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The Man Behind the Curtain: Confronting Expert Testimony

Daniel W. Edwards¹

"The Court does not seek to cast aspersions upon the State Police or their technicians in making these observations but rather to underscore the fact that we must beware of putting too much trust in the man behind the curtain. Doing so threatens to undermine one of the fundamental trial protections defendants have enjoyed since this nation's founding."²

I. INTRODUCTION

While *Melendez-Diaz*³ addressed the Confrontation Clause and the issue of the introduction into evidence of testimonial certificates from experts, the *Crawford*⁴-*Davis*⁵-*Melendez-Diaz* line of cases do not address the issue of an expert's reliance on evidence that is otherwise inadmissible in forming their opinions or inferences. Even more importantly, these cases do not address the issue of permitting testimony at trial that involves inadmissible facts and data essential to the basis of the expert's opinion. This article first addresses the historical underpinnings of the Confrontation Clause and its current interpretation, and the historical and current status of experts is explored. In defining whether evidence is "testimonial," it is suggested that Justice Scalia's "objective witness" standard should be replaced with a "reasonable defendant" standard. The following issues are also raised and addressed: First, when it comes to experts, is someone – anyone – to provide testimony sufficient to satisfy the Confrontation Clause? Justice Thomas' limiting interpretation of the Confrontation Clause is considered as a possible solution in determining what may be testimonial and, therefore, what may be required to satisfy confrontation rights of a criminal defendant as it relates to experts. Second, whether business and public records are testimonial and, if testimonial, to what extent their use should be permitted at trial. The appropriate evidentiary analysis is explored with Fed. Rule Evid. 402 being a possible starting point in the confrontation analysis. Third, whether the balancing test in Fed. Rule Evid. 703 or an appropriately-fashioned limiting instruction under Fed. Rule Evid. 105 is sufficient to protect a criminal defendant's confrontation. Carefully drafted jury instructions that clearly advise jurors of the responsibility to be fact-finders are necessary for the protection of a criminal defendant's Confrontation Clause rights. Finally, this article seeks solutions to the problem of introducing an expert's inadmissible facts or data as the basis for an opinion or inference.

II. THE CONFRONTATION CLAUSE

Described as an "essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal,"⁶ the right to confront witnesses in a criminal case originates in the Sixth Amendment and was made applicable to the States through the Fourteenth

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² *People v. Carreira*, 893 N.Y.S.2d 844, 851 (N.Y. City Ct. 2010).

³ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2530 (2009).

⁴ *Crawford v. Washington*, 541 U.S. 36 (2004).

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

⁶ *Pointer v. Texas*, 380 U.S. 400, 405 (1965).

Amendment.⁷ The Sixth Amendment states, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him...." The clause has been interpreted as a "preference for face-to-face accusation."⁸ Confrontation has been interpreted (1) to insure that statements presented to the jury are given under oath; (2) to force the witness against the defendant to submit to cross-examination; and (3) to test the credibility of the witness through the jurors' ability to view the demeanor of the witness as he testifies.⁹ The citizens of the various States determined that the right was so important that it was included in State constitutions, either using the language of the Sixth Amendment as a right to "confront" or be "confronted,"¹⁰ or as a right to "meet the witnesses against the defendant "face to face."¹¹

⁷ *Id.* at 406.

⁸ *Ohio v. Roberts*, 448 U.S. 56, 65 (1980).

⁹ *California v. Green*, 399 U.S. 149, 158 (1970).

¹⁰ See, e.g., ALA. CONST. art. I, § 6 ("That in all criminal prosecutions, the accused has a right ... to be confronted by the witnesses against him...."); ALASKA CONST. art. I, § 11 ("The accused is entitled ... to be confronted with the witnesses against him...."); ARK. CONST. art. II, § 10 ("In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...."); CAL. CONST. art. I, § 15 ("The defendant in a criminal cause has the right ... to be confronted with the witnesses against the defendant."); CONN. CONST. art. I, § 8 ("In all criminal prosecutions, the accused shall have a right ... to be confronted by the witnesses against him...."); FLA. CONST. art. I, § 16(a) ("In all criminal prosecutions the accused shall ... have the right ... to confront at trial adverse witnesses...."); GA. CONST. art. I, § 1, para. xiv ("Every person charged with an offense against the laws of this state ... shall be confronted with the witnesses testifying against such person."); HAW. CONST. art. I, § 14 ("In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against the accused...."); ILL. CONST. art. I, § 8 ("In criminal prosecutions, the accused shall have the right ... to be confronted with the witnesses against him or her...."); IOWA CONST. art. I, § 10 ("In all criminal prosecutions, and in cases involving the life, or liberty of an individual the accused shall have a right ... to be confronted with the witnesses against him...."); LA. CONST. art. I, § 16 ("An accused is entitled to confront and cross-examine the witnesses against him...."); ME. CONST. art. I, § 6 ("In all criminal prosecutions, the accused shall have a right ... to be confronted by the witnesses against the accused...."); MD. CONST. art. XXI ("That in all criminal prosecutions, every man hath a right ... to be confronted with the witnesses against him...."); MICH. CONST. ch. 1, art. 1, § 20 ("In every criminal prosecution, the accused shall have the right ... to be confronted with the witnesses against him or her...."); MINN. CONST. art. I, § 6 ("The accused shall enjoy the right ... to be confronted with the witnesses against him...."); MISS. CONST. art. III, § 26 ("In all criminal prosecutions the accused shall have a right ... to be confronted by the witnesses against him...."); N.J. CONST. art. I, para. 10 ("In all criminal prosecutions the accused shall have the right ... to be confronted with the witnesses against him...."); N.M. CONST. art. II, § 14 ("In all criminal prosecutions, the accused shall have the right ... to be confronted with the witnesses against him...."); N.C. CONST. art. I, § 23 ("In all criminal prosecutions, every person charged with crime has the right ... to confront the accusers and witnesses...."); OKLA. CONST. art. II, § 20 ("He shall ... be confronted with the witnesses against him...."); PA. CONST. art. I, § 9 ("In all criminal prosecutions the accused hath a right ... to be confronted with the witnesses against him...."); R.I. CONST. art. I, § 10 ("In all criminal prosecutions, accused persons shall enjoy the right ... to be confronted with the witnesses against them...."); S.C. CONST. art. I, § 14 ("Any person charged with an offense shall enjoy the right ... to be confronted with the witnesses against him...."); TEX. CONST. art. I, § 10 ("He ... shall be confronted by the witnesses against him...."); UTAH CONST. art. I, § 12 ("In criminal prosecutions the accused shall have the right ... to be confronted by the witnesses against him...."); VA. CONST. art. I, § 8 ("That in criminal prosecutions a man hath a right ... to be confronted with the accusers and witnesses...."); VT. CONST. ch. 1, art. 10 ("That in all prosecutions for criminal offenses, a person hath a right ... to be confronted with the witnesses....").

¹¹ See, e.g., ARIZ. CONST. art. II, § 24 ("In criminal prosecutions, the accused shall have the right ... to meet the witnesses against him face to face...."); COLO. CONST. art. II, § 16 ("In criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face...."); DEL. CONST. art. I, § 7 ("In all criminal prosecutions, the accused hath a right ... to meet the witnesses in their examination face to face...."); KAN. CONST. Bill of Rights, § 10 ("In all prosecutions, the accused shall be allowed ... to meet the witness face to face...."); KY. CONST. Bill of Rights, § 11 ("In all criminal prosecutions the accused has the right ... to meet the witnesses face to face...."); MASS. CONST. pt. 1, art. 12 ("And every subject shall have a right ... to meet the witnesses against him face to face...."); MO. CONST. art. I, § 18(a) ("That in criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face...."); MONT. CONST. art. II, § 24

In 1895 the United States Supreme Court addressed the right to confrontation in *Mattox v. United States*.¹² Although the case itself concerned the use of testimony from a former trial of the same action where two witnesses died before the second trial,¹³ the Court held:

The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.¹⁴

But even the *Mattox* court perceived that the "general rules of law" "must occasionally give way to considerations of public policy and the necessities of the case."¹⁵ The Court held that exclusion of transcripts of the witnesses' testimony, even though the defendant did not have a current opportunity to cross-examine, "would be carrying his constitutional protection to an unwarrantable extent."¹⁶

The Confrontation Clause has never been interpreted literally to require that any and all information from any source be produced through the testimony of a witness available for cross-examination. Because it has never been so interpreted, the analysis of the Confrontation Clause has always been a matter of line-drawing. Legal line-drawing must be based upon a rational basis and have criteria that requires just results.

Thus, to come as close to the language of the Confrontation Clause and in the usual case, the prosecution must produce the witness for cross-examination or demonstrate the unavailability of that witness.¹⁷ Under *Ohio v. Roberts*, now superseded by *Crawford v. Washington*¹⁸, to be admissible a statement where the witness was unavailable required a showing of "indicia of reliability."¹⁹ Under *Roberts*, statements were presumed reliable if they came within a "firmly rooted hearsay exception,"²⁰ or there was a showing of "particularized guarantees of trustworthiness."²¹ In *Roberts*, the prosecution sought to admit the preliminary hearing transcript of a witness who did not appear at trial.²² An out-of-court statement was admissible and the Confrontation Clause satisfied only if the witness was unavailable and the statement bears adequate "indicia of reliability."²³

("In all criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face...."); N.H. CONST. pt. 1, art. 15 ("Every subject shall have a right ... to meet the witnesses against him face to face...."); OHIO CONST. art. I, § 10 ("In any trial, in any court, the party accused shall be allowed ... to meet the witnesses face to face...."); OR. CONST. art. I, § 11 ("In all criminal prosecutions, the accused shall have the right ... to meet the witnesses face to face...."); S.D. CONST. art. VI, § 7 ("In all criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face...."); TENN. CONST. art. I, § 9 ("That in all criminal prosecutions, the accused hath the right ... to meet the witnesses face to face...."); WASH. CONST. art. I, § 22 ("In criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face....").

¹² *Mattox v. United States*, 156 U.S. 237 (1895).

¹³ *Id.* at 240.

¹⁴ *Id.* at 242-43.

¹⁵ *Id.* at 243.

¹⁶ *Id.*

¹⁷ *Ohio v. Roberts*, 448 U.S. 56, 65 (1980).

¹⁸ *Crawford v. Washington*, 541 U.S. 36 (2004).

¹⁹ *Roberts*, 448 U.S. at 66.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 59.

²³ *Id.* at 66.

Crawford changed the Confrontation Clause analysis.²⁴ The Court changed the second step of the analysis from "indicia of reliability" to "prior opportunity to cross-examine" the declarant. The analysis created by *Crawford* requires two things. First, the examination of any out-of-court to determine whether the statement is testimonial.²⁵ A statement is testimonial if the statement was "made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial."²⁶ Second, if the statement is determined to be testimonial, there must have been a prior opportunity for the defendant to have cross-examined the witness.²⁷ Stated another way, where the issue is testimonial evidence, the "Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."²⁸

Davis v. Washington provided an exception or clarification to the meaning of "testimonial."²⁹ In response to the issue of whether an emergency 911 call was testimonial, the Court held that "statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."³⁰ The Court referred back to the *Crawford* decision in noting the perimeters of the Confrontation Clause: (1) a witness is someone who bears testimony, and (2) testimony is a "solemn declaration or affirmation" for the purpose of proving a fact.³¹ Whether a statement is testimonial is an objective inquiry.³² However, a statement that begins objectively to be for the primary purpose of an emergency may evolve into a statement with the primary purpose of future prosecution.³³

Professor Michael Graham has described the current state of the Confrontation Clause by defining testimonial for Confrontation Clause purposes:

An out-of-court statement is 'testimonial' only if hearsay as defined in Fed. Rule Evid. 801(a)-(d) and the statement was made by, or made to, or elicited by a police officer, other law enforcement personnel, or a judicial officer under circumstances objectively indicating at the time made that the primary purpose to which the statement will be used by the government is to establish or prove past events potentially relevant to a later criminal prosecution.³⁴

The Professor describes the current interpretation of the Confrontation Clause to be "theoretically unsound, inconsistent, confused, and illogical."³⁵

The United States Supreme Court first considered the interplay between expert witnesses and the Confrontation Clause in *Melendez-Diaz v. Massachusetts*.³⁶ With the *Crawford* and *Davis* decisions behind them, the Court was now faced with a situation where affidavits reporting the substance and weight of a controlled substance were introduced in evidence and not through live testimony.³⁷ Justice Scalia, writing for the Court, held that "there is little doubt that the documents at issue in this case fall within the 'core class of testimonial statements'" prohibited

²⁴ *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

²⁵ *Id.* at 51-52

²⁶ *Id.* at 52.

²⁷ *Id.* at 53-54

²⁸ *Id.* at 68.

²⁹ *Davis v. Washington*, 547 U.S. 813, 822 (2006).

³⁰ *Id.*

³¹ *Id.* at 823-24 (citing *Crawford v. Washington*, 541 U.S. 36, 51 (2004)).

³² *Id.* at 826.

³³ *Id.* at 828-29.

³⁴ Michael H. Graham, *Justice Scalia's Fundamentally Flawed Confrontation Clause Analysis Continues in Melendez-Diaz: It's Time to Begin All Over Again*, 45 *Crim. L. Bull.* 6 (2009).

³⁵ *Id.*

³⁶ *Melendez-Diaz*, 129 S.Ct. 2527, 2530-31 (2009).

³⁷ *Id.*

by the Confrontation Clause.³⁸ Under the objective analysis, a reasonable person would have believed that those affidavits would be available for use at a criminal trial.³⁹ The Court held that the statements were testimonial and that the analysts were "witnesses" for Confrontation Clause purposes.⁴⁰ Thus to be admissible against the defendant, the prosecution would have to show two things: that the witness was unavailable and that the defendant had been afforded a prior opportunity to cross-examine witnesses.⁴¹

Justice Scalia addressed six specific arguments that were made by the prosecution and/or by the defendant. First, the argument was made that the forensic analysts were not "accusatory" witnesses and therefore the Confrontation Clause did not apply.⁴² The Court rejected this argument and held that there are two types of witnesses at trial and that are addressed in the constitution: first, there are witnesses against the defendant, for which the Confrontation Clause applies, and second, there are witnesses for the defendant, for which the compulsory process clause applies.⁴³

Second, the argument was made that the analysts were not "conventional," "typical," or "ordinary" witnesses.⁴⁴ The argument goes that the conventional witness was recalling past events while the analysts were reporting on their contemporary observations.⁴⁵ Further the argument was made that the statements were not made in response to interrogation and therefore the Confrontation Clause did not apply.⁴⁶ The Court rejected all of these arguments stating that analysts were "witnesses" and that affidavits were testimonial.⁴⁷

Third, the difference between recounting historical events and memorializing neutral scientific fact was cited as a reason why the Confrontation Clause should not apply to the analysts.⁴⁸ Justice Scalia called this reasoning nothing more than a call to return to the test for "particularized guarantees of trustworthiness" adopted in *Roberts* but later rejected in *Crawford*.⁴⁹ The Court held that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."⁵⁰ Confrontation is necessary because it cannot only discover the fraudulent analyst, but also ferret out the incompetent ones.⁵¹

Fourth, the analysts' affidavits were neither public records or business records admissible without confrontation.⁵² While many documents may be admissible as public or business records, ones that are created specifically for use at this trial do not fall within those exceptions.⁵³ The documents are not primarily created for the use in the business or in the agency, but rather are primarily created for use in court.⁵⁴ The test for whether the Confrontation Clause applies to public or business records is whether they were "prepared specifically for use at [the defendant's] trial."⁵⁵

³⁸ *Id.* at 2532.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 2533.

⁴³ *Id.* at 2534.

⁴⁴ *Id.*

⁴⁵ *Id.* at 2535.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 2536

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 2538.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 2540.

Fifth, it was argued that the defendant at trial could have subpoenaed the analysts. This argument was dealt short shrift when the Court indicated that it is the prosecution who has the burden of proof and the responsibility for calling witnesses.⁵⁶

Sixth, and last, the argument was made that in an age where there are analysts and experts in almost every trial, the "necessities of trial and the adversary process," will simply cause the criminal justice system to collapse if the prosecution is required to call all of those witnesses.⁵⁷ Justice Scalia found that many jurisdictions were already complying with the dictates of *Crawford* and that the sky was not falling now or going to fall because the Confrontation Clause requires live testimony.⁵⁸

III. EXPERTS

Experts in the trial courts in America have a long history. As early as 1876, the United States Supreme Court was making the distinction between, on one hand, subjects that were a matter of common observation "upon which the lay or uneducated mind is capable of forming a judgment" and, on the other hand, questions that require an expert because "in such questions scientific men have superior knowledge."⁵⁹ The key requirement for experts was that their testimony would "assist the court or jury in reaching a correct conclusion."⁶⁰

The focus for the fact-finder was always upon whether the facts underlying the opinion were true and proven at trial.⁶¹ One way an expert could perceive the facts underlying his opinion was through personal observation. The party opposing the expert could cross-examine the witness concerning the expert's own personal knowledge of facts.

The expert could be asked hypothetical questions, but jurors were instructed to carefully look to the facts that supported the question and "[i]f the statements in these questions are not supported by the proof, then the answers to the questions are entitled to no weight, because [they are] based upon false assumptions or [false] statements of facts."⁶² "[T]he opinions of these experts depend very largely upon the truth of the hypothetical case that counsel on the one side and on the other have seen proper to put to the witnesses during their examination...."⁶³ Jurors were forewarned to "...be careful to ascertain what the evidence establishes as to the truth of the one or the other of these different hypothetical cases put by counsel to the witnesses on the examinations."⁶⁴ The jury was left to decide whether the facts assumed in a hypothetical question were both true and proven.⁶⁵

Even now, some jurisdictions specifically instruct the jury that part of their decision making is determining the truth or falsity of the facts underlying an expert opinion.⁶⁶ The common law in

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Milwaukee & Saint Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 472-73 (1876).

⁶⁰ *Conn. Mut. Life Ins. Co. v. Lathrop*, 111 U.S. 612, 618 (1884).

⁶¹ *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891).

⁶² *Forsyth v. Doolittle*, 120 U.S. 73, 77 (1887).

⁶³ *Union Ins. Co. v. Smith*, 124 U.S. 405, 414 (1888).

⁶⁴ *Id.* at 415.

⁶⁵ *Gottlieb v. Hartman*, 3 Colo. 53, 63 (Colo. Terr. 1876) (citing *Carpenter v. Blake*, 75 N.Y. 12 (N.Y. 1878)).

⁶⁶ See, e.g., JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS (CACI) 220 (2003), ("In determining the weight to give to the expert's opinion that is based on the assumed facts, you should consider whether the assumed facts are true."); CALIFORNIA JURY INSTRUCTIONS – CRIMINAL (CALJIC) 2.82 (2005), in pertinent part, (I)† is for you to decide from all the evidence whether or not the facts assumed in a hypothetical question have been proved. If you should decide that any assumption in a question has not been proved, you are to determine the effect of that failure of proof on the value and weight of the expert opinion based on the assumed facts.

CALIFORNIA JURY INSTRUCTIONS, CIVIL: BOOK OF APPROVED JURY INSTRUCTIONS, BAJI 2.42 (2003), ("It is for you to decide from all the evidence whether or not the facts assumed in a hypothetical question have been proved."); ALABAMA PATTERN JURY INSTRUCTIONS CIVIL, APJI 15.08, ("(f)irst examine carefully all the material facts stated in the

the United States required the ability to test the expert opinion: an expert's personal observations would be subject to cross-examination, and if the expert was asked a hypothetical question, those underlying facts were subject to being proven at trial through some other method, usually witness testimony, and that testimony was subject to cross-examination.

Up to this point in the development of the utilization of experts at trial, jurors had the ability to make credibility determinations based upon the cross-examination of a live witness: either the expert himself or some other witness that testified to the underlying facts. Somewhere along the development of expert testimony, the notion that the underlying facts had to be proven as substantive evidence got lost.

Under the Federal Rules, expert analysis can be said to include eight considerations:

1. relevance⁶⁷
2. assist (fit)⁶⁸
3. qualified expert⁶⁹
4. sufficient facts or data⁷⁰
5. reliable principles and methods⁷¹
6. reliable application⁷²
7. appropriate basis for the opinion, introduced at the appropriate time⁷³
8. opinion on ultimate issue⁷⁴

The trial court should consider each of these steps in turn before admitting expert testimony. Occasionally, trial courts have permitted an expert to discuss reliable principles and methods

hypothetical questions and be reasonably satisfied that they have substantially been proved to be true."); and, for example, CALIFORNIA JURY INSTRUCTIONS - CRIMINAL (CALJIC) 2.8 (2010), in pertinent part,

An expert witness is permitted to consider statements made to the witness or a third person that have not been made under oath in court. Statements considered by an expert witness which were made to the witness or a third person do not prove that what was said was true. The truth of those statements may come from other evidence. You should consider the failure to prove in court that it was made or is true in determining what weight to give to the opinion of the expert.

NEW JERSEY MODEL CIVIL JURY CHARGES 1.13(A) (1995), ("You must determine if any fact assumed by the witness has not been proved and the effect of that omission, if any, upon the weight of the expert's opinion."); NEW MEXICO UNIFORM JURY INSTRUCTIONS - CRIMINAL, (UJI) 14-5051 (2010),

You must find all the evidence whether or not the assumed facts have been proved. If you should find that any assumption has not been proved, you are to determine the effect of that failure of proof on the value and weight of the expert opinion based on the assumption.

PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS, 4.10(B) (2001),

The value of an opinion given in response to a hypothetical question depends on various things, including how close the assumptions made are to the true facts. One of your tasks, as jurors, is to determine from all the evidence, whether or not the [facts] [testimony] assumed for a hypothetical question [have been] [has been] proven to be true. If you find that any of the assumed [facts have] [testimony has] not been proven, you should determine how that affects the value and weight of the expert witness's opinion.

⁶⁷ FED. R. EVID. 401, 401.

⁶⁸ FED. R. EVID. 702.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ FED. R. EVID. 703, 705.

⁷⁴ FED. R. EVID. 704.

without testifying to the application and/or express an opinion in the particular case.⁷⁵ Expert testimony, of course, is subject to Fed. Rule Evid. 403 considerations as well.⁷⁶

The adoption of the Federal Rules of Evidence codified the move from the underlying facts having to be proven to a principle that as long as the facts were "reasonably relied upon by experts in the field in forming opinions or inferences" the facts were admissible. Currently, expert testimony in the Federal courts is governed by the Federal Rules of Evidence, Rules 702 through 706. Rule 703 concerning the bases of an expert's opinion states, in pertinent part:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.⁷⁷

Many states adopted this precise language and continue to utilize it in their statute or rules of evidence.⁷⁸

Some courts have interpreted the second sentence of the Rule as not only permitting the opinion to be based upon facts or data "reasonably relied upon by experts" in the field, but also permitting the expert to testify to facts or data that are not admissible.⁷⁹ A competing interpretation is that while the expert could rely upon information that was otherwise inadmissible, that evidence could not be revealed by the expert on direct examination.⁸⁰ The

⁷⁵ See, e.g., *United States v. Smead*, 317 Fed. Appx. 457, 464-65 (6th Cir. 2008) (excluding expert testimony in part); *United States v. Smithers*, 212 F.3d 306, 311-12, 314 (6th Cir. 2000) (reciting historical use of eyewitness expert testimony and indicating that the expert testimony could be offered on the subject of psychological factors which influence memory).

⁷⁶ See, e.g., *United States v. Mathis*, 264 F.3d 321, 338 (3d Cir. 2001) (holding that after the Rule 702 analysis the court turns to a Rule 403 evaluation).

⁷⁷ FED. R. EVID. 703.

⁷⁸ ALASKA. R. EVID. 703; IOWA. R. EVID. 5.703; LA. CODE EVID. ART.703; ME. R. EVID. 703; MONT. CODE. ANN. 703; NEV. REV. STAT., 50.285; N.H. R.EVID. 703; N.J. R. EVID. 703; N.C. GEN. STAT. G.S. §8C-1, RULE 702; OR. REV. STAT., §40.415, RULE 703; PA. R. EVID. 703; S.D. CODIFIED LAWS, §19-15-3, RULE 703; TEX. R. EVID. 703; WASH. R. EVID. 703; W. VA. R. EVID. 703.

⁷⁹ *United States v. Pablo*, No. 09-2091, 2010 WL 4609188 (10th Cir. Nov. 6, 2010)

(t)herefore, where an expert witness discloses otherwise inadmissible out-of-court testimonial statements on which she based her opinion, the admission of those testimonial statements under Rule 703 typically will not implicate a defendant's confrontation rights because the statements are not admitted for their substantive truth.

People v. Leach, No. 1-07-1448, 2010 WL 4629056 (Ill.App. Nov. 12, 2010) (holding that "while the contents of reports and records relied upon by experts may be disclosed, an expert may also testify as to nontestifying experts' findings and conclusions."); *Foster v. State*, No. 49A04-0908-CR-435.930, 2010 WL 2983133 (Ind.App. 2010) (holding that the underlying basis may be disclosed under a three-part test: first, sufficient expertise; second, "the report is of the type normally found reliable," and third, the information is customarily relied upon by experts in the field."); *Gardner v. United States*, 999 A.2d 55, 59-60 (D.C. 2010) (permitting the hearsay underlying basis as long as a limiting instruction is given); *Miller v. State*, No. CR 08-1297 2010 WL 129708 (Ark. Jan. 7, 2010) (holding that the underlying basis for an expert opinion was hearsay, the evidence was allowed to be presented on direct because it was "critical in rendering a forensic evaluation"); *State v. Lui*, 221 P.3d 948, 957-58 (Wash. Ct. App. 2009) (holding that "the trial court (has) discretion to permit an expert to relate hearsay or otherwise inadmissible evidence to the jury for the limited purpose of explaining the reasons for his or her opinion."); *People v. Rutterschmidt*, 98 Cal.Rptr.3d 390, 413 (Cal. Ct. App. 2009) (holding "an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion."); *People v. Leach*, 908 N.E.2d 120, 131 (Ill. App. Ct. 2009) (holding that admissible facts, including another expert's findings and conclusion for the limited purpose of explaining the basis for an expert opinion).

⁸⁰ *United States v. Williams*, No. 09-0026, 2010 WL 4071538 (D.C. Oct. 18, 2010) (holding that the a forensic pathologist could use another pathologist's autopsy report as a basis for his opinion, that basis could not be revealed on direct examination); *Commonwealth v. Barbosa*, 933 N.E.2d 93, 106 (Mass. 2010) (permitting an expert to base his opinion on testimonial evidence from non-testifying witnesses, but prohibiting

question arose whether Rule 703 then became another hearsay exception or an unwritten method for circumventing hearsay. Some courts attempt to get around this interpretation by holding that the evidence was admissible only as it went to the basis of the expert's opinion, and, therefore, was not being admitted for its truth. But if the underlying facts and data are not true, the expert's opinion would be irrelevant and subject to a Rule 403 exclusion.

In criminal cases, these questions implicate the Confrontation Clause. Under the common law of evidence, the Confrontation Clause was not an issue because the expert was required to have personal knowledge that could be tested by cross-examination. Alternatively, the expert could be asked a hypothetical question and the facts contained in the question were subject to proof at trial. The expansion of the basis for the expert opinion to include other evidence "of a type reasonably relied upon by experts in the field"⁸¹ opened the floodgates to unopposed evidence.⁸²

The Supreme Court sought to control the flood of unopposed facts by the 2000 Amendment to Fed. Rule Evid. 403. The amendment added a sentence to the rule:

Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.⁸³

Several states adopted the new balancing test into their statutes or court rules of evidence.⁸⁴

The comments to the rule indicate the limited purpose of the "otherwise inadmissible" facts or data.⁸⁵ The comment warns that the jury must be instructed that the basis for the opinion is not admissible as substantive evidence (i.e., for its truth) but rather only as the basis of the opinion.⁸⁶

Looked at from another angle, in order for the facts or data to support an opinion, the facts or data must be true, or there must at least be a good-faith argument that the matters are true. One problem arises when an expert testifies to the testing that another expert performed: the basis is assumed to be true and there is no opportunity to cross-examine the original expert, the "man behind the curtain."

Under the Rule, the expert may use any evidence that is "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."⁸⁷ Those facts "need not be admissible," but if they are "otherwise inadmissible," the proponent is not permitted to ask the expert on direct examination, and the expert is not permitted to disclose them to the jury, unless a special balancing test is met.⁸⁸ That balancing test is whether the

disclosure except on cross-examination); *United States v. Gray*, No. 3:09 CR 182, 2010 WL 3515599 (N.D. Ohio, Sept. 3, 2010) (experts may use the testimonial statements of non-testifying witnesses as the basis of the opinion, but may not reveal them on direct examination); *Martinez v. State*, 311 S.W.3d 104 (Tex. Crim. App. 2010) (holding that disclosure of information from non-testifying pathologist's autopsy report was a violation of confrontation, but that the expert could use it as an undisclosed basis for his opinion).

⁸¹ FED. R. EVID. 703.

⁸² *But see* MICH. R. EVID. 703

The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.

⁸³ FED. R. EVID. 703.

⁸⁴ ARIZ. R. EVID. 703; COLO. R. EVID. 703; N.D. R. EVID. 703; OKL. ST. ANN. §2703; UTAH. R. EVID. 703.

⁸⁵ FED. R. EVID. 703 advisory committee notes (amended 2000).

⁸⁶ *Id.*

⁸⁷ FED. R. EVID. 703

⁸⁸ *Id.*

"probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."⁸⁹

Prior to the amendment, courts and commentators had reached different conclusions on how to treat this information. "The amendment provides a presumption against disclosure to the jury of information used as the basis for an expert's opinion and not admissible for any substantive purpose, when the information is offered by the proponent of the expert."⁹⁰

The underlying basis for the opinion can be "otherwise inadmissible" for any number of reasons. For example and pertinent here, although overlooked by the cases, the underlying basis may not be admissible because its admission might violate the defendant's right to confront the witnesses against him. The Wisconsin Supreme Court had this to say about disclosure of the bases for expert opinions: "(T)he thorny question of what to do with inadmissible evidence that experts rely upon as a basis for an opinion is one that has proved difficult to answer with a fair and workable rule."⁹¹

Some courts indicate that the underlying basis is not being admitted for its truth, but rather as the underlying basis of the opinion.⁹² For example, the Tenth Circuit in *United States v. Pablo*⁹³ held that a defendant's right to confrontation usually would not be implicated where the expert uses, as the basis of his own opinion, otherwise inadmissible out-of-court testimonial statements.⁹⁴ The type and quantity of testimonial testimony permitted, however, is a question of degree.⁹⁵ The expert cannot testify as a mere conduit of the non-testifying expert's knowledge and opinion because the purpose for introducing the evidence is for its truth and, therefore, a Confrontation Clause violation.⁹⁶ However, if the expert has formed his own opinion based upon the non-testifying expert's report, introduction of the report is for the factfinder to be able to test the underlying basis for the opinion, and, therefore, it does not violate the Confrontation Clause.⁹⁷

In *Pablo*, one expert was permitted to testify to statements contained in another expert's DNA report and to a third expert's serology report.⁹⁸ The defendant complained that his right to confront the other experts had been violated by the introduction of the evidence of the two non-testifying experts because the testifying witness was a mere conduit. The trial court, under the Tenth Circuit's reasoning, was then required to determine whether the testifying expert was merely a conduit for the other expert's reports or whether the expert had formed her own opinion and, therefore, was only using the other expert's reports as the basis for her own opinion.⁹⁹ The Tenth Circuit avoided resolving the underlying issue by finding there was no plain error.¹⁰⁰ The Court also noted that *Melendez-Diaz* did not clearly resolve the issue.

The degree to which an expert may merely rely upon, and reference during her in-court testimony, the out-of-court testimonial conclusions of another person not called as a

⁸⁹ *Id.*

⁹⁰ 2000 Amendment Commentary, *construed* in FED. R. EVID 703.

⁹¹ *Wisconsin v. Fischer*, 322 N.W.2d 629, 637 (Wis. 2010).

⁹² *Gardner v. United States*, 999 A.2d 55, 59-60 (D.C. 2010); *Marshall v. Oklahoma*, 232 P.3d 467, 474-75 (Okla. Crim. App. 2010); *New Mexico v. Bullcoming*, 226 P.3d 1 (N.M. 2010); *Washington v. Lui*, 221 P.3d 948, 957 (Wash. App. 2009) (holding that "to the extent the experts here related testimonial hearsay statements to the jury, they did so to explain the bases for their opinions."); *Wood v. Texas*, 299 S.W.3d 200, 213 (Tex. Crim. App. 2009); *California v. Nguyen*, No. H026581, 2005 WL 2064165 (Cal. Ct. App. Aug. 29, 2005).

⁹³ *United States v. Pablo*, No. 09-2091, 2010 WL 4609188 (10th Cir. Nov. 6, 2010).

⁹⁴ *Id.* at 4.

⁹⁵ *Id.* at 5.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 7-8.

witness is a nuanced legal issue without clearly established bright line parameters. Even today with the benefit of *Melendez-Diaz*.¹⁰¹

This reasoning skips steps in evidentiary analysis and has the basic flaw that the expert, the court, and the jurors assume that the underlying basis is true. If it is not true, then the underlying bases would be inadmissible because they are not relevant. While there certainly can be matters of fact that may be true or not true under a good faith analysis, the decision of whether the facts are true is a chore for the factfinder and should not be left to the expert's discretion. Often the testifying expert will not have sufficient personal knowledge of the facts when he is testifying based on someone else's report and, therefore, not have a sufficient basis for a valid exploration into the facts through cross-examination by the defense. Criminal defendants claim it is those underlying facts that they have a right to confront.

IV. POINT OF VIEW

Justice Scalia in *Crawford* adopted the following standard for testimonial statements: "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."¹⁰² The only authority for the citation was a National Association of Criminal Defense Lawyers and American Civil Liberties Union amicus brief.¹⁰³ The brief itself sets out a standard only in two places, in the introduction¹⁰⁴ and in the argument without any authority cited.¹⁰⁵ In fact, Justice Scalia adopted only the first statement of the proposed rule, while the second recitation stated, "an out-of-court statement is testimonial only when the circumstances indicate that a reasonable declarant at the time would understand that the statement would later be available for use at a criminal trial." While Justice Scalia adopted the standard, the standard's reference to an "objective witness" has no firm roots in legal precedent. Notwithstanding its lack of a firm foundation, Justice Scalia reiterated the standard in *Melendez-Diaz*.¹⁰⁶

This standard simply does not work. Any witness, lay or expert, after rational reflection, would believe that any statement made to the government could be used in a later prosecution. The pathologist who performs an autopsy at the request of law enforcement knows that the report could be used in a later prosecution. The analyst who tests drugs would know that the report could be used in a later prosecution. The clerk who prepares an affidavit of no record after a diligent search knows that the affidavit could be used in a later prosecution. The manufacturer who prepares blood alcohol test kits reasonably knows that the evidence could be used in a later prosecution. To go to the extreme, manufacturers of blood alcohol testing machines well know that those machines will be used for blood alcohol testing and that any statements made by individuals in the manufacturing and testing of the machine could be used in a later prosecution.

If the Confrontation Clause is going to be interpreted not to require live testimony from every witness, a position the United States Supreme Court has long taken,¹⁰⁷ a more workable line needs to be drawn than the point of view of an "objective witness." The Sixth amendment guarantees that it is the "accused" who "shall enjoy the right" to be confronted with the witnesses.¹⁰⁸ It is the defendant's right and the focus should not be taken from the defendant

¹⁰¹ *Id.* at 7.

¹⁰² *Crawford v. Washington*, 541 U.S. 36, 52 (2010).

¹⁰³ Brief for the National Association of Criminal Defense Lawyers ("NACDL") and the American Civil Liberties Union, *Crawford v. Washington*, 541 U.S. 36, (2003) (No. 02-9410), 2003 WL 21754961.

¹⁰⁴ *Crawford*, 541 U.S. at 52.

¹⁰⁵ *Id.* at 22.

¹⁰⁶ *Melendez-Diaz v. Massachusetts*, 129 U.S. 2527, 2527 (2009).

¹⁰⁷ See *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

¹⁰⁸ U.S. CONST. amend. VI.

and placed upon some "objective witness." However, line drawing must take into consideration not only the defendant's right to confrontation, but also the efficacy of cross-examination. The defendant certainly may benefit from the cross-examination of the pathologist or the drug analyst. The defendant can gain little, if any, benefit from the appearance and cross-examination of a clerk who found no record, or the manufacturer who prepared the blood alcohol test kits, or the manufacturer of the blood alcohol testing machine.

Therefore, the point of view should be from a hypothetical reasonable defendant, not the "objective witness." The question should not be whether the objective witness understands that the statement could be used at a criminal trial, but rather whether a reasonable defendant could benefit from cross-examination.

V. IS SOMEONE – ANYONE – TO CROSS-EXAMINE SUFFICIENT?

There is a split of authority on whether it sufficient for someone – anyone – who is an expert to be put on the witness stand so he can be cross-examined on the work and analysis done by other experts. If there is any expert witness to examine, some courts have held that is sufficient to admit the non-testifying expert's opinion or report as the underlying basis for the expert opinion.¹⁰⁹ This rationale skirts both a hearsay analysis and a confrontation analysis.

After the decision in *Melendez-Diaz*, the United States Supreme Court denied certiorari in *Pendergrass v. Indiana*, a case where one expert was called to testify to the procedures and results produced by another expert.¹¹⁰ Pendergrass was charged with inappropriately touching his thirteen year old daughter based, in part, on DNA testing.¹¹¹ The DNA analyst, Daun Powers, was not called as a witness at trial.¹¹² Two exhibits were admitted that had been prepared by Powers: an exhibit labeled "certificate of analysis" and an exhibit labeled "profiles for paternity analysis."¹¹³ The "certificate of analysis" enumerated the evidence submitted to the laboratory, a list of tests performed, and a certification of where the test results were sent.¹¹⁴ The "profiles"

¹⁰⁹ See *United States v. Turner*, 591 F.3d 928, 932-33 (7th Cir. 2010) (holding no confrontation clause violation for admitting expert's testimony based on underlying forensic testing of cocaine); *United States v. Williams*, No. 09-0026 (PLF), 2010 WL 4071538, at*4-5 (D.D.C. Oct. 18, 2010) (denying admission of underlying report serving as basis of expert's opinion); *United States v. Mirabal*, No. CR 09-3207 JB, 2010 U.S. Dist LEXIS 91595 at *11-13 (D.N.M. Aug. 7, 2010) (admitting expert testimony based on forensic chemical testing but not allowing expert to testify to unavailable expert's conclusions); *People v. Zayas*, No. E048865, 2010 WL 3530426, at 1-2, 4 (Cal. Ct. App. Sept. 13, 2010) (admitting discussion of underlying forensic drug analysis at trial); *Commonwealth v. Avila*, 912 N.E.2d 1014, 1029-30 (Mass. 2009) (holding expert could testify to opinions based on autopsy report but not direct findings of the report); *State v. Mitchell*, 4 A.3d 478, 490 (Me. 2010) (holding no confrontation clause violation for admitting expert's testimony based on underlying report); *State v. Dilboy*, 999 A. 2d. 1092, 1104 (N.H. 2010) (holding no confrontation clause violation for admitting expert's testimony based on underlying report); *State v. Bullcoming*, 2010 NMSC 007, 226 P.3d 1, 8-9 (N.M. 2010) (admitting expert testimony based on underlying forensic testing for alcohol in blood), *cert. granted*, *Bullcoming v. New Mexico*, No. 09-10876, 2010 WL 2008002 (U.S. Sept. 28, 2010); *State v. Hough*, 690 S.E.2d 285, 290-91 (N.C. Ct. App. 2010) (holding no confrontation clause violation by expert stating opinion based on underlying reports); *Wood v. State*, 299 S.W.3d 200, 213 (Tex. App. 2009) (holding no confrontation clause violation when expert gave opinion based on underlying autopsy reports, but a confrontation clause violation did occur when autopsy report findings were disclosed). *But See People v. Dendel*, No. 247391, 2010 WL 3385552 (Mich. Ct. App. Aug. 24, 2010) (holding a confrontation clause violation by allowing expert opinion based on inadmissible underlying report).

¹¹⁰ *Pendergrass v. Indiana*, 913 N.E.2d 703 (Ind. 2009), *cert. denied*, *Pendergrass v. Indiana*, 130 S.Ct. 3409 (2010).

¹¹¹ *Pendergrass*, 913 N.E.2d at 704.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

document contained numbers in columns categorized by abbreviated test labels for each of the three test subjects: Pendergrass, the daughter, and the fetus.¹¹⁵

The State did call two witnesses concerning the DNA evidence. Lisa Black, a supervisor at the laboratory, explained the process of test sampling.¹¹⁶ She testified that she performed technical, administrative, and random reviews of work performed by the DNA analysts.¹¹⁷ She did a "technical review" of Power's work in this case.¹¹⁸ She relied on Power's notes to testify about the procedures that were followed in this particular case.¹¹⁹ Dr. Michael Conneally, a DNA expert and the only other live expert witness to testify at trial, explained his conclusions and how he applied the DNA principles.¹²⁰ This witness created a paternity index table to calculate the probability of fatherhood of the fetus based upon the laboratory's test results.¹²¹

The Indiana Supreme Court found no confrontation violation.¹²² The Court found that Black, the laboratory supervisor, "did have a direct part in the process by personally checking Power's test results."¹²³ The fact that she looked at the results and could testify about standard operating procedures were sufficient for the Court to find that there was no confrontation violation.¹²⁴ "Here, the prosecution supplied a supervisor with direct involvement in the laboratory's technical processes and the expert who concluded that those processes demonstrate" the defendant was the father.¹²⁵ The Court concluded that "this sufficed for Sixth Amendment purposes."¹²⁶

The Court further found that although the exhibits might be inadmissible hearsay, "opinions by qualified experts" "may rely on information supplied by other persons" "even if the supplier is not present to testify in court."¹²⁷ The Court stated that the evidence relied upon by the experts who did testify "might have been subject to a limiting instruction," but that it was not error to admit them.¹²⁸

The Court seemed to be creating some type of exception for experts. However, any such exception must take into account not only the Rules of Evidence as they relate to experts, but also confrontation guaranteed by the Constitution. The dissent pointed out,

[the analyst who actually performed the test was] never subject to the rigors of cross-examination on either the examination she performed, the testing she conducted, or the results she reached.... Although a supervisor might be able to testify to her charge's general competence or honesty, this is no substitute for a jury's first-hand observations of the analyst that performs a given procedure; and a supervisor's initials are no substitute for an analyst's opportunity to carefully consider, under oath, the veracity of her results.¹²⁹

Since 2007, the courts in California since 2007 have been guided by the California Supreme Court's decision in *People v. Geier*.¹³⁰ The California case in *Geier* was decided post-

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 705.

¹²⁰ *Id.* at 704.

¹²¹ *Id.* at 705.

¹²² *Id.*

¹²³ *Id.* at 707.

¹²⁴ *Id.* at 707-08.

¹²⁵ *Id.* at 708.

¹²⁶ *Id.*

¹²⁷ *Id.* at 708-09.

¹²⁸ *Id.* at 709.

¹²⁹ *Id.* at 710-11 (Rucker, J. dissenting).

¹³⁰ *California v. Geier*, 161 P.3d 104 (Cal. 2007), *cert. denied*, *Geier v. California*, 129 S.Ct. 2856 (2009).

Interestingly, the denial of certiorari in *Geier* occurred on June 29, 2009, the *Melendez-Diaz* opinion issued June 25, 2009. Before the *Geier* decision, the California appellate courts had held that autopsy reports

Crawford, but pre-*Melendez-Diaz*. Certiorari was denied by the United States Supreme Court only four days after issuing *Melendez-Diaz*.

In *Geier*, the DNA analysis was performed by Paula Yates, a biologist.¹³¹ However, the prosecution chose to only call Dr. Robin Cotton, a DNA expert.¹³² Dr. Cotton had "reviewed the forms" Yates had filled out and Yates handwritten notes, as well as other data in the case.¹³³ The defendant objected based upon his right to confront the person who actually did the analysis, Yates.¹³⁴ After reviewing *Crawford* and the multitude of cases after *Crawford*, interpreting what is testimonial, the California Court held that "we are nonetheless more persuaded by those cases concluding that such evidence is not testimonial..."¹³⁵ The Court held that *Crawford* and post-*Crawford* opinions required an analysis to determine whether a statement was testimonial based on three conditions: (1) it is made to law enforcement, (2) it describes a past fact related to criminal activity, and (3) it was made for possible use at a later trial.¹³⁶

The Court found that "the crucial point is whether the statement represents the contemporaneous recordation of observable events."¹³⁷ Because Yates' information as recorded in her report and notes were made as part of an objective and standardized scientific protocol, they were not made to incriminate the defendant, but as part of Yates' employment as an objective observer.¹³⁸ The analyst's records were properly received in evidence because the testing took place in a "routine, non-adversarial process meant to ensure accurate analysis."¹³⁹ The California Supreme Court thus held that there were two requirements in overcoming a confrontation issue: first, there must be live testimony from some expert and an opportunity to cross examine that expert, and second, the report must be a "contemporaneous recordation of observable events."¹⁴⁰ The Court thus created a someone-anyone exception to Confrontation.

The *Geier* analysis, even after *Melendez-Diaz*, has been utilized by the vast majority of California cases in addressing such areas as DNA,¹⁴¹ autopsies,¹⁴² blood alcohol testing¹⁴³ and drug testing.¹⁴⁴ However, a minority of California Courts of Appeal have held that the *Geier* analysis was overruled by the *Melendez-Diaz* case.¹⁴⁵ Both the Indiana Supreme Court in

were admissible either as business records, *California v. Beeler*, 891 P.2d 153, 167-70 (Cal. 1995), or as public records, *California v. Williams*, 345 P.2d. 47,64 (Cal. Ct. App. 1959).

¹³¹ *Geier*, 161 P.3d at 132.

¹³² *Id.* at 131.

¹³³ *Id.* at 132.

¹³⁴ *Id.* at 133

¹³⁵ *Id.* at 138

¹³⁶ *Id.* at 138-39.

¹³⁷ *Id.* at 140

¹³⁸ *Id.* (quoting *People v. Brown*, 801 N.Y.S.2d 709, 712 (N.Y. Sup. Ct. 2005)).

¹³⁹ *Id.*

¹⁴⁰ *California v. Geier*, 161 P.3d 104, 140 (Cal. 2007).

¹⁴¹ *People v. Suen*, 2010 WL 4401796 (Cal.App. 2010) (DNA); *People v. Reed*, 2010 WL 4324384 (Cal.App. 2010) (DNA) *People v. Blueford*, 2010 WL 3932799 (Cal.App. 2010) (DNA)

¹⁴² See *California v. Suen*, No. B208155, 2010 WL 4401796, at *7-8 (Cal. Ct. App. Nov. 8, 2010) (DNA); *California v. Reed*, No. B216570, 2010 WL 4324384, at *10-13 (Cal. Ct. App. Nov 3, 2010) (DNA); *California v. Blueford*, No. B214908, 2010 WL 3932799, at *12-13 (Cal. Ct. App. Oct. 8, 2010) (DNA).

¹⁴³ See *California v. McKiernan*, No. D055374, 2010 WL 3609173, at *5 (Cal. Ct. App. Sept. 17, 2010) (blood alcohol testing).

¹⁴⁴ See *California v. Zayas*, No. E048865, 2010 WL 3530426, at *1-5 (Cal. Ct. App. Sept. 13, 2010) (drug testing); *California v. Bingley*, No. B205609, 2009 WL 3595261, at *4-6 (Cal. Ct. App. Nov. 3, 2009) (drug testing, distinguishing *Melendez-Diaz* on ground that in *Melendez-Diaz* there was no live testimony at all and therefore no opportunity to cross-examine and that the results of drug testing "constitutes a contemporaneous recordation of observable events").

¹⁴⁵ See *California v. Horn*, No. SCD184821, 2010 WL 1138836, at *5 (Cal. Ct. App. Mar. 26, 2010) (DNA testing where the witness was a "reviewing criminalist," not the person who had performed the analysis); *California v. Dungo*, 98 Cal. Rptr. 3d. 702, 710-12 (Cal. Ct. Ap. 2009) (pathologist relied exclusively on autopsy report

Pendergrass and the California Supreme Court in *Geier* suggest, if not outright hold, that the underlying basis of an expert opinion does not have to undergo the crucible of truth-testing that is cross-examination. The Courts seem to have taken a wrong turn into at least an evidentiary presumption that the underlying basis of the expert opinion does not have to be true to be admissible.

Can the defendant's Confrontation Clause right be protected by an adequate cross-examination conducted of the experts in *Pendergrass* or *Geier*? Certainly the experts who testify can testify on how certain procedures should be performed, but their testimony assumes the truth of the reports underlying the factual basis. It would not be permissible for a lay person to testify from the report of another lay person without doing the hearsay and confrontation analysis. The "someone – anyone" analysis would never satisfy defendant's right to confront when considering lay witnesses. Why then should it be permissible to have an expert witness testify from the report of another technician, analyst, or expert?

The California Supreme Court granted certiorari in *People v. Dungo* to review the use of the *Geier* holding.¹⁴⁶ The California Court of Appeals in *Dungo* held that the autopsy report in that case was testimonial and that relying upon its contents violated the defendant's confrontation rights.¹⁴⁷ The pathologist who performed the autopsy did not testify at trial.¹⁴⁸ The prosecution called the employer of the pathologist, himself a pathologist, to testify.¹⁴⁹ The employer-pathologist was not present at the autopsy and relied exclusively on his employee's report and photographs of the autopsy to form his independent opinions regarding the cause of death.¹⁵⁰ During his testimony, the expert was permitted to disclose parts of the autopsy report from the other expert.¹⁵¹ The trial court had held that there was no confrontation issue because "experts can rely on hearsay to help form their opinions."¹⁵² Further, the otherwise inadmissible information was not being introduced "for the truth of the matter, that's just what he based his opinion on."¹⁵³

The Court of Appeals first found that the autopsy report was testimonial.¹⁵⁴ In finding the report testimonial, the Court considered the facts of the statutory purpose for the report (circumstances, manner, and cause of death), the statutory duty to put the report in writing, the requirement of immediate notification of law enforcement, and the fact that the report was made during the course of a homicide investigation.¹⁵⁵ The Court found "the primary purpose... of the report was to establish or prove some past fact...."¹⁵⁶

Concerning the use of the autopsy report at trial, the prosecution argued that the report did not violate either hearsay rules or the Confrontation Clause because the information was not introduced for its truth but rather as the basis of the opinion.¹⁵⁷ The Court found that the report

prepared by a different pathologist); *California v. Lopez*, 98 Cal. Rptr. 3d 825, 827 (Cal. Ct. Ap. 2009) (criminalist supervisor testified about blood alcohol determined by an analyst).

¹⁴⁶ *California v. Dungo*, 102 Cal.Rptr.3d 282 (Cal. 2009) (granting certiorari on the following issues: (1) "Was defendant denied his right of confrontation under the Sixth Amendment when one forensic pathologist testified to the manner and cause of death in a murder case based upon an autopsy report prepared by another pathologist?" (2) "How does the decision of the United States Supreme Court in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009) affect this court's decision in *California v. Geier*, 161 P.3d 104 (Cal. 2007).").

¹⁴⁷ *Dungo*, 98 Cal. Rptr. 3d at 710-11.

¹⁴⁸ *Id.* at 706.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 708.

¹⁵² *Id.* at 707.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 710.

¹⁵⁵ *Id.* at 710-11.

¹⁵⁶ *Id.* at 711.

¹⁵⁷ *Id.* at 712.

was "formally prepared in anticipation of a prosecution," in rejecting the prosecution's arguments.¹⁵⁸ In its charge to the jury, the trial court had instructed in pertinent part that "[y]ou must decide whether information on which the expert relied was true and accurate."¹⁵⁹ The jury was thus required to determine whether the underlying autopsy report was true. "In other words, the truth and accuracy of Dr. Lawrence's opinions was entirely dependent upon the accuracy and substantive content of Dr. Bolduc's report."¹⁶⁰ The Confrontation Clause, the Court continued, is only satisfied when the defendant has an opportunity to cross-examine the person who made the personal observations, not a different expert.¹⁶¹ After finding a confrontation violation, the Court also found that introduction of the evidence was not harmless.¹⁶²

VI. JUSTICE THOMAS' VIEW OF THE CONFRONTATION CLAUSE

Justice Thomas authored a concurrence in *Melendez-Diaz*.¹⁶³ Although short, his opinion is the controlling opinion because it was necessary to create the decision for the Court. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"¹⁶⁴

Justice Thomas continued to state his position that there is only a Confrontation Clause violation if the out-of-court statements were "contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."¹⁶⁵ Because *Melendez-Diaz* involved the admission of certificates stating the results of forensic analysis concerning the weight and substance and because they were sworn to before a notary public,¹⁶⁶ Justice Thomas found these certificates to "fall within the core class of testimonial statements" that violate the Confrontation Clause.¹⁶⁷ Some courts have adopted this interpretation to permit documents, such as autopsy reports, to be admitted into evidence because they are not "affidavits, depositions, prior testimony, or confessions."¹⁶⁸

In *White v. Illinois*, Justice Thomas first stated his position that while hearsay and confrontation were evolving common-law principles, each protected a different interest.¹⁶⁹ The

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 713.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 713-14.

¹⁶² *Id.* 714-15

¹⁶³ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2543 (2009) (Thomas, J., concurring).

¹⁶⁴ *Marks v. United States*, 430 U.S. 188, 193 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

¹⁶⁵ *Melendez-Diaz*, 129 S.Ct. at 2543 (2009) (Thomas, J., concurring) (citing his concurring opinion in *White v. Illinois*, 502 U.S. 346, 365 (1992)).

¹⁶⁶ *Melendez-Diaz*, 129 S.Ct. at 2531.

¹⁶⁷ *Id.* at 2543 (Thomas, J., concurring).

¹⁶⁸ See *Larkin v. Yates*, No. CV09-2034-DSF(CT), 2009 WL 2049991, at *7-8 (C.D. Cal. July 9, 2009) (holding DNA report not testimonial); *California v. Thompson*, No. C061568, 2010 WL 4493478, at *8 (Cal. Ct. App. Nov. 10, 2010) (holding pathologist's report a government record but not testimonial); *California v. Zayas*, No. E048865, 2010 WL 3530426, at *2 (Cal. Ct. App. Sept. 13, 2010) (holding forensic drug analysis not testimonial); *California v. Hernandez*, No. F057090, 2010 WL 3506888, at *16 (Cal. Ct. App. Sept. 8, 2010); *California v. Miller*, 114 Cal.Rptr.3d 629, 637 (Cal. Ct. App. Aug 20, 2010) (holding DNA report not testimonial); *Illinois v. Johnson*, 915 N.E.2d 845, 853-54 (Ill. App. Ct. 2009) (holding DNA report not testimonial); *Maine v. Mitchell*, 4 A.3d 478, 490 (Me. 2010) (autopsy report would not be testimonial under *Melendez-Diaz*). *But see* *California v. Lopez-Garcia*, No. B215308, 2010 WL 3529775, at *10 (Cal. Ct. App. Sept. 13, 2010) (holding DNA report testimonial); *Michigan v. Dendel*, No. 247391, 2010 WL 3385552 (Mich. Ct. App. 2010) (holding forensic chemical analysis testimonial); *State v. Lui*, 221 P.3d 948, 955 n.11, 956 n.14 (Wash. Ct. App. 2009) (holding autopsy and DNA reports testimonial, but were not used in lieu of live expert testimony).

¹⁶⁹ *White v. Illinois*, 502 U.S. 346, 358-60 (1992) (Thomas, J., concurring).

"right of confrontation evolved as a response to the problem of trial by affidavit."¹⁷⁰ But, Justice Thomas went on to note, the Confrontation Clause was not intended to encompass hearsay in general or in totality.¹⁷¹ Drawing the line at what documents were "made in contemplation of legal proceedings and those not so made would entangle the courts in a multitude of difficulties" and, ultimately, lead to a merger of the evidentiary hearsay doctrine and the Confrontation Clause.¹⁷² Justice Thomas found:

One possible formulation is as follows: The federal constitutional right of confrontation extends to any witness who actually testifies at trial, but the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions. It was this discrete category of testimonial materials that was historically abused by prosecutors as a means of depriving criminal defendants of the benefit of the adversary process [citation omitted by author], and under this approach, the Confrontation Clause would not be construed to extend beyond the historical evil to which it was directed.¹⁷³

Justice Thomas reiterated his position in his opinion, concurring in part and dissenting in part, in *Davis v. Washington*.¹⁷⁴ The Justice criticized the Court's opinion by stating that the Court had adopted an "unpredictable test, under which district courts are charged with divining the 'primary purpose' of police interrogations."¹⁷⁵ Reaffirming his prior position, Justice Thomas wrote that a testimonial statement was "necessarily [one that] require[s] some degree of solemnity...."¹⁷⁶ A primary purpose test, whether statements are made for purposes of later use at trial or are made in response to an emergency, is rarely present in reality and is not reliably discernable, making it inevitable that the search for such a purpose is largely "an exercise in fiction."¹⁷⁷

VII. BUSINESS AND PUBLIC RECORDS

Experts often rely upon various outside information and records in forming opinions. Justice Scalia in *Melendez-Diaz* made the distinction between business record and public records that are not made for use at trial and those that are created specifically for use in the particular criminal trial.¹⁷⁸ As long as the records are made for the carrying on or the administration of the business or public office, the records meet both the Confrontation Clause and hearsay requirements.¹⁷⁹ This analysis requires the person that prepared the document to testify if the document was made specifically for use at trial.¹⁸⁰

To be true to the plain meaning of the Confrontation Clause, even those witnesses who create a business record or a public record and those witnesses who provide the personal knowledge that is contained in those records would have to testify. This notion has been rejected. The Confrontation Clause has become a matter of line drawing. Since this is true, there must be a rational basis for distinguishing between records made as part of the activities of the business or agency and those records that are made specifically for litigation.

¹⁷⁰ *Id.* at 362 n.1.

¹⁷¹ *Id.*

¹⁷² *Id.* at 364.

¹⁷³ *Id.* at 365.

¹⁷⁴ *Davis v. Washington*, 547 U.S. 813, 834 (2006) (Thomas, J., concurring in part, dissenting in part).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 836.

¹⁷⁷ *Id.* at 839.

¹⁷⁸ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2538 (2009).

¹⁷⁹ *Id.* at 2539-40.

¹⁸⁰ *Id.* at 2540.

Business records that meet the hearsay exclusion and are made as part of business activities are not testimonial.¹⁸¹ The custodian or other qualified witness (a witness who knows how the records are made and kept) can testify in court to the foundation for the record.¹⁸² The custodian or other qualified witness is not required to have any personal knowledge about the underlying facts that are contained in the record. In fact, the records can be self-authenticating if a certificate is made by the custodian or other qualified witness that establishes the foundation for the business record.¹⁸³ The issue has not been addressed by the courts, but it would seem under Justice Scalia's interpretation of the Confrontation Clause that a witness would be required to come into court to testify to the foundation for the business record and that introduction of a certificate meeting Fed. Rule Evid. 902(11) would be a violation. The cross-examination of the custodian or other qualified witness would prove of little assistance to the defendant because the witness generally has no knowledge of the underlying facts. The defendant cannot meaningfully cross-examine the custodian or other qualified witness concerning the underlying facts whose truth, once the business record foundation has been laid, is assumed. There is simply no rational distinction.

For the same reasons, a public record where a person comes to the trial court to testify would be admissible if made as an activity of the agency, but the public record could not be self-authenticating. This requirement simply is not workable nor does it further a criminal defendant's confrontation rights.

For example, some circuit courts now hold that a public agency's "certificate of nonexistence of record" (CNR) is insufficient and that the person who prepared the certificate must appear in court.¹⁸⁴ The cross-examination of the person performing the records search would prove of little assistance to the defendant. There is no meaningful cross-examination of the witness who can only testify that a search was made for the record and it does not exist. There is no rational distinction between the public employee who prepares a certificate of nonexistence and having the certificate admitted at trial and the same public employee appearing in court for cross-examination.

Other public records have been permitted where cross-examination of a live witness may have proven beneficial to the defendant. A warrant for removal and documents attesting to the removal have both been found not to be testimonial because the documents were not created for future prosecution.¹⁸⁵

¹⁸¹ See, e.g., *United States v. Dadaille*, 373 F. App'x 380, 382-83 (4th Cir. 2010) (holding business record was neither testimonial nor hearsay and, therefore, not excludable under the confrontation clause); *United States v. Jackson*, 635 F.3d 875, 880-82 (5th Cir. 2010) (holding drug dealer's ledgers were testimonial; however, reversed because ledgers were not properly authenticated and failed to meet hearsay exception requirements under 803(6)); *California v. Suen*, No. B208155, 2010 WL 4401796, at *7-8 (Cal. Ct. App. Nov. 8, 2010) (holding cell tower records are official business records and therefore non-testimonial); *Palacios v. State*, No. 02-09-00332-CR, 2010 WL 4570072, at *5 (Tex. App. Nov. 4, 2010) (holding hospital records containing blood alcohol levels were medical records created for treatment purposes and thus admissible).

¹⁸² FED. R. EVID. 803(6).

¹⁸³ FED. R. EVID. 902(11).

¹⁸⁴ See *United States v. Scott*, 2010 WL 4627876 (11th Cir. 2010) (summary of excerpts of business records prepared for litigation); *United States v. Gonzales*, 2010 WL 4342192 (2nd Cir. 2010) (IRS certification that defendant failed to file tax returns); *United States v. Gipson*, 2010 WL 2790646 (9th Cir. 2010) (declaration stating that an FDIC search revealed no record); *United States v. Norwood*, 595 F.3d 1025, 1029-30 (9th Cir. 2010) (affidavit of absence of any record with Washington Department of Employment); *United States v. Martinez-Rios*, 595 F.3d 581, 584-85 (5th Cir. 2010) (certificate of no record); *United States v. Troxler*, 2010 WL 3168147 (5th Cir. 2010) (certificate of non-existence of tax returns); *United States v. Madarikan*, 356 Fed. App'x 532 (2nd Cir. 2009) (CDR).

¹⁸⁵ *United States v. Orozco-Acosta*, 607 F.3d 1156 (9th Cir. 2010); *United States v. Villaviencio-Burrueal*, 608 F.3d 556 (9th Cir. 2010); *United States v. Diaz-Gutierrez*, 354 Fed. App'x 774 (4th Cir. 2009); *United States v. Cantellano*, 430 F.3d 1142 (11th Cir. 2005).

Some courts have made the distinction between whether the business records or public records were made for this specific prosecution as opposed to records created in general. For example, certificates of inspection of an intoxilyzer machine¹⁸⁶ and logbooks concerning a breathalyzer¹⁸⁷ were found to be nontestimonial because the acts or facts recorded did not pertain to this particular prosecution. Other courts, even after *Melendez-Diaz*, seem to indicate otherwise, finding that the information is permissible because it is "neutral information."¹⁸⁸ In an alien smuggling case, the introduction of the smuggled aliens "I-213 forms taken from their A-files" did not violate *Crawford-Melendez-Diaz* because those records contained "only routine biographical information"¹⁸⁹

VIII. CONFRONTATION, RULE 402, AND THE RULE 703 BALANCING TEST

In 2000, Fed. Rule Evid. 703 was amended to include the following language:

Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.¹⁹⁰

The balancing test was added to the Rule because circuit courts differed on whether the underlying basis was admissible and could be disclosed to the jury at all.¹⁹¹ The Comment to the amendment indicates that if the underlying basis is admitted a limiting instruction must be given. The comment went further, stating:

The amendment provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert.¹⁹²

As to how the States have dealt with the issue in their courts, certain states have adopted rules similar to Rule 703 that resolve the issue by requiring that any underlying basis be proven to the satisfaction of the factfinder at trial.¹⁹³ Other states have adopted the pre-amended Rule 703 without the balancing test¹⁹⁴ or the amended version of Rule 703.¹⁹⁵

¹⁸⁶ *Jackson v. State*, No. A10A2041, 2010 WL 4609148 (Ga. App. Nov. 16, 2010).

¹⁸⁷ *Illinois v. Jacobs*, No. 4-09-0878, 2010 WL 4366876 (Ill. App. Nov. 1, 2010).

¹⁸⁸ *State v. Ducasse*, No. Ken-10-159, 2010 WL 4456993 (Me. Nov. 9, 2010) (certificate of compliance by manufacturer of blood collections kits used in testing blood alcohol levels); *State v. Murphy*, 991 A.2d 35 (Me. 2010) (certificate issued by Secretary of State concerning driving record and suspension and holding that testimony would have little practical benefit on cross-examination); *State v. Carter*, 241 P.3d 1205 (Or. App. 2010) (warrant based upon failure to appear, holding that the record was not created for purposes of specific criminal prosecution).

¹⁸⁹ *United States v. Caraballo*, 595 F.3d 1214, 1226 (11th Cir. 2010).

¹⁹⁰ 192 F.R.D. 340, 424 (2000).

¹⁹¹ *Id.* (Committee notes referring to two contrary circuit cases: *United States v. Rollins*, 862 F.2d 1282 (7th Cir. 1988) (permitting evidence that was otherwise inadmissible); *United States v. 0.59 Acres of Land*, 109 F.3d 1493 (9th Cir. 1997) (finding error in the admission of otherwise inadmissible evidence)).

¹⁹² *Id.* at 425.

¹⁹³ *E.g.*, MICH. R. EVID. 703 ("The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence").

¹⁹⁴ ALASKA R. EVID. 703; I.C.A. R. 5.703; LA. CODE EVID. ART. 703; ME. R. EVID. 703; MONT. CODE ANN. § 26-10-703 (1976); NEV. REV. STAT. 50.285 (1971); N.H. R. EVID. 703; N.J. R. EVID. 703; N.C. GEN. STAT. ANN. § 8C-703 (WEST 1983); OR. REV. STAT. § 40.415 (1981); PENN. R. EVID. 703; S.D. CODIFIED LAWS § 19-15-3 (2010); TEX. R. EVID. 703; WASH. R. EVID. 703; W. VA. R. EVID. 703.

¹⁹⁵ ARIZ. R. EVID. 703; COLO. R. EVID. 703; N.D.R. EVID. 703; OKLA. STAT. TIT. 12, CH. 40, § 2703 (1978); UTAH R. EVID. 703.

The Amendment gives rise to the following issues: (1) whether the balancing test is sufficient to protect a defendant's confrontation rights; (2) whether a limiting instruction is sufficient to protect a defendant's confrontation rights; and (3) whether the presumption against admission is sufficient to protect a defendant's confrontation rights.

A. CONFRONTATION AS A RULE 402 ISSUE

Perhaps the wisest course in determining these issues requires us to return to the threshold relevance inquiry in the evidentiary analysis. Fed. Rule Evid. 402 states that relevant evidence is admissible "except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules. . . ." The language of the rule suggests that once a relevance determination has been made one question to ask is whether the Constitution permits the use of such evidence. So that even if relevant, evidence may be excluded if it violates the Confrontation Clause. If this is true, the issue of the admissibility of the underlying basis of an expert's opinion must first go through confrontation testing. Under this analysis, Confrontation Clause issues are considered before the Rules of Evidence. Further, the balancing test would only apply to evidence that has been found to be admissible under the Confrontation Clause and inadmissible under the rules of evidence. If the analysis begins at 402 instead of 703, all three issues are avoided because it is not the Rule of Evidence or the balancing test, but the Constitution itself that protects the defendant's confrontation rights.

B. CONFRONTATION AS A RULE 703 ISSUE

However, when it comes to the basis of an expert's opinion, courts tend to conduct their analysis under Rule 703. First, the Confrontation clause issue could be considered in determining whether the evidence is "otherwise inadmissible." Second, under the balancing test, any Confrontation Clause issue could be considered in the "prejudicial effect" portion of the analysis. The appropriate analysis under Rule 703 would be:

Step 1. Is the evidence admissible? This would require subjecting the fact or data to an analysis through the Rules of Evidence and the Confrontation Clause. If the evidence is admissible and has been or will be admitted into evidence at trial, there would be no Confrontation issue. However, if the evidence is "otherwise inadmissible," the trial court would then go to Step 2.

Step 2. If the evidence is inadmissible under the Rules of Evidence, can the evidence be admitted to test the basis for the expert's opinion or inference? This would require considerations of the presumption against admissibility, the Confrontation Clause, and the satisfaction of the balancing test.

The problem with Rule 703 and permitting testimony concerning the underlying basis of the expert's opinion is that the Rule then becomes an end run around the Rules of Evidence. It becomes a *de facto* hearsay exception. If the witness expert testifies that the facts are those that are reasonably relied upon by experts in the field, the factfinder will, just as the expert does, assume that those underlying facts are true. The "reasonably relied upon" phrase becomes magic language used by the proponent of the underlying basis of an expert opinion to avoid Confrontation and the Rules of Evidence.

The jurors' proper function as trier of fact is taken away when the expert assumes facts as true for purposes of his opinion or inference. There is no ability for the jurors to test the underlying facts. The facts are admitted because the facts are of a type that are reasonably relied upon by experts in the field in forming an opinion or inference. This makes the expert the determiner of what is true. The only possible line of cross-examination is to point out that the opinion relies upon the basis being true. The expert opinion falls if the expert admits that a sufficient number of the facts are false, but that depends upon the expert determining whether the underlying basis is true or false. The cross-examiner is required to ask either a general question, which in itself is not

very effective, or to ask specific questions concerning each underlying fact, which then reinforces the fact as being true, whether true or is not.

C. LIMITATION ON LIMITING INSTRUCTIONS

The efficacy of limiting instructions has long been questioned.¹⁹⁶ "Empirical evidence as well as common sense suggests that courts greatly exaggerate the efficacy of limiting instructions."¹⁹⁷ Limiting instructions are not talismans for the solution of any possible prejudice.¹⁹⁸ The possibility that the jury will consider evidence only to its limited purpose is occasionally overcome by the negative aspects as to be unmanageable from the jurors perspective.¹⁹⁹

The argument can be made that a limiting instruction is sufficient if it advises the "otherwise inadmissible" evidence can only be considered as it goes to the foundation for the expert's opinion or inference and cannot be used for the truth of the underlying facts. If the jurors can actually perform these mental gymnastics, the defendant's confrontation rights are said to be protected. The question arises whether a reasonable juror can actually separate out these two separate uses. Whether the use of a limiting instruction when it comes to separating out the proper and improper use of the evidence can conceivably eliminate the risk of misuse is an open matter.²⁰⁰ Limiting instructions are a nicety and are perhaps a necessary method of attempting to prevent jurors from improperly considering this evidence. Empirical research has found that limiting instructions are generally unsuccessful at controlling how the jurors' perceive and utilize evidence.²⁰¹

Limiting instructions are not up to the task that the Rules of Evidence require. It is difficult if not impossible for jurors to determine what is admissible because it is "reasonably relied upon by experts in the field in forming their opinions" to be used only for testing the basis of the expert's opinion and to differentiate that from the assumption that those facts are true.

D. PRESUMPTION AGAINST ADMISSIBILITY

The Advisory Committee Notes to the Rule 703 balancing test state that there is a presumption against admissibility of the "otherwise inadmissible" basis for an expert's opinion.²⁰² Otherwise inadmissible evidence "shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."²⁰³ This places on the proponent of the testimony the burden of going forward with evidence sufficient to prove certain propositions by a preponderance of evidence. First, the trial court is required to determine the weightiness of that the evidence will have with the jurors only to the extent that it will help the jury to evaluate the expert's opinion. Second, the court is required to determine the weightiness of any prejudicial effect. Finally, the court is then to balance those two items to determine whether the probative value previously determined "substantially" outweighs the prejudicial effect.

This balancing test will have to be applied by the trial court either before trial or as each piece of "otherwise inadmissible" evidence is introduced at trial. If not determined pretrial,

¹⁹⁶ Lieberman and Arndt, *Understanding the Limits of Limiting Instructions*, 6 PSYCHOL. PUB. POL'Y & L. 677 (2000).

¹⁹⁷ Richard A. Posner, *Frontiers of Legal Theory* 384 (2001).

¹⁹⁸ *United States v. Schiff*, 612 F.2d 73, 82 (2nd Cir. 1979).

¹⁹⁹ *Id.*

²⁰⁰ See, e.g., *Illinois v. Clay*, 884 N.E.2d 214 (Ill. App. 2008) (concerning the introduction of a prior conviction and the limiting instruction that the conviction could only be used for credibility).

²⁰¹ Lieberman & Arndt, *supra* note 195.

²⁰² 192 F.R.D. 340, 424-25 (2000).

²⁰³ *Id.*

each piece of facts or data of "otherwise inadmissible" evidence will require an objection or motion to strike, a bench conference, a ruling, and a limiting instruction that advises the jury either to disregard the evidence or to considered the evidence only as it goes to an evaluation of the expert's opinion and not as substantive evidence.

IX. BASES OF EXPERT OPINION AND JURY INSTRUCTIONS

Perhaps if the trial court judge does five things, violation of the Confrontation Clause might be minimized, but it cannot be completely eliminated. First, the trial judge must carefully scrutinize the underlying basis to determine whether or not the facts and data are admissible. Second, the trial judge must make sure that the basis meets the Rule 703 requirements when he has found that the basis consists of some facts or data that are "otherwise inadmissible" to determine whether those facts are "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Third, the trial judge must run the basis through the gauntlet of the special balancing test. Fourth, the judge must give a limiting instruction before and after the evidence is offered. Fifth and finally, the trial judge must properly instruct the jury.

The final instruction to the jury must remind them that the jurors, and not the expert, must make the determination whether the underlying basis is true or not. The jurors cannot, as seems natural, assume the truth of the underlying facts and data, but must themselves find the facts to be true or not. It would not be hard to inform the jurors that the jurors, and not the expert, are the final arbiters of the truth.

Most current pattern jury instructions are not up to the job. The Federal Pattern Jury Instructions appear to surrender the truth-finding function of the underlying basis to the expert. The Federal Pattern Criminal Jury Instruction as pertinent to this issue only provides "[y]ou must also decide whether his opinions were based on sound reasons, judgment, and information."²⁰⁴ This pattern instruction requires the juror to dissect the sentence to discover that the expert opinion was based on "sound . . . information." The First Circuit has a pattern jury instruction concerning weighing the testimony of an expert that states, in pertinent part:

In weighing the testimony, you should consider the factors that generally bear upon credibility of a witness as well as the expert witness's education and experience, the soundness of the reasons given for the opinion, and all other evidence in this case.²⁰⁵

Somewhere in that instruction, the jurors' are required to discern that they are required to be fact finders concerning the underlying basis of the expert's opinion. The Fifth, Seventh, Ninth and Tenth Circuits have similar instructions.²⁰⁶

The Eighth Circuit has an instruction that informs the jurors that they do not have to accept an expert opinion and that they should "consider the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case."²⁰⁷ Somehow that instruction is suppose to inform the jurors that the underlying facts and data are subject to truth finding by the jurors themselves. The Third Circuit does better by informing the jurors, "in weighing this opinion testimony you may consider...the reliability of the information supporting the witness' opinions...."²⁰⁸

²⁰⁴ PATTERN CRIM. JURY INSTR. 35 (1987).

²⁰⁵ PATTERN CRIM. JURY INSTR. 1ST CIR. 2.06 (1998).

²⁰⁶ PATTERN CRIM. JURY INSTR. 5TH CIR. 1.17 (2001); FED. CRIM. JURY INSTR. 7TH CIR. 3.07 (1999); MODEL CRIM. JURY INSTR. 9TH CIR. 4.14 (2010); PATTERN CRIM. JURY INSTR. 10TH CIR. 1.17 (2011).

²⁰⁷ MODEL CRIM. JURY INSTR. 8TH CIR. 4.10 (2007).

²⁰⁸ MOD. CRIM. JURY INSTR. 3RD CIR. 2.09.

Some State courts do a much better job in letting the jurors know their specific truth-finding function. California informs the jurors, in pertinent part:

An opinion is only as good as the facts and reasons on which it is based. If you find that any fact has not been proved, or has been disproved, you must consider that in determining the value of the opinion.²⁰⁹

Massachusetts has an alternate instruction concerning expert opinions that provides, in pertinent part:

It is also entirely up to you to decide whether you accept the facts relied on by the expert and to decide what conclusions, if any, you draw from the expert's testimony. . . . You must also, as has been explained, keep firmly in mind that you alone decide what the facts are. If you conclude that an expert's opinion is not based on the facts, as you find them to be, then you may reject the testimony and opinion of the expert in whole or in part You must remember that expert witnesses do not decide cases: juries do. . . .²¹⁰

New Jersey carefully instructs jurors that it is the function of the jury, not the expert, "to determine whether the facts on which the answer or testimony of an expert is based actually exists."²¹¹

Despite these samples, courts do a very poor job in instructing the jurors about their truth-finding function overall. The only appropriate way to be sure that a criminal defendant's confrontation rights are observed is to permit cross-examination of a testifying witness and advise the jurors of their truth-seeking role concerning the underlying facts and data for an expert opinion.

X. NOTICE AND DEMAND STATUTES

Notice-and-demand statutes require that the prosecution must first provide notice that an expert will testify at trial. The defendant after receiving the prosecution's notice must either assert his confrontation right to have the witness testify at trial or forfeit that right.²¹² Citing *Taylor v. Illinois*²¹³ and *Williams v. Florida*,²¹⁴ the Court held in *Melendez-Diaz* that the defendant can be required to assert his confrontation rights before trial.²¹⁵

Justice Scalia thought that defense attorneys would often stipulate to certain expert testimony.²¹⁶ He surmised that it would be unlikely that the defense would insist on the appearance and testimony from witnesses that the defense does not intend to challenge.²¹⁷ In a rational and reasonable world this may be true. However, a criminal defendant can constitutionally insist at trial on proof beyond a reasonable doubt as to each and every element, and a criminal defendant is not required to forego his Confrontation Clause rights for any reason. In fact in some jurisdictions that have notice-and-demand statutes, defense attorneys as a matter of course file demands for live testimony from every expert.

The fact that the defendant can be required pre-trial to demand live testimony from an expert does not entirely resolve the issue concerning the underlying basis for the expert's opinion

²⁰⁹ CAL. JURY INSTR.-CRIM. 2.80 (2010).

²¹⁰ CRIM. MODEL JURY INSTR. 3.640 (2009).

²¹¹ N.J. MODEL CRIM. JURY INSTR. EXPERT TESTIMONY (2003).

²¹² *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2541 (2009).

²¹³ *Taylor v. Illinois*, 484 U.S. 400 (1988) (upholding sanctions for defendant's failure to provide witness names and location pre-trial).

²¹⁴ *Williams v. Florida*, 399 U.S. 78 (1970) (upholding a requirement for pre-trial alibi notice).

²¹⁵ *Melendez-Diaz*, 129 S.Ct. at 2541.

²¹⁶ *Id.* at 2542.

²¹⁷ *Id.*

or inference. Still left to be resolved are those pesky "otherwise inadmissible" facts underlying the expert's testimony. To solve this problem, the notice-and-demand requirement could be expanded to include a defendant's notice that the prosecution will be required to prove each and every underlying fact at trial, either through personal knowledge of the expert or through some other witness or method of proof.

XI. SEARCHING FOR A SOLUTION

An acute problem arises when the expert becomes unavailable by reason of loss, change of employment, severe illness or infirmity, death, or another unforeseen circumstance. To exclude another expert's reliance upon an expert who has become unavailable in one of these situations would give the defendant an unfair advantage. As the *Mattox* Court indicated in 1895 in reference to the Confrontation Clause:

There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness But general rules of this kind however beneficent in their operation and valuable to the accused, must occasionally give way to consideration of public policy and the necessities of the case The law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved for the accused.²¹⁸

A defendant's right to cross-examine and the efficacy of any cross-examination should be considered in determining what "otherwise inadmissible" evidence should be permitted as the basis for an expert's opinion.

An actual example of the problem is presented in *United States v. Williams*, a Federal District Court case.²¹⁹ Williams was charged with murder, and one expert conducted the autopsy.²²⁰ However, this expert retired and moved overseas.²²¹ The prosecution filed a motion in limine to permit the introduction of the autopsy report and death certificate from the unavailable expert, the introduction of a diagram and photographs taken during the autopsy; and the testimony of another medical examiner who was not present at the autopsy but who examined the materials and formed his own opinion about the cause and manner of death.²²² Certainly it would be an unjust result if the prosecution was not able to use at least some of this evidence at trial.

The first possible solution is to adopt a rule in criminal cases that requires that the factual underlying basis of the expert's opinion be proven. The right to confront would be fulfilled by the introduction of direct evidence from the testifying expert or from other individuals, expert or not, that could testify to underlying facts. All witnesses would be subject to cross-examination. This would be truest to the literal constitutional language. This is the classic and perhaps easiest solution to the problem. But it also would require more testimony by more witnesses where expert testimony is involved. In our example, because of the unavailability of the expert who performed the autopsy, the autopsy report would be inadmissible. Whether the diagram and the photographs are admissible is a question of establishing the appropriate foundation through the Rules of Evidence and is not a confrontation issue. Without the pathologist who did the autopsy, created the diagram, and took the photographs, a satisfactory evidentiary foundation could not be met. The cause and manner of death could not be proven with this solution. The cost of this first solution is simply too high.

²¹⁸ *Mattox v. United States*, 156 U.S. 237, 243 (1895).

²¹⁹ *United States v. Williams*, 2010 WL 4071538 (D.D.C. Oct. 18, 2010).

²²⁰ *Id.* at *1.

²²¹ *Id.*

²²² *Id.*

If the first solution is rejected, it becomes a matter of line-drawing. Justice Thomas has suggested one place to draw that line: in order to be testimonial and require confrontation, the testimonial statement would have to be "contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."²²³ The question, of course, is what the language means and how those enumerated items would be construed by the courts. This solution would require the development of case law over a period of time. It would be easy to state that the autopsy report was not "formalized materials," not an affidavit, not a deposition, not prior testimony, and certainly not a confession. However, whether the autopsy report would be considered "formalized testimonial materials" is problematic. Justice Thomas formula would have to be tested and refined in the trial courts.

The third solution is to draw the line on a hypothetical view of an "objective person" as Justice Scalia suggests.²²⁴ That objective witness would need to find that it was reasonable to believe that the statement would be available for use at a later trial.²²⁵ But, a reasonable witness would never truly believe, after a little rational reflection, that when he has witnessed something that relates to a criminal offense and makes a statement about it, that any statement the witness makes would not be used at trial. So the question arises, what statements could be permitted under Justice Scalia's standard? Justice Scalia's point of view is wrong: it is not the reasonably objective witness's point of view, but rather whether a reasonable defendant could benefit from the cross-examination of the witness.

Under Justice Scalia's analysis, in order to satisfy the Confrontation Clause, a witness must either testify in court or, if unavailable, the defendant had a prior opportunity for cross-examination.²²⁶ In our example, the hypothetical "objective witness," or the reasonable pathologist, would know that one of the functions of an autopsy report is for use at a later trial. Because the witness knows this, the autopsy report could not be admitted at trial, except, under current practice, as perhaps part of the underlying bases of an opinion or inference by a testifying expert and even then, it could not be used for substantive purposes.

As a fourth solution, "testimonial" can be refined to exclude certain items but permit others. First, "testimonial" evidence should exclude items that were not prepared for a specific prosecution. For example the types of information that might be excluded include certificates or logbooks of inspection of an intoxylizer²²⁷ or certificate of compliance by a manufacturer that blood collection tubes complied with state requirements.²²⁸

Second, "testimonial" should exclude business records or public records that contain "neutral information" irrespective of whether the record was made in pursuance of the business or agency's activities or whether it was prepared for a particular prosecution. While it appears Justice Scalia would permit the introduction of certain business and public records prepared for the furtherance of the business or agency and not made for this particular litigation,²²⁹ this category would be expanded to include certain records that were specifically created for use in this particular prosecution. For example, courts have permitted the introduction of certificates from the Secretary of State concerning motor vehicle licenses, records, and suspensions, without requiring someone from that office to appear and testify in court.²³⁰ Another example would be evidence of court judgments concerning convictions. A certified copy of the judgment that is specifically requested by the prosecution and created by a court clerk's office should not be

²²³ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2543 (2009) (Thomas, J., concurring) (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992)).

²²⁴ *Melendez-Diaz*, 129 S.Ct. at 2532.

²²⁵ *Id.* at 2531.

²²⁶ *Id.*

²²⁷ *Jacobson v. State*, 2010 WL 4609148 (Ga. Ct. App. Nov. 16, 2010); *Illinois v. Jacobs*, 2010 WL 4366876 (Ill. App. Ct. Nov. 1, 2010).

²²⁸ *State v. Ducasse*, 8 A.3d 1252 (Me. 2010).

²²⁹ *Melendez-Diaz*, 129 S.Ct. at 2538.

²³⁰ *State v. Murphy*, 991 A.2d 35 (Me. 2010).

excluded because a live witness did not testify – although that appears to be the result of the holding in *Melendez-Diaz*. However, if the point of view of a reasonable defendant is adopted and the benefit the defendant might receive through cross-examination is weighed, these documents, although prepared for this particular prosecution, would be admissible.

Third, "testimonial" should exclude, during an expert's testimony on direct examination, any evidence that is otherwise inadmissible. However, such evidence should be permitted during cross examination and, to the extent raised on cross-examination, during redirect examinations. The defendant, who is under no confrontation requirement, can thus open the door to the prosecution's use of this otherwise inadmissible evidence.²³¹ This would jettison the current Fed. Rule Evid. 703 balancing test and its State's corollaries from use in a criminal case. The matter would be one of the jurors assessing the truth of facts underlying the expert's opinion or inference. As discussed above, Rule 703 has been used to justify the admission of evidence that the jury should not receive because it is inadmissible under the Rules of Evidence and inadmissible as a violation of the Confrontation Clause.

If, however, the admission of the "otherwise inadmissible" basis for expert opinion's continues, the trial court must ensure to the fullest extent possible that a defendant's Confrontation Clause rights are observed. This is best performed by utilizing an exacting evidentiary analysis that requires: (1) the trial court determines whether the facts underlying the opinion are admissible or inadmissible; (2) the trial court determines whether the inadmissible facts or data are reasonably relied upon by experts in the field in forming their opinions; (3) the trial court applies the special balancing test in Rule 703; (4) the judge gives a limiting instruction before and after the evidence; and (5) the jury is properly instructed as to its role in determining the truth of the underlying facts or data.

The application of the fourth solution would not permit the admission of the autopsy report except on cross-examination and re-direct examination to the extent cross opened the door for such evidence. More specifically, the autopsy report could not be disclosed unless the defendant was the first proponent of the evidence.

The District Court Judge in the *Williams* case came up with the following findings of fact, conclusions of law, and orders. First, the Judge found that the autopsy report and death certificate were testimonial.²³² Because the documents were testimonial, the Judge excluded them from being admitted at trial.²³³ Further the Judge stated that the prosecution could not make an end run around *Melendez-Diaz* by having another expert testify to the contents of the autopsy report.²³⁴ Referencing Fed. Rule Evid. 703, the Court held that the second expert could testify to his own independent opinion concerning the cause or manner of death, even if this expert relied on the excluded autopsy report.²³⁵ However, the underlying facts or data that were otherwise inadmissible were not admissible on direct examination.²³⁶

XII. CONCLUSION

Courts have permitted "otherwise inadmissible" evidence underlying an expert's opinion to be presented to the jury both through the *Ohio v. Roberts*²³⁷ "indicia of reliability" and the *Crawford v. Washington*²³⁸ "opportunity to cross-examine" analyses. Courts have made the analyses go both too far and not far enough in protecting a criminal defendant's Confrontation

²³¹ See, e.g., *United States v. Lopez-Medina*, 596 F.3d 716, 733 (10th Cir. 2010) (holding that "a defendant can open the door to admission of evidence otherwise barred by the Confrontation Clause.").

²³² *United States v. Williams*, 2010 WL 4071538, at *2 (D.D.C. Oct. 18, 2010).

²³³ *Id.* at *4.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at *5.

²³⁷ *Ohio v. Roberts*, 448 U.S. 56 (1980).

²³⁸ *Crawford v. Washington*, 541 U.S. 36 (2004).

Clause rights. Rule 703 surreptitiously allows jurors to assume inadmissible facts as true. Courts avoid a Confrontation Clause analysis by using the legal fiction that the evidence is not being admitted for its truth, but rather as a tool for the jurors to examine the expert's opinion or inference. Because the Supreme Court has never gone sufficiently far enough to explain the parameters of the Confrontation Clause, trial and circuit courts are struggling with how that Clause and expert testimony under the Rules of Evidence fit together. Compounding the problem is the expansion of fields of expertise and the utilization of expert testimony at trial.

The change in the point of view from an objective witness to a reasonable defendant's point of view and the measuring of the possible benefit of cross-examination concerning the particular evidence would improve Confrontation Clause analysis as it relates to experts. Under this analysis, a certificate of no report or a certified court record would be admissible because there is little benefit from cross-examining an analyst who searched or certified the records. *Melendez-Diaz* requires the exclusion of those records and requires the appearance of a witness. Under this analysis, certificates of analysts would not be admissible because there is benefit from cross-examining an analyst to determine whether the results of any testing, whether for drugs, alcohol, or DNA, were both reliable and verifiable. *Melendez-Diaz* requires the same result.