which this statement should not be deemed testimonial. Or suppose the observer walks into the police station with an affidavit completed, describing the crime. Does anyone seriously contend that this is not testimonial?

Of course, the statements in these hypotheticals are more formal than in the usual case, in which a witness makes a statement to a police officer in the field, perhaps before the officer is confident that a crime has been committed. But, for reasons that I will analyze in Part IX, formality is not required to render a statement testimonial. If the declarant in that field situation understands full well that once the officer receives the statement it is likely to be used for prosecutorial purposes, then the statement is testimonial. The declarant is creating evidence - and this critical reality is unaffected by the facts that (1) until the moment the statement was made, the police officer was not confident that a crime had been committed, and (2) structured questioning by the officer was not necessary to secure the statement.

The bottom line is that if the declarant is making the statement in a situation warranting a reasonable anticipation of prosecutorial use, it is testimonial, even if it is made without questioning by government authorities or entirely on the witness's own initiative. Interrogation may, however, be a significant factor in indicating that a reasonable person in the position of the declarant would have this anticipation; if the authorities are interrogating, that is a factor that would often convey to the declarant the likelihood of prosecutorial use. But when the declarant is reporting a crime, this factor is not necessary to characterize the statement as testimonial; she knows that she is conveying to the authorities information about a crime, and presumably she understands that they will use that information to invoke the machinery of criminal justice. To hold that such a statement is not testimonial is merely to try to avoid Crawford because it makes prosecutions more difficult.

IX. Formality

Some cases have indicated that a statement cannot be considered testimonial for purposes of the Crawford inquiry unless it was made formally. Once again, I believe this view represents a misunderstanding of Crawford, and of the basic approach to the confrontation right that Crawford reflects.

Again, courts adopting this rule can find some language in Crawford to cite in their support, though ultimately, once again, the attempt is unavailing. First, drawing on a definition given by Noah Webster, Justice Scalia wrote that testimony "is typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" Second, Justice Scalia then offered this contrast: "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Third, one of the three formulations of the class of testimonial statements presented by Justice Scalia is the one adopted by Justice Thomas (with Justice Scalia himself joining) in his separate opinion in White v. Illinois: "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." Even on their face, none of these three passages adopts a formality rule. The Court did not say that testimony must be a solemn declaration; it said that testimony typically is such a declaration. The two polar categories, "a formal statement to government officers" and "a casual remark to an acquaintance," plainly do not exhaust all possibilities, and so presenting these two does not indicate where the boundary between testimonial and non-testimonial lies. As for the Thomas formulation, it is only one of three alternatives presented by the Court, and the only one that includes a formality rule. Moreover, it is not clear whether Justice Thomas regards confessions as being a subset of "formalized testimonial materials"; if so, it is not clear why, because confessions can be very informal, and if not, it is not clear why the two sets, "formalized testimonial materials" and "confessions," should be deemed to constitute the overall class of testimonial statements.

In short, nothing in Crawford compels the conclusion that only formal statements can be deemed to be testimonial.
And courts should not adopt such a rule, most importantly because it makes no sense. Consider this exchange: n58

Police Officer: Please have a cup of coffee and make yourself comfortable. If that chair is too hard, please let me know and I'll get you a cushion.

Witness: Thanks so much. The chair is fine, but I'd love some milk if you have it.

Officer: Sure. Here you go. You know, I'm collecting evidence for the trial of Suspect on robbery charges. I know you'll find it inconvenient and unpleasant to testify in court, so why don't you tell me everything you remember, and then I'll tell the jury everything you've told me. We can do this very informally. In fact, I'm not even going to take notes. So just start talking whenever you're ready.

Witness: OK. Well, I was just walking down Main Street, minding my own business . . .

It seems to me clear that this statement is testimonial. Clearly, Witness is making a statement with the anticipation that it will be used in prosecution and (if it mattered, which of course I do not think it should) Officer understands that as well. But just as clearly, the statement seems informal - or, alternatively, it cannot be considered formal without robbing that term of all meaning. Finally, it seems obvious that this type of statement should not be admitted against Suspect if he never has an opportunity to cross-examine Witness. And - here is the crucial part - it is inadmissible not despite the lack of formality but, one may say, in large part because of it.

What formalities is this statement missing? Most notable are the presence of the accused and the opportunity for him to cross-examine. Those, of course, are the essence of the confrontation right. Clearly, the logic could not be that because of their absence the statement is informal and therefore the confrontation right does not apply, because that is a Catch-22 that would prevent the right from ever applying. Apart from those two, the most obvious formality is the oath. But we already know from Crawford itself that the absence of the oath will not make the statement non-testimonial; the majority [*269] opinion was quite explicit on this point, n59 and the statement at issue in that case was not given under oath. There are other formalities as well that usually accompany testimony - the question-and-answer format and the general ceremonial nature of the courtroom - but these are of lesser importance; I have already explained in Part VIII why I do not believe interrogation is necessary to make a statement testimonial.

In short, the absence of formalities does not render a statement non-testimonial; rather, the absence of the most important formalities may make unacceptable as evidence a statement that is testimonial in nature. This casts a helpful light on dictionary definitions, like the one quoted by Crawford, that include formality as a component of testimony: Formality is an ideal, an aspect of testimony given in the optimal way, at trial in open court. The purpose of the Confrontation Clause, indeed, is to ensure that testimony be given in an acceptably formal way, in the presence of the accused and subject to cross-examination, and if reasonably possible at an open trial. To say that the absence of formality takes a statement that would otherwise be deemed testimonial outside the purview of the Clause would be to treat a defect of the statement as a virtue. It would also give investigating officers precisely the wrong incentive. They would tend to avoid whatever procedure is deemed to be a critical aspect of formality, so that statements given to them in full anticipation of evidentiary use would then be deemed non-testimonial and outside the rule of Crawford.

Once again, simply because this factor, formality, is not required to make a statement testimonial does not mean that it is irrelevant in determining whether the statement is testimonial - that is, roughly speaking, that it was made in anticipation of prosecutorial use. For example, in Crawford the statement was videotaped, with an introduction by the investigating officer that left no doubt about why the statement was being taped. But when a witness to a completed crime knowingly makes a statement to the police or other authorities describing the crime, the statement should be deemed testimonial, no matter how informally it was taken, because the likely evidentiary use is so clear. The presence
of formalities can reinforce that determination, but they are not necessary to it. [*270]

X. Excited Testimony

Before Crawford, the decision in White v. Illinois, n60 treating the hearsay exception for spontaneous declarations as a "firmly rooted" one for purposes of applying the reliability test of Roberts and holding that the unavailability requirement of Roberts did not apply to them, n61 gave a green light to prosecutors and courts to try cases by introducing statements made in 911 calls and to responding officers, even if the declarant did not testify. This is a practice that Bridget McCormack and I have called "dial-in testimony." n62

Allowing this kind of evidence made it possible to try domestic violence cases by using the complainant's description of the incident, even without the complainant having testified in front of the accused. Many courts and prosecutors engaged in domestic violence cases give this practice a euphemistic name - "evidence-based prosecutions" - that is extraordinarily ironic, like the names of the Ministries of Love, Peace, and Truth in 1984: These prosecutions are most notable for the critical evidence that they lack, testimony given by the complainant subject to cross-examination. Since Crawford, many courts have continued operating essentially as they did before. Indeed, I believe that some courts and prosecutors who are actively engaged in domestic violence cases, determined to maintain the practice, have adopted a "draw the wagons" approach. n63

I believe a sensible view recognizes that just because a declarant is excited does not mean that the statement was not [*271] testimonial in nature. Crawford supports this view. In footnote 8, the Court said that "to the extent the hearsay exception for spontaneous declarations existed at all [at the time the Sixth Amendment was adopted], it required that the statements be made 'immediately upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.'" n64 In other words, it may be that there was no exception at all for spontaneous declarations; it may be that statements made contemporaneously with the events at issue were admitted only on non-hearsay grounds, as part of the events being litigated - as part of the res gestae, in the phrase usually now considered discredited. Certainly, nothing like the latter-day exception for excited utterances existed - and the reason presumably was recognition that narrative statements by victims of completed crimes almost certainly are made with anticipation of prosecutorial use, even though they may be made for other purposes as well.

I believe 911 calls provide some very close decisions; statements to responding officers are almost universally testimonial. I will adhere to the summary that Bridget McCormack and I have previously provided:

The more the statement narrates events, rather than merely asking for help, the more likely it is to be considered testimonial.

Thus, if any significant time has passed since the events it describes, the statement is probably testimonial. When, as is often the case, the 911 call consists largely of a series of questions by the operator, and responses by the caller, concerning not only the current incident but the history of the relationship, the caller's statements should be considered testimonial. When O.J. Simpson called 911 to report an assault by his girlfriend, his call was testimonial, not a plea for urgent protection.

Often, of course, a 911 call is such a plea. Even in this type of situation, a court should closely scrutinize the call. To the extent the call itself is part of the incident being tried, the fact of the call presumably should be admitted so the prosecution can present a coherent story about the incident. But even in that situation, the need to present a coherent story does not necessarily justify admitting the contents of the call. And even if the circumstances do warrant allowing the prosecution to prove the contents of the call, those contents generally should not be admitted to prove the truth of what they assert. If the contents of the call are probative on some ground other than to prove the truth of the caller's report of what
has happened, then admissibility should be limited to such other ground. To the extent that the contents of the call are significant only as the caller's report of what has happened, such a report usually should be considered testimonial.

XI. Children

Children presented some of the most difficult issues under the Roberts regime, and they will continue to do so under Crawford. In a pre-Crawford article, I have discussed at some length how a testimonial approach might apply to children's statements in various contexts. Here I will offer only some brief comments; I freely admit that my thought in this area remains unsettled.

I tend to believe that some very young children should be considered incapable of being witnesses for Confrontation Clause purposes. Their understanding is so undeveloped that their words ought to be considered more like the bark of a bloodhound than like the testimony of an adult witness. And perhaps, in accordance with Sherman Clark's theory, we should consider that morally they are so undeveloped that we do not want to impose on them the responsibility of being witnesses.

Even assuming a child is considered capable of being a witness, there remains the question of whether a particular statement should be considered testimonial. Here, the question of whether to take an objective or subjective view in determining whether a statement is testimonial becomes important. If the matter is viewed objectively, it probably does not make much sense to apply a "reasonable child" standard, and some courts that have confronted the issue have declined to do so. That is, an objective standard puts aside the particular incapacities of the given declarant, and it is not clear why youth and immaturity should be treated differently from other incapacities. On the other hand, there is something a little odd about asking, with respect to a statement by a young child, what the anticipation of a reasonable adult would be. If a subjective test is used, I do not believe the proper question for children should be whether the child anticipated prosecutorial use in the sense of the formal procedures of the criminal justice system. It should be enough if the child understood that she was reporting wrongdoing and that some adverse consequences - including that Mommy would get mad - would be visited on the wrongdoer.

Another wrinkle is worth considering if a subjective test is used, embellishing it with an estoppel rule: An investigator should not be able to withhold information about the likely use of the statement gratuitously for the purpose of being able to contend that the statement was made without testimonial understanding. That rule seems to me to be correct as a matter of principle; whether it would be sensibly applied is another matter.

XII. Conclusion

The question of whether a statement should be deemed to be testimonial will provide many interesting and perplexing issues over the next several years (fodder for Evidence exams!) and it will continue to provide at least many close factual issues long after that. But the existence of all these open questions, and the possibility of treating them in a wide range of ways, should not lead us to believe that Crawford is anywhere near as manipulable as Roberts was, or that it did not represent a great and beneficial development. Roberts did not articulate a doctrine worthy of respect, and so manipulation was inevitable. Crawford comes at least close to articulating the fundamental principle underlying the Confrontation Clause, a principle at the heart of our criminal justice system - that if a witness testifies against an accused, she must do so face to face, subject to oath and cross-examination. Crawford instantly made easy some cases - like that of Michael Crawford himself - that had divided the lower courts. If the Supreme Court continues to hold the line, lower courts will have to listen. They will realize that there is a wide range of conceivable ways in which witnesses can testify - some formal, others not; some to government officers, others not; some in response to questioning, others not; some after calm reflection, others not. The Confrontation Clause has a simple but strong demand: Prosecution testimony must be given face to face with the accused, subject to cross-examination.
Legal Topics:

For related research and practice materials, see the following legal topics:
- Criminal Law & Procedure
- Trials
- Examination of Witnesses
- Child Witnesses
- Evidence
- Hearsay
- Rule Components
- Truth of Matter Asserted
- Criminal Law & Procedure
- Trials
- Examination of Witnesses
- Cross-Examination

FOOTNOTES:


n2 Id. at 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law - as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether."). As far as I am aware, only one post-Crawford decision has held, with respect to a statement that was not excluded by the governing hearsay rules, that the statement was not testimonial and yet was barred by the Confrontation Clause - and there the trial court's error in admitting the statement was deemed harmless. State v. Lawson, No. COA04-564, 2005 WL 2276520, at *3-5 (N.C. Ct. App. Sept. 20, 2005). In Miller v. State, 98 P.3d 738, 748 (Okla. Crim. App. 2004), the court also found a statement to be non-testimonial yet violative of the Confrontation Clause, but it appears that the Miller court reached the confrontation issue without deciding whether the rule against hearsay would require exclusion. Moreover, at least arguably, the courts in both of these cases applied unduly narrow views of the meaning of "testimonial." My thanks to Andrew Fine for alerting me to both cases.

n3 448 U.S. 56 (1980).

n4 Id. at 66.

n5 Chief Justice Rehnquist said as much in his separate opinion in Crawford, 541 U.S. at 75 ("The thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of 'testimony' the Court lists . . . is covered by the new rule. They need them now, not months or years from now.") (Rehnquist, C.J., concurring). Prompt answers would, of course, be useful to judges, defense lawyers, defendants, and other participants in the criminal justice system - including the police officers who conduct initial interviews - as well as prosecutors.

n6 See, e.g., State v. Wright, 701 N.W.2d 802 (Minn. Aug. 11, 2005), discussed at The Confrontation Blog, http://confrontationright.blogspot.com (Aug. 18, 2005 09:29 EST) (purporting to apply a broad definition of the term testimonial, but yielding a very narrow conception).

n7 See, e.g., Helen Silving, The Oath, 68 YALE L.J. 1329 (1959) (discussing the history of the oath in various judicial systems).

n8 STEPHEN TODD, THE SHAPE OF ATHENIAN LAW 128-29 (1993); 2 DEMOSTHENES, PRIVATE ORATIONS 46:6, at 247-49 (A.T. Murray trans. 1939). ("The laws . . . ordain that [a witness's] testimony must be committed to writing in order that it may not be possible to subtract anything from what is written, or to add anything to it.").

n10 Deuteronomy 17:6, 19:15-18; Richard D. Friedman, Confrontation: The Search for Basic Principles, 86 GEO. L.J. 1011, 1022-23 & n.64 (1998) [hereinafter Friedman, Search].


n12 Acts 25:16 quotes the Roman governor Festus as declaring: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges." See Coy v. Iowa, 487 U.S. 1012, 1015-16 (1988).

n13 See Friedman, Search, supra note 10, at 1023-24 n.69.

n14 See Friedman & McCormack, Dial-In, supra note 9, at 1206-07; Randolph N. Jonakait, The Origins of the Confrontation Clause: An Alternative History, 27 RUTGERS L.J. 77, 112-16 (1995) (arguing that before the Sixth Amendment, several states adopted provisions protecting the confrontation right, as well as other procedural rights, as a result of the adversarial nature of American trials).

n15 For example, a witness in French is un temoin, and testimony is temoignage; in German, the words are zeuge and zeugnis. The French translation can be found at Babel Fish Translation, http://babelfish.altavista.com/. The German translation is available at LEO English/German Dictionary, http://dict.leo.org/.


n17 Note, for example, the Bill of Attainder Clause, U.S. CONST. art. I, § 9, cl. 3.

n18 Note, for example, the Fifth Amendment, U.S. CONST. amend. V.

n19 U.S. CONST. amend. VI.

n20 111 P.3d 844, 850 (Wash. 2005), petition for cert. filed (U.S. Jul. 8, 2005) (No. 05-5224).

n21 Id. at 850.

n22 New technologies have presented the troubling issue of whether confrontation requires that the witness and the accused always be in the same room with each other. See, e.g., Maryland v. Craig, 497 U.S. 836, 851 (1990); Richard D. Friedman, Remote Testimony, 35 U. MICH. J.L. REFORM 695 (2002) (commenting on proposal to allow testimony from a remote location). But even to the extent the answer is negative, the change created by sometimes allowing testimony from a remote location is a relatively small alteration of the traditional
procedure for presenting testimony.


n25 Sample Crawford Predicate Questions, VOICE (APRI's Violence Against Women Program, Alexandria, Va.), Nov. 2004, at 8-9, available at http://www.ndaa-apri.org/pdf/thevoicevolissue1.pdf (proposing that police officers be asked predicate questions at trial such as: "Were the statements taken during 'the course of an interrogation'?" "Were your questions to her an interrogation or merely part of your initial investigation?"; "Were these questions asked in order to determine whether a crime had even occurred?").

n26 This is not inevitable, though. At the argument of Crawford, Justice Kennedy posed this interesting hypothetical: Criminal charges are brought arising from a serious auto accident, and the prosecution offers a statement made shortly after the accident by an observer to an insurance investigator. The statement could clearly be characterized as testimonial with respect to civil litigation, whatever the consequences of such a characterization might be. Should it be considered testimonial for purposes of the Confrontation Clause? Transcript of Oral Argument at 5, Crawford, 541 U.S. 36 (Nov. 10, 2003), 2003 WL 22705281 (No. 02-9410). I believe it should, even without requiring proof that the declarant anticipated a criminal prosecution. In other words, given that the declarant made the statement in anticipation of litigation, it probably should be considered testimonial as a general matter, and therefore also for Confrontation Clause purposes, even without a showing that the declarant anticipated use in prosecution. An alternative and plausible rule would require a demonstration that the declarant anticipated prosecutorial use. In most cases, I suspect, such a showing could be made: If the circumstances were serious enough to warrant prosecution, and the declarant's statement aided that prosecution, the declarant, or a reasonable person in the position of the declarant, would probably have anticipated that prosecution was a significant possibility.

n27 Also, I will not explore beyond this footnote the question of what prosecution will satisfy this definition. Does the defendant have to be identified at the time of the statement? Not necessarily; it may be apparent when a statement is made that it is likely to be useful to the prosecution, perhaps in proving that a crime has in fact been committed, even though the perpetrator has not yet been identified. What if the statement is made with one crime in mind and is later introduced at a trial for a later-committed crime? If there is a substantial link between the two, that should probably be enough; I have in mind the cases in which a statement is made in the context of an incident of domestic violence, and the complainant is later murdered. Forfeiture doctrine would often nullify the confrontation right in this context, though. See, e.g., People v. Giles, 19 Cal. Rptr. 3d 843, 847-48 (Cal. Ct. App. 2004) review granted, 102 P.3d 930 (Cal. 2004). Does any crime have to have been committed yet? Not necessarily: here I have in mind the cases in which an eventual murder victim, fearing her assailant, tells a confidante information to be used in the event that he does in fact assault her and render her unable to testify. See State v. Cunningham, 99 P.3d 271, 274 (Or. 2004). Again, forfeiture is probable in this situation.

n28 See Friedman, Search, supra note 10, at 1039 (asserting ambiguously that if "the declarant correctly understands that her statement will be presented at trial" the statement is testimonial, but that it is not testimonial if "the declarant correctly understands at the time she makes the statement that it will play no role in any
litigation”). Cf. Friedman & McCormack, Dial-In, supra note 9, at 1240-41 (suggesting as a workable standard: “If a statement is made in circumstances in which a reasonable person would realize that it likely would be used in investigation or prosecution of a crime, then the statement should be deemed testimonial.”).

n29 See, e.g., Hammon v. State, 829 N.E.2d 444, 457 (Ind. 2005), ("If the declarant is making a statement to the police with the intent that his or her statement will be used against the defendant at trial, then the statement is testimonial. Similarly, if the police officer elicits the statement in order to obtain evidence in anticipation of a potential criminal prosecution, then the statement is testimonial.")., petition for cert. filed (U.S. Aug. 5, 2005) (No. 05-5705).

n30 See infra Part X.

n31 With respect to governmental authorities, it would not much matter whether the test were phrased in terms of purpose or anticipation; it would rarely occur that a government agent would take a statement with the anticipation, but without the purpose, that the statement be used in prosecution.


n34 Cf. People v. Morgan, 23 Cal. Rptr. 3d 224, 233 (Cal. Ct. App. 2005) (treating utterances as hearsay within an exception and holding that admission did not violate Confrontation Clause because - among other, spurious, grounds - of "their unintentional nature").

n35 See Coy v. Iowa, 487 U.S. 1012, 1016 (1988) ("There is at least some room for doubt (and hence litigation) as to the extent to which the Clause includes those elements [the right of cross-examination and restriction on admissibility of out-of-court statements], whereas . . . simply as a matter of English it confers at least a right to meet face to face all those who appear and give evidence at trial." ) (internal citations omitted). Although early Athenian witnesses testified orally at trial, the right to cross-examine appears not to have been invoked frequently. Todd, supra note 8, at 29. Note also the declaration of the Roman governor Festus, Acts 25:16, supra note 12, which insisted on the accuser being brought face-to-face with the accused but says nothing about questioning the accuser. See also Friedman, Search, supra note 10, at 1024-25 n.74 (noting a period in trial of treason cases in which witnesses were brought before the accused but he was not allowed to question them directly).

n36 See Statement of Scalia, J., 535 U.S. 1159, 1160 (2002) (explaining reasons for joining majority decision not to transmit to Congress proposed amendment to Federal Rule of Criminal Procedure 26(b) that would have allowed testimony from a remote location, subject to cross-examination, in a limited set of circumstances):

As we made clear in [Maryland v. Craig, 497 U.S. 836, 846-47 (1990)], a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations in the defendant's presence - which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's
image. Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.

n37 See Sherman J. Clark, An Accuser-Obligation Approach to the Confrontation Clause, 81 NEB. L. REV. 1258 (2003) (viewing the Confrontation Clause as giving the accused not merely the right to confront the witnesses but primarily the right to demand that the witnesses against him assume the burden of confronting him).

n38 The statement may nevertheless be admissible, preferably on the basis that the accused forfeited the confrontation right, but that is another matter.


n40 THOMAS SMITH, DE REPUBLICA ANGLORUM 114 (Mary Dewar ed., Cambridge Univ. Press 1982) (1583) (describing a typical criminal trial).

n41 Crawford v. Washington, 541 U.S. 36, 55 n.7 ("Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse . . . .").

n42 The court is a state actor, and so the decision to admit the statement constitutes state action, a necessary element under the Fourteenth Amendment, which makes the Confrontation Clause applicable to the states. See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 486 (2d ed. 2002) (summarizing the so-called "state action" doctrine: "The Constitution's protections of individual liberties and its requirement for equal protection apply only to the government [though the Thirteenth Amendment's prohibition of slavery should be excepted from this broad statement]. Private conduct generally does not have to comply with the Constitution.").

n43 Crawford, 541 U.S. at 51.

n44 I have adapted this Part from an entry called "The Interrogation Bugaboo" that I posted on The Confrontation Blog, http://confrontationright.blogspot.com/ (Jan. 20, 2005, 1:12 EST).


n47 See Sample Crawford Predicate Questions, supra note 24.
n48 Crawford, 541 U.S. at 53 (emphasis added).

n49 Id. at 52 (emphasis added).

n50 Id. at 68 (emphasis added).

n51 There the Court said that it was using the term in a colloquial sense, that it did not have to choose among definitions, and that "Sylvia's recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition." Id. at 53 n.4.

n52 Id.


n55 541 U.S. at 51 (quoting 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

n56 541 U.S. at 51.

n57 Id. at 51-52 (citing White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)).

n58 I could make the same point by using the actual situation addressed by the decision of the Sixth Circuit in United States v. Cromer, 389 F.3d 662, 666-68 (6th Cir. 2004), which rejected a formality requirement. Id. at 673-74.

n59 See Crawford, 541 U.S. at 52-53 n.3 ("We find it implausible that a provision which concededly condemned trial by sworn ex parte affidavit thought trial by unsworn ex parte affidavit perfectly OK.") (emphasis in original).


n61 Id. at 356-58.

n62 See generally Friedman & McCormack, Dial-In, supra note 9, passim.

n63 For example, consider what happened when the National Council of Juvenile and Family Court Judges
published in its journal Juvenile Justice Today an article by two Florida judges saying that courts could essentially ignore Crawford by invoking the excited utterance exception to the rule against hearsay. Amy Karan & David M. Gersten, Domestic Violence Hearsay Exceptions in the Wake of Crawford v. Washington, 13 JUVENILE & FAMILY JUSTICE TODAY, No. 2, at 20 (Summer 2004). Bridget McCormack, Jeff Fisher, and I, believing this article reflected a misleading ruling of Crawford that would eventually lead to many reversed convictions, wrote a response. The Council has refused to publish this article; it has said that its tone would be insulting to the judges who are valued members of the organization. We have expressed mystification about this contention, and have offered to adjust the tone to whatever extent necessary, but the Council has declined to change its decision. It is hard for me to perceive this decision as anything but censorship of views the Council finds unacceptable. A link to our essay is posted on The Confrontation Blog under the title A Case of Censorship?, http://confrontationright.blogspot.com/ (Feb. 15, 2005, 17:15 EST).

n64 541 U.S. at 58 n.8 (quoting Thompson v. Trevaniion, 90 Eng. Rep. 179 (K.B. 1694)).

n65 Friedman & McCormack, Dial-In, supra note 9, at 1242-43.


n67 See Clark, supra note 36, at 1280-85.

n68 People v. Sisavath, 13 Cal. Rptr. 3d 753, 758 n.3 (Ct. App. 2004) (holding that, though Crawford's reference to an "objective witness" could mean "an objective witness in the same category of persons as the actual witness - here, an objective four year old," the more likely meaning is "that if the statement was given under circumstances in which its use in a prosecution is reasonably foreseeable by an objective observer, then the statement is testimonial."); State v. Grace, 111 P.3d 28, 38 (Haw. Ct. App. 2005); but see State v. Scacchetti, 690 N.W.2d 393, 396 (Minn. App. 2005), review granted (Minn. Mar. 29, 2005) (holding that to invoke Crawford the defendant must show that "the circumstances surrounding the contested statements led the [child victim] to reasonably believe her disclosures would be available for use at a later trial, or that the circumstances would lead a reasonable child of her age to have that expectation."); In re D.L., No. 84643, 2005 WL 1119809, at *3 (Ohio Ct. App. May 12, 2005).

n69 Suppose an investigator has no reasonable fear that revealing to the child that she is looking into wrongdoing would inhibit the child from speaking, and yet she declines to make the revelation so that the state can contend that the child did not anticipate punitive use of her statement. In that case, the estoppel rule would apply. On the other hand, an undercover police officer could decline to reveal her role to a conspirator without invoking the estoppel rule, because given such a revelation the conspirator presumably would not make statements useful to the officer.

n70 Acknowledging "interim uncertainty" created by its adoption of a new standard, the Crawford Court noted that "the Roberts test is inherently, and therefore permanently, unpredictable." 541 U.S. at 68 n.10.
I. INTRODUCTION

Rule 703 of the Federal Rules of Evidence permits expert witnesses to offer opinions based upon evidence that has not been offered in the proceedings. \(^n1\) The Rule also sanctions the expert's basing her opinion on inadmissible evidence if that evidence is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." \(^n2\) In a recent Essay in this Review, Professor Carlson presents a helpful exposition of the confused evidentiary status of this otherwise inadmissible evidence. \(^n3\) He correctly notes that the majority of
courts refuse to allow the inadmissible evidence upon which the expert bases her opinion to come in as excess baggage with the opinion itself. The expert's reliance upon the inadmissible evidence does not change the evidentiary character of that evidence. For the limited purpose of explaining the expert's opinion, however, courts do permit the introduction of this otherwise inadmissible background information. 

Thus, on the one hand, the jury may consider the facts or data upon which the expert based her opinion to assess the weight to be given to that opinion. Yet, on the other hand, the jury, when deciding whether to arrive at the same conclusion, cannot accept what the expert relied upon as true. In reaching its own conclusion, the jury can rely only upon the product of that evidence -- the expert's opinion. If this practice sounds like judicial double talk, it is. Professor Carlson, however, supports this result on two grounds. First, he contends that the introduction of the underlying facts would violate the hearsay rule. Second, Professor Carlson justifies exclusion because of sixth amendment confrontation problems in criminal cases.

I disagree with Professor Carlson. With appropriate precautions, the introduction of the inadmissible facts or data upon which experts rely no more violates the hearsay rule's spirit than do the volumes of evidence that regularly are introduced through the numerous hearsay rule exceptions. And, although I am sympathetic to his confrontation concerns, recent developments suggest that no confrontation problem exists. More fundamentally, however, I oppose the view that Professor Carlson and the majority of courts support because that view is both illogical and unwise. 

II. THE ILLOGIC OF IT ALL

Admitting an expert's opinion, but not its basis, is illogical because one cannot accept an opinion as true without implicitly accepting the facts upon which the expert based that opinion. The value of any conclusion necessarily is tied to and dependent on its premise. Consequently, if in forming an opinion someone assumes that certain facts are true, the acceptance of that opinion necessarily involves the acceptance of those assumed facts. Compounding the absurdity of the approach supported by Professor Carlson is the court's allowing the expert to recite the underlying basis, and then instructing the jury not to accept the recited facts as true (even though the expert did), but to consider those facts only in assessing the value of the expert's opinion. This instruction is pure fiction; it cannot be done. Even if the instruction's distinction logically were possible, jurors likely would not be capable of performing such mental gymnastics.

This practice is not a recent development. Courts have followed it for decades when physicians testify regarding statements made to them by their patients. At one time, the hearsay exception for statements of present physical condition extended only to patients' statements about conditions experienced contemporaneously with the utterances. Thus, the physician could repeat in the courtroom, and the jury could accept as true, only what the patient said to the doctor about the condition then being experienced. The physician could not recount for truth the patient's statements about his medical history and the cause of his injuries. She could, however, recite the patient's statements about medical history and causation for the limited purpose of explaining her diagnosis and treatment, if those statements had been critical to the diagnosis and treatment. This practice, however, has gained no logic with age. It was as schizophrenic and illogical when tied to the present physical condition exception as it is now under Rule 703.

III. AN OPEN-ENDED HEARSAY EXCEPTION -- A WISER OPTION

Aside from the illogic of the practice, I believe that the exclusion of the underlying facts from the jury's consideration is unwise for two reasons. First, the exclusion formally changes the expert's role in litigation to that of a super-factfinder capable of producing admissible substantive evidence (an opinion) from inadmissible evidence. This capability allows the expert witness to influence the outcome of a case based on evidence that the finder of fact may not hear and cannot consider. Second, the exclusion of the evidence ignores the objective assurance of reliability that the expert's examination, evaluation, and reliance can provide -- an assurance that historically has justified exceptions to the hearsay rule.
A. The Historical Role of the Expert in Litigation

Historically, the expert's role in litigation has been solely to assist the finder of fact. n17 The expert's judgment is not a substitute [*587] for that of the judge or jury. n18 For this reason, the common law limited the admissibility of expert opinion testimony to those instances when judges or jurors were unable to perform their fact-finding role properly without the assistance of someone with special expertise. This reason also explains the common-law approach of receiving expert testimony only after its factual basis had been revealed and independent evidence had been presented from which the finder of fact reasonably could infer those facts. n19 Without this independent basis, the expert's opinion was irrelevant. n20 If the finder of fact was a jury, the expert testimony had to assist the jury either in understanding the evidence it heard or in drawing rational conclusions from that evidence. The expert was not an independent source of substantive evidence unless she, like any other witness, had personal knowledge of facts related to the cause of action. n21

Rule 703 of the Federal Rules of Evidence formally sanctions what the common law prohibited -- reliance upon facts not of record. If no means is adopted for explicitly making those facts part of the record (because the expert relied upon them), this rule, with no apparent reason or justification, will have changed significantly the expert's role in litigation.

B. The Hearsay Issue

To maintain the historical role of the expert under Rule 703, the underlying basis for the expert's opinion must qualify as an exception to the hearsay rule. Justification for this hearsay exception appears in the standard established in Rule 703 itself -- reasonable reliance by experts in the particular field. This standard satisfies the traditional test for exceptions to the hearsay rule: that the circumstances of the out-of-court utterance adequately assure reliability in terms of both the accuracy of the declarant's perception and memory and the sincerity with which [*588] the declarant recited what he perceived and remembered. n22

The logic of sanctioning an expert's use of inadmissible evidence in forming opinions is that if the evidence is of the type experts reasonably rely upon in a particular field to form opinions, the expert will possess sufficient expertise in evaluating the evidence's reliability to justify its broader use in judicial proceedings. As one court has stated: "Years of experience teach the expert to separate the wheat from the chaff and to use only those sources and kinds of information which are of a type reasonably relied upon by similar experts in arriving at sound opinions on the subject." n23 If the witness possesses this ability (something that we apparently must presume under Rules 702 and 703 upon establishment of the witness' general expertise, along with the fact of regular reliance upon the facts or data in question) and, more important, uses her expertise to evaluate the underlying information, the standards of trustworthiness for the admission of hearsay will be met. The argument for admissibility is buttressed because the expert who initially assessed the offered information's reliability is presently available for cross-examination about that assessment. This availability will allow the finder of fact to evaluate the reliability of each piece of information and, in turn, the reliability of opinions based upon it.

Unlike other established hearsay exceptions codified in Rules 803 and 804(b), under which the judge assesses a statement's reliability based on the circumstances surrounding its utterance, the reliability justifying admission under the proposed Rule 703 exception would be based on a third party's out-of-court assessment. Because the expert's screening creates a presumption that a sufficient threshold of reliability exists, the direct assessment of those surrounding circumstances in the judicial proceeding would shift from the judge, as a question of admissibility, to the jury, as a question of the weight to be given to the information and, ultimately, to the opinion.

The critical premise underlying admission of the otherwise inadmissible evidence is the expert's evaluation of the information -- not simply the expert's unquestioning reliance upon it for the purpose of rendering an opinion for the litigation. Combining her expertise with knowledge of the information or its source, the expert must have been convinced that the data was sufficiently [*589] reliable to have formed the basis of an opinion in her daily professional
practice. Accordingly, the "reasonable reliance" standard under Rule 703, which requires the information be "of the type" reasonably relied upon in the field, must be interpreted to require that the information not only be of the generic "kind" that is reasonably relied upon (for example, a doctor making diagnoses based upon statements from injured persons), but also be "acquired in a manner" that is consistent with the profession's standards (through the doctor's personal interviews of the injured persons, for example, rather than through a paralegal's interview subsequently provided to the doctor). n24

This "kind" versus "manner of acquisition" distinction has been the underlying current of many decisions that have excluded expert opinions based upon otherwise inadmissible evidence. In In re "Agent Orange" Product Liability Litigation, n25 for example, Judge Weinstein found a hematologist's and a pathologist's expert opinions to be inadequate to overcome a motion for summary judgment because of the manner in which the experts acquired their data. After the action had been filed for the benefit of Vietnam veterans, plaintiffs' counsel asked those veterans to fill out a symptomology checklist and to indicate whether they had any of a number of physical, mental, or emotional symptoms, as well as to supply some general information about themselves and their children. The judge, in effect, excluded the opinions because even though this information is the "kind" that an examining physician would require in rendering an opinion about patients' illnesses (personal medical histories), that information normally would not be obtained in that manner. In addition, a physician normally would not rely upon this information without corroboration from medical records, physical examinations, and medical tests. This ruling reaffirmed the established Rule 703 principle that the "reasonably relied upon" standard is one of practice, not trial preparation. n26

Similarly, in In re Swine Flu Immunization Products Liability Litigation, n27 the court struck the testimony of a plaintiff's doctor because the doctor, in testifying to a causal link between a swine flu vaccination and Guillain-Barre Syndrome, relied upon data that the plaintiff's attorney collected from hospitals. The district court held that "[t]he technique employed in compiling the data is not of the caliber used in the field of epidemiology and medical statistics and therefore, cannot form the basis of [the doctor's] opinion testimony." n28

If the judge properly screens expert opinions to ensure compliance with Rule 703's expanded basis requirements, no justification exists for precluding the finder of fact from hearing and using those facts supporting an opinion to the same extent as the expert. Indeed, the present physical condition hearsay exception under the Federal Rules of Evidence, from which the practice of differentiating between opinions and their bases appears to have been borrowed, precisely follows this suggested approach. n29 On the belief that doctors can detect if patients are fabricating their statements, Rule 803(4) now permits a doctor to repeat, for the truth of the matter asserted, what a patient said to him about medical history and cause, if those statements were "reasonably pertinent to diagnosis or treatment." n30

[*591] Professor Carlson is concerned about the "wholesale introduction" of data through experts. n31 I share that concern to the extent that courts may permit experts to dump large quantities of unscreened evidence into the record. We should not resolve this concern, however, by arbitrarily excluding an entire body of evidence that the finder of fact should consider. If courts properly scrutinize expert testimony to ensure that each expert has used her special talents in screening the facts upon which she has relied, we avoid the problem. Until the Federal Rules of Evidence incorporate a new hearsay exception to accommodate specifically the new dimensions of the proposed practice under Rule 703, courts could admit this hearsay under the residual exceptions codified in Rules 803(24) and 804(b)(5). n32

[*592] C. A Potential Problem

If the basis of an expert's opinion is admissible to the same extent as the opinion that it supports, a party possibly could present his entire case through an expert's testimony. n33 This option would present the theoretical possibility of the finder of fact's resolving factual disputes based only on the testimony of biased experts who have pretrial the case through their evaluation of the relevant facts. How realistic is this possibility? Although remote when adequate facts exist to support the expert's conclusions (because an advocate's case is always more convincing with the underlying evidence), the possibility is much greater in marginal cases when the party might attempt to mask the inadequacy or nonexistence of evidence through the use of biased testimony of his experts. n34 For practical purposes, however, the
probability that a party would employ such a tactic is remote. In any event, depending on one's view of the purpose of Rule 703, the problem is either avoidable or, at least, manageable.

The most obvious solution to this potential problem is to limit the applicability of the proposed hearsay exception to those instances when the source of the expert's information is unavailable. This limitation could be accomplished simply by classifying the exception under Rule 804, which makes the declarant's unavailability material to his hearsay statement's admissibility. All exceptions under this rule require a demonstrated necessity for their use. Employing the residual exception presently recognized in Rule 804(b)(5) should achieve this result because subsection (B) of that rule requires that the hearsay evidence being offered be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." n35

If one views Rule 703's purpose as relieving parties of the cumbersome and time-consuming burden of establishing the basis of expert opinions (because the expert's professional assessment of that basis adequately assures its reliability), then the Rule 804 solution could be seen as inconsistent with that purpose. That is, a required demonstration of unavailability under Rule 804 usually would necessitate bringing forward the basis that Rule 703 no longer requires. Thus, under this view of Rule 703, the only way to avoid this extended use of experts is to require that a party establish a prima facie case independent of the expert's secondhand factual information. This approach would be untenable, however, because it would create an inferior class of substantive evidence given by experts. Such evidence would be admissible for its truth, but inherently insufficient to support a verdict. Likewise, such evidence would be sufficient to form the basis of opinions, but insufficient to support a verdict consistent with those opinions. In effect, this approach would perpetuate through the back door the same illogic that is addressed through the front door by the admission of the opinion's basis for its truth.

If we wish to give experts the right to rely on otherwise inadmissible evidence and do not wish to impose a demonstrated necessity requirement before they are permitted to offer that basis, the risk of adversarial manipulation may be unavoidable. Such a risk, however, is quite manageable for several reasons. First, as mentioned above, the probability of a party's employing such a tactic is remote. Second, if a party attempts to establish his factual case exclusively through an expert's testimony when independent evidence in fact is available, the judge or jurors naturally will become suspicious and, thus, view the expert's testimony with greater caution. Third, a party's failure to produce available evidence is the fair subject of comment by the opposition in its closing argument. Fourth, and most important, the expert's availability for cross-examination about her biases and the basis of her opinion should apprise the jury sufficiently of the unreliability of that basis.

The accommodation of this potential misuse of expert testimony is in substance similar to the situation in which a cause of action's single disputed element is proven through hearsay presented under an established exception. In the latter case the entire case's disposition turns on this hearsay evidence. The most significant difference in the hearsay establishing the basis of an expert's opinion is that its value can be more fully explored and, therefore, more realistically weighed by the jury, because the expert, who must have been in a position to evaluate its reliability, is available for cross-examination.

IV. THE CONFRONTATION ISSUE

Professor Carlson confidently asserts throughout his Essay that if the court permits a government expert in a criminal prosecution to recite the inadmissible underlying facts upon which he relied (to prove their truth), a violation of the defendant's right of confrontation will occur. He claims that unless the government establishes a foundation, that is, qualifies the evidence under an exception to the hearsay rule, the facts are constitutionally inadmissible. I disagree.

In Ohio v. Roberts n36 the Supreme Court announced the requirements that the sixth amendment right of confrontation imposes on the government when it uses hearsay against a criminal defendant. In Roberts the defendant was convicted of a forgery and possession of a stolen credit card based on the prior recorded testimony that an unavailable witness had given at the defendant's preliminary hearing. In upholding the use of this hearsay, the Court
provided a helpful explanation of the specific requirements that the government may have to satisfy if offering hearsay in a criminal prosecution, when the declarant is not available for cross-examination:

In sum, 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. n37

There are two important points to be made about Roberts. First, the permissible use of hearsay is not limited to statements that fall within an established exception to the hearsay rule. If the hearsay falls within such an exception, the requisite indicia of reliability will be presumed. If, however, the hearsay does not fall within an established hearsay exception, its use is still permissible if the government can demonstrate a sufficient level of trustworthiness. Second, the Court specifically noted that the rule of necessity (demonstrated unavailability) is inapplicable when the “utility of trial confrontation” is “remote.” n38

[*595] Contrary to Professor Carlson's suggestion, one cannot predict the constitutional invalidity of any particular hearsay evidence outside of the context in which that evidence is used. Even though the Constitution favors the accused's face-to-face confrontation of the witnesses offered against him, the use of hearsay does not ipso facto violate the confrontation clause. Therefore, introducing the otherwise inadmissible basis of expert opinions is not necessarily unconstitutional. A violation of the confrontation clause will occur only (1) when the court finds that a particular hearsay declarant should be brought forward if he is available, and the government fails to demonstrate that it has made a good faith, but unsuccessful, effort to do so; or (2) when despite an adequate demonstration of unavailability, the particular statement does not bear sufficient indicia of reliability. n39

V. CONCLUSION

As the role of experts in litigation expands, the question of the evidentiary status of an expert opinion's basis becomes increasingly [*596] important. This status has given rise to litigation not only under Rule 703, but also under the public records exception to the hearsay rule, Rule 803(8)(C), when expert opinions are in the form of government agency investigative findings. n40 The charade that opinions and their bases are severable should end. Under the common law, such severance was simply an illogical practice that had no meaningful implications. With the formal recognition of the expert's right to rely on otherwise inadmissible evidence, however, the practice is altering the players' roles in litigation. If we are comfortable both with the expert's assumption of the role of superfactfinder and thirteenth juror and with the diminished role that necessarily follows for the judge or jury, we openly should acknowledge and embrace this expanded role. If we are not, we should give up the severability fiction as a remnant of the past and establish a hearsay exception for the introduction of the bases of experts' opinions that sets forth meaningful standards for ensuring reliability.

Legal Topics:

For related research and practice materials, see the following legal topics: EvidenceTestimonyExpertsHelpfulnessEvidenceHearsayExceptionsMedical Diagnosis & TreatmentEvidenceTestimonyExpertsAdmissibility

FOOTNOTES:

n1 Rule 703 states:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those
perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in
the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in
evidence.

*FED. R. EVID. 703.*

n2 Id.


1125, 1145 (E.D. Pa. 1980) (finding that although public records that contained expert opinions and conclusions
were admissible under the public records exception to the hearsay rule, *FED. R. EVID. 803(8)(c),* the
background information and data that accompanied the public records had to be independently admissible under
another exception to the hearsay rule before being offered for its truth).

n5 See, e.g., *Lewis v. Rego Co.,* 757 F.2d 66, 74 (3d Cir. 1985) (concluding that a conversation between the
expert witness and another doctor was the kind of information on which experts in the field base their opinions
and, therefore, the trial court should have allowed inquiry into the conversation).

n6 Cf. *Fox v. Taylor Diving & Salvage Co.,* 694 F.2d 1349, 1356 (5th Cir. 1983), in which the court,
although acknowledging that the expert is allowed to disclose hearsay only for the limited purpose of explaining
his opinion's basis, allowed hearsay to be heard for its truth because the opponent of the evidence failed to make
a timely hearsay objection.

n7 See Carlson, supra note 3, at 584-86.

n8 Id.

n9 Although a juror arbitrarily could attach value to an expert's opinion independent of its basis because of
the perceived credibility of that expert, this juror's behavior, in effect, would be a relegation to the expert of the
juror's factfinding role.

n10 In the specific context of statements to a physician, which can be recited for the purpose of explaining a
doctor's opinion but not for substantive evidence, Professor McElhaney agrees with this conclusion.

n11 See, e.g., *United States v. Madrid,* 673 F.2d 1114, 1118 n.4 (10th Cir.) (instructing the jury that the
testimony was being admitted to show the basis of the expert's opinion and not for the truth of the underlying
1981) (instructing the jury that the expert's testimony about his colleague's investigation was being admitted
only to show basis of opinion, not for the truth of the investigation); *United States v. Sims,* 514 F.2d 147, 149-50
(9th Cir.) (recognizing the need for the court to instruct the jury that hearsay evidence is to be considered solely
as a basis for the expert's opinion and not for its own truth), cert. denied, 423 U.S. 845 (1975).
n12 See generally McCORMICK ON EVIDENCE § 292, at 839-40 (K. Brown 3d ed. 1984) (discussing admissibility of a patient's statements to a doctor about a presently existing bodily condition).

n13 For example, the physician could testify that the patient said, "My stomach hurts," and the jury could accept as true that the patient had a stomach ache. Yet the court would refuse to admit the physician's testimony about the same patient's statements concerning the medical history ("Several years ago I was diagnosed as having colitis") and the cause of the condition for which treatment was sought ("I have been under a great deal of stress during the past few months," or "I have been eating a lot of hot, spicy food lately"). The court, however, could admit the testimony to explain the physician's opinion.

n14 Perhaps the practice was worse under the present physical condition exception because the court would admit statements of history and cause only if they were crucial to diagnosis and treatment. Unless the jury relegates its factfinding role to the expert, the jury needs at least as much evidence as the doctor possessed to reach the same conclusion.

n15 "Thus, when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise." United States v. Williams, 447 F.2d 1285, 1290 (5th Cir. 1971), cert. denied, 405 U.S. 954 (1972).

n16 See generally 5 WIGMORE ON EVIDENCE § 1430 (Chadbourn rev. 1974) (providing the principle behind the exceptions to the hearsay rule).

n17 For a general discussion of expert testimony, see Ladd, Expert Testimony, 5 VAND. L. REV. 414 (1952).

n18 See id. at 428 (explaining purpose of expert testimony).

n19 McCORMICK, supra note 12, §§ 14, 15.

n20 Id. § 15, at 38. The opinion logically may have been relevant in the sense that the expert rationally based the opinion upon facts that were probative of the issues being litigated. The opinion nonetheless was irrelevant to the expert's functioning vis-a-vis the fact-finders, who had sole responsibility for resolving those issues based on evidence presented to them through witnesses with personal knowledge.

n21 As explained by Professor McElhaney, an expert witness is permitted to offer opinions because he "is an explainer, whether he explains his own observations or someone else’s." McElhaney, supra note 10, at 471.

n22 See supra note 16.

n23 United States v. Sims, 514 F.2d 147, 149 (9th Cir. 1975).

n24 It goes without saying, of course, that the information upon which the expert relied must have been
relevant to the controversy before the court and consistent (or at least not inconsistent) with the evidence upon which the finder of fact will be asked to render a decision. For example, an expert will not be allowed either to offer an opinion about the cause of a ship's sinking if that opinion is based upon factual assumptions that are flatly inconsistent with the undisputed facts in the case, Cunningham v. Rendezvous, Inc., 699 F.2d 676 (4th Cir. 1983), or to speculate about the economic effect of certain conduct when evidence in the record contradicts the basis of the testimony, Merit Motors, Inc. v. Chrysler Corp., 569 F.2d 666 (D.C. Cir. 1977).


n26 See FED. R. EVID. 703 advisory committee's note, 56 F.R.D. 183, 283 (1973) (bringing Rule 703 practice into line with expert's own practice when not in court); see also McLellan v. Morrison, 434 A.2d 28, 30 (Me. 1981) (finding that a physician's conferring with another medical expert was common practice in forming opinions in that particular field).


n28 Id. at 904.

n29 Rule 803(4) states:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(4) Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pains, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

FED. R. EVID. 803(4).

n30 See, e.g., Shell Oil Co. v. Industrial Comm'n, 2 Ill. 2d 590, 602-03, 119 N.E.2d 224, 231 (1954) (admitting injured person's statements to his treating physician about cause under a hearsay exception because of the presumed trustworthiness of a statement relayed in expectation of medical treatment). Further, what is significant about this expansion of the present physical condition exception is that the patient no longer needs to have consulted the physician solely for the purpose of treatment. Now the patient can consult solely for the purpose of developing a diagnosis for trial use. Despite this elimination of a major guarantee of trustworthiness -- the patient's desire for accurate treatment -- the Federal Rules abandoned the common-law restriction because of the doctor's expertise in evaluating the reliability of hearsay evidence.

n31 Carlson, supra note 3, at 592.

n32 Rule 803(24) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(24) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these
rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 803(24).

Rule 804(b)(5) provides:

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(5) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 804(b)(5).

n33 Rule 704 increases this possibility by permitting experts to give opinions on ultimate issues in the case. It provides:

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

FED. R. EVID. 704.

n34 A necessary product of Rule 703, therefore, is the need for trial judges to screen the expert's testimony with care to ensure that a basis in fact exists and that the expert's biases do not render her testimony inadmissible under Rule 403. See, e.g., Viterbo v. Dow Chem. Co., 646 F. Supp. 1420, 1425-26 (E.D. Tex. 1986) (concluding that the expert did not view the plaintiff's condition objectively because he sought employment from the plaintiff's attorney in the subject case).

n35 See supra note 31.

n36 448 U.S. 56 (1980).

n37 Id. at 66.

n38 Id. at 65 n.7. In making this notation, the Court specifically referred to the type of situation that had been before it in Dutton v. Evans, 400 U.S. 74 (1970). In Dutton the defendant was convicted of murder primarily on the basis of one of his co-conspirator's testimony. This testimony, however, was corroborated by a hearsay statement of another co-conspirator who, in response to the question "How did you make out in court?" (he had been arraigned on the murder charge) made the following statement to his cellmate: "If it hadn't been for the dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." Id. at 77. The Court concluded that the use of
this statement did not violate the defendant's confrontation rights because the utility of trial confrontation would have been remote. The Court based this conclusion on the following factors: (1) the hearsay statement was not an expression about a past fact; (2) the declarant was obviously in a position to have known whether Evans was involved in the murder; (3) little chance of faulty recollection existed; (4) the circumstances under which the statement was made indicated no reason for Evans' involvement in the crime to be misrepresented; (5) the primary evidence against Evans came from another co-conspirator's testimony; (6) that cross-examination of the declarant would have enlightened the jury about the statement's accuracy was highly unlikely; and (7) the witness who heard the statement uttered was fully cross-examined.

Subsequent to Roberts, the Court has held that the rule of necessity (and the required demonstration of unavailability) does not apply when the government offers a co-conspirator's statement against the accused. United States v. Inadi, 106 S. Ct. 1121 (1985). The Court thought that the truth-seeking process would gain very little from a face-to-face confrontation between the accused and the alleged co-conspirator. This was a poorly reasoned decision. See P. RICE, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE § 5.01, at 331-37 (1986). One should be wary of its precedential value.

n39 For an example of when the Court might find the indicia of reliability lacking, see Lee v. Illinois, 106 S. Ct. 2056 (1986). Even though a co-conspirator's confession that implicated Lee fell within the declarations against interest exception, the Court found that the confession possessed insufficient indicia of reliability because it was made while the co-conspirator was in custody and therefore had a motivation to fabricate in order to curry favor with the police. Id. at 2063-66.

n40 See Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1125, 1143-50 (E.D. Pa. 1980) (stating that in examining a public report in the nature of an expert opinion, the court must determine the relevancy of the report by considering such factors as the agency's expertise, the factual basis of the report, and whether those facts are of a type reasonably relied upon by experts in the field).
I. INTRODUCTION

Technical witnesses have revolutionized the American lawsuit. Advertisements in litigation periodicals bear witness to the broad range of courtroom expert testimony available to the trial bar. A specialist in airplane pilot error places an advertisement on the same page with an advertiser who is "eminently qualified to provide expert testimony in churning securities litigation." n1 Also included are obscenity experts for criminal cases as well as a timber products specialist with "global experience in accidents and related cases," who claims, "more than 30 years experience with wood utility poles." n2 Within the category of timber and woods there are other experts as well. A national directory exists for locating experts whose specialties are "accidents and injuries caused by trees." n3

The offerings of available technical services of course include traditional specialties. Experts in document and handwriting analyses may be found along with a plethora of physicians. Some doctors have entered the courtroom expert market with enthusiasm. One recent advertisement promoting "Heavyweight Malpractice Experts."
The expanding array of scientific (as well as some not-so-scientific) specialties available as sources for testimony raises hard questions. Will courts require that the witness' opinions be reasonably based upon trustworthy data? How far must judges inquire into the practice of other experts in the same field prior to allowing the trial witness to proffer an expert opinion? How much of the expert's supporting data will be received in evidence? This Essay addresses these and other important questions affecting the scope of modern expert testimony.

II. THE BASES FOR EXPERT OPINION

The federal jury or bench trial usually is marked by the appearance of at least a few, if not several, expert witnesses. What these experts have to say may be based on material that is far different than it would have been fifteen or twenty years ago. With the advent of Federal Evidence Rule 703, the expert can form his opinion from many different reports and documents that formerly would have made the opinion inadmissible. Thus, objections such as "Objection, she is basing her expert opinion on out-of-court hearsay" are no longer automatically sustained.

The litmus test for admission or exclusion of an expert's opinion based upon reports of others is the reasonableness of the testifying expert's reliance on such reports. If the underlying facts or data that helped the expert reach conclusions are of a type on which other experts in the field customarily rely, most courts will permit the expert to testify. Accordingly, a question or two along these lines to counsel's expert may be helpful, especially when the trial judge applies stringent rules of procedure: "Dr. Watson, in reaching a diagnosis regarding a patient in the day-to-day practice of orthopedic medicine, do you regularly rely on radiology reports such as those produced on the plaintiff by Medicus Radiology Clinic? Is that also the practice of other orthopedists?"

In a typical case, once the expert identifies the basis for his opinion, the expert will proceed to propound his conclusions. There will be occasions, however, when a genuine issue is raised concerning the trustworthiness of the background data relied upon by an expert. The recent federal district court decision in In re "Agent Orange" Product Liability Litigation underlined the trustworthiness question.

A. Agent Orange Litigation

Of the numerous opinions issued in mid-1985 in litigation surrounding the use of Agent Orange in Vietnam, perhaps the most important one explored the question of expert qualifications, as well as the foundation for technical opinions. This well-researched effort by Chief Judge Weinstein of the United States District Court for the Eastern District of New York decided whether Vietnam veterans and their families could maintain a suit against several chemical companies who manufactured Agent Orange for the federal government. Some litigants proceeded in a class action; others did not join in the class. The court's decision affected veterans who opted out of the class. A central issue concerned the probative worth of expert medical opinions, most notably causation opinions by a hematologist and a pathologist.

The factual setting for Agent Orange developed out of the Vietnam War. Private corporations supplied the government with Agent Orange, a herbicide containing toxic chemicals. Many veterans who were exposed to this defoliating substance, as well as several family members, sued the manufacturing companies. Seven chemical companies moved for summary judgment, asserting that plaintiffs could not identify the individual manufacturer of the Agent Orange to which a given veteran was exposed and that plaintiffs could not prove that exposure to Agent Orange caused their injuries. This latter objection led to one of the most comprehensive judicial discussions to date of modern expert opinion evidence.

It should be noted that Chief Judge Weinstein announced the expert opinion rules in the context of a summary judgment motion. The question before the Agent Orange court was whether plaintiffs had met their burden of demonstrating a genuine issue of fact. Plaintiffs had introduced expert proof in affidavit form, which concluded that
plaintiffs' current diseases and afflictions resulted from Agent Orange. Finding that the proposed expert evidence lacked a solid basis, the court held that the affidavits failed to comply with Federal Evidence Rule 703. Defendants' motion for summary judgment was granted, and the case was dismissed. The test applied by the court was whether, assuming the proposed proofs were produced at trial, the chemical companies would be entitled to a directed verdict. Because the court applied a trial-type test, the Agent Orange opinion is relevant for establishing both trial and pretrial standards applicable to expert proof. The court was convinced that there was "no doubt that a directed verdict at the close of each of plaintiffs' cases would be required." n8

Avoiding protracted and expensive trials when the end result will be a directed verdict is a sensible goal. Summary judgment is a valuable tool for eliminating these costly burdens when only speculative issues of fact exist. A decisive question that frequently arises in making this judgment is whether the plaintiff's expert has a well-founded opinion, or whether the expert's opinion is based on unsound or theoretical speculations. This issue dominates the forty-two page decision in Agent Orange. When an expert relies on hearsay information, it must at least be the type of information normally employed by other experts in the field. The Agent Orange court concluded that absent such a showing the proffered evidence failed to meet the requirements of Rule 703.

One plaintiff's doctor formed his opinion by relying on forms completed by veterans that incorporated a checklist of symptoms attributable to their exposure to Agent Orange while in Vietnam. Items like skin disorders, fatigue, memory loss, anger, and other symptoms appeared on these forms. The trial court critically reviewed the expert's reliance on the material:

Plaintiffs' checklists and "affidavits," illustrated by Appendix "A" to this opinion, submitted with Dr. Singer's affidavits are not material that experts in this field would reasonably rely upon and so must be excluded under Rule 703. . . . The court takes judicial notice -- based on hundreds of trials -- that no reputable physician relies on hearsay checklists by litigants to reach a conclusion [*581] with respect to the cause of their afflictions. n9

Another physician who supported plaintiffs' case relied "in the main on the same self-serving hearsay used by Dr. Singer." n10 The court was similarly critical of that physician's testimony: "Plaintiffs have submitted no evidence that other physicians would rely upon material of this kind in reaching a medical conclusion about causation." n11

The court dismissed plaintiffs' claims after analyzing (1) epidemiological studies that showed that there is no evidence that paternal exposure to Agent Orange causes birth defects, (2) an Air Force survey that concluded that there is insufficient evidence to support a cause and effect relationship between herbicide exposure and adverse health, and (3) an Australian report finding no statistically significant difference in death rates from cancer among veterans and nonveterans. n12 Central to the perceived inadequacy of the lawsuit was the litigants' inability to eliminate other possible causes of plaintiffs' illnesses. n13 The court observed that many health complaints registered in the case were "frequently identified with Vietnam stress syndrome due to battle and other military stresses." n14 The court further found that "[w]hile many plaintiffs have become bald since leaving Vietnam, baldness is often a natural part of aging." n15 The court thus concluded that the fatal flaws in plaintiffs' action were unconvincing proof of causation and inappropriate expert reliance on hearsay.

B. Testing Expert Proof

Whether one agrees or disagrees with Judge Weinstein's resolution of summary judgment under the facts in Agent Orange, there should be little dissension regarding his suggested mechanics for testing expert opinion. The apparatus the opinion provides for accomplishing this task is sound and provides valuable guidance when the issue is hotly contested. The legal analysis contained in the decision begins with the proposition that the Federal Rules of [*582] Evidence require trial judges to "make a preliminary inquiry into the admissibility of expert testimony." n16 The opinion provides: "The court must first determine whether the expert is sufficiently qualified in his or her field to be allowed to testify. The court must also determine whether the proffered evidence would be helpful to the trier of fact, although doubts should be resolved in favor of admissibility." n17 In Agent Orange the credentials of the two major
medical witnesses satisfied these requirements of expert witness qualification. Furthermore, under the helpfulness standard of Federal Evidence Rule 702, the scientific techniques used by these experts should have been considered acceptable.

Nevertheless, qualifying as an expert in a relevant field, providing testimony that meets the helpfulness standard, and using an acceptable analytical technique are factors that do not always guarantee admissibility under the Federal Rules of Evidence. Rule 703 imposes an additional test for admissibility. The trial court must decide whether the data used by the expert to prepare his or her opinion in the litigated case is of a type reasonably and customarily relied upon by other experts in the field. Some appellate courts go further and impose a requirement that the trial judge separately determine the trustworthiness of the particular data underlying the expert’s opinion.

Agent Orange follows the latter view:

[T]he court may not abdicate its independent responsibilities to decide if the bases meet minimum standards of reliability as a condition of admissibility. If the underlying data are so lacking in probative force and reliability that no reasonable expert could base an opinion on them, an opinion which rests entirely upon them must be excluded.

Finding the underlying data faulty, the Agent Orange court excluded the expert opinions.

Because of the disposition in Agent Orange, an important expert witness issue was never reached: the role of supporting data once an expert’s opinion is deemed admissible. For example, after an expert testifies in a jury trial, does the background data from which he derived his conclusions become admissible evidence on behalf of the proponent of the expert witness? Because this issue has practical impact in cases that do proceed to trial, it requires discussion here.

C. Challenging the Admission of Supporting Data

An apt analogy exists between practice under Federal Evidence Rules 703 and 612. Rule 612 controls procedure when a witness refreshes his memory from a writing prepared by himself or another. Support a witness has a failure of memory during direct examination. When the witness accomplishes the refreshing process on the witness stand in front of a jury, there is consensus that the underlying document does not come into evidence merely because it refreshed recollection. Introduction options belong to the cross-examiner, not to the proponent of a witness who needed to look at a document in order to provide direct testimony.

Similarly, an expert whose opinion required extrinsic data may identify and briefly describe the supporting out-of-court document that gave rise to his conclusions. To go further and allow the admission of an unauthenticated writing into evidence or to permit the testifying expert to quote extensively from that writing violates accepted hearsay norms. Furthermore, in a criminal case, when a prosecutor directs an expert called by the state to read from an underlying report prepared by another person, the defendant’s constitutional right to confront the adverse witness is abridged. That the trial witness relied on the extrinsic report makes little difference. The outside report remains hearsay and is not admissible in evidence unless the proponent lays a proper foundation. While hearsay and confrontation concerns would seem minimal when an expert simply identifies a background document as a basis for his opinion, reporting fully to the jury from the conclusions of nontestifying experts is improper.

Courts have not always appreciated the fine but important distinction between allowing an extra-record report to form a basis for courtroom opinion and permitting the whole of the report to come into evidence. On the other hand, many courts have understood the vice of free introduction of underlying data. Of course, most experts will not rely exclusively on reports of others but will have first-hand contact with the subject. A doctor, for example, usually will have examined the patient. There will be, however, many instances when the physician augments his own examination with the lab studies or reports of other doctors. With technical subjects, such as chemistry, physics, or engineering, a highly qualified expert may develop his opinions from primary records generated exclusively by other professionals. While some of these underlying records will have been offered and received into evidence by the time...
the expert testifies, others will not. In selected cases, counsel may not have formally introduced any of the supporting data, especially when that data comes from offices in distant parts of the country. In these circumstances the question that arises is whether the lawyer who calls an expert is entitled to read the underlying records into evidence.

As has been explained, strict principles of expert, hearsay, and confrontation law require that the answer to the above question be an emphatic no. n27 While underlying records might qualify as admissible business records, virtually every formulation of the business records exception requires an authenticating witness from the office that generated the record. A records custodian knows the regularity of the entries contained in the offered record, the timeliness of the entries, and the type of knowledge possessed by individuals participating in the recordmaking process. n28

This Essay is not intended to suggest that experts should be denied the use of unadmitted hearsay to form and propound expert opinions. Rather, the analysis speaks to the impropriety of receiving in wholesale fashion the unauthenticated background data as an exhibit on behalf of the party that offered the expert's courtroom opinion. Once the expert identifies the sources for his conclusions during direct examination, the reference to outside material is complete. Furthermore, in criminal cases, permitting the expert to go beyond this point and recite extensively from another person's report significantly damages the confrontation clause of the Constitution. This back door introduction of the contents of a nontestifying expert's report, without producing the author of the material, impinges on the criminal defendant's sixth amendment rights.

To protect against litigation based on unsworn allegations contained in the report of a nontestifying expert, it may be time to [∗586] consider careful revision of Federal Evidence Rule 703. Such revision would lend predictability to expert witness practice and settle the question whether Rule 703 creates a giant exception to the hearsay rule for otherwise inadmissible hearsay reports and opinions. n29

III. SUMMARIZING THE JUDICIAL ROLE

It is perhaps valuable at this juncture to identify in systematic fashion some of the prominent steps involved in the admission of expert testimony. The decisions and inquiries that frequently mark this process are set forth below.

The court first must determine whether the expert is sufficiently qualified to testify. n30 Rule 702 provides a liberal standard that allows an expert to be qualified by academic training or life experiences. Notable examples in the latter category include allowing a long-time farmer to provide an opinion about a probable corn yield n31 or permitting a witness who has been an equipment service manager for three years to testify whether a front-end loader is defective. n32 When qualifications are lacking, the court will exclude the opinion testimony. n33

The court also must determine whether the proffered evidence would be helpful to the trier of fact. n34 One commentator writes that "a Ph.D. can be found to swear to almost any 'expert' proposition, no matter how false or foolish." n35 Before deferring to the expert, the court should ascertain that the expert's field of specialty, as well as the area of his expected testimony, will assist the trier of fact. With the large number of expert specialties available for courtroom testimony, n36 there may be topics upon which the jury does not need the aid of an expert. n37

When the expert relies on unadmitted data, the trial court must decide whether this data is of a type reasonably relied on by experts in the field. The proper foundation for expert opinion requires that the testifying expert affirm that the regularly relies on nonrecord matter of the kind involved in the litigated case. n38 After [∗588] the specialist states that he considered such material in forming his opinion, he should identify whether his professional judgments are based in whole or in part on this information. n39 Thereafter, the proponent must establish that other, similar experts place reasonable and customary reliance on the kind of material upon which the expert relied. n40 Finally, several courts impose a requirement that the trial judge make an independent assessment of the underlying data.

Numerous cases in addition to Agent Orange endorse this last requirement -- a special assessment of trustworthiness. In Barrel of Fun, Inc. v. State Farm Fire & Casualty Co., n41 for example, expert testimony was
based on a psychological stress evaluation (PSE). By measuring stress in a person's voice, this evaluation purportedly indicates whether the individual is lying. The Fifth Circuit held "that PSE evidence, whether in the form of raw data or expert opinion interpreting or extrapolating upon that data, is inherently suspect." n42 In deciding whether to permit expert opinion, the court held that "the trustworthiness of the underlying data is not irrelevant." n43 Similarly, in rejecting the testimony of a consulting engineer, the Colorado Supreme Court ruled that while the basis of expert testimony need not be admissible in evidence, the facts that are contrary to the undisputed evidence in the case cannot be reasonably relied on by experts. n44

Unfortunately, this sort of testing of underlying data is not universal. In Indian Coffee Corp. v. Proctor & Gamble Co., n45 the Third Circuit clearly emphasized the standard of reliance by experts in the field rather than the trial court's judgment of the trustworthiness of the underlying materials. n46 In another jurisdiction, ["589] a state supreme court announced a rule of judicial notice that physicians customarily rely on records prepared by other doctors in forming opinions about a patient's medical condition. n47 A dissenting justice expressed concern about the generalized extension of judicial notice and spoke of the need for trial courts to make particularized factual determinations:

I do not doubt that medical doctors often rely upon medical records prepared by other persons in forming their own opinions or drawing some kinds of inferences. I am unwilling to stretch that general observation into a judicially noticed fact that would satisfy rule 703 whenever a medical doctor wishes to give opinion testimony based in part on another doctor's medical records, regardless of the type of record, type of medical specialty, and type of opinion or inference to be drawn. The admissibility of opinion testimony based on hearsay should depend on the circumstances of each specific case, not on judicial notice of what doctors routinely rely upon in general. n48

Judge Weinstein apparently agrees with this justice's emphasis upon factual determinations by trial judges. In his Agent Orange opinion, Judge Weinstein observed:

[C]areful scrutiny of proposed evidence is especially appropriate in the toxic tort area. The uncertainty of the evidence in such cases, dependent as it is upon speculative scientific hypotheses and epidemiological studies, creates a special need for robust screening of experts and gatekeeping under Rules 403 and 703 by the court. n49

Is the expert's testimony, in whole or in part, unduly prejudicial or misleading? Is the testimony in proper form? Once other tests are met, the court still must exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or misleading the jury, or if admission would cause unnecessary delays. n50 It is important to note that expert opinion evidence complying with Rule 703 can still pose confusion and prejudice problems under Rule 403. n51 Moreover, the expert's testimony must comply with additional norms, including the following: an expert usually is not allowed to testify about conclusions of law or legal criteria necessary for the establishment of liability, n52 causation questions put to experts must be properly phrased, n53 and evidence of causation must be sufficient to satisfy legal standards. n54

Appropriate limits should be placed on the use of underlying data at trial. Underlying data may be identified as a basis for an expert's opinion, but it should not automatically become affirmative evidence on behalf of the proponent of the witness. Of course, when the background information meets the requirements of other rules, it may be independently admissible. n55

IV. CLOSING THE CIRCLE: CROSS-EXAMINATION WHEN THE BASIS FOR EXPERT OPINION IS LACKING

This Essay has concentrated on several of the primary problems in expert witness examination, including the court's role in testing whether underlying data was reasonably relied on by an expert, as well as the need to confine that data to its proper role. Completeness requires a brief look at a related concern. What if the expert presents an opinion and then cannot recall the supporting data from which that opinion was derived? What if the expert recalls the data, but refuses to reveal it?
Legal policy allows an opposing party to force full disclosure of an expert’s underlying facts on cross-examination. Thus, when a direct examiner chooses, as is his option, to produce an expert’s opinion without a full explanation of all of the tests and findings that went into forming the expert’s conclusions, the cross-examiner can force the expert to reveal the underlying data. What if the examiner is denied cross-examination rights because of an unwilling or forgetful expert? Will the court impose sanctions?

Although at first blush this hypothetical may seem remote and far-fetched, a 1985 opinion by the United States Supreme Court reviewed such a situation. In Delaware v. Fensterer, an expert for the prosecution could not recall why he reached a particular conclusion. Although the Delaware Supreme Court felt that the defense counsel’s cross-examination of the agent was an exercise in futility, the United States Supreme Court upheld the prosecution. The Supreme Court held that no confrontation violation occurred because it found no court-imposed restriction on the scope of cross-examination. The Court noted: "In this case, defense counsel’s cross-examination of Agent Robillard demonstrated to the jury that Robillard could not even recall the theory on which his opinion was based." Apparently, the Court concluded that the opportunity to discredit expert witness testimony is sufficient to satisfy the requirements of the confrontation clause.

The Fensterer decision, however, does not foreclose a different result in cases in which a witness’ lapse of memory totally frustrates any opportunity for cross-examination. Neither does the opinion dictate a submissive approach by the court when a witness who is well acquainted with the basis for his opinion stubbornly and contumaciously refuses to disclose it. Finally, statutory formulae that inappropriately emasculate the right of cross-examination will not be tolerated.

V. CONCLUSION

One of the great contributions of the Federal Rules of Evidence was the modernization of expert witness practice. Rule 703 broadened the bases for expert opinions by aligning courtroom procedures with the day-to-day approach of technicians, doctors, and other specialists. Under the Federal Rules, experts now can supply forensic opinions based on data made known to the expert outside of court, even though some of that data might not be admissible in evidence. Rule 703 thus sweeps away archaic restrictions and allows a testifying expert to state opinions based on nonrecord information.

Nevertheless, just as the foregoing proposition has become firmly established in the cases, new problems have arisen with which courts are beginning to cope. Some recent decisions have announced special rules for testing the reliability of information upon which expert opinions are based. Another issue that courts increasingly confront is the proper role of the expert’s underlying data. This Essay has argued that the wholesale introduction of this data into evidence is totally inappropriate. Furthermore, in criminal cases the exclusion of this data is mandated by the confrontation clause of the United States Constitution. Still, few commentators have addressed this vital constitutional issue. As one court characterized the issue, a predominant question today is not what data an expert may rely on, but what data the expert may put into evidence. Modern expert witness rules do not grant a license for testifying technicians freely to tell juries what other nontestifying experts concluded about the case. Rule 703 must never become the back door exception to the hearsay rule because the sixth amendment entitles a defendant to confront his accusers.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsOpt-Out ProvisionsCriminal Law & ProcedureTrialsExamination of WitnessesCross-ExaminationEvidenceTestimonyExpertsGeneral Overview

FOOTNOTES:
n1 21 TRIAL, Dec. 1985, at 103; see also 90 CASE & COMMENT, Jan.-Feb. 1985, at 60-63.

n2 21 TRIAL, Sept. 1985, at 91.

n3 Id. (referring to the MEMBERSHIP DIRECTORY OF AMERICAN SOCIETY OF CONSULTING ARBORISTS IN U.S. AND CANADA).

n4 21 TRIAL, supra note 1, at 96. The ad continues, “Two of our recent cases settled for $ 1.45 million and $ 990,000.00!” Id.

Expert witness networks of various kinds have developed. For example, the Technical Advisory Service for Attorneys (“TASA”) provides a central source of experts, and claims that “TASA’s computer contains 8,000 experts in 3,000 categories.” There also are printed directories of technicians and experts. See, e.g., DIRECTORY OF EXPERT WITNESSES IN TECHNOLOGY (1985), reviewed in 71 A.B.A. J. 74 (1985).

n5 Honoring such an objection may result in reversible error. See, e.g., State v. Henze, 356 N.W.2d 538 (Iowa 1984). The prosecution in Henze sought to show that defendant was intoxicated at the time of his arrest. A doctor who had examined defendant shortly after his arrest also reviewed defendant’s medical records, which had been prepared by other doctors. Relying partly on his own observations of defendant on the night of the arrest and partly on his later review of defendant’s medical records, the testifying doctor was prepared to state that defendant’s behavior did not require a conclusion that he was intoxicated. The trial judge sustained a hearsay objection that targeted the underlying medical records as an improper basis for testimony. Applying a state rule modeled after Federal Evidence Rule 703, the state supreme court reversed. The court stated:

We may and do hereby judicially notice the fact that doctors customarily rely on medical records prepared by other doctors in forming opinions about their patients’ conditions.

We conclude, therefore, that Dr. Berstler’s proffered testimony was admissible under rule 703 and the hearsay objection was not tenable. The trial court erred in excluding the testimony on hearsay grounds. Id. at 540 (footnote and citations omitted).


n7 Id. at 1229. Other grounds for dismissal also were alleged.

n8 Id. at 1260.

n9 Id. at 1246.

n10 Id. at 1247.

n11 Id. at 1248.

n12 The court also cited other reports. “[A]ll reliable studies of the effect of Agent Orange on members of
the class so far published provide no support for plaintiffs' claims of causation." *Id. at 1231*.

n13 *Id. at 1250.*

n14 *Id.*

n15 *Id. at 1251.*

n16 *Id. at 1239* ("In determining whether an expert opinion is sufficient to withstand a summary judgment motion, courts undertake a detailed inquiry into the admissibility of the proffered testimony."). Many summary judgment cases have examined expert testimony. See, e.g., *American Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569 (11th Cir. 1985); *Bieghler v. Kleppe*, 633 F.2d 531 (9th Cir. 1980).


n18 The test set out in Rule 702 is whether the testimony will assist the trier of fact. See *FED. R. EVID.* 702.

n19 In short, complying with *Federal Evidence Rule 702*.

n20 *FED. R. EVID.* 703. The courtroom foundation for expert opinion based in whole or in part on out of court hearsay frequently includes preliminary questions concerning the specialist's own reliance on the unadmitted data, as well as the practice of other experts in the field. R. CARLSON, SUCCESSFUL TECHNIQUES FOR CIVIL TRIALS § 4:20, at 219 (1983).

In Agent Orange the court found it significant that none of plaintiffs' experts asserted that they normally relied on hearsay checklists like those offered at trial to diagnose a patient. What the court termed the "bald assertion of plaintiffs' counsel that Dr. Singer's affidavit was 'based upon the kind of information which any treating or examining physician would require in rendering an opinion'" did not suffice in the court's view. "Instead, courts look to evidence from experts in the field about the reliability of the materials in question as well as their own experience and common sense." 611 F. Supp. at 1246 (citation omitted); see also Carlson, Collision Course in Expert Testimony: Limitations on Affirmative Introduction of Underlying Data, *36 U. Fla. L. Rev.* 234, 241 (1984) ("If the judge decides that the data is not reasonably relied upon, he may bar the expert's opinion altogether, bar it to the extent it relies on impermissible data, or only bar references to the impermissible data.").

n21 611 F. Supp. at 1244 (citing Carlson, Collision Course in Expert Testimony, supra note 20, at 240-41 & n.26). The Agent Orange court adverts to a liberal view, wherein experts are allowed to base opinions on
material relied upon by other experts in the field without separately determining the trustworthiness of the underlying data. Id. In support of this view, the court cited the Third Circuit’s decision in In re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983), cert. granted, 105 S. Ct. 1863 (1985). See 611 F. Supp. at 1244. For an enlarge discussion of this issue, see infra notes 41-49 and accompanying text.

n22 Id. at 1245 (citations omitted).

n23 Perhaps a description by the witness of the general subjects discussed in underlying reports would be unassailable as well. Beyond that, introduction of a copy of the report or recitation of its contents, including conclusions, raises profound hearsay and confrontation objections.


n27 See, e.g., Commonwealth v. Kendall, 9 Mass. App. Ct. 152, 399 N.E.2d 1115 (1980) (holding that in the guise of giving the reasons for his opinion the expert cannot testify to matters that are not admissible under a recognized hearsay rule exception).

n28 Evidence presented by a witness who receives a report or letter generally is insufficient to establish the document as a business record of the recipient. See, e.g., State v. Wright, 367 N.W.2d 269 (Iowa 1985).

n29 This unsettled issue has been referred to in commentaries. See, e.g., 83 FED. R. EVID. NEWS 78 (1983); 78 FED. R. EVID NEWS 118 (1978) (citing State v. Rolls, 389 A.2d 824 (Me. 1978)); see also 85 FED. R. EVID. NEWS 23 (1985).

Revision of the rules may be in the offing. The Federal Rules of Evidence will receive an official review for the first time since their adoption in 1975. An ad hoc committee of the Judicial Conference of the United States will study the rules and receive suggestions for amendments. Federal Evidence Rules Slated for First Review, 11 LITIGATION NEWS, Winter 1986, at 7. One American Bar Association committee already has considered many of the principles advanced in the foregoing section of this Essay. The Rules of Evidence and Procedure Committee of the Section of Criminal Justice, meeting on January 4, 1986, favorably reviewed the concept of imposing appropriate safeguards on the use at trial of underlying expert data, subject to further drafting of detailed rule language.
One productive idea might be to add a new section (b) to Rule 703 incorporating the following concept:

In criminal cases, and generally in civil cases, underlying expert data must be independently admissible in order to be received in evidence. An expert's reliance on unadmitted data does not mandate introduction of the data, where the sole reason for introduction is that it formed a basis for the expert's opinion. When good cause is shown in civil cases and the underlying information is particularly trustworthy, the court may admit the data under this rule to illustrate the basis for the expert's opinion.

Under the proposed revision, part (a) of Rule 703 would retain the present rule without change. The concept embraced in tentative subdivision (b) holds the promise of restricting use of inadmissible underlying data to its proper role, that of supporting an expert's opinion without becoming independent evidence. In particularly compelling circumstances, and especially in civil cases, judges might admit reliable background documentation. They certainly can do so when it comports with other rules of admission, including the catchall exceptions to the hearsay rule in Federal Evidence Rules 803(24) and 804(b)(5). With careful rule revision, modern expert witness practice can move forward without unduly trampling upon established hearsay doctrine or confrontation rights.

n30 Agent Orange, 611 F. Supp. at 1242.


n34 See Agent Orange, 611 F. Supp. at 1242.


n36 See the introductory remarks in this Essay for further details. In a recent interview in Litigation, attorney James F. Neal described his voir dire examination of a "self-proclaimed expert" who had "proposed to testify as an expert on everything from unsafe coffee pots to unsafe railroad cars." Schwartz, Evidence in the Pinto Case: An Interview with James F. Neal, LITIGATION, Fall 1985, at 29, 32.

n37 See Zimmer v. Miller Trucking Co., 743 F.2d 601 (8th Cir. 1984) (expert testimony that concerns subject matter within the knowledge of laymen is superfluous). For a case excluding expert testimony because psychological stress evaluation does not command sufficient scientific acceptance, see Barrel of Fun, Inc. v. State Farm Fire & Casualty Co., 739 F.2d 1028 (5th Cir. 1984) (precedents hold that polygraph evidence is likewise inadmissible).

On the other hand, courts should be alert to new areas of endeavor with potential for assisting the truth determination process. United States v. Ginsberg, 758 F.2d 823 (2d Cir. 1985) (expert on use of beepers and codes by narcotics dealers); WSM, Inc. v. Hilton, 724 F.2d 1320 (8th Cir. 1984) (expert in the field of regional English to explain origin and meaning of word "opry"); Schaffter v. Ward, 17 Ohio St. 3d 79, 477 N.E.2d 1116
(1985) (engineer should have been allowed to testify on point-of-impact in accident case; engineer's opinion could have aided jury). For a collection of cases on the admissibility of expert testimony on rape trauma syndrome as well as similar syndromes affecting battered wives and children, see Annot., 42 A.L.R. 4th 879 (1985) (cases on both sides). Another 1985 annotation collects decisions concerning when expert testimony will assist the trier of fact so as to be admissible under Federal Evidence Rule 702. Annot., 75 A.L.R. FED. 462 (1985).

n38 The foundation for expert opinion sometimes is flawed by a failure to include evidence of personal reliance. One court noted that an expert economist did not state that he normally would base his opinion on the type of information submitted to him. American Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1580 (11th Cir. 1985); see also State v. Rolls, 389 A.2d 824, 824 (Me. 1978) (experts must rely on data for "purposes other than testifying in a lawsuit").


n40 See Carlson, supra note 20, at 240-41.

n41 739 F.2d 1028 (5th Cir. 1984).

n42 Id. at 1033.

n43 Id. at 1033 (quoting Emerging Problems Under the Federal Rules of Evidence, 1983 A.B.A. SEC. LIT. 208). Without changing its position regarding the inadmissibility of the "raw data," the court suggested that an expert's opinion might be proper when based only partly on a PSE test. Id. at 1034. The court, however, rejected the opinion testimony because it found the opinion to be based exclusively on PSE test results. Id.


n46 See also In re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983), cert. granted, 105 S. Ct. 1863 (1985). The petition for Supreme Court review in this case raised the question whether a federal trial judge is powerless to exclude expert testimony that is "based upon false or unsupported factual assumptions" simply because other experts in the field may rely on similar types of information. 54 U.S.L.W. 3045 (U.S. Aug. 6, 1985) (No. 83-2004). Certiorari was granted on other questions. 105 S. Ct. 1863 (1985).


n48 Id. at 541 (Wolle, J., dissenting).
n49 611 F. Supp. at 1260. At another point, the court noted that the assumptions that form the basis for the expert's opinion should be subjected to "rigorous examination" in the mass toxic tort context. Id. at 1244. Judge Weinstein added, "[T]he court may not abdicate its independent responsibilities to decide if the bases meet minimum standards of reliability as a condition of admissibility." Id. at 1245; see also id. at 1239.

n50 FED. R. EVID. 403.

n51 See 85 FED. R. EVID. NEWS 103 (1985) (citing United States v. Rouco, 765 F.2d 983 (11th Cir. 1985)); see also United States v. Daly, 756 F.2d 1076 (5th Cir. 1985); Barrel of Fun, Inc. v. State Farm Fire & Casualty Co., 739 F.2d 1028, 1033 (5th Cir. 1984); In re Agent Orange Prod. Liab. Litig., 611 F. Supp. 1223, 1255 (E.D.N.Y. 1985).

n52 See, e.g., Miller v. Bonar, 337 N.W.2d 523, 529 (Iowa 1983) (testimony to a legal conclusion on domestic law not allowed; upon redirect examination, state trooper testified that driver was in violation of state code). Professor Rossi notes that inroads have been made in this rule in certain areas of litigation, citing securities and tax matters, among others. Rossi, supra note 25, at 24.

n53 See, e.g., State v. Burke, 368 N.W.2d 182, 186 (Iowa 1985) ("[W]hen expert testimony indicating a possibility of causation of a particular condition by a particular circumstance is coupled with nonexpert testimony to the effect that the condition did not exist before the occurrence of the circumstance that allegedly caused it, then a jury question as to causation is generated."). See generally R. CARLSON, supra note 20, § 4:26, at 230-31. (questioning experts on medical causation).


n55 For an example of a doctor's testimony predicated upon patient's statements, see O'Gee v. Dobbs Houses, Inc., 570 F.2d 1084 (2d Cir. 1978). See also FED. R. EVID. 803(4).

n56 FED. R. EVID. 705. A deviation from the text pattern may occur at the summary judgment stage. In making the decision whether a material issue of fact exists, the court may need to know the basis for the expert's opinion. Further, the civil procedure rule controlling summary judgments requires specific facts. See FED. R. CIV. P. 56; Evers v. General Motors Corp., 770 F.2d 984 (11th Cir. 1985). But see Bulthuis v. Rexall Corp., No.84-6090 (9th Cir. 1985) (holding that an expert opinion which is not supported by a description of underlying facts may be admissible and may defeat summary judgment if the affiant appears competent to give an expert opinion on the subject).

n57 FED. R. EVID. 705. Sometimes this data may consist of a report or other document. When the expert's reliance on the document is shown, and "the witness is properly cross-examined, the reference to the report is for impeachment purposes, not substantive evidence." Carlson, supra note 20, at 246 n.50.

n59 Id. at 293.

n60 Id. at 295.


n62 See C. McCormick supra note 25, at 48-49 (cross-examiner may have the direct examination testimony stricken from the record).

n63 See Davis v. Alaska, 415 U.S. 308 (1974); see also M. Ladd & R. Carlson, Cases and Materials on Evidence 129 (1972) (appellate court reversal when "trial judge improperly cuts off cross-examination"). In United States v. Jones, 766 F.2d 412 (9th Cir. 1985), the court ruled that the confrontation clause protects the right of a defendant to cross-examine witnesses for bias and that a judge's refusal to permit cross-examination may require reversal. This decision reviews the law regarding rebuffed homosexual advances, an area of cross-examination allowed in a number of courts.


n65 Fortunately, courts have addressed this constitutional issue. See State v. Towne, 142 Vt. 241, 453 A.2d 1133 (1982) (that forensic psychiatrists reinforced his opinion through consultation with another specialist did not authorize psychiatrist to relay conclusions of a witness never brought to court).

n66 See id. at 246, 453 A.2d at 1135.
U.S. Constitution. Amendment VI

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

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when part of an expert’s basis is testimonial. A psychiatrist’s opinion about sanity could depend in part on statements made by people to the police about the defendant’s behavior, or, in a criminal case arising from a vehicular accident, an accident reconstruction expert might base his opinion partly on affidavits made by witnesses to the authorities. The situation is similar when a gang expert relies on statements made by suspects under interrogation, or when one forensic scientist relies on the laboratory results of another, or when a medical or forensic report written by someone other than the testifying witness is introduced into evidence, or when, pursuant to statute, expert information (such as a breathalyzer test or an analysis of the composition of a drug) is introduced without any witness at all. In such cases, the Confrontation Clause could bar disclosure of this evidence.

In the two years since Crawford was decided, many state and federal courts have confronted cases involving expert reliance upon and disclosure of matters that are at least arguably testimonial. Some courts have concluded, sometimes reluctantly, that the prosecution’s expert may not disclose the basis for his testimony, because the basis is testimonial under Crawford. Yet, the majority of courts have managed to find that the Confrontation Clause does not bar such disclosure. A close look at the arguments presented by the courts who dismiss such evidence non-testimonial or otherwise find Crawford inapplicable shows them to be generally unpersuasive, sometimes even disingenuous. Even if reliance on testimonial evidence by experts continues to be permissible under Crawford, it is difficult to justify disclosure of this testimonial basis to the factfinder. The main arguments proffered by those courts that have found the disclosure of expert basis evidence or documentary evidence prepared by experts permissible notwithstanding Crawford are analyzed below.

§3.10.1 Not for the Truth of the Cazzions

Even after Crawford, a number of courts continue to argue that when experts disclose the basis for their opinion to the jury, the information comes in not for the truth of its contents, but merely to help the jury assess the basis for the expert’s opinion. If the basis comes in for some purpose other than the truth of its contents, then it is not hearsay at all. And if it is not hearsay, then it cannot be testimonial hearsay, and hence, Crawford does not apply. The first case to give careful attention to Rule 703 disclosure issues under Crawford made precisely this argument. In United States v. Steel, a federal district court admitted the expert testimony of an IRS agent in a criminal tax fraud case even though this testimony was based partly on statements made by company employees to a criminal tax investigator. The district court found that it was not clear from the record whether the defendant had an opportunity at the time these statements were made to cross-examine the declarants, nor was there evidence as to whether the declarants were present or unavailable to testify. Nonetheless, the court found no Confrontation Clause problem:
§3.10.1 Expert Evidence

Even if the particular Bemis Manufacturing employees are not "unavailable" and even if the statements they gave to IRS criminal investigator Bohanan during the interviews Ms. Canelo attended are "testimonial" as contemplated by the Court in Crawford, the statements may nevertheless be used by Ms. Canelo in forming her expert opinions because they would not be used to establish the truth of the matters the employees asserted. Rather, if defense counsel were to elicit the statements from Ms. Canelo on cross-examination, the purpose of the out-of-court statements would not be for hearsay purposes but rather would be for evaluating the merit of the opinions Ms. Canelo offered on direct examination. Because Crawford explicitly maintained the Confrontation Clause's inapplicability to statements used at trial for purposes other than establishing the truth of the matters asserted, Ms. Canelo could rely on the employees' statements in forming her opinions.15

Putting aside Stone's ambiguous reference to eliciting this information on cross-examination, a topic to which we will return below,16 let us assume that it was the prosecutor who inquired into the basis for the expert's testimony. The court's reasoning would still imply that the Confrontation Clause is inapposite: if the basis evidence is not offered to prove the truth of the matter asserted, the information is not hearsay, and there can therefore be no Confrontation Clause concern.

This argument is very weak. To use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true. If the jury believes that the basis evidence is true, it will likely also believe that the expert's reliance is justified so as to satisfy, if the jury doubts the accuracy or validity of the basis evidence, that presumably increases skepticism about the expert's conclusions.17 The factually implausible, formular claim that experts' basis testimony is being introduced only to help in the evaluation of the expert's conclusions but not for its truth ought not permit an end-run around a constitutional prohibition.

Prior to Crawford, many courts did argue that disclosure of basis evidence was not hearsay because it was offered for a purpose other than the truth of its contents. As several scholars have shown, this claim could not withstand careful scrutiny. But prior to Crawford, the key question both for analyzing hearsay that did not fit into any exception and for analyzing the Confrontation Clause was reliability. Given that the justification for reliance under Rule 703 was also reliability, disclosure of expert basis evidence that did not squarely fit into a hearsay exception was therefore not terribly troubling, so long as we had reasonable confidence in its reliability. Limiting the extent to which defense attorneys might use expert testimony as a back-door conduit to hearsay by insisting that disclosure was for only the limited purpose of helping the jury assess the expert's testimony (and thus preventing reliance on this evidence for the truth of its contents in closing arguments) was, perhaps, a practical compromise even if the argument was strained. But because Crawford no longer uses reliability as a touchstone, the implicit justification for an approach that was never entirely coherent falls apart. Such a blatant legal fiction ought not to permit an end-run around a constitutional mandate.

40
Chapter 5. The Bases for Expert Testimony

§ 10.1

The fictitious nature of the argument rises to the surface in cases like State v. Jones,24 in which a forensic chemist testified in court that a substance found in the defendant’s possession was cocaine.25 The basis for her conclusion was laboratory analysis by another agent who did not testify. The testifying witness detailed the testing methodology used by the non-testifying expert and explained that she reasonably relied on this test in concluding that the substance was cocaine. The laboratory analysis conducted by the other agent was also admitted by the trial court into evidence. Over the defendant’s objection that this violated the Confrontation Clause, the state appellate court in an unpublished opinion held that Crawford did not apply because the laboratory analysis was only “admitted to demonstrate the basis of the expert opinion . . . [and] not admitted, for the purpose of proving the truth of the matter asserted.”26

This is surely nonsense. The testimony was, in essence, “this laboratory report reliably informs me that the substance is cocaine, and therefore I inform you that it is cocaine.” In fact, the report and the accompanying notes were the testifying witness’s only basis for judging the substance to be cocaine. The expert’s judgment that the substance was cocaine can be accurate only if the report by the other non-testifying agent determining the substance to be cocaine is itself accurate. One can sympathize with a court’s desire to permit the disclosure of basis evidence that is quite probably reliable, such as a routine analysis of drug composition. But to pretend that it is not being introduced for the truth of its contents strikes all credibility.27

The New York Court of Appeals in the first case explicitly to reject the argument that expert basis testimony can be disclosed notwithstanding Crawford because it is being used for a non-hearsay purpose. In People v. Goldstein,28 the court stated:

The claim that the statements made to Hagerty, the expert, were not hearsay is based on the theory that they were not offered to prove the truth of what the interviewee said . . . . Here, according to the People, the interviewee’s statements were not evidence in themselves, but were admitted only to help the jury in evaluating Hagerty’s opinion, and thus were not offered to establish their truth.

We find the distinction the People make unconvincing. We do not see how the jury could use the statements of the interviewee to evaluate Hagerty’s opinion without accepting as a premise either that the statement were true or that they were false. Since the prosecution’s goal was to introduce Hagerty’s opinion, the prosecution obviously wanted and expected the jury to take the statements as true, Hagerty herself stated her purpose in obtaining the statements was “to get to the truth.” The distinction between a statement offered for its truth and a statement offered to shed light on an expert’s opinion is not meaningful in this context.29

Goldstein is correct. When the details of statements upon which experts have relied are disclosed to the jury, the point of the disclosure is indeed to help the jury evaluate the expert opinion— but this purpose is neither separate nor separable from an evaluation of the truth of the statement’s contents. While reasonable reliance by an expert on testimonial hearsay may be outside the scope of the Confrontation Clause’s
§3.10.1 Expert Evidence

Without disclosure of this basis evidence ought not to be justified on the argument that it is not actually hearsay at all.

In some post-Crawford cases, courts have made a similar argument—that Crawford does not prohibit experts from referring to fairly general sources in the kind of sources on which they relied. When only the general nature of the sources is described, the argument that the information is introduced strictly to help the factfinder assess the expert's testimony is stronger. This argument, however, cannot justify a detailed recital of the substance of the testimonial evidence on which the expert has relied.

§3.10.2 Business Records as an Exception to Crawford

Especially in the forensic evidence context, many courts have attempted to avoid Crawford by labeling expert reports non-testimonial because they are business or public records. Crawford does not that some hearsay is not testimonial. It notes that "[m]ost of the hearsay exceptions (recognized in 1791) covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy." Certainly, a bill, a receipt, a demand letter, or other commercial writings not prepared with an eye toward criminal litigation would not be "testimonial" within the meaning of Crawford. But it is extravagant to read this dictum as creating a generalized, business-records exception to the application of Crawford.

The fact that most business and public records are not testimonial does not exempt those that are from Crawford's dicta. There is no logical basis for a per se business records exception to the reach of the Confrontation Clause.

The core idea of Crawford's that when the state procures evidence expected to be used as substantive evidence incriminating a criminal defendant, that evidence is testimonial. Forensic science laboratory reports are surely testimonial in this sense. They are made with an explicit eye toward eventual prosecution. Their purpose is to provide information that will be useful both to identify the perpetrator of a criminal act (through, for example, DNA identification, fingerprinting, or ballistic evidence), or to identify the criminality of an act (by, for example, analyzing drugs, or blood alcohol levels, or the cause of death of a victim). These tests are conducted in significant part in order to provide legal evidence in court. Forensic scientists and those requesting this service know full well that the information may be used as testimony, and this is true regardless of whether the test is performed by government employees or an independent laboratory. As one of the few courts that has correctly deemed these tests testimonial wrote, "[b]ecause the test was initiated by the prosecution and generated by the desire to discover evidence against defendants, the results were testimonial." 25

§3.10.3 Cross-Examination of the Expert as an Adequate Substitute for Cross-Examination of the Declarant

In the past, courts sometimes concluded that the opportunity to cross-examine the expert, rather than the hearsay declarant, satisfied Confrontation Clause concerns.