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Cover Story

*12 CRAWFORD v. WASHINGTON AND EXPERT TESTIMONY: LIMITING THE USE OF TESTIMONIAL HEARSAY

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In March 2004, the United States Supreme Court issued its landmark decision in Crawford v. Washington, [FN1] in which it abrogated a permissive standard of admissibility for hearsay under the Confrontation Clause established in Ohio v. Roberts. [FN2] In its last term, the Court followed Crawford with Davis v. Washington, [FN3] in which it refined its definition of what constitutes a testimonial statement applied in the context of 911 calls and statements to the police at the scene of a crime.

Yet, Crawford and Davis leave many questions unanswered. The most intriguing and complex issue involves the application of Crawford to the testimony of experts. Lower court opinions to date, in several different areas of expert testimony, have yielded conflicting decisions. There are conflicts with respect to defining testimonial hearsay as well as to the admissibility of testimonial hearsay in support of an opinion. This article will focus upon the threshold issue of Crawford, the testimonial statement, and its definition and application in the context of expert testimony. In this discussion,

cases in several areas of expert testimony in which Crawford has been applied will be examined. These include laboratory reports, medical examiner testimony and reports, mental health testimony and gang membership. [FN4]

Pre-Crawford Expert Testimony

Historically, the admission of expert testimony was governed by state law and rules of evidence. There was little consideration paid to Confrontation Clause issues so long as the defendant was afforded an opportunity to cross-examine the expert witness. Most importantly, otherwise inadmissible hearsay evidence was routinely permitted in the testimony of an expert based upon several grounds. Often such hearsay was deemed admissible because it was not being admitted for its truth, but only as a basis for the expert's opinion.

In addition, courts often admitted such testimony on the basis that it was generally reliable or trustworthy because it was of a type routinely relied upon by experts in that field. [FN5] Courts also cited or relied upon traditional, firmly-rooted hearsay exceptions to permit the introduction of hearsay through the expert witness.

Crawford and Davis

In Crawford, the Supreme Court, in an opinion by Justice Scalia, held that "[W]here testimonial evidence is at issue, [however,] the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." [FN6]

While not providing an exclusive or comprehensive definition of "testimonial," the Court identified three categories of statements that it considered part of the "core class of testimonial statements" [FN7]: (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; [FN8] (2) extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; [FN9] and (3) statements that were made under circumstances which would lead an objective witness reasonably to believe that the ***13** statement would be available for use at a later trial. [FN10]

In Davis, the Court fashioned a test which addresses the primary purpose of the interrogator rather than the declarant's understanding or purpose, as discussed in Crawford. [FN11] In certain contexts, such as a state mental health expert questioning people about the defendant, [FN12] this test has application. But in the majority of cases involving expert testimony, there is no interrogation

producing the testimonial statements. Fortunately, Justice Scalia, in the Davis opinion, took pains to remind his readers that interrogation is not the sine qua non for producing a testimonial statement. Again citing to Lord Cobham's letter to the court in the Sir Walter Raleigh trial, [FN13] Scalia writes:

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. [FN14]

It is this sort of a spontaneous or self-generated statement that lies at the heart of the most prevalent and objectionable expert testimony which utilizes testimonial statements.

Forensic Lab Reports [FN15]

In the year after Crawford was decided, commentators expressed optimism that Crawford's application to expert testimony would limit the hearsay experts so often rely upon in expressing opinions. [FN16] However, particularly in the area of forensic lab reports, courts have avoided the application of Crawford by characterizing or mischaracterizing the underlying statements as nontestimonial.

Prior to Crawford, many courts admitted lab reports, especially concerning analyses of controlled substances, through the testimony of records custodians, lab supervisors or by certification or affidavit. [FN17] Admission of such documents was frequently based on the business records or public records exceptions to the hearsay rule. [FN18] In many states, statutes or rules were promulgated to admit such reports and to excuse the live testimony of the lab analyst who authored the report (or any live witness for that matter). [FN19] Confrontation issues were rarely addressed, although at least one court recognized the constitutional implications of admitting such testimony and predicted Crawford in holding the admission of testimonial hearsay was a Sixth Amendment violation. [FN20]

Following Crawford, courts continue to admit lab reports by holding that they are nontestimonial. This finding is usually based upon the business records or public records exceptions to the hearsay

rule. [FN21] The analysis routinely makes reference to the inclusion of "business records" in the Crawford opinion's citation of classic examples of nontestimonial hearsay. [FN22]

The fallacy with this analysis is two-fold. First, it assumes that all business records are, by definition, nontestimonal. However, it is unclear that Justice Scalia necessarily intended that his reference to business records in Crawford wholly excluded them from being classified as testimonial. [FN23] Second, lower courts tend to ignore (or defy) long-held standards or conditions applicable to defining business records or public records, the application of which would unequivocally make such documents testimonial under Crawford.

Business records are defined as a memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge. The definition of business records goes on to state that the information must have been kept in the course of a regularly conducted business activity, and it must have been the regular practice of that business activity to make the memorandum, report, record or data compilation -- unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

The term "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. [FN24] One of the salient features of business records is that they are generated in a routine, neutral and unbiased manner, without considerations of liability or potential or impending legal consequence or action. Accordingly, they are inherently reliable and trustworthy. Thus, when a record is created in anticipation of litigation, it loses that inherent reliability and cannot constitute a business record admissible as an exception to the hearsay rule. [FN25] Conversely, if a hearsay statement is generated in anticipation of litigation, and specifically in support of a criminal prosecution, it is clearly a testimonial statement. [FN26] In Johnson v. State, [FN27] the Florida Second District Court of Appeals, commenting on the reference to business records in Crawford, aptly stated:

It also noted, in dicta, that certain hearsay statements are by their nature nontestimonial -- such as business records.... The problem that comes into play in a case in which an FDLE lab report is admitted as a business record is that, technically, an FDLE lab report is a record kept in the regular course of business but, by its nature, it is intended to bear witness against an accused.... Thus, despite Crawford's suggestion that all business records are nontestimonial, we hold that an FDLE lab report prepared pursuant to police investigation and admitted to establish an element of a crime is testimonial hearsay even if it is admitted as a business record.... [T]he business records exception may have been the vehicle for admitting the report, but the vehicle does not determine the nature of the out-of-court statement. The nature of the statement is one that is intended to lodge a criminal accusation against a defendant -- in other words, it is testimonial. The out-of-court statement does

not lose its testimonial nature merely because it is contained in a business record. [FN28]

The public records exception suffers from the same flaw. [FN29] Courts which have found these records to be hearsay exceptions based upon a statutory duty to report fail to address the salient issue raised in Crawford: What is the reasonable ***14** expectation of the declarant? Crawford and Davis do not address a public duty exception, because none would be applicable under an appropriate confrontation clause analysis.

Indeed, applying Davis to a simple fact pattern illustrates the point. Police officer A recounts to police officer B, a detective, his observations of a completed street corner drug purchase for which your client was arrested (and for which a police report was filed). If police officer A is unavailable at trial, could police officer B testify to what he was told by officer A, absent a prior opportunity to cross-examine officer A? Under Davis, the answer is clearly no. But in most jurisdictions, officer A would have a statutory, legal or regulatory duty to make such a report. Would this report (whether oral or written) constitute a public record, and thus be nontestimonial? Again, the answer is unequivocally no.

In some jurisdictions, the courts do not address the testimonial aspect of the underlying hearsay statements. Rather they invoke a traditional legal fiction, by defining the statements as nonhearsay because they are not being admitted for their truth. [FN30]

This position is also fallacious. In People v. Goldstein, [FN31] the New York Court of Appeals confronted this argument head on. In Goldstein, a prosecution psychiatrist interviewed several people regarding the defendant's sanity at the time of the offense. At trial, the psychiatrist testified to the contents of those interviews, without the interviewees testifying. The prosecution argued the "interviewees' statements were not evidence in themselves, but were admitted only to help the jury in evaluating [the psychiatrist's] opinion, and thus were not offered for their truth." [FN32] Rejecting this argument, the court stated:

The claim that the interviewees' statements to Hegarty [the state expert] 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...." 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." 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. [FN33]

Some courts also continue to adhere to the old principle that an expert can testify to hearsay if it is of a type routinely relied upon by experts in that field so long as the expert witness is available for cross-examination. [FN34]

Verification Procedures

In a similar fashion, prosecutors introduce testimonial hearsay to support or bolster an expert's trial testimony through the so-called "verification procedures" employed by crime labs. While this procedure may be a standard scientific practice, often necessary for lab accreditation, it should not be invoked to permit the introduction of otherwise inadmissible testimonial evidence. The testimony is usually presented in one of two ways. Either a lab analyst who actually performed the testing testifies that, per lab procedure, his analysis was "verified" by another analyst, or a lab supervisor or records custodian testifies that the original analyst's test results (and procedures employed to achieve those results) were verified by a supervisor or other analyst. [FN35] This testimony has been permitted on the basis that the other analyst's opinion "necessarily forms a part of the basis for the opinion to which the [expert] witness testified, and it was clearly reasonable for an expert in the field ... to rely upon such a procedure." [FN36]

The argument against the admission of this testimony may be drawn from the informer hearsay cases, best exemplified by Favre v. Henderson. [FN37] In Favre, a police officer testified that he arrested defendant for armed robbery as a result of information he had received from two confidential informers. He further testified that the informers were reliable and that information received from them in the past had resulted in the convictions of other people. The court held that the only logical inference from the officer's testimony was that the informers had given information to the officer which led him to believe that the defendant was guilty. The court stated that inherent in the testimony was an assertion by an out-of-court declarant as to guilt. The court concluded that the testimony, when considered in light of its logical inferences, was hearsay and that defendant had been denied his constitutional right of confrontation because the testimony "led to the clear and

logical inference that out-of-court declarants believed and said that Favre was guilty of the crime charged." [FN38]

This differs from the situation where an officer testifies that he went to a location "based upon information received." Such testimony may be susceptible to different possible inferences, and in any event, is not directly accusatory. In the case of the analyst testifying to verification, as in Favre, there is only one reasonable inference that may be drawn -- that the test results are the same. In permitting this type of testimonial hearsay, courts permit the prosecution to have two opinions admitted by a single witness, without that witness having to even testify to the contents of the other's testing.

However, more than a few courts have recognized and applied Crawford appropriately. [FN39] For example, in State v. Crager, [FN40] the defendant was convicted of aggravated murder based in part upon DNA evidence. At trial, a state crime lab analyst testified in place of the analyst who performed the original DNA testing. Over defense objection, the trial court ***15** permitted the witness to testify not only to his own technical work on the case, but also to the results of the analysis performed by the other, original DNA analyst. In a well-reasoned opinion, the Ohio Court of Appeals reversed, rejecting the state's arguments that the initial report was admissible as a business record, [FN41] and finding that the report was testimonial. [FN42] This finding was predicated upon two salient facts. "First, Duvall's [the original analyst] report was prepared as part of a police investigation, and second, a reasonable person could conclude that the report would later be available for use at a trial." [FN43] By carefully and faithfully applying the test of Crawford, the court in Crager came to a sound and correct conclusion.

Medical Examiners and Autopsy Reports

In homicide prosecutions, it is not uncommon for the prosecution to substitute as an expert at trial a medical examiner who was not the pathologist who actually performed the autopsy. In testifying to the manner and cause of death, these "substitute medical examiners" routinely rely upon the autopsy report, photographs, and other data and information obtained or created in the course of the death investigation.

The extent to which a substitute medical examiner witness should be permitted to rely upon the work of the original examiner, and to testify to it, are substantial questions under Crawford. While many of the legal issues are identical to those arising in the lab report context, the cases construing the use of autopsy reports by substitute medical examiner witnesses tend to be more complex and ambiguous.

The analysis starts, of course, with a determination of whether the original autopsy report, or some portion of it, is testimonial. There are conflicting decisions. Some courts have held that an autopsy report is nontestimonial in its entirety because it "does not fall within the categories of testimonial evidence described in Crawford. It is not prior testimony at a preliminary hearing, before a grand jury, or at a former trial. It is not a statement given in response to police interrogations." [FN44] These courts then admit testimony of the contents of the report based upon either the business records or public records exceptions to the hearsay rule. [FN45]

Other courts have taken a more analytical approach. In Rollins v. State, [FN46] the court drew a distinction between routine observations and more analytical conclusions, stating:

Under such an approach, factual, routine, descriptive, and non-analytical findings made in an autopsy report are [non-testimonial] and may be admitted without the testimony of the medical examiner. In contrast, contested opinions, speculations, and conclusions drawn from the objective findings in the report are testimonial and are subject to the Sixth Amendment right of cross-examination set forth in Crawford. Such testimonial opinions and conclusions should be redacted in the event that the medical examiner is unavailable. No denial of due process arises under this resolution because both parties are granted access to the objective findings of the autopsy report and both parties may proceed to obtain their own expert testimony, opinions, and conclusions based upon the objective findings of the medical examiner performing the autopsy. [FN47]

The Rollins court further held that the report was admissible as both a public record and a business record. [FN48] It then examined the report to determine if it was testimonial in any respect. Finding that the report as redacted [FN49] and admitted at trial contained only factual observations, the court concluded that there was no Sixth Amendment violation under Crawford.

Are these holdings consistent with the analyses set forth by the courts in Crager or Lonsby? A distinction can be made based upon the roles of the forensic criminalist employed by law enforcement and the medical examiner, whose reporting requirements under statute differ from those of law enforcement. [FN50] Nevertheless, in a situation where the manner of death is determined to be homicide, how can forensic pathologists working for state (or local) governments not reasonably contemplate that their statements made in an autopsy report will not "be available for later use at a trial"? It is this standard for determining the testimonial nature of a hearsay statement that clearly should apply. Indeed, Rollins so held, but drew a distinction grounded in practicality (the death of the original medical examiner and the consequences of that to a successful prosecution) to enable the substitute witness to utilize all of the factual reports to draw his own conclusion.

***16 Mental Health Experts**

In People v. Goldstein, [FN51] several important issues were decided by the of New York Court of Appeals. Each of these bears upon state-sponsored psychological or psychiatric testimony, and should be reviewed in every circumstance in which a mental health defense is raised at trial.

Goldstein involved a notorious defendant who was accused of throwing an unsuspecting stranger in the path of an approaching subway train. The defense was insanity, and the evidence was focused upon the testimony of the two experts, one for the defense and the other for the state. [FN52] The state's expert relied in substantial part for her opinion on six interviews she conducted with various people who had contact with the defendant over the course of several years, including the defendant's roommate. [FN53] At trial, the state's expert was permitted to testify to the contents of all of these interviews.

Reversing the conviction for second degree murder, the court held that it was a violation of the Sixth Amendment to permit the expert to testify to the hearsay statements of the interviewees. The court found the statements to be testimonial, stating:

We think the statements made to Hegarty [the state expert] 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." [FN54]

Of course, the court also dispensed with the prosecution's argument that the statements were not admitted for their truth. [FN55]

The other significant part of the court's holding was that the expert could have properly testified to the fact of the interviews, and her reliance upon them, without running afoul of Crawford "because those statements met the test of acceptance in the profession." [FN56]

Their acceptance may be controversial, and a minority view, but the court was prepared to permit the expert to rely upon them. [FN57] However, the court found a Sixth Amendment violation where the interviews elicited testimonial statements which were detailed to the jury.

This approach seems consistent with established principles governing expert testimony. Yet, it raises concerns. To what extent can a defense attorney cross-examine such a witness without opening the door to the contents of the interviews? This was the dilemma faced by counsel in a case involving the testimony of a medical examiner and his reliance upon a codefendant's confession to

find the manner of death to be homicide. [FN58] In Howard v. Walker, the manner of death was at issue. In granting habeas relief, the court held that where the trial court ruled "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." [FN59]

It is unclear to what extent a Howard-like approach to the "opening of a door" on cross-examination will be accepted or implemented by other courts. These issues require a careful and thorough analysis of the expert's potential testimony, and a cross-examination that is well thought-out to avoid traps or pitfalls that may be set by a crafty state expert or a compliant judge. In any event, the criminal defense lawyer must be prudent in objecting to an expert's use of testimonial hearsay in order to blunt the impact of the testimony.

Gang Prosecutions

In a series of cases arising primarily in California, law enforcement officers have been permitted to testify as expert witnesses opining on the involvement of defendants in gang activities in order to secure a gang-enhancement finding and sentence. [FN60] The fact patterns of these cases are similar, where the expert officer testifies to his experience, and, to support his opinion, relates conversations with gang members.

In decisions relying upon familiar legal fictions, those courts have held: (1) experts may rely upon hearsay of a type reasonably relied upon by experts in the field; [FN61] (2) the hearsay is not direct evidence but merely forms a basis for the opinion; [FN62] or (3) that it is not admitted for its truth and is therefore not hearsay. [FN63] The courts also sidestep the issue by finding that, even if the hearsay evidence obtained from other gang members is testimonial, the opinion was still valid based solely upon the expert's own non-testimonial research and experience. [FN64]

It is hard to conceive of a jury parsing out the bases for these opinions as the courts so conveniently do on appeal. If a "gang expert" testifies that defendant A is a gang member based in large part upon information he received from a former gang member (including that defendant A was at one time a member of the gang), how can the opinion stand on appeal by simply stating the opinion was valid with or without the testimonial hearsay to bolster it?

What Should a Defense Lawyer Do?

In confronting these situations, what should a defense lawyer do? First, object. Far too many

Crawford issues are waived by a failure to recognize the issue and make a timely objection. Consider in limine motions to limit the testimony. [FN65]

Investigate the availability of the original analyst. If available, consider a cross-examination and motions to blunt the "expert witness" testimony rather than allowing the actual analyst to testify. If unavailable, litigate aggressively to preclude the testimony. Do not let a custodian or supervisor act as a mere mouthpiece for hearsay, as was done in People v. Lonsby.

Where there are state statutes requiring an invocation of the presence of the analyst, attack them as unconstitutional under Crawford. [FN66] A state statute cannot excuse an otherwise available witness and not run afoul of the Sixth Amendment. If that attack is unsuccessful, invoke the right to cross-examine. If denied, there can be no question of a Sixth Amendment violation. [FN67]

Finally, argue your cases by tracking the testimonial hearsay determination language of Crawford and reasonably applying it to the facts, as was done in Crager, Goldstein and other cases. It may seem elemental, but sometimes in the most complex cases, the best approach is the simple one.

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[FN1]. 541 U.S. 36 (2004).

[FN2]. 448 U.S. 56 (1980).

[FN3]. 126 S.Ct. 2266 (2006).

[FN4]. While DUI breath test testimony generally comes within the parameters of this article, the only references thereto will be to case law applicable to the general principles discussed. There are a host of articles concerning the application of Crawford to DUI cases. See, e.g., Bruce Kapsack and Steven Oberman, DUI Practitioner's Perspective, THE CHAMPION, September/October 2004, at 25; Kimberly Overton, The Blow, 2 FOR THE RECORD 1 (May 2005) (published by the Conference of District Attorneys); L. Steven Emmert, CAV Avoids Direct Analysis of DUI Breath Test Certificate Under Crawford, VIRGINIA APPELLATE NEWS AND ANALYSIS (2006); Robert L. Farb, Chemical Analyst's Affidavit and Crawford v. Washington, (June 2006), paper for the University of North Carolina Institute of Government, available at http://iogcriminal.unc.edu/crawford.pdf.

[FN5]. See, e.g., Fed. R. Evid. 703; United States v. Floyd, 281 F.3d 1346, 1349 (11th Cir.

2002)("[H]earsay testimony by experts is permitted if it is based upon the type of evidence reasonably relied upon by experts in the particular field"); Singh v. Greiner, 2002 WL 31641608, *3 (E.D.N.Y.2002)("[A]n expert may base her opinion on specialized knowledge and facts or data not admissible in evidence so long as they are reasonably relied upon by experts in the field."); Bryan v. John Bean Division of FMC Corp., 566 F.2d 541, 545 (5th Cir. 1978)("The modern view in evidence law recognizes that experts often rely on facts and data supplied by third parties. See Fed. R. Evid. 703. Rules 703 and 705 codifying the approach of this and other circuits that permit the disclosure of otherwise hearsay evidence for the purpose of illustrating the basis of the expert witness' opinion."); Brown v. United States, 375 F.2d 310, 318 (D.C. Cir. 1966), cert. denied, 388 U.S. 915 (1967)(Doctor's testimony on insanity based in part upon reports of other doctors which are not in evidence is admissible because reports are customarily relied upon in the practice of the profession.).

[FN6]. 541 U.S. at 51.While Crawford suggested that the admissibility of nontestimonial hearsay should be governed solely by state law or rules of evidence, it continued to refer to Ohio v. Roberts, Id. at 61, and did not definitively decide the issue. In Davis, the Court puts this issue to rest, abrogating Roberts entirely, and holding that the Confrontation Clause applies only to statements that are testimonial. Davis, 126 S.Ct. at 2273-75. Thus, the application of Crawford to expert testimony can focus only on an expert's use of testimonial evidence.

[FN7]. Id.

[FN8]. Id. at 51-52 (quoting White v. Illinois, 502 U.S. 346, 365 (1992)).

[FN9]. Id. at 52.

[FN10]. Id. at 51-52.

[FN11]. 126 S.Ct. at 2273-74; 541 U.S. at 51-52.

[FN12]. See, e.g., People v. Goldstein, 6 N.Y.3d 119, 843 N.E.2d 727 (2005), cert. denied, 126 S.Ct. 2293 (2006).

[FN13]. The letter was originally referred to in the Crawford opinion. 541 U.S. at 44-45.

[FN14]. Id. at 2274, n.1.

[FN15]. This discussion involves both expert witnesses relying upon lab reports to express opinions

as well as witnesses who may or may not be experts themselves proffering, authenticating or simply reciting the contents of the reports or the opinions or conclusions of others who are themselves the "experts." The constitutional implications under Crawford, particularly in defining the underlying report as either testimonial or nontestimonial, are essentially the same in either instance.

[FN16]. See Gerald Uelmen, Motions FYI: Admissibility of Lab Reports after Crawford v. Washington, THE CHAMPION, September/October 2005, at 67. ("Since they [lab reports] are prepared by police personnel for the purpose of subsequent criminal investigation, there is a very persuasive argument that they come within Crawford, and even those states which recognize a hearsay exception to admit them must now exclude them to protect the defendant's Sixth Amendment rights."); Ross Andrew Oliver, Testimonial Hearsay As The Basis For Expert Testimony: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After Crawford v. Washington, 55 HASTINGS L.J. 1539, 1560 (2004) ("On one end of the spectrum are experts who base their opinion almost solely on testimonial hearsay and merely recount to the jury what others have said. This type of expert testimony is almost surely a violation of the Confrontation Clause if the defendant cannot test the reliability of the expert's testimony by cross-examining the declarants of the underlying statements.").

[FN17]. See, e.g., State v. Thompson, 112 S.W.3d 57 (Mo. App. 2003) (Supervisor of crime lab analyst can testify to report regarding serology analysis of knife and bag found at crime scene); In re C.D., 354 N.J.Super. 457,808 A.2d 13 (App. Div. 2002) (lab certificate); Williams v. State, 734 So.2d 1149 (Fla. Dist. Ct. App. 1999) (Acting supervisor of state regional crime lab, as custodian of records, was proper person to authenticate lab report regarding cocaine analysis); State v. Smith, 312 N.C. 361, 323 S.E.2d 316 (1984) (chemical analyst's affidavit regarding blood alcohol concentration admissible).

[FN18]. See, e.g., People v. Henderson, 336 Ill.App.3d 915, 789 N.E.2d 774 (3d Dist. 2003) (lab report on blood alcohol test admissible as business record); State v. Charlton, 114 S.W.3d 378, 388 (Mo. App. 2003) (lab report admissible under business record exception); State v. Zackuse, 253 Mont. 305, 307, 833 P.2d 143, 144 (1992) (state crime lab report is public record); United States v. Sanchez, 47 Fed. Appx. 467, 471, 2002 WL 31105150, *3 (9th Cir. 2002) (lab report is public record within the meaning of Fed.R.Evid. 803(8)); United States v. Cordero, 21 M.J. 714, 715 (U.S. Air Force Ct. Military Review 1985) (lab report of urinalysis admissible as business record under exception to hearsay rule); J.G. v. State, 685 So.2d 1385, 1386 (Fla. Dist. Ct. App. 1997)(same); State v. Weller, 225 N.J. 274, 542 A.2d 55 (Law Division 1986) (blood alcohol report); State v. Matulewicz, 101 N.J. 27, 32, 499 A.2d 1363 (1985)(lab report may be admissible under one of two firmly-rooted hearsay exceptions -- business or public record).

[FN19]. See, e.g., Arkansas, A.C.A. § 12-12-313; Colorado, C.R.S.A. §16-3-309(5); Iowa, I.C.A. §691.2; Kansas, K.S.A. §22-3437; Louisiana, LSA-RS §§ 15:499-501; Minnesota, M.S.A. §634.15; New Jersey, N.J.S.A. 2C-35-19 (limited to controlled dangerous substances); North Dakota, N.D. ST 31-13-05 (DNA analyses only); Ohio R.C. § 2925.51 (limited to drug offenses); South Dakota, SDCL §1-49-6. While several of these states have provisions for the defendant to demand production of the analyst at trial, some condition this demand, while others have no such provision. Of course, their actual availability, under a Crawford analysis, would require their attendance at trial under any circumstances short of waiver or stipulation by the defense. Nevertheless, several courts have approved this mechanism under Crawford. See, e.g., State v. Campbell, 719 N.W.2d 374 (N.D. 2006) (Confrontation Clause objection to admission of forensic scientist's report, which appears testimonial, was waived where the defendant failed to avail himself of opportunity to confront the witness by invoking statute to subpoena report's author); State v. Smith, 2006 Ohio 1661, para. 5, 18 (Ohio Ct. App. 2006) (same). But at least one court has disapproved, in a pre-Crawford decision. People v. McClanahan, 191 Ill.2d 127, 136,729 N.E.2d 470 (2000) (holding that, in compelling the defendant to make a demand for live testimony, the statute "impermissibly requires the defendant to take affirmative action to secure a right that he has already been constitutionally guaranteed or be deemed to have waived that right.").

[FN20]. See United States v. Oates, 560 F.2d 45, 80-82 (2d Cir. 1977) (chemist's report was inadmissible hearsay because admitting report would raise "legitimate doubts regarding the constitutionality" of its introduction). See also, United States v. Bohrer, 807 F.2d 159 (10th Cir. 1986).

[FN21]. See People v. Grogan, 816 N.Y.S.2d 93, 28 A.D.3d 579 (2d Dept. 2006) (testimony of lab director and criminologist from medical examiner's office established business records exception foundation for admission of DNA reports from rape kit); United States v. Magyari, 63 M.J. 123, 126-27 (C.A.A.F. 2006) (lab report is nontestimonial and admissible as a business record); State v. Forte, 360 N.C. 427, 629 S.E.2d 137, 143 (2006) (DNA report not prepared exclusively for trial deemed nontestimonial); State v. March, ___ S.W.3d ____, 2006 WL 1791336 (Mo. App. June 30, 2006) (lab report identifying crack cocaine is nontestimonial and admissible as business record); People v. Hinojos-Mendoza, _____ P.3d ___, 2005 WL 2561391 (Colo. App. July 28, 2005) (same), cert. granted, 2006 WL 2338141 (Colo. August 14, 2006); Commonwealth v. Verde, 444 Mass. 279,827 N.E.2d 701 (2005) (lab report certificate is a public record); People v. Johnson, 121 Cal. App.4th 1409, 18 Cal.Rptr.3d 230 (2004)(lab reports are routine nontestimonial documents); State v. Dedman, 136 N.M. 561, 102 P.2d 628 (2004)(blood alcohol report is nontestimonial).

[FN22]. Crawford, 541 U.S. at 56 ("Most of the hearsay exceptions covered statements that by their nature were not testimonial -- for example, business records..."). See also, People v. Durio, 7 Misc.3d

729, 794 N.Y.S.2d 863 (2005) (autopsy report is business record and therefore nontestimonial per Crawford); Commonwealth v. Verde, supra; People v. Hinojos-Mendoza, supra.

[FN23]. See State v. Crager, 164 Ohio App.3d 816, 825, 844 N.E.2d 390, 397 (2005), rev. granted, 109 Ohio St.3d, 846 N.E.2d 533 (2006) (Table) (Referring to the afore-cited language of Crawford, the court stated "[W]hile we acknowledge the above statement ... we do not find it controlling. First, the statement is purely dictum, as it was made during the majority's historical delineation of the Sixth Amendment right to confrontation. Thus, we do not find that such a statement should control over the court's holding, which involves whether a statement is testimonial or nontestimonial. Secondly, upon review of the business records exception and the applicable case law surrounding the issue, we find that while some evidence may fall within the general business-records exception, other business records should nonetheless be subject to a analysis and be excluded from evidence thereunder because they are in fact testimonial.").

[FN24]. Fed. R. Evid. 803(6).

[FN25]. City of Chicago v. Old Colony Partners, L.P., 364 Ill.App.3d 806, 819, 847 N.E.2d 565, 576 (1st Dist. 2006) ("[B]usiness records made in anticipation of litigation do not possess the same trustworthiness of other records prepared in the ordinary course of business."); People v. Jambor, 271 Mich.App. 1, 9, 717 N.M.2d 889, 894 (2006) (Cooper, PJ. concurring) (The evidence in question, fingerprint cards, "are records prepared in anticipation of litigation, because their purpose was to document the presence of particular individuals at the scene of the crime."); People v. Rogers, 780 N.Y.S.3d 393, 397, 8 A.D.3d 888, 891 (Third Dept. 2004)("Documents prepared for litigation lack the indicia of reliability necessary to invoke the business records exception to the hearsay rule."); Commonwealth v. Carter, 861 A.2d 957, 969- 70 (Pa. Super. 2004) (lab report verifying presence of cocaine in items seized from defendant was prepared for litigation, and therefore lacked indicia of reliability traditionally found in business records); People v. McDaniel, 469 Mich. 409, 413-14, 670 N.W.2d 659,661 (2003) (hearsay exception is based on the inherent trustworthiness of business records, which is "undermined when the records are prepared in anticipation of litigation").

[FN26]. Crawford, supra at 51-52. See also, State v. Berezansky, 386 N.J. Super. 84, 94, 899 A.2d 306, 313 (App. Div. 2006) (In a DWI case, a lab certificate of blood alcohol level is testimonial and not admissible as a business or public record.); People v. Lonsby, 268 Mich. App. 375, 707 N.W. 2d 610 (2005) (DNA report prepared by state police crime lab from analysis of rape kit is prepared in anticipation of litigation, and is therefore testimonial), rev. den., 2006 WL 2623326 (Mich. Sept. 14, 2006); People v. Rogers, supra (blood alcohol test report on victim's blood prepared by private lab employed by law enforcement for purpose of discovering evidence against the defendant is testimonial); State v. Crager, supra (DNA analyst's report prepared as part of a police investigation

is testimonial under Crawford, regardless of whether it is a business record); Martin v. State, 936 So.2d 1190, 2006 WL 2482442 (Fla. Dist. Ct. App. August 30, 2006) (while state crime lab report may meet definition of business record, it was prepared for litigation purposes; testing was result of arrest of defendant, performed by law enforcement agency, and offered in furtherance of criminal prosecution); People v. Hernandez, 7 Misc.3d 568, 569, 794 N.Y.S.2d 788, 789 (Supreme Ct. N.Y. Co. 2005)(fingerprint test report is testimonial and not admissible under business record exception).

[FN27]. 929 So.2d 4 (Fla. 2d DCA 2005), rev. granted, 928 So.2d 810 (Fla. 2006).

[FN28]. Id. at 7-8 (citations omitted). See also, Rivera v. State, 917 So.2d 210 (Fla. Dist. Ct. App. 2005); Crager, supra (DNA report is business record but prepared wholly in anticipation of litigation and is, therefore, testimonial).

[FN29]. See People v. McDaniel, 469 Mich. at 413, 670 N.W.2d at 661 (police report which "helped to establish an element of the crime by use of hearsay observations" is not admissible under the public records exception to the hearsay rule); Fed. R. Evid. 803(8) (excluding observations by police officers and law enforcement personnel). But see Iowa v. Musser, 721 N.W.2d 734, 2006 WL 2244640, *13-14 (Iowa August 4, 2006)(positive HIV test report was nontestimonial where it was not requested by law enforcement, it was conducted two years before offense was committed, and its primary purpose was to provide the defendant and medical providers with information required to make treatment decisions).

[FN30]. People v. Thomas, 130 Cal.App.4th 1202, 1210, 30 Cal.Rptr.3d 582, 587 (4th Dist. 2005) ("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."); State v. Bunn, 619 S.E.2d 918, 920 (N.C. App. 2005) (forensic drug expert's testimony that substance was cocaine, which was based on analyses conducted by another analyst, was not violative of Crawford because underlying report is not hearsay since it is not offered as substantive evidence, and expert witness is available for cross-examination); State v. Delancey, 171 N.C.App. 141, 613 S.E.2d 699 (2005)(same).

[FN31]. 6 N.Y.3d 119, 843 N.E.2d 727 (2005), cert. denied, 126 S.Ct. 2293 (2006).

[FN32]. 6 N.Y.3d at 127.

[FN33]. 6 N.Y.3d at 127-28 (citations omitted).

[FN34]. See, e.g., State v. Bunn, 619 S.E.2d at 920 (witness testified "his opinion was based on data reasonably relied upon by others in the field").

[FN35]. See, e.g., Walker v. State, 913 So.2d 198, 228 (Miss. 2005) (another analyst); State v. Coombs, 149 N.H. 319, 320, 821 A.2d 1030, 1031 (2003)(lab supervisor); Mooneyham v. State,, 842 So.2d 579, 587 (Miss. App. 2002)(records custodian); Caw v. State, 851 S.W.2d 322 (Tex. App.-El Paso 1993)(lab supervisor); State v. Jones, 322 N.C. 406, 410, 368 S.E.2d 844, 846 (1988)(state's fingerprint expert testified that according to his lab's standard procedure for quality control, his result was verified by another latent examiner in his section).

[FN36]. Id. at 414, 368 S.E.2d at 848 (stating that such evidence is not admitted for its truth but merely as a part of the expert's opinion).

[FN37]. 464 F.2d 359 (5th Cir. 1972), cert. denied, 409 U.S. 942 (1972).

[FN38]. 464 F.3d at 364. See also, Postell v. State, 398 So.2d 851, 853 (Fla. Dist. Ct. App. 1981), rev. denied, 411 So.2d 384 (Fla. 1981) (holding that where "the inescapable inference from the testimony is that a non-testifying witness has furnished the police with evidence of the defendant's guilt, the testimony is hearsay, and the defendant's right of confrontation is defeated, notwithstanding that the actual statements made by the non-testifying witness are not repeated"); State v. Bankston, 63 N.J. 263, 271, 307 A.2d 65, 69 (1973)(same).

[FN39]. See cases cited in endnote 26, supra. See also, United States v. Buonsignore, 131 Fed. Appx. 252 (11th Cir. 20050 (unpublished opinion), cert. denied, 126 S.Ct. 270 (2005).

[FN40]. 164 Ohio App. 3d 816, 825, 844 N.E.2d 390, 397 (2005), rev. granted, 846 N.E.2d 533 (2006) (Table).

[FN41]. See Crager, supra and explanatory statement in endnote 23.

[FN42]. 164 OhioApp.3d at 823, 844 N.E.2d at 396.

[FN43]. Id.

[FN44]. Moreno Denoso v. State, 156 S.W.3d 166, 182 (Tex. Crim. App. 2005) (citations omitted). See also, People v. Durio, 7 Misc.3d 729, 794 N.Y.S.2d 863 (Sup. Ct. King Co. 2005).

[FN45]. See Moreno Denoso, supra (public record); Durio, supra (business record). Interestingly, both courts predicate their rulings upon a finding that a medical examiner is not a law enforcement officer, and has a statutory duty to report his findings. See also, Perkins v. State, 897 So.2d 457, 464 (Ala. Crim. App. 2004) (holding that an autopsy report is nontestimonial and properly admitted as a business record).

[FN46]. 392 Md. 455, 897 A.2d 821 (2006).

[FN47]. Id. at 478, 897 A.2d at 834-35 (citing State v. Lackey, 280 Kan. 190, 120 P.2d 332 (2005)).

[FN48]. Id. at 483-84, 897 A.2d at 837-38.

[FN49]. "The autopsy report in the instant case was redacted to omit any information that could be construed as an 'opinion.'" Id. at 489, 897 A.2d at 841. By redacting the opinion from the report, the trial court apparently avoided the confrontation issue. See also Schoenwetter v. State, 931 So.2d 857, 871 (Fla. 2006)(finding no Crawford violation where the substitute medical examiner witness did not testify to any conversations with or specific statements by the original medical examiner who performed the autopsy).

[FN50]. In Rollins, the court noted the responsibilities of the medical examiner: "The information that was not redacted from the autopsy report, while it might eventually be used in a criminal trial, was not created for that express purpose, and was statutorily required to be determined by the medical examiner and placed into the report pursuant to.... Unlike the interview in Snowden, the express purpose for the preparation of the autopsy report was not for use in a criminal trial. It is clear that there is a statutory duty to prepare such a report when a death has occurred in 'any suspicious or unusual manner.' Md. Code (1982, 2005 Repl.Vol.)." Rollins, 392 Md. at 484-86, 897 A.2d at 838-39 (footnotes omitted).

[FN51]. 6 N.Y.3d 119, 843 N.E.2d 727 (2005), cert. denied, 126 S.Ct. 2293 (2006).

[FN52]. Id. at 122.

[FN53]. Id.

[FN54]. Id. at 129.

[FN55]. See text accompanying endnote 33, supra.

[FN56]. 6 N.Y.3d at 126.

[FN57]. Id.

[FN58]. Howard v. Walker, 406 F.2d 114 (2d Cir. 2005). This case does not rely upon Crawford, but rather Bruton and other considerations because it is a habeas corpus action where the final conviction predated the decision in Crawford.

[FN59]. Id. at 129.

[FN60]. See People v. Thomas, supra; In re Cesar L, 2006 WL 1633474 (Cal. App. 5th Dist. June 14, 2006) (unpublished); In re Daniel D, 2006 WL 1365111 (Cal App.5th Dist. May 19, 2006) (unpublished).

[FN61]. See, e.g., Thomas, supra at 1209-10.

[FN62]. Id. at 1210.

[FN63]. Id.

[FN64]. In re Cesar L., supra.

[FN65]. Davis, 126 S.Ct. at 2277 ('[T]rial 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.").

[FN66]. See People v. McClanahan, supra.

[FN67]. See State v. Simbara, 175 N.J. 37, 811 A.2d 48 (2002) (approving lab certification statute but finding a confrontation violation where the defendant sought the live testimony of the analyst, which was denied).