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The *Crawford* Confusion Marches On: The Confrontation Clause and Hearsay Laboratory Drug Reports

*State v. March*¹

I. INTRODUCTION

Rapid advances in science and technology have influenced criminal prosecutions as police often utilize advanced technology to obtain evidence that is integral to the prosecution's case against a criminal defendant. Such practices are especially common in cases involving illegal drugs, in which slight variations in the precise measurements of such substances could add or subtract from the lengths of sentences.² Often, prosecutors offer this crucial evidence in court through a laboratory report documenting the exact results of the tests performed on the alleged illegal substances. The admission of these lab reports seemingly complies with the rules of evidence of most jurisdictions, but at the same time, this approach may be at odds with a defendant's constitutional right "to be confronted with the witnesses against him." It seems perfectly logical that the defendant in this situation should be able to face the person that produced the drug test results that ultimately lead to the conviction.

When the Missouri Supreme Court faced this situation in *State v. March*, it attempted to resolve the apparent conflict between the rules of evidence and the United States Constitution. Unfortunately for the Missouri Supreme Court and other courts in similar situations, there is no clear guiding light to aid them in resolving these cases. At best, the United States Supreme Court has provided a dim illumination through its recent decisions that have continued to leave courts stumbling around in the shadows in search of a way out of this confrontation confusion.

II. FACTS AND HOLDING

In September 2002, members of the Poplar Bluff, Missouri Police Department entered the home of Kendra Davis, and seized a small plastic baggy

1. 216 S.W.3d 663 (Mo. 2007) (en banc).

2. For example, drug trafficking in the second degree is punishable as a Class B felony if the person possesses more than two grams, but less than six grams, of a cocaine-based substance; but possession of more than six grams is punishable as a Class A felony. MO. REV. STAT. § 195.223(3) (2000). The sentence for a Class B felony is a term not less than five years, and not to exceed fifteen; whereas a sentence for a Class A felony is not less than ten years, and not to exceed thirty years or life imprisonment. MO. REV. STAT. § 558.011(1).

containing an off-white residue that was later determined to belong to Robert March.³ After this substance field-tested positive for crack cocaine,⁴ March was arrested and later charged with drug trafficking in the second degree.⁵ The plastic baggy and its contents were sent to the Southeast Missouri Regional Crime Lab for further analysis, where Dr. Robert Briner, then the lab's director, affirmed the field test results and determined the substance to be approximately 2.7 grams of crack cocaine.⁶ Dr. Briner prepared a standard laboratory report documenting these results and gave the report to the prosecution for use during trial.⁷

At the proceedings against March, the State did not call Dr. Briner to testify about his report because he no longer worked at the lab and had moved to North Carolina.⁸ Instead, the State had Pam Johnson testify as to the results because she was the chief criminologist at the time the report was prepared and later succeeded Dr. Briner as lab director.⁹ While Ms. Johnson was able to authenticate the report and stated that the tests ran by Dr. Briner were the standard practices for the lab in analyzing evidence, she did not personally perform any of the tests on the drugs herself.¹⁰ Nevertheless, the report was admitted into evidence, over defense counsel's objection, under the business records exception to hearsay evidence found in Missouri Revised Statute section 490.680.¹¹

On appeal to the Missouri Supreme Court,¹² the defendant argued that the lab report should not have been admitted into evidence because doing so

3. See Respondent's Substitute Brief at 8-10, *March*, 216 S.W.3d 663 (No. SC87902), 2006 WL 3447484; *March*, 216 S.W.3d at 664.

4. Respondent's Substitute Brief, *supra* note 3, at 9.

5. *March*, 216 S.W.3d at 664.

6. Respondent's Substitute Brief, *supra* note 3, at 13.

7. *See id.*

8. *March*, 216 S.W.3d at 664.

9. *Id.*

10. Respondent's Substitute Brief, *supra* note 3, at 14-15.

11. *Id.* at 14-15. The full text of the business records exception states that [a] record of an act, condition or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

MO. REV. STAT. § 490.680 (2000).

12. The case was transferred directly to the Missouri Supreme Court by an order pursuant to the Missouri Constitution, stating that

[c]ases pending in the court of appeals may be transferred to the supreme court by order of the majority of the judges of the participating district of the court of appeals, after opinion, or by order of the supreme court before or after opinion because of the general interest or importance of a question

violated his right to confront the witnesses against him as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution.¹³ In particular, the defendant relied upon the recent U.S. Supreme Court case of *Crawford v. Washington*,¹⁴ which held that due to the Confrontation Clause of the Sixth Amendment, “all testimonial statements [must] be excluded unless the declarant is unavailable to testify at trial and the defendant has had a prior opportunity to cross-examine the declarant.”¹⁵ Applying this principle to the case at bar, the defendant contended that the lab report containing the results of the drug analysis was testimonial¹⁶ and that the requisite conditions mentioned in *Crawford* needed to admit such statements without calling the declarant as a witness had not been established by the State.¹⁷

Regarding the absence of the *Crawford* conditions, the defendant stated that the State had failed to show that Dr. Briner, as the report’s preparer, was unavailable to testify at trial regarding his analysis of the report.¹⁸ Instead, Dr. Briner simply preferred not to make the trip back to Missouri for the trial.¹⁹ And, since Dr. Briner moved to North Carolina before the trial started, there was no chance for the defendant to confront and cross-examine Dr. Briner about the report itself.²⁰ Therefore, according to the defendant, the key issue before the court was whether or not the out-of-court declarations contained in the laboratory report were “testimonial” under *Crawford*.²¹

To support his conclusion that the report was testimonial, the defendant first argued that Dr. Briner’s laboratory report bore the characteristics of the generic descriptions of testimonial statements offered by the United States

involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule.

MO. CONST. art. V, § 10.

13. Appellant’s Substitute Brief at 18, *March*, 216 S.W.3d 663 (No. SC87902), 2006 WL 3096558. The pertinent part of the Sixth Amendment states that a criminal defendant has the right “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 defence.” U.S. CONST. amend. VI (emphasis added). Similarly, the Missouri Constitution states that a criminal defendant has the right “to demand the nature and cause of the accusation; to meet *the witnesses against him face to face*; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county.” MO. CONST. art. I, § 18(a) (emphasis added).

14. 541 U.S. 36 (2004). Discussed *infra* notes 70-94 and accompanying text.

15. Appellant’s Substitute Brief, *supra* note 13, at 22 (citing *Crawford*, 541 U.S. at 68).

16. *Id.* at 18.

17. *Id.*

18. *Id.* at 22.

19. *Id.*

20. *Id.* at 18, 22.

21. *Id.* at 22.

Supreme Court in *Crawford*.²² In addition to this argument, the defendant also cited a further characterization of testimonial statements reached in *Davis v. Washington*,²³ the aspect of having “the purpose . . . to nail down the truth about past criminal events.”²⁴ The defendant contended that Dr. Briner’s laboratory report was the primary means of answering the law enforcement’s question about the illegal identity of the white substance found at the scene of the crime.²⁵ Therefore, the report effectively established the truth of past criminal events and falls within the standard in *Davis*.²⁶ Finally, the defendant directed the court to cases from numerous other jurisdictions that had considered similar situations to the case at bar, and reached the same conclusion about the testimonial nature of such reports.²⁷ Therefore, the defendant contended that the admission of Dr. Briner’s laboratory report was in error, and the lower decision should be reversed.²⁸

In contrast, the State contended that while *Crawford* held that the right of the Confrontation Clause of the Sixth Amendment applies to testimonial statements, it *only applies* to statements of this nature and not to those that would be otherwise admissible.²⁹ In particular, the State relied on the fact that *Crawford* mentioned only generic examples of what the Court believed to be testimonial statements.³⁰ In addition, *Crawford* also addressed in dicta that various exceptions to the normal rules of hearsay evidence that make certain types of information and statements, including “business records and

22. *Id.* at 24. The characteristics specifically referred to were those of affidavits and similar documents or statements admitted in lieu of present testimony at trial. *Id.*

23. 547 U.S. 813 (2006). Discussed *infra* notes 126-135 and accompanying text.

24. Appellant’s Substitute Brief, *supra* note 13, at 24 (quoting *Davis*, 547 U.S. at 830).

25. *Id.* The actual identification of the substance as cocaine was, according to the defendant, an essential element of the crime charged against him. *See id.* at 34.

26. *Id.* at 24.

27. *Id.* at 26-28 (citing *State v. Caulfield*, 722 N.W.2d 304, 310 (Minn. 2006); *Commonwealth v. Carter*, 861 A.2d 957, 969 (Pa. Super. Ct. 2004), *rev’d*, 932 A.2d 1261 (Pa. 2007); *Johnson v. State*, 929 So. 2d 4, 7 (Fla. Dist. Ct. App. 2005), *cert. granted*, 924 So. 2d 810 (Fla. 2006); *People v. Lonsby*, 707 N.W.2d 610, 613 (Mich. Ct. App. 2005); *State v. Crager*, 844 N.E.2d 390, 397 (Ohio Ct. App. 2005), *rev’d*, 879 N.E.2d 745 (Ohio 2007); *Smith v. State*, 898 So. 2d 907, 916 (Ala. Crim. App. 2004); *City of Las Vegas v. Walsh*, 124 P.3d 203, 207-08 (Nev. 2005) (en banc); *People v. Rogers*, 780 N.Y.S.2d 393, 397 (App. Div. 2004); *People v. Pacer*, 796 N.Y.S.2d 787, 788 (App. Div. 2004), *aff’d*, 847 N.E.2d 1149 (N.Y. 2006); *Belvin v. State*, 922 So. 2d 1046, 1053 (Fla. Dist. Ct. App. 2006) (en banc), *cert. granted*, 928 So. 2d 336 (Fla. 2006); *Shiver v. State*, 900 So. 2d 615, 618 (Fla. Dist. Ct. App. 2005)).

28. *Id.* at 34. On remand, the State could either call Dr. Briner to testify and thereby be cross-examined, or have the evidence retested by another analyst, such as Pam Johnson, who will be available to testify in court about their own findings. *See id.*

29. Respondent’s Substitute Brief, *supra* note 3, at 15-16.

30. *See id.* at 16 (citing *Crawford v. Washington*, 541 U.S. 36, 76 (2004)).

official records,”” admissible in any instance.³¹ Consequently, the State urged that this reference to business records being non-testimonial should guide the court, as it has in other jurisdictions, to conclude that the statements made in the drug report were non-testimonial in nature and therefore not subject to the Confrontation Clause.³²

To support this conclusion, the State argued that Dr. Briner’s laboratory report qualified as a “business record” under the applicable Missouri statute.³³ Laboratory reports detailing the results of evidence analysis are made in the regular course of business of the Southeast Missouri Regional Crime Lab and in fact, are made on every drug tested regardless of whether or not there will be a trial.³⁴ In addition, the process utilized routine laboratory testing methods for these types of substances, and the report itself contained results objectively stated with no personal opinions whatsoever.³⁵ According to the State, this routine use and objectivity demonstrated that the laboratory report was a business record kept both accurately and precisely in the business interests of the crime lab.³⁶ Therefore, because the report in this instance falls squarely within the definition of a “business record,” it was properly admitted into evidence during the original trial through the appropriate hearsay exception as a non-testimonial statement.³⁷ As a result, the report does not fall under the rule laid out in *Crawford* and is not subject to the Confrontation Clause of the Sixth Amendment.³⁸

Upon hearing the arguments of both the State and the defendant, the Missouri Supreme Court ultimately reversed the trial court’s original decision. It held that when a forensic laboratory report is offered as evidence in a criminal prosecution and the report’s analyst is not called as a witness, then the report cannot be admitted under the business record exception to hearsay

31. *See id.* at 16-17 (quoting *Crawford*, 541 U.S. at 76).

32. *See id.* at 17-20 (citing *United States v. Lee*, 374 F.3d 637, 644 (8th Cir. 2004); *Commonwealth v. Verde*, 827 N.E.2d 701, 705-06 (Mass. 2005); *State v. Dedman*, 102 P.3d 628, 635 (N.M. 2004); *State v. Cao*, 626 S.E.2d 301, 305 (N.C. Ct. App. 2006); *People v. Johnson*, 18 Cal. Rptr. 3d 230, 233 (Ct. App. 2004); *Rollins v. State*, 897 A.2d 821, 845-46 (Md. 2006); *People v. Hinojos-Mendoza*, 140 P.3d 30, 37 (Colo. Ct. App. 2006), *aff’d in part, rev’d in part*, 169 P.3d 662 (Colo. 2007); *State v. Forte*, 629 S.E.2d 137, 143 (N.C. 2006)).

33. *See id.* at 22 (referring to language stating that “[t]he term ‘business’ shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.” MO. REV. STAT. § 490.670 (2000)).

34. *Id.*

35. *Id.* at 22-23. The lack of personal opinions drawn by the analyst in the report further demonstrated that the report did not contain “testimony” in the traditional sense, but was rather produced in the “standard practices of the laboratory.” *See id.* at 24-25.

36. *Id.* at 24.

37. *Id.* at 24-25.

38. *See id.*

evidence.³⁹ Instead, the report qualifies as testimonial evidence under *Crawford* and is therefore subject to the Confrontation Clause of the Sixth Amendment guaranteeing a defendant the right to cross-examine those witnesses making testimonial statements against him.⁴⁰

III. LEGAL BACKGROUND

A. Missouri's "Old Rule" – the Business Records Exception, Taylor, and Roberts

In Missouri, the admission of laboratory reports and other such "business" documents as evidence was historically accomplished through a hearsay exception governed solely by the state's version of the Uniform Business Records as Evidence Law.⁴¹ Generally speaking, the common law hearsay rule "is designed to protect a party from out-of-court declarations of other persons who cannot be cross-examined as to the bases of their perceptions, the reliability of their observations, and the degree of their biases."⁴² However, the business records exception provides a way around this general rule in order to both broaden the scope of the admissibility of business records⁴³ and to avoid the many "antiquated and technical common law rules."⁴⁴ The rationale of this exception is that such records are reliable because there is routine recording of regularly-performed business activities, especially at times close to the commission of the crime or events giving rise to the civil cause of action.⁴⁵ Therefore, it follows that when properly admitted under this rule, any objection as depriving a person of his right to cross-examine a witness is ineffective.⁴⁶

The question then becomes: what does it mean for a record to be properly admitted? While the specifics of the process may vary slightly based on the nature of the evidence sought to be admitted, the basic components of admission are embodied in *State v. Taylor*.⁴⁷ In that case, the Missouri Supreme Court dealt with a defendant's objection to the State introducing a chemical laboratory report containing analysis of key evidence connecting him to the crime scene of a recent burglary.⁴⁸ The defendant objected because the State did not call the analyst that actually performed the tests to the

39. *State v. March*, 216 S.W.3d 663, 666-67 (Mo. 2007) (en banc).

40. *Id.*

41. See MO. REV. STAT. §§ 490.660-690 (2000).

42. *State v. Brown*, 833 S.W.2d 436, 438 (Mo. App. W.D. 1992).

43. *State v. Davis*, 608 S.W.2d 437, 439 (Mo. App. E.D. 1980) (citing *State v. Taylor*, 486 S.W.2d 239, 242 (Mo. 1972), *abrogated by March*, 216 S.W.3d 663).

44. *State v. Jones*, 518 S.W.2d 322, 325 (Mo. App. E.D. 1975).

45. *State v. Graham*, 641 S.W.2d 102, 106 (Mo. 1982) (en banc).

46. *Allen v. St. Louis Pub. Serv. Co.*, 285 S.W.2d 663, 666 (Mo. 1956).

47. 486 S.W.2d 239 (1972).

48. *Id.* at 241-42.

stand to testify, but instead relied on the testimony of a different analyst to explain and corroborate the results of the report.⁴⁹ Despite the defense's argument, the court ruled that the analyst's testimony, including a reading and explanation of the report's results, laid enough foundation to admit the report through the business records exception.⁵⁰ According to the court, all that is required for the record to qualify as a business record is a preliminary showing of the identity of the record, the mode and time of its preparation in the regular course of business, and a positive determination by the court of the sufficiency of the source of information contained therein.⁵¹

Taylor essentially states that the right to confront witnesses can be satisfied if a court determines through proper testimony and characteristics of the record itself that the evidence is reliable.⁵² This proposition is not unique to Missouri, but rather is the basic equivalent to the more general test articulated by the United States Supreme Court in *Ohio v. Roberts*.⁵³ In that case, the Court stated that when a hearsay declarant is not present for cross-examination, the Confrontation Clause of the Sixth Amendment is normally satisfied by a showing that the declarant is unavailable for trial, and that the statement bears adequate 'indicia of reliability.'⁵⁴ Reliability can be inferred either when the evidence falls within a firmly rooted hearsay exception or when there are other particularized guarantees of trustworthiness.⁵⁵ Here, as in *Taylor*, the court again had discretion in determining what constitutes a proper showing of reliability, either through an established hearsay exception or other specific circumstances, even without cross-examining the witnesses during trial.⁵⁶

While *Taylor* and *Roberts* both provide broad guidelines for admitting laboratory reports as business records without cross-examination of the report's analyst, subsequent cases in Missouri specify three requirements within

49. *Id.* In his argument, the defendant contended that the report should not be admitted because its preparer was not available for cross-examination because he moved to a different state before the trial began. *Id.* at 242. This fact pattern is nearly identical to the situation presented in *March*. See *supra* note 8 and accompanying text.

50. *Taylor*, 486 S.W.2d at 242. The state's witness, Mr. Joseph Stevens, a chemist for the St. Louis Metropolitan Police Department, testified that the report was in fact prepared by the department's chief criminalist in the regular course of business of the Police Department approximately one week after the material was received, as well as basic information about the tests ran on the evidence and the results yielded by those tests. *Id.* at 241-42.

51. *Id.* at 242. Consequently, with the defendant's objection now overruled due to the satisfaction of these stipulations, his conviction from the lower court was upheld. *Id.* at 245.

52. Appellant's Substitute Brief, *supra* note 13, at 23.

53. 448 U.S. 56 (1980), *abrogated by* Crawford v. Wash., 541 U.S. 36 (2004).

54. *Id.* at 66.

55. *Id.*

56. See *id.*

this general framework that are useful for organizing further analysis. First, either the custodian of records or another qualified witness must testify to the identity and mode of the preparation of the record.⁵⁷ This is typically satisfied if the person testifying has knowledge of the business operation and its method of keeping records sufficient enough to “give the records probity,” as determined by the court.⁵⁸ The witness may be the “custodian of the records,” often defined as the person that has the responsibility of the care and control of the property or information,⁵⁹ or he may simply be deemed “qualified” by the court as being generally familiar enough with the record sought to be admitted.⁶⁰

Second, the record itself must have been made in the regular course of business at or near the time of the act, condition or event.⁶¹ For a record to be in the “regular course of business,” it must generally be “in the inherent nature of the business in question and in the methods systematically em-

57. *State v. Kriedler*, 122 S.W.3d 646, 650-51 (Mo. App. S.D. 2004) (citing MO. REV. STAT. § 490.680 (2000)).

58. *State v. Williamson*, 836 S.W.2d 490, 499 (Mo. App. E.D. 1992).

59. *State ex rel. Hobbs v. Tuckness*, 949 S.W.2d 651, 654 (Mo. App. W.D. 1997).

60. *See U.S. v. Franco*, 874 F.2d 1136, 1139 (7th Cir. 1989). It should be noted that there is no real standard for the court in determining whether or not someone is “qualified,” as the court has considerable discretion in making this decision. *Mitchell v. City of Everton*, 655 S.W.2d 864, 866 (Mo. App. S.D. 1983). For instance, personal knowledge by the witness of the *specific* documents sought to be admitted as business records and their mode of preparation is not necessarily required, so long as the witness at least had personal knowledge of all *like* records and could testify to their mode of preparation as being in the regular course of business. *Fisher v. Gunn*, 270 S.W.2d 869, 878 (Mo. 1954); *Thomas v. Dir. of Revenue*, 875 S.W.2d 582, 585 (Mo. App. W.D. 1994); *cf. Markley v. Edmiston (In re Estate of Markley)*, 922 S.W.2d 87, 92 (Mo. App. W.D. 1996) (ruling record could not be admitted where sponsoring witness did not know what the document was, presented no testimony as to the mode of preparation, and did not testify to the normal procedures for preparing documents of that kind). Moreover, the witness does not even have to have been employed at the business at the time that the records were made. *Mo. Dep’t of Soc. Servs. v. Schlotter (In re Estate of Newman)*, 58 S.W.3d 640, 647 (Mo. App. W.D. 2001); *Rouse Co. of Mo., Inc. v. Justin’s, Inc.*, 883 S.W.2d 525, 530 (Mo. App. E.D. 1994) (holding witness qualified to testify about a lease because she was familiar with the bookkeeping and recordkeeping procedures of the business, as well as how files were organized and leases were executed). Finally, some occasions even allow what would normally be qualified testimony of a witness or custodian to be substituted by a sworn affidavit with the accompanying record attached thus providing a “practical way to avoid the necessity of a personal appearance by a records custodian.” *Tebow v. Dir. of Revenue*, 921 S.W.2d 110, 113 (Mo. App. W.D. 1996) (referring to MO. REV. STAT. § 490.692 (2000)).

61. MO. REV. STAT. § 490.680 (2000).

ployed for the conduct of the business as a business.”⁶² In addition to the characteristics of the record’s content, the timeliness of the record’s creation is also important as only those records that are made contemporaneously with, or shortly after, the event in question will be admissible.⁶³ Finally, the underlying purpose of the record with respect to the litigation or trial is also taken into consideration by the court.⁶⁴ Records are still admissible if they were prepared in anticipation of, or during, litigation provided that there is still an underlying business purpose.⁶⁵ However, those records whose “primary utility” lies within the litigation itself are therefore rendered inadmissible for falling outside the “course of business” requirement discussed above.⁶⁶

Finally, if all of the above qualifications are met, then the admissibility of business records comes down to the court’s discretion. It is left up to the court to determine the record’s trustworthiness and whether or not the record itself and the mode of its preparation are reliable enough as to justify its admission.⁶⁷ Generally speaking, unless there is any sort of indication of untruthfulness or untrustworthiness surrounding the record, the court should admit it into evidence.⁶⁸ Courts have a considerable degree of discretion on this issue as all decisions on whether to exclude or admit records into evidence under a hearsay exception are only reversed if the trial court has abused its discretion.⁶⁹ This broad discretion, along with the belief that, in practice, much of the difficulties of faithfully applying the details of the rule are “gloss[ed] over” by the courts, has led some critics to conclude that “courts have injected a degree of confusion into an area that should be relatively

62. *Hobbs*, 949 S.W.2d at 655 (quoting *Kitchen v. Wilson*, 335 S.W.2d 38, 43 (Mo. 1960)). Entries or records must therefore relate to an activity that is typically engaged in by that business and one that is considered an integral component as well. See *Mo. Valley Walnut Co. v. Snider*, 569 S.W.2d 324, 328 (Mo. App. W.D. 1978); *State v. Boyington*, 544 S.W.2d 300, 305 (Mo. App. W.D. 1976).

63. *State v. Zagorski*, 632 S.W.2d 475, 477 (Mo. 1982) (en banc) (finding hospital records properly admitted that were made soon after the defendant was actually in the emergency room); *State v. Triplett*, 520 S.W.2d 166, 168 (Mo. App. E.D. 1975) (finding medical records admitted properly when made contemporaneously with the events described by persons observing the incidents at issue).

64. See *State v. Powell*, 648 S.W.2d 573, 576 (Mo. App. E.D. 1983).

65. *Id.*

66. *Hobbs*, 949 S.W.2d at 655.

67. See *Peters v. Johnson & Johnson Prods., Inc.*, 783 S.W.2d 442, 444 (Mo. App. E.D. 1990).

68. See *Dickerson v. Dir. of Revenue*, 957 S.W.2d 478, 480 (Mo. App. E.D. 1997) (“[I]f the opponent of the proffered records fails to produce any evidence that contradicts the content of the records, the trial court must admit the records into evidence.”).

69. *State v. Williams*, 976 S.W.2d 1, 2 (Mo. App. W.D. 1998).

clear.”⁷⁰ Despite this uncertainty, however, the court’s sole determination as to the admissibility of the record nevertheless remained the prevailing standard at this point in time.

B. The United States Supreme Court Alters the Issue – Crawford v. Washington

The controlling law on admitting business records, such as laboratory reports, drastically changed in 2004 after the United States Supreme Court handed down its decision in *Crawford v. Washington*.⁷¹ In a decision that has been described as having a monumental impact on the criminal justice system,⁷² and starting a “revolution in confrontation jurisprudence,”⁷³ *Crawford* overruled nearly a quarter-century of precedent in this area of law.⁷⁴ In that case, the State of Washington brought assault and attempted murder charges against Michael Crawford, who stabbed another man after who allegedly tried to rape Crawford’s wife, Sylvia.⁷⁵ Sylvia, who had witnessed the stabbing, gave a tape-recorded interview to law enforcement officials at the police station that generally corroborated Crawford’s account of the events leading up to the stabbing.⁷⁶ However, even though her testimony resembled Crawford’s story, her interview sharply differed on the account of the fight itself and largely discounted her husband’s self-defense claim.⁷⁷ However, Sylvia did not actually testify at the trial itself because of the state’s marital privilege, “which generally bars a spouse from testifying without the other spouse’s consent.”⁷⁸ Therefore, the prosecution offered and the court admitted the tape-recorded statements as evidence in place of Sylvia’s personal testimony at trial.⁷⁹ Crawford then claimed that the Washington court erred in allowing this evidence because it violated his Confrontation Clause rights under the Sixth Amendment.⁸⁰

In its decision, the United States Supreme Court traced the history of the Sixth Amendment and the Confrontation Clause in an effort to look beyond the actual text of the Constitution and to discover the principal purposes of

70. Sidney Kwestel, *The Business Records Exception to the Hearsay Rule – New is Not Necessarily Better*, 64 MO. L. REV. 595, 601-02 (1999).

71. 541 U.S. 36 (2004).

72. Bradley Morin, *Science, Crawford, and Testimonial Hearsay: Applying the Confrontation Clause to Laboratory Reports*, 85 B.U. L. REV. 1243, 1248 (2005).

73. Christopher L. Mueller, *Cross-Examination Earlier or Later: When is it Enough to Satisfy Crawford?*, 19 REGENT U. L. REV. 319, 319 (2006-07).

74. Morin, *supra* note 72, at 1245.

75. *Crawford*, 541 U.S. at 38, 40.

76. *Id.* at 39-40.

77. *Id.*

78. *Id.* at 40 (citing WASH. REV. CODE § 5.60.060(1) (1994)).

79. *See id.*

80. *Id.*

the right as applied throughout past jurisprudence.⁸¹ The Court first derived the notion 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.”⁸² Therefore, the Court made it clear that the Confrontation Clause was not merely limited to in-court testimony, but also included specific types of out-of-court statements that are “testimonial” in nature.⁸³ However, the Court did not provide a clear-cut definition of what statements fall within this category and instead provided three general “categories”:

[E]*x parte* in-court testimony or its functional equivalent – that is, materials such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pre-trial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.⁸⁴

The Court’s analysis also revealed that the majority’s view of history supported the proposition that the testimonial statements of a witness should not be admitted “unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”⁸⁵ Thus, it rejected the view that the Confrontation Clause’s application to out-of-court statements should be entirely dependent upon the current formulations of the law of evidence.⁸⁶ The Court noted that past cases have generally remained faithful to both of the historical principles it identified, as well as to the framers’ understanding of the interaction of the laws of evidence and the right of confrontation.⁸⁷

81. *See id.* at 42-50.

82. *Id.* at 50.

83. *Id.* at 51. Some reformers had been advocating a change such as this one, thereby providing a background for the court to adopt the ruling that it did in this instance. *See, e.g.,* Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1038-39 (1998) (arguing that the definition of “witnesses” must extend to persons who make out-of-court statements under the formalities prescribed by the system for the making of statements later to be presented to the fact finder).

84. *Crawford*, 541 U.S. at 51-52 (ellipses alteration in original) (citations omitted).

85. *Id.* at 53-54.

86. *Id.* at 50-51.

87. *See id.* at 60.

However, it concluded that recent rationales, such as that in *Roberts*, have not had the same characteristics and therefore need to be altered.⁸⁸

In addressing the reliability standard developed in *Roberts*, the Court concluded that it did not think the framers meant to leave the Sixth Amendment's protections up to the "vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"⁸⁹ Instead, while the Confrontation Clause's ultimate goal is to ensure the reliability of the evidence, the Court characterized it as a procedural guarantee rather than a substantive guarantee.⁹⁰ Therefore, the protections of the Confrontation Clause required not that the evidence itself be reliable, but rather that the reliability be assessed through the use of cross-examination.⁹¹ By disallowing a jury to hear evidence due to the mere judicial determination of reliability as proscribed by *Roberts*, this process effectively and incorrectly takes the place of the method prescribed by the Constitution.⁹² Thus, the Court concluded that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."⁹³

Therefore, the *Crawford* opinion mainly emphasized that when testimonial evidence is at issue, the Sixth Amendment requires the confrontation of witnesses and requires the unavailability of the witness and a prior opportunity for cross-examination to circumvent this right.⁹⁴ However, at this point in time, the Court left "for another day any effort to spell out a comprehensive definition of 'testimonial.'"⁹⁵ Rather, it seems as if the Court left that daunting task for other courts in the future.

C. *Interpreting the New Standard*

Consequently, it is not surprising that courts have struggled to apply the vague testimonial guidelines handed down in *Crawford* when dealing with

88. *Id.*

89. *Id.* at 61.

90. *Id.*

91. *See id.*

92. *Id.* at 62.

93. *Id.*

94. *Id.* at 68.

95. *Id.* Chief Justice Rehnquist wrote a separate concurring opinion in which he disagreed with the Court's emphasis on statements being "testimonial" for triggering Confrontation Clause analysis, stating that there is no historical basis for this justification as the majority supposedly believes. *See id.* at 70-72 (Rehnquist, C.J., concurring). Moreover, he criticized the majority for its failure to come up with a comprehensive definition of "testimonial" and for the large degree of uncertainty it created in the lower courts. *Id.* at 70, 75. Instead, he felt that *Roberts* need not necessarily be overruled and that using a standard of "truthfulness" for the statement, corroborated by sufficient evidence, would be the more appropriate course for the Court to take. *Id.* at 76 (citing *Idaho v. Wright*, 497 U.S. 805, 820-24 (1990)).

various types of evidence, particularly modern day scientific laboratory reports. In searching through *Crawford* for some sort of tangible guidance, jurisdictions are split on whether or not such laboratory reports constitute testimonial evidence, and courts have arrived at their decisions through different avenues.

1. Laboratory Reports as Non-Testimonial Hearsay

Many of the jurisdictions concluding that laboratory reports are *not* testimonial in nature have relied on the dictum statement in *Crawford* that notes that “[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial – for example, business records or statements in the furtherance of conspiracy.⁹⁶ As a result, some cases utilize the business records exception to get around any Confrontation Clause concerns, concluding that the exception itself allows the evidence to be admitted because a laboratory report, as a record, is non-testimonial in nature and bears a high probability of trustworthiness.⁹⁷ Laboratory reports should be characterized as a type of “traditional documentary evidence,”⁹⁸ being neither discretionary nor based on any sort of opinion, and “the results of a well-recognized scientific test determining the composition and quantity of [a] substance.”⁹⁹ Consequently, they do not “bear testimony” against the defendant in the traditional sense of the word, as elucidated in *Crawford*, because the presence of the technician or preparer of the report would serve merely to only authenticate the results and not add to the fact-finding process in any manner.¹⁰⁰

A different line of cases holding that laboratory reports are non-testimonial have reached their decision by instead relying on a narrow reading of the specific language contained in *Crawford*. The courts that followed this approach examined the categories that the Supreme Court specifically defined as unquestionably testimonial and determined that laboratory reports

96. See, e.g., *People v. Hinojos-Mendoza*, 140 P.3d 30, 36 (Col. Ct. App. 2005) (quoting *Crawford*, 541 U.S. at 56), *aff'd in part, rev'd in part*, 169 P.3d 662 (Colo. 2007).

97. See, e.g., *Perkins v. State*, 897 So. 2d 457, 464 (Ala. Crim. App. 2004).

98. See *People v. Johnson*, 18 Cal. Rptr. 3d 230, 233 (Ct. App. 2004).

99. *Commonwealth v. Verde*, 827 N.E.2d 701, 705 (Mass. 2005) (dealing with the admission of certificates of analysis of controlled substance identified as cocaine).

100. See, e.g., *Hinojos-Mendoza*, 140 P.3d at 37; *Perkins*, 897 So. 2d at 465. Cases such as these typically argue that the need for the confrontation of witnesses is particularly important when trying to assess different characteristics of the witness, especially their demeanor while testifying. See, e.g., *Johnson*, 18 Cal. Rptr. 3d at 233. However, these concerns are not significant factors when evaluating the more objective foundational testimony for laboratory reports, and would thus not make the reports “testimonial” hearsay under *Crawford*. See *id.*

did not fall within one of these categorizations.¹⁰¹ For example, some courts have chosen specifically to focus on the formulation found in a *Crawford* footnote that discusses “[i]nvolvement of government officers in the production of testimony with an eye toward trial,” as this involvement creates a danger of abuse by prosecutors.¹⁰² In *State v. Dedman*, for instance, the Supreme Court of New Mexico had to determine whether or not the results of a blood alcohol test taken at a hospital after the defendant was in custody for driving while intoxicated were testimonial in nature.¹⁰³ In its ruling, the court found that because the tests were conducted by hospital personnel as opposed to law enforcement officers, and the report was prepared in a routine, non-adversarial method to ensure accurate measurement, the report did not amount to testimonial evidence under *Crawford*.¹⁰⁴

Finally, some cases ruling that laboratory reports are not testimonial focus on the Supreme Court’s language in *Crawford* that specifies what the term “testimonial” applies to “at a minimum,” particularly police interrogations.¹⁰⁵ Typically in these situations, courts are able to categorize the reports as falling outside the boundaries of police interrogations because the reports are not technically responses to police inquiry due to the objective facts contained within the report and the mechanical means by which those facts were obtained.¹⁰⁶ However, some of the dicta in *State v. Cao* suggests that laboratory reports of this nature may, in some instances, actually constitute testimonial evidence.¹⁰⁷ The North Carolina Court of Appeals in that case acknowledged that there is a point in police interrogations where reports move beyond objective facts, and instead function more in preparation for trial.¹⁰⁸ Under this approach, courts may need to consider both the stage of the proceedings at which the statement or report was made, and the declarant’s

101. See *State v. Forte*, 629 S.E.2d 137, 143 (N.C. 2006) (ruling that reports of a State Bureau of Investigation agent that contained information on criminal DNA material as well as analysis results were not testimonial under *Crawford*).

102. See, e.g., *State v. Dedman*, 102 P.3d 628, 636 (N.M. 2004) (quoting *Crawford v. Washington*, 541 U.S. 36, 56 n.7 (2004)).

103. See *id.*

104. *Id.* After ruling the hospital report non-testimonial under *Crawford*, the court went on to analyze the report under the *Roberts* reliability standard because it found that *Roberts* at this time still applied to non-testimonial statements. *Id.* at 636-37. In the end, it found that the State had proven the report to be trustworthy and reliable under *Roberts* and therefore admitted the report into evidence. *Id.* at 639.

105. See, e.g., *State v. Cao*, 626 S.E.2d 301, 303 (N.C. Ct. App. 2006). The specific language of *Crawford* states that the term testimonial “applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Crawford*, 541 U.S. at 68.

106. See *Cao*, 626 S.E.2d at 305 (holding that a laboratory report identifying substances purchased from the defendant as cocaine likely qualified as an objective fact obtained through mechanical means regarding the substance’s weight).

107. *Id.* at 303.

108. See *id.*

knowledge, expectation, or intent that his or her statements (in the form of a report) would be used at subsequent trial.¹⁰⁹ However, the characteristics of the laboratory report in *Cao* were not definitive enough for the court to reach the conclusion that the report was testimonial, and the objective nature of the report led to its admission against the defendant.¹¹⁰

Thus, some courts have determined that laboratory reports are not testimonial under *Crawford* by focusing on select language from that ruling. It appears that the most influential language for these courts is either the dicta mentioning business records as being reliable, the involvement of government officers focusing on later prosecution, or the specific types of testimonial evidence actually identified by the *Crawford* court. But, while focusing on these sections of *Crawford* leads to one particular result, other courts have chosen different language to guide them and that has led to a different conclusion.

2. Laboratory Reports as Testimonial Hearsay

Ironically, the same language found in *Cao* that hints at a prosecutorial purpose in the laboratory report also forms the basis of many of the decisions that hold this type of evidence to be testimonial in nature and subject to the Confrontation Clause. Generally, these cases focus more on the *function* of the evidence as opposed to the *characteristics* of the evidence.¹¹¹ That is, analysis is centered upon the three general definitions of “testimonial” statements that are mentioned in *Crawford*, with particular emphasis on whether or not the statement or record was made for later use at trial against the defendant.¹¹² Using this standard, various jurisdictions have found laboratory reports to be testimonial under *Crawford*, if the report was made in preparation of litigation,¹¹³ is used to establish an element of a crime,¹¹⁴ or includes

109. *Id.* (citing *State v. Lewis*, 619 S.E.2d 830, 842-43 (N.C. 2005)).

110. *See id.* at 305-06. After the court commented on the likely objectivity of the report itself, it concluded that the admission of the report into evidence, even if in error, was harmless in this case. *Id.*

111. *See, e.g., State v. Crager*, 844 N.E.2d 390, 396-97 (Ohio Ct. App. 2005), *rev'd*, 879 N.E.2d 745 (Ohio 2007).

112. *Belvin v. State*, 922 So. 2d 1046, 1050 (Fla. Dist. Ct. App. 2006) (en banc), *cert. granted*, 928 So. 2d 336 (Fla. 2006); *Shiver v. State*, 900 So. 2d 615, 617-18 (Fla. Dist. Ct. App. 2005); *People v. Hernandez*, 794 N.Y.S.2d 788, 789 (2005).

113. *City of Las Vegas v. Walsh*, 124 P.3d 203, 208 (Nev. 2005) (en banc) (finding that a nurse’s affidavit and lab report containing information about procedures used in a blood alcohol test on the defendant were prepared for later use at trial or legal proceeding).

114. *Johnson v. State*, 929 So. 2d 4, 7-8 (Fla. Dist. Ct. App. 2005), *cert. granted*, 924 So. 2d 810 (Fla. 2006) (finding that a laboratory report establishing the illegal nature of substances was primarily utilized to establish an essential element of the crime at trial).

statements or records that the preparer would reasonably expect to be used prosecutorially.¹¹⁵

The New York decision of *People v. Rogers* illustrates this logic.¹¹⁶ That case involved two different charges against the defendant of rape and sexual assault due to the victim's incapacity to consent.¹¹⁷ One of the main issues on appeal was the admission of a laboratory report containing results of a blood test on the victim for blood alcohol content without the testimony of the analyst that ran the tests and compiled the report.¹¹⁸ In its decision, the court considered the testimonial definitions in *Crawford* and found that the report fell within this framework because the test was initiated by the prosecution and generated to discover evidence against the defendant.¹¹⁹ Particularly, the test result established the victim's blood alcohol content at the time of the incident, which was crucial to the case because it was directly related to the victim's capability to consent.¹²⁰ As a result of this error, the past conviction was reversed and remanded for a new trial.¹²¹

Although these cases focus on one particular aspect of *Crawford*, they have not completely ignored other rationales used to find reports non-testimonial. For instance, some have addressed the suggestion in *Crawford* that business records are non-testimonial and stated that the fact that a document may fall within a jurisdiction's business record exception does not now *automatically* render the document non-testimonial.¹²² For one thing, the Supreme Court's observation in *Crawford* regarding the reliability of business records appears only in dictum and was thus not central to the Court's decision.¹²³ As a result, some courts have stated that such a statement should not control their determination of whether a statement is testimonial or non-testimonial.¹²⁴ Therefore, it follows that just because something is a business record does not mean that it is automatically non-testimonial.¹²⁵ As one court stated, "[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-

115. *People v. Lonsby*, 707 N.W.2d 610, 619 (Mich. Ct. App. 2005) (finding that a laboratory report identifying a substance on the defendant's swim trunks as semen clearly qualified as statements the preparer would reasonably expect to be used prosecutorially in a sexual assault case).

116. 780 N.Y.S.2d 393 (App. Div. 2004).

117. *Id.* at 395.

118. *See id.* at 396-97.

119. *Id.* at 397.

120. *Id.*

121. *Id.*

122. *See State v. Crager*, 844 N.E.2d 390, 397 (Ohio Ct. App. 2005), *rev'd*, 879 N.E.2d 745 (Ohio 2007).

123. *Id.*

124. *Id.*

125. *See id.*

court statement. . . . The out-of-court statement does not lose its testimonial nature merely because it is contained in a business record.”¹²⁶

Thus, it is apparent that jurisdictions have attempted to decipher the Supreme Court’s decision in *Crawford* by focusing on specific language found within the opinion. While the overall results might be inconsistent and the lines of differentiation are certainly blurred, it is clear that in the absence of more guidance, the choice of what to emphasize in the language controls the jurisdictional rationale and can lead to completely opposite results.

D. Further Definition of the Crawford Standard – Davis v. Washington

In the midst of different jurisdictions struggling to apply the new standard from *Crawford*, the United States Supreme Court finally provided additional guidance in some respects when it decided the case of *Davis v. Washington*.¹²⁷ That decision involved two separate domestic violence cases,¹²⁸ and the issue was whether or not the court could successfully admit evidence without calling the actual declarant of two different statements to testify at trial.¹²⁹ One piece of evidence consisted of a conversation between the victim of the crime and a 911 operator recorded as the event in question was happening, while the other was multiple statements made to officers *after* the event was over.¹³⁰ In its primary ruling, the Court concentrated on the testimonial standard reached in *Crawford*, particularly on the dicta mentioning that statements taken by police officers in the course of interrogations are within the core class of testimonial statements.¹³¹ Therefore, the Court was required to determine precisely which police interrogations produced what *Crawford* classified as “testimonial.”¹³²

The Court concluded, again without offering additional examples of those statements that might qualify under this standard, that statements made under circumstances objectively indicating that the primary purpose is to meet an ongoing police emergency are *not* testimonial in nature.¹³³ However, those statements made during an interrogation that have the primary purpose of establishing or proving events or facts of a past crime, which are potentially relevant to later criminal prosecution and identification of the perpetrator,

126. *Johnson v. State*, 929 So. 2d 4, 8 (Fla. Dist. Ct. App. 2005), *cert. granted*, 924 So. 2d 810 (Fla. 2006).

127. 547 U.S. 813 (2006).

128. This case is actually a consolidation of both *Davis v. Washington*, and the companion case of *Hammon v. Indiana*. *Id.* at 817, 819.

129. *Id.* at 819-21.

130. *Id.* at 819-21.

131. *Id.* at 821-22.

132. *Id.* at 822.

133. *Id.*

are testimonial in nature.¹³⁴ Therefore, in this case, those statements made during the 911 phone call were *not* testimonial because they were made in an ongoing emergency, and the declarant was not “witnessing” or “testifying” in any manner of the traditional sense.¹³⁵ On the other hand, those statements made to police officers after the crime took place *were* testimonial because they describe how potentially past criminal events began and progressed, which is substituted for exactly what witnesses do on direct examination in court.¹³⁶

The decision reached in *Davis* has had a definite and significant impact on this area of law, as demonstrated by recent jurisprudence in the state of Oregon with the case of *State v. Miller*.¹³⁷ The Oregon Court of Appeals in that case again faced the question of whether or not it was constitutionally permissible to admit two forensic laboratory reports into evidence without calling the analysts to testify at trial.¹³⁸ The court discussed a very similar case decided just two years earlier in which it rejected the defendant’s argument that admission of lab reports concerning the presence of controlled substances in his urine violated his right to confrontation under the Sixth Amendment.¹³⁹ In reaching this decision, the court noted that there was reasonable dispute of whether such reports were testimonial hearsay, but that it was not prepared to decide on this issue at the moment, and in fact did not need to, based on the legal question at hand.¹⁴⁰

134. *Id.* at 826.

135. *Id.* at 828.

136. *Id.* at 830. Justice Thomas filed a separate opinion, in which he concurred only in the judgment of *Davis* and dissented in the judgment of *Hammon*. *Id.* at 834 (Thomas, J., concurring in part, dissenting in part). He criticized the “primary purpose” test as being unpredictable and unworkable for officers and prosecutors trying to comply with the law, as often times the purpose of an “interrogation” when viewed from the perspective of the police is *both* to respond to an emergency *and* to gather evidence. *Id.* at 838-40. Furthermore, he believed that characterizing evidence from informal settings as “testimonial” bears little resemblance to the formalized and solemn statements targeted by the Confrontation Clause itself. *Id.* at 835-37.

137. 144 P.3d 1052 (Or. Ct. App. 2006), *abrogated by* *State v. Marroquin*, 168 P.3d 1246 (Or. Ct. App. 2007).

138. *Id.* at 1054.

139. *Id.* at 1055-56 (citing *State v. Thackaberry*, 95 P.3d 1142 (Or. Ct. App. 2004)).

140. *Id.* at 1056. In the 2004 decision, the court stated that *Crawford* does little to aid in determining when hearsay falls into the testimonial category. *Thackaberry*, 95 P.3d at 1145. It noted that a laboratory report of a test performed on a urine sample did not seem analogous to testimony at a preliminary hearing, or a response, at least in an obvious way, to a police interrogation; but rather it might be more analogous to a business or official record, which *Crawford* suggested in dictum would not be testimonial. *Id.* In the end, the limitations of the guidance offered by *Crawford* led the court to conclude that the point was open to “reasonable dispute.” *Id.*

However, now with more guidance from the ruling in *Davis*, the court in *Miller* was able to finally decide on the “disputable” issue that was before it just two years ago and this time concluded that the laboratory reports constituted testimonial hearsay.¹⁴¹ The court presumed “that the reports were, in fact, produced in response to a police inquiry” because the crime lab prepared the reports and sent them to the police department “because the police wanted to know whether the evidence that had been collected revealed the presence of controlled substances.”¹⁴² The reasons for the report’s creation, according to the court, showed that the reports bore similar qualities to traditional statements in response to questioning by police officers.¹⁴³ Because the police used the response to this “inquiry” to establish a past event at issue in the criminal prosecution – that of possession – the report should be considered testimonial evidence.¹⁴⁴

Davis therefore enabled the *Miller* court to determine that laboratory reports constitute testimonial evidence, and has likewise lead other courts to reach the same result as well.¹⁴⁵ Some courts, however, have still reached the opposite conclusion and found the reports to constitute non-testimonial evidence. For example, in the case of *United States v. Ellis*, the court ruled that medical records establishing the presence of methamphetamine in the defendant’s system were non-testimonial business records not subject to the Confrontation Clause.¹⁴⁶ While acknowledging that the technician who ran the tests would likely expect her results to end up being used at trial, the court “[did] not think these circumstances transform[ed] what is otherwise a non-testimonial business record into a testimonial statement implicating the Confrontation Clause. There [was] no indication that the . . . records were made in anything but the ordinary course of business.”¹⁴⁷ The court believed that this view was consistent with *Crawford*, as it mentioned in dicta that business records were not testimonial, and consistent with *Davis*, as the professionals running the tests were making observations and were not acting as witnesses or testifying, much like the person reporting the emergency in *Davis*.¹⁴⁸

141. See *Miller*, 144 P.3d at 1058.

142. *Id.* (emphasis omitted).

143. *Id.*

144. *Id.*

145. See *Thomas v. United States*, 914 A.2d 1, 14-15 (D.C. 2006) (holding that an analyst’s report identifying a substance obtained by the police as cocaine was testimonial as it was created expressly as a substitute for live testimony against the accused in future litigation); *State v. Caulfield*, 722 N.W.2d 304, 309-10 (Minn. 2006) (finding that a lab report verifying seized substance as cocaine prepared solely for litigation in drug dealing case was testimonial); *State v. Kent*, 918 A.2d 626, 637 (N.J. Super. Ct. App. Div. 2007) (finding a chemist’s report issued after analyzing the defendant’s blood in a drunk driving case was testimonial as it had the primary purpose of proving past events of a crime).

146. 460 F.3d 920, 926-27 (7th Cir. 2006).

147. *Id.* at 925.

148. *Id.* at 926-27.

Ellis is not alone on this front, as the subsequent ruling in *People v. Geier* reached a similar result regarding a DNA analysis that was incriminating against a defendant during a forcible rape trial.¹⁴⁹ In *Geier*, the California Supreme Court interpreted *Davis* as emphasizing consideration of “the circumstances under which the statement was made” and “whether the statement represent[ed] [a] contemporaneous recordation of observable events.”¹⁵⁰ Turning to the report, the court stated that it was made as part of the analyst’s normal duties at work and in compliance with normal occupational scientific protocol.¹⁵¹ Therefore, these circumstances indicated that the analyst was not “bearing witness” against the defendant, but rather simply recording each step of the DNA analysis as it took place.¹⁵² By utilizing this application of *Davis*, the court found the laboratory report non-testimonial.¹⁵³

Thus, despite the fact that the Supreme Court further defined “testimonial statements” in *Davis*, the specifics of that decision appear to leave some questions unanswered when state courts deal with forensic laboratory reports. As recent jurisprudence suggests, the way each individual court interprets the standards in both *Davis* and *Crawford* will essentially dictate their judgments on whether or not these reports constitute testimonial evidence.

IV. INSTANT DECISION

In *State v. March*, the Missouri Supreme Court rejected the State’s arguments regarding the application of the business records exception laid out in *Taylor*.¹⁵⁴ Instead, the court ruled that the exception was no longer applicable in Missouri to satisfy the Confrontation Clause because *Crawford* effectively divorced the hearsay exceptions from the analysis of this issue.¹⁵⁵ With the prior business records exception rule now dismissed as a means of satisfying the Confrontation Clause, the court then turned to the issue of whether or not the laboratory report offered as evidence was testimonial under the *Crawford* analysis.¹⁵⁶ This issue was crucial in the case because if the report was determined to be testimonial in nature, the Confrontation Clause would then

149. See 161 P.3d 104, 140 (Cal. 2007).

150. *Id.* In formulating this interpretation, the court effectively rejected the notion that the critical inquiry is whether the statement might be reasonably anticipated to be used at a later trial. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *State v. March*, 216 S.W.3d 663, 665 (Mo. 2007) (en banc).

155. *Id.* Although the State relied on dicta in *Crawford* mentioning that some hearsay exceptions, including the one for business records, existed as early as 1791 and “were by their nature not testimonial,” the court found that more recent interpretations held that “falling within a hearsay exception does not resolve the Confrontation Clause issue.” *Id.*

156. *Id.* at 666.

apply and failing to call the report's preparer would amount to a violation of March's Sixth Amendment rights.¹⁵⁷ Before engaging in its own analysis, the court quickly discounted the many cases cited by the State holding that laboratory reports were considered business records and that such records are not testimonial when offered as evidence.¹⁵⁸ As a basis for this decision, the court stated that "generally these cases seem to incorrectly focus on the reliability of such reports. The reliability of the reports, once paramount under *Roberts*, is now irrelevant."¹⁵⁹

For the proper guidance in this case, the court turned to the broad definitions of "testimony" and "testimonial" stated in *Crawford*, as well as the primary purpose test in *Davis*. In doing so, it concluded that "it [was] clear that the laboratory report in this case constituted a 'core' testimonial statement subject to the requirements of the Confrontation Clause."¹⁶⁰ The court relied on the fact that the report was prepared at the request of law enforcement officers for March's prosecution, and was subsequently offered to prove that the substance he possessed was cocaine-based, an essential element of the crime charged.¹⁶¹ Therefore, the report was more of a formalized statement of the preparer and was offered instead of the preparer's actual testimony.¹⁶² It followed then, according to the court, that both of these characteristics made the laboratory report akin to an *ex parte* affidavit.¹⁶³ Since the use of such documents to secure criminal convictions was the principal evil at which the Confrontation Clause was directed, at least according to Justice Scalia in *Crawford*, the court concluded that the report was testimonial.¹⁶⁴ Thus, "[i]t [could] not be admitted without the testimony of its preparer unless the witness [was] unavailable and there was a prior opportunity to cross examine."¹⁶⁵ As neither of those conditions were met in this case, the court held that admission of the report violated March's rights under the Confrontation Clause of the Sixth Amendment.¹⁶⁶

157. *See id.*

158. *Id.* at 665-66. For the list of cases cited by the state, see *supra* note 32.

159. *March*, 216 S.W.3d at 665-66.

160. *Id.* at 666.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 666-67.

165. *Id.* at 667.

166. *Id.* The court then considered the constitutional violation in light of the harmless error doctrine, which requires that in order for the verdict to stand as is, the error must be "harmless beyond a reasonable doubt, meaning that there is no reasonable doubt that the error's admission failed to contribute to the jury's verdict." *Id.* (citing *United States v. Chapman*, 356 F.3d 843, 846 (8th Cir. 2004)). In this case, the court concluded that because "the laboratory report was essentially the only evidence offered to prove that the substance March possessed was cocaine," the jury must have relied on this report to find him guilty of drug trafficking. *Id.* Therefore,

V. COMMENT

In *March*, the Missouri Supreme Court dealt with the confusing collision of modern day scientific evidence and the well-established Confrontation Clause of the Sixth Amendment. In light of the two standards handed down from the United States Supreme Court in *Crawford* and *Davis*, the court's decision in *March* holding that the laboratory report fell within the category of "testimonial" evidence represents Missouri's interpretation of these two recent major decisions. Thus, it is important to critically examine not only the rationale that the Missouri Supreme Court used in this instance, but also potential issues surrounding the two prominent opinions that confined the court's decision in the first place.

A. *The Shortcomings of Crawford*

In looking at *Crawford*, the major and perhaps most apparent criticism of this case is centered on Justice Scalia's statement in the majority opinion that declares "[w]e leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"¹⁶⁷ While the overall decision restored one of the basic protections of the common law system of criminal justice – that of confrontation – to its central position,¹⁶⁸ this restoration is at best one based on shaky grounds. Under *Crawford*'s three broad definitions of testimonial evidence, the "trick," as some scholars describe it, for courts now becomes "defining what is 'testimonial' in this context."¹⁶⁹ However, without any real specific guidance under this completely new approach, courts will struggle to proceed confidently and reach consistent results. As Chief Justice Rehnquist noted in his concurrence in *Crawford*, both federal and state prosecutors need answers now about the scope of the *Crawford* rule and what specific types of "testimony" are covered.¹⁷⁰ He went on to say that "[r]ules of criminal evidence are applied every day in courts throughout the [sic] country, and parties should not be left in the dark in this manner."¹⁷¹ However, the majority chose not to heed Chief Justice Rehnquist's words and therefore did not fully address the issue before it.

Because the testimonial standard is vague and unpredictable for courts in many instances, it is questionable whether the decision actually did anything more than change the arena of the analysis. The new approach of

the constitutional violation was not harmless error, and the judgment of the lower court had to be reversed and the case remanded. *Id.*

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

168. Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4, 5 (Summer 2004).

169. Paul C. Giannelli, *Admissibility of Lab Reports: The Right of Confrontation Post-Crawford*, 19 CRIM. JUST. 26, 30 (Fall 2004).

170. *Crawford*, 541 U.S. at 75 (Rehnquist, C.J., concurring).

171. *Id.* at 75-76.

Crawford was supposed to correct the many problems with the *Roberts* reliability standard, one which the Court in *Crawford* described as an “amorphous notion[.]”¹⁷² The overbreadth of the *Roberts* approach inevitably required courts to determine exceptions and limitations to a statement’s “indicia of reliability,” heavily depending on which factors the judge considers and how much weight the judge affords each factor.¹⁷³ It is not surprising then that courts disagree on the reliability of very similar statements, including laboratory reports, and come to opposite conclusions on whether admission of such statements violated the Confrontation Clause.¹⁷⁴

But in seeking to correct the troublesome standard from *Roberts*, the Court essentially replaced it with an equally troublesome testimonial standard in *Crawford*, because outcomes are still heavily dependent on what factors and characteristics of the report the judge chooses to emphasize. As previously discussed, the two main approaches that courts have generally taken when dealing with forensic laboratory reports in the post-*Crawford* period are to either focus on the report being akin to a business record, thus being non-testimonial in nature,¹⁷⁵ or to focus on the fact that the report’s functionality is geared toward later use at trial against the defendant, thus being testimonial.¹⁷⁶

As if two completely different determinative methods were not bad enough in an already confusing area of law, to make matters worse, both of these approaches appear to be strengthened because they are based upon seemingly inconsistent portions of the Court’s opinion in *Crawford*.¹⁷⁷ Thus, it is arguably difficult to fault a lower court for choosing one approach over the other, given the mixed messages that *Crawford* sends about whether or not business records such as laboratory reports are testimonial. It seems somewhat logical to think of a laboratory report as a business record based on its characteristics and traditional hearsay exceptions that are familiar to courts. On the other hand, the same can be said for viewing the report from the pers-

172. *Id.* at 61 (majority opinion).

173. Friedman, *supra* note 168, at 5.

174. Giannelli, *supra* note 169, at 29 (listing cases dealing with scientific laboratory reports decided after *Roberts*, in which some courts have ruled the reports are reliable and therefore admissible, while others have reached the opposite conclusion).

175. *See, e.g.*, Commonwealth v. Verde, 827 N.E.2d 701, 706 (Mass. 2005); People v. Hinojos-Mendoza, 140 P.3d 30, 37 (Colo. Ct. App. 2005), *aff’d in part, rev’d in part*, 169 P.3d 662 (Colo. 2007); State v. Forte, 629 S.E.2d 137, 143 (N.C. 2006).

176. *See, e.g.*, State v. Crager, 844 N.E.2d 390, 395-96 (Ohio Ct. App. 2005), *rev’d*, 879 N.E.2d 745 (Ohio 2007); Johnson v. State, 929 So. 2d 4, 7 (Fla. Dist. Ct. App. 2005), *cert. granted*, 924 So. 2d 810 (Fla. 2006); Belvin v. State, 922 So. 2d 1046, 1050 (Fla. Dist. Ct. App. 2006), (en banc), *cert. granted*, 928 So. 2d 336 (Fla. 2006).

177. *See supra* notes 96-126 and accompanying text.

pective of its use in future litigation, which essentially characterizes the report as an affidavit of the expert or analyst.¹⁷⁸

Which one of these approaches is correct? *Crawford* does not provide a clear answer. This may be in part because of the majority's historical emphasis on the Confrontation Clause, in the sense that looking back for answers fails to look forward and consider modern day methods of gathering evidence in the criminal justice system. Given that forensic laboratory reports are often made with sophisticated scientific technology, focusing on traditional characteristics of "testimony" as done in *Crawford* provides minimal help at best.¹⁷⁹ While the Court should be credited for focusing on the rights of the accused and the crucial element of confrontation of witnesses, a decision such as this that ushered in a drastic legal change needed to be more comprehensive and take into account potential future applications and developments. In this regard, while a change from the *Roberts* reliability standard may have been needed, the *Crawford* decision may have been premature.

B. Concerns with the Davis Decision

As with *Crawford*, the primary critique of the Supreme Court's decision in *Davis* lies in the narrow direct application that the ruling provides, and the resulting uncertainty as to its scope and application to forensic laboratory reports. In one sense, the "primary purpose" test articulated by the majority in *Davis* can be seen as reinforcing the functionality approach that some jurisdictions have utilized in the post-*Crawford* era. An indirect application of the general principles of *Davis* could naturally lead a court to conclude that a laboratory report has the primary purpose of establishing a fact about a past event, such as the defendant's blood alcohol content in a drunk driving case, or the identification of illegal substances in drug possession or trafficking cases. On the other hand, it is questionable as to whether the processing of forensic evidence is technically an *interrogation* in the traditional sense of the word, as some cases have held.¹⁸⁰ Therefore, those courts that choose to interpret *Davis* in the stricter sense could reasonably find that *Davis* does not apply to laboratory reports, thus bringing the analysis back to the vague standards previously outlined in *Crawford*, where arguably anything is possible.

As a result, the amount of judicial discretion in this area of law makes it unclear whether *Davis* will be applied to render laboratory reports testimonial. Moreover, certain aspects of the decision tend to foreshadow potential developments in the future that could alter the present state of uncertainty, but not necessarily for the better. For one thing, it is interesting to note that the

178. See Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 504 (2006).

179. See Morin, *supra* note 72, at 1256.

180. See, e.g., *State v. Miller*, 144 P.3d 1052, 1058 (Or. Ct. App. 2006), *abrogated by State v. Marroquin*, 168 P.3d 1246 (Or. Ct. App. 2007).

majority's opinion in *Davis* did not cite a single lower-court opinion applying any of *Crawford's* formulations.¹⁸¹ In fact, the *Davis* court did not cite *any* post-*Crawford* decision outside from the two lower-court cases it was considering on appeal, and one Massachusetts case that addressed the distinct matter of forfeiture, which is not a major component to the central holding.¹⁸² The Court then appeared to ignore almost two years of jurisprudence that interpreted the very standard it was elaborating on in *Davis*.

Not taking this case law into account is disturbing because it seems more logical for the Court to rely on the more recent and arguably more relevant cases that came about in the post-*Crawford* era as opposed to referencing a plethora of cases before *Crawford* that date back to the mid-1800s. As such, it seems that “[r]ather than learn from and build upon lower courts’ attempts to apply *Crawford's* formulations, the *Davis* Court seemed bent on reshaping the inquiry.”¹⁸³ That being the case, one has to wonder whether any decision reached by lower courts post-*Davis* will have any bearing on the Court in the future.

The other peculiarity in *Davis* worth noting is Justice Scalia's response to the dissent's criticism that the majority's holding was not directed at the abuses forbidden by the Confrontation Clause, namely statements with a high degree of formality.¹⁸⁴ He noted that the characterization of formality made by the dissent is misplaced in light of current law enforcement practices and routine investigatory functions now performed by everyday police officers.¹⁸⁵ In justifying the majority's extension of formality to these current law enforcement methods, Justice Scalia went on to say “[r]estricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.”¹⁸⁶ This seems to be at odds with the historical and traditional emphasis that the Scalia majority used in *Crawford* to justify creating the “testimonial” standard in the first place. The Court went to great lengths in *Crawford* to trace the history of the right to confrontation and where it should apply, yet, in *Davis*, it appears to be stating that such an originalist approach is not one that the Court should presently utilize.

Therefore, reading both *Crawford* and *Davis* together causes some confusion as to whether a more originalist or evolutionist methodology should be used in analyzing confrontation issues. And, while rationales used by courts can alter over time, such a change in the Court's logic in this instance is hard to justify by examining the entire text of the *Davis* majority opinion because, as previously mentioned, the opinion does not cite a single post-*Crawford*

181. GEORGE FISHER, FEDERAL RULES OF EVIDENCE 2007-2008 STATUTORY AND CASE SUPPLEMENT 471 (2007).

182. *Id.*

183. *Id.*

184. *Davis v. Washington*, 547 U.S. 813, 830 n.5 (2006).

185. *Id.*

186. *Id.*

case that dealt with the new testimonial standard.¹⁸⁷ More recent cases such as these could have supplied support for the Court's new viewpoint that seemingly expands the scope and application of the Confrontation Clause; however, Justice Scalia fails to provide this reassurance.

The future under *Davis* is therefore uncertain. The Court's more expansive approach of classifying statements as subject to the Confrontation Clause could provide some of the ammunition needed to include things like forensic laboratory reports within the clause's scope. However, at the same time, the change in approach between *Crawford* and *Davis* without any justification from recent post-*Crawford* cases suggests that this might very easily happen again in the future. If another change takes place and the Court chooses not to mention any post-*Davis* cases, it could take lower courts by surprise once again.

C. Missouri's Approach in *March*

With all of the uncertainties stemming from *Crawford* and *Davis*, the Missouri Supreme Court had very few direct principles to work with in deciding that the laboratory drug report in *March* was testimonial in nature. Nevertheless, the court was able to use an approach based on the report's functionality, focusing on both its preparation at the request of law enforcement for *March*'s prosecution, and its establishment of a crucial element of the crime with which he was charged.¹⁸⁸ Such an analysis is logical in light of *Crawford* and *Davis*, and seems to be in accordance with their general ideas and principles. Under *Davis*, the "past event" that the report had the "primary purpose" of establishing can be seen as the possession of illegal substances, which is absolutely necessary for a charge of drug trafficking.¹⁸⁹ With *Crawford*, the report can be seen as a formal statement that bears very similar characteristics to an *ex parte* affidavit,¹⁹⁰ one of the few things that *Crawford* expressly defines as testimonial. Therefore, the overall approach by the court seems to be a rational extension of the controlling standards of law, and is consistent with approaches utilized in other jurisdictions.¹⁹¹

The court should be credited for its methodology in *March*. In an area of law where there has been nothing but vagueness, it is imperative for the court to be specific as to why it is choosing a particular approach. However, at the same time, it is just as important for it to specify why it is *not* using other approaches that might arguably be just as viable. The court in this case, when confronted with post-*Crawford* decisions finding similar laboratory

187. See *supra* note 182 and accompanying text.

188. *State v. March*, 216 S.W.3d 663, 666 (Mo. 2007) (en banc).

189. See MO. REV. STAT. § 195.223 (2000) (identifying substances which can lead to a charge of drug trafficking in the second degree).

190. *March*, 216 S.W.3d at 666.

191. See, e.g., *Thomas v. United States*, 914 A.2d 1, 14 (D.C. 2006); *State v. Caulfield*, 722 N.W.2d 304, 309 (Minn. 2006).

reports non-testimonial, merely glossed over them with a single generalized statement.¹⁹² While this generic statement is partially correct,¹⁹³ the court is misplaced in its assertion of the other cases' "incorrect focus" on reliability because nearly all of them frame their analysis within the testimonial framework of *Crawford*, and tend to focus on the report not "bearing testimony" in the traditional sense.¹⁹⁴ Its approach is therefore in line with *Crawford*'s historical themes, and is simply a refusal to extend *Crawford*'s definitions of testimony to cover forensic laboratory reports. Reliability might play an indirect role in this matter, but this does not justify the sweeping statement made by the court in *March* to dismiss a whole line of cases dealing with a confusing and uncertain standard.

In light of this observation, the court should have taken a more comprehensive approach in reaching its decision in two different respects. First, regarding the rejection of other cases, a more preferable approach would have been one similar to that in *Thomas v. United States*.¹⁹⁵ In that case, the District of Columbia Court of Appeals not only determined that a laboratory report identifying a substance as cocaine was testimonial, but also outlined the opposing arguments of the state and its specific reasons for not accepting them.¹⁹⁶ Had the Missouri Supreme Court provided this type of an explanation in its *March* decision, the opinion would have been strengthened from a two sentence explanation that is likely easier to "reinterpret" or declare to be "misplaced" in the future, to something more stable and concrete.

Secondly, it would have helped the court's analysis and provided more contextual background to discuss at least some of the cases it dismissed in detail instead of simply placing them all in a footnote. Moreover, the court should have referenced *United States v. Ellis*¹⁹⁷ in the analysis as well. *Ellis* is the one case decided in the short post-*Davis* period that ruled that laboratory reports were still non-testimonial.¹⁹⁸ All of the cases actually referenced by the court, albeit briefly, were decided before *Davis*.¹⁹⁹ The law in this area

192. See *supra* note 159 and accompanying text.

193. In that the *Crawford* decision did have the effect of overruling the reliability standard of *Roberts*. See *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004).

194. See, e.g., *People v. Johnson*, 18 Cal. Rptr. 3d 230, 233 (Ct. App. 2004) ("A laboratory report does not 'bear testimony,' or function as the equivalent of in-court testimony."); *People v. Hinojos-Mendoza*, 140 P.3d 30, 37 (Colo. Ct. App. 2005), *aff'd in part, rev'd in part*, 169 P.3d 662 (Colo. 2007) ("But the report before us is not an affidavit. Nor does it resemble the other types of statements identified by the *Crawford* majority as testimonial . . ."); *State v. Forte*, 629 S.E.2d 137, 143 (N.C. 2006) ("[The reports] do not fall into any of the categories that the Supreme Court defined as unquestionably testimonial. These unsworn reports . . . do not bear witness against [the] defendant.").

195. 914 A.2d 1 (D.C. 2006).

196. *Id.* at 13.

197. 460 F.3d 920 (7th Cir. 2006).

198. *Id.* at 925-26.

199. See *State v. March*, 216 S.W.3d 663, 666 n.1 (Mo. 2007) (en banc).

is relatively new considering the recent changes made by the United States Supreme Court, and is therefore continuing to develop with each lower court decision. Thus, it is imperative for the court to be up-to-date on all cases that have a potential influence on its decision and to discuss and distinguish them accordingly. The decision in *March*, however, falls short in this respect.

VI. CONCLUSION

While the Missouri Supreme Court reached a logical result in *March* based on the vagaries of the standards it had to work with from *Crawford* and *Davis*, the court took a shortcut to get there. While the decision did have its various shortcomings, at least for now it marks a willingness to focus on the constitutional protections of the Confrontation Clause for defendants charged with drug related crimes in Missouri. How long this interpretation will last, however, is unclear. The United States Supreme Court has shown an unwillingness to specifically address the testimonial standard from *Crawford* and provide the needed guiding light to lower courts, instead seemingly preferring to let the law evolve over time. Thus, while the decision in *March* may have illuminated a path for Missouri courts to take when faced with the admission of laboratory reports and brought them out of the shadows of confusion they had regrettably become accustomed to, it is likely that the United States Supreme Court will have to once again intervene at some point in the future.

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