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Gabriela M. Reyes-Noyola
IIT Chicago-Kent College of Law

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**OBJECTIVELY UNREASONABLE:
THE SEVENTH CIRCUIT LIMITS CRIMINAL
DEFENDANTS' RIGHTS UNDER THE
CONFRONTATION CLAUSE**

GABRIELA M. REYES-NOYOLA*

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INTRODUCTION

Imagine a situation where you have been pulled over by a police officer. The police officer thinks you may have been drinking and asks you to perform some field sobriety tests. You fail the tests. He then gives you a commonly used alcohol field test which comes up negative. The officer prompts you to go to the local hospital to have your blood and urine tested for drugs. You agree.

At the hospital, under the watchful eye of the police officer, a laboratory technician collects your chart and notices that the “Reasons for Test” box indicates that the cause for these tests is “Reasonable Suspicion/Cause.”¹ Also included on the chart is a conspicuously placed, handwritten note stating “Blood Drug Screen—Requested by

* J.D. candidate, May 2007, Chicago-Kent College of Law, Illinois Institute of Technology; B.A Government, Franklin and Marshall College. Thank you to Professor Morris and Julia Lissner for all their help. Very special thank you to my mother, sister, family and friends for all of their support during this process and law school in general.

¹ See *United States v. Ellis*, 460 F.3d 920, 922 (7th Cir. 2006).

Officer.”² The technician takes your blood and urine samples as the officer watches. The results come back positive for methamphetamine.

Charged with “use of a controlled substance,” your trial begins. The police officer testifies that he saw you urinate into a cup and that the laboratory technician took a sample of your blood for testing. The police officer is the only person who is allowed to testify as to your medical records; the laboratory technician that conducted the tests is not called to testify. The results of your lab exams are admitted into evidence under the ordinary business records exception to the hearsay rule despite your objections.

This scenario is not fiction: it is the reality of the recent Seventh Circuit decision, *United States v. Ellis*.³ In *Ellis*, the court ruled that blood and urine drug screen records were not testimonial in nature because they were records of regularly conducted activity kept in the ordinary course of business, and thus, were not subject to the Sixth Amendment’s Confrontation Clause.⁴ While the Seventh Circuit may have produced a result that is consistent with the purpose of the Confrontation Clause,⁵ it did so through flawed reasoning.⁶

This Note will first discuss the history and background of the hearsay rule, its exceptions, and the Confrontation Clause. It will then consider the issue of whether a business record prepared in anticipation of litigation should be admitted into evidence without giving the defendant the opportunity to cross-examine the declarant.⁷

² *See id.*

³ *Id.*

⁴ *Id.* at 927.

⁵ Robert L. Windon, Crawford v. Washington - *How the Seventh Circuit Improperly Defined “Testimonial,”* 1 SEVENTH CIRCUIT REV. 105 (2006), at <http://www.kentlaw.edu/7cr/v1-1/widon.pdf>. (The underlying purpose of the Confrontation Clause is to enhance the accuracy in the fact-finding process, therefore, it only approves of hearsay that is “marked with such trustworthiness that there is no material departure from the reason of the general rule”).

⁶ Discussed further, *infra*.

⁷ “1. One who has made a statement <in accordance with the rules of evidence, the statement was offered to prove the declarant's state of mind>. 2. One who has

In addressing that issue, this Note will focus on the line of cases that explain the evolution of the Confrontation Clause and its relationship with the hearsay exceptions. The discussion focuses on the split within the authorities and argues that, although the Seventh Circuit may have reached the right decision, it did so with flawed reasoning. Finally, this Note provides a possible solution to the split in authorities. This Note ultimately concludes that the courts are using a sliding scale when attempting to decide whether evidence that has been prepared in anticipation of litigation is testimonial or nontestimonial and propose a bright line rule for use in future cases.

I. THE CONFRONTATION CLAUSE

John Henry Wigmore⁸ famously stated that “cross-examination is ‘beyond any doubt the greatest legal engine ever invented for the discovery of truth.’”⁹ “This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination taken down in writing before an officer or his clerk.”¹⁰

Wigmore’s quote, made over seven hundred years ago, reverberates loudly to this very day as evidenced by the embodiment of his quote’s spirit in the Constitution of the United States.¹¹ The Sixth Amendment’s Confrontation Clause requires that “in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted

signed a declaration, esp. one stating an intent to become a U.S. citizen <the declarant grew up in Italy>.” BLACK’S LAW DICTIONARY (8th ed., 2004).

⁸ COLUMBIA ENCYCLOPEDIA (6th ed. 2001-2005). John Henry Wigmore is a noted American legal educator. Wigmore is most known for his work on *Treatise of Evidence* and other books on Evidence. He was a professor at Northwestern University School of Law from 1893 until 1901, when he became Dean of the Law Faculty until 1929.

⁹ 5 John Henry Wigmore, *Evidence in Trials at Common Law* § 1367, p. 32 (James H. Chadbourn rev. ed. 1974).

¹⁰ 3 William Blackstone, *Commentaries* 373.

¹¹ *See* U.S. CONST. amend. VI.

with the witnesses against him.”¹² This basic right was modified throughout the years as a response to such grand state trials as those of Sir Walter Raleigh¹³ and Sir John Fenwick¹⁴ because “[n]othing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question.”¹⁵ Moreover, “written evidence . . . [is] almost useless [because] it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth.”¹⁶

The Confrontation Clause envisages personal and cross-examination where the accused “has an opportunity, not only of testing the recollection and sifting the conscience of the witness but of compelling him to stand face to face”¹⁷ with his accuser while the trier of fact has the opportunity to witness his or her character and demeanor.¹⁸ However, the Supreme Court has recognized that it is impossible to read the language of the Confrontation Clause literally because doing so would require “the exclusion of any statement made by a declarant not present at trial.”¹⁹ Thus, the Court has come to recognize and accept that some hearsay will be admissible.²⁰

Under *Ohio v. Roberts*,²¹ “if a court deemed a hearsay statement to be sufficiently reliable, the Confrontation Clause usually posed no barrier to admissibility.”²² A statement is considered reliable

¹² U.S. CONST. amend. VI.

¹³ *Crawford v. Washington*, 541 U.S. 36, 44-47 (2004) (Rehnquist, J. concurring).

¹⁴ *Id.*

¹⁵ *Id.* at 49 (quoting R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787)).

¹⁶ *Id.*

¹⁷ *Mattox v. United States*, 156 U.S. 237, 242-43 (1985).

¹⁸ *Id.*

¹⁹ *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (Brennan, J. dissenting); (while the Court excludes some out-of-court statements under the hearsay rules, the Court has come to recognize that other out-of-court statements should be admissible as exceptions to the hearsay rule).

²⁰ *Id.*; see also *California v. Green*, 399 U.S. 149, 156-57 (1970).

²¹ 448 U.S. 556 (1980).

²² Prof. Richard Friedman and Jeffrey Fisher, *Spotlight on the Confrontation Clause*, available at

if it fits within a “firmly rooted” hearsay exception.²³ However, “*Crawford* rejected this doctrine, holding that the principal focus of the Clause is statements that are testimonial in nature.”²⁴

The Confrontation Clause has been a source of much debate—and court attention—throughout the years.²⁵ One recent debate has centered around the “complexity of reconciling the Confrontation Clause and the hearsay rules,”²⁶ particularly the admissibility of laboratory reports such as blood-alcohol tests under the business-records exception to the hearsay rule.²⁷ “Prior to *Crawford* [*v. Washington*],²⁸ many courts admitted lab reports, especially concerning analyses of controlled substances, through the testimony of

<http://www.law.umich.edu/library/spotlight/confrontationclause/confrontationclauseindex.htm> (last visited May 1, 2007).

²³ *Id.*

²⁴ *Id.* An out-of-court statement that meets that description may not be admitted against an accused to prove the truth of what it asserts unless the accused has had an opportunity to cross-examine the maker of the statement and that person—the witness—is unavailable to testify at trial.

²⁵ See, e.g., *Crawford v. Washington*, 541 U.S. 36 (2004) (Rehnquist, J. concurring); *Davis v. Washington*, 126 S.Ct. 2266 (2006); *United States v. Maher*, 454 F.3d 13 (1st Cir. 2006); *United States v. Saget*, 377 F.3d 223 (2d Cir. 2004); *United States v. Hinton*, 423 F.3d 355 (3d Cir. 2005); *United States v. Rueda-Rivera*, 396 F.3d 678 (5th Cir. 2005); *United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004); *United States v. Gilbertson*, 435 F.3d 790 (7th Cir. 2006); *State v. Davis*, 111 P.3d 844, 154 Wn.2d 291 (Wash. 2005).

²⁶ *Ohio v. Roberts*, 448 U.S. 56, 65 n.9 (1980) (Brennan, J. dissenting).

²⁷ See Steven Yermish, *Cover Story: Crawford v. Washington and Expert Testimony: Limiting the use of Testimonial Hearsay*, 30 CHAMPION 12 (2006).

²⁸ In 2004, the Supreme Court overruled thirty years of *Ohio v. Roberts* when it decided *Crawford v. Washington*. *Crawford* ruled that the only “indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” The Court emphasized that one should focus on the meaning of the word *testimonial*, when deciding whether the evidence in question should be subject to the requirements of the Confrontation Clause. (The interesting point being that the Court left for another day the opportunity to thoroughly define the word *testimonial*). It lessened the judge’s ability to use his or her own discretion when deciding the matter in question.

records custodians, lab supervisors or by certification or affidavit.”²⁹ Confrontation Clause issues were seldom addressed in these situations, although one court did recognize that there could be “constitutional implications of admitting such testimony.”³⁰

II. THE HEARSAY RULES AND THE BUSINESS RECORDS EXCEPTION

Hearsay is defined as “a statement (either a verbal assertion or nonverbal assertive conduct) other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”³¹ Generally, hearsay is inadmissible in a court proceeding because it is deemed unreliable.³² Over time, exceptions and exemptions to this general rule have been developed because courts have recognized that certain statements can be deemed reliable based on the fact that they are trustworthy.³³ The business records exception to the hearsay rule is one of those situations.³⁴

To qualify as a “business record,”³⁵ certain criteria must be met. Specifically, a business record must be “(1) a memorandum, report, record or data compilation . . . made at or near the time, by or from information transmitted by a person with knowledge, and (2) the information must have been kept in the course of a regularly

²⁹ Yermish, *supra* note 27, at 12.

³⁰ *Id.* at 13 (citing *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)).

³¹ BLACK’S LAW DICTIONARY (8th ed. 2004).

³² *Id.*

³³ *See Houghtaling v. Superior Court*, 21 Cal. Rptr. 2d. 855 (Cal. App. 1993).

³⁴ FED. R. EVID. 803(6).

³⁵ *Id.* A business record is defined as: “[A] memorandum, report, record, or date compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification.”

conducted business activity.”³⁶ Once those requirements are met, a court may consider a document to be admissible.³⁷

Business records, although hearsay, have come to be recognized as reliable.³⁸ They are created by a business on a day-to-day basis in an automatic (or procedural) fashion.³⁹ This, in turn makes it safe to conclude that the business record is not tainted or prejudiced.⁴⁰ Thus, courts will be permitted to admit business records as evidence.⁴¹

The validity or reliability of a business record is tainted where the record is made in anticipation of litigation.⁴² This type of situation raises Confrontation Clause concerns because the record has lost its indicium of reliability.⁴³ There could be a motive for the declarant to manipulate the information in order to further the investigation.⁴⁴ Because “records made in anticipation of litigation do not possess the

³⁶ *Id.*

³⁷ *Id.*

³⁸ *See id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See* Yermish, *supra* note 27, at 13 (citing *People v. Jambor*, 271 Mich. App. 1, 9 (2006) (Cooper, P.J. 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 (Third Dept. 2004) (“Documents prepared for litigation lack the indicium of reliability necessary to invoke the business records exception to the hearsay rule”); *People v. McDaniel*, 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”); BLACK’S LAW DICTIONARY (8th ed. 2004) (defining a business-records exception as “[a] hearsay exception allowing business records (such as reports or memoranda) to be admitted into evidence if they were prepared in the ordinary course of business). If there is good reason to doubt a record’s reliability (e.g., the record was prepared in anticipation of litigation), the exception will not apply.

⁴³ *See* *State v. Manocchio*, 497 A.2d 1 (R.I. 1985).

⁴⁴ *Id.*

same trustworthiness of other records,”⁴⁵ they should not be allowed in as evidence.⁴⁶

Since *Crawford* was decided, courts have begun to note that “whether a statement was made with an eye towards prosecution, that is, with the knowledge or for the purpose that it would be used later for prosecution, is an important aspect of delineating between testimonial and nontestimonial evidence.”⁴⁷ Thus, it has been suggested that a case-by-case analysis should be conducted to consider whether a document was produced “with an eye towards prosecution.”⁴⁸

Under such a test, if it is found that an objective witness could reasonably be led to believe that the statement would be used at a later trial,⁴⁹ the court should, at the very least, consider the fact that the record could be testimonial evidence and prompt the State to present its case on why the defendant should not be entitled to its Sixth Amendment rights. This argument is supported by the fact that all evidence should be construed in the light most favorable to the defendant, especially in a criminal trial where the defendant’s liberty is at stake.

With a better understanding of hearsay, the business record rules, and the Confrontation Clause, the discussion will now turn to how the Seventh Circuit reached its decision. Shedding light on its reasoning begins with the Supreme Court case of *Ohio v. Roberts*.⁵⁰

⁴⁵ *City of Chicago v. Old Colony Partners, L.P.*, 847 N.E.2d 565, 576 (Ill. App. Ct. 2006).

⁴⁶ *Id.*

⁴⁷ *United States v. Ellis*, 460 F.3d 920, 924 (7th Cir. 2006); *see Crawford v. Washington*, 541 U.S. 36 (2004) (Rehnquist, J. concurring); *State v. Cramer*, 164 Ohio App. 3d 816 (2005) (statements made under circumstances that would lead a reasonable person to conclude that such statements would later be available for use at trial also qualify as testimonial under *Crawford*); *see also United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004).

⁴⁸ *Ellis*, 460 F.3d at 924.

⁴⁹ *Id.*

⁵⁰ 448 U.S. 56 (1980) (Brennan, J. dissenting).

III. *OHIO V. ROBERTS*

In 1980, the Supreme Court, in an opinion authored by Justice Blackmun, held that (1) a defendant's "right[s] . . . to be confronted by the witnesses against [the defendant]"⁵¹ did not bar admission, at a criminal trial, of an unavailable witness' statement against the defendant if the statement bore an "adequate indicia of reliability";⁵² and (2) to meet this test, evidence had to (a) "fall[] within a firmly rooted hearsay exception",⁵³ or (b) "bear[] particularized guarantees of trustworthiness."⁵⁴

Roberts was on trial for having forged a check and for possession of stolen credit cards.⁵⁵ The victim's daughter was called as the defense's only witness.⁵⁶ The daughter testified at the preliminary hearing; however, she did not appear at the subsequent trial despite the fact that several subpoenas were sent to her parents' home.⁵⁷ The state attempted to offer the transcript of her previous testimony; however, the defense objected stating that it was a violation of the Sixth Amendment's Confrontation Clause.⁵⁸ The trial court admitted the transcript, and the Court of Appeals of Ohio reversed it.⁵⁹ The Supreme Court of Ohio affirmed, and the case was subsequently heard by the United State Supreme Court on certiorari.⁶⁰

The Court concluded that the introduction of the daughter's testimony did not run afoul of the Sixth Amendment because her prior testimony "bore sufficient indicia of reliability and afforded the trier of

⁵¹ U.S. CONST. amend. VI.

⁵² *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (Rehnquist, J. concurring) (citing *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (Brennan, J. dissenting)).

⁵³ *Crawford*, 541 U.S. at 42.

⁵⁴ *Id.*

⁵⁵ *Roberts*, 448 U.S. at 58.

⁵⁶ *Id.*

⁵⁷ *Id.* at 59.

⁵⁸ *Id.*

⁵⁹ *Id.* at 60.

⁶⁰ *Id.*

fact a satisfactory basis for evaluating the truth of the prior statement.”⁶¹ Furthermore, the witness was constitutionally unavailable for purposes of the defendant’s trial.⁶² The Court summarized its conclusion by stating that whenever a hearsay declarant is not available to be cross-examined, the Confrontation Clause “requires a showing that he is unavailable.”⁶³ After meeting this burden, the statement is “admissible only if it bears adequate indicia of reliability.”⁶⁴ An adequate indicium of reliability can be found when “evidence falls within a firmly rooted hearsay exception,”⁶⁵ however, evidence that does not show “particularized guarantees of trustworthiness”⁶⁶ under *Roberts*, shall be excluded in all circumstances.⁶⁷

For almost thirty years, the *Roberts*’ “indicia of reliability”⁶⁸ test was the method for determining whether evidence could be admitted at trial without triggering the requirements of the Confrontation Clause.⁶⁹ However, the landscape changed dramatically when the Supreme Court decided *Crawford v. Washington* in 2004.⁷⁰

IV. CRAWFORD V. WASHINGTON

In an opinion authored by Justice Scalia, the Supreme Court reversed almost thirty years of precedent when it concluded that “the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”⁷¹

⁶¹ *Id.* at 73 (quoting *Mancusi v. Stubbs*, 408 U.S. 204, 216 n. 12 (1972)).

⁶² *Roberts*, 448 U.S. at 65.

⁶³ *Id.* at 66.

⁶⁴ *Id.* (internal quotation marks omitted).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *See* 541 U.S. 36 (2004).

⁷¹ *Id.* at 68-69 (2004) (Rehnquist, J. concurring).

Crawford was on trial for assault and attempted murder.⁷² The State wanted to introduce a recorded statement that the accused's wife had made during a police interrogation as evidence that Crawford had attempted murder and not acted in self-defense.⁷³ The accused's wife did not testify at trial because of the state's marital privilege laws.⁷⁴ The Court made note of the traditional *Roberts* test and concluded that the use of the wife's statement was a violation of the Confrontation Clause because, "where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is . . . confrontation."⁷⁵

In concluding that *Roberts* must be overruled, the *Crawford* majority criticized the "indicia of reliability" method as being "unpredictable and inconsistent."⁷⁶ The Court stated that this method confers upon a judge excessive discretion in determining which factors are reliable and which ones are not.⁷⁷ Allowing statements in simply because a judge deems them reliable is "fundamentally at odds with the right of confrontation."⁷⁸ The Court further buttressed its conclusion by noting that the Framers were "loath to leave too much discretion in judicial hands."⁷⁹

The Court took the stance that the *Roberts* test was a departure from the Sixth Amendment's historical principles because it would permit "a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability."⁸⁰ Mindful of the immense change it was about to produce, the Court warned that "[d]ispensing with confrontation because testimony is obviously

⁷² *Id.* at 40.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 68-69.

⁷⁶ *Id.* at 66 (citing *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (Brennan, J. dissenting)).

⁷⁷ *Crawford*, 541 U.S. at 67.

⁷⁸ *Id.* at 61.

⁷⁹ *Id.* at 67.

⁸⁰ *Id.* at 62.

reliable is akin to dispensing with jury trial because a defendant is obviously guilty.”⁸¹

In short, the *Robert’s* test was one of judicial discretion which was highly subjective and malleable.⁸² Under that test, a court’s consideration of “[w]hether a statement [should be] deemed reliable depend[ed] heavily on which factors the judge consider[ed] and how much weight [the judge] accord[ed] each of them.”⁸³ The Court forcefully stated that “[t]he unpardonable vice of the *Robert’s* test . . . [was] not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.”⁸⁴ One such statement could be a document made with an eye towards litigation that was admitted under the cloak of the business records exception to the hearsay rule.

The *Crawford* court continued its discussion by declaring that “not all hearsay implicates the Sixth Amendment’s core concerns.”⁸⁵ It cited examples of hearsay that is unreliable (an off-hand remark) and hearsay that would be arguably admissible in modern times but not in common law times (ex-parte examinations).⁸⁶ However, the crux of the argument is formulated around whether a certain type of hearsay is considered testimonial in nature.⁸⁷

The Court used Webster’s American Dictionary of the English Language to define the word “testimonial” as “[a] solemn declaration

⁸¹ *Id.*

⁸² *Id.* at 60-61.

⁸³ *Id.* at 63 (“For example, the Colorado Supreme Court held a statement to be more reliable because its inculcation of the defendant was ‘detailed,’ . . . while the Fourth Circuit found a statement more reliable because the portion implicating another was ‘fleeting[.]’ . . . The Virginia Court of Appeals found a statement more reliable because the witness was in custody and charged with a crime (thus making the statement more obviously against her penal interest) . . ., while the Wisconsin Court of Appeals found a statement more reliable because the witness was *not* in custody and *not* a suspect”) (emphasis in original) (internal citations omitted).

⁸⁴ *Id.*

⁸⁵ *Id.* at 51.

⁸⁶ *Id.*

⁸⁷ *Id.*

or affirmation made for the purpose of establishing or proving some fact.”⁸⁸ In order to explain the dictionary definition, the Court gave an illustration of a person who bears testimony: “an accuser⁸⁹ who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”⁹⁰ While this example seems to present both extremes, the Court elaborated on the dictionary definition by stating, in dicta, that the following formulations of core classes of testimonial statements share a common nucleus: “[1]ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations . . . or [2] similar pretrial statements that declarants would reasonably expect to be used prosecutorially”⁹¹ and “[3]statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for later use at trial.”⁹²

The second and third formulations—pretrial statements that a declarant would reasonably expect to be used prosecutorially and statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for later use at trial—are the definitions of most importance. This is because those formulations help demonstrate that the Seventh Circuit, although they may have reached the right decision, did so for the wrong reasons. It is important to keep these two formulations in mind for the discussion of the *Ellis* case.

When discussing how testimonial statements would affect the many hearsay exceptions, the Court, in dictum, stated that “most of the hearsay exceptions covered statements that by their nature were not

⁸⁸ *Id.* at 51 (quoting 1 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

⁸⁹ A person who accuses another of a crime. BLACK’S LAW DICTIONARY (8th ed. 2004).

⁹⁰ *Crawford*, 541 U.S. at 51.

⁹¹ *Id.* (quoting Br. for Pet’r at 23).

⁹² *Crawford*, 541 U.S. at 52 (quoting Br. for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* Supporting Pet’r at 3).

testimonial—for example, business records.”⁹³ This statement seems inconsistent with the Court’s earlier declarations,⁹⁴ leaving lower courts to wonder: how does one deal with hybrid business records that were created in anticipation of litigation or that one “would reasonably expect to be used prosecutorially”?⁹⁵ If it is true that business records are by their very nature non-testimonial, what happens when there is a blood and alcohol test that was created for the sole purpose of convicting an alleged criminal?⁹⁶ Although, as we will see, this is still unclear, one thing is certain: “where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity to cross examine.”⁹⁷

V. *STATE V. DAVIS* AND *DAVIS V. WASHINGTON*

Before reaching the discussion on *Ellis*, there is one more set of important cases to discuss in this evolution: *State v. Davis* (“*Davis I*”)⁹⁸ and on certiorari to the Supreme Court, *Davis v. Washington* (“*Davis II*”).⁹⁹

⁹³ *Crawford*, 541 U.S. at 56.

⁹⁴ See Yermish, *supra* note 27, at 13 (citing *People v. Grogan*, 816 N.Y.S.2d 93 (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*, 629 S.E.2d 137, 143 (N.C. 2006) (DNA report not prepared exclusively for trial deemed nontestimonial); *cf.* *Johnson v. State*, 929 So.2d 4 (Fla. Dist. Ct. App. 2005), rev. granted, 920 So.2d 810 (Fla. 2006); *State v. Crager*, 164 Ohio App. 3d 816 (2005) rev. granted 846 N.E.2d 533 (2006) (DNA analyst’s report prepared as part of a police investigation is testimonial under *Crawford*, regardless of whether it is a business record).

⁹⁵ *Crawford*, 541 U.S. at 51 (Rehnquist, J. concurring) (quoting Br. for Pet’r at 23).

⁹⁶ See *United States v. Ellis*, 460 F.3d 920 (7th Cir. 2006).

⁹⁷ *Crawford*, 541 U.S. at 68.

⁹⁸ 111 P.3d 844 (Wash. 2005).

⁹⁹ 126 S.Ct. 2266 (2006).

Davis I was being decided when the *Crawford* ruling changed the state of the law.¹⁰⁰ Thus, the court had to revisit its initial conclusions to hold that whether statements made during a 911 call are admissible hearsay depends on whether they are testimonial or non-testimonial.¹⁰¹ The court noted that this type of determination should be made on a case-by-case basis and “that statements made should be individually evaluated for admissibility in light of the confrontation clause.”¹⁰²

Davis was arrested and charged with one count of felony violation of the provisions of a domestic no-contact order.¹⁰³ This arrest was prompted by a 911 call from the alleged victim, McCottry.¹⁰⁴ The State only had two witnesses: the two officers that responded to the 911 call.¹⁰⁵ McCottry did not testify because the State was not able to find her at the time of the trial.¹⁰⁶ “The only evidence linking Davis to her injuries was the tape recording of the 911 call.”¹⁰⁷ The defense objected, arguing that the “admission of the 911 tape would violate Davis’s right of confrontation,”¹⁰⁸ however, the court admitted the tape under the ‘excited utterance’¹⁰⁹ hearsay exception.¹¹⁰

The court reasoned that when someone calls 911 as part of an ongoing emergency, he is usually not “bearing witness” to the

¹⁰⁰ *Davis I*, 111 P.3d at 844.

¹⁰¹ *Id.*

¹⁰² *Id.* at 847.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 846-47.

¹⁰⁵ *Id.* at 847.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ BLACK’S LAW DICTIONARY (8th ed. 2004) (An excited utterance is defined as “A statement about a startling event made under the stress and excitement of the event. An excited utterance may be admissible as a hearsay exception. Fed. R. Evid. 803(2)”).

¹¹⁰ *Davis I*, 111 P.3d at 847 (citing *Ohio v. Roberts*, 448 U.S. 56 (1980) (Brennan, J. concurring)).

incident; he is simply calling out for help.¹¹¹ However, one could be “bearing witness” if he calls 911 to report a crime, and this “may conceivably be considered testimonial.”¹¹² The court continued that McCottry’s call was not intended to bear witness and was simply a call for help as part of an ongoing emergency.¹¹³

In an amicus brief it was argued that it is common knowledge that 911 calls may be used for prosecution, making McCottry’s statement one that would fit within the formulations of “core classifications of testimonial hearsay listed in *Crawford*.”¹¹⁴ The court dismissed this argument because there was no evidence whatsoever that McCottry “had such knowledge or that it influenced her decision to call.”¹¹⁵ Thus, McCottry did not seek to “bear witness” in contemplation of legal proceedings (as implied by the third *Crawford* formulation) and her phone call was arguably not considered testimonial.¹¹⁶ It is important to keep this distinction in mind as well for the *Ellis* discussion below.

The *Washington* court noted that the inquiry that *Crawford* demands is “whether the ‘witness’ is testifying.”¹¹⁷ In order to determine the answer to the inquiry, one considers whether the person is “bearing witness”¹¹⁸ to the event or if the evidence sought to be admitted is one of the “principal evil[s] at which the Confrontation Clause was directed” such as the civil-law mode of criminal

¹¹¹ *Davis I*, 111 P.3d at 850.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* (citing *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (Rehnquist, J. concurring)).

¹¹⁵ *Davis I*, 111 P.3d at 850.

¹¹⁶ *Id.* The court noted that “nonetheless, certain statements in the call could be deemed to be testimonial to the extent they were not concerned with seeking assistance and protection from peril. However, the information essential to the prosecution of this case was McCottry’s initial identification of Davis as her assailant.”

¹¹⁷ *Id.* at 850.

¹¹⁸ *Id.*

procedure.¹¹⁹ The majority did not focus much on developing a method for answering the *Crawford* inquiry, however, the dissent did.

The dissent, authored by Judge Sanders, focused on the two definitions *supra* and quoted the Sixth Circuit who noted that: “[t]he proper inquiry . . . is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant’s position would anticipate his statement being used against the accused in investigating and prosecuting the crime.”¹²⁰ The dissent criticized the majority for focusing “on the *lack* of evidence that McCottry ‘knew’ her 911 call would be used to prosecute”¹²¹ and not whether a “reasonable person in the 911 caller’s position would know that their statement is ‘likely to be used in investigation or prosecution of a crime.’”¹²²

The dissent quoted noted scholar Richard D. Friedman: “Whether a statement is deemed to be testimonial . . . depends on whether the statement fulfills the function of prosecution testimony. That function, in rough terms, is the transmittal of information for use in prosecution.”¹²³ According to the dissent, the 911 call performed this function.¹²⁴ The majority did not analyze the 911 call under this definition, so there is no telling what they would have concluded under that classification.¹²⁵

¹¹⁹ *Id.* at 850 (noting that the Confrontation Clause was particularly wary of the use of *ex parte* examinations as evidence against the accused).

¹²⁰ *Id.* at 852 (quoting *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004)).

¹²¹ *Davis I*, 111 P.3d at 852.

¹²² *Id.*

¹²³ *Id.* at 853 (quoting Richard D. Friedman, *Grappling with the Meaning of Testimonial*, <http://www.law.umich.edu/library/spotlight/confrontationclause/otherauthorities/articles/friedman/friedmandraft.pdf> at 2).

¹²⁴ *Davis I*, 111 P.3d at 853.

¹²⁵ *See Davis II*, 126 S.Ct. 2266 (2006).

The United State Supreme Court granted certiorari in June of 2006 and, in an opinion authored by Justice Scalia, affirmed the Supreme Court of Washington’s holding that “the portion of the 911 conversation in which McCottry identified Davis was not testimonial and that if other portions of the conversation were testimonial, admitting them was harmless beyond a reasonable doubt.”¹²⁶ Justice Scalia recounted the history and purpose of the Confrontation Clause and sought to reach a more structured definition of “testimonial,” at least for the case that was presently before them:

Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statement are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.¹²⁷

Even though the definition deals specifically with *interrogations*, particularly police interrogations,¹²⁸ it is important to note that Justice Scalia recognized that one could plausibly take this slightly more

¹²⁶ *Id.* at 2271.

¹²⁷ *Id.* at 2273-74.

¹²⁸ *Id.* at 2273 n.1. Justice Scalia noted that “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 non testimonial.

structured definition of testimonial and apply it to other circumstances.¹²⁹

The above historical explanation has set forth the backdrop under which the Seventh Circuit reached its decision in the 2006 case of *United States v. Ellis*.¹³⁰

VI. *UNITED STATES V. ELLIS*

A. *The Facts*

On August 22, 2006, the Court of Appeals for the Seventh Circuit decided the matter of *United States v. Ellis*.¹³¹ A three judge panel led by Judge Kanne ruled that “because the statements of medical personnel ‘were made in the ordinary course of business, [they] are statements that by their nature were not testimonial’ and their admission, therefore, does not violate the Sixth Amendment.”¹³²

Brian K. Ellis was pulled over by a police officer in Indiana.¹³³ He failed some initial sobriety tests, but the field alcohol test came up negative.¹³⁴ “With the officer’s prompting, Ellis agreed to go to a hospital to have his blood and urine tested for drugs.”¹³⁵ Ellis was placed in custody and escorted to the hospital by the officers.¹³⁶

At trial, the police officer testified that he witnessed the lab technician draw Ellis’s blood and watched Ellis urinate into a cup.¹³⁷ “He also testified that the results of the urine test were positive for

¹²⁹ *Id.*

¹³⁰ 460 F.3d 920 (7th Cir. 2006).

¹³¹ *Id.*

¹³² *New Jersey v. Renshaw*, 915 A.2d 1081, 1087 (N.J. Super. Ct. App. Div. 2007) (citing *Ellis*, 460 F.3d at 927).

¹³³ *Ellis*, 460 F.3d at 921.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 922.

methamphetamine.”¹³⁸ The medical records were sought to be introduced under the ordinary business records exception in order to prove that Ellis was a controlled substance user.¹³⁹ Authentication of the medical records was established by a certificate of authenticity performed by a laboratory technician, in compliance with Federal Rule of Evidence 902(11).¹⁴⁰ The exhibit admitted at trial contained two forms filled out at the local hospital that indicated that the “collector” of the samples was a woman named Kristy.¹⁴¹ The forms had a preprinted “Reason[s] for Test” box that indicated that the reason for Ellis’s test was “Reasonable Suspicion/Cause.”¹⁴² “Furthermore, in the section of one of the forms indicating which test would be performed . . . there is a handwritten note stating ‘Blood Drug Screen—Requested by Officer.’”¹⁴³ The urine test was conducted not only by Kristy, but by two out of state labs as well.¹⁴⁴ Both out of state companies and the local hospital produced documents that indicated that Ellis had methamphetamine in his system.¹⁴⁵ Ellis was convicted on all counts.¹⁴⁶

Ellis argued that the admission of the blood/alcohol tests under the business records exception violated his guarantees under the Sixth Amendment’s Confrontation Clause.¹⁴⁷ The court did not give much credence to his argument; however, it considered both the business records issue and the certification issues in turn.¹⁴⁸

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* (it is important to note that Ellis did not object to the authenticity of the records).

¹⁴¹ *Id.* at 922.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 924.

¹⁴⁸ *Id.* The court addressed the issue of certification in the final part of its decision. Certification sets the foundational basis required to show that the evidence in question is admissible. It must be noted that certification does not determine

The court quickly recognized the “obstacle”¹⁴⁹ of the *Crawford* Court’s “designation of business records as nontestimonial.”¹⁵⁰ The Court’s overbroad definition is flawed and has caused a lot of confusion.¹⁵¹ The definition is faulty primarily because “it assumes that all business records are, by definition, nontestimonial”¹⁵² and secondly, because the courts tend to disregard the “long-held standards or conditions applicable to defining business records”¹⁵³ which tends to make such records testimonial as defined by *Crawford*.¹⁵⁴

One court acknowledged that the Supreme Court’s designation of business records as nontestimonial was purely dictum and refused to find it controlling.¹⁵⁵ That court dismissed the above designation because, it argued that not only is it dictum, but it does not properly acknowledge that “while some evidence may fall within the general business-record exception, other business records should nonetheless be subject to a analysis to be excluded from evidence thereunder because they are in fact testimonial.”¹⁵⁶ The Seventh Circuit preferred to take the literal, blanket approach, instead of a case-by-case analysis to resolving whether a defendant’s Sixth Amendment rights have been violated.¹⁵⁷ While this approach may not necessarily conflict with the underlying purpose of the Confrontation Clause *supra*, it does seem to conflict with the current developments in the law of the Confrontation Clause.

whether confrontation concerns will be raised; however, it helps lay the proper foundation that will in turn determine whether the evidence is admissible.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *See supra* note 86.

¹⁵² Yermish, *supra* note 27, at 13.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 13 n.23 (quoting *State v. Crager*, 844 N.E.2d 390, 397 (Ohio Ct. App. 2005)).

¹⁵⁶ Yermish, *supra* note 27, at 13 (quoting *Crager*, 844 N.E.2d at 397).

¹⁵⁷ *See United States v. Ellis*, 460 F.3d 920 (7th Cir. 2006).

B. The Business Records Exception as Applied in Ellis

Ellis “attack[ed] the underlying medical records by arguing that they were created not because of routine medical procedures, but because of government investigation.”¹⁵⁸ The court then makes an argument that they in essence seem to totally disregard. It noted that “the records used against Ellis . . . might be considered testimonial because they were created under police supervision and *during* an investigation for the purpose of determining whether a crime had been committed.”¹⁵⁹ Without really explaining why it dismissed this seemingly viable argument, the court continued its discussion by indicating that “whether a statement was made with an eye toward prosecution, that is, with the knowledge or for the purpose that it would be user for later prosecution” is important when designating between testimonial and non testimonial statements.¹⁶⁰ It found support for these statements and for the definitions of “testimonial” in the First,¹⁶¹ Second,¹⁶² Third,¹⁶³ and Sixth Circuits.¹⁶⁴ The court even noted that in the past it had rejected arguments made under *Crawford* because the statements were “not [considered] testimonial because

¹⁵⁸ *Id.* at 924.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 924 (citing *United States v. Maher*, 454 F.3d 13, 20 (1st Cir. 2006) (holding a statement to be testimonial because “it [was] clear that an objectively reasonable person in [the declarant’s] shoes would understand that the statement would be used in prosecuting [the defendant] at trial”)).

¹⁶² *Ellis*, 460 F.3d at 924 (citing *United States v. Saget*, 377 F.3d 223 (2d Cir. 2004)).

¹⁶³ *Ellis*, 460 F.3d at 924 (citing *United States v. Hinton*, 423 F.3d 355 (3d Cir. 2005) (noting that statements are testimonial when “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at later trial” (citations and quotations omitted))).

¹⁶⁴ *Ellis*, 460 F.3d at 924 (citing *United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004) (noting that a statement is testimonial when “a reasonable person in the declarant’s position would anticipate his statement being used against the accused in investigating and prosecuting a crime”)).

they were not made with the respective declarants having an eye towards criminal prosecution.”¹⁶⁵

In 2004 the Second Circuit decided *United States v. Saget*.¹⁶⁶ Saget was indicted for firearms trafficking, conspiring to traffic firearms, and for making false statements in connection to the trafficking of firearms.¹⁶⁷ Saget’s co-conspirator was a man named Beckham.¹⁶⁸ Beckham engaged in several conversations with a person he later came to find out was a confidential informant.¹⁶⁹ These conversations were tape recorded without Beckham’s knowledge.¹⁷⁰

At Saget’s trial, Beckham was not available to testify, and the state sought to admit the taped conversations under the 804(b)(3) hearsay exceptions.¹⁷¹ Because *Crawford* had not yet been decided, the trial court concluded that “the admission of the statements as substantive evidence of Saget’s participation in the conspiracy did not violate the Confrontation Clause because the statements bore particularized guarantees of trustworthiness required under *Ohio v. Roberts*.”¹⁷² However, before oral arguments were heard, the Supreme Court decided *Crawford v. Washington*, which dramatically changed the legal landscape.¹⁷³

On appeal, the Second Circuit stated that “*Crawford* at least suggests that the determinative factor in determining whether a

¹⁶⁵ *Ellis*, 460 F.3d at 925 (quoting *United States v. Gilbertson*, 435 F.3d 790, 795-96 (7th Cir. 2006) (citing *Crawford v. Washington*, 541 U.S. 36, 56 n.7 (2004))).

¹⁶⁶ 377 F.3d 223 (2d Cir. 2004).

¹⁶⁷ *Id.* at 225.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* Rule 803(b)(3) speaks to the hearsay exception relating to statements made against penal interest.

¹⁷² *Saget*, 377 F.3d at 225.

¹⁷³ *Id.* at 226. *Crawford*, discussed *passim*, held that no prior testimonial statement made by a declarant who does not testify at the trial may be admitted against a defendant unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine him or her.

declarant bears testimony is the declarant's awareness that his or her statement may later be used at trial."¹⁷⁴ It further intimated that the examples presented in *Crawford* "provide that the statement must be such that the declarant reasonably expects that the statement might be used in future judicial proceedings."¹⁷⁵ While the Supreme Court did not expressly adopt any particular or express definition, because they all share a common nucleus, the Second Circuit argued that the Supreme Court would probably agree to use the "reasonable expectation of the declarant as the anchor of a more concrete definition of testimony."¹⁷⁶ Thus, a more narrow definition of *testimonial* began to emerge.

The Third Circuit's decision in *United States v. Hinton*¹⁷⁷ echoes the Second Circuit's ruling in *Saget*.¹⁷⁸ The court began its opinion by reciting the changes in the law post *Crawford* and continued by stating that "where an objective witness reasonably anticipates that a given statement will be used at a later trial, that statement is likely testimony in the sense that it is offered to establish or prove a fact."¹⁷⁹

Hinton had appealed his conviction for possession with intent to distribute cocaine.¹⁸⁰ The main issue, as with the other relevant cases, is whether the evidence being sought to be admitted was testimonial in nature, and thus, subject to the Confrontation Clause.¹⁸¹ However, the key question is what is the definition of testimonial?

This court derived its definition of testimonial from the Supreme Court's use of the word *witness*.¹⁸² "The term 'witnesses' . . . embraces all those who 'bear testimony,' whether at trial or outside the

¹⁷⁴ *Id.* at 228.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *United States v. Hinton*, 423 F.3d 355 (3d Cir. 2005).

¹⁷⁸ *See Saget*, 377 F.3d 223.

¹⁷⁹ *Hinton*, 423 F.3d at 355, 357-59.

¹⁸⁰ *Id.* at 356.

¹⁸¹ *Id.*

¹⁸² *Id.* at 358.

courtroom.”¹⁸³ Thus, it settled on the language that implies that “testimony” is “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”¹⁸⁴ Once the court reached the conclusion *supra*, it acknowledged what the Court in *Crawford* stated as one of its formulation for defining testimonial: “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at later trial.”¹⁸⁵ To further support its conclusion, the Third Circuit again cited to the Supreme Court’s language in *Crawford*: “where an objective witness reasonably anticipates that a given statement will be used at a later trial, that statement is likely testimony in the sense that it is offered to establish or prove a fact. As such, absent unavailability and a prior opportunity for cross-examination, it must be subjected to the strictures of the Confrontation Clause.”¹⁸⁶

Moreover, the Third Circuit, through the Supreme Court’s very language, supports the Second Circuit’s conclusion that when a witness can anticipate that the statement he or she is making could be used at trial, the only way to avoid Sixth Amendment issues is to allow the witness to testify and to be cross-examined by the defendant.¹⁸⁷

The Third Circuit’s definition was supported again with the First Circuit’s July of 2006 decision, *United States v. Maher*.¹⁸⁸ *Maher* dealt with “the admission of [a] non-testifying informants’ out-of-court statements through the testimony of police officers.”¹⁸⁹ Because this case was heard after *Crawford* was decided, the controlling law dictated that a testimonial out-of-court statement is inadmissible unless “(1) the declarant testifies, or (2) the defendant had a prior opportunity for cross-examination and the declarant is unavailable, or (3) the

¹⁸³ *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 51 (2004)).

¹⁸⁴ *Hinton*, 423 F.3d at 355, 358 (quoting *Crawford*, 541 U.S. at 51).

¹⁸⁵ *Hinton*, 423 F.3d at 355, 358

¹⁸⁶ *Id.* at 360 (citing *Crawford*, 541 U.S. at 51, 68).

¹⁸⁷ See generally *Hinton*, 423 F.3d at 355.

¹⁸⁸ 454 F.3d 13 (1st Cir. 2006).

¹⁸⁹ *Id.* at 19.

evidence is admitted for purposes other than establishing the truth of the matter asserted.”¹⁹⁰

Since the *Crawford* decision did not specifically define testimonial, it has been up to the courts to narrow the scope of the definition.¹⁹¹ The *Maher* court acknowledged that in “applying *Crawford*, . . . a statement is testimonial if a reasonable declarant, similarly situated, would have the capacity to appreciate that the statement is of a sort typically preserve[d] . . . for . . . potential prosecutorial use.”¹⁹² In this case, the police officer’s testimony about what he learned from a third party falls within the definition of testimonial because it is similar, if not identical, to one of the examples¹⁹³ given by the *Crawford* court of a testimonial statement.¹⁹⁴

Other evidence indicated that the statement should be considered testimonial: it should be testimonial because the police officer and the informant made a cooperation agreement which strongly indicates that the statement would be used prosecutorially.¹⁹⁵ Thus, this case supports the proposition that if a declarant *is* available to testify, and the statement fits the definition of testimonial *supra*, then the Confrontation Clause will be violated if the declarant does not testify in open court.¹⁹⁶

¹⁹⁰ *Id.* at 19-20 (citing *Crawford*, 541 U.S. at 53-54, 59 n.9 (Rehnquist, J. concurring)).

¹⁹¹ See *United States v. Saget*, 377 F.3d 223 (2d Cir. 2004); *Hinton*, 423 F.3d 355; *Maher*, 454 F.3d 13.

¹⁹² *Maher*, 454 F.3d at 19 (citing *United States v. Brito*, 427 F.3d 53, 60-61 (1st Cir. 2005) (holding that 911 calls may be testimonial in certain circumstances) (internal quotations omitted)).

¹⁹³ *Crawford*, 541 U.S. at 51 (stating various formulations of this core class of “testimonial” statements exist: “material such as affidavits [and] custodial examinations”).

¹⁹⁴ *Maher*, 454 F.3d at 19.

¹⁹⁵ *Id.* at 21.

¹⁹⁶ *Id.*

The cases *supra* primarily involve situations where a police officer is testifying on what he heard from an informant.¹⁹⁷ Although this is not the exact same situation in *Ellis*, the underlying concern is the same: an out-of-court statement made by a witness that can reasonably anticipate that his or her statement could be used prosecutorially needs to be available to testify as to his or her declaration or risk violating the defendant's constitutional rights.¹⁹⁸ The Seventh Circuit cited these cases and acknowledged what each one held.¹⁹⁹

The *Ellis* court continued to move in the direction of finding a violation of the Confrontation Clause and cited to the cases discussed *supra* as well as pointing out that “Ellis . . . appear[s] to be on strong ground in arguing that the results of his medical tests were testimonial” because “[i]t must have been obvious to Kristy²⁰⁰ . . . that her results might end up as evidence against Ellis in some kind of trial.”²⁰¹ Besides it allegedly being obvious to Kristy that the test results may be used at trial, the court cited further circumstances that would lend a reasonable witness to conclude that the statement could be used prosecutorially.²⁰² A police officer not only escorted Ellis to the hospital, but he also watched as the tests were performed.²⁰³ The lab charts clearly indicated that the reason for the test was “Reasonable Suspicion/Cause” and that they were “Requested by Officer.”²⁰⁴ Unlike the complete lack of evidence in *Stave v. Davis*,²⁰⁵

¹⁹⁷ See *Hinton*, United States v. Hinton, 423 F.3d 355, 355 (3d Cir. 2005); *Maher*, 454 F.3d at 13.

¹⁹⁸ See generally *Crawford*, 541 U.S. 36; United States v. Saget, 377 F.3d 223 (2d Cir. 2004); *Hinton*, 423 F.3d at 355; *Maher*, 454 F.3d at 13.

¹⁹⁹ United States v. Ellis, 460 F.3d 920, 925 (7th Cir. 2006).

²⁰⁰ Kristy is the laboratory technician who performed the tests on Mr. Ellis.

²⁰¹ *Id.* at 924.

²⁰² *Id.* at 921-22.

²⁰³ *Id.*

²⁰⁴ *Id.* at 924.

²⁰⁵ *State v. Davis* (“*Davis I*”), 111 P.3d 844, 850 (Wash. 2005) (stating that there was no evidence whatsoever that McCottry knew or should have known that her statements would be used at trial when she made the call to 911).

supra, the court pointed to ample evidence that indicated that Kristy, the lab technician, should have known that these lab exams and the results were “pretrial statements that . . . would reasonably [be] expect[ed] to be used prosecutorially,”²⁰⁶ or “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.”²⁰⁷ Applying this objective, reasonable witness standard, one would think the court would have concluded that the laboratory records were testimonial, however the court chose to go in a different direction than the cases *supra*²⁰⁸ and did just the opposite.²⁰⁹

One small “nevertheless” later and the court dismissed its previous four paragraphs worth of arguments²¹⁰ that are consistent with *Crawford*.²¹¹ The reason behind its decision was eloquently put: the court “d[id] not think th[o]se circumstances transform[ed] what [wa]s otherwise a nontestimonial business record into a testimonial statement implicating the Confrontation Clause.”²¹² This succinctly put statement begs one particular question: what rises to the level of implicating the Confrontation Clause? Intriguingly, the court does not proffer any support for its one-sentence assertion *supra*, and it cites

²⁰⁶ *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (citing *White v. Illinois*, 502 U.S. 346, 365 (1992) and Br. for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* Supporting Pet’r at 3).

²⁰⁷ *Crawford*, 541 U.S. at 51 (citing *White v. Illinois*, 502 U.S. 346, 365 (1992) and Br. for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* Supporting Pet’r at 3).

²⁰⁸ *See Ellis*, 460 F.3d at 924.

²⁰⁹ *Id.* at 924-26.

²¹⁰ *Id.* In *United States v. Ellis*, the Court of Appeals for the Seventh Circuit devotes at least four full paragraphs to arguments that would logically support a conclusion that Kristy should have known that the statements would be used for later trial. Thus, under the third formulation of *Crawford*, her acts would be considered testimonial, and therefore only admissible as evidence if the declarant is available to testify and the defendant had a chance to cross-examine the declarant. However, as noted in the article *supra*, the court rejects its own conclusions without much support.

²¹¹ *Id.*

²¹² *Id.* at 925.

only two cases²¹³ *infra* for substantiation of its highly subjective conclusion.²¹⁴

The court may have been correct in its determination if *Roberts* was still the controlling law;²¹⁵ however the court seems to disregard the recent change in the law under the *Crawford* rule that the court clearly acknowledges exists.²¹⁶ In an effort to understand why the Seventh Circuit came to this conclusion, it leads to the question: How are other courts handling similar issues?

VII. OTHER COURT'S APPLICATIONS OF THE BUSINESS-RECORDS EXCEPTION AND THE CONFRONTATION CLAUSE

Recent state court decisions have grappled with issues that are similar to *Ellis* and have ruled contrary to the Seventh Circuit.²¹⁷ The following will discuss the cases, state what they concluded, and attempt to explain why they ruled differently than the Seventh Circuit. Of course, these decision are not binding precedent, however, they may shed some light on why the Seventh Circuit's argument is flawed.

A. Rivera v. Florida

In September of 2005, the District Court of Appeal of Florida, Fifth District heard the case of *Rivera v. Florida*.²¹⁸ Salvador Rivera

²¹³ For support, the Seventh Circuit cites to: *United States v. Cervantes-Flores*, 421 F.3d 825, 833 (9th Cir. 2005) and *United States v. Rueda-Rivera*, 396 F.3d 678, 680 (5th Cir. 2005) both holding that certificates of non-existence of records are nontestimonial and thus their admission does not violate the Confrontation Clause.

²¹⁴ *Ellis*, 460 F.3d at 924-26.

²¹⁵ Under *Roberts*, a judge is afforded much more discretion because the test allows otherwise inadmissible hearsay in *if* it falls within a firmly rooted hearsay exception or if the court deems the statement to be reliable.

²¹⁶ *Ellis*, 460 F.3d at 924-26.

²¹⁷ *See, e.g.*, *Martin v. Florida*, 936 So.2d 1190 (Fla. Dist. Ct. App. 2006) (Thomas, J. dissenting); *Rivera v. Florida*, 917 So.2d 210 (Fla. Dist. Ct. App. 2005); *New Jersey v. Renshaw*, 915 A.2d 1081 (N.J. Super. Ct. App. Div. 2007)

²¹⁸ *Rivera*, 917 So. 2d 210.

had been on trial for allegedly trafficking cocaine.²¹⁹ He appealed the lower court's decision by arguing that "the court erred in introducing a Florida Department of Law Enforcement ("FDLE") lab report through the records custodian and in limiting his right to cross-examine the confidential informant involved in his case."²²⁰ In this case, the State tried to introduce the lab reports through the testimony of one Amanda Julian, the supervisor of the chemist who conducted the lab test.²²¹ The lower court overruled Rivera's hearsay objection and the District Court of Appeal of Florida reversed, concluding that the admission of the lab report without the opportunity to cross-examine the declarant was in error.²²²

The court's main argument revolved around the concern that it "is Rivera's constitutional right to confront his accusers in a criminal trial."²²³ The court recognized that lab "tests performed in the usual course of hospital business are admissible in criminal cases under the business records exception" because they are inherently trustworthy.²²⁴ If the reports are reliable enough for medical purposes, then they should be reliable enough for trial.²²⁵ However, it failed to extend this exception to the FDLE lab report because allowing the record into evidence without the opportunity for cross-examination would "threaten Rivera's right under the Confrontation Clause to question the witness to ensure a fair trial."²²⁶ By cross-examining the declarant, the defense could have questioned him or her about "chain of custody, methods of scientific testing, and analytical procedures regarding" the reports at issue.²²⁷ The court succinctly concluded its argument by

²¹⁹ *Id.* at 211.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 212.

²²⁵ *Id.* (citing *Baber v. State*, 775 So.2d 258, 260-61 (Fla. 2000), *cert. denied*, 532 U.S. 1022 (2001)).

²²⁶ *Rivera*, 917 So.2d at 212.

²²⁷ *Id.*

persuasively stating that: “[T]he chemist’s report lacks the indicia of reliability characteristic of hospital record cases. The hospital tests a patient’s blood alcohol for the benefit of the patient’s treatment; in contrast, the State tests alleged drug samples to incriminate and convict the accused.”²²⁸

This language plainly sets forth a logical way of looking at the intersection between the Confrontation Clause and the business records exception to the hearsay rule.²²⁹ If lab records or similar documents are being used to incriminate and convict an accused, then the accused should retain his Sixth Amendment right to confront his accuser.²³⁰ Otherwise, accusers may attempt to thwart the Constitution by allowing “the State to sidestep . . . prov[ing] the elements of the charged offense.”²³¹ It is especially important when the evidence being sought to be admitted is crucial to the State’s case.

A second Florida state court case echoes the decision made in *Rivera, supra*.

B. *Martin v. Florida*

The facts in *Martin v. Florida* closely mirror those of *Rivera*. The defendant had been on trial for possession of cocaine and cannabis and was appealing those convictions.²³² The State also attempted to admit an FDLE report to show that the “substances seized from Martin were contraband.”²³³ Martin objected to the admission of the FDLE report and the lower court overruled the objection.²³⁴ The Court of Appeal reversed holding that “admission of the FDLE report as a business record without giving appellant the right to examine the

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Martin v. Florida*, 936 So. 2d 1190, 1191 (Fla. Dist. Ct. App. 2006) (Thomas, J. dissenting).

²³³ *Id.*

²³⁴ *Id.*

author of the report was reversible error”²³⁵ because under *Crawford*, “the admission of hearsay evidence which was ‘testimonial’ in nature violates the Confrontation Clause unless the declarant is unavailable to testify and unless the defendant had a prior meaningful opportunity to cross-examine the declarant.”²³⁶ The court recognized that *Crawford* did not define testimonial and that the Court noted that business records are by their nature nontestimonial. However, the Court of Appeal did not get bogged down by *Crawford*’s dicta and, unlike the Seventh Circuit, focused on the language that implied that testimonial statements were those statements that a witness “reasonably expect[] to be used prosecutorially”²³⁷ or which “would be available for use at later trial.”²³⁸

The court continued its discussion by admitting that the FDLE report “may meet the definition of a business record,”²³⁹ however, because it was prepared in anticipation of litigation, it should not have been admitted without the opportunity for cross-examination.²⁴⁰ “The testing memorialized in the report was occasioned solely by the arrest of the appellant and was performed by a state law enforcement agency, and the report was offered by the State in furtherance of a criminal prosecution.”²⁴¹ This statement could easily be taken out of the instant case and transplanted into the *Ellis* opinion in order to support the conclusion that the blood and alcohol lab reports were, in fact, testimonial in nature.

The dissent in this case disagreed with the majority’s decision and cited a series of cases for support.²⁴² Moreover, the dissent, much

²³⁵ *Id.* at 1192.

²³⁶ *Id.* (citing *Crawford v. Washington*, 541 U.S. 36, 59 (2004)).

²³⁷ *Martin*, 936 So. 2d at 1192 (quoting *Crawford*, 541 U.S. at 55).

²³⁸ *Martin*, 936 So. 2d at 1192

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*; see also *People v. Johnson*, 18 Cal. Rptr. 3d 230 (Cal. Ct. App. 2004) (laboratory reports routine and nontestimonial documents); *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005) (laboratory report on weight of cocaine a

like the Seventh Circuit, focused on the conclusion in dicta that business records are a likely example of a nontestimonial statement.²⁴³ Its argument continued by refuting the majority's argument that the FDLE report was created solely to convict the accused, and thus was testimonial, by stating that "an FDLE record is not always intended to bear witness against the accused, because it could also be used to exonerate the accused."²⁴⁴ However, it stands to reason that if the defense were to introduce this evidence as conclusory, the State may want to argue that without an opportunity to cross-examine the declarant, the lab report, created in anticipation of litigation and being used to *exonerate* the accused, could be just as unreliable and untrustworthy.

The dissent concluded that the lab report met the definition of a business record as defined in the Florida Statute and it declined the majority's in anticipation of litigation argument.²⁴⁵ "FDLE has no motive to fabricate its reports and has no financial interest at stake. Further, FDLE will not suffer adverse consequences if its scientists report that a tested substance is not contraband."²⁴⁶ It summed up its arguments by stating that FDLE lab reports are not produced by law enforcements officers in adversarial settings, unlike an arresting officer's affidavit, and they are "exactly the type of business records that the legislature intended to authorize as exceptions to the business rule."²⁴⁷ While this may be true, it begs the question: Is it fair to infer that an arresting officer's affidavit, conducted in the regular course of his official business, used as evidence to prove or disprove an accused's innocence, is so inherently unreliable that it is automatically subject to confrontation? However, a lab report created by a non-governmental entity solely to prove or disprove an accused's alleged

business record); *People v. Brown*, 801 N.Y.S.2d 709 (N.Y. 2005) (DNA testing records nontestimonial).

²⁴³ *Martin*, 936 So.2d at 1193.

²⁴⁴ *Id.* at 1194.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 1195.

²⁴⁷ *Id.* at 1196.

crime is not? There are no clear answers to these questions because even amongst the different state courts, there is a large disagreement on whether laboratory reports are testimonial or nontestimonial in nature.²⁴⁸

VIII. DID THE SEVENTH CIRCUIT GET IT RIGHT?

The Seventh Circuit blindly holds on to the *Crawford* court's language (in dictum) that business records are by their very nature, nontestimonial statements.²⁴⁹ It makes it clear that "[it] do[es] not think it matters that these observations were made with the knowledge that they might be used for criminal prosecution."²⁵⁰ But what about the three formulations set forth in *Crawford* of what constitutes a testimonial statement? The Seventh Circuit acknowledges the formulations and even comments that "[w]hether a statement was made with an eye toward prosecution, that is, with the knowledge that it would be used for later prosecution, is an *important* aspect of delineating between testimonial and nontestimonial evidence."²⁵¹ Despite this acknowledgement and with very little reasoning and support, the court disregards the *Crawford* formulations.²⁵² However, the court does attempt to provide some support for its seemingly unreasonable statement by citing two cases, one from the Court of

²⁴⁸ See, e.g., *id.* (citing *People v. Kanhai*, 797 N.Y.S.2d 870 (N.Y. Crim. Ct. 2005) (breathalyzer test results regular business records); *People v. Durio*, 794 N.Y.S.2d 863 (N.Y. Crim. Ct. 2005) (autopsy reports business records); *but cf.* *Belvin v. State*, 922 So. 2d 1046 (Fla. Dist. Ct. App. 2005) (holding that a breath-test affidavit was testimonial hearsay and not admissible as a business record because the affidavit was prepared in anticipation of litigation)).

²⁴⁹ *United States v. Ellis*, 460 F.3d 920, 925 (7th Cir. 2006);

²⁵⁰ *Id.*

²⁵¹ *Id.* at 924 (emphasis added).

²⁵² *Id.* The court also declares that the records used against *Ellis* may be considered testimonial in nature because "they were created under police supervision and *during* an investigation for the purpose of determining whether a crime had been committed." This is a crucial argument that the court simply disregards without explanation.

Appeals for the Ninth Circuit²⁵³ and one from the Court of Appeals for the Fifth Circuit.²⁵⁴

The facts presented in both of these cases are very similar, and thus, are considered together. The plaintiffs in both these cases were immigrants who were subsequently caught in the United States without the proper authorization to remain in the country.²⁵⁵ Each plaintiff brought a lawsuit against the government alleging that the admission of the certificates of non-existence of records (“CNR”), without the opportunity to cross-examine the declarant, violated their Sixth Amendment rights.²⁵⁶ Both of these cases held that CNRs “were nontestimonial despite the fact that they were prepared by the government in anticipation of criminal prosecution” because the creation of the documents was “routine” and too dissimilar from the “examples of testimonial evidence provided by *Crawford*.”²⁵⁷

This line of reasoning is faulty, and these courts erred in a similar manner as the Seventh Circuit did in *Ellis*. Specifically, all three courts disregarded the definitions set forth in the three *Crawford* formulations, *supra*, and single-mindedly held on to the “non-exhaustive” list of examples of testimonial statements.²⁵⁸ The three courts used a strict, literal approach to their arguments by reading only the black letters written on the page and ignoring the spirit of the Confrontation Clause and of the Supreme Court’s decision.

Justice Scalia stated in *Davis v. Washington* that “[o]ur opinion in *Crawford* set forth various formulations of the core class of testimonial statements . . . but found it unnecessary to enforce any of them, because some statements qualify under any definition.”²⁵⁹ It is hard to believe that the Seventh Circuit would strictly adhere to one

²⁵³ United States v. Cervantes-Flores, 421 F.3d 825 (9th Cir. 2005).

²⁵⁴ United States v. Rueda-Rivera, 396 F.3d 678, 680 (5th Cir. 2005).

²⁵⁵ *Cervantes-Flores*, 421 F.3d at 828; *Rueda-Rivera*, 396 F.3d at 680.

²⁵⁶ *Cervantes-Flores*, 421 F.3d at 828; *Rueda-Rivera*, 396 F.3d at 680.

²⁵⁷ *Ellis*, 460 F.3d at 925-26 (internal quotations omitted).

²⁵⁸ *Id.*

²⁵⁹ *Davis v. Washington* (“*Davis II*”), 126 S.Ct. 2266, 2273 (2006) (internal quotations omitted).

example stated in dictum of what testimonial is not, disregard the spirit behind the generalizations made in the non-exhaustive list of core class of testimonial statements, and ignore the formulations that were stated in *Crawford*,²⁶⁰ reiterated in *Davis I*²⁶¹ and *Davis II*.²⁶²

Ellis dealt with laboratory records of blood and alcohol tests.²⁶³ It was argued that the only reason for the existence of the records was for use at trial to prove that a crime had occurred.²⁶⁴ Similarly, in *Cervantes-Flores* and *Rueda-Rivera*, the defense also argued that the only reason for the existence of the records was the immigration proceeding, and thus, the records should not be ordinary business records.²⁶⁵ Despite the parallel arguments, the two records are very dissimilar.

Ordinary laboratory records are created when a patient voluntarily seeks medical attention at a hospital or a laboratory. The documents are prepared in a routine manner on a daily basis. They are not prepared with an eye towards prosecution or in anticipation of litigation. Thus, they are inherently trustworthy and can be admitted at trial under the business records exception to the hearsay rule.

²⁶⁰ *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (Using formulations two and three to define what testimonial statements are: Pretrial statements that a declarant would reasonably expect to be used prosecutorially and statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for later use at trial).

²⁶¹ *State v. Davis*, (“*Davis I*”), 111 P.3d 844, 853 (Wash. 2005) (quoting *United States v. Cromer*, 389 F.3d 668, 675 (6th Cir. 2004) (Using the following to help narrow the incomplete definition of testimonial: A statement made by a declarant who seeks to bear witness against the accused determined by querying whether a reasonable person in the declarant’s position would anticipate his statement being used against the accused in investigating and prosecuting the crime).

²⁶² *Davis II*, 126 S.Ct. at 2273 (Using the following to help define testimonial: “They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution”).

²⁶³ See *Ellis*, 460 F.3d 920.

²⁶⁴ *Id.* at 924.

²⁶⁵ See *United States v. Cervantes-Flores*, 421 F.3d 825 (9th Cir. 2005); *United States v. Rueda-Rivera*, 396 F.3d 678 (5th Cir. 2005).

The laboratory test conducted in *Ellis* was prepared solely for use at trial, at the request of an officer (not the patient), and is a perfect example of exactly what the Sixth Amendment was created to protect. It is not an ordinary business record because the document is serving as a “witness” that a crime occurred, thus falling squarely within the definitional of testimonial as set forth in *Crawford*.²⁶⁶ Therefore, the record should not have been admitted into evidence unless the defendant had a chance to meaningfully cross-examine the declarant²⁶⁷ as to the method and manner of preparing and maintaining the document in question.

In contrast, the CNR can be seen as an ordinary business record. A CNR is routinely created to prove the absence of a document.²⁶⁸ A CNR can be made at the request of an immigration officer or a party to a lawsuit.²⁶⁹ In contrast to the two different ways that a laboratory record can come to exist, it appears that a CNR only exists for one purpose: to prove, at a proceeding, whether a certain document exists. Thus, it can be argued that the record is prepared in the same manner and for the same reason every time it is requested making the Seventh Circuit’s reliance on the two CNR cases for support misplaced.

The Seventh Circuit continues to puzzle its audience by citing to its own decision, *United States v. Gilbertson*.²⁷⁰ The court, in an opinion also authored by Judge Kanne, declared that odometer statements were not testimonial in nature because they were not made with an eye towards criminal prosecution.²⁷¹ It continued its discussion by stating that the declarations were not initiated by the government, nor made with the hope that they would later be used at trial against any defendant.²⁷² In addition, each statement in question was made

²⁶⁶ See *Crawford v. Washington*, 541 U.S. 36 (2004).

²⁶⁷ *Id.* at 68.

²⁶⁸ See *Cervantes-Flores*, 421 F.3d at 831 n.2.

²⁶⁹ *Id.*

²⁷⁰ 435 F.3d 790 (7th Cir. 2006).

²⁷¹ *Id.* at 796.

²⁷² *Id.*

prior to a defendant's involvement in any crime.²⁷³ Thus, the court's conclusion seems to flow logically from its reasoning. Unfortunately, this decision only serves to highlight the objectively unreasonable conclusion in *Ellis*.

The *Ellis* court cites the *Gilbertson* holding in its discussion of all the evidence that supports the conclusion that "Ellis may . . . be on strong ground in arguing that the results of his medical tests were testimonial."²⁷⁴ This can be found in those four paragraphs, *supra*, that argue the reasons why the laboratory test results should be testimonial in nature.²⁷⁵ *Gilbertson's* logic, when applied to *Ellis*, supports the conclusion that a statement is testimonial in nature, despite being labeled as a business record, if it is made with an eye towards criminal prosecution. Although the cases are factually different, the underlying premise is the same: when a document is prepared with an eye toward prosecution, it should be deemed testimonial, and thus afforded the protections of the Sixth Amendment's Confrontation Clause.

In light of the conclusions reached in *Gilbertson*, it is very difficult to comprehend, let alone reconcile, how the same court came to the opposite conclusion in *Ellis*. Unfortunately, an analysis of other decisions in other courts does little to clarify why the Seventh Circuit ruled as it did.

IX. WHERE IS THE POLICY?

Public policy helps bolster legal conclusions by putting them in the context of the impact on society. Unfortunately, the Seventh Circuit does not use any public policy arguments to support its seemingly arbitrary conclusion in *Ellis*. Perhaps the court should have inserted some well thought out policy arguments to support its conclusion.

It is a well-known fact that dockets are over-crowded and state's attorneys, public defenders and trial attorneys are

²⁷³ *Id.*

²⁷⁴ United States v. Ellis, 460 F.3d 920, 924 (7th Cir. 2006).

²⁷⁵ *Id.* (see also note 206, *supra*).

overworked.²⁷⁶ By limiting the number of witnesses a party is required to present at trial, the average length of a trial can be shortened. Safeguards exist in order to ensure that parties receive their Sixth Amendment right to a speedy trial. One such safeguard is the exceptions to the hearsay rule (discussed *supra*). When the foundation is laid properly, statements that fall under these exceptions have historically been deemed reliable and trustworthy and thus are admissible in court without lengthy presentations about where the statements came from or how they were made.²⁷⁷ Imagine a trial where every receipt, record, memoranda and document had to be presented in court by each and every declarant. Then, imagine sitting through each and every direct and cross-examination. This scenario would certainly make for lengthy, tedious trials and the core mission of the fact-finder would be endlessly delayed in a needless procedural quagmire. Policy suggests that in order for the public to benefit from fair and just trials, certain reasonable concessions must exist. Restricting the types of witnesses that are required to testify at trial is one such concession.

Ensuring the right of justice for all the parties involved is crucial. One such element of ensuring justice is monitoring the constitutional rights of all the parties involved. Courts should not be allowed to simply have a blanket “hearsay exception” approach for situations such as *Ellis*, *Martin*, and *Davis* without considering the individual facts of the case. For example, laboratories have produced what are known as “false positive” results in the past.²⁷⁸ A “false positive” is “[a] result that is erroneously positive when a situation is normal.”²⁷⁹ When conducted again, the same test can provide a different result. A criminal defendant should be allowed to cross-examine a declarant who has created a document, memoranda or other

²⁷⁶ See, e.g., Alison Retka, *A typical week with Missouri Attorney Jasman Lutz*, MISSOURI LAWYERS WEEKLY, April 23, 2007; Jerry Crimmins, *On defense: Crimes that fiction wouldn't touch*, CHICAGO DAILY LAW BULLETIN, March 27, 2007.

²⁷⁷ BLACK'S LAW DICTIONARY (8th ed. 2004).

²⁷⁸ See, e.g., *Illinois v. Caballes*, 543 U.S. 405 (2005); *Green v. Bd. Of County Comm'rs*, 472 F.3d 794 (9th Cir. 2007); *United States v. Comprehensive Drug Testing Inc.*, 473 F.3d 915 (9th Cir. 2006).

²⁷⁹ WEBSTER'S NEW WORLD MEDICAL DICTIONARY (2d ed. 2003).

such statement that will be used at trial as evidence against the defendant. A blanket approach does not seem fair, much less constitutional, when it comes to the rights of criminal defendants. The public would not benefit from such an approach and the courts should be weary about attempting to implement one.

There will be certain occasions when it will be appropriate to use one of the many hearsay exceptions to offer a statement into evidence without presenting the witness. That is exactly why the hearsay exceptions exist. However, in certain situations (such as when a statement is prepared in anticipation of litigation) courts should make case-by-case, factual determinations on whether the specific situation warrants a blanket hearsay exception approach, or if the situation mandates closer scrutiny. The Confrontation Clause exists for many reasons, including protecting a criminal defendant's right to confronting any and all hostile witnesses against him. In these situations, and with the high stakes of a criminal prosecution, one or two extra witnesses seem worth the time spent, especially if it means protecting a criminal defendant's constitutional rights. The integrity of the system demands it.

X. PROPOSED NEW RULE

Courts should attempt to create one uniform way of classifying and dealing with business records that are made in anticipation of litigation. There are many benefits to have one uniform rule: consistency in application, a bright line rule for potential litigants to follow, as well as ease in applying and understanding the rule.

In order to classify this hybrid type of business records, courts should look to formulations two and three of the *Crawford* decision.²⁸⁰ Such hybrid statements can include, but are not limited to: (1)

²⁸⁰ See *Crawford v. Washington*, 541 U.S. 36 (2004) (Formulation two states that testimonial statements are those pretrial statements that declarants would reasonably expect to be used prosecutorially and formulation three declares that testimonial means statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for later use at trial).

laboratory records made solely in anticipation of litigation;²⁸¹ (2) records created to solely prove that a crime was committed;²⁸² (3) records that would otherwise be ordinary business records but were created solely with an eye towards prosecution.

Thus, a new rule is proposed: if a document is prepared in anticipation of litigation (meaning it fits within one of the two formulations *supra*), then the document should be considered testimonial, and thus afforded the protections of the Confrontation Clause.²⁸³ This is so because it is extremely important to err on the side of protecting constitutional rights and not on the side of abrogating them.

CONCLUSION

The definition of testimonial has definitely evolved since *Crawford* was decided in 2004.²⁸⁴ The courts have grappled with its meaning and attempted to narrow the scope of the definition. It has become clear that statements that are made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later criminal trial should only be admissible if the declarant is available to testify and there has been an opportunity to cross-examine him or her. However, as this Note has shown, confusion still exists as to how to classify business records that were created in anticipation of litigation. The proposed

²⁸¹ See *United States v. Ellis*, 460 F.3d 920 (7th Cir. 2006).

²⁸² See *Martin v. Florida*, 936 So.2d 1190 (Fla. Dist. Ct. App. 2006); *Rivera v. Florida*, 917 So.2d 210 (Fla. Dist. Ct. App. 2005).

²⁸³ The protection of the Confrontation Clause is: ensuring that the defendant has a meaningful opportunity to cross-examine his accuser.

²⁸⁴ See, e.g., *Crawford v. Washington*, 541 U.S. 36 (2004) (Rehnquist, J. concurring); *Davis v. Washington*, 126 S.Ct. 2266 (2006); *United States v. Maher*, 454 F.3d 13 (1st Cir. 2006); *United States v. Saget*, 377 F.3d 223 (2d Cir. 2004); *United States v. Hinton*, 423 F.3d 355 (3d Cir. 2005); *United States v. Rueda-Rivera*, 396 F.3d 678 (5th Cir. 2005); *United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004); *United States v. Gilbertson*, 435 F.3d 790 (7th Cir. 2006); *State v. Davis*, 111 P.3d 844, 154 Wn.2d 291 (Wash. 2005).

rule, *supra*, would provide a workable directive that would help ease judicial inconsistency and help establish a consistent way to deal with this hybrid form of business records.